

*Before the*  
**Department of Transportation**  
Washington, DC

*In re*

Transparency of Airline Ancillary Fees and  
Other Consumer Protection Issues

Docket No. DOT-OST-2014-0056

**COMMENTS OF  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the Notice of Proposed Rulemaking (NPRM) published by the Department of Transportation (DOT or the Department), the Computer & Communications Industry Association (CCIA) submits the following comments.<sup>1</sup>

CCIA is an international not-for-profit membership organization dedicated to innovation and enhancing society's access to information and communications. CCIA promotes open markets, open systems, open networks and full, fair and open competition in the computer, telecommunications and Internet industries. CCIA's member companies vary widely in size and operate both domestically and globally. Members include computer and communications companies, equipment manufacturers, software developers, service providers, re-sellers, integrators, and financial service companies. Together they employ almost one million workers and generate in excess of \$465 billion in annual revenue. CCIA membership includes companies that offer travel search services and other companies interested in furthering innovation in consumer and business travel.

CCIA member companies often face governments around the world seeking to impose old-line regulations designed for a physical world upon digital information services. Government missteps include inappropriately equating an information platform with the underlying products or services indexed, categorized or referenced on the information platform. At other times governments seek to impose liability on information intermediaries for actions taken by the

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<sup>1</sup> Available at <http://www.dot.gov/sites/dot.gov/files/docs/Passenger%20Protections%20NPRM%20April%2016%202014.pdf>.

underlying user or purveyor. Accordingly, CCIA seeks to assist governments in recognizing the hidden costs and burdens of regulating information services.

## **A. Summary**

CCIA applauds the Department of Transportation's goal of providing consumers with information necessary for them to determine the full cost of travel. However, in the case of airline ancillary fee transparency, attempting to solve an air travel cost data failure by extending ticket agent regulations to information service providers is misguided and runs afoul of Congress's explicit statutory direction. Metasearch sites are not agents of airlines and neither sell, control, nor arrange air transportation.

Instead of imposing ticket agent requirements on information intermediaries, DOT should simply require airlines to provide dynamic ancillary fee data. That straightforward step will provide consumers with accurate ancillary fee information in the most direct manner, with the least overall regulatory cost.

Extending regulations promoting the release of data on ancillary fees to also dictate how that data is then displayed by metasearch sites would be misguided. How travel metasearch sites display, organize and present their information is the main vector on which they compete, and consumers will benefit if established companies and startups have sufficient flexibility to continue to innovate in this space. Requiring a rigid disclosure format, however well meaning, would have the unintended consequence of limiting competition and innovation in travel exploration. A key factor differentiating metasearch sites like Kayak, Google Flight Search, Bing Travel and Hipmunk from themselves and other travel information services is how they choose to package and display travel information to consumers. Furthermore, as the evolution of the greater Internet ecosystem has made clear, consumer preferences on the packaging and display of information vary depending on the size of the screen and the type of the device. Also, given that metasearch sites are information tools, not the actual providers of travel, such regulation would be unnecessary. A metasearch site that distorts or inaccurately displays information about the full cost of travel will quickly find itself losing business.

We also encourage DOT not to extend the definition of "ticket agent" to include metasearch sites. One of the key principles of Internet policy – a principle enshrined in U.S. law, which has allowed the U.S. Internet industry to thrive – is the principle of not regulating Internet

intermediaries as if they are the provider of the underlying service, which incorrectly assumes the intermediary itself has control of the underlying product or service. In this case, metasearch sites merely sort through and present the underlying information, providing consumers value by decreasing research costs and increasing their savings on travel expenses.

**B. DOT Should Withdraw Its Proposed New Definition of “Ticket Agent” Because Metasearch Sites Do Not Fit the Statutory Definition and Should Not Be Treated As Traditional Ticket Agents.**

The proposed regulations blur the line of what constitutes an information service versus a fulfillment site, and therefore would impose significant unintended consequences that could ultimately harm much-needed innovation in travel exploration.

*1. Metasearch Sites Do Not Meet the Statutory Definition of “Ticket Agent.”*

Browsing and exploring travel options is a popular search activity on the Web. Metasearch sites help consumers discover, research, and compare transportation options, and help travel suppliers connect with people researching air travel at a moment of potential interest. Metasearch sites work to provide fast results using innovative displays and interfaces as users browse various options and figure out when and where to travel using a map or text queries. Users can sort the options and adjust filters in the way that best meets their travel needs, and results can vary widely by market.

