



DOT Enforcement of its Prohibitions on Unfair and Deceptive Practices, 2014 (January 2015)

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 nearly 30 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); or a formal enforcement action before a DOT Administrative Law Judge (ALJ). DOT also periodically issues public notices setting forth its policies for advertising and other practices, and can issue new regulations via rulemaking proceedings. Consent orders are by far the most commonly used tool in DOT’s arsenal. In 2014, DOT issued 24 consent orders – the fewest since 2008 – but the nominal fines attached to them totaled \$2,675,000.³

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 one of DOT’s areas of greatest concern continues to have been its “full fare rule” disclosure requirements for advertising by air carriers and ticket agents, DOT also has taken enforcement action regarding an array of other requirements, ranging from consumer protection rules newly adopted in 2011 to DOT’s long-standing rules for passengers with disabilities.⁴



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.

For further information regarding the matters discussed in this article, please contact:

Jol A. Silversmith
(202) 973-7918
jasilversmith@zsrllaw.com



Zuckert, Scoutt & Rasenberger, L.L.P.
888 17th Street, N.W., Suite 700
Washington, D.C. 20006
Telephone: (202) 298-8660
Fax: (202) 342-0683
www.zsrllaw.com

This document has been prepared by Zuckert, Scoutt & Rasenberger, L.L.P. to inform its clients and other parties of legal developments of interest. The views expressed herein do not constitute legal opinion or advice and should not be used as such. © 2015 Zuckert, Scoutt & Rasenberger, L.L.P.

DOT Prohibitions on Unfair and Deceptive Practices, 2014

Page 2 of 13

This article briefly summarizes the consent orders and other public guidance that were issued by DOT in 2014, as well as certain related agency actions and court decisions, and actions by other agencies that also will affect the disclosures made by and practices of carriers and ticket agents.

Enhanced Passenger Protection Requirements

In 2014, released for public comment a set of proposals – organized in ten general categories – to adopt new regulations intended to further enhance its existing protections for passengers.⁵ The most significant proposals included:

- Codifying DOT’s interpretation of the “ticket agents” over which it has jurisdiction to include metasearch engines and similar intermediaries;
- Requiring carriers to disclose information about ancillary fees for baggage and seat assignments to agents, and in turn requiring agents to display that information to consumers; and
- Requiring large agents to adopt customer service commitments, similar to certain of those that carriers already are required to adopt.

Numerous responsive comments were filed by carriers, agents, and other interested parties – some in support and some in opposition to the proposals. As of the end of 2014, the rulemaking remains pending. Additionally, in 2014 DOT issued consent orders premised on passenger protection requirements that the agency previously had adopted, most recently in 2011.⁶

- **Tarmac Delay Plans.** DOT requires carriers to adopt tarmac delay plans that, among other mandates, generally prohibit aircraft from remaining on the tarmac for more than four hours (in the case of international flights) or three hours (in the case of domestic flights); require food and water to be distributed to passengers within two hours of the start of the delay; and require that passengers be notified every 30 minutes if they have an opportunity to deplane during a tarmac delay.⁷ In 2014, five carriers were fined for violations of one or more of these requirements. Three carriers failed to notify passengers during a tarmac delay at a gate that they had an opportunity to deplane.⁸ Three carriers had allowed a tarmac delay for an international flight to continue for more than four hours.⁹ One carrier had failed to timely provide food and water to passengers during a tarmac delay, and DOT also concluded that it also had failed to devote sufficient resources to implementing the plan, a separate mandate.¹⁰ Finally, one carrier was fined because it had not submitted a report of a tarmac delay,¹¹ as separately required by DOT.¹²

Additionally, an air carrier trade association requested a limited waiver of the tarmac delay rules for delays that occurred on November 1, 2013, due to an incident which closed a runway at Los Angeles International Airport; it subsequently was withdrawn, based on DOT’s finding that none of the thirteen delays which occurred that day actually had violated DOT requirements.¹³

- **Baggage and Ancillary Fees.** The requirements include that carriers must disclose their baggage fees and restrictions, as well as other ancillary fees; ticket agents also have a disclosure obligation, but it is limited to key baggage-related information such as the fees for the first and second checked bag and any carry-on bag.¹⁴ In 2014, a ticket agent was fined because it failed to provide information about baggage fees as required.¹⁵
- **Complaints.** The requirements include that a carrier must acknowledge the receipt of complaints from consumers within 30 days and must provide a substantive response within 60 days.¹⁶ A carrier was fined because it failed to respond to complaints within the required timeframe.¹⁷
- **Post-Purchase Price Increase.** The requirements include that consumers must be provided a prominent warning if a price increase is possible prior to full payment as well as that written consent be obtained from consumers about the potential increase;¹⁸ moreover, even if a warning is provided and consent is obtained, the only circumstance under which a price increase is

DOT Prohibitions on Unfair and Deceptive Practices, 2014

Page 3 of 13

permissible after full payment has been made is if it is due to an increase in a government-imposed tax or fee.¹⁹ Two ticket agents were fined because they failed to prominently disclose the possibility of and/or legally assess a post-purchase price increase.²⁰

Additionally, DOT also continued to closely monitor airfare advertising – and issued consent orders based on its requirement for “all-inclusive” fare advertising, as updated in 2011, as discussed further below.

