DOT Enforcement of its Prohibitions on Unfair and Deceptive Practices, 2012 (February 2013)

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 municipalities are preempted from imposing their own requirements "related to a price, route, or service of an air carrier."[2] For more than 25 years, DOT has exercised its authority under this statute and 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 or 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. But consent orders are by far the most commonly used tool in DOT's arsenal. In 2012, DOT issued 62 consent orders – the most in DOT history – with the nominal fines attached to those orders totaling $4.135 million.[3]

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. Although DOT's greatest area of concern in the past year continues to have been the "full fare rule" for advertising by air carriers and ticket agents, DOT also has taken enforcement action – and adopted new requirements – regarding an array of practices, ranging from tarmac delay and customer service plans to the reimbursement of passengers for lost baggage pursuant to international standards.

The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with the DOT's rules on the advertising and sale of air transportation.

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This article briefly summarizes the consent orders and other public guidance that were issued by DOT in 2012, as well as certain related agency actions and court decisions.

An especially significant development in 2012 was the DOT's assertion of authority over unfair or deceptive practices by entities that had not traditionally been considered to fall within its jurisdiction. By statute, in addition to air carriers, DOT can regulate "ticket agents."[4] In two consent orders, DOT took the position that entities which provided information about air transportation but did not themselves sell tickets qualified as "ticket agents," based on the circumstances of their operations. The subjects of both investigations disputed DOT's reasoning, but agreed to enter into consent orders to conclude the matters.[5]

Additionally, Congress imposed several new consumer protection requirements by statute, in the FAA Modernization and Reform Act of 2012, which was signed by President Obama on February 14, 2012.[6] Notably, airports are now required to adopt their own tarmac delay plans;[7] DOT previously had only required such plans from air carriers.[8] Congress also directed U.S. and foreign carriers to provide information about how passengers can submit complaints – both to the air carrier and to DOT[9] – and directed them to alert passengers to disinsection information on the DOT website.[10] Other sections of the statute did not immediately impose new requirements, but DOT must within two years develop regulations to allow passengers to carry musical instruments as carry-on or checked baggage on U.S. carriers without paying a fee in addition to that required for comparable baggage,[11] and FAA must within one year develop regulations to require U.S. carriers to disclose the maximum dimensions of a child safety seat that can be used on its aircraft.[12]

The statute also required DOT to establish an "Advisory Committee for Aviation Consumer Protection," composed of representatives of air carriers, airports, state/local governments, and nonprofit public interest groups.[13] The committee issued its first report on October 22, 2012, which made recommendations in eight general categories: (1) travelers with disabilities, (2) discrimination, (3) consumer complaints, (4) information about consumer rights, (5) terms used in contracts of carriage, (6) pricing transparency, (7) ticket agent disclosures, and (8) on-time reporting. To date, no public actions have been taken on the basis of the recommendations.[14]

Enhanced Passenger Protection Requirements

In 2011, DOT adopted a second set of "enhance[d] airline passenger protection" regulations ("EAPP II"), some of which entered into effect in 2011 and some of which entered into effect in 2012.[15] Generally, the EAPP II regulations extended to foreign carriers many rules previously made applicable only to U.S. carriers, and also imposed new requirements on both U.S. and foreign carriers:

- ***Tarmac Delay Contingency Plans.*** Foreign carriers for the first time are required to adopt contingency plans for tarmac delays at U.S. airports, and to post the plans on their websites – requirements that already apply to U.S. carriers. Generally, all air carriers must not allow tarmac delays of more than four hours for international flights or three hours for domestic flights, and must provide updates to passengers every 30 minutes during a tarmac delay.

- ***Tarmac Delay Data Reporting.*** Previously, only U.S. carriers that accounted for at least 1% of domestic scheduled passenger revenues were required to report data about tarmac delays. Now, virtually all U.S. and foreign carriers that operate flights to, from, or within the U.S. are obligated to report tarmac delay data to the Bureau of Transportation Statistics.

- ***Customer Service Plans.*** Foreign carriers for the first time are required to adopt customer service plans for flights to/from the U.S., and to post the plans on their websites – requirements that already apply to U.S. carriers. Generally, air carriers must inform passengers of their policies regarding twelve specific service areas – and for some of these areas, DOT has set new minimum standards. Notably, air carriers must provide a prompt refund of any fees paid by a passenger for services that he is unable to use (i.e., due to a denied boarding situation or flight cancellation); and for reservations made more than 7 days in advance of a flight, passengers

must be allowed to "hold" reservations for at least 24 hours, or obtain a refund during that same time period, without penalty.

- ***Contracts of Carriage.*** Foreign carriers for the first time are required to post their contracts of carriage on their websites – a requirement that already applies to U.S. carriers.

- ***Response to Consumer Problems.*** Foreign carriers for the first time are required to publicize how complaints can be submitted, acknowledge complaints within 30 days, and substantively respond to complaints within 60 days – requirements that already apply to U.S. carriers. DOT also has clarified that air carriers need not respond to complaints posted on social media sites, if they post a disclaimer and alternate contact information for complaints.

- ***Denied Boarding Compensation.*** DOT has increased the maximum compensation that is due to a passenger who is involuntarily denied boarding of a flight within or departing from the U.S. by a U.S. or foreign carrier to $1300. The exact compensation due to a passenger depends on whether the flight is domestic or international, and other circumstances. DOT also has revised the disclosures that must be provided to passengers who are involuntarily denied boarding by a U.S. or foreign carrier, as well as those that must be provided when an air carrier solicits volunteers.[16]

- ***Full Fare Advertising.*** DOT previously allowed U.S. and foreign carriers, as well as ticket agents, to exclude from advertised fares any government-imposed taxes and fees that are assessed on a per-passenger basis, subject to disclosure requirements. DOT now will require all-inclusive advertising of fares; all taxes and fees must be included in the advertised price. Ads still will be allowed to specify what taxes and fees are included in the total price, but the details must be less prominent than the total price. DOT also will codify and expand its existing policy on how fares may be advertised on an "each-way" or "one-way" basis if a round-trip purchase is required, and DOT for the first time has prohibited "opt-out" provisions in advertising (i.e., the pre-selection of ancillary services such as insurance, rental cars, and premium seats is not permitted).[17]

- ***Baggage Fees.*** U.S. and foreign carriers now are required to prominently disclose any fees for carry-on or checked baggage on their websites, as well as to provide a prominent warning about baggage fees in the online booking process and in e-ticket confirmations. Ticket agents, unlike air carriers, are not required to provide specific information about baggage fees, but must provide a prominent warning about baggage fees and alert consumers as to where they can obtain specific information. Additionally, air carriers now must refund any baggage fees that they have collected if a bag is lost, and air carriers now must apply the same baggage fees and rules to all segments of an itinerary, including segments involving interline and code-share partners.

- ***Other Optional Fees.*** DOT also now requires U.S. and foreign carriers to comprehensively disclose fees for optional services (i.e., meals, cancelling or changing reservations, or advanced or upgraded seating) on their websites, as well as to disclose any difference between their optional services and fees and those of the operating air carrier for a code-share flight.

