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## **DOT Oversight of Air Carrier Advertising and Unfair or Deceptive Practices, 2005**

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When the Civil Aeronautics Board (CAB) was abolished in 1985, a significant portion of its authority was transferred to the Department of Transportation (DOT). One of the most noteworthy powers now exercised by 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> For twenty years, DOT has used its authority under this statute, as well as associated regulations, to monitor and sanction practices by air carriers, travel agents, and other entities involved in air transportation.

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, agent, or other entity usually agrees to pay a fine); or a formal enforcement action before a DOT Administrative Law Judge (ALJ). 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 were issued by DOT in 2005.

In the past year, DOT’s Aviation Consumer Protection Division continued to closely monitor and investigate practices by air carriers, travel agents, and other entities involved in the aviation industry. Although DOT’s priorities do appear to have shifted somewhat from the issues that it emphasized in the previous year<sup>2</sup> – with one very notable concern in 2005 being issues affecting passengers with disabilities – DOT nevertheless continued to assert jurisdiction over a vast array of practices, ranging from the practices of air charter brokers to advertising directed at the general public.

### **Air Charter Brokers**

In 2004, the primary focus of DOT was the role of air charter brokers (i.e., entities that link prospective charter customers with direct air carriers) in arranging air transportation. In 2005, DOT continued to issue consent orders – albeit in reduced numbers – emphasizing 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. Moreover, Part 125 air carriers, which lack authority to perform “common carriage,”<sup>3</sup> can conduct only very limited operations through an air charter broker without “holding out” service to the general public. Over the course of the

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

<sup>2</sup> Jol A. Silversmith, “DOT Oversight of Air Carrier Advertising and Unfair or Deceptive Practices, 2004,” *The Air & Space Lawyer* (Winter 2005).

<sup>3</sup> 14 C.F.R. § 125.1(a).

year, DOT issued five consent orders involving Part 125 air carriers or uncertificated companies that DOT concluded to have held out air transportation through air charter brokers and/or directly or indirectly to the general public.<sup>4</sup> In addition, the DOT issued a consent order involving a Part 135 carrier that had effectively loaned its authority to a broker, which then held out service to the general public.<sup>5</sup>

Furthermore, in two of the consent orders DOT concluded that a broker also had violated the DOT regulation that prohibit a ticket agent from misrepresenting itself to be a direct air carrier by holding out service to the general public.<sup>6</sup> In one order DOT further concluded that the broker had violated the regulations that prohibit misrepresentations about the quality and certification of services by falsely stating that the services would be operated by Part 135 carriers that had been certified by a third party.<sup>7</sup>

In 2004 DOT also initiated a formal enforcement proceeding before an ALJ in which it alleged that Ascend Aviation Group, LLC, as well as its principals and two affiliated companies, held out air transportation despite not possessing any DOT authority. In 2005, Ascend's nominal chairman, George Warde, entered into a consent agreement with DOT, and a default judgment was entered against Ascend, Scot Spencer, and the two affiliated companies after they failed to respond to discovery requests from DOT. Spencer subsequently sought DOT's reconsideration of the default judgment; as of early 2006, his request remains pending.<sup>8</sup>

### **Passengers with Disabilities**

In 2005, DOT concluded that an air carrier had violated the requirements of Part 382 – which sets forth its standards for the treatment of passengers with disabilities – by denying boarding to a passenger with cerebral palsy. DOT determined that the carrier had failed to properly investigate whether the passenger could assist in her own evacuation, and also failed to make a Complaint Resolution Official (CRO) available to the passenger upon request.<sup>9</sup>

DOT also concluded that two air carriers had violated Part 382 by failing to equip new aircraft with 100 or more passenger seats with in-cabin stowage space for a wheelchair.<sup>10</sup> In addition, DOT expressed concern that in response to telephone inquiries, one carrier's reservation center had provided inaccurate information about the availability of seats with movable armrests,<sup>11</sup> and the other carrier had provided inaccurate information about both the

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<sup>4</sup> Ceres Group, LLC, d/b/a Team Flight Support and Joseph A. DePaulis, Consent Order (2005-11-6, Nov. 3, 2005); BlueStarJets, LLC, Consent Order (2005-10-24, Oct. 24, 2005); C&M Airways, Inc., Consent Order (2005-6-2, June 2, 2005); Contract Air Cargo, Inc., Consent Order (2005-3-39, Mar. 30, 2005); A-Liner-8 Aviation, Inc., Consent Order (2005-2-4, Feb. 7, 2005).

