

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL  
750 FIRST STREET NE SUITE 1100  
WASHINGTON, D.C. 20002  
(202) 326-6018  
(202) 408-6998  
<http://www.naag.org>

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February 13, 2006

Docket Management Facility  
U.S. Department of Transportation  
400 Seventh Street, SW  
Nassif Building, Room PL-401  
Washington, D.C. 20590-001

RE: Comment on Airline Price Advertising Rules  
Docket No. OST-2005-23194

Dear Director:

We, the undersigned Attorneys General ("the Attorneys General"), submit these Comments in response to your invitation to comment on potential revisions to the United States Department of Transportation's ("the Department") price advertising regulation, and the Air Transport Association of America's petition to be allowed to separate fuel surcharges from the advertised air fare, which invitation appeared in the *Federal Register*, Vol. 70, No. 239, December 14, 2005.

The Attorneys General support and advocate Option II, the position the Department has taken these last 22 years, which requires that in advertisements of air transportation, the price advertised must be the full price that the consumer will pay. The Department's Statements of General Policy<sup>1</sup> provide that the Department considers any advertisement of passenger air transportation that does not state the entire price the consumer must pay to be an unfair or deceptive practice. The Attorneys General are preempted from enforcing their consumer protection laws against air carriers.<sup>2</sup> If we could, we would argue in concert with the Department's long held position, and its rule, that it is deceptive to advertise a price for air transportation which is not the full price a passenger must pay to obtain that advertised transportation. In that neither the states nor the FTC can bring deceptive advertising actions

<sup>1</sup> 14 CFR parts 399 and 380.

<sup>2</sup> *Morales v. Trans World Airlines*, 504 U.S. 374 (1992).

against air carriers, the Department is the only agency that can protect the public from deceptive air fare advertising. Thus, it is important that the Department continue to regard the failure of any advertiser to state the entire price a consumer must pay to obtain the advertised good or service as a violation of its regulations.

In its invitation for comment, the Department raises the issue of whether and to what extent consumers and competitors continue to need the level of consumer protection that the Department's current requirements afford. Certainly, consumers continue to need fair price disclosure in advertising. Although computer use has grown significantly since the original regulation was adopted, the fact that information is also available by the Internet should not adversely affect the level of protection that consumers receive. Nor should the speed by which this vast information is delivered to the public diminish standards of fair disclosure. It is the quality and accuracy of the information which enables consumers to effectively navigate the Internet. Option II promotes the early disclosure of a ticket's cost, including the government and carrier-imposed charges, and thus encourages informed choice, justifiable reliance on the written regulation and trust in the content of advertisements. When such accurate information is quickly located on the Internet, and all competitors advertise the same full price information, the consumer is encouraged to purchase on-line and competitors that operate fairly are protected.

Full-fare disclosure would not adversely affect competition among the air carriers. Government-imposed per-person taxes and costs are uniformly imposed upon carriers; thus, any effect upon the air carriers would affect them proportionately. To the contrary, a regulation allowing separation of government and carrier-imposed fees would have a disproportionate effect on price advertising and would require additional time and effort for consumers to effectively compare fares. The lowest advertised fare would not necessarily be the lowest price available. Upon seeing an enticing advertisement, the Internet consumer would be required to go through several screens on the site before being able to learn the total cost. Many consumers have difficulty adding separate figures and have a psychological preference for the single dominant figure. Yet, even if we disregard consumer preference, the single figure advertised fare (with or without government imposed taxes and fees) is the one most likely to be quoted by third party sellers. If the true fare is significantly higher than the advertised fare, a cost conscious consumer would have to go through the same laborious process for other airlines to obtain the bottom line prices. The consumer who purchases by telephone or in person, in the same situation, would have to expend a significant amount of time and mathematical calculation, as well as the time of the airline's agent or salesperson, to obtain the final price. Ultimately, this might thwart true low price incentive advertising. Competition and the free market benefit when full price comparisons can be made easily.

Requiring full-fare disclosure does not reduce an air carrier's flexibility. The Department contrasts the "traveling public's need to know the price of air transportation" with the "air carriers' need for flexibility in advertising." Such a "balancing" mistakenly suggests that the goals of disclosure and flexibility are mutually exclusive. They are not. We note that airlines have flexibility because, for a number of years, they have not been required to file for Department approval of rate changes they wish to implement before they can advertise such "new" rates. Under the present rules, air carriers can charge whatever price they wish. The Attorneys General do not suggest any limitation on the prices airlines charge. The only issue is

whether the advertising of those prices is accurate and will enable consumers to evaluate competitive price advertising. Most certainly, the Department would not wish to give the air carriers the flexibility to deceive consumers with an advertisement of fares that are not truly available. Under Option II, the only way that one carrier can advertise a fare lower than its competitor is truly to provide a more economical fare.

