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February 16, 2011

The Honorable Ray LaHood
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Re: Enhancing Airline Passenger Protections (*Consumer Rule II*) Rulemaking Proposal –
Supplementary Comments of Allegiant Air – Docket DOT-OST-2010-0140

Dear Secretary LaHood:

By letter dated September 23, 2010, Allegiant Air submitted general comments in response to the Department's *Consumer Rule II* rulemaking proposal.¹ Allegiant now submits the following supplementary comments, which are limited to three specific concerns. We first discuss the timing of this submission.

Late-Filed Comments. Allegiant acknowledges that these supplementary comments are submitted well after the date by which comments ordinarily should have been filed. Allegiant asks the Department to consider these comments for the following reasons.

First, at the outset of the NPRM, the Department advised that late-filed comments would be considered to the extent practicable.² Given that the Department does not anticipate issuance of a final rule or other decision in this matter for at least another several weeks,³ consideration of these supplementary comments would appear practicable.

Second, on January 18, 2011, the President issued Executive Order 13563, *Improving Regulation and Regulatory Review*, requiring that by mid-May 2011, each federal agency develop and submit to OMB's Office of Information and Regulatory Affairs a preliminary plan under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed.⁴ As discussed below, the new Executive Order raises a significant question of whether the Department should proceed with *Consumer Rule II* prior to completion of the required review of existing consumer-protection regulations.

Third, over the past 3-4 weeks a political crisis has erupted in Egypt. Like previous Middle East crises, the situation has triggered a substantial run-up in fuel costs, with the ultimate outcome of the events in Egypt and their regional and global side-effects unknown. This development has underscored the necessity for DOT to allow carriers to retain the right to price their services flexibly, as discussed below.

¹ A copy of our September 2010 comments is appended as Attachment A for convenient reference.

² 75 Fed. Reg. 32318, col. 3 (June 8, 2010).

³ See *DOT Regulatory Agenda Semiannual Summary*, 75 Fed. Reg. 79612-13 (Dec. 20, 2010).

⁴ See Executive Order 13563, Sec. 6, published at 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).



Executive Order 13563. In Allegiant’s view, the Executive Order raises a significant question of whether the Department should proceed with *Consumer Rule II* prior to completion of the required review of existing consumer-protection regulations. At the very least, considering the Executive Order’s stated concern with avoiding excessively burdensome regulation, it would appear inconsistent with the order for DOT to impose *Consumer Rule II*’s undeniably greater regulatory burdens on the air transportation industry prior to analyzing existing regulations under the criteria DOT develops (with public input) in response to the order. In fact, in the Department’s request for comments on implementation of the new Executive Order, DOT states specifically that it “plan[s] to allow for comments on candidate rules for review.”⁵ The Department should not preempt Allegiant’s, other carriers’ and the public’s ability to nominate, criticize and/or defend existing rules – notably 14 CFR §§ 253.7 and 399.84 – by adopting major revisions to those rules before they undergo the review prescribed by the Executive Order.

The Department should withdraw *Consumer Rule II* or defer further action on it until completion of the process required by Executive Order 13563 vis-à-vis DOT’s consumer-protection regulations. DOT has declared in the context of the Executive Order, “The Department has long recognized that there should be no more regulations than necessary and those that are issued should be simple, comprehensible, and impose as little burden as necessary.”⁶ That policy is deserving of more than lip service, and Allegiant urges DOT to implement it by withdrawing or deferring further action on *Consumer Rule II* until further notice.

