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January 23, 2023

Ryan Patanaphan  
Blane Workie  
Office of Aviation Consumer Protection  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Washington, DC 20590

RE: Enhancing Transparency of Airline Ancillary Service Fees  
Docket ID: DOT-OST-2022-0109  
RIN 2105-AF10

Dear Mr. Patanaphan and Ms. Workie:

On behalf of the American Society of Travel Advisors, Inc. (ASTA) and the more than 160,000 Americans across the country who work in our part of the travel industry, I am writing to express ASTA's viewpoints with respect to the above-referenced Notice of Proposed Rulemaking (NPRM) on enhancing transparency of airline ancillary service fees.<sup>1</sup>

Established in 1931, ASTA is the world's leading professional travel trade organization. Our current membership consists of nearly 7,500 travel agencies, independent travel advisors and related companies varying in size from the smallest home-based businesses to traditional brick-and-mortar storefront agencies to the largest travel management companies and online travel agencies such as Expedia, representing in total more than 90,000 travel professionals. As the largest segment of air ticket sellers, travel advisors serve an indispensable distribution role in the broader travel and tourism industry. In 2019, travel agencies sold nearly 830,000 airline tickets *per day*, representing 48 percent of total sales and aggregate spending of more than \$97 billion.<sup>2</sup>

Because travel agencies, individual travel advisors and other similarly situated third-party intermediaries are considered "ticket agents" under federal statute,<sup>3</sup> our members, like the airlines themselves, are entities regulated by the Department of Transportation ("the Department" or "DOT") and as such have a significant and particular interest in the outcome of the present rulemaking.

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<sup>1</sup> [Enhancing Transparency of Airline Ancillary Service Fees](#), Notice of Proposed Rulemaking, Docket DOT-OST-2022-0109, 87 Fed. Reg. 63718 (October 20, 2022).

<sup>2</sup> Airlines Reporting Corporation (ARC). [Airline Sales Statistics](#).

<sup>3</sup> See [49 U.S.C. § 40102\(a\)\(45\)](#) (Definitions) ("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").

ASTA has long believed that consumers deserve full transparency with respect to airfares and optional ancillary service fees, as well as the ability to buy those services – transactability – regardless of the channel in which they elect to book their travel. As such, we view the present NPRM as a step in the right direction in that it requires airlines to provide travel agencies with ancillary fee information that is “usable, accurate and accessible in real-time” and requires transactability for some ancillary services, namely those that enable family seating.<sup>4</sup>

We share both the Department’s view that “a market failure may exist because airline consumers may have inadequate information about ancillary fees before buying tickets,”<sup>5</sup> and its goal of “protect[ing] consumers from hidden and deceptive fees and enable them to determine the true cost of travel in an effective and efficient manner when they price shop for air transportation.”<sup>6</sup>

In our view, this rulemaking is necessary due to market developments – entirely outside of travel agencies’ control – over the past decade-plus. Specifically, since the airlines began unbundling the services they sell as “airfare” in 2008 and 2009, their marketing and sales practices have created widespread confusion among consumers, frustrating the efforts of even the most astute frequent travelers to understand in a timely way the full price of their air travel, including all of the unbundled components. These practices have at least two dimensions, both of which negatively affect consumers regardless of the booking channel they select. First, on airline websites, ancillary service fees remain difficult for consumers to discover, are hard to understand when found and are too often revealed too late in the search process to permit effective comparison shopping. Secondly, with respect to intermediated transactions, travel agencies, though duly appointed by the airlines and closely governed by them through the Airlines Reporting Corporation (ARC), are largely denied timely dynamically displayed access to their ancillary services/fees through the global distribution systems (GDSs) technologies, upon which travel agencies rely. Moreover, the airlines have generally withheld from travel advisors the authority to transact those services with consumers at the time of ticket purchase.

