

## ***Aviation Insights: DOT Rules on Fare Advertising (Feb. 2019)***

### **Overview**

The U.S. Department of Transportation (DOT) regulates advertisements by airlines and ticket agents (including but not limited to online and brick-and-mortar travel agencies, tour operators and other sellers of air transportation). This power derives from DOT's legal authority to prevent unfair and deceptive practices and unfair methods of competition in the sale of air transportation (49 U.S.C. § 41712). The DOT has issued extensive guidance setting forth its advertising requirements, such as formal statements of enforcement policy and consent orders directing respondents to pay significant penalties and "cease and desist" from certain practices. The DOT takes the position that an airline shares responsibility for fares presented to the public by ticket agents, advertising agencies, or other partners and has fined airlines for violations directly caused by other parties.

### **DOT's Enforcement Power is Exclusive**

The U.S. Supreme Court has held that the DOT's power to regulate airfare advertising is exclusive. State consumer protection agencies may not regulate such ads. Moreover, the Federal Trade Commission's power to prevent unfair methods of competition and unfair or deceptive acts or practices does not extend to airfare advertising. Additionally, Federal courts have concluded that consumers cannot sue airlines for violating the Federal law which empowers the DOT to prevent unfair and deceptive practices. The DOT's enforcement role is therefore heightened; if it does not act to prevent deceptive practices among sellers of air transportation, neither consumers nor other government agencies may take action in this area.

### **Covered Activities**

The DOT's requirements apply to all forms of advertisements and solicitations for air transportation, including via traditional print media (e.g., newspapers, magazines, flyers, and brochures), radio and television broadcasts, billboards, Internet ads and booking engines, specialized channels such as press releases and "social media" websites, email solicitations and trade publications such as the Official Airline Guide. The DOT also imposes requirements for consumer inquiries and ticket sales made via the telephone.



The firm's practice encompasses virtually every aspect of aviation law, including advising sellers of air transportation regarding compliance with DOT's economic regulations and enforcement policies. For further information regarding the matters discussed in this article, please contact any of the following attorneys:

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## The Full Fare Rule

The DOT requires any ad or solicitation for passenger air transportation that includes a price to “state the entire price to be paid by the customer,” either in the exact amount or rounded up to the next whole dollar. Previously, as a matter of enforcement policy, the DOT allowed certain government-imposed taxes and fees to be stated separately from the advertised fare; however, airline-imposed charges (such as fuel surcharges) and taxes calculated on a percentage basis (such as the U.S. domestic 7.5% excise tax on the sale of commercial air transportation) were required to be included in the fare. But in early 2012, the DOT ceased allowing any government-imposed taxes and fees to be excluded from the stated price; advertised prices for air transportation (and for packages that include air transportation) must be all-inclusive. For example, a fare no longer can be described as “\$250 + \$50 in taxes/fees”; it instead must be described as “\$300.”

However, once a full price has been stated in an advertisement or solicitation, additional details may be provided – i.e., the taxes and fees included in the full price may be identified, so long as they are (i) not displayed more prominently than the full price and (ii) described accurately. Additionally, the disclosure must accurately distinguish between government-imposed taxes and fees on the one hand, and airline- or ticket agent-imposed fees on the other; i.e., amounts that include both taxes and airline fuel surcharges should be described as “taxes and airline-imposed fees.”

## Examples of U.S. taxes and fees (and their amounts as of January 2019) which can be applicable to fares are:

- Passenger Facility Charge – up to \$4.50 per segment (maximum \$18 round-trip)
- September 11th Security Fee – \$5.60 per one-way trip
- Domestic Segment Fee – \$4.20 per segment
- Domestic Excise Tax – 7.5% of fare paid
- International Departure/Arrival Tax – \$18.60
- Hawaii/Alaska Departure/Arrival Tax – \$9.30
- Customs User Fee – \$5.77
- Immigration User Fee – \$7.00
- Animal and Plant Health Inspection Service (APHIS) User Fee – \$3.96

## Air-Inclusive Packages

The DOT’s advertising requirements apply to ads for tours or tour components that include air transportation. As a result, as noted above, any mandatory charge payable to a tour operator must be included in the advertised fare. Further, where a mandatory charge is payable to an entity other than the tour operator (e.g., convenience fees payable to a rental car company, a linen or energy charge payable to a hotel, etc.), the ad should alert consumers to the nature and extent of such charges; such an alert can be included in the portion of the ad where a description of government imposed taxes and fees is provided, if applicable.

## Baggage Fees and Other Charges for Optional Services

In response to restrictions on the weight and number of passenger bags that are included in the price of air transportation, the DOT mandated that airlines and ticket agents must disclose that bag fees may apply during the online purchase process. Further, the DOT requires airlines and ticket agents to disclose on e-ticket confirmations and purchase summaries any applicable charge for a passenger’s first and second checked bags, as well as any fees applicable to carry-on baggage. In addition, bag restrictions and fees may not be applied retroactively to consumers who already have purchased tickets. Airlines (but not agents) also are required to disclose any fees for ancillary

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services, such as seat-selection and in-flight meals on their websites. Additionally, the DOT specifically has prohibited offers for air transportation and tours that include air transportation from automatically adding optional services (i.e., travel insurance) to a consumer's purchase; consumers must affirmatively "opt-in" before any optional services are added to their purchases.

