



AIR TRANSPORT ASSOCIATION

**Briefing for
Office of Information and Regulatory Affairs
Department of Transportation Final Rule:
Enhancing Passenger Protections**

March 30, 2011



Overview

Docket No. DOT-OST-2010-0140, RIN 2105-AD92

Areas of Concern covered here include:

- 1. The overall cost/benefit methodology and conclusions**
- 2. The reliance on Full-Fare Advertising to justify this entire proposal**
- 3. The failure to assign any cost or benefit to the requirement to incorporate customer service plans and contingency plans into contracts of carriage – yet still include this item as a proposal**
- 4. The question whether the Department should regulate the commercial relationship between airlines and global distribution systems**



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Department of Transportation Final Rule: Enhancing Passenger Protections

- The Department seeks to vastly expand its passenger protection regulations for the second time in a year. The last amendment took effect April 29, 2010.
- ATA members share the Department's goal of improved customer service but this proposal overreaches and includes provisions that are not in the public's best interest. We supported 12 of the Department's 24 provisions.
- The Department's benefit-cost analysis is incomplete, flawed, and does not meet Executive Orders 12866 and 13563 principles.
- The Department relies on one item for 84% of the benefits and uses it to justify the entire proposal.
- The highest impact cost items were either excluded or unrealistically minimized.
- Portions of the proposal would exceed DOT's authority, re-regulating industry and undoing Congress' work in the Airline Deregulation Act. The Department does not have the authority to re-regulate the industry without express statutory authority to do so.
- OMB should ensure DOT provides a "reasoned determination" that realistic benefits outweigh costs, seeking "to improve the actual results of regulatory requirements." These EO goals can only be met with substantial revision to the proposal and a renewed effort to accurately measure the impact of any final rule and issuance of a Supplemental Notice of Proposed Rulemaking.



Cost/Benefit Analysis Flaws

The Department failed to complete its preliminary regulatory analysis but still concluded that the benefits of the proposal outweigh the costs:

- The Department did not estimate the overall benefit for 7 of 11 items yet still somehow found that benefits outweigh costs.
- Inconclusive and incomplete findings fail Executive Order 12866 obligations to “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”
- Each individual provision included no benefits or benefits below costs, except for Full-Fare Advertising.
- Developing and publishing costs or benefits for the first time after the final rule is published does not “allow for public participation and an open exchange of ideas.” Executive Order 13563



Summary of the Department's Incomplete Preliminary Regulatory Analysis

(Table 33, DOT PRA pages 60-62)

Requirement 1: Expansion of tarmac delay contingency plan requirements and extension of prior Final Rule requirements to cover foreign carriers	Totals (millions)
Net Benefits	-\$1.25
Requirement 2: Expanded tarmac delay reporting and application to foreign carriers	
Net Benefits	not estimated
Requirement 3: Establishment of minimum standards for customer service plans (CSPs) and extension of prior Final Rule requirements to cover foreign carriers	
Net Benefits	-\$2.33
Requirement 4: Incorporation of tarmac delay contingency plans and CSPs into carrier contracts of carriage	
Net Benefits	not estimated
Requirement 5: Extension of prior Final Rule requirements for carriers to respond to consumer complaints to cover foreign carriers	
Net Benefits	-\$1.82
Requirement 6: Changes in denied boarding compensation policy	
Net Benefits	not estimated
Requirement 7: Full-fare advertising	
Net Benefits	\$66.64
Requirement 8: Expanded requirements for disclosure of baggage and other optional fees	
Net Benefits	not estimated
Requirement 9: Prohibiting Post-Purchase Increase	
Net Benefits	not estimated
Requirement 10: Prompt passenger notification of flight status changes	
Net Benefits	not estimated
Requirement 11: Limitations on venue provisions in contracts of carriage	
Net Benefits	not estimated
Requirements 1 -11: TOTAL	
Net Benefits	\$61.6



Full Fare Advertising

The Department relies on one provision, Full-Fare Advertising, to justify the entire proposal

- Full-Fare Advertising accounts for 84% of the benefits. Without it, the entire proposal would not be justified.
- \$58 million of the total \$66 million “benefit” derives from the reduction of the theoretical “dead weight loss.”
- DWL arises from passengers misallocating funds for air travel that could have been spent more efficiently elsewhere, if the passenger knew earlier in the booking process that the airfare quote did not include government taxes and fees.
- Theoretically, the Department concludes if government taxes and fees were included in advertised prices, fewer passengers would book air travel.
- The Department estimates 438,086 future passengers would not book air travel if Full-Fare advertising were adopted as proposed (Table 15, PRA page 42).
- Even if true, the loss of passenger revenue should be counted as a cost not a benefit. This error must be corrected before proceeding.