Post-Purchase Price Increases (14 CFR § 253.7). In the event DOT proceeds with *Consumer Rule II* despite the new Executive Order, Allegiant urges the Department to adopt the second alternative DOT has proposed in regard to post-purchase price increases; that is, to allow such price increases so long as the seller conspicuously discloses the potential for such an increase, the maximum amount of the increase, and that the consumer must affirmatively agree to the potential for such an increase prior to purchase. Allegiant is considering a new pricing option for use on its website: when making a purchase, consumers would be able to choose between a traditional “locked in” fare that would not fluctuate, and a lower fare that could change before the date of travel. That lower fare could be reduced further or could increase (up to a set maximum that would be clearly disclosed) depending on changes in fuel price between the booking and travel dates. This would be a non-compulsory alternative for consumers; it would provide them another option for potential substantial savings on their trip costs and would be clearly disclosed and explained prior to any purchase.

Under current section 253.7, Allegiant could implement this pricing structure. Unfortunately, however, the first option stated in the NPRM in this regard would establish a blanket ban on post-purchase price increases and thus would foreclose the valuable alternative discussed above for consumers.⁷

⁵ 76 Fed. Reg. 8940, 8942 col. 1 (Feb. 16, 2011).

⁶ *Id.* at 8941 col. 1.

⁷ In addition to opposing the first option stated in the NPRM, Allegiant opposes the third option (see 75 Fed. Reg. at 32330) which would allow such increases but only 30 or 60 days in advance of the first flight in the passenger’s itinerary. Such a time frame would negate essentially all benefits of the concept for consumers and carriers alike.



The potential to offer this alternative is especially important for Allegiant. First, even a slight change in fuel cost has a major financial impact on Allegiant, as it does on other air carriers (as the Department is aware). Second, Allegiant caters specifically to leisure travelers. This means, among other things, that a high proportion of Allegiant customers purchase their travel significantly in advance of their travel dates – in many cases months in advance – making it especially difficult for Allegiant to predict what the fuel price might be at time of travel. Preserving the ability for carriers to offer and consumers to choose between a locked-in price and a price that may change, within limits, based on the price of fuel, strikes an appropriate balance between the interests of consumers and the interests of carriers.

To the extent post-purchase price increases are prohibited, carriers are forced to bear all risk of fuel price volatility and resulting large cost increases, particularly on tickets purchased far in advance. If consumers wish to lock in a price, they would be free to do so. Others who wish to purchase at a lower rate and key their ticket price, in part, to fuel price at the time of travel would also be free to do so. This would provide consumers the ability to receive additional savings in the event the fuel price dropped – as could very well be the case for consumers purchasing when fuel prices were high – and would provide carriers some measure of protection against unpredictable increases. In Allegiant’s view, fundamental fairness dictates that both parties to a travel transaction have available a measure of protection. Alternative two identified in the NPRM preserves that measure of protection and appropriately balances the interests of consumers and carriers.

Full-Fare Advertising (14 CFR § 399.84). In the event DOT proceeds with *Consumer Rule II* despite the new Executive Order, adoption of the Department’s proposal to enforce the full-price advertising rule “as it is written” (to quote the NPRM) would disserve the public interest. It would do so by fostering confusion among members of the traveling public, who have been conditioned since the 1980’s, by virtue of the Department’s policies, to understand that the basis upon which air transportation is advertised and sold is fundamentally the same as other consumer goods and services. The proposed change in policy would alter that basis and generate confusion. A byproduct would be weakened demand for air transportation, harming carriers directly and further disserving the public interest indirectly.

For over a quarter century, the Department has permitted air transportation to be advertised on essentially the same basis as all other consumer goods and services, that is, with taxes and fees excluded from the base price.⁸ While the Department requires sellers of air transportation (unlike sellers of other goods and services) to disclose the amount of such taxes and fees by hyperlink or on the same page as the base price, the fact remains that advertised prices do not include at least \$10.70 each way in taxes and government fees. As a result of 25-plus years of consistent practice in this regard, the public has been conditioned to understand that an advertised domestic airfare does not include all taxes and fees. This is consistent with the advertising practice of every retail industry of which Allegiant is aware, and is true regardless of the advertising medium utilized.

⁸ In the case of domestic air transportation, the 7.5% federal excise tax is included in the base price as required by law. The present issue, however, concerns other charges such as segment taxes, passenger facility charges and September 11th security fees.



