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## **DOT Enforcement of its Prohibitions on Unfair and Deceptive Practices, 2008**

*By Jol A. Silversmith\**

When the Civil Aeronautics Board (CAB) was abolished in 1985, a significant portion of its authority was transferred to the Department of Transportation (DOT). One of the most noteworthy powers now exercised by DOT is to prohibit any “unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.”<sup>1</sup> For more than twenty years, DOT has exercised its authority under this statute, as well as associated regulations, to monitor and sanction practices by air carriers, travel agents, and other entities involved in air transportation.

### **DOT Oversight of Air Carriers, Travel Agents, and Other Entities**

DOT has several tools at its disposal for responding to allegedly unfair and deceptive practices, including a private warning 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 enforcement policies for advertising and other practices. Consent orders are by far the most commonly used tool in DOT’s arsenal; according to its Inspector General, between 1996 and 2006 DOT entered into more than 233 consent orders, with penalties totaling more than \$21.8 million.<sup>2</sup>

In the past year, DOT’s Office of Aviation Enforcement and Proceedings continued to closely monitor and investigate practices by air carriers, ticket agents, and other entities involved in the sale of air transportation (including package tours that include air transportation). In addition, in 2008 DOT sponsored three “Aviation Consumer Forums” – in Miami, Chicago, and New York – which DOT described as “intended to educate the public about the air travel environment and provide them an opportunity to discuss their concerns about airline consumer

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

<sup>2</sup> DOT Inspector General, Follow-Up Review: Performance of U.S. Airlines in Implementing Selected Provisions of the Airline Customer Service Commitment, Report No. AV-2007-012, at 8 (November 21, 2006) (<http://www.oig.dot.gov/StreamFile?file=/data/pdffdocs/ACSfinal11-21signed.pdf>). Since the report was issued, DOT has entered into more than fifty additional consent orders; the penalties assessed in 2008 are noted throughout this article. Additionally, in 2008 DOT increased the maximum civil penalty for violations of its economic statutes and regulations to \$27,500 per violation. See Civil Penalties, 73 Fed. Reg. 70592 (November 21, 2008).

matters dealing with reservations, oversales, refunds, frequent flyer issues, and advertising with DOT officials.”<sup>3</sup>

Although the DOT’s greatest area of concern in the past year, based on the orders issued, appears to have been the “full fare rule” for advertising by air carriers and travel agents, DOT also continued to take enforcement action regarding an array of practices, ranging from the requirements governing the carriage of passengers with disabilities to unauthorized operations by air charter brokers. This article briefly summarizes the consent orders and other public guidance that were issued by DOT in 2008, as well as certain related agency actions and court decisions.

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

DOT’s “full fare rule” requires that advertising by air carriers or ticket agents state “the entire price to be paid by the customer to the air carrier, or agent, for such air transportation, tour, or tour component.”<sup>4</sup> Historically, DOT has interpreted this regulation to allow only certain government-imposed per-person taxes and fees (e.g., the September 11th Security Fee, federal segment taxes, and airport Passenger Facility Charges)<sup>5</sup> to be listed separately from an advertised fare, as long as the amount of those taxes and fees is clearly stated elsewhere in the advertisement or is available via a prominent hyperlink, with a warning signal proximate to the fare. Additionally, substantial conditions, such as blackout dates and restrictions on refunds, must be disclosed prominently.<sup>6</sup>

In 2008, DOT sanctioned six air carriers, one travel agent, and four tour operators for violations of the full-fare rule. One carrier had not included fuel surcharges in certain fare quotations in initial screens on its website.<sup>7</sup> Another carrier had failed to include a carrier-imposed service fee that applied to non-ticket counter sales in the fare quotations.<sup>8</sup> The third air carrier had excluded various carrier-imposed fees in its fare quotations, including a “Natural Occurrence Interruption Fee” and an ‘International Service Recovery Fee,” as well as a

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<sup>3</sup> National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Delays, Record of Meeting (September 22, 2008) (Docket DOT-OST-2007-0108). DOT also has stated that in 2008 it conducted five onsite reviews of air carriers’ compliance with requirements for advertising, oversales, refunds, passengers with disabilities, and baggage, among other issues, and that at least two enforcement investigations have been initiated as a result of these reviews. See id.

