ZUCKERT SCOUTT & RASENBERGER, L.L.P.
ATTORNEYS AT LAW

888 Seventeenth Street, NW, Washington, DC 20006-3309
Telephone [202] 298-8660 Fax [202] 342-0683

DOT Enforcement of its Prohibitions on Unfair and Deceptive Practices, 2010

By Jol A. Silversmith*

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 any "unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."[1] Indeed, DOT's authority over these matters is exclusive; states and local jurisdictions are preempted from imposing their own requirements "related to a price, route, or service of an air carrier."[2] For more than twenty-five years, DOT has exercised its authority under this statute, as well as associated regulations, to monitor and sanction practices by air carriers, ticket agents, and other entities involved in air transportation.

DOT Oversight of Air Carriers, Ticket Agents, and Other Entities

DOT has several regulatory tools at its disposal for responding to allegedly unfair and deceptive practices, including a private warning or cease-and-desist letter; a public consent order (pursuant to which the air carrier, agent, or other entity usually agrees to pay a fine and refrain from future violations); or a formal enforcement action before a DOT Administrative Law Judge (ALJ). DOT also periodically issues public notices setting forth its enforcement policies for advertising and other practices, and can issue new regulations via rulemaking proceedings. Consent orders are by far the most commonly used tool in DOT's arsenal; according to its Inspector General, between 1996 and 2006 DOT entered into more than 233 consent orders, with penalties totaling more than $21.8 million.[3] In 2010, DOT issued 52 consent orders – by far the most in DOT history – with the nominal fines attached to those orders totaling $3,667,000.[4]

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* Jol A. Silversmith is a partner with the firm of Zuckert, Scoutt & Rasenberger, L.L.P., in Washington, D.C. The views expressed in this article are the author's alone, and do not necessarily reflect those of the firm or any other individual or entity. The author thanks Jonathon H. Foglia for his assistance in preparing this article.

[1] 49 U.S.C. § 41712 (formerly § 411 of the Federal Aviation Act of 1958).

[2] 49 U.S.C. § 41713. In 2010, courts held that federal preemption barred a variety of allegations brought against air carriers by passengers, including in: Onoh v. Northwest Airlines, Inc., 613 F.3d 596 (5th Cir. 2010) (claims of discrimination and emotional distress held preempted); Ray v. American Airlines, Inc., 609 F.3d 917 (8th Cir. 2010) (claims of false imprisonment during tarmac delay held preempted); Sanchez v. Aerovias de Mexico, S.A. de C.V., 590 F.3d 1027 (9th Cir. 2010) (claims that inapplicable tax was collected held preempted); Tanen v. Southwest Airlines Co., 114 Cal. Rptr.3d 743 (Cal. Ct. App. 2010) (state prohibition on expiring gift certificates held preempted).

[3] DOT Inspector General, "Follow-Up Review: Performance of U.S. Airlines in Implementing Selected Provisions of the Airline Customer Service Commitment," Report No. AV-2007-012, at 8 (November 21, 2006) (http://www.oig.dot.gov/StreamFile?file=/data/pdfdocs/ACSfinal11-21signed.pdf). Since the report was issued, DOT has entered into more than 120 additional consent orders, including the orders issued in 2010.

[4] However, DOT often waives a portion of the penalties if the subject of a consent order complies with its terms and conditions during the subsequent year, or another period designated by DOT; the specific penalties and waivers assessed

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In the past year, DOT's Office of Aviation Enforcement and Proceedings continued to closely monitor and investigate practices by air carriers, ticket agents, and other entities involved in the sale of air transportation (including package tours that include air transportation). Although DOT's greatest area of concern in the past year appears to have been the "full fare rule" for advertising by air carriers and ticket agents, DOT also continued to take enforcement action – and adopt new requirements – regarding an array of practices, ranging from "passenger rights" issues to the requirements governing the carriage of passengers with disabilities. This article briefly summarizes the consent orders and other public guidance that were issued by DOT in 2010, as well as certain related agency actions and court decisions.

Enhanced Passenger Protections

In 2007, DOT initiated a rulemaking proceeding to adopt new regulations "enhancing airline passenger protections," pursuant to its general authority to prohibit unfair or deceptive practices.[5] In 2009, after two rounds of public comments, DOT announced the final rules, which took effect on April 29, 2010.[6] Generally, the new requirements apply to U.S. carriers that operate scheduled or charter service using aircraft with 30 or more passenger seats, and include:

- *Tarmac Delay Contingency Plans.* Covered U.S. carriers are required to develop and implement contingency plans for lengthy tarmac delays, with certain standards for the content of such plans having been specified by DOT. The carriers also are required to post information about their contingency plans on their websites, and to retain records about tarmac delays.

- *Response to Consumer Problems.* For scheduled services, covered U.S. carriers are required to: (1) designate an employee to monitor the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers; (2) make available the email and postal contact information about the department at the carrier with which complaints can be filed; and (3) acknowledge receipt of complaints within 30 days of receipt and send a substantive response within 60 days of receipt.

- *Chronically Delayed Flights.* For U.S. carriers that are already required to report detailed operational data to DOT,[7] DOT will consider the operation of a "chronically delayed flight" for more than four consecutive one-month periods to be an unfair and deceptive practice. A flight is deemed to be "chronically delayed" if it is operated at least 10 times

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in 2010 are noted throughout this article.

[5] "Enhancing Airline Passenger Protections," 72 Fed. Reg. 65233 (November 20, 2007).

