

**DEPARTMENT OF TRANSPORTATION**

**14 CFR Part 399**

**Office of the Secretary**

**Docket No. DOT-OST-2021-0007**

**RIN No. 2105-AE91**

**Airfare Advertising**

**AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).**

**ACTION: Advance Notice of Proposed Rulemaking (ANPRM).**

**SUMMARY:** The U.S. Department of Transportation is seeking comment on the Department's airfare advertising rule, also known as the "full fare" rule, which requires U.S. and foreign air carriers and ticket agents advertising airfares to state the entire price to be paid by the customer, inclusive of all mandatory taxes and fees. The full fare rule also prohibits sellers of air transportation from displaying in airfare advertisements charges that are included within the airfare more prominently or in the same or larger font size than the total single price. This rulemaking examines whether the full fare advertising rule imposes unnecessary or costly burdens on carriers and consumers, whether a revision of the rule is warranted, and, if so, how the rule should be revised.

**DATES:** Comments should be filed by [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** You may file comments identified by the docket number DOT-OST-2021-0007 by any of the following methods:

- Federal eRulemaking Portal: go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue S.E., West Building Ground Floor, Room W12-140, Washington, D.C., 20590-0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue S.E., Washington, D.C., between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.
- Fax: (202) 493-2251

*Instructions:* You must include the agency name and docket number DOT-OST-2021-0007 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

*Privacy Act:* Anyone may search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). You may review DOT's complete Privacy Act statement in the *Federal Register* published on April 11, 2000 (65 FR 19477-78), or you may visit <http://DocketsInfo.dot.gov>.

*Docket:* For access to the docket to read background documents and comments received, go to <http://www.regulations.gov> or to the street address listed above. Follow the online instructions for accessing the docket.

**FOR FURTHER INFORMATION CONTACT:** Clereece Kroha or Kimberly Graber, Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Avenue

S.E., Washington, D.C., 20590, 202-366-9342, 202-366-7152 (fax), [clerece.kroha@dot.gov](mailto:clerece.kroha@dot.gov) or [kimberly.graber@dot.gov](mailto:kimberly.graber@dot.gov) (e-mail).

## **SUPPLEMENTAL INFORMATION:**

The U.S. Department of Transportation (DOT or Department) is reviewing its existing regulation at 14 CFR 399.84 on airfare advertising and seeking comment on the effects of the rule on the airline industry and consumers to help it determine whether the rule should remain the same, be modified, or be repealed.

### **Considerations for Air Transportation Policy**

In carrying out its responsibility to regulate air transportation services, the Department is statutorily required<sup>1</sup> to consider certain requirements as being in the public interest and in accordance with public convenience and necessity. Those requirements include, among others: (1) placing maximum reliance on competitive market forces and on actual and potential competition to provide the needed air transportation system and to encourage efficient and well-managed air carriers to earn adequate profits and attract capital; (2) preventing unfair, deceptive,<sup>2</sup> predatory, or anticompetitive practices in air transportation; and (3) encouraging, developing, and maintaining an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to decide on the variety and quality of, and determine prices for, air transportation services. Accordingly, when considering whether to

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<sup>1</sup> See *Airline Deregulation Act of 1978*, 95 P.L. 504, 92 Stat. 1705, 95 P.L. 504, 92 Stat. 1705.

<sup>2</sup> On December 7, 2020, the Department issued a final rule that, among other things, adopted definitions for the terms “unfair” and “deceptive” when used in discretionary aviation consumer protection rulemaking actions brought pursuant to section 41712. A practice is “unfair” to consumers if it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition. A practice is “deceptive” to consumers if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer’s conduct or decision with respect to a product or service. Proof of intent is not necessary to establish unfairness or deception for purposes of 49 U.S.C. 41712(a). See *Final Rule, Defining Unfair or Deceptive Practices*, 85 FR 78707, Dec. 7, 2020.

promulgate regulations on aviation consumer protection, the Department must identify the appropriate balance between ensuring consumers are treated fairly and not deceived, and ensuring airlines and ticket agents have the flexibility to operate, grow, and compete without unjustified regulatory intervention.