Despite evolution in the sale of air transportation, Congress has steadfastly maintained an explicit statutory definition of “ticket agent” as comprising “a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.”<sup>2</sup> Metasearch sites simply do not meet the statutory definition. They are neither a principal nor agent of the airlines, and do not sell, offer for sale, negotiate or hold themselves out as selling, providing or arranging for air transportation. Metasearch sites are not the ticketing entities brokering air transportation, reserving or issuing tickets. Much of the time a user of a metasearch site does not even attempt to purchase air transportation, meaning what they value from a metasearch site is often purely information. Should a user desire to proceed to a purchase, the

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<sup>2</sup> 49 U.S.C. § 40102(a)(45).

metasearch site may provide a link to a fulfillment site but the fulfillment site, not the metasearch site, handles transaction and post-transaction matters directly with the consumer.

Providing information and introducing a prospective customer to a fulfillment site do not equate to “arranging for” air transportation. “Arranging for” by definition means more than merely conveying information about a particular transportation option. Alongside “selling” and “providing”, it is facially clear that “arranging for” means entities that have a direct role in the selection and purchase of a particular underlying transportation option. Metasearch sites do not broker or control any air travel inventory. Indeed, the lack of an ability to issue a ticket and complete the sale is a key differentiator of a metasearch site from a GDS, OTA or traditional ticket agent. Metasearch sites are indistinguishable from many other information services that merely categorize, but do not originate or exercise control over, the underlying products or services.

Congressional intent shows a clear desire to link a “ticket agent” with the direct sale of air transportation. When Congress first empowered DOT’s predecessor, the Civil Aeronautics Board, to regulate “ticket agents” in addition to airlines, the stated concern was “ticket agents who are engaged in selling air transportation.”<sup>3</sup> For decades, the CAB/DOT interpretation has been limited to entities that have a direct role in the sale of transportation, an interpretation consistent with the statutory mandate. Congress has not intervened to alter this fundamental understanding of the scope of a “ticket agent”.

The Department’s prior conclusion that it could regulate GDSs as “ticket agents” (affirmed in *Sabre v. DOT*, 429 F.3d 1113 (D.C. Cir. 2005)) does not provide a basis to extend the reach to information intermediaries like metasearch sites. That case was premised on Sabre GDS acting as an intermediary between a ticket agent (as the term was historically understood) and an airline – and not as a consumer-facing information source serving an intermediary function between the consumer and the ticket agent. The *Sabre* court explicitly noted that DOT had “expressly avoided claiming jurisdiction over firms that provide only information on airline services . . . or firms that provide a link to sites where bookings could be made.” *Id.* at 1123. For these reasons, the *Sabre* decision does not serve as pertinent precedent for examining whether the functionality of a metasearch site fits the statutory “ticket agent” definition.

The *Sabre* court’s caution is both practical and appropriate, given that opening up the definition to information services necessitates near impossible line-drawing exercises between online and offline advertising outlets and information sources. How, for instance, is a metasearch

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<sup>3</sup> S. REP. NO. 82-1508 (1952); H.R. REP. NO. 82-2420 (1952).

site link different from a newspaper travel page carrying advertisements of a particular transportation option, which leads to a consumer going to an airline website? Or a printed airline guide containing multiple flight entries?

In determining what entities fit the statutory definition of “ticket agent,” DOT proposes in revised paragraph (s) of Section 399.80 to include any intermediary involved in the sale of air transportation “indirectly to consumers” if the person “holds itself out as a source of information” about “the air transportation industry” and receives compensation “in any way related to the sale of air transportation.” Such a broad interpretation would clearly extend to numerous information services, including blogs describing the airline industry, billboards for particular air routes or price discounts, newspaper pages that review various industry or travel developments and receive advertising revenue, travel guides, etc. While the proposed regulations seek to exclude publishers compensated for cost-per-click links, publishing monetization models will no doubt evolve as innovation and experimentation continues (which CCIA would urge DOT to encourage not constrain). This means more information sources will fall outside the specific exclusion and thereby become regulated ticket agents over time. Moreover, the fact that the proposed new definition of a “ticket agent” sets forth compensation examples based on the number of consumers directed or referred to a “ticket agent” shows how DOT’s attempt to include information providers into the statutory definition for fulfillment sites is circular. Information sources that feed potential customers into traditional ticket agent sales channels are not, simply by virtue of that referral, ticket agents.