Under the Department's proposal, a one-way fare currently advertised at, for example, \$39 – which consumers understand does not include certain additional charges – will increase, perceptively, over 25% to become a \$49 or \$50 advertised fare. This inevitable (albeit inaccurate) consumer perception of a higher fare will have a dampening effect on sales, as consumers will not understand that air transportation is now being advertised on a different basis than (a) has been the case for over 25 years, and (b) is the case for all other goods and services.

It is significant as well that continued unbundling of taxes and fees from the base fare is consistent with broader industry practice. Virtually all carriers unbundle fees for a variety of services such as checked baggage, seat assignments, priority boarding and others. The Department has proposed no change to this practice – nor should it, as unbundling is pro-consumer in enabling each passenger to assess the relative value of ancillary services and pay only for the services he or she desires. It would be inconsistent with this industry pricing reality, however, for the Department to require certain additional charges – i.e., those imposed by governmental entities – to be bundled with the base fare, while allowing other charges to be separately stated. The mandatory nature of the government charges makes no difference in this context. The issue is one of consistency with long-established airline practice and retail advertising methodology in all other industries.

Thank you for your consideration of these supplementary comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Maurice J. Gallagher, Jr." with a stylized flourish at the end.

Maurice J. Gallagher, Jr.
Chairman and CEO



ATTACHMENT A

September 23, 2010

The Honorable Ray LaHood
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Re: Allegiant Air Comments for DOT-OST-2010-0140, Enhancing Airline Passenger Protections

Dear Secretary LaHood,

Allegiant Air appreciates the opportunity to comment on the Department of Transportation's latest rulemaking concerning tarmac delays and consumer protection issues. Overall, Allegiant has significant concerns about nearly all aspects of this latest notice of proposed rulemaking (NPRM).

Allegiant is a Las Vegas-based, full-service travel company that brings travelers from the United States' small cities to leisure destinations like Las Vegas, Orlando and Ft. Lauderdale. Our airline is low-fare and offers nonstop, all-jet service that can be bundled with hotel accommodations and other travel-related services. Recently, we were ranked number one for low-cost carriers in *Aviation Week's* Top Performing Airline study and ranked 25 on *FORTUNE* magazine's Fastest-Growing Companies list.

On December 30, 2009, the Department issued a final rule related to many of the same subjects being discussed in the most current NPRM. The final rule dating from December had not been in effect for six months before the Department drafted this new NPRM that claims the new rules are not sufficient and do not go far enough.

The Department continues to place more and more regulation on a "deregulated" industry, which has been one of the factors driving costs higher. Allegiant is one of the most successful air carriers, bringing air service to small, rural communities in many parts of the United States. With the cost of an airline ticket not being much higher than it was in the 1980s, adding operational costs and additional reporting requirements only makes providing air service more difficult.

Allegiant has been one of the industry's leaders in breaking down the cost of air travel and providing consumers with more choices for travel services. Providing a clear and understandable website is in the best interest of Allegiant, and frankly all airlines, since an unhappy customer who does not have their expectations met may be unlikely to fly with our airline again. We oppose the Department's attempt to regulate how airline websites should appear and what information must be presented to the consumer.



We believe the Department should intervene directly where there are clear efforts underway by an air carrier to deceive the public when it comes to selling air travel or other deceptive practices. Imposing a broad rule across the industry to punish a small percentage of bad players is not fair to the rest of the responsible carriers in the airline industry.

We ask that the Department suspend this proposed rulemaking and let the industry digest and meet the requirements of the final rule that was issued less than a year ago. Lumping another final rule on the airline industry will lead to further costs, reduced air service, and confusion for air carriers.

Thank you for consideration of our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Maurice J. Gallagher, Jr." with a stylized flourish at the end.

Maurice J. Gallagher, Jr.
Allegiant Chairman and CEO