

ZUCKERT SCOUTT & RASENBERGER, L.L.P.

ATTORNEYS AT LAW

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

JOL A. SILVERSMITH

jasilversmith@zsrllaw.com

Department of Transportation Advertising Regulations

(November 2008)

The U.S. Department of Transportation (“DOT”) has statutory authority to regulate any “unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.” Pursuant to this authority, the DOT has adopted rules, published guidelines, and issued orders that have established a wide-ranging program of regulation for advertising by air carriers, travel agents, and tour operators.

This article is intended to provide a basic introduction to the DOT’s advertising regulations. The DOT regularly issues guidelines and orders that clarify its existing standards and address new issues, and the precise effect of the regulations will be determined by the specific facts and context of an advertisement. Therefore, this article should not be relied on as a legal opinion or advice. The law firm of Zuckert, Scoutt & Rasenberger, L.L.P. is available to consult with interested parties about air transportation advertising issues.

Introduction

The DOT’s advertising regulations apply to all air carriers, travel agents, and tour operators that do business in the United States. Although the DOT only has statutory authority to regulate advertising regarding air transportation, and not related services (such as cruises, hotels, and rental cars), the DOT does regulate advertising regarding travel packages that include air transportation, even if the packages also include related services.

The DOT’s advertising standards apply to all forms of communication, including traditional media, such as newspapers and television; new media, such as the web and e-mail; and specialized media, such as press releases, brochures, billboards, and trade publications such as the Official Airline Guide.

The DOT’s advertising standards are enforced by the Office of Aviation Enforcement and Proceedings. The Office regularly monitors advertisements in all forms of media to determine if they comply with the DOT’s standards (i.e., that they are clear, accurate, and internally consistent). The Office has the authority to take a variety of actions, including sending a warning letter; entering into a consent order (pursuant to which the advertiser usually agrees to pay a settlement to DOT); or initiating an enforcement proceeding, which can direct that advertising be terminated and require the advertiser to pay a fine.

The Full-Price Rule

Generally, the DOT requires all advertising to clearly state the full price that a consumer must pay for the advertised services. A carrier may not engage in what DOT considers to be “bait-and-switch” tactics by increasing the price at a later stage of the booking process. In particular, DOT allows only certain taxes and fees to be listed separately from a fare in advertising; all other taxes and fees must be included in the fare.

Pursuant to this standard, the DOT *allows* per-person, government-imposed taxes and fees to be listed separately from a fare. These taxes and fees currently include:

- Passenger Facilities Charge – up to \$4.50 per segment (maximum \$18 round-trip)
- September 11th Security Fee – \$2.50 per segment (maximum \$10 round-trip)
- Domestic Segment Fee - \$3.50 per segment (\$3.60 for sales on or after Jan. 1, 2009)
- International Departure/Arrival Tax – \$15.40 (\$16.10 for sales on or after Jan. 1, 2009)
- Hawaii/Alaska Departure/Arrival Tax – \$7.70 (\$8 for sales on or after Jan. 1, 2009)
- Customs User Fee – \$5.50
- Immigration User Fee – \$7.00
- APHIS User Fee – \$5.50

Taxes and fees that are imposed on a per-person basis by foreign governments also may be listed separately. (However, if an advertiser so chooses, some or all of these U.S. and foreign taxes and fees can be included in the fare; they are not *required* to be listed separately.)

In contrast, taxes and fees that are assessed on an *ad valorem* basis, such as the 7.5% federal excise tax, must be included in the advertised fare. Any air carrier-imposed surcharges, such as “fuel surcharges” and “insurance surcharges,” also must be included in the advertised fare. In addition, for travel packages that include air transportation, any taxes and fees that are not government-imposed on a per-person basis also must be included (i.e., taxes assessed on hotel rooms and rental cars, as well as hotel “linen charges” and “energy charges”).

When taxes and fees are listed separately from a fare, the advertising should either disclose their nature and amount in proximity to the fare, or through a prominent asterisk or hyperlink. The disclosure should state at least the range of the excluded taxes and fees, such as in the format “fares do not include up to \$___ in government-imposed taxes and fees, including the September 11th Security Fee.”

Security Fees

Since 2002, the Transportation Security Administration (“TSA”) has required air carriers to collect the September 11th Security Fee from passengers (\$2.50 per segment; maximum \$10 round-trip). Because this fee is imposed by the government on a per-person basis, the DOT allows it to be listed separately from a fare. However, TSA regulations require the fee to be identified specifically as the “September 11th Security Fee” if it is listed separately.

Security taxes and fees that are imposed by a foreign government on a per-person basis also can be listed separately, but air carrier-imposed “security” or “insurance” surcharges cannot be listed separately, even if they have been “approved” by a foreign government.