Carrier and 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.”²¹ Historically, DOT interpreted this regulation to allow government-imposed taxes and fees that were assessed on a per-person basis (e.g., the September 11th Security Fee, federal segment taxes, airport Passenger Facility Charges, and U.S. immigration and customs fees) to be listed separately from an advertised fare.²² However, in 2011 DOT revised its position. Air carriers and ticket agents are no longer allowed to separately state government-imposed taxes and fees; all-inclusive advertising of fares is required (although information about the taxes and fees that are – and must be – included in the full price may be provided).²³ In 2014, DOT further clarified that the rule did not apply to corporate booking tools, which involve private contractual arrangements.²⁴
- **Government-Imposed Taxes and Fees.** In 2014, a carrier²⁵ and an agent²⁶ were fined because they advertised prices for air transportation or packages that included air transportation which did not include all of the applicable government taxes and fees. Additionally, in 2014 the Transportation Security Administration (TSA) announced revisions to the amount and methodology of the September 11th Security Fee,²⁷ pursuant to a Congressional directive.²⁸ Two trade associations subsequently filed a lawsuit, alleging that the TSA’s methodology was inconsistent with the statute – i.e., even though the fee nominally was to be paid on a one-way basis, depending on a passenger’s itinerary, TSA could require a passenger to pay the fee more than twice for a round-trip itinerary.²⁹ Congress subsequently further amended the underlying statute to cap the fee at two payments per round-trip.³⁰
- **Fuel and Other Carrier/Agent Surcharges.** Even before the changes announced in 2011, carrier- and agent-imposed surcharges were required to be included in advertised fares. In 2013, DOT fined a carrier³¹ and three agents³² that had advertised prices which excluded carrier- and/or agent-imposed fees. An additional agent was fined because, prior to the regulatory revisions announced in 2011, it excluded agent-imposed fees from its advertised prices.³³ Additionally, a third-party complaint alleged that a carrier – through a website operated by an international airline alliance – misrepresented its fuel surcharges as being government-imposed taxes. DOT concurred that the displays were non-compliant – but because the carrier and alliance took prompt remedial action, no fine was assessed, and the DOT further explained that the actual amount of the fuel surcharge had been shown to be justified.³⁴ DOT also declined to take action on a third-country complaint about how fuel surcharges were displayed on the website of a foreign carrier in its home country, because the displays were outside DOT’s jurisdiction,³⁵ and docketed two further complaints which alleged that other carriers had misrepresented its own fees as being government-imposed taxes.³⁶
- **Fare Conditions.** DOT historically has required important conditions applicable to the purchase of air transportation or a package that includes transportation to be disclosed. In 2014, DOT fined an agent which failed to disclose that its advertised tour prices were conditioned on double occupancy of rooms,³⁷ and another which failed to disclose both a double-occupancy condition and that its prices were “cash only.”³⁸
- **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, but DOT has not set specific thresholds. In 2014, a carrier was fined because it advertised fares for which there was no availability.³⁹

DOT Prohibitions on Unfair and Deceptive Practices, 2014

Page 4 of 13

- **Rounding.** DOT has warned 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.⁴⁰ In 2014, an agent was fined because it rounded down fares to lower whole dollar amounts.⁴¹
- **Each Way Fares.** DOT historically, as a matter of policy, required carriers and agents to prominently and proximately disclose if a fare advertised on an “each way” basis could only be purchased as part of a round-trip; in 2011, this requirement was codified.⁴² In 2014, a carrier was fined because it had advertised such fares without a prominent and proximate disclosure.⁴³

Public Charter Flights

DOT imposes various requirements on the sale and operation of public charter flights, above and beyond those generally applicable, primarily intended to protect payments made by consumers.⁴⁴ In 2014, DOT fined a public charter operator that had not escrowed consumer payments as required by DOT rules,⁴⁵ and fined another public charter operator and its principal because it had failed to issue timely refunds and had issued vouchers without specific travel dates, also in violation of DOT rules.⁴⁶ DOT also reminded colleges and universities organizing flights to college bowl games and other special events that they should ensure that any public charter operator or charter broker that they utilize complies with DOT requirements, as well as that they must themselves comply with DOT’s requirements for public charter operators if they resell individual seats on those flights.⁴⁷

Additionally, in 2013, an escrow agent submitted a petition for rulemaking, proposing that escrow agents be allowed to manage the security and depository requirements for public charter programs in lieu of banks,⁴⁸ in order to address the problem that many were not willing to do so given the extensive recordkeeping and compliance requirements.⁴⁹ In 2014, DOT responded that it was not prepared to grant the request, because escrow agents are not subject to the same protections as banks – e.g., there is no FDIC insurance should an escrow agent’s operations fail.⁵⁰

Passengers with Disabilities

In 2008, DOT substantially amended its regulations⁵¹ which implement the Air Carrier Access Act (“ACAA”),⁵² and which prohibit discrimination by air carriers against passengers on the basis of disability.⁵³ Among the requirements are that larger U.S. and foreign carriers are required to file annual reports with DOT regarding disability-related complaints that they have received.⁵⁴ In 2014, DOT fined a carrier that had failed to respond to disabilities-related complaints within the timeframe required by DOT rules,⁵⁵ and delayed the enforcement of a new rule regarding placarding requirement connected with the stowage of folding wheelchairs aboard aircraft⁵⁶ from January 12, 2014 until April 12, 2014.⁵⁷ DOT also docketed a complaint which alleged that a carrier had refused to accommodate his service dog as required by DOT rules.⁵⁸

