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## **DOT Oversight of Air Carrier Advertising and Unfair or Deceptive Practices, 2004**

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Although the U.S. domestic aviation industry widely is regarded to have been deregulated with the abolition of the Civil Aeronautics Board (CAB) on January 1, 1985, a significant portion of the CAB's authority was transferred to and continues to be exercised by the Department of Transportation (DOT). One of the most noteworthy powers retained by the DOT is to prohibit or regulate any "unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."<sup>1</sup>

Under this authority, the DOT's Aviation Consumer Protection Division monitors and investigates practices by air carriers, travel agents, and other entities involved in the aviation industry. Historically, the DOT's primary focus has been advertising directed at the general public; but the DOT also understands its statutory mandate to include other practices, such as the treatment of passengers with disabilities, as well as which entities may "hold out" air transportation to the public. In 2004 the DOT continued to assert jurisdiction over a vast array of practices.

The DOT has several tools at its disposal for responding to an allegedly unfair or deceptive practice, including a private warning letter, a public consent order (under which the air carrier or other entity usually agrees to pay a fine), or a formal enforcement action before a DOT administrative law judge. The DOT also periodically issues public notices setting forth its policies for advertising and other practices. This article briefly summarizes the consent orders and other public guidance that the DOT issued in 2004.

### **Air Charter Brokers**

The DOT's primary focus during 2004 was the role of air charter brokers (i.e., entities that link prospective charter customers with direct air carriers) in arranging air transportation. Although the DOT previously had stated that only entities with the appropriate authority or an exemption from the DOT could hold out air transportation in their own right or enter as principals into contracts to provide air transportation, in 2004 the DOT issued 20 consent orders concerning air charter broker practices, following a first wide-ranging investigation of the issue.

The DOT emphasized that air charter brokers that do not have the appropriate authority or an exemption from DOT must act either as an agent of the direct air carrier or the customer,

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<sup>1</sup> 49 U.S.C. § 41712 (formerly § 411 of the Federal Aviation Act).

and explained that brokers would not and could not be allowed to bypass the regulations that the DOT has enacted to afford financial and other protections to charter customers.<sup>2</sup> In addition, the DOT emphasized that Part 125 air carriers, which lack authority to perform “common carriage,”<sup>3</sup> should not contract with more than three customers through an air charter broker.<sup>4</sup>

Over the course of the year, the DOT issued 10 consent orders involving Part 125 air carriers that had held out air transportation through air charter brokers and/or directly or indirectly to the general public;<sup>5</sup> seven similar consent orders involving entities that did not possess any DOT authority or an exemption;<sup>6</sup> two consent orders involving Part 121 air carriers that had facilitated the holding out of air transportation by entities that did not possess DOT authority or an exemption;<sup>7</sup> and one consent order involving a Part 298 air taxi that had facilitated the holding out of air transportation by a Part 125 air carrier.<sup>8</sup> Additional consent orders are likely in 2005.<sup>9</sup>

### The Full-Price Rule

DOT regulations require that advertising by air carriers or travel agents state “the entire price to be paid by the customer to the air carrier, or agent, for such air transportation, tour, or tour component.”<sup>10</sup> Historically, the DOT has interpreted this regulation to allow government-imposed per-person taxes and fees (i.e., the September 11th Security Fee, federal segment taxes, and airport passenger facility charges) to be listed separate from an advertised fare, as long as the amount of those taxes and fees is clearly stated elsewhere in the advertising.

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<sup>2</sup> The Role of Air Charter Brokers in Arranging Air Transportation, Notice, Oct. 8, 2004.

<sup>3</sup> 14 C.F.R. § 125.1(a).

<sup>4</sup> The Role of Air Charter Brokers, *supra* note 2.

<sup>5</sup> Ferreteria E Implementos San Francisco, Consent Order (2004-10-18, Oct. 29, 2004); Lone Star Air Contract Air Cargo, Inc., Consent Order (2004-10-17, Oct. 29, 2004); Red Apple Aviation, Inc., Consent Order (2004-10-14, Oct. 22, 2004); Ameristar Airways, Inc., Consent Order (2004-8-9, Aug. 12, 2004); MSG Flight Operations, LLC, Consent Order (2004-7-3, July 6, 2004); Universal Airlines, Inc., Consent Order (2004-6-15, June 18, 2004); Premier Aircraft Management, Inc., Consent Order (2004-5-11, May 13, 2004); Traffic Management Corp. and Contract Cargo Airlines, Inc., Consent Order (2004-5-1, May 3, 2004); AGS Partnership, Consent Order (2004-2-7, Feb. 9, 2004); Classic Limited Air, Inc., Consent Order (2004-1-23, Jan. 29, 2004).