The Department asks whether including government imposed fees and costs with the price of the fare "would deprive passengers of potentially useful information concerning the composition of airfares." The Attorneys General assert that it would not. Certainly, consumers should not be denied access to full price disclosure of taxes, government-imposed costs and carrier-imposed charges prior to purchase, but consumers obtain no benefit by the omission of these items from the full price of the air fare at the advertising stage. As the Department notes, nothing in the Department's current rules or regulations, nor anything proposed under Option II, "precludes carriers from stating in advertisements"<sup>3</sup> the total price of the fare and separately, disclosing the government imposed taxes, fees and costs, or even other carrier-imposed costs that the air carrier will charge.

There is, however, one aspect of Option II which deserves specific attention because it works to consumers' disadvantage. The regulation allows the carrier to offer a "range of prices for each city-pair," using the word "from" to show the lowest price, or to post the maximum and minimum price. The Attorneys General recognize that each air carrier varies its prices, depending upon the route chosen, and other elements of travel. However, if it is difficult for the air carrier to efficiently itemize these prices, we believe that it is that much more difficult for the consumer to determine the actual full price of air fare from such advertisements. Allowing the use of the word "from" in air fare advertisements would be confusing, unclear or vague. Allowing an air carrier to list the airfare to a specific destination at a price "from" a given amount, would enable an air carrier to offer that price as a one-seat loss leader, so that the consumer, upon calling, would find no such fare available. Neither would such advertising disclose other restrictions, such as night travel and blocked travel dates. Notwithstanding our belief that allowing use of the word "from" in airline price advertising will only lead to confusion and deception, we suggest that if the Department chooses to permit advertisements containing a range of fares, with use of the word "from," that it also require proximate and conspicuous disclosure that such a fare is "not available on all flights," or that "seats are subject to limited availability," if this is the case, and that, as currently required, "a reasonable number of seats be available at [the] advertised price."<sup>4</sup>

The Attorneys General oppose adoption of Option I. We strongly disagree with the Department's Option I proposal regarding the advertisement of one-way fares. Advertisement of a one-way fare that is not available for one-way travel is deceptive and is an unnecessarily cumbersome method of advertising the price of a round-trip ticket, which gives no benefit to the round-trip traveler. As to the one-way traveler, even if the requirement for round-trip travel is disclosed clearly, conspicuously and in close proximity to the advertised one-way fare, such advertisements are deceptive. The total cost of a ticket should be explicitly provided, because,

<sup>3</sup> 70 Fed. Reg. 73961 (Dec. 14, 2005) (to be codified at 14 CFR Part 399).

<sup>4</sup> 70 Fed. Reg. 73962 (Dec. 14, 2005) (to be codified at 14 CFR Part 399).

for example, differences in landing fees and other charges may cause the cost of a round trip ticket to exceed twice the advertised one way trip fare.

Further, in Option I, we oppose the suggestion of leaving the current enforcement policy in effect, even though it differs from the written regulation. A policy by which the Department maintains one written regulation and enforces another breeds confusion. Rather than negate an entire regulation by stating a selective enforcement policy, the Department should reserve its prosecutorial discretion to challenge any deceptive advertising for individual situations. Thus, the Department can decide not to take prosecutorial action where consideration of equitable factors due to unusual situations would make such action unsuitable.

Finally, the Attorneys General oppose any regulation that allows air carriers to break out fuel surcharges from the advertised fare a consumer must pay to purchase the advertised ticket. As with the cost of insurance, overhead and employee benefits, consumers expect fuel costs to be reflected in the base service price. Consumers would not expect a business, the sole purpose of which is to transport customers by fuel driven engines, to advertise fares which separate the cost of fuel from the cost of the ticket. The only reason that a business would advertise fares which do not reflect the cost of running the business would be to lure consumers in on the basis of incomplete, and misleading information. Since airlines can change the price they charge when they want, or need, to, the price advertised can always be changed to reflect higher operating costs. Requiring all air carriers to include such costs in the advertised price prevents deceptive advertising and places all air carriers in the same position.