[6] "Enhancing Airline Passenger Protections," 74 Fed. Reg. 68983 (December 30, 2009). Most of the new requirements are codified in 14 C.F.R. Part 259. DOT subsequently granted an extension of the initial compliance deadline, as well as the recurring monthly deadline, for publishing flight delay data on carrier websites. See "Enhancing Airline Passenger Protections: Response to Requests To Extend Compliance Date," 75 Fed. Reg. 11075 (March 10, 2010);" Enhancing Airline Passenger Protections: Extension of Compliance Date for Posting of Flight Delay Data on Web Sites," 75 Fed. Reg. 17050 (April 5, 2010); "Posting of Flight Delay Data on Web Sites," 75 Fed. Reg. 34925 (June 21, 2010); "Posting of Flight Delay Data on Web Sites," 75 Fed. Reg. 42599 (July 22, 2010).

[7] 14 C.F.R. Part 234 (which requires reporting by U.S. carriers that account for at least 1% of domestic scheduled passenger revenues).

per month and arrives more than 30 minutes late (including cancelled flights) more than 50% of the time.

- *Delay Data on Carrier Websites.* U.S. carriers that are already required to report detailed operational data to DOT also will be required to include the on-time performance code for domestic flights on their websites, including flights operated by a code-share partner. Upon the initial listing of flights, either on the same page or via a hyperlink, these carriers must provide the on-time performance data for the most recent calendar month reported to DOT, and specifically highlight chronically delayed flights.

- *Customer Service Plans.* For scheduled services, covered U.S. carriers are required to develop and implement customer service plans. DOT has specified certain matters that carriers must address in their plans, but not how they must be addressed (i.e., the plans must address how passengers will be notified of delays, cancellations, and diversions, but there is no baseline as to how and when they must be notified). The carriers also are required to post information about their plans on their websites, and to annually audit their adherence to their plans.

- *Retroactive Amendments to Contract of Carriage.* U.S. carriers are prohibited from retroactively applying any material amendments to their contracts of carriage with significant negative implications to consumers who have already purchased tickets.

DOT subsequently denied a request that it exempt operations at New York's John F. Kennedy International Airport– as well as operations at three other airports with overlapping space – from the tarmac delay requirements for the duration of a runway construction project at JFK. DOT noted that FAA had predicted that the delays due to the construction would be limited, and that it was incumbent on carriers to adjust their schedules.[8]

In 2010, two carriers were sanctioned for failing to file accurate reports about tarmac delays as required by 14 C.F.R. Part 234. Both initially reported delays in excess of three hours, which after further investigation were determined to be erroneously filed; in one of the cases, DOT explained that "[t]he work associated with those delays ... required the unnecessary use of government resources."[9]

Additionally, DOT proposed to expand the scope of its passenger protection regulations. Notably, the requirements would now be applicable foreign air carriers, and many of the requirements would become stricter; i.e., carriers would now be specifically required to incorporate their tarmac delay contingency plans and customer service plans into their contracts of carriage.[10] Other proposals included increasing the amount of compensation to passengers

[8] "Request for Comments on Carriers' Temporary Exemption Requests From DOT's Tarmac Delay Rules for JFK, EWR, LGA and PHL Operations," 75 Fed. Reg. 15765 (March 30, 2010); "Denial of Airlines' Temporary Exemption Requests From DOT's Tarmac Delay Rules for JFK, EWR, LGA and PHL Operations," 75 Fed. Reg. 21692 (April 26, 2010).

[9] Pinnacle Airlines, Inc., Order 2010-9-11 (September 8, 2010) (assessing a penalty of $10,000, half suspended on condition of compliance during the subsequent year); United Air Lines, Inc., Order 2010-9-22 (September 21, 2010) (assessing a penalty of $12,000, half suspended on condition of compliance during the subsequent year).

[10] "Enhancing Airline Passenger Protections," 75 Fed. Reg. 32318 (June 8, 2010); "Enhancing Airline Passenger *(continued…)*

involuntarily denied boarding; to no longer allow government-imposed taxes and fees to be advertised separately from airfares; and to require carriers to disclose fees for ancillary services on their websites and through GDSs. Comments were filed in response to the proposals by air carriers, trade associations, consumers, and other parties; many argued that certain proposals were unnecessary, counter-productive, and/or beyond DOT's authority.[11] As of the end of the year, the rulemaking remains pending.

Air Carrier and Ticket Agent Advertising

DOT's "full fare rule" requires that advertising by air carriers or ticket 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."[12] Historically, DOT has interpreted this regulation to allow only government-imposed taxes and fees that are assessed on a per-person basis and that are not ad valorem in nature (i.e., the September 11th Security Fee, federal segment taxes, airport Passenger Facility Charges, and U.S. immigrations and customs fees)[13] to be listed separately from an advertised fare. The amount of those taxes and fees must be clearly stated elsewhere in the advertisement – or, for online advertisements, be available via a prominent hyperlink that leads directly to the disclosure,[14] with a warning signal such as an asterisk proximate to the fare. In contrast, taxes and fees that are not assessed on a per-passenger basis (such as the 7.5% federal excise tax) or are imposed by carriers or ticket agents (such as fuel surcharges and services fees) must be included in advertised fares. Additionally, there are other requirements applicable to fare advertising, including for ancillary fees such as baggage fees and the availability of the offered fares.

Protections," 75 Fed. Reg. 45562 (August 3, 2010). Most of the new requirements would be codified in 14 C.F.R. Part 259.

[11] DOT subsequently acknowledged that one of its proposals – to limit the service of peanuts in-flight in order to prohibit discrimination against passengers with severe peanut allergies – conflicted with a federal law which prohibited DOT from enacting any peanut-related restrictions without first having submitted a scientific study to Congress. See "Enhancing Airline Passenger Protections," 75 Fed. Reg. 36300 (June 25, 2010), citing Pub.L. 106-69, § 346.