The awkwardness and overbreadth of the proposed extension of the “ticket agent” definition shows the need for the underlying regulations to remain on the core functionality of ticket agents as sellers of air transportation — the entities that provide reservations and serve as the ticketing entity and merchant of record for the sale of air transportation.

## *2. Extending “Ticket Agent” Regulations to Metasearch Sites is Not Sound Policy.*

Consumers use metasearch sites broadly to meet a variety of pre-sale travel exploration needs. For the most part, users control their own personalized research and discovery experience on metasearch sites, which offer a more flexible, open-ended research and comparison process than airline sites, OTAs and traditional ticket agents. Consumers may start the travel exploration process by broadly examining what airports are near a given destination, what airlines fly to a particular

airport, how often, and with how many stops. Indeed, as industry research shows, many metasearch users have no immediate intention to purchase, further distinguishing metasearch sites from OTAs and airline sites.<sup>4</sup> DOT has provided no factual basis to apply ticket agent requirements to information services that are not directly involved in the sale of air transportation.

The lack of ancillary fee transparency is not a justifiable basis to deem metasearch sites as ticket agents. Metasearch sites do not set prices for, control or arrange airline ancillary fees. Metasearch sites do not have access to the underlying ancillary fee raw data. If given access, metasearch sites would have strong marketplace incentives to provide their users with accurate travel-related information. Indeed, metasearch sites currently convey facts that an airline or OTAs may choose not to reveal, such as the percentage of late arrivals for a particular air route. Should metasearch sites get access to dynamic ancillary fee data, there is no basis to presume a market failure that would preclude displaying such fees to users at the appropriate stages of a user's travel exploration.

If, however, DOT were to mandate that metasearch sites show particular information for every flight search, this would dampen innovation in the flight search exploration process. Sites would have less ability to present more selective results based upon the user's particular query or interest. As the Department recognizes, this overzealous display of ancillary fee information could very well result in screen clutter frustrating the user experience. If the Department further mandated particular display standards or formats, the harm to innovation on metasearch sites would be exacerbated.

Given that metasearch sites enable users interested in a potential purchase to link directly to points of sale, where the user will see any required disclosures, there is no gap in consumer protection that needs to be filled by regulating information sources. Accordingly the benefit of redefining ticket agents to include metasearch sites is speculative. The governmental interest in protecting consumers from deceptive practices and financial harm can be fully realized by ensuring that the consumer will see the full cost of essential ancillary fees prior to the purchase. In the case of air travel, that can occur with the entity that will reserve or issue the ticket.

DOT's finding that metasearch sites are an entry point for the potential purchase of air transportation does not mean that the entry point is the appropriate stage to apply regulations to

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<sup>4</sup> Sean O'Neill, *OTAs outshine metasearch sites in sending traffic to air and hotel suppliers, says study*, TNOOZ, Dec. 13, 2012, available at <http://www.tnooz.com/article/otas-outshine-metasearch-sites-in-sending-traffic-to-air-and-hotel-suppliers-says-study/>.

protect consumers from financial harm. Consumers use a wide variety of entry points to find out about travel options, including newspapers, television, radio, social media, emails, billboards, magazines, blogs, and word-of-mouth. For example, a consumer may read an ad contained in a publication, whether online or offline, about a specific airline's discount fare on a particular route and go directly to the carrier's website to obtain more information. Or a consumer on a metasearch site may click on a link to an OTA or airline site. Despite serving as an entry point, the metasearch site would not have obtained the personal contact information, credit card, frequent flyer status, or other data that may determine ancillary fees for that passenger for that flight option.