<sup>4</sup> 14 C.F.R. § 399.84.

<sup>5</sup> In 2008, the IRS announced inflation adjustments for certain air transportation taxes, effective for tickets issued on or after January 1, 2009. Arrival and departure taxes increased to \$16.10; the tax for domestic segments beginning or ending in Alaska or Hawaii increased to \$8.00; and the tax for other domestic segments increased to \$3.60. See Rev. Proc. 2008-66, § 3.32.

<sup>6</sup> The European Union in 2008 adopted even stricter requirements, which require that: (i) advertised fares be fully, and (ii) advertising include a breakdown of the fare, taxes, surcharges, and other fees. The E.U. also requires that any optional charged be assessed only on an “opt-in” basis. See Regulation (EC) No. 1008/2008 (September 24, 2008), published in the Official Journal of the European Union at L 293/3 (October 31, 2008).

<sup>7</sup> AirTran Airways, Inc., Order 2008-5-38 (May 29, 2008) (assessing a penalty of \$45,000, half suspended on condition of compliance during the subsequent year).

<sup>8</sup> Allegiant Air, LLC, Order 2008-9-18 (September 15, 2008) (assessing a penalty of \$50,000, \$15,000 of which could be offset by certain mitigating measures, and half suspended on condition of compliance during the subsequent 15 months).

“Passenger Usage Fee” which applied to non-ticket counter sales.<sup>9</sup> The fourth carrier had not included fuel surcharges in certain fare quotations in initial screens on its website and also had failed to provide sufficient disclosure about government-imposed per-person taxes and fees that were not included.<sup>10</sup>

The fifth air carrier, in initial screens on its website, had stated that lap infants on international flights could travel at no charge, but later informed consumers that a fee would be assessed.<sup>11</sup> The sixth carrier had advertised its services without properly disclosing that its services were subject to the receipt of government operating authority.<sup>12</sup>

In another case, a travel agent, in initial screens on its website, had not included fuel surcharges in certain fare quotations or provided a disclaimer about excluded taxes.<sup>13</sup>

In four separate tour operator cases, DOT found that fare quotations in brochures and on websites did not include fuel surcharges,<sup>14</sup> and in three of these cases also found that the advertisements did not provide adequate disclosure about the excluded taxes and fees.<sup>15</sup> In addition, DOT indicated in two of the cases that tour operator brochures should warn consumers that the cited fares were not guaranteed and referred consumers to the tour operators’ websites for current information.<sup>16</sup>

Additionally, DOT announced that pursuant to its requirement that significant conditions be disclosed, air carriers must provide prominent and timely notice if passengers are limited to

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<sup>9</sup> Air Jamaica, Ltd., Order 2008-12-25 (December 30, 2008) (assessing a penalty of \$105,000, half suspended on condition of compliance during the subsequent 15 month; the penalty was enhanced because the carrier had twice previously entered into similar consent orders with DOT).

<sup>10</sup> Spirit Airlines, Inc., Order 2008-12-14 (December 23, 2008) (assessing a penalty of \$40,000, \$10,000 of which could be offset by certain mitigating measures, and half suspended on condition of compliance during the subsequent year).

<sup>11</sup> US Airways, Inc., Order 2008-2-35 (February 28, 2008) (assessing a penalty of \$100,000, which could be offset by reimbursements made to consumers).

<sup>12</sup> Virgin America, Inc., Order 2008-4-32 (April 23, 2008) (assessing a penalty of \$25,000). Generally, DOT prohibits U.S.-flag carriers from advertising their services before they receive government operating authority. See 14 C.F.R. § 201.5. Virgin America previously had obtained a waiver of that requirement, so long as its advertising disclosed that its services were subject to the receipt of government operating authority. See Order 2007-8-17 (August 17, 2007).