<sup>6</sup> Blue Moon Aviation, LLC, Consent Order (2004-11-4, Nov. 12, 2004); Falcon Air Charter, Inc., Consent Order (2004-9-1, Sept. 1, 2004); Calypso Airline, Inc., Consent Order (2004-8-10, Aug. 12, 2004); Professional Airways, LLC, Consent Order (2004-3-30, March 29, 2004); MM&S Airways, LLC, Consent Order (2004-3-29, March 29, 2004); Executive Airways, LLC, Consent Order (2004-3-28, March 29, 2004); DB Air, Ltd., Consent Order (2004-2-21, Feb. 23, 2004).

<sup>7</sup> Frontier Airlines, Inc., Consent Order (2004-8-20, Aug. 18, 2004); Miami Air International, Inc., Consent Order (2004-4-15, April 20, 2004).

<sup>8</sup> Scott Aviation, Inc., Consent Order (2004-2-6, Feb. 9, 2004).

<sup>9</sup> An enforcement proceeding is pending against Ascend Aviation Group, LLC, which DOT alleges held out air transportation despite not possessing any DOT authority or an exemption. Ascend Aviation Group, LLC (Docket OST-2004-17486). An additional proceeding is pending against Ascend’s principal, Scot Spencer, concerning his activities with Braniff Airlines and indirect air carriers in the 1990s; the proceeding had been suspended while Spencer was serving a sentence in federal prison for bankruptcy fraud, but DOT resumed its prosecution in 2004. Travel Group, Inc. d/b/a Republic Air Travel and Scot Spencer (Docket OST-1995-272).

<sup>10</sup> 14 C.F.R. § 399.84.

In 2004, the DOT issued several consent orders reiterating its interpretations of the full-price rule. The DOT re-emphasized its position that if government-imposed taxes and fees are not included in an advertised fare, the amount thereof must be clearly stated elsewhere in the advertising.<sup>11</sup> For advertising on the Internet, if the tax and fee information is not posted on the same page, it must be made available through a prominent hyperlink.<sup>12</sup> In addition, DOT has taken the position that if the September 11th Security Fee<sup>13</sup> is among the taxes and fees listed separately, it must be identified by its full name.<sup>14</sup>

The DOT also has reiterated its policy that fuel, insurance, and service surcharges cannot be listed separate from an advertised fare, because they are not a government-imposed tax or fee.<sup>15</sup> The DOT has clarified that, to be listed separately, a fee cannot simply be “government-approved” but must actually be imposed by a U.S. or foreign government.<sup>16</sup> In addition, the DOT has taken the position that air carriers should disclose whether advertised fares are available only for purchase via the Internet, and may state the higher price that applies if they are purchased by telephone or at a ticket office. However, under the above policy, the price difference should not be described as a “fee.”<sup>17</sup>

In addition, the DOT has restated its historic interpretation of the full-price rule that advertising must prominently disclose whether an advertised one-way fare is actually available only as part of the purchase of a round-trip ticket.<sup>18</sup>

Finally, the DOT withdrew a notice of proposed rulemaking that would have amended the full-price rule. The DOT had proposed to extend the rule to computer reservations systems (CRS) and to require travel agents to list service fees separate from advertised fares. However, the DOT stated that the changes had not been shown to be necessary or beneficial.<sup>19</sup>

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<sup>11</sup> AAA Washington/Inland, Consent Order (2004-8-2, August 6, 2004); Consortio Aviacsa S.A. de C.V., Consent Order (2004-2-11, Feb. 11, 2004); TFI Tours International, Ltd., Consent Order (2004-2-5, Feb. 6, 2004); JetBlue Airways, Inc., Consent Order (2004-2-4, Feb. 3, 2004).

<sup>12</sup> Aer Lingus Limited, Consent Order (2004-5-9, May 6, 2004); TFI Tours, Order 2004-2-5; JetBlue, Order 2004-2-4.