The full fare advertising rule was intended to prevent consumer confusion or deception by advertisements of low base fares that did not reflect the total cost of air transportation. To assess the need and justification for this regulation, the Department must consider how changes to its regulation of airfare advertising would impact the likelihood of consumer confusion or deception, competition in the marketplace, and whether it would permit sellers of air transportation to compete freely on the value and quality of services they offer while preventing anticompetitive or predatory behaviors.

## **Background**

The Department has the exclusive authority<sup>3</sup> to regulate airfare advertising by airlines and ticket agents under the statutory provision in 49 U.S.C. § 41712, which prohibits unfair or deceptive practices in the provision of air transportation. In 1984, the Civil Aeronautics Board (CAB), which regulated airfare advertising at that time, adopted a policy statement declaring any advertising of flights, tours, or components of tours that did not state the total price of the flight, tour, or tour component, to be an unfair or deceptive practice.<sup>4</sup> The CAB's adoption of this policy statement, which was codified as a final rule in 14 CFR 399.84, was intended to address

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<sup>3</sup> Pursuant to 49 U.S.C. § 41713, States are preempted from regulating in this area. See also, e.g., *Morales v. Trans World Airlines*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

<sup>4</sup> See Civil Aeronautics Board, 14 CFR part 380 [Special Regulations; Amendment No. 18 to Part 380; Docket 41184; Regulation SPR-195], Public Charters, Final Rule, 49 FR 49438-49440 (December 20, 1984), and 14 CFR part 399 [Policy Statements; Amendment No. 88 to Part 399; Docket 41184-PS-113], Statements of General Policy, Final Rule, 49 FR 49440 (December 20, 1984).

the widespread practice of advertising attractive base fares and featuring “add-on” costs of taxes and fees displayed much less prominently.<sup>5</sup>

After the sunset of the CAB in 1985, jurisdiction over airfare advertising transferred to the Department. During the intervening years until 2012, as a matter of enforcement policy, the Department instituted limited exceptions to the regulatory requirement that airfare advertisements must state the entire price of the advertised air transportation or tour.<sup>6</sup> Specifically, while the full fare rule remained in effect, as a matter of enforcement discretion, the Department’s Office of Aviation Consumer Protection (OACP, formerly the Office of Aviation Enforcement and Proceedings) did not take enforcement action against any advertisement that excluded government-imposed fees and taxes from the quoted fare, provided that such charges were collected on a per-passenger basis and were not *ad valorem* in nature (a percentage of the price), and that the advertisement showed the existence and amount of these charges clearly so that consumers could readily determine the total fare. The OACP’s enforcement policy was intended to strike a balance between carriers’ asserted need for greater flexibility in displaying the price, particularly in print advertising, to account for the variation, depending on the route, in government imposed fees and taxes, and the traveling public’s interest in knowing the total price they must pay for air transportation. The Department did not permit any other exceptions through enforcement policy, and, during the period when this enforcement policy was in effect, the OACP consistently took enforcement action as appropriate when sellers of air transportation

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<sup>5</sup> Id.

<sup>6</sup> See, e.g., *Letter To all U.S. “Major” and “National” Passenger Carriers, and Larger Foreign Air Carriers*, May 1, 1992, <https://www.transportation.gov/sites/dot.gov/files/docs/19920501.pdf> ; *Disclosure of Additional Fees, Charges and Restriction on Air Fares in Advertisements, including “Free” Airfares*, Sept. 4, 2003, <https://www.transportation.gov/airconsumer/advertising-free-tickets-disclosure-fees-september-4-2003>.

failed to include any seller-imposed fees, including fuel surcharges and service fees, or taxes imposed on an *ad valorem* basis in advertised fares.

In December 2005, the Department reexamined the issue of airfare advertising through a Notice of Proposed Rulemaking (NRPM) following a request by Airlines for America (A4A, formerly Air Transport Association) that the Department permit separate listing of fuel surcharges because of high fuel costs. In that NPRM, the Department solicited comment, on not only A4A's suggestion, but various other options, including OACP changing its long-standing enforcement policy to discontinue exceptions to the strict terms of the full fare rule. However, after considering public comments, the Department concluded that the public interest would be served by maintaining the status quo and withdrew the NPRM in 2006.