[12] 14 C.F.R. § 399.84. Additionally, an overlapping prohibition for public charter operators appears to 14 C.F.R. § 380.27, and an overlapping prohibition for ticket agents appears at 14 C.F.R. § 399.80(f). The latter prohibition rarely was cited by DOT until this year, when it was included in some – but not all – orders involving ticket agents that also relied upon § 399.84.

[13] On December 29, 2010, the IRS announced inflation adjustments for certain air transportation taxes, effective for tickets issued on or after January 1, 2011 (IR-2010-129). The fee for domestic segments was unchanged, at $3.70, but international arrival and departure taxes increased from $16.10 to $16.30, and the tax for domestic segments beginning or ending in Alaska or Hawaii increased from $8.10 to $8.20.

[14] In prior years, DOT had advised that tax and fee information could be provided via a prominent hyperlink that led to a page which included the disclosures, but not that the hyperlink must lead directly to the disclosures. The latter requirement appeared for the first time in orders issued in 2010, see footnote 15, despite DOT's citation of prior orders and industry letters as the basis for the requirement; indeed, at least one order issued in 2010 continued to state the prior standard. See US Airways, Inc., Order 2010-3-5 (March 8, 2010) (assessing a penalty of $40,000).

Government-Imposed Taxes and Fees

A failure to adequately identify government-imposed taxes and fees that were not included in advertised fares was the single most common advertising violation sanctioned by DOT in 2010; DOT's actions included:

- Five carriers, seven travel agents, and a public charter operator were sanctioned for failing to adequately disclose the taxes and fees excluded from advertised fare; i.e., by either providing full information on the same page or via a hyperlink that led directly to a statement of the nature and amount of those taxes and fees.[15]

- One carrier and a travel agent were sanctioned for failing to provide any notice at all about applicable taxes and fees.[16]

- One carrier was sanctioned for failing to include the ad valorem 7.5% federal excise tax in advertised fares.[17]

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[15] Southern Sky Air & Tours, LLC d/b/a Myrtle Beach Direct Air & Tours, Order 2010-2-16 (February 18, 2010) (assessing a penalty of $35,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year) (this order cited 14 C.F.R. § 380.27 in addition to 14 C.F.R. § 399.84, because the subject of the order was a public charter operator); Prestige Cruise Holdings, Inc., Oceania Cruises, Inc., and Seven Seas Cruises S. de R.L. d/b/a Regent Seven Seas Cruises, Order 2010-4-1 (April 7, 2010) (assessing a penalty of $75,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year); Delta Air Lines, Inc., Order 2010-5-30 (May 28, 2010) (assessing a penalty of $40,000); farePortal, Inc., Order 2010-5-31 (May 28, 2010) (assessing a penalty of $50,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year); Sceptre Tours, Inc., Order 2010-6-23 (June 28, 2010) (assessing a penalty of $30,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year); Lion World Travel Ltd. d/b/a South African Airways Vacations, Order 2010-9-5 (September 3, 2010) (assessing a penalty of $20,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year) (this order cited 14 C.F.R. § 399.80(f) in addition to 14 C.F.R. § 399.84, because the subject of the order was a ticket agent); China Focus, Inc. d/b/a China Focus Travel, Order 2010-9-6 (September 3, 2010) (assessing a penalty of $50,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year); MN Airlines, LLC d/b/a Sun Country Airlines, Order 2010-9-25 (September 24, 2010) (assessing a penalty of $40,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year); Educational Opportunities Tours, Inc., Order 2010-10-14 (October 22, 2010) (assessing a penalty of $60,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year) (his order cited 14 C.F.R. § 399.80(f) in addition to 14 C.F.R. § 399.84, because the subject of the order was a ticket agent); Alaska Airlines, Inc., Order 2010-10-24 (October 29, 2010) (assessing a penalty of $50,000); Compania Panamena de Aviacion, S.A., d/b/a Copa Airlines, Inc. (Copa), Order 2010-11-15 (November 15, 2010) (assessing a penalty of $50,000, half suspended on condition of compliance during the subsequent year); Caribbean Airlines Limited, Order 2010-12-4 (December 2, 2010) (assessing a penalty of $40,000, half suspended on condition of compliance during the subsequent year); The COMM Group, Inc., Cheap Caribbean, Inc., Order 2010-12-20 (December 20, 2010) (assessing a penalty of $65,000, half suspended on condition of compliance during the subsequent year).

[16] US Airways, Inc., Order 2010-3-5; Pacific Holidays, Inc., Order 2010-10-8 (October 18, 2010) (assessing a penalty of $30,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year) (this order cited 14 C.F.R. § 399.80(f) in addition to 14 C.F.R. § 399.84, because the subject of the order was a ticket agent).

[17] United Air Lines, Inc., Order 2010-1-13 (January 15, 2010), (assessing a penalty of $30,000 and triggering United's liability for the portion of a previous fine, $37,500, that had been imposed by Order 2009-8-17 but *(continued…)*

September 11th Security Fee

TSA regulations require that if the September 11th Security Fee is not included in an advertised fare, it must be identified by its full name.[18] Although the fee is imposed under the authority of a different agency, DOT considers a violation of this TSA requirement to also constitute an unfair and deceptive practice that violates DOT requirements. In 2010, DOT sanctioned five travel agents for failing to identify the September 11th Security Fee at all;[19] two carriers for failing to identify it at the start of the online booking process;[20] and another carrier for not identifying it by the correct name.[21]

Fuel Surcharges

The full fare rule prohibits air carriers and ticket agents from listing fuel surcharges separate from an advertised fare.[22] In 2010, DOT sanctioned six ticket agents for failing to include fuel surcharges in fares posted on their websites, in brochures and/or in print advertisements,[23] and two air carriers for failing to include fuel surcharges in fares posted on its website.[24]

Service Fees

The full fare rule also generally prohibits air carriers and ticket agents from listing a service fee separate from an advertised fare. In 2010, three ticket agents and a public charter operator were sanctioned for failing to comply with this requirement by imposing service fees that were not included in their advertised prices.[25]

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suspended on condition of compliance during the subsequent year).