The Attorneys General also oppose Option III because it opens the door to many potentially deceptive advertisements. We believe the disadvantages set forth by the Department<sup>5</sup> far outweigh any possible benefits gained and illustrate why the Department should not change its twenty-two years of regulation. By merely telling the consumer the total price at some time "before the purchase is transacted," the Department would be sanctioning behavior which, in other industries, has led to numerous enforcement actions by the Attorneys General. For instance, door-to-door magazine sellers are legend for telling consumers that the magazines, which they will receive for five years, will only cost \$1.35 a week. Then, after consumer has agreed and provided the payment information, the magazine seller off-handedly informs the buyer that the total price is \$351.00 (which usually has to be paid within 12 months). Other examples abound, but suffice it to say, that based upon our experience, the Attorneys General signing this Comment believe that the policy outlined as Option III will lead to bait and switch advertising tactics and will result in low price advertisements that bear no relationship to the total price that must be paid. Option III will leave the less sophisticated traveler scratching her head as to how the advertised ticket of \$237 resulted in a total charge of \$393.

Regarding Option IV, we agree with the Department that adoption of this Option, would leave "consumers . . . [with] less regulatory protection."<sup>6</sup> As the Department recognizes, neither the FTC nor the states can enforce their deceptive advertising laws against air carriers.<sup>7</sup> While

<sup>5</sup> 70 Fed. Reg. 73964 (Dec. 14, 2005) (to be codified at 14 CFR Part 399).

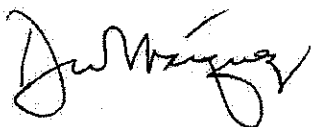
<sup>6</sup> 70 Fed. Reg. 739645 (Dec. 14, 2005) (to be codified at 14 CFR Part 399).

<sup>7</sup> 70 Fed. Reg. 73961 (Dec. 14, 2005) (to be codified at 14 CFR Part 399). Additionally, the department takes the position that no private right of action exists for such violations. *Id.*

the Department's Enforcement Office has been doing as well as can be expected with the resources it has been given, we believe that adoption of Option IV will lead to a wide-open marketplace of advertisements, each of which has to be reviewed against the standard of whether a particular advertisement deceives the public. Such enforcement actions require more manpower, resources, and trial time, than actions alleging that an advertiser violated a specific regulation. For this very reason, economy and efficiency in enforcement, the FTC and States, in their respective arenas, adopted regulations and trade rules. The Department should not move away from the rules it has held in place and enforced for the last twenty-two years. These are the rules that shaped airline advertising, the rules that consumers expect, and the rules with which advertisers should comport. To change these rules will only lead to consumer confusion and deception.

In closing, Option II,<sup>8</sup> the position long taken by the United States Department of Transportation, requires that the price advertised must be the full price that the consumer will pay. By enforcing this policy, both consumers and air carriers will benefit. Consumers will be able to efficiently determine the cost of travel. This will make comparison shopping of rates easier and thereby, foster fair and vigorous rate competition. Financial transactions will be more satisfactory when the amount paid by the consumer is the amount advertised and expected. Not only will Option II protect consumers from unfair or deceptive business price advertising, it will build trust in airfare advertising and help restore the traveling public's enthusiasm for air travel, to the benefit of both carrier and consumer.

Sincerely,



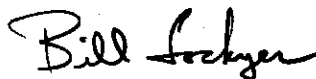
David Márquez  
Attorney General of Alaska



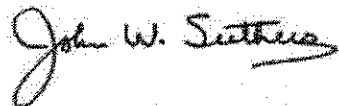
Terry Goddard  
Attorney General of Arizona



Mike Beebe  
Attorney General of Arkansas



Bill Lockyer  
Attorney General of California



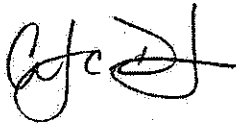
John Suthers  
Attorney General of Colorado



Richard Blumenthal  
Attorney General of Connecticut

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<sup>8</sup> Which the state Attorneys General who are signing this comment favor with the modifications noted above.



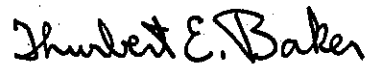
Carl Danberg  
Attorney General of Delaware



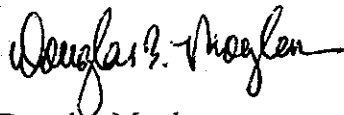
Robert Spagnoletti  
Attorney General of District of Columbia



Charlie Crist  
Attorney General of Florida



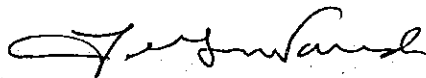
Thurbert Baker  
Attorney General of Georgia



Douglas Moylan  
Attorney General of Guam



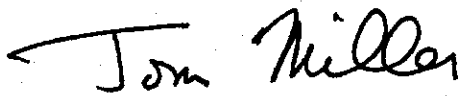
Stephen Levins, Executive Director,  
Hawaii Office of Consumer Protection



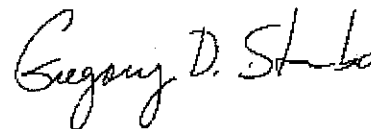
Lawrence Wasden  
Attorney General of Idaho