In 2011, after studying airfare advertising again and issuing an NPRM on the matter, the Department determined in a final rule that it would enforce the full fare advertising rule as written, ending its previous exercise of enforcement discretion.<sup>7</sup> Since that time, the full fare advertising rule has required that advertised fares must include all government imposed taxes and fees as well as mandatory carrier imposed charges. When issuing the final rule, the Department stated that comments filed by individual consumers to the proposed rule, as well as consumer complaints received by the Department, indicated that consumers felt confused or deceived when the fare provided after an initial airfare inquiry did not reflect the total cost of travel. The Department pointed out that some consumers compared such means of advertising to a “bait and switch” tactic. In addition, the Department identified changes in the advertising methods used by sellers of air transportation—particularly newer forms of advertising such as social media platforms, unbundling of the cost of air travel into components that must be

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<sup>7</sup> See *Final Rule, Enhancing Airline Passenger Protections*, 76 FR 23110, April 25, 2011.

purchased separately, and offers of more complicated routing with multiple connections—that often result in a lower base fare but higher taxes and fees. The Department found that consumers need “a full picture of the total price to be paid in order to compare fares and routings,” and concluded that “to understand the true cost of travel, consumers need to be able to see the entire price they [must] pay to get to their destination the first time the airfare is presented to them.”<sup>8</sup>

Following the issuance of the 2011 final rule, several airlines filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit, asserting, among other things, that the full fare advertising rule was arbitrary and capricious and that it violated the First Amendment right of airlines to engage in commercial and political speech.<sup>9</sup> The airline petitioners stated that the Department’s action was arbitrary and capricious because there was nothing inherently deceptive about listing taxes separately and that the Department lacked substantial evidence for concluding that doing so is deceptive in practice. In finding the full fare rule was not an arbitrary exercise of the Department’s authority to prevent unfair or deceptive practices, the Court noted that, while the full fare rule required that the total, final price be the most prominently listed figure in fare advertising, it does not prohibit airlines from also identifying the taxes separately or require airlines to hide the taxes. The Court added that the final rule left unaltered the key language in the rule text adopted in 1984 and the Court gives substantial deference to the Department’s interpretation of its own regulations. With respect to the airlines’ First Amendment argument, the Court found that the full fare rule does not violate the First Amendment right of airlines because the rule regulates the manner of disclosure and

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<sup>8</sup> Id.

<sup>9</sup> See *Spirit Airlines, Inc. v. United States DOT*, 687 F.3d 403 (D.C. Cir. 2012).

imposes no burden on speech other than requiring disclosure of the total price. As such, the Court upheld the Department's airfare advertising rule, which became effective in January 2012, and it remains in effect today.<sup>10</sup>

## **Regulatory Review**

On October 2, 2017, the Department issued a Notice of Regulatory Reform seeking input from the public on existing regulations and other agency actions that are good candidates for repeal, replacement, suspension, or modification.<sup>11</sup> In response to this notification, several U.S. and foreign airlines and airline associations as well as consumer rights advocacy groups filed comments on the full fare advertising rule. The airlines and airline associations favored repealing the full fare rule and replacing it with a rule that codifies the pre-2012 enforcement policy to permit airfare advertising that separately lists taxes and fees. They contended that the full fare rule subjects airlines to price advertising requirements that are different from most other businesses and industries in the United States, including other modes of transportation that are potential competitors of the aviation industry, that the Department adopted the full fare rule without meaningful evidence of consumer confusion under the prior enforcement policy, and that the rule was premised on a flawed cost-benefit regulatory impact analysis. Some airline commenters also argue that the full fare rule does not permit sellers to provide consumers complete information regarding the amount of taxes and fees imposed by the government on the airfares, which the Department disputes. Consumers Union, a consumer rights advocacy group,

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<sup>10</sup> Since the Court rendered this decision, the U.S. Supreme Court has consistently reviewed commercial speech restrictions more stringently. See Micah L. Berman, *Manipulative Marketing and the First Amendment*, 193 *Geo. L.J.* 497, 500 (2015). The Supreme Court also recently made clear that expansively applying legal standards to uphold laws imposing restrictions on the size and appearance of speech is inconsistent with its governing precedent. See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372, 2377-78 (2018). This raises questions about whether the full fare rule remains consistent with the Supreme Court's First Amendment jurisprudence.