<sup>5</sup> Darby Aviation, Inc. d/b/a AlphaJet International, Consent Order (2005-12-1, Dec. 1, 2005).

<sup>6</sup> 14 C.F.R. § 399.80(a); Ceres Group, Order 2005-11-6; BlueStarJets, LLC, Order 2005-10-24

<sup>7</sup> 14 C.F.R. § 399.80(c) - (d); BlueStarJets, LLC, Order 2005-10-24.

<sup>8</sup> Ascend Aviation Group, LLC (Docket OST-2004-17486). As of early 2006, a related enforcement proceeding also remains pending. Travel Group, Inc. d/b/a Republic Air Travel and Scot Spencer (Docket OST-1995-272).

<sup>9</sup> United Air Lines, Inc., Consent Order (2005-10-22, Oct. 20, 2005).

<sup>10</sup> Hawaiian Airlines, Consent Order (2005-10-26, Oct. 24, 2005); Aloha Airlines, Consent Order (2005-10-25, Oct. 24, 2005).

<sup>11</sup> Aloha Airlines, Order 2005-10-2.

availability of seats with movable armrests and the availability of priority seat assignments for passengers with disabilities.<sup>12</sup>

In a related development, DOT denied a petition by an air carrier for an exemption from its requirement that air carriers provide in-cabin stowage space for a wheelchair on all new aircraft with 100 or more passenger seats.<sup>13</sup> DOT stated that the carrier had not adequately demonstrated that in-cabin stowage was not possible, and noted that the carrier knew or should have known of the requirement before ordering the aircraft at issue.<sup>14</sup>

However, DOT did agree to amend a consent order that it had entered into with a carrier in 2004. Although the order nominally imposed a fine of \$850,000 on the carrier due to its failure to assist passengers in wheelchairs and to respond to complaints, the order allowed the carrier to offset up to \$775,000 for expenditures made to improve its procedures for passengers with disabilities. DOT agreed to allow an additional \$15,000 of the fine to be offset, noting that the carrier had agreed to actually expend an additional \$50,000 on remedial efforts.<sup>15</sup>

DOT issued a notice reminding air carriers that they should describe an aircraft lavatory as “accessible” only if the lavatory offers all of the features specified in its disabilities regulations, although DOT also took the position that, if asked about accessible lavatories, air carriers should describe the assistance features of lavatories that are not fully accessible.<sup>16</sup> Late in the year, DOT also made available on its website a model training program for air carriers about the rights of passengers with disabilities.<sup>17</sup>

Finally, DOT issued a Notice of Proposed Rulemaking (NPRM) which would modify Part 382. Most notably, DOT proposed to 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. Comments on the NPRM were due on March 4, 2005; as of early 2006, the proposal remains pending.<sup>18</sup> Later in the year, DOT issued an additional NPRM which would require air carriers to provide medical oxygen without charge to passengers. Comments on the NPRM were due on January 30, 2006; as of early 2006, the proposal remains pending.<sup>19</sup>

### **Air Carrier and Travel Agent Advertising**

DOT’s “full-price rule” requires 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,

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<sup>12</sup> Hawaiian Airlines, Order 2005-10-26.

<sup>13</sup> JetBlue Airways, Inc., Order Denying Exemption (2005-6-5, June 6, 2005).

<sup>14</sup> As of early 2006, a similar petition filed by another carrier remains pending. Aloha Airlines, Inc. (Docket OST-2004-19190).

<sup>15</sup> America West Airlines, Inc., Order (2005-11-5, Nov. 2, 2005).

<sup>16</sup> 14 C.F.R. § 382.21(a)(3); Providing accurate information to consumers about accessible aircraft lavatories, <http://airconsumer.ost.dot.gov/rules/2005-07-28.pdf> (July 28, 2005).

<sup>17</sup> <http://airconsumer.ost.dot.gov/training/index.htm> (December 22, 2005).

<sup>18</sup> Nondiscrimination on the Basis of Disability in Air Travel, 70 Fed. Reg. 4058 (Jan. 28, 2005).

<sup>19</sup> Nondiscrimination on the Basis of Disability in Air Travel – Medical Oxygen and Portable Respiration Assistive Devices, 70 Fed. Reg. 53108 (Sept. 7, 2005); 70 F.R. 61241 (Oct. 21, 2005).

or tour component.”<sup>20</sup> Historically, 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 separately from an advertised fare, as long as the amount of those taxes and fees is clearly stated elsewhere in the advertising.