- ***Post-Purchase Price Increases.*** DOT has expanded its restrictions on U.S. and foreign carriers increasing the price of a ticket or air tour package after purchase. Generally, after payment in full, the price can be increased only due to an increase in a government-imposed tax or fee, and only if the passenger agreed to the potential for such an increase prior to purchase. Before payment in full, the price can be increased only if the passenger agreed to the potential for such an increase prior to purchase. This prohibition also applies to fees for carry-on bags and first/second checked bags, but DOT has clarified that it does not apply to other ancillary services.[18]

- ***Flight Status Changes.*** U.S. and foreign carriers are required to promptly notify consumers of flight delays of 30 minutes or more, cancellations, and diversions. The notice must be provided

within 30 minutes of the air carrier becoming aware of the change, and must be provided in their U.S. boarding gate areas; through their telephone reservations systems; on their websites; and on airport display boards under their control.

- ***Choice-of-Forum Provisions***. DOT has codified its existing policy, which prohibits choice-of-forum provisions that require passengers to bring any claims against an air carrier in a specific court.

In 2012, DOT denied two requests to formally extend the deadline for applying the same baggage fees and rules to all segments of an itinerary, but initially granted an informal six-month waiver of the requirements under specified circumstances,[19] and subsequently indicated that it would exercise discretion in enforcement, to the extent that air carriers continued to encounter technological barriers to coordination.[20] A court also denied a challenge that had been brought to some of the EAPP II requirements (specifically, full fare disclosure; the requirement to allow reservations to be "held" for at least 24 hours without penalty; and post-purchase price increases) by air carriers.[21] Additionally, DOT revised the list of "Frequently Asked Questions" that it had issued in 2011 to provide additional guidance about issues such as full fare disclosure; baggage and other optional fees; and post-purchase price increases.[22]

Additionally, three of the new requirements listed above were frequent subjects of DOT consent orders in 2012: tarmac delays, customer service plans, and baggage and other optional fees:[23]

- ***Tarmac Delays***. Two foreign carriers were fined because they allowed a flight to remain on the tarmac at a U.S. airport without allowing the passengers to deplane.[24] In one case, the air carrier also failed to provide food and water within two hours after the aircraft left the gate.[25] Two U.S. carriers also were fined, because they failed to inform passengers aboard a flight that was delayed at a gate that they had an opportunity to deplane,[26] as required by the DOT tarmac delay regulation.[27] Additionally, DOT fined a foreign carrier because it failed to make its tarmac delay contingency plan available on its website,[28] and both a U.S. carrier and a foreign carrier because the tarmac delay contingency plans they had adopted did not include all of the required assurances.[29]

- ***Customer Service Plans.*** Three foreign carriers were fined based on inadequacies related to their customer service plans. One had failed to make its plan available on its website;[30] the others had failed to include in their plans the requirement that for reservations made more than 7 days in advance of a flight, passengers be allowed to "hold" reservations for at least 24 hours, or obtain a refund during that same time period, without penalty.[31]

- ***Baggage and Ancillary Fees.*** Four foreign carriers were fined because they failed to provide a link to baggage fee information on the first screen on which a fee quotation appeared,[32] as required by regulation.[33] In two additional cases, a foreign carrier had provided a link but did not make clear whether the additional baggage fees applied to the displayed fares.[34] A foreign carrier also was fined because it failed to provide a clear and conspicuous link from its home page to disclosures about baggage and other ancillary fees.[35] Lastly, a U.S. ticket agent was fined, even though a link to baggage fee information was provided on the first screen on which a fee quotation appeared, because the location of the disclosure required a user to scroll to the bottom of the page, and therefore the disclosure was not clear and prominent.[36]

As discussed below, DOT also continued to closely monitor airfare advertising – and issued consent orders based on both its prior policy (which allowed some, but not all, taxes and fees to be listed separately) and its new requirement for "all-inclusive" fare advertising.

Additionally, in 2011 DOT advised that the new prohibition on post-purchase price increases[37] requires air carriers and agents to honor "mistake" fares if a consumer's purchase of such a fare had been confirmed by the air carrier or agent.[38] Although no new formal guidance was published in 2012, media reports indicated that DOT on several occasions had influenced air carriers to honor such fares, at

least to the extent that they involved travel to/from the U.S., or an extended stopover in the U.S.[39] But DOT did not require a U.S. carrier to honor frequent flyer tickets that had been made available to some consumers for 4 miles, stating in unpublished correspondence with affected parties that there had been ambiguous circumstances and that "the actual price of the advertised fare was never clearly stated during the booking process."[40]

Air Carrier and Ticket Agent Advertising

All-Inclusive Fare 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."[41]

Historically, DOT interpreted this regulation to allow government-imposed taxes and fees that were assessed on a per-person basis (i.e., the September 11th Security Fee, federal segment taxes, airport Passenger Facility Charges, and U.S. immigration and customs fees)[42] to be listed separately from an advertised fare. But the amount of those taxes and fees was required to be clearly stated elsewhere in the advertisement – or, online, be available via a prominent hyperlink that led directly to the disclosure, with a warning signal such as an asterisk proximate to the fare. Moreover, taxes and fees that were not assessed on a per-passenger basis (such as the 7.5% federal excise tax) or were imposed by air carriers or ticket agents (such as fuel surcharges and service fees) generally had to be included in advertised fares.

However, the enhanced airline passenger protection rules adopted in 2011 and effective in 2012 revised the full fare rule. Air carriers and ticket agents are no longer allowed to separately state any taxes and fees; all-inclusive advertising of fares is required.[43] Four carriers[44] and four agents[45] were fined because they failed to comply with the new requirements in online advertising after the new requirements became effective. One agent also had published non-compliant print advertising.[46]

Additionally, although all-inclusive fare advertising now is required, once the full price is stated advertising may – as a supplemental matter – specify the taxes and fees that are included in the total price. But the disclosure of those taxes and fees must be less prominent than the total price, and must be accurate.[47] In 2012, DOT fined a ticket agent that had displayed "base" fares – that did not include taxes and fees – more prominently than total fares.[48] DOT also issued guidance which stated that if such disclosures are made, air carrier-imposed fees should not be implied to be government-imposed charges – i.e., they should not be included in a sum described as "taxes and fees," which suggests that all of the charges included in that sum are government-imposed.[49]

DOT also issued new guidance warning that to the extent all-inclusive advertising now is required, carriers and agents may not round down a fare to a whole dollar amount less than the exact fare; either the exact fare must be publicized, or any rounding must be up an amount greater than the exact fare.[50]

Government-Imposed Taxes and Fees

Although all-inclusive fare advertising is now required, in 2012 DOT continued to issue consent orders fining carriers and agents for violations of its prior policy, which allowed some – but not all – taxes and fees to be identified separately. In particular, ten carriers[51] and five agents[52] were fined for failing to adequately disclose the taxes and fees that had been excluded from fares advertised on their websites and/or in print under DOT's prior policy; i.e., by either providing full information about the nature and amount of taxes and fees on the same page, or by warning consumers that taxes and fees were additional and providing a hyperlink that led directly to a statement of the nature and amount of those taxes and fees.