<sup>13</sup> Flight Centre USA, Inc., Order 2008-7-5 (July 2, 2008) (assessing a penalty of \$40,000, half suspended on condition of compliance during the subsequent year).

<sup>14</sup> JTB Corporation d/b/a JTB USA, Inc., Order 2008-12-24 (December 29, 2008) (assessing a penalty of \$60,000, half suspended on condition of compliance during the subsequent year); AHI International Corporation d/b/a AHI Travel and Alumni Holidays, Order 2008-3-5 (March 6, 2008) (assessing a penalty of \$45,000, half suspended on condition of compliance during the subsequent year); Ritz Tours, Inc., Order 2008-2-22 (February 15, 2008) (assessing a penalty of \$55,000, half suspended on condition of compliance during the subsequent year); Pacific Delight Tours, Inc., Order 2008-2-13 (February 7, 2008) (assessing a penalty of \$20,000, half suspended on condition of compliance during the subsequent year)

<sup>15</sup> JTB Corporation d/b/a JTB USA, Inc., Order 2008-12-24; Ritz Tours, Inc., Order 2008-2-22; Pacific Delight Tours, Inc., Order 2008-2-13.

<sup>16</sup> AHI International Corporation d/b/a AHI Travel and Alumni Holidays, Order 2008-3-5; Ritz Tours, Inc., Order 2008-2-22.

fewer than two free checked bags of the size and weight that generally have been free in the past.<sup>17</sup> Moreover, DOT stated that carriers must make clear when added charges and/or revised policies will take effect, and that they may not be applied retroactively. Subsequently, DOT announced that an air carrier which had implemented a retroactive baggage fee would issue refunds to consumers.<sup>18</sup>

### **Passengers with Disabilities**

In 2008, DOT substantially amended its regulations which implement the Air Carrier Access Act,<sup>19</sup> and which prohibit discrimination by air carriers against passengers on the basis of disability.<sup>20</sup> One of the most significant changes is that most of the requirements now apply to foreign air carriers.<sup>21</sup> Other notable changes from the prior version of the regulations include:

- Carriers must ensure that terminal facilities that they own, lease, or control are accessible to disabled passengers (e.g., by providing captioned television/audio-visual displays and providing relief areas for service animals).
- Carriers must provide assistance to disabled passengers throughout terminals, and not just in enplaning and deplaning (e.g., reasonable assistance to access ticket and baggage locations, rest rooms, food service concessions).
- Carriers must allow the use of electronic respiration assistance devices that meet the applicable FAA and/or foreign requirements for such devices, although a carrier may require advance notice and/or advance check-in.
- Carriers must continue to allow passengers to be accompanied by service animals, but carriers may require documentation and/or advance notice for “emotional support” and “psychiatric service” animals, and unusual service animals (e.g., miniature horses, pot-bellied pigs, and monkeys) may be evaluated on a case-by-case basis.

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<sup>17</sup> Guidance on Disclosure of Policies and Charges Associated with Checked Baggage, 73 Fed. Reg. 28854 (May 19, 2008).

<sup>18</sup> DOT, Delta Reach Agreement on Baggage Fees, DOT News Release 85-08 (June 20, 2008).

<sup>19</sup> 49 U.S.C. § 41705. In 2008, the U.S. District Court for the Eastern District of Michigan held that the statute does not create a private right of action and can only be enforced by DOT, but further held that the Americans with Disabilities Act (42 U.S.C. § 12101, et seq.) and not the ACAA governed airport terminals. Thomas v. Northwest Airlines Corp., 2008 WL 4104505 (E.D.Mich. September 2, 2008).

<sup>20</sup> 14 C.F.R. Part 382.

