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**Comments of Consumers Union and U.S. PIRG
To the U.S. Department of Transportation on
“Exploring Industry Practices on Distribution and Display of
Airline Fare, Schedule, and Availability Information”
Docket No. DOT-OST-2016-0204**

Introduction

Consumers Union (CU)¹ submits the following comments to the U.S. Department of Transportation (“Department”) in the above-referenced Request for Information. We support and encourage the Department’s examination of how airlines distribute information pertinent to marketing their flights, including how airline fares and fees—as well as flight schedules and availability—are presented to consumers.

As explained below:

- Consumers benefit from having reliable flight, fare, and fee information from a number of independent sources. Consumers are harmed when anticompetitive restrictions or other distortions are imposed on access to that information, whether by the airlines, by the online travel agents (OTAs), by the global distribution systems (GDSs), or by anyone else in the pipeline.

¹ Consumers Union is the policy and mobilization arm of Consumer Reports, an independent, nonprofit organization that works side by side with consumers to create a fairer, safer, and healthier world. As the world’s largest independent product-testing organization, Consumer Reports uses its more than 50 labs, auto test center, and survey research center to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

- It is a convenience to consumers, and to travel agents serving them, to be able to go to one place to compare all flights. Right now, on domestic flights, there's one major airline that doesn't participate, and that does create an extra search burden. If more airlines opt for going separately, that burden gets bigger.
- Airlines already employ branding advertisements, frequent flyer programs, and other marketing tactics to lock consumers in, both psychologically and financially. The convenience of one-stop comparison shopping helps create an effective counterweight for cost-conscious consumers that makes choice easier, and gives airlines more incentive to compete on fares as well as on convenience, quality, and customer service. Making comparison shopping less convenient makes the airlines' lock-in efforts more successful.
- The airlines, OTAs, and GDSs are in the best position to quantify the effects of restrictions, and we hope the Department will press them all to more specifically explain their basis for defending any restrictions on the open distribution of this information.
- Flight schedule, fare, and fee information is basic market information on which consumers base their purchasing decisions. The fact that airlines may find some commercial advantage in restricting access to this information does not make that information proprietary.

Background

This Request for Information² explores the variety of practices airlines employ to display fares, schedules, and flight availability information to consumers. Such practices have become more complex in recent years, due to several key factors: 1) the shift from shopping in person or over the telephone to shopping online; 2) the “unbundling” of fares into separate charges for basic ancillary services such as checking baggage and reserving seats; 3) the growth of online third-party travel sites, such as online travel agencies (OTAs) and travel metasearch sites; 4) the dramatic consolidation in the U.S. airline industry; and 5) airlines' efforts to drive consumers to their own websites. Consumers Union has steadfastly supported making this basic information transparent for consumers, regardless of the booking channel a consumer chooses—online or offline, directly with the airline or through a third party.

49 U.S.C. 41712 authorizes the Secretary to order an air carrier or ticket agent to stop an unfair or deceptive practice or unfair method of competition that the Secretary finds, after notice and an opportunity for a hearing, the carrier or agent to be engaged in. The Department has regulated Computer Reservations Systems (now called Global Distribution Systems) pursuant to this authority in the past.³ More recently, the Department has taken important steps to strengthen

² www.federalregister.gov/documents/2016/10/31/2016-26191/exploring-industry-practices-on-distribution-and-display-of-airline-fare-schedule-and-availability.

³ www.gpo.gov/fdsys/pkg/FR-2004-01-07/pdf/03-32338.pdf.

consumer rights, including the Airline Passenger Protections of 2009⁴ and 2011.⁵ We are hopeful that this new inquiry by the Department will lead to providing consumers with the further protection of meaningful transparency, provided in a manner that will enable consumers to use their choice of independent sources to conveniently and reliably comparison shop for flights and fares.

Response to Specific Questions

Below are our responses to specific questions posed in the RFI.