In addition, DOT sanctioned an air carrier for double-charging passengers for Passenger Facility Charges (PFCs). Although at the time the violations occurred PFCs could be identified separately, the carrier had initially included PFCs in online fare quotations, and then re-added them to that price before purchase.[53]

Fuel and Other Surcharges

The full fare rule, both before and after the changes implemented by EAPP II, prohibits air carriers and ticket agents from listing fuel surcharges separately from an advertised fare; carrier-imposed surcharges must be included in advertised fares. In 2012, DOT fined three air carriers and four ticket agents for failing to correctly handle fuel surcharges. The air carriers had failed to include fuel surcharges in fares promoted online.[54] Additionally, one of the air carriers had included the fuel surcharges under the rubric "taxes," even while asserting that there were no applicable air carrier-imposed "surcharges".[55] Two of the agents had failed to include fuel surcharges in print fare advertising,[56] and the third agent had failed to include fuel surcharges in online fare advertising.[57] The fourth agent had offered an online "flexible dates tool" that did not consistently include the fuel surcharges applicable to fares; DOT noted that this problem had an additional misleading consequence for consumers, because results displayed without including fuel surcharges were incorrectly suggested to be less expensive than results displayed with fuel surcharges included.[58]

Additionally, DOT reiterated its position that if a fuel surcharge is identified to consumers (i.e., after an all-inclusive fare has been stated, and less prominently), it "must accurately reflect a reasonable estimate of the per-passenger fuel costs incurred by the carrier above some baseline calculated based in such factors as the length of the trip, varying costs of fuel, and number of flight segments involved."[59]

Looking beyond fuel surcharges, DOT consistently has required any and all other mandatory air carrier-imposed service fees to be included in advertised fares. In 2012, a U.S. carrier was fined because it excluded in online advertising a "convenience fee" that was mandatory for tickets purchased online.[60] A ticket agent also was fined because it excluded a service fee from online fare advertising.[61] Additionally, a foreign carrier was fined for failing to provide conspicuous written notice on or with tickets that a processing fee would be charged for refunds,[62] and DOT held that a seller of international tour packages could not reserve the right to add a surcharge post-purchase if the dollar declined against the Euro by more than 5%.[63] DOT also expressed concern that an agent did not warn consumers until the final stage of the online booking process that a selected itinerary required a paper ticket, and a delivery fee would be assessed – but did not specify what disclosures should have been made, and when.[64]

"Free" Fares

Under DOT's previously-effective interpretation of the full fare rule, an advertisement could promote "free" air transportation (e.g., a frequent flyer award or companion ticket) so long as it prominently disclosed any conditions that must be met – including the payment of taxes and fees that DOT generally allowed to be listed separately from advertised fares. In 2012, DOT fined two air carriers for violations of this policy that occurred prior to the effective date of the changes implemented by EAPP II.[65] Both promoted "free" fares online, but did not disclose until a later stage in the booking process that the payment of taxes and fees was required. In addition, one had excluded a "convenience fee" from the "free" fares that was mandatory for tickets purchased online;[66] the other had excluded carrier-imposed fuel surcharges.[67] In both cases, DOT noted that under its prior policy, such fees could not be excluded from an advertised fare, and thus could not be excluded from a "free" fare.

DOT also issued a guidance letter regarding how the term "free" could be used in advertisements pursuant to its new requirement that fare advertising be all-inclusive.[68] Generally, no government-imposed taxes and fees or mandatory carrier-imposed charges can be payable if a frequent-flyer award or other fare is to be identified as "free". DOT also noted that, for frequent flyer awards, if government taxes and fees or mandatory carrier-imposed charges are payable, they must be given the same prominence as mileage award requirements; for example, "25,000 miles plus from $5.00 in gov. fees," if in fact those amounts are accurate.

Round-Trip Purchase Conditions

DOT previously had advised carriers and agents that, as a matter of policy, if an advertised "one-way" or "each-way" fare was only available when a round-trip is purchased, that requirement must be disclosed prominently and proximate to the advertised fare. The EAPP II rules have codified and expanded this requirement.[69] Notably, for such advertising, the use of the phrase "one-way" no longer is allowed, although the phrase "each-way" may be used.[70] In 2012, an air carrier was fined for advertising fares on an each-way basis but insufficiently disclosing the round-trip purchase requirement; it appeared in small type, with abbreviations and inconspicuously placed beneath a prominent illustration.[71] Additionally, in a guidance document, DOT noted concern that an air carrier was offering outbound each-way fares that appeared to be deceptively low in comparison to return flight fares ($102 outbound and $629 return). DOT cautioned that each-way fares should not be used as bait – i.e., an unrealistically low outbound fare to induce passengers to purchase a disproportionately expensive round-trip fare.[72]

Fare Availability

DOT historically has required carriers and agents, when advertising a fare, to ensure that a "reasonable" number of seats are available at that fare for the period during which the fare is being offered. However, DOT acknowledged that because air carriers' fares vary over time, ticket agents that arrange air 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.[73]

Air Tour Packages

To the extent that a tour package includes an air transportation component, DOT asserts jurisdiction over the entire package. In 2012, four of the consent orders that DOT issued based on full-fare advertising requirements noted that the violations at issue had involved tour packages.[74]

Code-Sharing Disclosures

DOT regulations for many years have required air carriers and ticket agents to disclose to consumers, prior to purchase, if a flight involves a code-share arrangement.[75] But, in 2010, Congress added a further disclosure requirement – namely that for online bookings, the identity of the operating carrier must be disclosed "on the first display of the Web site following a search of the requested itinerary in a format that is easily visible to a viewer."[76] In 2011, DOT issued a notice providing guidance as to how carriers and agents could comply with this requirement. Generally, code-share disclosure now must be made on the same screen as, and immediately adjacent to, an itinerary; disclosure through a hyperlink or rollover is not sufficient.[77]

In 2012, six ticket agents were fined for failing to adequately disclose code-share arrangements online. In one case, DOT specifically noted that code-share disclosures had been provided in itinerary displays only if a consumer used a "hover text" feature;[78] in two additional cases, code-share disclosures were said not to have been provided at any stage of the booking process.[79] In the other three cases, DOT specified only that no code-share disclosures were provided in itinerary displays.[80] Notably, one of the agents that had not provided code-share disclosures at any stage of the booking process had previously been fined for the same violation. In mitigation, the agent stated that a third-party software patch had, without its knowledge, undone the corrections that it previously had implemented; DOT, however, imposed a fine considerably larger than those imposed in the other code-share-related consent orders.[81]

Passengers with Disabilities

In 2008, DOT substantially amended the regulations[82] which implement the Air Carrier Access Act ("ACAA"),[83] and which prohibit discrimination by air carriers against passengers on the basis of

disability. Notable changes – most of which took effect in 2009 – include expanded requirements for air carriers to provide enplaning and deplaning assistance to passengers, and revisions to the regulations to explicitly extend most of the requirements to foreign carriers.[84] In 2012, DOT solicited public comments on a revised edition of its Technical Assistance Manual, which had been revised to incorporate the new requirements.[85]

DOT fined a U.S. carrier because it failed to advise a disabled passenger that it would be unable to accommodate him using procedures that had been permitted on prior flights operated by the same carrier; specifically, the carrier deviated from its prior practice and did not allow him to use seatbelt extenders to secure his body in an upright position. Additionally, the carrier failed to provide pre-boarding and adequate enplaning/deplaning assistance to the same passenger; among other violations, he fell out of an aisle chair that was missing proper restraints when he was deplaned.[86]

DOT also fined three air carriers for failing to adequately categorize disabilities-related complaints that they received – based on the type of disability and nature of the complaint; failing to submit accurate annual reports about disabilities-related complaints to DOT because of the aforementioned under-coding; and failing to provide dispositive written responses to disabilities-related complaints within 30 days.[87]

Additionally, DOT dismissed a formal complaint which alleged that a passenger had been discriminated against based on his disability.[88] DOT concluded that the air carrier had acted properly in refusing to accept his dog as a service animal, because the passenger had failed to provide a credible verbal assurance or other evidence of its status, and that he was denied transportation due to his abusive behavior and not his disability.[89]