DOT also granted equivalent alternative determinations and conflict-of-law waivers to various carriers. In regard to the equivalent alternative determinations, the agency determined that three carriers had proposed adequate alternate procedures for transporting wheelchairs in the hold instead of in-cabin,⁵⁹ and another had proposed adequate alternate procedures for providing accessible seats without movable armrests.⁶⁰ In regard to the conflict-of-law waivers, DOT granted waivers from the relevant sections of the ACAA regulations to a carrier that under its homeland law was required to limit the number of passengers with disabilities aboard a flight,⁶¹ and to a carrier that under its homeland law was required to impose more extensive requirements for safety assistants than were permitted by DOT.⁶² However, in response to certain other carriers’ applications, DOT denied waivers of the ACAA-based requirements to assist passengers with stowing and retrieving mobility aids, and to timely return checked mobility aids,⁶³ and of the general prohibition on requiring a passenger to provide advance notice of their travel.⁶⁴ In these cases, DOT concluded that there was no conflict of law between the ACAA regulations and the homeland law applicable to those carriers. Additionally, DOT issued blanket denials of applications from multiple European carriers for waivers of the ACAA-based requirement to allow the use of POCs in-flight⁶⁵ and the prohibition on refusing to provide transportation on the basis of a disability.⁶⁶ For both regulations, DOT

DOT Prohibitions on Unfair and Deceptive Practices, 2014

Page 5 of 13

noted that there was an incorporated exemption for actions taken based on foreign government requirements; additionally, DOT noted that no actual conflict had been shown for the POC requirement.

Finally, in 2013 DOT adopted requirements to ensure that air carrier websites and kiosks at U.S. airports are accessible to passengers with disabilities.⁶⁷ A lawsuit was filed by an advocacy group which asserted that the new requirements did not go far enough; DOT has sought the dismissal of the case on procedural grounds.⁶⁸

Agency Jurisdiction

In 2014 DOT continued to assert authority over unfair or deceptive practices by entities that had not traditionally been understood to fall within its jurisdiction. By statute, in addition to air carriers, DOT can regulate “ticket agents.”⁶⁹ DOT has taken the position that a website which provides information about air transportation but does not itself sell tickets qualifies as a “ticket agent,” based on the circumstances of its operations, including its receipt of commissions. In a consent order, a website operator disputed DOT’s reasoning, but agreed to settle the matter.⁷⁰ As discussed above, a pending rulemaking would codify DOT’s definition of a “ticket agent.”⁷¹ Additionally, DOT clarified the scope of its jurisdiction to regulate the websites of foreign carriers. The agency dismissed a complaint against a foreign carrier premised on how tax and surcharges were displayed on the carrier’s home country website, which was not marketed to U.S. consumers.⁷² But in a case involving another foreign carrier, DOT indicated that it considered all fares marketed on a foreign carrier’s U.S. website to be within its jurisdiction, even if they are for travel that both originates and terminates outside the U.S.⁷³

Air Carrier Authority

Both air carriers that are citizens of the United States and foreign air carriers are required to obtain authority from DOT before they can engage directly or indirectly in the U.S.-related transportation of passengers or property for compensation.⁷⁴ In 2014, three foreign carriers were fined because they had operated unauthorized international flights⁷⁵ (two of which specifically were partners in an unauthorized code-share relationship).⁷⁶ DOT also noted, in its approval of another foreign carrier’s authority to serve the U.S., that it prematurely had sold tickets for its services before they were approved,⁷⁷ and DOT declined a third-party request to clarify the terms of a 2013 order that had penalized yet another carrier on the basis that it was nominally a U.S. carrier but actually was controlled by a foreign citizen.⁷⁸ The agency also reminded colleges and universities organizing flights to college bowl games and other special events that they should ensure that they contract with a carrier that has both DOT and Federal Aviation Administration (FAA) authority to operate such flights.⁷⁹

Code-Sharing Disclosures

DOT regulations for many years have required air carriers and ticket agents to disclose to consumers, prior to purchase, whether a flight involves a code-share arrangement.⁸⁰ 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.”⁸¹ 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.⁸² In 2014, a ticket agent and a carrier were fined for failing to adequately disclose code-share arrangements in response to telephone inquiries,⁸³ and another ticket agent was fined for failing to adequately disclose code-share arrangements in its online itinerary results.⁸⁴ Additionally, DOT initiated an enforcement action, docketed before an ALJ, against another carrier which was alleged to have failed to adequately disclose code-share arrangements in response to telephone inquiries.⁸⁵

Air Carrier Reporting

DOT is statutorily authorized to impose various reporting requirements on U.S. and foreign carriers, including the tarmac delay-related and disabilities-related reporting requirements discussed above. DOT

DOT Prohibitions on Unfair and Deceptive Practices, 2014

Page 6 of 13

also requires the timely reporting of certain statistics related to air carrier finances and traffic, and other operational data.⁸⁶ In 2014, a carrier was fined because it had failed to timely file reports.⁸⁷ DOT also announced revisions, effective in 2015, to its requirements for the reporting of incidents involving animals during air transportation.⁸⁸