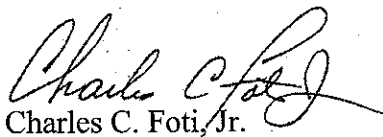
Lisa Madigan  
Attorney General of Illinois



Tom Miller  
Attorney General of Iowa



Gregory Stumbo  
Attorney General of Kentucky



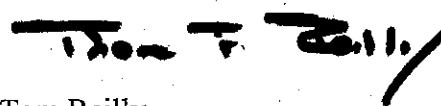
Charles C. Foti, Jr.  
Attorney General of Louisiana



G. Steven Rowe  
Attorney General of Maine



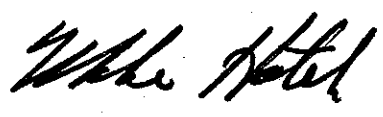
J. Joseph Curran, Jr.  
Attorney General of Maryland



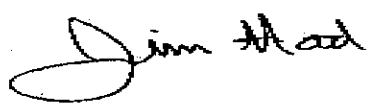
Tom Reilly  
Attorney General of Massachusetts



Mike Cox  
Attorney General of Michigan



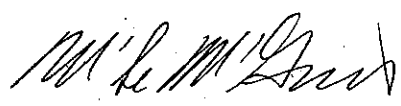
Mike Hatch  
Attorney General of Minnesota



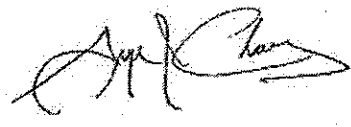
Jim Hood  
Attorney General of Mississippi



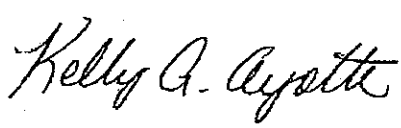
Jay Nixon  
Attorney General of Missouri



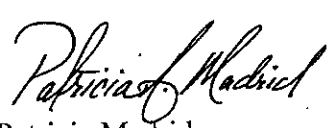
Mike McGrath  
Attorney General of Montana



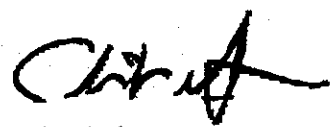
George Chanos  
Attorney General of Nevada



Kelly Ayotte  
Attorney General of New Hampshire



Patricia Madrid  
Attorney General of New Mexico



Eliot Spitzer  
Attorney General of New York



Roy Cooper  
Attorney General of North Carolina



Wayne Stenehjem  
Attorney General of North Dakota



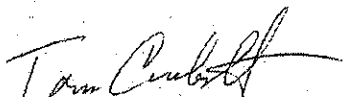
Jim Petro  
Attorney General of Ohio



W.A. Drew Edmondson  
Attorney General of Oklahoma



Hardy Myers  
Attorney General of Oregon



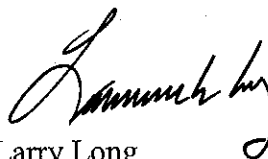
Tom Corbett  
Attorney General of Pennsylvania



Patrick Lynch  
Attorney General of Rhode Island



Henry McMaster  
Attorney General of South Carolina



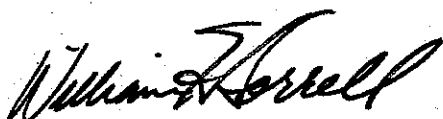
Larry Long  
Attorney General of South Dakota



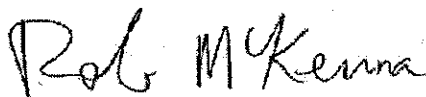
Paul Summers  
Attorney General of Tennessee



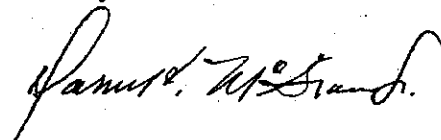
Greg Abbott  
Attorney General of Texas



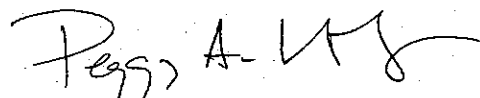
William Sorrell  
Attorney General of Vermont



Rob McKenna  
Attorney General of Washington



Darrell V. McGraw, Jr.  
Attorney General of West Virginia



Peggy A. Lautenschlager  
Attorney General of Wisconsin

9. Of the states listed, Hawaii is represented by its Office of Consumer Protection, an agency which is not a part of the state Attorney General's Office, but which is statutorily authorized to represent the State of Hawaii in consumer protection actions. For the sake of simplicity, the entire group will be referred to as the "Attorneys General," and such designation as it pertains to Hawaii, refers to the Executive Director of the State of Hawaii Office of Consumer Protection.