In 2005, DOT issued several consent orders reiterating its interpretations of the full-price rule. 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>21</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, and not be disclosed only at the final step of the booking process.<sup>22</sup> In addition, if an advertised “each way” fare is available only with the purchase of a round-trip, that condition must be prominently disclosed.<sup>23</sup>

DOT also reiterated its policy that fuel and other carrier-imposed surcharges cannot be listed separately from an advertised fare, because they do not represent a government-imposed tax or fee.<sup>24</sup> In addition, DOT restated its position that ad valorem taxes – such as the 7.5% federal excise tax – unlike per-passenger taxes, cannot be listed separately from an advertised fare.<sup>25</sup> DOT also has taken the position that if the September 11th Security Fee is among the taxes and fees listed separately, it must be identified by its full name, pursuant to a regulation issued by the Transportation Security Administration.<sup>26</sup>

Finally, DOT issued a NPRM that requested comments on whether the “full-price rule” should be modified or repealed. DOT proposed four alternatives: (1) maintaining its current standards, either with or without additional codification; (2) eliminating the exemption for government-imposed per-person taxes and enforcing the rule as written; (3) eliminating most of its current standards but requiring that consumers either (a) be informed of the total fare before a purchase is made, or (b) be provided with sufficient information to calculate the total fare; or (4) repealing the rule in its entirety. Comments on the NPRM were due on February 13, 2006; as of early 2006, the proposal remains pending.<sup>27</sup>

### **Air Carrier Authority**

DOT regulations permit air taxi operators to transport passengers using small aircraft without obtaining a certificate from DOT.<sup>28</sup> However, if an air taxi operator carries passengers on five or more round-trips per week on a route between two or more points, according to a

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<sup>20</sup> 14 C.F.R. § 399.84.

<sup>21</sup> Grand Casinos, Inc., Consent Order (2005-5-15, May 26, 2005)

<sup>22</sup> Sun Country Airlines, Consent Order (2005-8-15, Aug. 19, 2005); Societe Air France, Consent Order (2005-7-3, July 5, 2005); Scandinavian Airlines System (SAS), Consent Order (2005-5-13, May 20, 2005).

<sup>23</sup> ATA Airlines, Consent Order (2005-10-11, Oct. 17, 2005).

<sup>24</sup> El Al Israel Airlines, Consent Order (2005-10-6, Oct. 11, 2005); Societe Air France, Order 2005-7-3; Scandinavian Airlines System (SAS), Order 2005-5-13.

<sup>25</sup> Sun Country Airlines, Order 2005-8-15.

<sup>26</sup> 14 C.F.R. § 1510.7; Sun Country Airlines, Order 2005-8-15; Societe Air France, Order 2005-7-3; Grand Casinos, Inc., Order 2005-5-15.

<sup>27</sup> Price Advertising, 70 Fed. Reg. 73960 (Dec. 14, 2005).

<sup>28</sup> 14 C.F.R. § 298.11.

flight schedule that specifies the times and places between which those flights are performed, DOT considers the air taxi's services to be those of a commuter air carrier, and the operator is required to obtain a certificate.<sup>29</sup> In 2005, DOT issued three consent orders involving air taxi operators that had held out services which DOT considered to require commuter air carrier authority.<sup>30</sup>

Public charter operators can advertise, accept reservations, and sell tickets only after they have filed and DOT has approved their prospectus for the services. Further, all solicitation materials must refer to the operator-participant contract, and copies of the contract must be provided to participants.<sup>31</sup> In 2005, DOT sanctioned three public charter operators that did not comply with one or more of these requirements.<sup>32</sup>

In addition, foreign air carriers can operate services to and from points in the United States only after they have been issued the appropriate authority by DOT. In 2005, DOT sanctioned Canadian and French air carriers that had operated services without such authority.<sup>33</sup>

Finally, a U.S.-flag air carrier must meet certain standards regarding the citizenship of its presidents, officers, directors, and stockholders, and also must be under the actual control of U.S. citizens.<sup>34</sup> In 2005, DOT sanctioned an air taxi that, while meeting the numerical requirements, was found by DOT to be under the actual control of a Swiss holding company.<sup>35</sup>

### Code-Share Disclosure

In early 2005, DOT issued a NPRM that would modify its requirements for the disclosure of code-sharing services.<sup>36</sup> At the time, advertising was required to disclose the identity of code-share carriers for each advertised city-pair. DOT proposed to allow print advertising to simply disclose that advertised flights may be operated by another carrier, and list those carriers, but Internet advertising would continue to be required to provide disclosures for each advertised city-pair.<sup>37</sup> Later in the year, DOT adopted the proposed modifications, but also extended them to the Internet. However, DOT noted that even though the same standards would apply to

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<sup>29</sup> 14 C.F.R. § 298.21.