Family Assistance Plans

Both U.S. and foreign air carriers are required to adopt and adhere to plans for assisting the families of passengers involved in an aircraft accident.⁸⁹ In 2014, a foreign air carrier was fined because it failed to adhere to specific requirements of its plan after an accident, and generally had failed to commit sufficient resources to carrying out its plan.⁹⁰

Baggage Liability

The minimum liability limit for the loss or damage of baggage entrusted to air carriers on flights within the U.S. is \$3,400 per passenger.⁹¹ In 2014, a carrier was fined because its boarding passes stated a lower, outdated limit.⁹²

Special Event Tours

DOT re-issued its annual warning to consumers that an air tour operator selling “special event tours” – such as for a college bowl game or other special event – must have the game/event tickets in its possession or a written contract for the tickets if they are sold in connection with a flight; if a tour operator fails to comply with these requirements, consumers are entitled to a full refund, including airfare.⁹³

Third Party Complaints

In a notice dated 2013 but not actually made available until 2014, DOT provided guidance to carriers regarding how they should respond to complaints filed on behalf of passengers by third parties (i.e., to confirm that a complainant has authority to act on behalf of a passenger).⁹⁴

Commonly Used Terms

In 2014 DOT made available a list of terminology commonly used in air transportation in order to assist consumers in understanding rules applicable to their travel.⁹⁵

Refunds

DOT regulations require that if a ticket is refundable, a carrier must promptly issue a refund in response to a consumer request.⁹⁶ In 2014, DOT continued to pursue an enforcement action, docketed before an ALJ, against a carrier and its principal that allegedly had failed to issue refunds as required.⁹⁷

Voice Calls

In 2014, DOT solicited public comments on whether and how it should restrict or prohibit the use of mobile phones for in-flight voice calls; a formal rulemaking proposal is anticipated in 2015.⁹⁸

Frequent Flyer Programs

DOT historically has declined to regulate the terms of frequent flyer programs.⁹⁹ But in 2014, the DOT's Inspector General announced that at the request of a member of Congress it would audit how DOT required carriers to disclose the terms of their programs.¹⁰⁰ Additionally, a pending docketed complaint alleges that a carrier had penalized a consumer's frequent flyer account after accusing him of making fictitious reservations for the ulterior purpose of obtaining upgrades for his own travel.¹⁰¹

DOT Prohibitions on Unfair and Deceptive Practices, 2014

Page 7 of 13

Change Fees

A pending docketed pleading seeks to reopen a prior proceeding in which DOT was asked to investigate the reasonableness of, and impose limitations on, the change fees assessed by carriers.¹⁰² Two pending docketed complaints similarly assert that passengers had been improperly assessed change fees after their original flights were cancelled.¹⁰³

Consumer Committee

At the direction of Congress, in 2012 DOT established an Advisory Committee for Aviation Consumer Protection,¹⁰⁴ which submitted a set of recommendations to DOT later in the year,¹⁰⁵ followed by additional recommendations in 2014. In 2014 the committee also held its sixth meeting, at which it discussed the status of its 2012 and 2014 recommendations; the DOT's pending proposal to regulate voice calls; the impact of government-imposed taxes and fees on air transportation; and the impacts of mergers and consolidations on air transportation.¹⁰⁶

IATA Resolution 787

In 2013, the International Air Transport Association (IATA) submitted to DOT for approval a resolution adopted at an international conference that would establish new standards for the distribution of airfare-related information. IATA and its allies asserted that the changes would be pro-competitive; opponents argued that the new standards would make airfares less transparent and urged DOT to reject the resolution, for reasons including that it allegedly would facilitate deceptive practices.¹⁰⁷ In 2014, DOT approved the resolution with conditions and caveats, including that the approval of the standard should not be construed as DOT approval of any agreements among carriers for a method or business model of the distribution of air transportation.¹⁰⁸

FAA/PHMSA - Hazardous Materials

In 2011, the FAA and the Pipeline and Hazardous Materials Safety Administration (PHMSA) jointly adopted a regulation which required air carriers to ensure that passengers, at the time of ticket purchase, are provided information about hazardous materials prohibited aboard aircraft, including for purchases made through agents. Additionally, as originally adopted the regulation would have required passengers to affirmatively indicate that they understand the requirements before completing the purchase process, effective January 1, 2013.¹⁰⁹ The agencies subsequently delayed the effective date of the affirmation requirement until January 1, 2015,¹¹⁰ and made available guidance for compliance with both the notice and affirmation requirements.¹¹¹ Subsequently, the agencies announced plans to modify the notice and affirmation requirements for bookings made by telephone.¹¹²

FAA – Seating Requirements

The FAA solicited public comments on whether and how it should require U.S. carriers to make available on their websites seat width information which would assist passengers in determining whether child safety seats can be used.¹¹³ The FAA also docketed a petition which requested that the agency establish minimum standards for seat pitch and seat width.¹¹⁴

APHIS – User Fees

The Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) solicited public comments on its plan to reduce the APHIS fee for international passengers arriving in the U.S. (collected on behalf of APHIS by carriers and agents) from \$5.00 to \$4.00, but at the same time to increase the per-aircraft inspection fee (assessed directly against carriers) from \$70.75 to \$225.00.¹¹⁵