<sup>13</sup> 14 C.F.R. § 1510.7

<sup>14</sup> AAA Washington, Order 2004-8-2; Aer Lingus, Order 2004-5-9; JetBlue, Order 2004-2-4.

<sup>15</sup> Brendan Airways, LLC, d/b/a USA 3000 Airlines, Consent Order (2004-5-12, May 13, 2004); Aer Lingus, Order 2004-5-9; TFI Tours, Order 2004-2-5.

<sup>16</sup> Disclosure of Higher Prices for Airfares Purchased Over the Telephone via Airline Telephone Reservation Centers or at Airline Ticket Counters, and Surcharges That May Be Listed Separately in Fare Advertisements, Notice, Nov. 4, 2004.

<sup>17</sup> Id.

<sup>18</sup> Alaska Airlines, Inc. and Horizon Air, Inc., Consent Order (2004-10-19, Oct. 29, 2004); Aer Lingus, Order 2004-5-9.

<sup>19</sup> Statement of General Policy: Price Advertising, 69 Fed. Reg. 21450 (April 21, 2004). In a related development, Sabre, Inc. filed a petition in the U.S. Court of Appeals for the D.C. Circuit, challenging DOT's position that it retained authority under 49 U.S.C. § 41712 to regulate the practices of CRSs that no longer had any airline ownership, despite the fact that DOT had terminated its specific CRS regulations. Computer Reservations System (CRS) Regulations, 69 Fed. Reg. 976 (Jan. 7, 2004); Sabre, Inc. v. DOT (D.C. Cir. Docket CV-04-1073).

## Passengers with Disabilities

In 2004, the DOT entered into consent orders with three air carriers that it had accused of violating its regulations setting forth standards for the treatment of passengers with disabilities. Two of the orders concerned carriers that had failed to provide in-cabin stowage space for folding wheelchairs,<sup>20</sup> and the third order concerned a carrier that had failed to provide the required enplaning and deplaning assistance to passengers in wheelchairs and failed to properly respond to complaints about its noncompliance.<sup>21</sup> The consent orders required that fines be paid to the DOT, but they allowed the carriers to offset most of the fines with expenditures to install stowage space for wheelchairs on aircraft and/or otherwise to improve the quality of services to passengers with disabilities.

In addition, two carriers filed petitions for exemptions from the DOT's wheelchair stowage requirements. Each carrier asserted that it used aircraft that could not be reconfigured to provide in-cabin stowage space without imposing an undue burden on the carrier, and that an exemption would not affect the quality of the service provided to passengers with disabilities. The petitions remain pending as of early 2005.<sup>22</sup>

The DOT dismissed a complaint that alleged that an air carrier had refused to allow a passenger to board a flight while carrying marijuana issued to him for medical purposes under a Food and Drug Administration program. The DOT held that the passenger should have been allowed to board the flight but that an enforcement action was not warranted due to the unique circumstances of his case and his failure to sufficiently document his participation in the medical program to the carrier.<sup>23</sup>

The DOT issued a notice of proposed rulemaking that would revise its regulations for the treatment of passengers with disabilities. Most notably, the DOT has proposed to explicitly extend the coverage of some of the regulations to foreign air carriers, and to require that air carrier and travel agent websites be accessible to passengers with disabilities. Additional proposals include reorganizing the regulations to enhance their clarity and incorporating interpretations that previously had been stated only in consent orders or other guidance materials. Comments on the proposal initially were due by February 2, 2005, but the deadline was extended to March 4, 2005.<sup>24</sup>

The DOT reminded air carriers that, under a regulation that was adopted in 2003,<sup>25</sup> air carriers now are required to submit annual reports to the DOT, summarizing the complaints that

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<sup>20</sup> ATA Airlines, Inc., Consent Order (2004-4-22, April 30, 2004); Northwest Airlines, Inc., Consent Order (2004-3-4, March 9, 2004).

<sup>21</sup> America West Airlines, Inc., Consent Order (2004-8-19, Aug. 18, 2004).

<sup>22</sup> Petition of JetBlue Airways, Inc. (Nov. 8, 2004) (Docket OST-2004-19626); Petition of Aloha Airlines, Inc. (Sept. 22, 2004) (Docket OST-2004-19190).

<sup>23</sup> Complaint of Irvin Rosenfeld v. Delta Air Lines, Inc., Order Dismissing Complaint (2004-3-27, March 26, 2004) and Order Affirming Dismissal of Complaint (2004-5-25, May 27, 2004).