[18] 14 C.F.R. § 1510.7.

[19] Sceptre Tours, Inc., Order 2010-6-23; Lion World Travel Ltd. d/b/a South African Airways Vacations, Order 2010-9-5; China Focus, Inc. d/b/a China Focus Travel, Order 2010-9-6; Pacific Holidays, Inc., Order 2010-10-8; Educational Opportunities Tours, Inc., Order 2010-10-14.

[20] Compania Panamena de Aviacion, S.A., d/b/a Copa Airlines, Inc. (Copa), Order 2010-11-15; Caribbean Airlines Limited, Order 2010-12-4.

[21] Alaska Airlines, Inc., Order 2010-10-24.

[22] See also footnote 35 (DOT guidance for advertising of air tour packages).

[23] Prestige Cruise Holdings, Inc., Oceania Cruises, Inc., and Seven Seas Cruises S. de R.L. d/b/a Regent Seven Seas Cruises, Order 2010-4-1; Nuevo Mundo Travel Agency, Inc., Order 2010-7-17 (July 22, 2010) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent two years) (this order cited 14 C.F.R. § 399.80(f) in addition to 14 C.F.R. § 399.84, because the subject of the order was a ticket agent); Lion World Travel Ltd. d/b/a South African Airways Vacations, Order 2010-9-5; China Focus, Inc. d/b/a China Focus Travel, Order 2010-9-6; Pacific Holidays, Inc., Order 2010-10-8; Educational Opportunities Tours, Inc., Order 2010-10-14.

[24] Compania Panamena de Aviacion, S.A., d/b/a Copa Airlines, Inc. (Copa), Order 2010-11-15; Caribbean Airlines Limited, Order 2010-12-4.

[25] Southern Sky Air & Tours, LLC d/b/a Myrtle Beach Direct Air & Tours, Order 2010-2-16; Prestige Cruise Holdings, Inc., Oceania Cruises, Inc., and Seven Seas Cruises S. de R.L. d/b/a Regent Seven Seas Cruises, Order 2010-4-1; farePortal, Inc., Order 2010-5-31; The COMM Group, Inc., Cheap Caribbean, Inc., Order 2010-12-20.

Baggage Fees

DOT previously advised carriers that they must provide prominent and timely notice if passengers are limited to fewer than two free checked bags of the size and weight that generally have been free in the past.[26] In 2010, DOT sanctioned a public charter operator that did not disclose its baggage charges until the later stages of the booking process.[27]

"Free" Fares

If an advertisement promotes "free" air transportation, it must prominently disclose any conditions that must be met, such as the payment of taxes and fees applicable to the "free" ticket. In 2010, DOT sanctioned a public charter operator, two ticket agents, and a carrier for failing to comply with this requirement. The public charter operator had failed to adequately disclose the taxes and fees associated with an offer for a free second ticket or car/van rental.[28] One ticket agent had failed to disclose the taxes and fees associated with an offer for a free second ticket.[29] The other had advertised "free" airfares in connection with tour packages when, in fact, passengers would be required to pay both fuel surcharges and "airline costs," as well as undisclosed taxes and fees.[30] The carrier had entirely failed to disclose the taxes and fees associated with a "Kids Fly Free" offer.[31]

Fare Availability

DOT requires carriers, when advertising a fare, to have a "reasonable" number of seats available at that fare for the period during which the fare is being offered.[32] In 2010, DOT sanctioned two carriers for failing to comply with this requirement by advertising fares that were not available at all. One had issued a press release advertising fares "starting as low as $39" one-way, even though the lowest available fare was actually $44 one-way.[33] The other had listed three cities as being part of a "Fall Fare Sale from $89" even though the lowest available fare to those cities was either $99 or $129.[34]

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[26] Guidance on Disclosure of Policies and Charges Associated with Checked Baggage, 73 Fed. Reg. 28854 (May 19, 2008).

[27] Southern Sky Air & Tours, LLC d/b/a Myrtle Beach Direct Air & Tours, Order 2010-2-16.

[28] Southern Sky Air & Tours, LLC d/b/a Myrtle Beach Direct Air & Tours, Order 2010-2-16.

[29] Prestige Cruise Holdings, Inc., Oceania Cruises, Inc., and Seven Seas Cruises S. de R.L. d/b/a Regent Seven Seas Cruises, Order 2010-4-1.

[30] Unique Vacations, Inc., Order 2010-11-7 (November 8, 2010) (assessing a penalty of $200,000, half suspended on condition of compliance during the subsequent 18 months).

[31] Alaska Airlines, Inc., Order 2010-10-24.

[32] See also footnote 35 (DOT guidance for advertising of air tour packages).

[33] AirTran Airways, Inc., Order 2010-5-29 (May 28, 2010) (assessing a penalty of $20,000, half suspended on condition of compliance during the subsequent year).

[34] MN Airlines, LLC d/b/a Sun Country Airlines, Order 2010-9-25.