Concerns regarding proprietary nature of flight information

Basic information about flight schedules, fares, fees, and availability is market information on which consumers base their purchasing decisions. It is not proprietary information, legitimately subject to restrictions on its distribution, any more than is a sign in a store window, or a newspaper advertisement. The fact that the airlines might see an advantage to themselves in keeping this information restricted and under their control does not entitle them to treat it as proprietary. Once an airline decides to present this information to the public in order to market flights to consumers, that information is in the public marketplace. While this question may be rendered a bit more complicated by the airline's development and use of software to ensure that flight, fare, fee, and availability information is current, the principle should remain. Consumers' ability to conveniently and reliably comparison shop depends on the same information being readily accessible at all sources.

It has long been understood and accepted that information about routes and fares for transportation services sold to the public is not proprietary. In 1929, the first edition of the Official Aviation Guide of the Airways (OAG) was published and widely disseminated throughout the world; the OAG, and its international counterpart, the ABC Guides, provided and continue to provide complete listings of scheduled passenger flights for every airline in every region of the globe.⁶ Even earlier, the ABC Alphabetical Railway Guide, first published in 1853, provided detailed railroad timetables to the traveling public.⁷

Later, the Computer Reservations Systems, developed by the airlines in the 1960s, became the primary distribution system for providing travel agents, corporate travel managers, and other third parties with access to detailed flight and fare information. In that era, airlines referred to travel agencies as "partners," and built those computerized systems to make third-party bookings easier for all parties in the supply chain: airlines, travel agents, and customers.⁸

Today, travel agencies process more than 50% of all airline bookings, according to the American Society of Travel Agents (ASTA).⁹ Yet in October 2016, an ASTA official noted that

⁴ www.transportation.gov/airconsumer/enhancing-airline-passenger-protections-baggage-and-other-consumer-issue.

⁵ www.transportation.gov/briefing-room/us-department-transportation-expands-airline-passenger-protections.

⁶ www.oag.com/oag-history.

⁷ abcrailwayguide.uk/page/about#.WFBE0DKZPLE.

⁸ www.asta.org/files/MainSite/images/pr/aLivingHistory.pdf.

⁹ www.asta.org/News/PRDetail.cfm?ItemNumber=15010&navItemNumber=539.

“while some progress has been made, serious challenges remain in terms of agency access to ancillary fees.”¹⁰

Two factors have combined to alter the competitive landscape. The first factor is the tremendous growth of online commerce, making it easier for airlines to sell flights directly to consumers. Direct sales eliminate intermediary costs of distribution such as fees, commissions, and other incentives to Global Distribution Systems, travel agencies, Online Travel Agencies, online travel metasearch sites and aggregators, and other third-party ticket sellers. But direct sales can also make it more difficult and time-consuming for consumers to comparison shop.

The second factor is the tremendous growth of ancillary revenue generated by the airlines in fees charged for products and services that once were complimentary as a part of the fare, such as checked baggage, seat assignments and other onboard amenities, and changes to reservations. This change began in 2007 when two domestic “ultra low cost carriers”—Allegiant Airlines and Spirit Airlines—began charging for checked bags; in 2008, American Airlines became the first major U.S. carrier to follow suit.¹¹ By 2015, the Department estimated that revenues from baggage fees alone on U.S. airlines totaled \$3.8 billion.¹² Airline ancillary revenue worldwide for 2016 is projected to be \$67.4 billion, a 200% increase over 2010.¹³

Both of these factors increase the incentives for airlines to restrict and control how flight information is made available to consumers. But that does not alter the nature of the information: it is basic market information, not business proprietary information.

Consumer access to information needed to make informed choices

In our view, there is no sense in which airlines’ withholding of critical information from third-party OTA and metasearch sites benefits consumers; on the contrary, the practice harms consumers by making it more difficult for consumers to conveniently and reliably comparison shop for the best flights and fares. Our recent research underscores this.