Full Fare Advertising

The Department proposed to fundamentally change advertising practices in the aviation industry by requiring sellers of air transportation (airlines and ticket agents) to include all taxes and other government-mandated charges in advertised prices.

This change would reverse over 25 years of current practice that has permitted advertising with a separate listing of government taxes and fees.

In 2006, the Department reaffirmed its historical position that separating ticket price and taxes and fees is acceptable; this proposal does not explain what has changed since 2006 and the cost/benefit analysis fails to show a “need” for this regulation.

Other industries unbundle prices separating government taxes and fees into advertised prices, FTC has specifically affirmed such advertising in car leasing and real estate services.



Contracts of Carriage

The Department proposed that all airline customer service plans and contingency plans must be incorporated into a airline's contract of carriage, creating a private right of action under contract law in state courts.

However, Congress directed DOT to enforce the consumer protection provisions and determine whether a practice is "unfair and deceptive." Congress did not create a private right of action.

DOT's attempt to arbitrarily create a private right of action in state courts conflicts with Congress's express direction for DOT to enforce the statute and the Supreme Court's *Sandoval* decision, which held that agencies cannot create a private right of action where Congress has not created one.

DOT would exceed its authority by abdicating its enforcement authority to state courts.



Contracts of Carriage

The Department failed to provide any estimated benefits or any estimated costs resulting from the requirement to incorporate customer service plans and contingency plans into contracts of carriage, yet still included this item in the proposal.

DOT could not identify any quantitative benefits from the litigation that would ensue, instead it found that consumers would have better notice of their rights since the information would then be contained in a readily available source.

- However, airlines are already required by recently adopted DOT regulations to post customer service and contingency plans online.
- This would eliminate any benefit identified by DOT

The Department failed to include any cost for litigation this proposal would create:

- Even though ATA provided DOT with estimated litigation cost data from a member survey in prior consumer protection comments
- ATA estimated annual litigation costs of \$500,000 per domestic airline
- This estimate does not include foreign or regional airlines this proposal would now include
- The Department concluded that this provision “is estimated to involve minimal administrative and website programming costs.” (PRA, page 50)



GDS Distribution

The Department also asked if it should require airlines to provide all baggage and other fee information to global distribution systems in which they participate in an up-to-date fashion and useful format.

Whether airlines should provide fee schedules for optional services to GDSs, or authorize travel agents to sell such services and collect the fees from customers are competitive issues under consideration and negotiation among airlines, GDSs, and travel agents.

The Department fails to cite statutory authority to regulate this private/commercial relationship; its “unfair and deceptive” statutory authority does not apply because there is nothing unfair and deceptive about private parties negotiating to determine what information should be shared between them.

As a policy matter, the Department should not intervene in this private contractual matter between airlines and GDSs, which would further erode deregulation of the airline industry. As a legal matter, the Department does not have the authority to regulate this contractual matter.



Conclusions

Executive Orders 13563 and 12866 set out a number of regulatory principles, to which the Department has not adhered in this rulemaking.

- **First, “[f]ederal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need....”**
 - The Department’s analysis did not demonstrate a compelling public need for this proposal. The entire proposal was justified by the Full-Fare advertising “benefits.” As discussed in our comments, the Full-Fare advertising “benefits” should be classified as industry costs. Eliminating the Full-Fare advertising benefits, as they should, removes any public need for this regulatory action.
- **Second, “[e]ach agency shall assess both the costs and the benefits of the intended regulation and ... propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”**
 - The Department’s assessment of the costs and benefits of the NPRM was deeply flawed, and did not represent a “reasoned determination” because the agency concluded that benefits outweighed costs even though the cost benefit analysis is incomplete and the only significant benefit in the proposal should be classified as a cost.
- **Finally, “[e]ach agency shall base its decision on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.”**

The Department did not complete its economic analysis of this intended regulation, and failed to prove “the need for or identify the consequences” of this proposal. For these reasons, the NPRM did not meet E.O. 13563 and 12886 standards, and should be substantially reviewed and revised before proceeding to a Supplemental Notice of Proposed Rulemaking.





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