The proposals overlook that even if somehow deemed a ticket agent, a metasearch site may not have access to the underlying real-time flight-specific ancillary fee information. Metasearch sites are not ticketing entities. Transaction-related communications and agreements occur between the underlying seller (the fulfillment site) and the purchaser. The user conveys personal and payment information to the seller, and the seller issues the ticket. The user then handles any post-transaction matters (*e.g.*, flight changes, refunds, cancellations) directly with the seller. Regardless of whether they are compensated, metasearch sites do not have access to the transactional information that is available to the ticketing entity. Insofar as the metasearch site may never know who the consumer is, whether they proceed to a purchase, or whether they seek changes after the booking, it is hardly accurate or wise to deem the metasearch site part of the customer service functions for regulatory purposes. It is the fulfillment site, not the metasearch site, that knows what information was provided as part of the transaction, serves as the merchant of record, and has a direct relationship with the relevant airline for post-transaction customer service needs.

An attempt to justify the regulatory extension is that consumers may begin searching for air transportation options on one website then complete the purchase on another website and “in the process, not be provided disclosures.”<sup>5</sup> This is not the case with air travel metasearch sites, as consumers are directed to a fulfillment site where they verify their intent to purchase a particular air transportation selection and receive pricing and any required disclosures. Moreover, the simple remedy for this perceived gap is to apply the disclosure requirements to the ticketing entity.

The Department should avoid wading into the regulation of non-point of sale information services, particularly when such services are already regulated by other federal agencies. As information service providers, metasearch sites are already subject to consumer protection

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<sup>5</sup> NPRM at 11.

requirements enforced by the Federal Trade Commission. Given that metasearch sites offer travel exploration services broader than air transportation, and may be part of much more expansive websites and companies, it is unclear whether DOT intends to enforce the proposed regulations across other lines of business that are clearly not within DOT jurisdiction. DOT's proposals have not adequately accounted for the potential risk of confusion and duplication in regulatory protections.

The proposal to classify entities "arranging for" air transportation based on the entity's form of compensation significantly increases the risk of subjecting metasearch sites to overlapping and duplicitous regulation. Industry marketing arrangements vary widely, and metasearch sites, like other information service providers, continuously seek to experiment and innovate in ad formats and compensation arrangements. To administer the proposed regulations in such a dynamic environment, DOT would need to substantially increase its expertise in the variety of online advertising models (cost-per-click, cost-per-impression, cost-per-action, cost-per-lead, etc.), which is outside the Department's traditional expertise. For example, the widely-used cost-per-click model invites users to express general interest in a product or service by clicking on an ad for more information, but may not lead to a sale. By explicitly seeking to reach general advertising compensation (*i.e.*, "cost-per-click for air transportation advertisements, . . . or other compensation based on factors such as the number of flight segments booked, number of sales made, or number of consumers directed or referred"), the proposed regulations would sweep in a broad variety of marketing arrangements that may not be related to any specific transaction or sale of air transportation, contrary to Congressional intent and the longstanding definition of a "ticket agent".

Given industry dynamics and rapid advances of online advertising payment models, distinguishing cost-per-click ads from cost-per-action or other forms of advertising is neither a sustainable nor appropriate regulatory classification. Whether or not the metasearch site receives compensation is not determinative of whether the site is "arranging for" air transportation. As described above, the metasearch site may refer potential customers to a fulfillment site, but, regardless of compensation, it does not serve as the ticketing entity to complete or "arrange" the booking. The metasearch site does not reserve the seat with the airline, nor verify the passenger's payment, frequent flyer status, airline history, etc. The mere fact of compensation does not transform a metasearch site into a ticket agent, just like a brick-and-mortar travel agent paying someone to hold open its front door to welcome potential customers does not give the door holder credentials to book tickets.

Similarly, the metasearch proposals would involve the Department in troubling and unprecedented technological questions. DOT may be called upon, for example, to decipher what websites have “flight search capability”, what level of information manipulation comprises a regulated “flight search tool”, and other highly complex technical distinctions. In addition, the proposed requirements for metasearch sites also presume an online desktop environment and are not adequately designed to work on a mobile platform (*e.g.*, smartphones and tablets). The space constraints of mobile platforms only exacerbate the likelihood that metasearch display requirements would clutter and impede the consumer experience, contrary to the Department’s objectives.