During the summer of 2016, we conducted an extensive analysis of nine popular third-party OTA and metasearch sites: CheapOair; Expedia; Google Flights; Hotwire; Kayak; Orbitz; Priceline; Travelocity; and TripAdvisor.¹⁴ The results were published in the October 2016 edition of *Consumer Reports*. We found that fares for all routes could vary considerably on flights departing just hours earlier or later, or from and to nearby alternate airports. We found that all nine of these third-party sites offered helpful filters to facilitate consumer research and make comparison shopping even easier. We also found that these sites offer effective “price alerts” that notify consumers when airfares fall. These third-party sites are especially useful to consumers in monitoring for fluctuations in airline pricing; according to ATPCO, the global airline tariff publisher, the world’s airlines offer more than 100 million fares at any given

¹⁰ *Id.*

¹¹ faculty.haas.berkeley.edu/rjmorgan/mba211/2010%20Final%20Projects/Garde%20Final%20V%205.0.pdf.

¹² www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/subject_areas/airline_information/baggage_fees/html/2015.html.

¹³ www.ideaworkscopany.com/november-29-2016-press-release.

¹⁴ “How To Get the Lowest Fare,” *Consumer Reports*, October 2016, at 26, <http://www.consumerreports.org/airline-travel/secrets-to-stress-free-flying/>.

moment.¹⁵

Finally, we found that third-party sites offer a valuable option for consumers that airline “branded” sites cannot adequately match: the ability to create interline itineraries using multiple airlines. These nine sites often provided our testers with flight options composed of two or more carriers, either as connection options to a destination or as different outbound-and-return options for a roundtrip. Even airlines with many marketing and codesharing partners cannot – or will not – provide so many flight and fare options on their own “branded” sites. This ability to paste together itineraries among rival airlines is a key distinction among third-party sites that can greatly assist consumers in terms of both convenience and price.

As we noted in our October 2016 article, some U.S. airlines appear to be making comparison shopping more difficult for consumers, by restricting the flight and fare information available to consumers on third-party sites, particularly information on ancillary fees.¹⁶ This distorts the information consumers are able to obtain, making the third-party sellers less reliable and less convenient.

One aspect of that distortion is “drip pricing,” the levying of additional fees in the course of a sale. The Federal Trade Commission (FTC) defines drip pricing as “a pricing technique in which firms advertise only part of a product’s price and reveal other charges later as the customer goes through the buying process.”¹⁷ At a 2012 FTC conference, then-FTC Chairman Jon Leibowitz noted that the practice “is likely to be much more problematic when a consumer cannot get out of a transaction; for instance, where the consumer has already purchased an airline ticket and arrives at the airport on the day of the flight, only to learn about additional fees for baggage, better seats, perhaps even use of the bathroom.”¹⁸ Restricting availability of ancillary fee information can lead to a discriminatory marketplace in which consumers purchasing on third-party sites are subjected to drip pricing.

Similarly, many airlines do not allow third-party sites to provide seat selection.¹⁹ Consumers flying on one of those airlines must book directly with that airline if a guaranteed seat assignment is important.

Importantly, as we have confirmed in extensive polling of many thousands of airline passengers over the years, not all customers are equally concerned with the same criteria when booking a flight.²⁰ Making *all* information available through all channels enables consumers to shop according to their own needs and preferences.

In recent years, U.S. airlines have moved to induce travelers to book directly on their own

¹⁵ www.atpco.net/life-cycle-fare.

¹⁶ “How To Get the Lowest Fare,” *supra* note 14.

¹⁷ www.ftc.gov/news-events/events-calendar/2012/05/economics-drip-pricing.

¹⁸ www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/transcript.pdf.

¹⁹ “How To Get the Lowest Fare,” *supra* note 14.

²⁰ www.consumerreports.org/airline-travel/best-and-worst-airlines/.

“branded” sites, with some success.²¹ One means of accomplishing this is to make it more convenient to shop on the branded site, by making it *less* convenient to shop elsewhere—such as by restricting availability of fee information, or the availability of seat selection. In advising consumers to “shop around” online, for example, we have suggested as one approach that they first find an acceptable fare on a third-party site, and then comparison shop that fare on the airline’s own “branded” site.²² This and other approaches become more difficult as airlines restrict third-party sites from obtaining and providing to consumers all the same key information.