Consumer confusion and frustration associated with this unbundling will only grow as airline revenue generated by this practice continues its steady march upward. According to the 2022 CarTrawler Yearbook of Ancillary Revenue, the 75 airlines with the most ancillary revenue collected \$48.4 billion in such fees in 2021, a 54.2 percent increase year-over-year, with growth among all categories of airlines. While the airlines’ total revenue figure is \$18.5 billion lower than the pre-pandemic total posted in 2019, the average ancillary revenue per passenger was \$29.96, up 39 percent from the \$21.54 reported in 2019. The share of total revenue attributable to ancillaries also increased in 2021 to 22.2 percent for major U.S. carriers from 16.1 percent in 2019, and to 36.3 percent for high-performing low-cost carriers compared with 27 percent two years prior.<sup>7</sup>

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<sup>4</sup> Op. cit at 63729.

<sup>5</sup> [Enhancing Transparency of Airline Ancillary Service Fees - Regulatory Impact Analysis](#) (RIN 2105-AF10). Office of the General Counsel, Office of Regulation. September 2022.

<sup>6</sup> Op. cit at 63721.

<sup>7</sup> [2022 CarTrawler Yearbook of Ancillary Revenue](#). IdeaWorksCompany. September 2022.

While supportive of the overall spirit and several particular provisions of the proposed rule, ASTA does have concerns about several of its finer details, foremost among them being the requirement that ticket agents disclose fees for multiple services in each and every “offline” transaction – even to repeat customers and frequent fliers – and its expected impact on agency operations. We are also concerned about the exclusion of the GDSs – the primary technology advisors use to fulfill client requests – from the universe of ticket agents with whom the airlines are required to share ancillary fee data.

As the national trade association representing the interests of travel agencies and travel advisors, ASTA is most concerned with the provisions of the NPRM that, if adopted, would be most impactful to our members, their businesses and their clients. Not surprisingly, the majority of our comments focus on these concerns and are the result of extensive discussions with our members and others well-versed in the complexities of the airline distribution process. We also express our views on other aspects of the NPRM where we believe that ASTA can provide a valuable perspective distinct from that of the airlines, consumer advocacy groups and other stakeholders.

## **MODIFICATIONS TO OFFLINE/ONLINE DISCLOSURE REGIME**

The Department proposes requiring ticket agents to inform consumers of bag fees, change and cancellation fees and family seating fees that apply when consumers attempt to purchase airline tickets offline – in-person or over-the-phone. These new oral disclosures would be layered on top of the numerous disclosure requirements that travel advisors are already required by law and regulation to comply with today. These include disclosures related to airline code-sharing, insecticide spraying, price increases, baggage fees, hazardous materials and ticket expiration dates, among others.<sup>8</sup> Some must be conveyed in every transaction regardless of whether it’s online or over-the-phone or face-to-face while others can be fulfilled via the Internet or the e-ticket receipt. Others are only triggered in specific transactions (e.g. if the buyer is considering a code-share flight). In most cases, failure to make these disclosures is considered an “unfair and deceptive practice” by the Department and exposes agents to fines of up to more than \$37,000 per infraction. Applying the same calculation the Transportation Security Administration (TSA) used when developing its Secure Flight rules in 2008 – that 25 seconds of “talk time” costs ticket agents \$26.6 million per year<sup>9</sup> – we estimate the annual economic impact of *current* regulations on ticket agents at \$8.83 million per year.<sup>10</sup>

Based on consumer surveys and ARC data, we estimate that 17.2 million air transactions are consummated over-the-phone or face-to-face every year, and these transactions will be

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<sup>8</sup> See for example 49 USC 41712(c), 49 USC 42303, 14 CFR §399.88 & 89, 49 CFR 175.25 and 49 USC 41712(b).

<sup>9</sup> Regulatory Evaluation Final Rule Secure Flight, 49 CFR 1560, October 17, 2008 at 84.

<sup>10</sup> Not every air transaction triggers a disclosure obligation. Some required disclosures are in fact quite rare, such as a notification that the price of an airfare or government taxes and fees may increase after purchase. In calculating the costs of the *current* regulatory burden as it relates to travel advisors, we focus on code-share and insecticide, the two most likely to be triggered and which must be conveyed in all transactions, including over-the-phone and face-to-face.

particularly impacted by the new, expanded disclosure regime envisioned by this NPRM. If the disclosure provisions in the NPRM become final, we estimate agents will have to spend *at least* an additional 20 seconds making disclosures per oral transaction, and that assumes that information enabling passenger-specific disclosure (e.g. frequent flier status) and that the client asks no questions in response to what's being presented. Again, using the TSA's Secure Flight parameters, this would translate into an *additional* economic impact to our industry of \$21.3 million per year in talk time alone. Compliance would also impose other new costs on our members, such as those associated with reprogramming systems and training staff, as well as opportunity costs from lost sales.