<sup>21</sup> Foreign carriers may file requests for a waiver if a DOT requirement directly conflicts with a foreign law requirement. To date, 43 foreign air carriers have filed such requests. U.S. and foreign air carriers also may file requests for an equivalent alternative determination, to allow them to use procedure different than those set forth by DOT; to date, 11 such requests have been filed. See Dockets DOT-OST-2008-0272 and DOT-OST-2008-0273. In October, DOT held a forum in Paris in conjunction with a meeting of the European Civil Aviation Conference (ECAC), “to provide foreign air carriers in particular an opportunity to ask questions and discuss compliance concerns related to the new rule.” National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Delays, Record of Meeting (September 22, 2008) (Docket DOT-OST-2007-0108).

Most of the new disabilities requirements enter into effect on May 13, 2009.<sup>22</sup>

In addition, DOT sanctioned two air carriers for violations of the disabilities rules. In the first case, a foreign air carrier had required certain disabled passengers to travel with attendants under circumstances in which the rules did not allow such a requirement.<sup>23</sup> In the second case, an air carrier had failed to file reports about disability-related complaints that it had received from passengers.<sup>24</sup>

DOT also dismissed a complaint filed by two employees of a contractor that provided airport wheelchair services, on the primary grounds that DOT lacked jurisdiction over the target of the allegations, which was the particular contractor and not air carriers.<sup>25</sup>

### **Passenger Rights and Preemption**

The Airline Deregulation Act of 1978 (ADA) restricts state and local regulation of air carriers.<sup>26</sup> In 2007, New York enacted a “passenger bill of rights” after proposals to adopt specific passenger protections stalled in Congress.<sup>27</sup> In 2008, DOT issued a statement – nominally clarifying its own pending proposal to enhance passenger protections – which emphasized that state and local regulation of air carrier services were preempted.<sup>28</sup> Subsequently, the U.S. Court of Appeals for the Second Circuit reversed a lower court decision and invalidated the New York statute, holding that it was indeed preempted.<sup>29</sup>

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<sup>22</sup> Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. 27614 (May 13, 2008).

<sup>23</sup> Compania Mexicana de Aviacion, S.A. de C.V., Order 2008-4-6 (April 2, 2008) (assessing a penalty of \$75,000, \$65,000 of which could be offset by certain mitigating measures).

<sup>24</sup> Primaris Airlines, Inc., Order 2008-9-31 (October 15, 2008) (assessing a penalty of \$80,000, \$15,000 of which could be offset by certain mitigating measures, and half suspended on condition of compliance during the subsequent 28 months).

<sup>25</sup> Complaint of Tim Maddox and Xiomara Osorio, Order 2008-12-5 (December 10, 2008) (DOT also noted that the complaint failed to verify that all relevant parties had been properly served).

<sup>26</sup> As now codified, the ADA prohibits states and localities from enacting or enforcing a law or regulation “related to a price, route, or service of an air carrier.” 49 U.S.C. § 41713(b)(1).

<sup>27</sup> A separate statute, 49 U.S.C. § 40116 (the “Anti-Head Tax Act”), restricts state and local taxation of air carriers. In a declaratory order, DOT held that a “privilege fee” imposed by a locality in which certain airport facilities were located, but which did not actually own or operate the airport, was preempted by the statute. Tinicum Township Privilege Fee Proceeding, Order 2008-3-18 (March 24, 2008).

<sup>28</sup> Enhancing Airline Passenger Protections, 73 Fed. Reg. 11843 (March 5, 2008).