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

DOT Prohibitions on Unfair and Deceptive Practices, 2014

Page 8 of 13

monitors other areas of industry activity, and in recent years has begun to emphasize consumer-oriented “passenger rights” issues – in 2014, both by continuing to enforce newly-enacted rules and proposing further regulations. As set forth above, 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 *Northwest, Inc. v. Ginsberg*, 134 S.Ct. 1422 (2014), the Supreme Court confirmed that this language generally should be given a broad interpretation. Courts also held that claims premised on a reduction in frequent flier benefits were preempted, see *Lagen v. United Continental Holdings, Inc.*, ___ F.3d ___, 2014 WL 7251178 (7th Cir. December 22, 2014), and that claims premised on European Union regulations were preempted by implication, see *Giannopoulos v. Iberia Lineas Aereas de Espana, S.A.*, 17 F.Supp.3d 743 (N.D.Ill. 2014). But in *Ray v. Spirit Airlines*, 767 F.3d 1220 (11th Cir. September 23, 2014), the court noted that the preemption language could only be invoked against states and municipalities, and not against other federal laws. See also *General Refining Corp. v. Federal Express Corp.*, 993 F.Supp.2d 254 (E.D.N.Y. 2014) (claims premised on mistake found not to be preempted); *Amerijet International, Inc. v. Miami-Dade County, Florida*, 7 F.Supp.3d 1231 (S.D.Fla. 2014) (living wage ordinance not directly applicable to carriers found not to be preempted).

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, and also sometimes waives a portion of the penalties that is commensurate with mitigation expenses; the specific penalties and waivers assessed in 2014 are noted throughout this article.

⁴ An additional significant development in 2014 was that DOT announced that Blane Workie was selected to be the new Assistant General Counsel for Aviation Enforcement and Proceedings – succeeding Samuel Podberesky, who had held the position since 1986.

⁵ *Transparency of Airline Ancillary Fees and Other Consumer Protection Issues*, 79 Fed. Reg. 29970 (May 23, 2014); *Transparency of Airline Ancillary Fees and Other Consumer Protection Issues*, 79 Fed. Reg. 45731 (August 6, 2014); *Transparency of Airline Ancillary Fees and Other Consumer Protection Issues*, 79 Fed. Reg. 57489 (September 25, 2014)

⁶ *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).

⁷ 14 C.F.R. § 259.4.

⁸ *In re Qantas Airways Limited*, Consent Order, Order 2014-1-11 (January 15, 2014) (assessing a penalty of \$90,000, half suspended on condition of compliance during the subsequent year); *In re British Airways PLC*, Consent Order, Order 2014-4-8 (April 8, 2014) (assessing a penalty of \$225,000, half suspended on condition of compliance during the subsequent year); *In re Air Europa Lineas Aereas, S.A.U.*, Consent Order, Order 2014-5-5 (May 14, 2014) (assessing a penalty of \$140,000, half suspended on condition of compliance during the subsequent year).

⁹ *In re British Airways*, Order 2014-4-8; *In re Air Europa*, Order 2014-5-5; *In re Air Canada rouge*, Consent Order, Order 2014-10-23 (October 28, 2014) (assessing a penalty of \$90,000, half suspended on condition of compliance during the subsequent year).

¹⁰ *In re Air Canada rouge*, Order 2014-10-23.

¹¹ *In re China Eastern Airlines Co., Ltd.*, Consent Order, Order 2014-11-14 (November 19, 2014) (assessing a penalty of \$10,000, half suspended on condition of compliance during the subsequent year).

¹² 14 C.F.R. Part 244.

¹³ Docket DOT-OST-2014-0039.

¹⁴ 14 C.F.R. § 399.85.

¹⁵ *In re Skyscanner Limited*, Consent Order, Order 2014-4-2 (April 1, 2014) (assessing a penalty of \$40,000, half

DOT Prohibitions on Unfair and Deceptive Practices, 2014

Page 9 of 13

suspended on condition of compliance during the subsequent year).

¹⁶ 14 C.F.R. § 259.7.

¹⁷ In re Turkish Airlines (Türk Hava Yolları, A.O.), Consent Order, Order 2014-7-18 (July 25, 2014) (assessing a penalty of \$300,000, \$20,000 of which could be credited towards vouchers provided to affected passengers).

¹⁸ 14 C.F.R. § 399.89.

¹⁹ 14 C.F.R. § 399.88.

²⁰ In re Global Target International, Inc. d/b/a GTS Globotours, Consent Order, Order 2014-2-14 (February 20, 2014) (assessing a penalty of \$80,000, half suspended on condition of compliance during the subsequent year); In re Voyager Travel LLC, formerly d/b/a LDS Travel and Meridian Trips LLC, and Brian Mickelson, Consent Order, Order 2014-8-9 (August 14, 2014) (assessing a penalty of \$20,000, half suspended on condition of compliance during the subsequent 21 months, and prohibiting Mickelson from being involved in air transportation for 10 years).

²¹ 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.

²² On October 30, 2014, the IRS announced inflation adjustments for certain air transportation taxes, effective for tickets issued on or after January 1, 2015 (Rev. Proc. 2014-61). The fee for domestic segments was unchanged, at \$4.00, but the international arrival and departure taxes increased from \$17.50 to \$17.70, and the tax for domestic segments related to Alaska or Hawaii increased from \$8.70 to \$8.90.

²³ Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110 (April 25, 2011);

²⁴ In re Third Party Complaint of Benjamin Edelman v. British Airways PLC, Consent Order, Order 2014-9-2 (September 5, 2014).