<sup>11</sup> See *Notification of Regulatory Review*, 82 FR 45750, October 2, 2017.



opposed the airlines' position and argued that any regulatory revision that occurs as part of a well-considered process should have the advancement of consumer protection and other public interest priorities at its core. In that regard, Consumers Union suggested that the Department focus on ensuring complete airfare transparency—which it defined as including all taxes, surcharges, and fees for ancillary services in advertised fares. Consumer advocacy groups also filed a joint comment stating that knowing the full fare is central to ensuring that the free market forces work for consumers because consumers can only make informed buying decisions based on the full price.<sup>12</sup>

### **Request for Comment**

The Department is committed to continuously improving its regulations. The Department's rules provide that there should be no more regulations than necessary, that where regulations impose burdens they are narrowly tailored to address identified market failures or statutory mandates, that regulations specify performance objectives when appropriate, and that they are designed to minimize burdens. 49 CFR 5.5. The Department is examining the need and justification for the full fare advertising rule, and taking into consideration the comments received pursuant to the Notification of Regulatory Review. Through this rulemaking the Department is studying whether the full fare advertising rule has achieved its intended goal of preventing unfair or deceptive advertising practices or whether it has resulted in unintended consequences of inhibiting competition or innovation in the marketplace without any substantial benefit to consumers. Airlines, as evidenced by the comments filed in response to the

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<sup>12</sup> Although the primary purposes of this ANPRM are to determine whether the full fare advertising rule remains consistent with the U.S. Supreme Court's First Amendment jurisprudence and whether the Department should continue to restrict the size and appearance of airline disclosures regarding mandatory taxes and fees in their airfare advertisements, the Department also seeks comments on Consumer Union's suggestion that non-mandatory charges be included in airfare advertising.

Department’s regulatory review initiative, stated that they believed the rule is burdensome and unnecessary and harmful to competition. Meanwhile, consumer advocacy groups filed comments with the opposite view, stating that the full fare rule is necessary and beneficial to competition. In addition, in a 2017 Report titled “Information on Airline Fees for Optional Services,” the U.S. Government Accountability Office (GAO) reported that three consumer groups informed the GAO that the full fare advertising regulation has resulted in more transparent pricing of airfares across the industry and has reduced instances of misleading airfare advertising.<sup>13</sup>

The Department’s examination of its airfare advertising rule may also include the impact of any revision of the rule on carriers operating international flights. The European Union and Canada, both of which constitute a significant portion of international air traffic to and from the United States, have adopted regulations requiring certain airfare advertising to include all taxes and fees. The European Union requires that airfare advertising include all taxes and fees when advertising flights from an airport located in the territory of a Member State to which the Treaty applies.<sup>14</sup> Similarly, Canadian regulation requires that airfare advertising for air services within, or originating in, Canada must include the total price to be paid to the seller of air transportation.<sup>15</sup>

By this Notice, the Department is seeking comment on the effect of the full fare advertising rule on airlines, ticket agents, consumers and other interested stakeholders, and input regarding whether the rule should be retained as written, modified, or repealed. To assist the

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<sup>13</sup> See *Commercial Aviation: Information on Airline Fees for Optional Services*, GAO-17-756, Sept. 20, 2017. <https://www.gao.gov/products/GAO-17-756>.

<sup>14</sup> See, e.g., European Union Regulation (EC 1008/2008), Article 23.

<sup>15</sup> See Canadian Transportation Agency Air Passenger Protection Regulations (SOR/2019-150), Section 25.

Department in its evaluation, the Department seeks comment in four distinct areas—(1) the need for the full fare advertising rule; (2) the impact of the full fare advertising rule on airlines and ticket agents; (3) the benefit and cost analysis conducted for the full fare advertising rule; and (4) the Department’s ability to restrict how airlines disclose government taxes on airfare under the full fare advertising rule, including the prominence of such disclosures.