We recognize that an airline, particularly a low-cost airline, might choose to sell all seats directly to consumers, thereby avoiding outside distribution chains and the attendant costs entirely, but also giving up the increased sales that might result from greater exposure to consumers who shop exclusively on the third-party sites. Southwest Airlines is a prominent example of an airline that has made this choice, even in the pre-Internet era.²³ Such a decision has the same adverse effect from a consumer perspective as selectively restricting access to flight information, in making comparison shopping more difficult. But selective restriction, or discriminatory restriction, raises an additional concern, in creating a marketplace where consumers can be misled.

Airlines’ stated reasons for restricting flight information

The airlines reportedly claim that “OTAs or metasearch entities have provided inaccurate or incomplete information about airline services and products, provided poor customer service, or engaged in marketing practices the airline does not approve of, and have in some cases engaged in fraud.” Consumers Union is sensitive to these kinds of concerns, and we believe it is in the interests of consumers that the airlines have the ability to appropriately address them.

We note that the Department actively investigates both airlines and third-party ticket sellers for providing inaccurate or incomplete information, and has imposed fines where warranted.²⁴ A February 2016 legal article referred to DOT’s authority to regulate the practices of air carriers, ticket agents, and other entities involved in the aviation industry as “wide-ranging.”²⁵ And fraud is a prosecutable criminal offense.

These concerns can and should be effectively addressed through existing legal and regulatory avenues, in an appropriately targeted fashion. In addition to government enforcement, airlines can take appropriate legal action in instances of fraud, misrepresentation, or other substandard third-party conduct. These concerns should not be used as a pretext for more

²¹ See Phocuswright, “Airlines’ Lead Over Online Travel Agencies Stalling,” March 2016, www.phocuswright.com/Travel-Research/Research-Updates/2016/Airlines-Lead-Over-Online-Travel-Agencies-Stalling-214746527.

²² “How To Get the Lowest Fare,” *supra* note 14.

²³ See investors.southwest.com/~media/Files/S/Southwest-IR/documents/company-reports-ar/ar-2008.pdf, at 7. In a 2007 distribution agreement with Galileo, a GDS, Southwest stipulated that its “exclusive web fares” (available only at Southwest.com) would not be included in Galileo’s inventory, investors.southwest.com/news-and-events/news-releases/2007/15-05-2007a.

²⁴ E.g., “DOT Fines Ticket Agent WK Travel for Code-Share Disclosure Violations,” Jan. 2, 2014, <https://www.transportation.gov/briefing-room/dot-fines-ticket-agent-wk-travel-code-share-disclosure-violations>

²⁵ Jol Silversmith, “DOT Enforcement of its Prohibitions on Unfair and Deceptive Practices, 2015 (February 2016), www.zsrslaw.com/images/stories/Aviation_-_Silversmith_-_DOT_Enforcement_Article_Annual_2015.pdf

broadly restricting market access to basic market information. That does not help consumers; it hurts consumers seeking to comparison shop.

Effects of airlines restricting use of flight information

We believe the airline practice of reducing the availability of flight information on third-party OTA and metasearch sites clearly has a “significant negative impact” on consumers, including in the following ways:

- Some consumers will not budget properly when booking on third-party sites, because it is not clear that the “total” price does not include ancillary fees for basic services such as checked baggage, carry-on baggage, seat assignments, ticket changes, etc.
- Some consumers will be inconvenienced or will pay too much if they do not realize that airlines are not providing third-party sites with all available flight options, and they may schedule vacations or business trips without realizing there are more options on itineraries and fares.
- Some consumers will choose not to travel at all, because they are unaware that more convenient and affordable flight options are available but are not being offered on third-party travel sites.

Among the “subsets of consumers” more likely to be harmed are budget-conscious consumers and families, economically struggling or living on strict budgets, who need to fly but are hit with surprise added fees after the booking is complete, or even on the day of travel. This includes members of the U.S. Armed Forces and students, who can be hard hit by unexpected expenses. And it includes consumers who are not particularly savvy about online commerce—including some seniors.