Air Tour Packages

To the extent that a tour package includes an air transportation component, DOT asserts jurisdiction over the entire package. In 2010, DOT sanctioned two ticket agents for conditions applicable to the non-air travel components of an air-inclusive package. One had failed to disclose, until late in the booking process, that the price advertised for its tour packages included a double occupancy requirement.[35] Another failed to prominently disclose that the price advertised was conditioned on a minimum of 45 passengers purchasing each tour package, and asserted that it reserved the right to add a surcharge based on foreign exchange rates.[36] The same agent also was sanctioned for asserting a right to retroactively add a surcharge to its package prices if the dollar declined by more than 5% against the Euro based on foreign exchange rates.[37]

Additionally, DOT acknowledged that because carriers' fuel surcharges can vary over time, ticket agents that arrange tours can have difficulty in advertising their packages. DOT has advised that brochures can warn consumers that fare availability may be limited and refer them to a source of current fare information. But fares that are advertised online and in newspapers must be current and available; when a specific price is advertised, reasonable inventory must be available for a reasonable time period.[38]

Baggage Liability

DOT previously issued a policy statement regarding air carrier liability for lost, damaged, or delayed baggage on international flights. DOT took the position that the Montreal Convention[39] did not permit air carriers to disclaim liability for the loss, damage, or delay of valuable items – or for the loss or delay of fragile items – in checked baggage. Accordingly, DOT indicated that air carrier tariffs and contracts of carriage which denied liability for electronics, cameras, jewelry, etc. must be modified.[40] In 2010, two carriers were sanctioned for refusing reimbursement for certain items lost in international transit.[41]

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[35] Lion World Travel Ltd. d/b/a South African Airways Vacations, Order 2010-9-5.

[36] Educational Opportunities Tours, Inc., Order 2010-10-14.

[37] Id.

[38] Prestige Cruise Holdings, Inc., Oceania Cruises, Inc., and Seven Seas Cruises S. de R.L. d/b/a Regent Seven Seas Cruises, Order 2010-4-1; China Focus, Inc. d/b/a China Focus Travel, Order 2010-9-6; Educational Opportunities Tours, Inc., Order 2010-10-14.

[39] Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999.

[40] "Providing Guidance on Airline Baggage Liability and Responsibilities of Code-Share Partners Involving International Itineraries," 74 Fed. Reg. 14837 (April 1, 2009). Although not explicitly cited by DOT, the CAB advised that the Warsaw Convention – the Montreal Convention's predecessor – similarly did not allow air carriers to deny liability for valuable or fragile items carried on international flights. See Trans International Airlines, Inc. Enforcement Proceeding, Order on Petition for Discretionary Review of Initial Decision, Order 77-8-116 (August 23, 1977).

[41] EL AL Israel Airlines, Ltd., Order 2010-9-32 (September 30, 2010) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year); Societe Air France, Order 2010-12-26 (December 23, 2010) (assessing a penalty of $100,000, half suspended on condition of compliance during the *(continued…)*

Additionally, for domestic flights, DOT in 2009 provided new guidance for the reimbursement of expenses incurred as a result of the loss, damage, or delay of baggage on domestic flights. DOT warned that its baggage liability rules[42] require air carriers to assume liability for all direct or consequential damages. Accordingly, air carriers may not limit their liability (i.e., by setting a maximum amount per day or providing reimbursement for incidental expenses only on the outbound leg of a roundtrip), and should cover all reasonable, actual, and verifiable expenses related to the loss, damage, or delay of baggage on domestic flights.[43] In 2010, a carrier was sanctioned for denying any reimbursement for expenses if baggage was delivered within 24 hours, and limiting it subsequent liability for delayed baggage to $25 per day up to a maximum of $125 while a passenger was away from his or her permanent residence.[44]

Oversales

DOT regulations require air carriers to compensate passengers who are denied boarding involuntarily (i.e., "bumped"), and set out additional requirements for providing information about denied boarding compensation to passengers and for soliciting volunteers before involuntarily denying boarding to passengers.[45] In 2010, two carriers were sanctioned for repeated violations of these requirements; both had failed to inform passengers involuntarily denied boarding who were offered vouchers of the amount of cash that would otherwise be due, and otherwise failed to immediately provide the correct amount of compensation to passengers involuntarily denied boarding.[46] Additionally, one of them had failed to provide passengers involuntarily denied boarding with a written explanation of their rights;[47] the other had failed to solicit volunteers before involuntarily denying boarding and had mis-classified passengers who were involuntarily denied boarding as having volunteered to give up their seats in reports to DOT.[48]

Code-Sharing Disclosures

DOT requires air carriers and ticket agents to promptly disclose to consumers that a flight involves a code-share arrangement prior to purchase.[49] In 2010, two carriers that were in

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subsequent year).

[42] 14 C.F.R. Part 254.

[43] "Guidance on Reimbursement of Passenger Expenses Incurred as a Result of Lost, Damaged or Delayed Baggage" 74 Fed. Reg. 53309 (October 16, 2009). However, air carriers may cap their liability for baggage on domestic flights to $3300 per passenger. See 14 C.F.R. § 254.4.

[44] Delta Air Lines, Inc., Order 2010-10-23 (October 29, 2010) (assessing a penalty of $100,000, half suspended on condition of compliance during the subsequent year).

[45] 14 C.F.R. Part 250.

[46] Southwest Airlines Co., Order 2010-4-14, April 27, 2010) (assessing a penalty of $200,000, $90,000 suspended on condition of compliance during the subsequent year and $20,000 credited toward remedial measures); Comair, Inc., Order 2010-7-18 (July 26, 2010) (assessing a penalty of $275,000).

[47] Southwest Airlines Co., Order 2010-4-14.

[48] Comair, Inc., Order 2010-7-18.