Charter Flights

DOT imposes various requirements on the operation and sale of charter flights.[90] In 2012, it fined an entity that organized a charter program (referred to as the "public charter operator") that violated multiple requirements.[91] Namely, it had held out service in a manner which suggested that it was an air carrier;[92] it had failed in advertising on its website to disclose the name of the direct air carrier that would operate the flights and to refer consumers to its operator-participant contract;[93] and it had failed to properly escrow consumer payments.[94] DOT also fined both a foreign carrier and a subsidiary for holding out charter flights for which the subsidiary – which had no DOT authority – was identified as the operator, even though the parent carrier did have DOT authority and was the actual operator of the flights.[95]

Additionally, DOT fined three carriers that had been the direct air carriers for a charter program organized by a third party, which had shut down suddenly. In all three cases, the carriers were found to have failed to make efforts to return stranded passengers to their points of origin and to have cancelled flights within 10 days of their scheduled departure dates,[96] contrary to DOT regulations.[97] Two of the carriers also were fined for failing to ensure that full payment had been received from the public charter operator before conducting flights and for failing to monitor the public charter operator's general compliance,[98] also contrary to DOT regulations.[99] DOT also submitted a claim against the public charter operator in its bankruptcy proceedings,[100] which was indefinitely suspended pending the determination of the bankruptcy estate's assets.[101] At the end of the year, DOT announced new standards for its review and approval of public charter prospectuses, said to be intended to prevent similar circumstances from occurring again.[102]

DOT also granted a limited exemption from escrow and other requirements for charter flights organized by a private golf and ski community on behalf of its members,[103] and – as in past election years – issued a blanket exemption from its charter regulations to presidential election campaigns.[104] Additionally, DOT re-issued an advisory letter which provides guidance to colleges and other organizations interested in arranging charter flights, such as to football bowl games. Generally, the letter notes that the direct air carrier must have appropriate authority, as well as that additional requirements or concerns may be applicable if seats are sold to the general public and/or a broker is used to arrange the transportation.[105] Additionally, if tickets to a game or other special events are offered in conjunction with a

flight, the entity offering them must be in physical possession of the tickets or have a written contract, directly traceable to the game/event sponsor, for sufficient tickets.[106]

Finally, 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.[107] In 2012, DOT sanctioned an entity that lacked any such authority for holding out air transportation in its own right, including by bidding on charter solicitations in its own name; publishing language and photos on its website which suggested that it was an air carrier; and misrepresenting – after winning a bid – that it had an arrangement with a carrier to operate the flights.[108]

International Baggage Liability

DOT policy is that for international flights, the Montreal Convention[109] does not allow air carriers to disclaim or arbitrarily limit liability for the loss, damage, or delay of valuable items – or for the loss or delay of fragile items – in checked baggage. Accordingly, DOT has warned that air carrier tariffs and contracts of carriage which denied liability for electronics, cameras, jewelry, etc. must be modified.[110] In 2012, three foreign carriers were sanctioned for non-compliance, including by limiting reimbursement of incidental expenses to $75 per day regardless of actual expenses;[111] stating in its contract of carriage that no reimbursement would be provided for electronics, jewelry, or other valuables;[112] actually refusing reimbursement for electronics, jewelry, or other valuables;[113] and also refusing to pay incidental expenses to passengers if their baggage was lost on a return flight to their country of residence.[114]

Additionally, a foreign carrier was fined for failing to state the correct liability limits for lost baggage under the Montreal Convention;[115] it stated that the minimum liability was 1000 SDRs, even though an inflation adjustment that took effect on December 30, 2009 had increased the minimum to 1131 SDRs.[116]

Air Carrier Authority

Citizens of the United States[117] 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.[118] In 2012, DOT fined an air taxi that had operated sufficiently frequent scheduled services[119] that it should have obtained a DOT license as a commuter air carrier.[120] Another air taxi was fined because it only had authority to conduct intrastate operations but held out its services by the Internet and telephone to customers from outside the state, including connecting passengers.[121] DOT also fined a prospective carrier that sold memberships in a club that would offer discounts after service began,[122] because the carrier did not yet have DOT authority.[123]

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."[124] In 2011, DOT fined a Canadian carrier for conducting services during which certain passengers were transported solely between points within the U.S.[125] DOT also fined a Canadian air taxi for operating a fifth-freedom charter flight between a point in a third country and points in the U.S. without obtaining authority from DOT to do so.[126]

Air Carrier Reporting

DOT is authorized to impose various reporting requirements on U.S. and foreign carriers, including timely reporting about their financial performance and other operational data.[127] Additionally, U.S. and foreign carriers are required to file annual reports with DOT regarding disabilities-related complaints that they had received.[128] As discussed above, in 2012, DOT fined three carriers for submitting reports that were inaccurate due to their failure to adequately categorize disabilities-related complaints that they received.[129] Two additional carriers were fined for submitting such reports late or not at all.[130] DOT also fined a foreign carrier for failing to report a tarmac delay of more than four hours.[131]

In addition, DOT held a public meeting to solicit input on a pending rulemaking that would impose new reporting requirements, including for ancillary passenger revenues; mishandled baggage; and mishandled wheelchairs and other mobility devices used by passengers with disabilities.[132] DOT also solicited comments on proposals to revise its reporting requirements for incidents involving animals who die, are injured, or are lost during air transportation by U.S. carriers,[133] including to require carriers to report data on the total number of animals transported as well as to expand the definition of "animal" to include all cats and dogs, regardless of whether they were pets.[134]

Miscellaneous

- ***Discrimination.*** In addition to the prohibition on unfair or deceptive practices, another statute enforced by DOT prohibits a carrier from engaging in discrimination based on race, color, national origin, religion, sex or ancestry.[135] In 2012, a carrier was sanctioned for refusing transportation to two passengers. DOT noted that while the initial decision to remove them for secondary screening was not discriminatory, the carrier's failure to allow them to continue on the same flight after they were cleared for travel was discriminatory.[136]

- ***Refunds.*** A foreign carrier was fined because it failed to forward credits to passenger credit cards within seven days of receiving a complete refund application from passengers,[137] as required by DOT regulations.[138]

- ***Trade Names.*** In 2012, DOT fined a Canadian air taxi for holding out services under a "doing business name" that had not been registered with the Department.[139] This decision was included in the same order that fined the air taxi for facilitating unauthorized services by a sister company (as described above), but was considered to be a separate offense.[140]

- ***Change Fees.*** A formal complaint and petition for rulemaking requested that DOT prohibit carriers from imposing change fees and/or require that a full refund be offered if a carrier changed its flight schedule between the time that a ticket was purchased and the date of travel. DOT denied the request, noting that schedules are not part of a contract of carriage and that absent compelling evidence of consumer deception or unfair methods of competition, the marketplace should govern carrier decisions.[141] However, DOT noted that carriers were required to give notice of all conditions that restrict refunds or impose cancellation penalties.[142]

- ***Hazardous Materials.*** In 2011, the FAA and the Pipeline and Hazardous Materials Safety Administration (PHMSA) jointly adopted a regulation that required carriers to ensure that passengers were provided information about hazardous materials prohibited aboard aircraft during the purchase process; moreover, effective January 1, 2013, passengers would be required to indicate that they understand the requirements before completing the purchase process.[143] In 2012, FAA and PHMSA convened a public meeting to discuss uncertainty about how carriers should comply with the new requirements,[144] and subsequently deferred the deadline for obtaining an indication of understanding from passengers – but not the requirement that disclosures be made in the purchase process.[145]

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 consumer-oriented "passenger rights" issues, including tarmac delay requirements. As this article demonstrates, 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.