Another subset of consumers more likely to be harmed are those in geographic areas that have been marginalized by the airline consolidation in recent years, and the resulting abandonment of hubs and downsizing of airports as competition shrinks.²⁶ Consumers depending on these marginalized airports have a greater need than ever to obtain reliable flight information on third-party travel sites.

More broadly, a significant number of consumers simply will not have the time, patience, and expertise to also query one or more airline “branded” sites after shopping on third-party OTA and metasearch sites. It would be useful if the Department could obtain and publish statistics on the relative frequency of such shopping trends.

Issues with information on flight availability are also of concern. In our summer 2016 investigation into third-party OTA and metasearch sites, we repeatedly found numerous problems with flight availability information. In multiple instances, when we queried third-party

²⁶ See testimony of William J. McGee before the United States Senate, The American Airlines/ US Airways Merger: Consolidation, Competition, and Consumers, March 2013, <https://www.judiciary.senate.gov/imo/media/doc/3-19-13McGeeTestimony.pdf>.

sites for specific itineraries, we were initially provided with listings of flights that met our criteria; however, upon clicking through to obtain more information, we were suddenly told that some flights were unavailable. While the real-time nature of online travel reservations could also be a contributing factor, we believe such incidences may have stemmed from restrictions imposed by the airlines on third-party sites.

As we noted above, we believe the most helpful approach for consumers is for *all* flight schedule, fare, fee, and availability information to be available to consumers on the full variety of independent OTA and metasearch sites, to enable consumers to have the fullest array of competitive choices when shopping for and booking flights. Any restriction on full transparency hampers the booking process and puts consumers at a disadvantage.

As we also noted above, we believe consumers would be significantly harmed if another major airline decided to withdraw completely from making flight information available to third-party sites. We hope that will not occur. But consumers are harmed now by airlines seeking to have it both ways, taking selective advantage of the third-party sites while seeking to control the sites' competitive influence on the marketplace.

The Department also notes that some airlines are restricting OTAs and metasearch sites from displaying codeshare flights. These restrictions raise similar transparency and competition concerns, in that they obscure what choices are available to consumers, as well as raising issues of accountability for safety, security, reliability, and comfort.²⁷

Competitive Air Transportation Marketplace

How the restrictions on distribution and availability of flight information are dealt with will have significant implications for competition and consumer choice. More transparency, available more broadly, means more meaningful competition, giving consumers the power of more choice.

As we have said repeatedly over the years, consumers should be able to rely on third-party websites displaying flight choices accurately and objectively, without bias. This means ensuring integrity on the part of the third-party sites themselves, as we have recommended for years,²⁸ including in September 2014 comments to the Department.²⁹ Equally important is that the third-party sites be receiving accurate and complete information from the airlines to convey

²⁷ The airline industry has a history of inadequate transparency for codeshare flights. In 2010, as a member of the Department's Future of Aviation Advisory Committee, we proposed adding codeshare partner data to the Department's monthly Air Travel Consumer Report, www.transportation.gov/sites/dot.gov/files/docs/faac-final-report-for-web.pdf, at 37. The Department included this proposal in the Enhanced Protections for Air Travelers announced in October 2016, www.transportation.gov/briefing-room/us-department-transportation-announces-enhanced-protections-air-travelers-actions.

²⁸ See, e.g., "Travel Web Sites: Look Around Before You Book," *Consumer Reports Travel Letter*, Oct. 2000; "Is Your Travel Agency Playing 'Fare'?", *Consumer Reports Travel Letter*, June 2001; "Travel Web Sites: You Still Need to Compare," *Consumer Reports Travel Letter*, June 2002, <http://consumersunion.org/news/travel-web-sites-you-still-need-to-compare/>.