Baggage Fees

In response to recent air carrier restrictions on the weight and number of passenger bags, DOT has required air carriers and their agents to disclose if they limit passengers to fewer than two free checked bags of the type that generally have been free in the past. In addition, bag restrictions may not be applied retroactively to consumers who already have purchased tickets.

Service Fees

Generally, any service fee charged by an air carrier or travel agent must be included in the fare that is advertised to consumers. The DOT has allowed some variations for advertising on the web that displays a “matrix” of fares, subject to very specific restrictions; few if any air carriers, travel agents, or tour operators make use of this narrow exemption.

Purchase and Use Restrictions

Advertising should mention all significant restrictions on the purchase and use of a fare, including:

- Availability – Advertising must disclose if the number of seats available at the advertised price is limited. (Generally, advertised fares also must be available in reasonable quantities and for a reasonable period of time after an advertisement is published.)
- Refundability/Change Conditions – Advertising must disclose if a fare is non-refundable and if changes are allowed, and specify the fees for refunds or changes if allowed.
- Blackout Dates – Advertising must disclose if seats are not available at the advertised fare on specific dates during the term of the sale.
- Length of Stay/Advance Purchase – Advertising must disclose minimum and maximum stay restrictions (such as a Saturday-night stay requirement), or other time-based purchase and use restrictions (such as a two-week advance purchase requirement).
- One-Way Fares – Advertising must provide a prominent and proximate notice if a fare advertised at a one-way price is only available as part of a round-trip purchase.
- “Free” Fares/Two-For-One Fares – Advertising must disclose if “free” fares require the payment of taxes and fees and/or are subject to other restrictions, and if the qualifying fare for a two-for-one offer is higher than other fares available in the same market.

Code-Share and Change-of-Gauge Services

An airline must disclose if a flight actually will be operated by another airline, or if a flight with a single flight number actually involves a change of aircraft en route. These disclosures not only must be included in advertising, but also must be provided directly to the consumer when a ticket is purchased.

On-Time Performance

If an airline cites its on-time performance in advertising, it must also cite the data used in the calculation (usually official DOT data), the time period for the calculation, and the airlines to which its performance is being compared. In addition, air carriers generally should not publish unrealistic flight schedules (i.e., if they lack resources and/or traffic to operate those flights).

Public Charters

Additional rules apply to advertising for public charters. In particular, advertising must identify both the charter operator and the air carrier that will actually operate the flights. If the advertising includes a price, it must also refer consumers to or include a copy of the public charter's operator-participant contract. Additional requirements apply to the content of the operator-participant contract, and flights may not be advertised until after the charter operator and direct air carrier have filed a prospectus with the DOT.

Internet Advertisements

Generally, the same standards apply to advertising on the web and in e-mail that apply to advertising in traditional media. However, the DOT has allowed some variations that take advantage of the new media. For example, in Internet advertising, taxes and fees that are not included in a fare can be listed on a separate web page or pop-up box if the advertising provides a notice that not all taxes and fees are included in the fare, and provides a prominent and proximate hyperlink to that information.

The DOT also has set forth some special standards for advertising via television, radio, and billboards, because of the limited opportunities for disclosures to be made (i.e., for radio ads, the principle requirement is that the sum of excluded taxes and fees be disclosed audibly).

Telephone Bookings

Generally, the same standards apply to bookings made by telephone that apply to advertising in traditional media (i.e., agents must disclose to consumers the taxes and fees that are not included in a fare, as well as purchase and use restrictions, before a booking is made).

Additionally, consumers should be warned if an air carrier, travel agent, or tour operator charges more for fares that are not purchased via the Internet. However, the additional cost of making a booking by telephone (or by other traditional means, such as at a ticket counter) must not be described as a "fee" in fare advertising, in accordance with the full-price rule which does not allow carrier-imposed "fees" to be listed separately from fares.

Chain of Responsibility

The DOT takes the position that an air carrier shares responsibility for how its fares are presented to the public by travel agents, advertising agencies, or other partners. The DOT has assessed significant fines against air carriers for violations that were caused by other parties.

Additional Enforcement Issues

Although the historic focus of the Office of Aviation Enforcement and Proceedings has been advertising issues, it also enforces other DOT regulations, including the requirements that air carriers file periodic reports with DOT. In addition, in recent years it has assessed significant fines against air carriers that have violated the DOT's regulations governing the accommodation of passengers with disabilities; that have violated the DOT's regulations for denied boarding compensation; and that have held out services for which they lacked authority.

Questions?

There are many specialized advertising issues that are not discussed in this article, and the DOT regularly issues guidelines and orders that clarify its existing standards and address new issues. For additional advice or information about air transportation advertising issues, please contact Jol A. Silversmith at (202) 973-7918 or via e-mail at jasilversmith@zslaw.com.