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

[2] 49 U.S.C. § 41713. In 2012, a federal appeals court clarified that federal preemption encompassed foreign air carriers in addition to U.S. carriers, see In re Air Cargo Shipping Services Litigation, 697 F.3d 154 (2d Cir. 2012). Federal district courts held that claims brought against a carrier based on a tarmac delay were preempted, see Joseph v. JetBlue Airways Corp., 2012 WL 1204070 (N.D.N.Y. April 11, 2012), and that unfair trade and consumer protection claims brought against a carrier based on the terms and conditions of its "$9 Fare Club" were preempted, see Madorsky v. Spirit Airlines, 2012 WL 6049095 (E.D.Mich. December 5, 2012). DOT itself held that an agricultural inspection fee as imposed by Hawaii – which dictated how carriers bill, collect, and remit fees on behalf of shipper customers – was preempted. See Hawaii Inspection Fee Proceeding, Declaratory Order, Order 2012-1-18 (January 24, 2012).

[3] 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 in 2012 are noted throughout this article. Additionally, in an end-of-year press release, DOT incorrectly stated that it had issued 49 consent orders and imposed $3.264 million in fines. See DOT Issues Two Fines Against Passenger Carriers for Tarmac Delay Violations, no. 01-13 (January 2, 2013).

[4] 49 U.S.C. § 40102(a)(45) ("a person … that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for air transportation").

[5] In re Travelzoo Inc., Consent Order, Order 2012-11-29 (November 26, 2012) (assessing a penalty of $50,000, half suspended on condition of compliance during the subsequent year); In re Trip Advisor, LLC, Consent Order, Order 2012-7-16 (July 13, 2012) (assessing a penalty of $80,000, half suspended on condition of compliance during the subsequent year).

[6] Pub. L. 112-95.

[7] 49 U.S.C. § 42301.

[8] 14 C.F.R. § 259.4.

[9] 49 U.S.C. § 42302. See also Guidance on the FAA Modernization and Reform Act Requirements that U.S. and Foreign Air Carriers Place Consumer Complaint-Related Information on their Websites and Refer Consumers to the Department's Website on the Use of Insecticides in Passenger Aircraft (April 19, 2012) (noting that DOT had not established the toll-free hotline required by the statute).

[10] 49 U.S.C. § 42303.

[11] 49 U.S.C. § 41724.

[12] Pub. L. 112-95, § 412.

[13] Pub. L. 112-95, § 411.

[14] Report of the Advisory Committee on Aviation Consumer Protection, doc. no. DOT-OST-2012-0087-0119 (October 22, 2012). DOT provided the committee with presentations summarizing its overall consumer protection standards (doc. no. DOT-OST-2012-0087-0002), its disabilities standards (doc. no. DOT-OST-2012-0087-0025), and its tarmac delay standards (doc. no. DOT-OST-2012-0087-0026).

[15] Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110 (April 25, 2011); Enhancing Airline Passenger Protections: Limited Delay of Effective Date for Certain Provisions, 76 Fed. Reg. 45181 (July 28, 2011); Enhancing Airline Passenger Protections: Limited Extension of Effect Date for Full Fare Price Advertising, 76 Fed. Reg. 78145 (December 16, 2011); Enhancing Airline Passenger Protections: Full Fare Price Advertising Requirements, 76 Fed. Reg. 82115 (December 30, 2011). DOT also has informally indicated that it intends to release a third set of proposals in 2013.

[16] In Giuffre v. Delta Air Lines, Inc., 2012 WL 3988981 (E.D.N.Y. September 11, 2012), the court held that the plaintiffs were not entitled to denied boarding compensation because they were late in checking-in; they had not been denied passage due to overbooking.

[17] Section 1104 of the FAA Modernization and Reform Act of 2012 (Pub. L. 112-95) amended 26 U.S.C. § 7275, a section of the tax code that separately purports to limit how taxes and fees are displayed. But it is uncertain if the amendment has actually imposed any new requirements – or if DOT would consider the enforcement of the statute to be its responsibility. DOT has noncommittally stated that the amendment "may bear on what may be included under a breakout of taxes in air fare advertising." Additional Guidance on Airfare/Air Tour Price Advertisements, 77 Fed. Reg. 11618, 11619 n.3 (February 27, 2012) (emphasis added).

[18] Guidance on Price Increases of Ancillary Services and Products Not Purchased with the Ticket (December 28, 2011).

[19] Petition to Delay the Effective Date of 14 C.F.R. § 399.85(c) and 399.87, Response to Petition, 2012-1-2 (January 6, 2012).

[20] Request to Extend the Compliance Relief Provided by Order 2012-1-2, Response to Request to Extend DOT Order 2012-1-2, Order 2012-7-23 (July 19, 2012).

[21] Spirit Airlines, Inc., et al. v. DOT, 687 F.3d 403 (D.C.Cir. 2012).

[22] Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2) (revised January 11, 2012, and June 15, 2012).

[23] DOT also issued two notices clarifying the additional requirements imposed by the FAA Modernization and Reform Act of 2012, most notably that U.S. airports also adopt plans, and that both U.S. carriers and U.S. airports submit their plans to DOT. See Submission of U.S. Carrier and Airport Tarmac Delay Contingency Plans to Department of Transportation for Approval, 77 Fed. Reg. 12644 (March 1, 2012) and Submission of U.S. Carrier and Airport Tarmac Delay Contingency Plans to Department of Transportation for Approval, 77 Fed. Reg. 27267 (May 9, 2012).

[24] In re Pakistan International Airlines Corporation, Consent Order, Order 2012-9-21 (September 19, 2012) (assessing a penalty of $150,000, half suspended on condition of compliance through November 1, 2014); In re Copa Airlines, Inc., Consent Order, Order 2012-12-18 (December 31, 2012) (assessing a penalty of $150,000, half suspended on condition of compliance during the subsequent year).

[25] Copa Airlines, Order 2012-12-18.

[26] In re JetBlue Airways Corporation, Consent Order, Order 2012-8-25 (August 20, 2012) (assessing a penalty of $90,000, half suspended on condition of compliance during the subsequent year); In re Virgin America, Inc., Consent Order, Order 2012-12-20 (December 31, 2012) (assessing a penalty of $55,000, half suspended on condition of compliance during the subsequent year, and an additional $8000 creditable against vouchers issued to passengers).

[27] 14 C.F.R. § 259.4.

[28] In re Air India, Limited, Consent Order, Order 2012-5-4 (May 3, 2012) (assessing a penalty of $80,000, half suspended on condition of compliance during the subsequent year).

[29] JetBlue Airways, Order 2012-8-25; Copa Airlines, Order 2012-12-18. DOT also stated that as of August 25, 2012, warning letters about various tarmac delay issues had been sent to five additional carriers. See doc. no. DOT-OST-2012-0087-0026.

[30] Air India, Order 2012-5-4.

[31] In re EgyptAir Airlines Company, Consent Order, Order 2012-8-26 (August 21, 2012) (assessing a penalty of $60,000, half suspended on condition of compliance during the subsequent year); In re JSC Aeroflot, Consent Order, Order 2012-9-1 (September 4, 2012) (assessing a penalty of $60,000, half suspended on condition of compliance during the subsequent year).