²⁵ In re Cathay Pacific Airways Limited, Consent Order, Order 2014-10-14 (October 17, 2014) (assessing a penalty of \$260,000, half suspended on condition of compliance during the subsequent year).

²⁶ GTS Globotours, Order 2014-2-14.

²⁷ Adjustment of Passenger Civil Aviation Security Service Fee, 79 Fed. Reg. 35462 (June 20, 2014).

²⁸ Bipartisan Budget Act of 2013, Pub. L. 113-67, § 601 (December 26, 2013).

²⁹ Airlines for America and International Air Transport Association v. Transportation Security Administration, D.C.Cir. no. 14-1143.

³⁰ Pub. L. 113-294. See also September 11th Security Fee Frequently Asked Questions (December 19, 2014) (http://www.tsa.gov/sites/default/files/assets/pdf/passenger_fee_faqs_12.19.14.pdf).

³¹ Cathay Pacific, Order 2014-10-14.

³² In re Airtrade International, Inc., d/b/a Vayama, Consent Order, Order 2014-1-9 (January 14, 2014) (assessing a penalty of \$80,000, half suspended on condition of compliance during the subsequent year); GTS Globotours, Order 2014-2-14; Voyager Travel, Order 2014-8-9.

³³ Voyager Travel, Order 2014-8-9.

³⁴ Third Party Complaint of Benjamin Edelman v. British Airways PLC, Order 2014-9-2.

³⁵ Third Party Complaint of Benjamin Edelman v. SC Compania Nationala de Transporturi Aeriene Romane TAROM S.A., Order of Dismissal, Order 2014-4-18 (April 21, 2014).

³⁶ Benjamin Edelman v. Virgin Atlantic, docket DOT-OST-2014-0156; Benjamin Edelman v. Sri Lankan Airlines Limited, docket DOT-OST-2014-0230.

³⁷ GTS Globotours, Order 2014-2-14.

³⁸ Voyager Travel, Order 2014-8-9.

³⁹ In re Southwest Airlines Co., Consent Order, Order 2014-5-13 (May 29, 2014) (assessing a penalty of \$200,000 as well as the portion - \$100,000 – of the civil penalty suspended by Order 2013-7-20 on condition of subsequent compliance).

⁴⁰ Guidance on the Use of Rounding in Air Fare Advertisements, 77 Fed. Reg. 13172 (March 5, 2012).

DOT Prohibitions on Unfair and Deceptive Practices, 2014

⁴¹ Vayama, Order 2014-1-9

⁴² 14 C.F.R. § 399.84(b).

⁴³ In re Delta Air Lines, Inc., Consent Order, Order 2014-7-7 (July 9, 2014) (assessing a penalty of \$100,000, half suspended on condition of compliance during the subsequent year).

⁴⁴ 14 C.F.R. Part 212 and Part 380.

⁴⁵ In re Charter by the Seat LLC, Consent Order, Order 2014-3-5 (March 11, 2014) (assessing a penalty of \$30,000, half suspended on condition of compliance during the subsequent year).

⁴⁶ In re MetJet, Inc. and Michael Heisman, Consent Order, Order 2014-8-8 (August 13, 2014) (prohibiting Heisman from being involved in public charter operations for 5 years).

⁴⁷ Notice to Colleges and Universities Organizing Flights to College Bowl Games and other Special Events (December 15, 2014) (https://cms.dot.gov/sites/dot.gov/files/docs/BowlGameGuidance2014_ORGANIZERS.pdf)

⁴⁸ 14 C.F.R. § 380.34.

⁴⁹ Docket DOT-OST-2013-0107.

⁵⁰ Letter from Kathryn B. Thompson, DOT General Counsel, to David J. Valpredo, President, Shelby Financial Corporation, docket DOT-OST-2013-0107 (September 16, 2014).

⁵¹ 14 C.F.R. Part 382.

⁵² 49 U.S.C. § 41705. The ACAA typically has been interpreted to preempt disability claims from being brought against air carriers under state law. But in Adler v. WestJet Airlines, Ltd., ___ F.Supp.2d ___, 2014 WL 3114070 (S.D.Fla. July 8, 2014), the court held that claims for negligence were not preempted, although the ACAA might be relevant to the duty of care.

⁵³ In practice, DOT's jurisdiction over disabilities-related issues can overlap with that of the FAA. For example, in 2014 the FAA approved two additional Portable Oxygen Concentrators (POCs) for use aboard aircraft, Use of Additional Portable Oxygen Concentrators on Board Aircraft, 79 Fed. Reg. 6078 (February 3, 2014), and proposed acceptance criteria for POCs that would no longer require the FAA to approve them on a case-by-case basis, Acceptance Criteria for Portable Oxygen Concentrators Used On Board Aircraft, 79 Fed. Reg. 56288 (September 19, 2014).

⁵⁴ 14 C.F.R. § 382.157. In 2014, 43 U.S. carriers and 128 foreign air carriers filed reports for 2013; the U.S. carriers received 21,965 disability-related complaints and the foreign carriers received 3,281 disability-related complaints, for a total of 25,246 – an increase of approximately 7.7% over 2012. DOT noted that 11,768 of the complaints – almost 50% – alleged a failure to provide adequate assistance to passengers using wheelchairs. See Annual Report for 2013 on Disability-Related Air Travel Complaints (July 2014) (<http://www.dot.gov/sites/dot.gov/files/docs/2013GeneralText.pdf>).