<sup>30</sup> Friendship Airways, Inc. d/b/a Yellow Air Taxi, Consent Order (2005-5-4, May 11, 2005); Twin Town Leasing Company d/b/a Twin Air, Consent Order (2005-3-38, Mar. 28, 2005); Tradewind Aviation, LLC, Consent Order (2005-3-17, Mar. 9, 2005).

<sup>31</sup> 14 C.F.R. Part 380.

<sup>32</sup> Starquest Expeditions, Inc., Consent Order (2005-11-14, Nov. 18, 2005); Akwaaba Airlines & Tours Limited d/b/a Ahenfo Airlines Limited, Consent Order (2005-10-15, Oct. 19, 2005); Southern Caribbean Air, Inc., Consent Order (2005-7-6, July 8, 2005).

<sup>33</sup> Capital Airways, Inc., Consent Order (2005-12-16, Dec. 29, 2005); St. Barth Commuter, SARL, Consent Order (2005-4-2, April 4, 2005).

<sup>34</sup> 49 U.S.C. 40102(a)(15).

<sup>35</sup> AMI Jet Charter, Inc., Consent Order (2005-9-11, Sept. 9, 2005). Subsequently, DOT issued a NPRM that would modify its interpretation of the "actual control" requirement. Comments on the proposal were due on January 6, 2006; as of early 2006, the proposal remains pending. Actual Control of U.S. Air Carriers, 70 F.R. 67389 (Nov. 7, 2005).

<sup>36</sup> 14 C.F.R. § 257.5.

<sup>37</sup> Disclosure of Code Sharing and Long-Term Wet Lease Arrangements, 70 F.R. 2372 (Jan. 13, 2005).

advertising on the Internet, once a consumer requested information about a specific itinerary and/or fare, full disclosure about code-sharing services should be made.<sup>38</sup>

In addition, DOT issued a NPRM which proposed to repeal the regulation governing the disclosure of code-sharing services in computer reservation systems.<sup>39</sup> DOT noted that its other regulations governing CRSs had been repealed in 2004 on the ground that they were no longer necessary, and therefore it was proposing to terminate this regulation also. As of early 2006, the proposal remains pending.<sup>40</sup>

### **Additional Issues**

**Incidents Involving Animals.** In 2005, DOT adopted a regulation which requires U.S. air carriers to file monthly reports on incidents involving the death, injury, or loss of an animal during air transport.<sup>41</sup> Although originally the reports were to be filed with the Animal and Plant Health Inspection Service, a subsequent notice instead provided that they be filed with DOT.<sup>42</sup> As of early 2006, reports were publicly available from DOT for the period between May 2005 and November 2005; during that period, 22 deaths, 17 injuries, and 3 losses (one of which was later recovered) had been reported.<sup>43</sup>

**Direct Air Carrier Responsibility for Public Charters.** DOT historically has required direct air carriers that operate aircraft on behalf of a public charter operator to return round-trip passengers to the U.S. in the event of the failure of the public charter operator, as well as to generally ensure that the public charter operator complies with DOT regulations.<sup>44</sup> In 2005, DOT concluded that a direct air carrier had failed to comply with these requirements by not returning passengers to the U.S., even though its contract with the public charter operator had ended, as well as by not ensuring that the public charter operator complied with the escrow and ticket sales requirements for public charter programs.<sup>45</sup>

**Ticket Sales and Refunds.** In 2004, DOT initiated a formal enforcement proceeding against a foreign air carrier – which suspended operations in 2003 – that allegedly had sold tickets for services it failed to perform and had not reimbursed passengers for cancelled services.

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<sup>38</sup> Disclosure of Code Sharing and Long-Term Wet Lease Arrangements, 70 F.R. 44848 (Aug. 4, 2005).

<sup>39</sup> Display of Joint Operations in Carrier-Owned Computer Reservations Systems Regulations, 70 F.R. 16990 (April 4, 2005).