We do not believe it is the Department's intent, nor is it in the public interest, that consumers be forced to listen to a litany of disclosures if they wish to purchase tickets over the phone instead of online. We suspect that this would be especially burdensome for frequent fliers who will have to listen to the same disclosures again and again and again.

We appreciate the Department seeking public comment on this portion of the NPRM, and to avoid the outcome described above, we suggest a simple solution from the DOT's recent regulatory past. The Department, in its January 2017 proposal on baggage fee disclosures, more limited than the present NPRM, stated, "In any oral communication with a prospective consumer...[a] ticket agent must inform a consumer, **upon request**, of the fees for a first checked bag, a second checked bag and one carry-on bag."<sup>11</sup> DOT should adopt the same approach here and insert "upon request" into the new proposed §399.85(f). Doing so would allow ticket agents to use their professional judgement as to the fee-related information their clients need when such information is not specifically requested, be they a seasoned "road warrior" well versed in airline fees, a frequent flier in need of a refresher on what add-on fees are associated with the trip (customized to the extent she shares information to enable passenger-specific disclosures) or a first-time or infrequent flier.

To be clear, ASTA would support a number of alternative approaches to solving this problem, some of which the NPRM identifies, including "explaining that fees may apply and referring the consumer to the carrier or ticket agent's website, provided that the website is accessible to consumers with disabilities,"<sup>12</sup> but we are suggesting the "upon request" path due to its appearance in the Department's most recent attempt to regulate ancillary fee disclosures.

With regard to online transactions and the Department's request for comment on whether it should allow carriers and ticket agents to provide consumers an opt-out option from receiving ancillary service fee information that would otherwise be required, our view is yes, it should. Without it, consumers risk being overwhelmed by the amount of information in front of them,

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<sup>11</sup> [Transparency of Airline Ancillary Service Fees](#), Supplemental Notice of Proposed Rulemaking, Docket DOT-OST-2017-0007, 82 Fed. Reg. 7536 (January 19, 2017). Emphasis added.

<sup>12</sup> Op. cit at 63729.

especially in a ticket agent environment where they are searching across dozens or even hundreds of carriers. We do not, however, opine on the exact mechanics of such an opt-out.

On this topic, we observed with interest the discussion at the DOT Advisory Committee on Aviation Consumer Protection's (ACPAC) January 12, 2023 meeting, at which committee members recommended the Department go a step further and implement an *opt-in* regime for online disclosures, to avoid online consumers being overwhelmed with fee information they don't want or need.<sup>13</sup> We respectfully point out that this is *precisely* what we are suggesting for offline transactions, as described above, and would vehemently oppose a final rule that allows for streamlined disclosures in online transactions while making offline transactions so cluttered with disclosures as to be virtually impossible to execute.

### **TO ENSURE AGENCY CLIENTS ARE FULLY INFORMED, FEE DATA MUST BE DISTRIBUTED THROUGH THE GDSs**

At several points in the NPRM, the Department seeks comment on whether it should require that carriers provide fee information about critical ancillary services to GDSs to which the carrier currently provides fare, schedule, and availability information. Reflecting unanimous feedback in member surveys we conducted in advance of this filing,<sup>14</sup> ASTA's view on this question is, unequivocally, yes.

GDSs are the tools our members use to search, compare and book air tickets, hotel rooms, rental cars and more for their clients, and they provide a range of non-booking support services as well. Over the years, travel agencies have invested heavily to integrate GDS processing into the agencies' back office and mid-office accounting, quality control and security systems. Agency integration investments are estimated to be in the tens of millions of dollars. If travel agencies are excluded from the ancillary fee information flow through the tools upon which they principally rely, much of this investment will have to be duplicated elsewhere so that agents can continue to meet the needs of their clients. In the best of circumstances this will take many years and much disruption to accomplish.