The uncertainty caused by arbitrary and vague line drawing among consumer travel information sources will likely impose significant compliance costs on metasearch sites and entrepreneurs seeking to offer consumers innovative flight search tools or travel services. Widely popular metasearch sites would be subject to a range of regulatory requirements designed for traditional ticket agents directly involved in the ticketing process. Imposing legacy regulations on the entities offering consumers new and innovative intermediary services is hardly a recipe for further innovation. The NPRM makes little attempt to assess the risk that this regulatory overhang will thwart innovation and deprive consumers of innovative travel exploration services. While superficially appealing, extending the statutory definition of “ticket agent” to cover information sources that are not the point of sale for air transportation is neither necessary to protect consumers (who can be fully protected by imposing disclosure requirements on the ticket sellers), nor wise insofar as it thrusts DOT into difficult line drawing in technical and marketing areas well outside DOT’s expertise.

**C. DOT Should Address the Root Cause of the Lack of Transparency in Ancillary Fees by Requiring Airlines to Release Dynamic Ancillary Fee Data.**

CCIA believes the DOT proposals are well-intentioned. It’s undisputed that in recent years airlines have sought additional fees for consumer activity that was previously free or built into the cost of an air ticket. Yet, real-time information about the cost of ancillary services is not shared with airline distribution channels. This underlies the transparency market failure – the lack of dynamic ancillary fee data flowing from airlines. While the NPRM addresses various reasons why ancillary fee data is not flowing today (*e.g.*, state of GDS technology, airlines’ desire to sell more through non-GDS sales channels), it is not clear that the market alone will unleash dynamic ancillary fee data absent DOT intervention. DOT should address the underlying root cause of the

information failure in the least costly and burdensome manner by requiring airlines to unleash flight-specific real-time data about essential ancillary fees.<sup>6</sup>

Addressing the foundational data issue directly with the airline that controls the ancillary fees would go a long way toward unleashing data transparency without imposing burdensome and unnecessary regulations on information tools. Once the airlines make dynamic ancillary fee data accessible, then multiple entities will have incentives to display ancillary fee information and design innovative comparison services utilizing the raw data. Assuming industry standard portable data formats for the transfer of the raw data, there would be no need for DOT to mandate a particular display format or standard, and, in fact, such a mandate would only serve to depress innovation and competition.<sup>7</sup> Only after taking the initial step of requiring airlines to be transparent about their ancillary fees will DOT be in a position to determine if the marketplace is adequately protecting consumers or if other steps, such as recommending that Congress expand the ticket agent definition, are needed.

If DOT were to fail to fix the underlying data flow imbalance while imposing ticket agent requirements on metasearch sites, it is not at all clear that this would provide any additional transparency. Even today metasearch sites have difficulty obtaining complete and accurate pricing data from some airlines. Today's experience shows that the data flow out from the airlines is the bottleneck. If airlines continue to decline to provide dynamic ancillary fee data, then expanding the scope of regulated ticket agents will have no impact on improving consumer transparency. It would merely harm innovation and deprive consumers of current and future opportunities for enhanced travel exploration services.

#### **D. Conclusion**

The clear goal of metasearch sites is to make it easier and faster for people to find useful travel information and to plan potential trips. Because of this overarching objective, if metasearch sites had real time access to key ancillary fee data, they would likely organically offer innovative ways to display ancillary fee information at the appropriate stage and manner for inquiring users,

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<sup>6</sup> Passenger-specific ancillary fee discounts can likely only be calculated at the point of purchase, when the passenger has chosen to purchase a particular flight and provides their personal identification, including frequent flier details, to the seller. Airlines often discount certain ancillary fees as rewards for their frequent fliers or customers who use airline-associated credit cards.

<sup>7</sup> Open industry standards are needed for the formatting of the initial ancillary fee raw data flowing out from airlines; not the display of the data to consumers on metasearch sites, OTAs or other information sources.

without a specific regulatory mandate that imposes significant compliance costs and could impede innovation in metasearch display formats and future travel exploration services. In other words, if DOT could unleash the ancillary fee raw data, there would likely be no market failure to warrant redefining a “ticket agent” to impose a regulatory mandate on the display of that information on metasearch sites. Solving the root cause of the lack of transparency would lead the marketplace to further disseminate the desired information — and to do so in more innovative, consumer-friendly ways than impermissively stretching a statutory definition and mandating particular display requirements.

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