1. Need for the Full Fare Advertising Rule

The full fare advertising rule requires that the entire price for airfare, including taxes and fees, be disclosed to consumers in advertising, including in the first instance following an itinerary search. In promulgating this rule, the Department stated: “In order to understand the true cost of travel, consumers need to be able to see the entire price they need to pay to get to their destination the first time the airfare is presented to them.” The rationale supporting the rule is that sellers of air transportation should provide the full fare the first time an airfare is provided or displayed to avoid the confusion and potentially deceptive practice of presenting a price to attract consumers that does not reflect the total cost to travel, which could be significantly higher than the initially advertised price. As the cost of airfare is one of the most important considerations driving consumers’ purchase decisions, knowing the full cost early in the airfare search process is beneficial because it will avoid the confusion caused when consumers are attracted to the initial presentation of a lower price, only to find out later that the total price for travel is higher than they expected, possibly above what a consumer would be willing to pay.

To determine whether the full fare advertising rule has been and remains effective and necessary, it is important to consider the ways that airfares are advertised and airline tickets are sold, and the burden on consumers to locate information relating to the cost of travel. It is the Department’s understanding that approximately 55 percent of tickets are sold by airlines directly

to consumers, and the remainder are sold through ticket agents.<sup>16</sup> A study sponsored by Travel Technology Association, an industry organization representing travel agencies, suggests that before purchasing airfares, consumers often use online ticket agent websites or metasearch sites to compare fares offered by different airlines.<sup>17</sup> In a typical online airfare search process, a consumer enters the desired travel dates, city pair, and possibly other criteria (e.g., routing preferences such as non-stop flights, preferred airline, or preferred time of day to travel). The booking tool, whether on an airline website, online ticket agent website, or metasearch website, generally displays in the search results a list of available itineraries with airfares based on the consumer's preferences. Booking tools usually permit consumers to organize the results by various filters of the passenger's choosing, such as the fare, departure time or number of stops. However, the default search results display for most, if not all, booking tools is to arrange the flights by the fare price from low to high.

During the last eight years, the Department has required airlines and ticket agents to advertise the full fare. The Department seeks comment on whether this requirement has worked as intended and benefited consumers by preventing or minimizing consumer confusion about the price of the ticket. The Department also requests comment on whether there are alternatives to the full fare rule to prevent or minimize consumer confusion that may result from a presentation of a low base fare in advertisements. For example:

- What would the impact be if airfare advertisements were allowed to exclude mandatory charges other than airfare that were collected on a per-passenger basis, and were not *ad valorem* in nature, if the advertisement or quoted fare display made clear

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<sup>16</sup> See *Charles River Associates Report: Benefits to Preserve Consumers' Ability to Compare Airline Fares*, May 19, 2015, [https://skift.com/wp-content/uploads/2015/05/CRA.TravelTech.Study\\_.pdf](https://skift.com/wp-content/uploads/2015/05/CRA.TravelTech.Study_.pdf).

<sup>17</sup> *Id.*

that per passenger taxes and fees were not included and the existence and amount of the excluded charges were clearly provided in conjunction with the fare so that consumers could readily determine the total fare?

- Without a regulatory mandate for full fare advertising, would airlines have an incentive to continue to provide the full fare, even if that price would appear higher than the price from other airlines displaying only the base fare, which could result in the airline displaying the full fare being presented lower in search results?
- Without a regulatory mandate for full fare advertising, would market forces sufficiently incentivize sellers of air transportation or intermediary entities to develop a platform that can produce total price for air travel in a way that minimizes confusion and allows consumers to understand the total fare? Is there an additional potential consumer benefit if platforms are developed to make comparisons across different airlines' offers? For example, is it possible that third parties would use technology to take an airline's base fare and publicly available taxes and fees information to calculate and display automatically the full price of air transportation based on a particular itinerary and other criteria of a passenger's choice? Is this type of software technically possible and financially viable for non-airline sellers of air transportation to provide on their websites? Are there examples of this being done in advertising and search for other products and services?