Thus, today the GDS toolbox remains the primary means by which travel agencies search for and book air travel, and much more. Such reliance cannot be ignored in the policy-making process if the Department is serious about eliminating the hurdles to optimal consumer decision-making that now exist with regard to determining the true cost of travel. Requiring ancillary distribution through GDSs, as ASTA advocates, does not restrict airlines from adding new distribution sources for their fares and fees. Firms that have technology superior to the GDSs, such as they exist or emerge, will be free to compete for roles in air travel distribution and airlines, and travel advisors, will be free to do business with them. In the meantime, which looks to be a long time,

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<sup>13</sup> [Aviation Consumer Protection Advisory Committee](#). U.S. Department of Transportation. Updated December 28, 2022.

<sup>14</sup> 2022 Member Survey – DOT Ancillary Fees NPRM, American Society of Travel Advisors, November 21 – December 6, 2022.

any regulatory regime that drives travel agencies to “direct connects” with individual airlines (such as they exist today), multiple internet sources and/or airline websites to serve their clients will create inefficiencies, record-keeping issues and errors and will complicate follow-up and monitoring of post-booking issues that often arise, all to the detriment of the consumer. Requiring ancillary distribution through the GDSs avoids all of these unnecessary consequences.

If the Department’s overriding concern is to “protect consumers from hidden and deceptive fees and enable them to determine the true cost of travel in an effective and efficient manner when they price shop for air transportation,”<sup>15</sup> then requiring information related to such fees through the primary technology advisors rely on to serve their clients is the quickest and most efficient way to do it. These clients, after all, represent roughly 50 percent of all air travelers by DOT’s own estimation.

Doing so would also be consistent with the 2005 court case of *Sabre v DOT*, where the U.S. Court of Appeals expanded the definition of a ticket agent to include GDSs,<sup>16</sup> as well as the Department’s previously-cited 2017 bag fee proposal, which “require[d] each covered carrier to provide useable, current, and accurate...baggage fee information to all ticket agents that receive and distribute the carrier’s fare and schedule information, **including Global Distribution Systems**.”<sup>17</sup>

The above represents ASTA’s position on this question. However, if the Department disagrees and opts for a rule that does not ensure that travel agency clients (again, 50 percent of air consumers) have full access to ancillary fee information, we suggest an alternative approach. The final rule could regulate airline distribution *behavior* as opposed to requiring distribution to specified entities. For example, if a carrier provides fare, schedule and availability information in a given distribution channel, it must also provide information about critical ancillary services in the same channel. We’ll call this approach “fees follow the fares” – the point being that travel agencies, acting on behalf of their clients, should not have to look in one place for fares and schedules and in a different place for ancillary fee information.

## **TO PROTECT AGENCY CLIENTS, BAGGAGE AND SEATING FEES MUST ALSO BE TRANSACTABLE**

As noted above, ASTA has long believed that consumers deserve full transparency in airfares and optional ancillary service fees, as well as the ability to buy those services (transactability), regardless of the channel in which they elect to book their travel. In this NPRM, the Department is not proposing to require that ancillary services be transactable at all points of sale, with the exception of those that enable family seating.

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<sup>15</sup> Op. cit at 63721.

<sup>16</sup> *Sabre Inc v. DOT*, 429 F.3d 1113 (D.C. Cir. 2005).

<sup>17</sup> Op. cit. Emphasis added.

With regard to family seating, we support the requirement that those fees be transactable through the agency channel, as mentioned above, and fully support as well the Department's policy requiring U.S. airlines to do everything in their power to ensure that children who are age 13 or younger are seated next to an accompanying adult with no additional charge.<sup>18</sup> That said, we believe the Department can and should go further with regard to ancillary fee transactability through ticket agents.