[49] 14 C.F.R. Part 257.

the process of merging were sanctioned for failing to disclose in online booking channels the trade name under which flights were operated for them by regional carriers.[50] Another carrier was sanctioned for failing, in response to telephone inquiries, to consistently disclose that the requested flights would be operated by a code-share partner.[51]

In addition, effective August 1, 2010, Congress imposed additional requirements for the disclosure of code-share arrangements. Carriers and agents now are specifically required to provide, prior to purchase, the name of each carrier operating a flight segment of an itinerary. Additionally, for online sales, this information must be disclosed in the first display following a search for an itinerary "in a format that is easily visible to a viewer."[52]

Charter Brokers

Since 2004, DOT has entered into numerous consent orders with air charter brokers (i.e., entities that link prospective charter customers with direct air carriers). DOT takes the position that brokers must act on behalf of either the direct air carrier or the charter customer(s); as a result, a broker must not hold out air transportation in its own right (i.e., as a principal) without DOT economic authority.[53] Further, DOT considers it an unfair and deceptive practice for an air charter broker, even if it acts as an agent of a direct air carrier, to make statements in advertisements which might lead consumers to reasonably conclude that the broker itself is a direct air carrier, if the broker lacks any DOT authority in its own right.[54] In 2010, DOT sanctioned two brokers for practices that amounted to directly holding out air transportation,[55] and further sanctioned one of them for false statements about its membership and/or affiliations with various organizations.[56]

Additionally, DOT issued an exemption allowing brokers to act as principals in contracts with the General Services Administration ("GSA") and other government agencies, subject to conditions such as that the brokers must use carriers that themselves hold the requisite authority to conduct air transportation.[57]

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[50] Delta Air Lines, Inc. and Northwest Airlines, Inc., Order 2010-7-4 (July 9, 2010) a penalty of $80,000, half suspended on condition of compliance during the subsequent year).

[51] JetBlue Airways Corp., Order 2010-12-17.

[52] Pub.L. 111-216, Title II, § 210, as codified at 49 U.S.C. § 41712(c).

[53] 49 U.S.C. § 41101.

[54] 14 C.F.R. § 399.80(a).

[55] Luxury Air Jets, Inc., Order 2010-2-17 (February 19, 2010) (assessing a penalty of $40,000, half suspended on condition of compliance during the subsequent year); New Flight Solutions, Inc. d/b/a New Flight Charters, Order 2010-11-23 (November 19, 2010) (assessing a penalty of $40,000, half suspended on condition of compliance during the subsequent year).

[56] Luxury Air Jets, Inc., Order 2010-2-17.

[57] Application of CSI Aviation Services, Inc., for an emergency exemption pursuant to 49 U.S.C. § 40109 to continue to act as an indirect air carrier charter broker under contract to the General Services Administration, Order 2010-3-21 (March 16, 2010) and Order 2010-4-7 (April 17, 2010). In the latter order, DOT clarified that the carriers operating the transportation must have authority under 14 C.F.R. Part 121 or 14 C.F.R. Part 135; authority to conduct "private carriage" under 14 C.F.R. Part 125 is insufficient.

Air Carrier Authority

Citizens of the United States generally are required to obtain authority from DOT before they can engage directly or indirectly in the transportation of passengers or property by aircraft for compensation.[58] In 2010, DOT sanctioned:

- an air ambulance for holding out service to the general public in a manner that it was not authorized to do so,[59] and under a name it was not authorized to utilize;[60]
- another air ambulance for holding itself out as the operator of aircraft that was in fact operated by another company;[61]
- a carrier that had advertised passenger air transportation while its application for such authority still pending at DOT,[62] which is not permitted without DOT authorization.[63]
- two carriers that were only authorized to conduct "private carriage"[64] for holding out service to the general public;[65]
- an air taxi that had conducted scheduled operations of sufficient frequency that it was required to obtain commuter authority,[66] but had failed to do so;[67]
- a public charter operator that advertised, accepted passenger funds, and contracted with a direct air carrier to conduct a flight, without complying with DOT's rules for public charters,[68] which require, among other things, advance approval from DOT;[69] and

[58] 49 U.S.C. § 41101.

[59] Order 83-1-36 provides a blanket exemption for air ambulances to hold out services to the general public, but only under specific conditions, including that it not represent itself to be a direct air carrier rather than an indirect air carrier.

[60] R&M Aviation, Inc., Order 2010-5-1 (May 3, 2010) (assessing a penalty of $60,000).

[61] Mercy Flights, Inc., Order 2010-6-18 (June 18, 2010) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year).

[62] 14 C.F.R. § 201.5.

[63] National Air Cargo Group, Inc. d/b/a/ National Airlines, Order 2010-12-22 (December 20, 2010) (assessing a penalty of $20,000, half suspended on condition of compliance during the subsequent year).

[64] 14 C.F.R. Part 125.

[65] Jet Team Charters, LLC, Order 2010-7-21 (July 30, 2010) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year); A-Liner-8 Aviation, Inc., Order 2010-12-23 (December 20, 2010) (assessing a penalty of $20,000, half suspended on condition of compliance during the subsequent year).

[66] 14 C.F.R. Part 298.

[67] Craig Air Center, Inc., Order 2010-9-23 (September 21, 2010) (assessing a penalty of $25,000, half suspended on condition of compliance during the subsequent year).

[68] 14 C.F.R. Part 380.