In addition to preventing consumer confusion and potential deception, consumer rights advocacy groups have asserted to the Department that the full fare rule benefits consumers by streamlining the airfare shopping experience and making price comparison shopping more efficient, and that rolling back the full fare rule would remove the ability for consumers to

comparison shop among airlines by routes and total price. The Department seeks comment on how the streamlined comparison shopping experience for airfares that is facilitated by the full fare rule benefits consumers and whether that benefit should be considered when the Department reviews the rule's overall benefits.

## 2. Impact of the Full Fare Rule on Airlines

Airline representatives in their comments submitted to the Regulatory Reform docket pointed out that the Department's full fare advertising rule differs from the standards set forth by the Federal Trade Commission (FTC), which has the jurisdiction to regulate commercial advertising by other industries and to prevent unfair or deceptive practices. The airlines emphasize that the FTC does not require the entities it regulates to include government taxes and fees in advertised prices as the Department requires of airlines and ticket agents advertising air transportation. The FTC has a long history of regulating commercial advertisements under its statutory authority prohibiting anticompetitive, unfair, or deceptive business practices. With respect to advertising travel related products or services such as hotel room rates, the FTC has issued warning letters to hotel operators stating that their online reservation sites may violate the law by providing a deceptively low estimate of what consumers can expect to pay for their hotel rooms.<sup>18</sup> Although the FTC has not taken enforcement action against hotels for not including government imposed taxes and fees in their rate quotes, it has found that hotels may have violated the law by misrepresenting the price consumers can expect to pay for their hotel rooms.<sup>19</sup> This approach is consistent with the Department's enforcement policy prior to the

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<sup>18</sup> See <https://www.ftc.gov/news-events/press-releases/2012/11/ftc-warns-hotel-operators-price-quotes-exclude-resort-fees-other>. Also see <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-economic-issue-paper-examines-impact-disclosing-mandatory>.

<sup>19</sup> See <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-warns-hotel-operators-price-quotes-exclude-resort-fees-other-mandatory-surcharges-may-be/121128hoteloperatorsletter.pdf>

adoption of the full fare rule, which required that any carrier imposed mandatory fees, such as “fuel surcharges,” be included in the airfare quotes.

The Department’s adoption of the full fare rule established a regulatory standard for airfare advertising that is different from those applicable to other businesses. Other modes of transportation are not required by federal regulation to advertise full fare but may choose to do so. For example, Amtrak currently includes taxes when displaying the price on its websites. Airline representatives emphasized their view that regulations applicable to airfare advertising should be consistent with the regulations applicable to the advertisements of other transportation services such as, for example, cruise lines and rental car companies. The airlines commented that neither cruise lines nor rental car companies are required to advertise the total cost of their services, including applicable taxes and fees, to consumers in the first instance. In the 2011 final rule, the Department stated that it was not persuaded by the argument that the Department should not adopt the full fare rule because other industries advertise without including government imposed taxes and fees. The Department noted that airfares are different from products in other industries for a variety of reasons, including the multitude of methods of advertising that sellers of air transportation employ and the various taxes and government fees that apply.

In this ANPRM, the Department is revisiting this issue and seeking comment on whether airfare advertising should be treated differently from other products or services. The Department’s full fare rule was based on a view that the structure of applicable taxes and fees on other travel related products and services such as Amtrak, interstate buses, hotels, and rental car rates is much simpler than that of airfares. Taking rental car rates as an example, when a consumer searches for a rental car within a specified category and for a particular date range at a specified location, all the rates that fit the requested parameters will be subject to the same State

and local tax rates. As a result, the rental car rate from one company would be subject to the same tax rates as another company. Therefore, internet search results listing available rates for a rental car, arranged by price from low to high, will be displayed in the same order, even after adding taxes and fees. In other words, the lowest base rate will usually remain the lowest total rate after adding taxes and fees.

Airfares, however, are structured differently. The taxes and fees for different flight itineraries between the same city pair on the same date may differ significantly depending on the routes, the number of stopover points, the locations of the stopover points, and other factors. This is even more so for international itineraries because different countries may have different taxes and fees on transit travelers. Therefore, the lowest base airfare listed in the search result may not be the lowest total cost for travel when all taxes and fees are added to the fare. If the total price is not provided in the initial display of airfare search results, consumers may be confused about which itinerary is the lowest fare or best value.