<sup>29</sup> Air Transport Association v. Cuomo, 520 F.3d 218 (2d Cir. March 25, 2008). In another case, the U.S. District Court for the Central District of California held that the statute’s preemptive effect applies to foreign air carriers as well as U.S.-flag air carriers, as well as to state-law based antitrust and consumer claims. In re: Korean Air Lines Co., Ltd. Antitrust Litigation, 567 F.Supp.2d 1213 (C.D.Calif. 2008). In yet another case, the U.S. District Court for the Southern District of Florida held that state laws restricting the sale of charter travel to Cuba were preempted by the ADA. \_\_\_ F.Supp.2d \_\_\_, 2008 WL 4500352 (S.D.Fla. October 1, 2008). Additionally, in 2008 Hawaii enacted a bill which would enable it to regulate inter-island carriers, but the bill specifically provided that it would become effective only if federal legislation was enacted to permit its implementation. See Hawaii H.B. 2250.

Over the course of the year, DOT itself engaged in several actions intended to enhance passenger protections. Early in the year, DOT announced that it would collect additional data from air carriers regarding the cancellation, diversion, or gate return of flights, to better understand and track the causes of delays.<sup>30</sup> In addition, DOT organized and held meetings of a task force comprised of air carrier, airport, and government officials to develop contingency plans for lengthy delays.<sup>31</sup> At the end of the year, the task force released a report and a model plan, but did not propose any binding requirements for air carriers.<sup>32</sup>

Shortly after the task force report was released, DOT requested comments on a revised set of proposals to enhance passenger protections. Unlike the task force report, these proposals (which reflected public input that DOT had received since 2007) would bind carriers. In particular, DOT proposed to:

- (1) Require air carriers to adopt contingency plans for lengthy tarmac delays (but not set any specific standards for such plans); require air carriers to incorporate such plans in their contracts of carriage (which would enable private enforcement); and require air carriers to retain data on delays;
- (2) Require air carriers to designate employees who have input on cancellation decisions to monitor delays; require air carriers to publicize how complaints may be filed; and require air carriers to acknowledge consumer complaints within 30 days and to provide a substantive response within 60 days;
- (3) Deem the operation of a chronically delayed flight (e.g., arriving more than 15 minutes late more than 70 percent of the time for three consecutive quarters) to be an unfair and deceptive practice;
- (4) Require air carriers to publish on their websites before purchase, for each flight, information about its performance during the latest reported month;
- (5) Require air carriers to adopt customer service plans; require air carriers to incorporate the customer service plans in their contracts of carriage (which would enable private enforcement); and require air carriers to audit their compliance with their customer service plans; and
- (6) Prohibit air carriers from retroactively applying amendments to their contracts of carriage with negative implications to consumers who have already purchased tickets.

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<sup>30</sup> Revision of Airline Service Quality Performance Reports and Disclosure Requirements, 73 Fed. Reg. 29426 (May 21, 2008).

<sup>31</sup> National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays, 73 Fed. Reg. 7785 (February 11, 2008).

<sup>32</sup> Development of Contingency Plans for Lengthy Airline On-Board Delays (November 12, 2008) (<http://www.dot.gov/affairs/Tarmac.pdf>). See also *supra* text accompanying footnote 32.

The deadline for comments is February 6, 2009.<sup>33</sup>

## **Oversales**

DOT regulations generally require air carriers to compensate passengers who are denied boarding involuntarily, as well as set out requirements for providing information about denied boarding compensation to passengers.<sup>34</sup> In 2008, DOT doubled the maximum required compensation (to \$800), which had not been adjusted in more than 25 years. DOT also extended the rule's threshold, which had been aircraft with 60 or fewer seats, to aircraft with fewer than 30 seats, and provided guidance on the rules that carriers may utilize to determine which passengers will be involuntarily bumped.<sup>35</sup>

In addition, DOT sanctioned two air carriers. One had provided only vouchers and not cash compensation to passengers who had been involuntarily denied boarding ("bumped"),<sup>36</sup> contrary to the requirement that such passengers be informed of their entitlement to cash compensation.<sup>37</sup> The second had failed to solicit volunteers before bumping passengers;<sup>38</sup> had failed to timely provide bumped passengers with the appropriate amount and type of compensation;<sup>39</sup> and also had failed to inform bumped passengers of their entitlement to cash compensation.<sup>40</sup>

## **Additional Issues**

### **Reporting**

DOT sanctioned an air carrier that had not filed reports about its financial performance and other operational data, as required by 14 C.F.R. Part 241.<sup>41</sup> In addition, U.S. and foreign air carriers are required to file annual reports with DOT regarding disability-related complaints that

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<sup>33</sup> Enhancing Airline Passenger Protections, 73 Fed. Reg. 74586 (December 8, 2008).