[32] In re Concessionaria Vuela Compania de Aviacion, Consent Order, Order 2012-6-15 (June 22, 2012) (assessing a penalty of $130,000, half suspended on condition of compliance during the subsequent year); In re Santa Barbara Airlines, Consent Order, Order 2012-8-4 (August 2, 2012) (assessing a penalty of $80,000, half suspended on condition of compliance during the subsequent year); In re Royal Jordanian Airlines, Consent Order, Order 2012-8-28 (August 21, 2012) (assessing a penalty of $70,000, half suspended on condition of compliance during the subsequent year); In re Qantas Airways Limited, Consent Order, Order 2012-10-12 (October 11, 2012) (assessing a penalty of $100,000, half suspended on condition of compliance during the subsequent year).

[33] 14 C.F.R. § 399.85.

[34] EgyptAir, Order 2012-8-26; Compagnie Nationale Royal Air Maroc, Consent Order, Order 2012-8-27 (August 21, 2012) (assessing a penalty of $60,000, half suspended on condition of compliance during the subsequent year).

[35] Air India, Order 2012-5-4.

[36] In re Orbitz Worldwide, LLC, Consent Order, Order 2012-8-24 (August 20, 2012) (assessing a penalty of $50,000, half suspended on condition of compliance during the subsequent year).

[37] 14 C.F.R. § 399.88.

[38] Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2) (revised January 11, 2012, and June 15, 2012).

[39] See, e.g., El Al to Honor Mistake Fares to Israel (August 9, 2012) (http://travel.usatoday.com/flights/post/2012/08/el-al-scrambling-after-fare-glitch-discounts-israel-flights/820206/1).

[40] An example of an article publicizing the initial error and the carrier's refusal to honor the tickets is DOT

Investigates After United Says it Will Kill Award Tickets It Sold for 4 Miles (July 18, 2012) (http://blogs.wsj.com/middleseat/2012/07/18/dot-investigates-after-united-says-it-will-kill-award-tickets-it-sold-for-4-miles/).

[41] 14 C.F.R. § 399.84. Additionally, an overlapping prohibition for public charter operators appears at 14 C.F.R. § 380.27, and an overlapping prohibition for ticket agents appears at 14 C.F.R. § 399.80(f). Historically, the latter prohibition rarely was cited by DOT, but it has been included in some – but not all – orders involving ticket agents that also relied upon § 399.84.

[42] On November 5, 2012, the IRS announced inflation adjustments for certain air transportation taxes, effective for tickets issued on or after January 1, 2013 (Rev. Proc. 2012-41). The fee for domestic segments was increased from $3.80 to $3.90, international arrival and departure taxes increased from $16.70 to $17.20, and the tax for domestic segments beginning or ending in Alaska or Hawaii increased from $8.40 to $8.60.

[43] Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110 (April 25, 2011).

[44] In re Philippine Airlines, Inc., Consent Order, Order 2012-8-3 (August 2, 2012) (assessing a penalty of $80,000, half suspended on condition of compliance during the subsequent year); Royal Jordanian Airlines, Order 2012-8-28; In re Aerolineas Argentinas S.A., Consent Order, Order 2012-8-33 (August 29, 2012) (assessing a penalty of $50,000); Aeroflot, Order 2012-9-1.

[45] In re Pacific for Less, Inc., Consent Order, Order 2012-8-2 (August 2, 2012) (assessing a penalty of $20,000, half suspended on condition of compliance through August 15, 2013); In re Travel Today, Inc., Consent Order, Order 2012-8-34 (August 30, 2012) (assessing a penalty of $10,000, half suspended on condition of compliance during the subsequent year); In re 734758 Ontario Limited, d/b/a FlightNetwork.com, Consent Order, Order 2012-10-4 (October 5, 2012) (assessing a penalty of $15,000); In re STI Travel, LLC, Consent Order, Order 2012-11-27 (November 23, 2012) (assessing a penalty of $20,000, half suspended on condition of compliance through January 31, 2014).

[46] Travel Today, Order 2012-8-34.

[47] Id.

[48] Trip Advisor, Order 2012-7-16.

[49] Additional Guidance on Airfare/Air Tour Price Advertisements, 77 Fed. Reg. 11618 (February 27, 2012).

[50] Guidance on the Use of Rounding in Air Fare Advertisements, 77 Fed. Reg. 13172 (March 5, 2012).

[51] In re AirTran Airways, Inc., Consent Order, Order 2012-1-1 (January 4, 2012) (assessing a penalty of $60,000, half suspended on condition of compliance during the subsequent year); In re Icelandair Group, Consent Order, Order 2012-1-8 (January 18, 2012) (assessing a penalty of $50,000, half suspended on condition of compliance during the subsequent year); In re Polskie Linie Lotnicze LOT S.A., Consent Order, Order 2012-1-13 (January 23, 2012) (assessing a penalty of $60,000, half suspended on condition of compliance during the subsequent year); In re Asiana Airlines, Consent Order, Order 2012-1-14 (January 23, 2012) (assessing a penalty of $70,000, half suspended on condition of compliance during the subsequent year); In re Finnair Plc, Consent Order, Order 2012-1-21 (January 27, 2012) (assessing a penalty of $35,000, half suspended on condition of compliance during the subsequent year); In re Allegiant Air, LLC, Consent Order, Order 2012-2-10 (February 15, 2012) (assessing a penalty of $100,000, half suspended on condition of compliance during the subsequent year); In re Qantas Airways Limited, Consent Order, Order 2012-3-1 (March 2, 2012) (assessing a penalty of $40,000, half suspended on condition of compliance during the subsequent year); In re Vision Airlines, Inc., Consent Order, Order 2012-7-13 (July 12, 2012) (assessing a penalty of $75,000, half suspended on condition of compliance during the subsequent year); In re British Airways Plc, Consent Order, Order 2012-10-1 (October 1, 2012) (assessing a penalty of $250,000, half suspended on condition of compliance during the subsequent year); In re Societe Air France, Consent Order, Order 2012-11-1 (November 1, 2012) (assessing a penalty of $85,000, half suspended on condition of compliance during the subsequent year).

[52] In re Imagine Tours & Travel, L.L.C., Consent Order, Order 2012-1-5 (January 9, 2012) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year); In re Unister USA, LLC, d/b/a Flights24.com, Consent Order, Order 2012-2-23 (March 1 2012) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year); In re Worldwide Travel, Inc., Consent Order, Order 2012-10-13 (October 11, 2012) (assessing a penalty of $15,000, half suspended on condition of compliance during the subsequent year); In re Eros Group, Inc., Consent Order, Order 2012-12-17 (December 28, 2012) (assessing a penalty of $30,000, half suspended on condition of compliance through March 15, 2014); In re World Travel Network, LLC, Consent Order, Order 2012-12-19 (December 28, 2012) (assessing a penalty of $10,000, half suspended on condition of compliance through January 31, 2014).

[53] In re Aviation Services, Ltd., d/b/a Freedom Air, Consent Order, Order 2012-1-22 (January 27, 2012) (assessing a penalty of $20,000, half suspended on condition of compliance during the subsequent year).

[54] Asiana Airlines, Order 2012-1-14; British Airways, Order 2012-10-1; Air France, Order 2012-11-1.

[55] Air France, Order 2012-11-1.

[56] Imagine Tours, Order 2012-1-5; World Travel Network, Order 2012-12-19.

[57] STI Travel, Order 2012-11-27.

[58] Travelocity.com LP, Consent Order, Order 2012-7-30 (July 27, 2012) (assessing a penalty of $180,000, half suspended on condition of compliance during the subsequent year).