In its comment on the full fare rule filed with the Regulatory Review docket, A4A, the trade association representing the largest U.S. carriers, stated that it only found two products for which the mandatory inclusion of taxes and fees is required in price advertisements in the United States—gasoline and tobacco products. According to A4A, court cases have determined that the mandatory inclusion of taxes and fees for gasoline prices is necessary to prevent congestion and traffic accidents that would occur if drivers could not easily see the tax-included prices. A4A also stated that the mandatory inclusion of taxes and fees for tobacco products is intended to discourage the use of these products, particularly by minors. The Department requests comment on whether the complexity of airfare taxes and fees and its impact on consumers' ability to



understand the total cost of air transportation creates a unique need for a standard on airfare advertising that does not apply to other transportation options or other products or services.

The Department also seeks comment on the impact of the full fare rule on competition, including its effect on the ability of sellers of air transportation to advertise their products freely and compete against each other and against other modes of transportation. The Department has a statutory obligation to rely on actual and potential competition to provide efficiency, innovation, and low prices. The Department is mindful of the variation in total cost of air transportation depending on the routing and other factors and understands that carriers compete against one another not only on the total price of air transportation but also on the availability of routing and other factors. Accordingly, the Department seeks comment on whether requiring sellers of air transportation to display the full price of airfare creates more competition than would be the case when only base fares exclusive of taxes and fees are displayed.

As all sellers of air transportation marketing to U.S. consumers are subject to the same rule, the Department is particularly interested to know how the full fare advertising requirement has affected sellers' ability to develop innovative ways to advertise their products and engage in fair competition. Examples of advertising innovations impeded by the full fare rule would be helpful, particularly those that promote competition in a free market but are currently prohibited by the full fare rule. A4A indicated that airlines may be disadvantaged by the full fare rule when competing with other modes of commercial transportation because the rule imposes a different advertising standard on them, while the other modes of transportation are permitted to advertise a low base fare. If available, the Department welcomes information, academic studies, or market research that might demonstrate that consumers are dissuaded from air travel by the higher full

cost of airfare presented in the first instance during price search, and instead choose less expensive fares or to travel by other means (e.g., train or bus).

The Department is also interested to know whether a regulation specifying how prominently tax and fee information is displayed is necessary to avoid unfair and deceptive practices in airfare advertising given the complexity of the taxes and fees applicable to airfares. For example, there are some travel service websites that offer full cost information and comparative shopping for rental cars and hotels, despite the lack of a government mandate to provide the total cost. Would these or other travel websites be able or incentivized to provide the total cost of air transportation without a regulatory mandate for airlines to advertise the full fare? Why have these websites chosen to display pricing information to consumers on a full cost basis, and why have others chosen only to display the base price initially when presenting search results?

### 3. Regulatory Evaluation of the 2011 Final Rule

The Department is also reexamining the cost and benefit analysis that was conducted for the full fare rule. In A4A's comment on the full fare rule submitted to the Regulatory Review docket, A4A states that "DOT relied on a seriously flawed cost-benefit analysis" in developing the rule. A4A believes the analysis is flawed because it counted reduced air travel due to the rule as a benefit, and argues that any reduction in air travel should be counted as a societal cost instead. However, whether reduced air travel represents a benefit or cost depends on whether information asymmetry existed in the market prior to the rule, and whether the rule succeeded in eliminating that asymmetry, thereby correcting for a market failure. In the case of failure stemming from lack of information, the reduction in air travel represents an elimination of deadweight loss. This deadweight loss occurs because information asymmetry induces

consumers to purchase air travel beyond the socially optimal quantity. Elimination of this deadweight loss generates net societal benefits. However, if the market for air travel was functioning efficiently prior to the full fare rule, then its adoption would not be justified based on market failure. Interventions in well-functioning markets may generate deadweight loss and impose the type of societal costs that A4A's comment describes. The Department is seeking comment on whether the rule succeeded in correcting a market failure arising from information asymmetry, or whether the rule has distorted a market that would function more efficiently in its absence.