<sup>40</sup> In a related development, in 2004 Sabre, Inc. challenged DOT's assertion in the CRS final rule that DOT retained authority under 49 U.S.C. § 41712 to regulate the practices of CRSs which lacked any airline ownership, even after the termination of its CRS rules. In 2005, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision holding that even though the statute only referred to the practices of an "air carrier, foreign air carrier, or ticket agent," the statute nevertheless was broad enough to empower DOT to regulate intermediaries in the ticketing process such as Sabre. Sabre, Inc. v. DOT, 249 F.3d 1113 (D.C.Cir. 2005).

<sup>41</sup> Reporting Directive Regarding Incidents Involving Animals During Air Transport, 70 F.R. 9217 (Feb. 25, 2005).

<sup>42</sup> Reports by Carriers on Incidents Involving Animals During Air Transport, 70 F.R. 7392 (Feb. 14, 2005).

<sup>43</sup> Air Travel Consumer Report (July 2005 – January 2006), <http://airconsumer.ost.dot.gov/reports/>.

<sup>44</sup> 14 C.F.R. § 212.3; 14 C.F.R. § 380.34.

<sup>45</sup> World Airways, Inc., Consent Order (2005-11-1, Nov. 1, 2005).

The carrier did not respond to the complaint, and an ALJ entered a default judgment against the carrier.<sup>46</sup>

**Privacy.** DOT affirmed its dismissal of a complaint which alleged 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. DOT stated that the petition for review did not introduce any new information and arguments, and restated its finding that the carrier had not violated its own privacy or policy or any DOT-enforced statute or regulation.<sup>47</sup>

**Slots at National Airport.** In 2005, DOT denied a petition by a trade association to suspend or regulate the sale or lease of slots at Ronald Reagan Washington National Airport. The association argued that DOT should investigate under the authority of 49 U.S.C. § 41712 whether slot transactions had been used to block low-fare competition at National as well as LaGuardia, but DOT stated that the petition only tangentially invoked the statute, as well as that the pleadings did not provide a sufficient basis to institute an investigation.<sup>48</sup>

**Air Carrier Insolvency and Bankruptcy.** In the aftermath of the September 11 terrorist attacks, Congress required air carriers to provide transportation to passengers of other air carriers that had ceased operations due to insolvency and bankruptcy.<sup>49</sup> In 2005, DOT issued a notice stating that it interpreted the statute to allow air carriers to charge such passengers no more than \$50 one-way, to cover the actual costs of transportation (a prior DOT interpretation had set a limit of \$25 one-way).<sup>50</sup> The effectiveness of the statute briefly lapsed on November 19, 2005, but it subsequently was re-enacted with an expiration date of November 30, 2006.<sup>51</sup>

**Oversales.** DOT regulations require air carriers under most circumstances to compensate passengers who are denied boarding involuntarily, as well as set out requirements for providing information about denied boarding compensation to passengers.<sup>52</sup> In 2005, a passenger who had been “bumped” – and also happened to be an aviation lawyer – argued to a New York Small Claims Court that the regulations did not preempt a claim under state contract law for consequential and inconvenience damages. The court agreed, noting that the carrier had not fully complied with the regulations or promptly returned his baggage, and awarded him \$3,110.<sup>53</sup>

## Conclusion

As demonstrated by this article, 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.

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<sup>46</sup> Aeromar Airlines, C. por A., Order Granting Motion for Default Judgment (June 10, 2005) (Docket OST-2004-19610).

<sup>47</sup> Electronic Privacy Information Center, Order Affirming Dismissal of Complaint (2005-3-9, March 7, 2005).

<sup>48</sup> Air Carrier Association of America, Order (2005-2-1, Feb. 1, 2005).

<sup>49</sup> Pub. L. No. 107-11, § 145 (Nov. 19, 2001).

<sup>50</sup> Notice on Honoring Tickets of Insolvent Airlines Pursuant to the Requirements of Section 145 of the Aviation and Transportation Security Act, 70 F.R. 33932 (June 10, 2005).

<sup>51</sup> Pub. L. No. 109-115, § 178 (Nov. 30, 2005).

<sup>52</sup> 14 C.F.R. Part 250.

<sup>53</sup> Stone v. Continental Airlines, 2005 N.Y. Misc. LEXIS 2514 (N.Y. Sup. Ct., App. Term Nov. 10, 2005).

However, it also is relatively unknown. Attorneys that represent clients in the aviation industry should take care to familiarize themselves with DOT's regulations and interpretations; to review their clients' practices in light of DOT's guidance; and to keep abreast of new developments, such as those reviewed above.