⁵⁵ Turkish Airlines, Order 2014-7-18.

⁵⁶ 14 C.F.R. § 382.67(c).

⁵⁷ Petition to Delay the Effective Date of 14 CFR 382.67(c), Response to Petition, Order 2014-1-5 (January 9, 2014).

⁵⁸ Kevin Crowell v. American Airlines, Inc., docket DOT-OST-2014-0146.

⁵⁹ Docket DOT-OST-2008-0273 (TACA and certain affiliated carriers, Virgin America, and Volaris). See 14 C.F.R. § 382.67 and § 382.123.

⁶⁰ Docket DOT-OST-2008-0273 (Cathay Pacific). See 14 C.F.R. § 382.61.

⁶¹ Docket DOT-OST-2008-0272 (Cathay Pacific). See 14 C.F.R. § 382.17. DOT also denied the carrier's request for a waiver of the prohibition on refusing to provide transportation on the basis of a disability, because that regulation (14 C.F.R. § 382.19) incorporates an exception if the refusal is dictated by foreign government requirements.

⁶² Docket DOT-OST-2008-0272 (South African Airways). See 14 C.F.R. § 382.29.

⁶³ Docket DOT-OST-2008-0272 (Qantas). See 14 C.F.R. § 382.111 and § 382.125.

⁶⁴ Docket DOT-OST-2008-0272 (Aer Lingus and BMI British Midland). See 14 C.F.R. § 382.25.

⁶⁵ Docket DOT-OST-2008-0272 (Aer Lingus, Air Berlin, Air France, Alitalia, Austrian, British Airways, Condor, Finnair, KLM, LOT, Lufthansa, Monarch, Pullmantur, Qantas, Thomas Cook, and TUI). See 14 C.F.R. § 382.133.

⁶⁶ Docket DOT-OST-2008-0272 (Aer Lingus, Air France, Air Tahiti Nui, Alitalia, Austrian, British Airways, Cathay

DOT Prohibitions on Unfair and Deceptive Practices, 2014

Page 11 of 13

Pacific, Condor, Finnair, Iberia, KLM, LOT, Lufthansa, Monarch, Pullmantur, Swiss, Thomas Cook, TUI, and Virgin Atlantic). See 14 C.F.R. § 382.19.

⁶⁷ 14 C.F.R. § 382.43 and § 382.57.

⁶⁸ National Federation of the Blind v. DOT, D.D.C. 14-CV-0085.

⁶⁹ 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”).

⁷⁰ Skyscanner, Order 2014-4-2.

⁷¹ Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, 79 Fed. Reg. 29970 (May 23, 2014).

⁷² TAROM, Order 2014-4-18.

⁷³ Cathay Pacific, 2014-10-14.

⁷⁴ 49 U.S.C. § 41101 and § 41301.

⁷⁵ In re WestJet, Consent Order, Order 2014-9-3 (September 5, 2014) (assessing a penalty of \$50,000, half suspended on condition of compliance during the subsequent year). Operating unauthorized codeshare flights; In re China Eastern Airlines Corporation Limited, Consent Order, Order 2014-9-4 (September 5, 2014) (assessing a penalty of \$40,000, half suspended on condition of compliance during the subsequent year). Holding out unauthorized codeshare flights; In re Saudi Arabian Airlines Corporation, Consent Order, Order 2014-11-19 (November 26, 2014) (assessing a penalty of \$50,000, half suspended on condition of compliance during the subsequent year). Holding out unauthorized flights.

⁷⁶ WestJet, Order 2014-9-3; China Eastern Airlines, Order 2014-9-4.

⁷⁷ Application of Compagnie Aérienne Interregionale Express (CAIRE) dba Air Guyane Express/Air Antilles Express, Order Granting Exemption and to Show Cause, Order 2014-5-1 (May 2, 2014).

⁷⁸ In re VIH Cougar Helicopters, Inc., Order Denying Motion for Clarification and Dismissing Formal Complaint, Order 2014-3-7 (March 12, 2014).

⁷⁹ Notice to Colleges and Universities Organizing Flights to College Bowl Games and other Special Events (December 15, 2014) (https://cms.dot.gov/sites/dot.gov/files/docs/BowlGameGuidance2014_ORGANIZERS.pdf).

⁸⁰ 14 C.F.R. Part 257.

⁸¹ 49 U.S.C. § 41712(c).

⁸² Disclosure of Code-Share Service by Air Carriers and Sellers of Air Transportation, 76 Fed. Reg. 2744 (January 14, 2011).

⁸³ WK Travel, Inc. d/b/a OneTravel, Consent Order, Order 2014-1-1 (January 2, 2014) (assessing a penalty of \$95,000, half suspended on condition of compliance during the subsequent year); In re Alaska Airlines, Inc., Consent Order, Order 2014-6-15 (June 27, 2014) (assessing a penalty of \$150,000).

⁸⁴ Skyscanner, Order 2014-4-2.

⁸⁵ Delta Air Lines, Inc., docket DOT-OST-2014-0229.

⁸⁶ 49 U.S.C. § 41708.

⁸⁷ In re Sky King, Inc., Consent Order, Order 2014-3-18 (March 31, 2014) (assessing a penalty of \$100,000 as an administrative claim in carrier’s bankruptcy proceeding).