On the cost and burden of the rule, the Department seeks comment on whether the rule is imposing costly and unnecessary burdens on the sellers of air transportation (i.e., airlines and ticket agents), and if so, what those burdens encompass. The Department welcomes information on specific cost and benefit estimates of the current rule and of any alternatives. The Department welcomes examples demonstrating new ways and methods of advertising that are currently not permitted by the rule, why they should be permitted, and whether these new methods and forms of advertising would harm consumers. Also, are there ways to preserve the benefits of the existing rule while providing more flexibilities to airfare advertising? Market research data that compares changes in airfare sales volume, consumer behavior when searching for airfare, and other relevant data before and after the 2011 final rule would be relevant to the Department's review.

4. The Department's Ability to Restrict How Airlines Disclose Government Taxes on Air Transportation, Including Prominence of Such Disclosure.

In addition to requiring that the total cost of air transportation be displayed in airfare advertisements, the full fare rule requires that the display of government imposed charges that

are included in the total cost not be false or misleading and not be displayed prominently. In its response to the Department's regulatory review initiative, A4A stated that the rule's prescriptive requirements inhibit airlines from clearly informing the public of the true burden of government taxation on air transportation.

The Department fully supports transparency regarding the components of airfares, and the full fare rule is designed to allow airlines and ticket agents to provide complete and accurate information regarding the components of a fare, while ensuring consumers are not misled regarding the total price of air transportation. The 2011 final rule stated that nothing in the rule prohibits sellers of air transportation from making the information about the amounts and the nature of taxes and fees and other mandatory carrier-imposed charges available to consumers, but the rule also states that "such charges ... may not be displayed prominently." 14 CFR § 99.84(a). Thus, the full fare advertising rule requires that, if a seller of air transportation chooses to display the taxes and fees included in airfare, the information may not be displayed prominently or presented in the same or larger size as the total price. The total cost of airfare must be provided to consumers more prominently than itemized taxes and fees and in the first instance.

In light of A4A's comment, the Department is seeking comment on whether the full fare rule has made it difficult for sellers of air transportation to provide information on government taxes and fees applicable to airfare or for consumers to determine the nature and amount of taxes and fees included in airfare. If that is the case, the Department also seeks comment on what amendments to the rule, if any, would be appropriate to address this problem.

Furthermore, given the U.S. Supreme Court's repeated emphasis on heightened scrutiny in the commercial speech context since the United States Court of Appeals for the District of

Columbia Circuit decided *Spirit Airlines, Inc. v. United States DOT*, the Department is seeking comment on whether the full fare rule's prominence restrictions remain consistent with the governing First Amendment jurisprudence.

Notwithstanding any First Amendment concerns, the Department is also seeking comment on whether the rule should be modified to eliminate the requirements on the prominence and the font size of the taxes and fees that the sellers choose to display. Under this approach, the full fare rule would require sellers of air transportation to display the total cost of air transportation following the initial fare inquiry, but would not dictate how they display the total cost of airfare in relation to the display for taxes and fees and the base fare. For example, a seller that wants to emphasize the amount of taxes and fees could display this amount in a larger font and more prominently next to the total cost. Likewise, a seller wanting to highlight the amount of base fare could display that amount more prominently next to the total cost, provided the seller makes clear the nature of each amount so consumers are not confused about which amount is the base fare and which amount is the total price. Would this approach address the concerns that the rule's prominence and font restrictions are not justified? Would this approach be sufficient to ensure that consumers are fully informed of the elements, such as government taxes, and total cost of air transportation at the earliest stage of fare inquiry?

The Department also seeks comment on whether requirements regarding prominence and font size would be necessary if the Department were to adopt a rule permitting taxes and fees to be stated separately, as was permitted in the previous enforcement policy. Regarding a rule that permitted base fares to be advertised without including taxes and fees, should there be any restrictions on the prominence or size of any disclosure regarding additional taxes and fees? What would be the positive or negative impact of eliminating any requirements regarding

prominence or font size? What would be the positive or negative impacts of retaining requirements for prominence or font size?

In addition to soliciting comment on these issues and concerns identified above, we also welcome any other relevant information.

Issued this 15th day of January 2021 in Washington D.C., pursuant to authority delegated in 49 CFR 1.27(n).

**-Original Signed-**

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Steven G. Bradbury,  
Acting Secretary and General Counsel.