While we accept DOT's argument that it does not make sense that fees for changing or canceling a reservation be transactable through the agency channel in advance, we respectfully disagree with the notion that requiring transactability for baggage and seating fees is unnecessary given the regulatory limitations placed on increasing these fees following a ticket purchase. Under the NPRM, the travel advisor is able to disclose the airline's fee to the consumer and that fee cannot increase between time of booking and time of travel. In the absence of transactability, however, this leaves the travel agency in the position of having to refer its customer to a competitor – the airline – to complete the transaction: a competitor that, for shopping purposes, the consumer already decided to avoid by going to the ticket agent in the first place.<sup>19</sup>

We submit that the inability to transact all air travel purchases through the channel of the consumer's choice, in advance of travel if that is his or her preference, is a form of consumer harm. We are not able to estimate the exact economic impact of such harm at the time of writing, but in essence it is the value of the time spent on separate transactions on airline websites after already having booked through a travel advisor, multiplied by the millions of Americans who do so every year. This is certainly more than the *de minimis* impact the NPRM implies. As such, we urge the Department to require that fee data related to baggage and *all* seating fees (not just those related to family travel) be distributed by carriers to ticket agents in a transactable format.

## **CORPORATE TRAVEL AGENCIES SHOULD BE EXEMPTED FROM THE RULE**

As nearly one-fifth of ASTA's 7,500 member companies report that business or corporate travel makes up at least 70 percent of their annual sales volume, we noted with interest the Department's request for comment on whether "corporate travel agents" should be exempt from the final rule in whole or in part.<sup>20</sup> This request comes in the context of "Covered Entities," which implies exempting "corporate travel agents" from the entirety of the proposal and identifies one example of why it makes sense to do so, reading "regarding ticket agents who sell air transportation, should the proposed requirement to display information about certain critical ancillary services exclude corporate travel agents because the display content is typically

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<sup>18</sup> [Notice Encouraging U.S. Airlines to Have Policies that Enable Children To Be Seated Adjacent to an Accompanying Adult to the Maximum Extent Practicable and at No Additional Cost](#). U.S. Department of Transportation. July 8, 2022.

<sup>19</sup> We are aware that DOT has on occasion accepted the airlines' argument that airlines and ticket agents are not competitors. That argument, at least as it pertains to air ticket distribution, flies in the face of commercial, and economic realities, not to mention common sense. If two firms are substitutes for each other, in that a consumer can get the same product or service from either, those two firms compete regardless of their technical legal relationship.

<sup>20</sup> *Op. cit* at 63724.

negotiated by the business involved?” This reason, among several others, points to the conclusion that there are clear differences between business and leisure travel, and that corporate travel agencies should be exempted.

After consultation with ASTA member companies of all business models – corporate, leisure and hybrid models – our answer to the question is yes, corporate travel agencies, frequently referred to as travel management companies (TMCs), should be exempt from the rule, in its entirety. To assist the Department in delineating the scope of the final rule’s application as clearly as possible, we recommend that a corporate travel agency be defined as those who are “engaged in the provision of travel services primarily to business entities pursuant to a written contract for the business travel of such business entities’ employees.”

Exemption from the rule is warranted because the business travel market differs substantially from that of the leisure market. Demand-side considerations in leisure travel services are different from those for business travel services, principally due to the fact that leisure travel is less frequent, is specific to one individual (or one group) and does not typically require the same level of pre-trip support, advisory services, account management or other ancillary services. Corporate travel agency services are negotiated in advance and meet the needs of companies for business travel by management and employees in accordance with corporate travel budgets, policies and plans.<sup>21</sup> These services are outlined in contracts between each company and corporate travel agency, based on such company’s policies and priorities (e.g., timing and reduction in carbon emissions). On the other hand, leisure travel agencies provide services to individuals in connection with their non-business vacation and personal travel needs based on personal preferences and finances. Business travel tends to be more complex than leisure travel, and the level of flexibility and support required by business travelers is typically higher and pre-negotiated. Fees charged, payment conditions and booking channels all differ substantially for business travel versus leisure.

Furthermore, many of the concerns expressed by the Department (and largely shared by ASTA) regarding consumer confusion about the total cost of travel in an unbundled air travel marketplace simply do not apply in the context of corporate travel. First, it is the business that generally pays the fees, and not the individual traveler. And while business entities are cost-conscious when it comes to travel, the consumer protection concerns here are not the same as with a leisure traveler. Second, in business travel, the type of fees displayed in the business’ preferred booking tool or conveyed by other means are pre-negotiated between the business client and the corporate travel agency. So, to the extent that the business traveler is dissatisfied with their experience with regard to his or her company’s policy with respect to ancillary fees, they can report their experience and, if the company is in agreement, it can be addressed contractually during the next round of negotiation with the business’ TMC and/or corporate

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<sup>21</sup> Business travelers also often have frequent flier status and fly business class, which can include benefits such as free checked baggage and preferred seat selection.



booking tool provider, or the business can choose to engage a different TMC or booking tool provider.