[69] City Skies, Inc. and Ronald E. Mays, Order 2010-11-1 (November 3, 2010) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year, jointly against City Skies and Mays, and *(continued…)*

- a foreign air carrier that had operated "fifth-freedom"[70] charter flights without first obtaining a statement of authorization[71] from DOT.[72]

Additionally, foreign air carriers generally are prohibited from taking on, for compensation, at a place in the U.S., passengers or cargo destined for another place in the U.S., a practice known as "cabotage."[73] In 2010, DOT sanctioned a carrier for conducting services during which certain passengers were transported solely between points within the U.S.[74]

Passengers with Disabilities

In 2008, DOT substantially amended its regulations[75] which implement the Air Carrier Access Act ("ACAA"),[76] and which prohibit discrimination by air carriers against passengers on the basis of disability.

Notable changes – most of which took effect in 2009 – include additional requirements to provide assistance to passengers at airports and in-flight, and revising the regulations to explicitly extend most of the requirements to foreign air carriers. In 2010, DOT sanctioned two carriers for failing to provide adequate assistance to passengers with disabilities in enplaning and deplaning aircraft, as well as for failing to provide adequate written responses to disability-related complaints.[77]

In 2010, DOT also issued minor corrections to the rules,[78] and announced that it would allow carriers to "seat-strap" wheelchairs instead of establishing a priority space for them in new

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prohibiting Mays from being involved with an air carrier, ticket agent, or other entity directly or indirectly engaged in air transportation for 20 months).

[70] A fifth-freedom charter is "a charter flight carrying traffic that originates and terminates in a country other than the carrier's home country, regardless of whether the flight operates via the home country." 14 C.F.R. § 212.3

[71] 14 C.F.R. § 212,9.

[72] ACASS Canada Ltd., Order 2010-11-27 (November 24, 2001) (assessing a penalty of $20,000).

[73] 49 U.S.C. § 41703.

[74] 92674 Ontario Limited, d/b/a President Air Charter, Order 2010-10-9 (October 18, 2010) (assessing a penalty of $20,000, half suspended on condition of compliance during the subsequent year).

[75] 14 C.F.R. Part 382.

[76] 49 U.S.C. § 41705. In Elassaad v. Independence Air, Inc., 613 F.3d 121 (3rd Cir. 2010), the court held that the ACAA does not bar a state-law claim for negligence by a disabled passenger who was injured while disembarking an aircraft, because he alleged a tort, and not any discrimination that would be preempted by the statute. But courts typically hold that there is no private right of action for violations of the ACAA itself. See, e.g., Smith v. AirTran Airways, ___ F.Supp.2d ____, 2010 WL 4007597 (M.D.Fla. 2010).

[77] AirTran Airways, Inc., Order 2010-8-14 (August 26, 2010) (assessing a penalty of $500,000 for this and other regulatory violations, $200,000 credited towards remedial measures); JetBlue Airways Corp., Order 2010-12-17 (December 13, 2010) (assessing a penalty of $600,000 for this and other regulatory violations, $250,000 credited towards remedial measures). DOT noted that these violations of the ACAA and Part 382 also amounted to violations of 49 U.S.C. § 41310 (which prohibits unreasonable discrimination in foreign air transportation) and 49 U.S.C. § 41702 (which requires carriers to provide safe and adequate interstate air transportation).

[78] "Nondiscrimination on the Basis of Disability in Air Travel; Corrections," 75 Fed. Reg. 44885 (July 30, 2010).

aircraft, pending a future rulemaking.[79] Additionally, FAA expanded the list of Portable Oxygen Concentrators ("POCs") that it has approved for use in flight (DOT's rules separately require that carriers allow FAA-designated POCs to be used in flight) to include five additional models.[80]

U.S. and foreign carriers also are required to file annual reports with DOT regarding disability-related complaints that they had received.[81] In 2010, DOT sanctioned four carriers for failing to file timely reports,[82] and three carriers for substantially underreporting the complaints that they had received by classifying each as a single complaint, even if the passenger's complaint involved more than one disability-related issue.[83]

Reporting

DOT is authorized to impose various reporting requirements on U.S. and foreign air carriers, including timely reporting about their financial performance and other operational data.[84] In 2010, DOT sanctioned three U.S. carriers that had not complied with the financial reporting requirements of 14 C.F.R. Part 241,[85] one U.S. carrier that had not complied with the

[79] Petition to stay the effectiveness of 14 CFR 382.67 and 14 CFR 382.123(c), Order 2010-6-20 (June 21, 2010). DOT has indicated that future rulemaking will also address various issues not resolved in 2008, such as accessibility standards for airline websites and airport kiosks. See "Nondiscrimination on the Basis of Disability in Air Travel," 73 Fed. Reg. 27614 (May 13, 2008). In 2010, the U.S. Department of Justice indicated that it was considering standards for websites and kiosks generally, pursuant to the Americans with Disabilities Act; it did not indicate whether it was coordinating with DOT. See "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations," 75 Fed. Reg. 43460 (July 26, 2010); "Nondiscrimination on the Basis of Disability by State and Local Government Entities and Places of Public Accommodation; Equipment and Furniture," 75 Fed. Reg. 43452 (July 26, 2010).

[80] "Use of Additional Portable Oxygen Concentrator Devices on Board Aircraft." 75 Fed. Reg. 739 (January 6, 2010); "Use of One Additional Portable Oxygen Concentrator Device on Board Aircraft." 75 Fed. Reg. 39629 (July 12, 2010).

[81] 14 C.F.R. § 382.157. In 2010, 51 U.S. carriers and 119 foreign air carriers filed reports for 2009; the U.S. carriers received 15,496 disability-related complaints and the foreign carriers received 1,572 disability-related complaints, for a total of 17,068 – an increase of 22% over 2008. Approximately half of the complaints – 8,653 – alleged a failure to provide adequate assistance to passengers using wheelchairs. See Annual Report on Disability-Related Air Travel Complaints (September 2010) (http://airconsumer.dot.gov/publications/Gateway1-2009.htm).