[59] Additional Guidance on Airfare//Air Tour Price Advertisements, 77 Fed. Reg. 11618 (February 27, 2012).

[60] Allegiant Air, Order 2012-2-10.

[61] Flights24.com, Order 2012-2-23.

[62] In re Bahamasair Holdings Limited, Consent Order, Order 2012-7-1 (July 3, 2012) (assessing a penalty of $70,000, half suspended on condition of compliance during the subsequent year).

[63] Imagine Tours, Order 2012-1-5.

[64] Travelocity.com, Order 2012-7-30.

[65] Allegiant Air, Order 2012-2-10; British Airways, Order 2012-10-1.

[66] Allegiant Air, Order 2012-2-10.

[67] British Airways, Order 2012-10-1. DOT also noted that its violations continued after the effective date of the changes implemented by EAPP II.

[68] Guidance on the Use of the Term "Free" in Air Fare Advertisements and Disclosure of Consumer Costs in Award Travel (May 17, 2012) (http://www.dot.gov/sites/dot.dev/files/docs/Use_of_the_word_free_in_fare_advertisements.pdf).

[69] 14 C.F.R. § 399.84(b).

[70] Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110.

[71] British Airways, Order 2012-10-1.

[72] Additional Guidance on Airfare/Air Tour Price Advertisements, 77 Fed. Reg. 11618 (February 27, 2012).

[73] Imagine Tours, Order 2012-1-5.

[74] Imagine Tours, Order 2012-1-5; British Airways, Order 2012-10-1; Pacific For Less, Order 2012-8-2; STI Travel, Order 2012-11-27.

[75] 14 C.F.R. Part 257.

[76] 49 U.S.C. § 41712(c).

[77] Guidance on Disclosure of Code-Sharing Service Under Recent Amendments to 49 U.S.C. § 41712 (January 10, 2011) (http://www.dot.gov/sites/dot.dev/files/docs/Notice.41712.codeshare.8.pdf).

[78] Trip Advisor, Order 2012-7-16.

[79] In re Solar Tours, Inc., Consent Order, Order 2012-9-19 (September 17, 2012) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year); In re Airtrade International, Inc., Consent Order, Order 2012-11-36 (assessing a penalty of $150,000, half suspended on condition of compliance during the subsequent year).

[80] Flights24.com, Order 2012-2-23; Travelzoo, Order 2012-11-29; Eros Group, Order 2012-12-17.

[81] Airtrade International, Order 2012-11-36.

[82] 14 C.F.R. Part 382.

[83] 49 U.S.C. § 41705. The ACAA typically is interpreted to preempt disability claims from being brought against air carriers under state law, see, e.g., Compass Airlines, LLC v. Montana Human Rights Bureau, 2012 WL 6726428 (D.Mont. December 27, 2012) (enjoining state board from exercising jurisdiction over discrimination claim); Segalman v. Southwest Airlines, __ F.Supp.2d __, 2012 WL 5289308 (E.D.Cal. October 24, 2012) (holding that there is no private right of action under the ACAA).

[84] Foreign carriers may request a waiver if a DOT requirement conflicts with foreign law. In 2012, DOT granted one such request (from Qantas) in docket DOT-OST-2008-0272 because Australian law required the carrier to provide individual briefings on emergency procedures to passengers with disabilities; in contrast, the U.S. generally prohibits

individual briefings. Additionally, 14 C.F.R. § 382.10 allows carriers to request an "equivalent alternative determination" which permits them to meet the requirements of Part 382 through alternate procedures. In 2012, DOT granted five such requests in docket DOT-OST-2008-0273. Four decisions exempted carriers from movable armrest requirements for business/first class seats, because passengers could be transferred to the seats without being lifted over the armrest (AeroGal, Asiana, Korean Air Lines, and TACA Peru); two decisions exempted carriers from in-cabin wheelchair stowage requirements, because special procedures would be used to stow wheelchairs in the cargo hold (Avianca and LAN Colombia).

[85] Nondiscrimination on the Basis of Disability in Air Travel: Draft Technical Assistance Manual, 77 Fed. Reg. 39800 (July 5, 2012).

[86] In re Frontier Airlines, Inc., Consent Order, Order 2012-4-15 (April 13, 2012) (assessing a penalty of $50,000).

[87] In re Spirit Airlines, Inc., Consent Order, Order 2012-1-20 (January 27, 2012) (assessing a penalty of $100,000, half suspended on condition of compliance during the subsequent year); Allegiant Air, Order 2012-2-10; In re Virgin America, Inc., Consent Order, Order 2012-5-22 (May 24, 2012) (assessing a penalty of $100,000, half suspended on condition of compliance during the subsequent year).

[88] Formal Third Party Complaint and Request to Commence Enforcement Proceedings of Don Edward Williams, Order Dismissing Third Party Complaint and Request to Commence Enforcement Proceedings, Order 2012-9-7 (September 7, 2012).

[89] DOT also posted (in docket DOT-OST-2012-0030) but took no action on a petition to expand the type of passengers that were entitled to a bulkhead seat pursuant to 14 C.F.R. § 382.81 to include passengers with medical conditions that cause pain from prolonged sitting in a flex-kneed position.

[90] 14 C.F.R. Part 212 and Part 380.

[91] In re Mauiva, LLC, Consent Order, Order 2012-11-3 (November 6, 2012) (assessing a penalty of $50,000, half suspended on condition of compliance during the subsequent year)

[92] 49 U.S.C. § 41101.

[93] 14 C.F.R. § 380.30.

[94] 14 C.F.R. § 380.34.

[95] In re Pilatus PC-12 Centre, Canada, Inc., Consent Order, Order 2012-4-16 (April 13, 2012) (assessing a penalty of $20,000, half suspended on condition of compliance during the subsequent year); In re Private Air, Inc., Consent Order, Order 2012-4-17 (April 13, 2012) (assessing a penalty of $25,000, half suspended on condition of compliance during the subsequent year).

[96] In re Caribbean Sun Airlines d/b/a World Atlantic Airlines, Consent Order, Order 2012-7-31 (July 27, 2012) (assessing a penalty of $180,000, half suspended on condition of compliance during the subsequent year); In re TEM Enterprises d/b/a Xtra Airways, Consent Order, Order 2012-10-3 (October 2, 2012) (assessing a penalty of $300,000, half suspended on condition of compliance during the subsequent two years); Vision Airlines, Order 2012-12-1.

[97] 14 C.F.R. § 212.3, § 380.43.

[98] World Atlantic Airlines, Order 2012-7-31; Xtra Airways, Order 2012-10-3.

[99] 14 C.F.R. § 212.3, § 380.11, § 380.40.

[100] In re Southern Sky Air & Tours, LLC, d/b/a Direct Air, Department of Transportation's Chapter 11 Administrative Claim, D.Mass.Bankr. docket no. 12-40944 (July 31, 2012).

[101] In re Southern Sky Air & Tours, LLC, d/b/a Direct Air, Order Approving Joint Motion to (i) Continue Response Deadline and Hearing on the Department of Transportation's Chapter 11 Administrative Claim and (ii) Defer Determination of the Department of Transportation's Chapter 11 Administrative Claim, D.Mass.Bankr. docket no. 12-40944 (August 20, 2012).