Lastly, there is a statutory precedent for making a distinction between corporate and leisure travel when it comes to aviation consumer protection. As part of the FAA Reauthorization Act of 2018, the Department was instructed to issue regulations setting minimum customer service standards for large ticket agents, but to exempt those ticket agents that provide services pursuant to a corporate contract.<sup>22</sup>

To be clear, while we support exempting corporate travel agencies from this proposal, we feel strongly that *all* ticket agents should be provided with more flexibility than is currently provided in the NPRM when it comes to the timing and frequency of ancillary fee disclosures in both online and offline transactions (as discussed above). The reasons for this are the same – as a result of airline creativity and aggressiveness in charging fees, if the NPRM becomes final as-is consumers will be presented with an overwhelming amount of information when shopping for air travel, most of which will either not apply to them, will already be known or will otherwise not require repeated disclosure. This overload of information threatens to drive customers away from the valued service and critical support that travel agencies provide, and to the airlines themselves.

### **PROPOSED SIX MONTH IMPLEMENTATION PERIOD IS TOO SHORT**

In the NPRM, the Department seeks comment on whether proposed implementation period of six months is too lengthy or too short, the subject of which was also discussed at multiple ACPAC meetings after the publication of the NPRM. While this question is best directed to the airlines, GDSs and other travel technology providers who are more knowledgeable than ASTA about the implications of the NRPM in terms of technology and systems considerations, it appears to us that implementation will require substantial changes to an already massively complex airline distribution system. From IT investments, including but not limited to those required by travel agencies, to training staff to figuring out the mechanics of how ancillary fee information will get from carriers to agents to consumers, implementing this proposal in a way that meets the Department's consumer protection objectives will certainly take more than six months.

Accordingly, we suggest an implementation period of at least 18 months. In the event the Department declines to require fee data to flow through GDSs, we recommend that carriers be given 12 months to establish how they will share ancillary service fee information with ticket agents, with full implementation at least 12 months thereafter.

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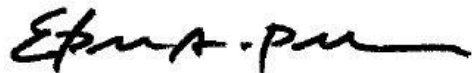
<sup>22</sup> Pub. L. 115-254, § 427.

## **FURTHER DEFINE RESPONSIBILITIES WHEN FEES NOT DISCLOSED**

Under the NPRM, collecting a fee from consumers for critical ancillary services without disclosure of this fee during the search process would be deemed an unfair and deceptive practice, and “the seller of the air transportation” must be refund the fee(s) in question to the consumer if the required disclosures are not made.<sup>23</sup> This is concerning for several reasons. First, in offline transactions (over-the-phone or face-to-face) it will be difficult for the agency to prove that such disclosures were made, which creates the potential for fraudulent claims and abuse. Second, while there are rare instances where a carrier authorizes a ticket agent, by contractual agreement, to collect baggage or ancillary fees from the ticket agent’s customers on behalf of the carrier, in the vast majority of cases the agent is simply facilitating this transaction and is not receiving the money, as is the case with airfares sold by agents in general.<sup>24</sup> With regard to this section, we request that, at minimum, the refunding obligation only apply to the ticket agent in cases where the agency is in possession of or otherwise has access to the funds in question.

We thank you for taking the time to consider ASTA’s views on these critically important issues. If you or your staff have any questions regarding the role of travel agencies in the industry, the distribution of ancillary services through ticket agents, or any of our specific recommendations, please do not hesitate to contact me at (703) 739-6842 or [epeck@asta.org](mailto:epeck@asta.org).

Yours Sincerely,



Eben Peck  
Executive Vice President, Advocacy  
American Society of Travel Advisors, Inc. (ASTA)

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<sup>23</sup> Op. cit at 63729.

<sup>24</sup> See [comments](#) of the American Society of Travel Advisors. Airline Ticket Refunds and Consumer Protections, Notice of Proposed Rulemaking, Docket DOT-OST-2022-0089, 87 Fed. Reg. 51550 (August 22, 2022).