[82] TAM Linhas Aereas, S.A., Order 2010-1-8 (January 15, 2010) (assessing a penalty of $5,000, half suspended on condition of compliance during the subsequent year); Bahamasair Holdings Limited, Order 2010-2-27 (February 26, 2010) (assessing a penalty of $15,000, half suspended on condition of compliance during the subsequent year); Cayman Airways Limited, Order 2010-6-21 (June 22, 2010) (assessing a penalty of $50,000, $20,000 suspended on condition of compliance during the subsequent year); Compania Panamena de Aviation, S.A., Order 2010-7-15 (July 20, 2010) (assessing a penalty of $20,000, half suspended on condition of compliance during the subsequent year).

[83] Continental Airlines, Inc., Order 2010-5-9 (May 10, 2010) (assessing a penalty of $100,000); AirTran Airways, Inc., Order 2010-8-14; JetBlue Airways Corp., Order 2010-12-17.

[84] 49 U.S.C. § 41708. See also footnote 9 (carriers failed to file accurate reports of tarmac delays); footnote 48 (carrier failed to file accurate reports of passengers denied boarding).

[85] Falcon Air Express, Inc., Order 2010-5-15 (May 12, 2010) (assessing a penalty of $100,000, half suspended on condition of compliance during the subsequent year); Republic Airline, Inc., Order 2010-9-2 (September 1, 2010) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year); and Shuttle America Corporation, Order 2010-9-3 (September 1, 2010) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year).

traffic reporting requirements of 14 C.F.R. Part 298,[86] and two foreign carriers that had not complied with the traffic reporting requirements of 14 C.F.R. Part 217.[87]

Additional Developments

DOT sanctioned a carrier for failing to maintain current information on file at DOT about its aircraft accident liability insurance;[88] sanctioned another carrier for allowing its insurance to lapse while continuing operations;[89] and sanctioned a travel agent for asserting that taxes were subject to change "according to the airlines" (because carriers do not impose taxes).[90]

DOT dismissed a petition which asserted that carriers should be required to notify passengers traveling to the U.S. of security-related rules applicable to liquids and gels. DOT explained that carriers generally are not responsible for ensuring passenger compliance with security requirements, and furthermore consumers were already on notice of TSA's rules for liquids and gels.[91]

DOT received a request from the trustee responsible for liquidating the assets of Aloha Airlines to clarify whether a carrier was required to refund Passenger Facility Charges ("PFCs") that had been collected for flights not operated due to the carrier's bankruptcy. DOT stated that even though ordinarily no refund of a PFC was due if a non-refundable ticket was not utilized, in the case of a carrier that had not operated the relevant flights and was no longer able to deliver air transportation, a refund of the entire ticket, including PFCs, should be provided to customers, even if PFCs already had been transferred from the carrier's trust to an airport.[92]

Additionally, the Food and Drug Administration ("FDA") released draft guidance for its planned implementation of a statute that would require restaurants and certain "similar retail food establishments" to provide calorie information and other nutrition information for menu items.[93] In the draft, FDA stated that "transportation carriers (e.g., airlines and trains)" are subject to regulation and if they meet "the other relevant characteristics (i.e., 20 or more

[86] Chautaqua Airlines, Inc., Order 2010-9-1 (September 1, 2010) (assessing a penalty of $50,000, half suspended on condition of compliance during the subsequent year).

[87] Aero-Services-Executive, S.A., Order 2010-4-17 (April 30, 2010) (assessing a penalty of $20,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year); Insel Air International B.V., Order 2010-12-32 (December 28, 2010) (assessing a penalty of $20,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year).

[88] Aero-Services-Executive, S.A., Order 2010-4-17.

[89] Friendship Airways, Inc. d/b/a Yellow Air Taxi, Order 2010-11-14 (November 15, 2010) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year).

[90] China Focus, Inc. d/b/a China Focus Travel, Order 2010-9-6.

[91] Petition for Rulemaking of Donald L. Pevsner, Order 2010-1-19 (January 28, 2010).

[92] "Notice – Interpretation of 49 CFR 158.45," 75 Fed. Reg. 17823 (April 7, 2010).

[93] "Draft Guidance for Industry: Questions and Answers Regarding Implementation of the Menu Labeling Provisions of Section 4205 of the Patient Protection and Affordable Care Act of 2010; Availability," 75 Fed. Reg. 52426 (August 25, 2010).

locations, 'doing business under the same name,' and 'offering for sale substantially the same menu items')," they should comply with the menu labeling statute.[94]

Conclusion

DOT's authority to regulate the practices of air carriers, ticket agents, and other entities involved in the aviation industry is wide-ranging. Although DOT's historic focus has been on advertising, the agency monitors other areas of industry activity, and in recent years has begun to emphasize "passenger rights" issues, including tarmac delay requirements. As this article shows, DOT's regulations and enforcement policies are extensive and complex. Those who provide, sell, or otherwise arrange air transportation should take care to familiarize themselves with DOT's regulations and interpretations; to review their practices in light of DOT's guidance; and to keep abreast of new developments, such as those reviewed above.

[94] "Guidance for Industry: Questions and Answers Regarding Implementation of the Menu Labeling Provisions of Section 4205 of the Patient Protection and Affordable Care Act of 2010," docket no. FDA-2010-D-0370-0004. No comments were filed by DOT or representatives of the aviation industry, but the Center for Science in the Public Interest asserted that the statute should be interpreted such that "[a]irlines that serve the same menu items or recipes on more than 20 planes are covered." See docket no. FDA-2010-D-0370-0045.1.