[102] Guidance on Review and Approval of Public Charter Prospectuses (November 13, 2012) (http://www.dot.gov/sites/dot.dev/files/docs/direct%20air%20policy%20notice%20final.docx). DOT subsequently delayed the implementation date of the new requirements, and modifying their terms, in response to industry feedback. See Guidance on Review and Approval of Public Charter Prospectuses: Extension of Effective Date to January 14, 2013 (December 11, 2012) (http://www.dot.gov/sites/dot.dev/files/docs/policy_edits_extension_final.docx); Public Charter Prospectuses, 78 Fed. Reg. 5239 (January 24, 2013).

[103] In re The Yellowstone Mountain Club, L.L.C., Order Granting Exemption, Order 2012-2-1 (February 1, 2012).

[104] Blanket Waiver to U.S. Certificated Air Carriers and Presidential Campaign Organizations, Order Granting

Waivers, Order 2012-1-10 (January 13, 2012).

[105] Notice of Department of Transportation Requirements Regarding Flights to College Bowl Games and other Special Events, (November 28, 2012) (http://www.dot.gov/sites/dot.dev/files/docs/Bowl%20Game%20Guidance%202012.doc).

[106] 14 C.F.R. Part 381.

[107] 49 U.S.C. § 41101.

[108] In re I-Jet Aviation LLC, Consent Order, Order 2012-10-20 (October 19, 2012) (assessing a penalty of $50,000, half suspended on condition of compliance during the subsequent year).

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

[110] 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).

[111] In re Alitalia Compagnia Aerea Italiana SpA, Consent Order, Order 2012-1-15 (January 23, 2012) (assessing a penalty of $80,000, half suspended on condition of compliance during the subsequent year).

[112] In re Air China, Limited, Consent Order, Order 2012-9-18 (September 17, 2012) (assessing a penalty of $40,000, half suspended on condition of compliance during the subsequent year); In re Jetstar Airways Pty Limited, Consent Order, Order 2012-10-2 (October 5, 2012) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year).

[113] British Airways, Order 2012-10-1; In re Malaysia Airline System Bhd, Consent Order, Order 2012-11-26 (November 21, 2012) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year).

[114] British Airways, Order 2012-10-1.

[115] Bahamasair Holdings Limited, Order 2012-7-1.

[116] Inflation Adjustments to Liability Limits Governed by the Montreal Convention Effective December 30, 2009, 74 Fed. Reg. 59017 (November 16, 2009).

[117] In 2012, DOT opened an investigation of whether a U.S. air taxi, VIH Cougar Helicopters, was actually under the control of a Canadian citizen. At the end of the year, DOT was considering whether the restructuring of the company could resolve and actually had resolved the problem. See docket no. DOT-OST-2012-0022.

[118] 49 U.S.C. § 41101.

[119] Pursuant to 14 C.F.R. Part 298, air taxis may operate no more than four round-trips per week in any single market according to a published schedule.

[120] In re Twin Air Calypso Limited, Inc., Consent Order, Order 2012-2-20 (February 24, 2012) (assessing a penalty of $70,000, half suspended on condition of compliance during the subsequent year).

[121] In re Scott Air LLC d/b/a Island Air Express, Consent Order, Order 2012-12-16 (December 28, 2012) (assessing a penalty of $20,000, half suspended on condition of compliance during the subsequent year).

[122] In re People Express Airlines, Inc., Consent Order, Order 2012-5-7 (May 9, 2012) (assessing a penalty of $10,000).

[123] In addition to the statute, 14 C.F.R. § 201.5 also imposes restrictions on advertising by prospective carriers. In 2012 DOT also docketed a report noting that AirTran had disclosed that it had briefly advertised flights that it did not have authority to operate, but no enforcement action followed. See Memorandum from Susan L. Kurland, Assistant Secretary for Aviation and International Affairs, doc. no. DOT-OST-2012-0001-0011 (February 17, 2012).

[124] 49 U.S.C. § 41703.

[125] In re International Jet Management GmbH, Consent Order, Order 2012-3-18 (March 29, 2012) (assessing a penalty of $25,000, half suspended on condition of compliance during the subsequent year).

[126] In re Swift Jet, Inc., Consent Order, Order 2012-4-24 (April 19, 2012) (assessing a penalty of $10,000, half suspended on condition of compliance during the subsequent year). DOT also noted that Volaris briefly operated unauthorized flights in certain U.S.-Mexico markets, because it failed to obtain a timely renewal of its authority, but no

enforcement action followed. See Notice of Action Taken, doc. no. DOT-OST-2012-0091-0003 (June 6, 2012).

[127] 49 U.S.C. § 41708.

[128] 14 C.F.R. § 382.157. In 2012, 49 U.S. carriers and 119 foreign air carriers filed reports for 2011; the U.S. carriers received 18,953 disability-related complaints and the foreign carriers received 2,419 disability-related complaints, for a total of 21,372 – an increase of approximately 3% over 2010. DOT noted that 11,010 of the complaints – more than 50% – alleged a failure to provide adequate assistance to passengers using wheelchairs. See Annual Report on Disability-Related Air Travel Complaints (June 2012).

[129] Spirit Airlines, Order 2012-1-20; Allegiant Air, Order 2012-2-10; Virgin America, Order 2012-5-22.

[130] Vision Airlines, Order 2012-7-13; In re AeroSvit Airlines, Consent Order, Order 2012-11-6 (November 8, 2012) (assessing a penalty of $20,000, half suspended on condition of compliance during the subsequent year).

[131] Copa Airlines, Order 2012-12-18.

[132] Reporting of Ancillary Airline Passenger Revenues, Notice of Public Meeting, 77 Fed. Reg. 25105 (April 27, 2012).

[133] 14 C.F.R. § 234.13. For 2012, U.S. carriers reported 29 deaths, 26 injuries, and 1 loss.

[134] Reports by Air Carriers on Incidents Involving Animals During Air Transport, 77 Fed. Reg. 38747 (June 29, 2012).

[135] 49 U.S.C. § 40127(a). See also 49 U.S.C. § 41702 and 49 U.S.C. § 41310.

[136] In re Atlantic Southeast Airlines, Inc., Consent Order, Order 2012-5-2 (May 2, 2012) (assessing a penalty of $25,000 and also requiring civil rights training for the flight and cabin crew of the flight at issue).

[137] Bahamasair Holdings Limited, Order 2012-7-1.

[138] 14 C.F.R. Part 374.

[139] Pilatus PC-12 Centre Canada, Order 2012-4-16.

[140] 14 C.F.R. § 294.31.

[141] Petition for Rulemaking and Third-Party Complaint of Donald L. Pevsner, Esq., Order Denying Petition and Dismissing Complaint, Order 2012-11-4 (November 6, 2012).

[142] 14 C.F.R. § 253.7. For foreign carriers, the applicable regulation is actually 14 C.F.R. § 221.107(d).

[143] Hazardous Materials: Harmonization with the United Nations Recommendations on the Transport of Dangerous Goods: Model Regulations, International Maritime Dangerous Goods Code, and the International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air, 76 Fed. Reg. 3308 (January 19, 2011).

[144] Air Carrier Hazardous Materials Passenger Notification Requirements: Acceptable Means of Compliance, 77 Fed. Reg. 43141 (July 23, 2012).

[145] Advisory Notice: Notice of Intent to Provide Compliance Date Extension for Air-Passenger Notification of Hazardous Material Restrictions, 77 Fed. Reg. 69926 (November 21, 2012). Subsequently, the new deadline was specified to be January 1, 2015. See Hazardous Materials: Harmonization with the United Nations Recommendations on the Transport of Dangerous Goods: Model Regulations, International Maritime Dangerous Goods Code, and the International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air, 78 Fed. Reg. 1101 (January 7, 2013).

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