<sup>24</sup> Nondiscrimination on the Basis of Disability in Air Travel, 69 Fed. Reg. 64364 (Nov. 4, 2004).

<sup>25</sup> 14 C.F.R. § 382.70.

they have received concerning service to passengers with disabilities. The first report, summarizing complaints received in 2004, was due on January 25, 2005.<sup>26</sup>

### **Air Carrier Authority**

Foreign air carriers can operate services to and from the United States only after they have been issued the appropriate authority by the DOT. In 2004, the DOT sanctioned two Canadian air carriers that operated services without such authority.<sup>27</sup> In addition, U.S. air carriers may not advertise services during the pendency of an application for authority at the DOT. In 2004, the DOT sanctioned a carrier for advertising and accepting reservations for a service that had not yet been authorized by the DOT.<sup>28</sup>

The DOT twice sanctioned air carriers for failing to submit complete and accurate data required as a condition of their authority.<sup>29</sup> One air carrier understated the amount of mail it carried on intra-Alaska services, and the other repeatedly failed to file financial, traffic, and other required reports.<sup>30</sup>

The DOT sanctioned a Part 125 carrier that nominally was a U.S. air carrier but actually constituted a foreign air carrier because the majority of its officers and directors were not U.S. citizens. The DOT also noted that because the airline effectively was a foreign air carrier, it was prohibited from operating cabotage services between points in the United States.<sup>31</sup>

### **Racial Discrimination**

In 2004, the DOT entered into consent orders with three air carriers that it had accused of discriminating against passengers on the basis of ethnic background, religion, or national origin in the aftermath of the September 11, 2001, terrorist attacks, in violation of Section 411 and other statutes. The consent orders required the air carriers to provide civil rights training to their pilots and cabin crew but did not require any fines to be paid to the DOT. The carriers, for their part, denied that discrimination had occurred and questioned whether the DOT had jurisdiction over the issue but stated that they had agreed to settle the claims to avoid protracted litigation.<sup>32</sup>

### **Code-Share Disclosure**

The DOT requires air carriers and travel agents to promptly disclose to consumers that a flight involves a code-share arrangement.<sup>33</sup> In 2004, the DOT initiated an enforcement proceeding alleging that the regulation applied to a travel agent even though the agent sold

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<sup>26</sup> Reporting Requirements for Disability-Related Complaints, 69 Fed. Reg. 77885 (Dec. 29, 2004).

<sup>27</sup> Avia Aviation, Ltd., Consent Order (2004-5-3, May 4, 2004); Coastal Mountain Airways, Ltd., Consent Order (2004-1-19, Jan. 26, 2004).

<sup>28</sup> Frontier Airlines, Inc., Consent Order (2004-8-7, Aug. 11, 2004).

<sup>29</sup> 14 C.F.R. Part 241.

<sup>30</sup> Tatonduk Outfitters Limited d/b/a Everts Air Alaska and Everts Air Cargo, Order 2004-12-12 (Dec. 16, 2004); Transmeridian Airlines, Inc., Order 2004-5-4 (May 6, 2004).

<sup>31</sup> Premier Aircraft Management, Order 2004-5-11.

<sup>32</sup> Delta Air Lines, Inc., Order 2004-6-13 (June 21, 2004); Continental Airlines, Inc., Order 2004-4-4 (April 2, 2004); American Airlines, Inc., Joint Motion for Approval of Proposed Settlement Agreement (Feb. 27, 2004) and Order Terminating Proceeding (March 2, 2004) (Docket OST-2003-15046).

<sup>33</sup> 14 C.F.R. § 257.5.

tickets only to federal agencies and not to the general public. The parties ultimately agreed to the issuance of a consent order; the travel agent questioned whether the DOT had jurisdiction over the issue but stated that it had agreed to settle the claim to avoid protracted litigation.<sup>34</sup>

In addition, a carrier filed a petition requesting that the DOT no longer require print advertising to disclose the specific carriers that would operate any given code-share flight, but instead to provide an overview of the carriers that operate code-share flights. The carrier argued that for network carriers the current requirement results in numerous footnotes listing multiple carriers, which are likely to confuse rather than inform consumers, and also that consumers still would receive full disclosure of a code-share arrangement at the time of booking. The petition remains pending.<sup>35</sup>

