

McBreen & Kopko Newsletter – Aviation and Travel Group

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New Developments in Compliance for Internet Travel Sellers

The federal Department of Transportation (“DOT”) has authority to regulate air travel vendors, whether they consist of air carriers, indirect air carriers, or agents of either. 14 C.F.R. 385, *et seq.* The DOT also has authority to promulgate rules and regulations that pertain to air fares advertised over the Internet. 14 C.F.R. 380.80. It is important to note that these regulations also apply to the advertisement of tour or cruise packages that contain an air component.

Based on the numerous DOT enforcement actions against travel companies and travel providers over the past year as well as our firm's interaction with the DOT, we have identified a number of new trends in the interpretation and enforcement process that we want to share with you.

1. There Is No Complete Fare Quote

The DOT has consistently sought transparency in air fare advertisements. Air fare advertisements, including Internet fare displays must state the full price charged the consumer. The DOT considers any such fare that does not state the “entire price to be paid by the customer to the air carrier, or agent, for such air transportation” to be an unfair or deceptive practice. 14 C.F.R. 399.84. Accordingly, DOT has interpreted this regulation to require the fare to include fuel surcharges, carrier imposed fees, Internet site service fees, and *ad valorem* taxes. (Note, PFCs, international departure taxes and 9/11 security fee may be separately quoted from the fare.)

However, the recent trend in how air fares are priced and structured is subverting the intent of these regulations. Airfares are no longer marketed and sold as the complete price a passenger would pay to travel from one airport to another. In an effort to shore-up their financial positions after the Wall Street collapse, air carriers are “unbundling” their products. Amenities that were traditionally part of the cost of air transportation are no longer included in the fare. Meals were

eliminated years ago, but now, add-on fees are charged for checked baggage, blankets, exit row or preferred seating, priority boarding, and to package other services, such as lower ticket change fees. These fees can add up and significantly increase the cost of the fare.

What this means for airfare advertisement on the Internet is that the first price quote may be considerably higher if, for instance, the traveler will be checking baggage.

The difference between carriers in these fees and services is confusing and makes it almost impossible to compare fares among various Internet travel sites and air carrier websites, as well.

For example, in booking a domestic coach ticket:

American Airlines, Delta and United Airlines charge domestic ticket holders \$25.00 to check one bag and \$35.00 for the second checked bag, each way. These add-on fees could amount to as much as \$200.00 for a round trip domestic flight where a passenger has two checked bags.

Among the low cost carriers, Jet Blue allows the first bag checked at no cost and charges \$30.00 for the second. AirTran charges \$20.00 for the first bag checked and \$25.00 for the second. Southwest will allow two bags checked free of charge.

If the base fares are almost equal, the difference in baggage fees can range from zero to two hundred dollars for a round trip ticket.

2. The Plot Thickens

From time to time, DOT disseminates notices to the industry addressing unfair and deceptive advertising practices in the form of DOT guidelines. The guidelines are based on regulations codified in the Code of Federal Regulations, after notice and receipt and review of public comment. It is interesting to note that the regulations do not state what is or is not considered unfair or deceptive or unfair. The guidelines are meant to provide guidance to carriers, travel agents and others on complying with the regulations. However, these guidelines do not address the current complexity in the display of air fares and add-on fees and services.

Further, these guidelines contain the most general descriptions (as all good guidelines should do) of what is required. Interpretation of the guidelines by DOT enforcement units can vary greatly. The DOT does not provide seminars or other educational forums where the Internet travel

industry can learn and acquaint itself with what specifically is required. What exactly is "proximate and prominent"? We see a lot of gray area in the guidance documents and enforcement actions.

New regulations will be issued when the FAA reauthorization bill, now before the Senate, is passed. This bill would direct the DOT to expand the breadth of subjects it considers for airline consumer complaint investigations, and establish an advisory committee for aviation consumer protection. The law also requires DOT to issue rules requiring air carriers to provide the public with a list of all passenger charges, besides airfare, that may be imposed by the air carrier. The list must be updated by carriers every 90 days unless there is no increase in the amount or type of fees.

Finally, under the new law, all sellers of airline tickets, including those who market primarily on the Internet will be required to identify the air carrier providing the air transportation service in the first display of the fare. Advertisements and sales on the Internet must also give notice of all taxes and fees, including their amount and a description, in reasonable proximity to the fare display and before the passenger is required to give personal or billing information.

3. Hey, They Have To Make Money Too

In early 2001, the DOT stated its intention to take steps, including enforcement actions, to bring all Internet air travel websites into compliance with air fare advertising regulations. *See*, Notice of Office of Aviation Enforcement and Proceedings, "Prohibition of Deceptive Practices in the Marketing of Airfares to the Public using the Internet", January, 18, 2001. DOT is working with limited staff and funds and, like all federal agencies, is under tremendous pressure to produce more with less. While it is not a self-funding agency, DOT is taking a very aggressive position against violators, even if there was no intent to deceive and no consumer complaints. DOT is assessing huge monetary penalties and any mitigating factors have little or no sway in decreasing or limiting the severity of these fines. Moreover, if the offending company is found to violate the same regulation in the future, the administrative enforcement action is likely to be much more severe.

The DOT has been criticized for focusing much of its enforcement resources on seeking violations of fare displays on the Internet. In 2009 Ultimate Fares appealed an assessed penalty of \$1million for failure to quote the full fare in advertisements. Penalties assessed in recent enforcement actions range from a low of \$40,000 assessed against foreign air carriers for failure to include ad valorem taxes in the amount of the air fare to \$600,000 assessed against a low-cost carrier for violations of regulations with regard to disabled passengers and failure to disclose the air carrier operating a code-share flight segment.

4. The DOT Might Just Join That Rewards Club!

The Internet is not obscure. The DOT enforcement agents are signing up on Internet site to join your company's rewards program and to receive all advertisements and offers instantly. This makes their job of scanning the web so much easier. It also means that any violation of the regulations and guidelines will be automatically sent to their email inbox.

Where previously the DOT had to scan printed advertisements or troll the web to find violations, their search is much easier and the likelihood of enforcement action, much higher when advertisements and travel offers are automatically sent to the DOT inbox. *See, e.g.,* Travelocity.com LP. Violations of 49 U.S.C. Sec 41712 and 14 C.F.R. 399.84, Order 2006-10-4, where Travelocity was fined for stating in a footnote that air carrier fuel surcharges may apply to certain fares obtained by use of a flexible date search feature.

Such reward clubs also serve to counter mitigating factors raised in defense of an enforcement action, as it allows the DOT to claim that the breath of the offending advertisement is at least as widespread as the reward club's membership.

5. Conclusion---Get Out In Front and Stay Out In Front

The enforcement authority of the DOT primarily lies in its ability to levy fines and to negotiate and enter into consent orders with parties who violate applicable rules and regulations. Indeed, a review of enforcement actions by the DOT makes it clear that Internet air fare providers are a

frequent subject of DOT enforcement authority. In addition to the monetary penalties, there may be other significant costs associated with a violation, including negative publicity resulting in a drop in traffic and a reluctance by your travel providers to do business with you.

Internet travel companies need to be proactive and not reactive in regard to advertising compliance.

Depending on the structure and organization of your company and its 'corporate culture', we can suggest ways to ensure monitoring of website advertisements and provide regular updates and training sessions for your staff. Based on our experience, the costs of non-compliance greatly exceed the costs of compliance.

Get out in front and stay out in front of compliance.

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