<sup>34</sup> 14 C.F.R. Part 250.

<sup>35</sup> Oversales and Denied Boarding Compensation, 73 Fed. Reg. 21026 (April 18, 2008). The European Union adopted its own oversales rules in 2004, which were interpreted by the European Court of Justice for the first time on December 22, 2008. The court held that the "exceptional circumstances" exemption of the oversales rules should be interpreted narrowly, and that an air carrier was obligated to compensate passengers for a delay caused by an engine defect. See Wallentin-Hermann v. Alitalia-Linee Aeree Italiane SpA (no. C549/07).

<sup>36</sup> Frontier Airlines, Inc., Order 2008-11-1 (November 5, 2008) (assessing a penalty of \$40,000, to be treated as a non-priority pre-petition general unsecured claim in the air carrier's ongoing bankruptcy proceedings).

<sup>37</sup> 14 C.F.R. § 250.5.

<sup>38</sup> 14 C.F.R. § 250.2b.

<sup>39</sup> 14 C.F.R. § 250.8.

<sup>40</sup> US Airways, Inc., Order 2008-12-13 (December 23, 2008) (assessing a penalty of \$140,000).

<sup>41</sup> Arrow Air, Inc., d/b/a Arrow Cargo, Order 2008-10-19 (October 21, 2008) (assessing a penalty of \$60,000, half suspended on condition of compliance during the subsequent year).

they had received;<sup>42</sup> and U.S. air carriers are required to file monthly reports regarding the death, injury, and loss of pets carried on passenger flights.<sup>43</sup>

### **On-Time Performance**

DOT regulations generally require air carriers to file on-time performance reports,<sup>44</sup> and specifically require them to disclose the same information, upon request, to consumers.<sup>45</sup> In 2008, DOT sanctioned a carrier for failing to provide accurate performance data to consumers.<sup>46</sup>

### **Domestic Baggage Liability**

DOT amended its regulations which govern air carrier liability for loss, damage, or delay in the domestic carriage of passenger baggage,<sup>47</sup> to increase the minimum permissible liability to \$3,300 per passenger.<sup>48</sup>

### **Sovereign Immunity**

The permits and exemptions that DOT issues to foreign air carriers effectively require such carriers to waive sovereign immunity for any claims brought against them for air transportation to/from the U.S. In 2008, DOT sanctioned a carrier for asserting sovereign immunity in a case brought by a passenger who had been denied transportation.<sup>49</sup>

### **Air Carrier Fitness**

By law, an air carrier must meet continuing “fitness” requirements,<sup>50</sup> which DOT historically has defined to include its financial wherewithal, managerial competence, and

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<sup>42</sup> 49 C.F.R. § 382.70, to be re-codified effective May 13, 2009 at 14 C.F.R. § 382.157. In 2008, 174 U.S. and foreign air carriers reported that in 2007 they had received a total of 15,290 disability-related complaints. See Annual Report on Disability-Related Air Travel Complaints (October 2008) (<http://airconsumer.ost.dot.gov/publications/GeneralText2007.htm>).

<sup>43</sup> 49 U.S.C. § 41721(a); 14 C.F.R. § 234.13. In 2008, U.S. air carriers reported (for the period November 2007-October 2008) the death of 29 pets, the injury of 12 pets, and the loss of 6 pets. Data from and links to redacted versions of these reports are published in DOT’s monthly Air Travel Consumer Report (<http://airconsumer.ost.dot.gov/reports/index.htm>). In addition, the U.S. Department of Agriculture has authority to sanction air carriers for violations of the Animal Welfare Act (7 U.S.C. § 2131, *et seq.*). In 2008, Northwest Airlines agreed to pay a civil penalty of \$10,000 for losing cats in two incidents in 2005-06. Northwest Airlines, Inc., Consent Decision and Order, AWA Docket No. 08-0050 (September 2, 2008).