⁸⁸ Reports by Air Carriers on Incidents Involving Animals During Air Transport, 79 Fed. Reg. 37938 (July 3, 2014).

⁸⁹ 49 U.S.C. § 41113 and § 41313.

⁹⁰ In re Asiana Airlines, Inc., Consent Order, Order 2014-2-20 (February 25, 2014) (assessing a penalty of \$500,000, \$100,000 of which could be allocated to efforts to improve its procedures).

⁹¹ Domestic Baggage Liability, 78 Fed. Reg. 14913 (March 8, 2013). See also 14 C.F.R. § 254.4.

⁹² In re JetBlue Airways Corporation, Consent Order, Order 2014-2-9 (February 20, 2014) (assessing a penalty of \$25,000).

⁹³ Notice to Consumers Purchasing Tickets to Special Events that Include Air Transportation (December 15, 2014) (https://cms.dot.gov/sites/dot.gov/files/docs/BowlGameGuidance2014_consumers.pdf). See also News Digest DOT

DOT Prohibitions on Unfair and Deceptive Practices, 2014

Page 12 of 13

11-14 (January 24, 2014) (<http://www.dot.gov/briefing-room/news-digest-dot-11-14>).

⁹⁴ Guidance on Responding to Complaints Filed on Behalf of Airline Passengers (December 13, 2013) (http://www.dot.gov/sites/dot.gov/files/docs/guidance_final_2013_12_06.pdf).

⁹⁵ Common Terms in Air Travel (September 2, 2014) (<http://www.dot.gov/sites/dot.gov/files/docs/CommonTermsAirTravel.pdf>).

⁹⁶ 14 C.F.R. Part 374.

⁹⁷ In re Friendship Airways, Inc. d/b/a Yellow Air Taxi and Christopher Behnam, docket DOT-OST-2013-0066.

⁹⁸ Use of Mobile Wireless Devices for Voice Calls on Aircraft, 79 Fed. Reg. 10049 (February 24, 2014).

⁹⁹ See, e.g., In re Complaint of Association of Discount Travel Brokers, Order Dismissing Complaint and Denying Petition for Rulemaking, Order 92-5-60 (May 29, 1992).

¹⁰⁰ Audit Announcement - Review of DOT's Oversight of Airlines' Frequent Flyer Programs (September 11, 2014) (<https://www.oig.dot.gov/sites/default/files/Frequent%20Flyer%20Program%20Announcement%20Letter%209-11-14.pdf>).

¹⁰¹ Joel Hayes v. American Airlines, Inc., docket DOT-OST-2014-0077.

¹⁰² Motion for Reconsideration of Order 2012-11-4, docket DOT-OST-2012-0109 (April 8, 2014).

¹⁰³ Robert Samstein v. American Airlines, Inc., docket DOT-OST-2014-0033; Darren Martin v. American Airlines, Inc., docket DOT-OST-2014-0029.

¹⁰⁴ Pub. L. 112-95, § 411. Congress also, at § 403 (codified at 49 U.S.C. § 47124), directed DOT to adopt regulations regarding the carriage of musical instruments as baggage on U.S. air carriers. At the end of 2014, DOT released the regulations in docket DOT-OST-2014-0231, which subsequently was published at 80 Fed. Reg. 161 (January 5, 2015).

¹⁰⁵ Report of the Advisory Committee on Aviation Consumer Protection, doc. no. DOT-OST-2012-0087-0119 (October 22, 2012).

¹⁰⁶ Sixth Meeting of the Advisory Committee on Aviation Consumer Protection, doc. no. DOT-OST-2012-0087-0266 (October 29, 2014).

¹⁰⁷ Docket DOT-OST-2013-0048.

¹⁰⁸ Agreements among Member Carriers of the International Air Transport Association concerning an agreement (Resolution 787) of the Passenger Services Conference, Final Order, Order 2014-8-1 (August 6, 2014).

¹⁰⁹ 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).

¹¹⁰ 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).

¹¹¹ Notice of Availability of Proposed Advisory Circular for Passenger Notification Hazardous Materials Regulations, 79 Fed. Reg. 12133 (March 4, 2014), citing Passenger Notification of Hazardous Materials Regulations Aviation Rulemaking Committee (ARC) Membership Recommendations to the FAA Assistant Administrator of the Office of Security and Hazardous Materials Safety, docket FAA-2014-0131 (November 1, 2013).

¹¹² Hazardous Materials: Harmonization with International Standards (RRR), 79 Fed. Reg. 50742 (August 25, 2014).

¹¹³ Disclosure of Seat Dimensions to Facilitate Use of Child Safety Seats on Airplanes During Passenger-Carrying Operations, 79 Fed. Reg. 18212 (April 1, 2014).

¹¹⁴ National Association of Airline Passengers, A Proposal to Establish Minimum Standards for Seat Pitch and Seat Width, docket FAA-2014-0663 (September 3, 2014).

¹¹⁵ User Fees for Agricultural Quarantine and Inspection Services, 79 Fed. Reg. 22895 (April 25, 2014).

DOT Prohibitions on Unfair and Deceptive Practices, 2014

Page 13 of 13

Zuckert, Scoutt & Rasenberger, L.L.P.
888 17th Street, N.W., Suite 700
Washington, D.C. 20006
Telephone: (202) 298-8660
Fax: (202) 342-0683
www.zsrlaw.com