### **Additional Issues**

**Privacy.** The DOT dismissed a complaint alleging that an air carrier had committed an unfair and deceptive practice by sharing passenger data with a federal agency in violation of its stated privacy policy. The DOT concluded that the policy did not unambiguously preclude the carrier from sharing the data with the agency, and that there was no evidence of actual or likely harm to passengers. The DOT, however, noted that air carriers are bound by representations made to passengers and that a breach thereof could be considered an unfair or deceptive practice.<sup>36</sup>

**Ticket Sales and Refunds.** An enforcement proceeding initiated by the DOT in 2004 against a foreign air carrier remains pending. The DOT alleged that the carrier – which suspended operations in 2003 – had sold tickets for services it failed to perform and had not reimbursed passengers for cancelled services. Subsequently, the DOT filed a motion for a default judgment on the ground that the carrier had failed to respond to the complaint.<sup>37</sup>

**Air Carrier Insolvency and Bankruptcy.** In the aftermath of the September 11 terrorist attacks, Congress enacted a statute that required air carriers to provide transportation to passengers of other air carriers that had ceased operations due to insolvency and bankruptcy.<sup>38</sup> Subsequently, the DOT interpreted the statute to allow air carriers to charge such passengers no more than \$25 one-way, to cover the actual costs of transportation.<sup>39</sup> The effective date of the

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<sup>34</sup> SatoTravel, Inc., Consent Order (2004-5-8, May 6, 2004).

<sup>35</sup> Petition of United Air Lines, Inc. (Sept. 7, 2004) (Docket OST-2004-19083).

<sup>36</sup> Third-Party Enforcement Complaint of The Electronic Privacy Information Center Against Northwest Airlines, Inc., Order Dismissing Complaint (2004-9-13, Sept. 10, 2004). EPIC has filed a petition for review of the order with DOT. Petition of the Electronic Privacy Information Center for Review of Order Dismissing Complaint (Sept. 20, 2004) (Docket OST-2004-16939).

<sup>37</sup> Aeromar Airlines, C. por A., Notice of Enforcement Proceedings and Proposed Assessment of Civil Penalties (Nov. 5, 2004) and Motion for Default Judgment (Dec. 7, 2004) (Docket OST-2004-19610).

<sup>38</sup> Pub. L. No. 107-11, 115 Stat. 645, § 145 (Nov. 19, 2001).

<sup>39</sup> Honoring Tickets of Insolvent Airlines Pursuant to the Requirements of Section 145 of the Aviation and Transportation Security Act, Notice (Jan. 23, 2003); Honoring Tickets of Insolvent Airlines Pursuant to the Requirements of Section 145 of the Aviation and Transportation Security Act, Notice (Nov. 14, 2002); Honoring Tickets of Insolvent Airlines Pursuant to the Requirements of Section 145 of the Aviation and Transportation Security Act, Notice (Aug. 8, 2002).

statute was extended several times and lapsed on November 19, 2004. The end-of-year National Intelligence Reform Act, however, reinstated its provisions through November 19, 2005.<sup>40</sup>

**Holiday Flight Disruptions.** Secretary of Transportation Norman Y. Mineta directed the DOT's inspector general, Office of Aviation and International Affairs, and Office of General Counsel to investigate widespread flight disruptions at US Airways and Comair during the December 2004 Christmas holidays. US Airways attributed the disruptions to weather and sick employees, while Comair cited weather and a malfunction by the computer scheduling flight crews. Mineta requested an expedited review of the disruptions.<sup>41</sup>

## **Conclusion**

Although the DOT's authority to regulate the advertising and practices of air carriers, travel agents, and other entities involved in the aviation industry is wide-ranging, it also is relatively unknown. Attorneys that represent clients in the aviation industry should take care to familiarize themselves with the DOT's regulations and interpretations; to review their clients' practices in light of the DOT's guidance; and to keep abreast of new developments, such as those reviewed in this article.

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<sup>40</sup> Pub. L. No. 108-458, § 8404 (Dec. 17, 2004).

<sup>41</sup> Memorandum to Kenneth J. Mead, Holiday Weekend Disruptions, available at [www.dot.gov/affairs/Letter.pdf](http://www.dot.gov/affairs/Letter.pdf), (Dec. 27, 2004).