<sup>44</sup> 14 C.F.R. Part 234.

<sup>45</sup> 14 C.F.R. § 234.11.

<sup>46</sup> US Airways, Inc., Order 2008-4-4 (April 2, 2008) (assessing a penalty of \$50,000, \$20,000 of which was suspended on condition of compliance during the subsequent year).

<sup>47</sup> 14 C.F.R. Part 254.

<sup>48</sup> Domestic Baggage Liability, 73 Fed. Reg. 70591 (November 21, 2008).

<sup>49</sup> Thai Airways International Public Company Ltd., Order 2008-9-15 (September 12, 2008) (assessing a penalty of \$15,000, half of which was suspended on condition of compliance during the subsequent year).

<sup>50</sup> 49 U.S.C. § 41110(e).

compliance disposition. In 2008, DOT revoked the authority of a carrier on the basis of its poor financial position, and further because its ex-general counsel had submitted false financial information to DOT, which the agency concluded directly reflected upon the carrier's managerial competence and/or compliance disposition.<sup>51</sup>

### **Air Charter Brokers**

Since 2004, DOT has entered into numerous consent orders with air charter brokers (e.g., 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 customers; in contrast, a broker must not hold out air transportation in its own right (e.g., as a principal) without DOT economic authority.<sup>52</sup> Further, DOT considers it an unfair and deceptive practice for an air charter broker, even if it acts as an agent of a direct air carrier, to falsely imply that it is a direct air carrier. Indeed, in 2008 DOT sanctioned a broker that had made representations which would lead the public to conclude that it was a direct air carrier with operational control over flights.<sup>53</sup>

### **Public Charters**

DOT imposes various requirements on the operation and sale of public charters, including that: (1) the charter operator deposit all funds that it receives from passengers in an escrow account until the flight is operated; and (2) the charter operator provide refunds within 14 days if a flight is cancelled.<sup>54</sup> In 2008, DOT sanctioned a charter operator and its principal for failing to comply with these requirements.<sup>55</sup>

### **Indirect Air Carriers**

In a letter to the Governor of Ohio, the Secretary of Transportation stated that Deutsche Post AG's plans to restructure DHL Express and cease all operations at its facility in Wilmington, Ohio did not constitute an unfair or deceptive practice. In particular, the Secretary noted that DOT's regulations for foreign air freight forwarders, 14 C.F.R. Part 297, do not restrict their choice of a U.S. air carrier to transport their cargo domestically.<sup>56</sup>

## **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

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<sup>51</sup> Boston-Maine Airways Corp., Order 2008-4-42 (April 29, 2008). DOT's decision has been appealed to the U.S. Court of Appeals for the District of Columbia Circuit (docket no. 08-1212).

<sup>52</sup> 49 U.S.C. § 41101.

<sup>53</sup> Jet One Jets, Inc., Order 2008-3-2 (March 4, 2008) (assessing a penalty of \$60,000, half suspended on condition of compliance during the subsequent year).

<sup>54</sup> 14 C.F.R. §§ 380.32, 380.34.

<sup>55</sup> Mujtabah Mohammed and Constellation Travel Services, Inc., Order 2008-12-3 (December 5, 2008) (assessing a penalty of \$50,000, half suspended on condition of compliance during the subsequent year).

<sup>56</sup> Letter from Mary E. Peters, Secretary of Transportation, to Ted Strickland, Governor of Ohio (August 15, 2008).

advertising, the agency monitors other areas of industry activity. Nevertheless, the full scope of DOT's enforcement powers are relatively unknown to many in the industry. 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.