²⁹ Comments of Consumers Union and the U.S. Public Interest Research Group, Docket No. DOT-OST-2014-0056, "Transparency of Airline Ancillary Fees and Other Consumer Protection Issues," Sept. 2014, <https://www.regulations.gov/document?D=DOT-OST-2014-0056-0632>.

to consumers. As we stated in our September 2014 comments: “Consumers should know not only whether they are receiving the complete universe of options, but also whether the scales are being artificially tilted in favor of certain carriers.”³⁰ As the American Antitrust Institute noted in its own September 2014 comments to the Department: “When prices are not transparent, bad deals often are ‘disguised’ as good deals, and consumers may be deceived and misled into purchasing inferior or unwanted products, or products that do not suit their needs.”³¹

Independent third-party websites are particularly important to consumers shopping in the concentrated air travel marketplace. Several waves of airline mergers over the 35+ years since deregulation have left American consumers with only four major airlines from which to choose for the vast majority of domestic flights—the three legacy airlines, American, Delta, and United, plus Southwest. As we predicted,³² with fewer competitive constraints on the remaining giants, the result has been cancelled routes, closed hubs, fewer flight choices, reductions in service quality, and fewer new-entrant airlines, along with higher fares. The ability to conveniently obtain independent, reliable, up-to-date information on flights, fares, and fees is a critical tool for consumers to take advantage of whatever competition remains, to find the best choices based on their needs and preferences.

In the research we conducted during the summer of 2016, over the course of two weeks we repeatedly searched for the lowest nonstop airfares on five busy domestic routes, using nine popular third-party travel sites: CheapOair; Expedia; Google Flights; Hotwire; Kayak; Orbitz; Priceline; Travelocity; and TripAdvisor.³³ After a total of 372 queries, we found these third-party sites very beneficial in locating choices in airlines, flight availability, and pricing, particularly when the search could be repeated multiple times over several days.

Resources Needed for Competitive Entry

New entrant airlines can offer consumers more options, and potentially lower prices and better service. Indeed, new entrants have a strong incentive to offer those advantages, in order to persuade consumers to switch from one of the established airlines with which they are more familiar. But in order for new entrants to establish a foothold in the marketplace, they must be able to reach consumers. Independent third-party sites are a key way—and perhaps the only effective way—for the new entrants to do so. That is why it is essential that there be effective competition among the third-party sites, that they be transparent and unbiased, and that they be obtaining all the kinds of information that consumers assess in order to make purchasing decisions.

No new scheduled passenger jet airline has entered the U.S. domestic market since the launch of Virgin America in 2007. At no time since the airline industry was deregulated in 1978

³⁰ *Id.*

³¹ www.antitrustinstitute.org/sites/default/files/Comments%20of%20the%20American%20Antitrust%20Institute,%20Docket%20No%20OST-2014-0056.pdf

³² *See, e.g.,* McGee testimony, *supra* note 26; testimony of William J. McGee before the United States Senate, The United/Continental Airlines Merger: How Will Consumers Fare?, May 27, 2010, <https://www.judiciary.senate.gov/imo/media/doc/5-27-10%20McGee%20Testimony.pdf>.

³³ “How To Get the Lowest Fare,” *supra* note 14.

have so many years passed without a new start-up carrier entering the domestic market. One reason may be the difficulties consumers face in comparison shopping.

Conclusion

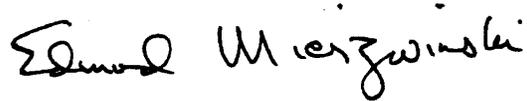
Consumers Union has strongly supported initiatives the Department has undertaken in recent years to better protect the rights of airline passengers. We recognize that addressing the fairness of how airlines' flight, fare, fee, and availability information is distributed and displayed presents a number of issues for consideration. We encourage the Department to take on this challenge, with the goal of ensuring that consumers have convenient and reliable venues for comparison shopping, so that they can obtain the full benefits of whatever competition is available to them in this more concentrated air travel marketplace.

The airlines and OTAs and GDSs are in the best position to quantify the effects of restrictions on availability of flight information, and we hope the Department will press all parties to be more specific in fully explaining their basis for defending any restrictions they are imposing on the open distribution of this information.

Respectfully submitted,



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