## Service Fees

Generally, any mandatory service fee charged by an airline or ticket agent must be included in the fare that is advertised to consumers. The DOT has allowed some limited exceptions – such as Internet advertisements that display a "matrix" of fares, subject to very specific restrictions, or if there are means by which the service fee can be avoided, such as by purchasing a ticket at an airport counter. However, few airlines or ticket agents make use of these exceptions, and legal advice should be sought before doing so.

## Disclosure of Essential Terms

The DOT requires that ads prominently disclose essential terms in connection with the purchase of passenger air transportation. Examples and required disclosures include, but are not limited to, the following:

- Refundability/Change Conditions – advertising must disclose if a fare is non-refundable, if changes are allowed, and specify the fees for refunds or changes.
- 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 any 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).

Moreover, terms applicable to services other than air transportation that apply to an air-inclusive package, such as hotel and cruise double occupancy requirements, must be prominently disclosed.

## Availability of Fares

Fares held out orally or on the Internet must always be current and available for purchase. For newspaper, radio and television ads, sellers must ensure that each time such ads are run, they have made a reasonable number of seats available at the advertised price for a reasonable period of time after the ad runs (typically 72 hours unless a shorter time is specified in the ad). For printed materials with long shelf-lives, e.g., brochures, flyers and mailers, such ads may contain a statement that fare availability is limited and prices are good "as of" a certain date, directing customers to a location where current prices may be obtained, such as a telephone number or website. DOT has developed additional guidance applicable to other circumstances.

## Offers for "Free" Air Transportation and "Percentage Off" Promotions

Offers for free air transportation must clearly disclose any significant conditions that must be met to obtain the ticket. In particular, the DOT has issued guidance addressing two-for-one promotions requiring such ads to clearly state if the fare that must be purchased to take advantage of the offer is higher than other fares in the market available on the same airline. The DOT also prohibits the advertisement of fares as "free" when, in fact, the consumer must pay mandatory charges, fees, or taxes in order to take advantage of the offer. Finally, the DOT's policy on "percentage off" promotions considers such sales to be deceptive unless the "benchmark" fare (i.e., the fare to which the discounted fare is compared) was available in reasonable quantities and for a reasonable period immediately prior to the ad and either the ad identifies and describes the benchmark fare or the benchmark fare is a discounted fare comparable to the promotional fare, with similar fare rules.

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## Advertising Each-Way Fares

Ads promoting each-way fares available only as part of a round-trip purchase must clearly and conspicuously disclose the round-trip purchase requirement. This disclosure must be prominent and in close proximity to the advertised base fare; mere inclusion in the terms and conditions or at the footer of the ad is insufficient. In addition, if a round-trip purchase is required, the fare can be described as “each-way” but cannot be described as “one-way.” Finally, airlines cannot – in order to “bait” customers – advertise outbound each-way fares that are deceptively low in comparison to the return flight fares.

## Codeshare, Wet Lease and Change-of-Gauge Services

Airlines and ticket agents must disclose: (i) the identity of the operator of a codeshare service flight or a flight conducted under a long term wet lease, i.e. a lease by which the lessor provides both an aircraft and crew dedicated to a particular route; and (ii) whether a flight with a single flight number actually involves a change of aircraft en route. These disclosures must be included in advertising and disclosed directly to the consumer when a ticket is purchased. In addition, for online displays, the DOT has specified that codeshare disclosures must be provided in the first set of results following an itinerary search. The DOT regulations also govern the font size airlines and ticket agents must use when identifying codeshare and long term wet lease flights on desktop browsers and applications as well as mobile websites and applications. Moreover, the DOT regulations require that, with respect to oral communications with prospective customers concerning a codeshare or long term wet lease operation, the identity of the operator be provided “the first time” that such a flight is “offered” to the consumer, or, “if no such offer was made, the first time a consumer inquiries about such a flight.” 14 C.F.R. § 257.5(b).

## 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, airlines generally should not publish unrealistic flight schedules (i.e., if they lack resources to operate those flights, or the flight has been consistently delayed).

## Public Charters

Additional rules apply to advertising for public charters. In particular, advertising must identify both the charter operator and the airline that will actually operate the flights ( i.e., the direct air carrier). 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 a DOT-approved charter prospectus.

## Internet Requirements

The DOT has developed specific enforcement policies for Internet ads, including websites, online booking engines and email solicitations. As noted above, there are specific requirements for the disclosure of fees for ancillary services on airline websites and baggage fees on airline and ticket agent websites. Furthermore, the DOT requires that any prices advertised on the Internet be current and available. Finally, for ticket agent websites that display flight results based on consumer entered criteria (e.g., nonstop flights or specific airports), if the ticket agent does not market all airlines that may serve the market, the display results must indicate that: (i) only search results from marketed airlines are displayed; and (ii) a “no results” display does not necessarily mean other airlines do not offer flights matching the search criteria.

## 24-Hour Reservation Requirement

Most airlines conducting scheduled or public charter service to, from or within the U.S. must adopt and adhere to a customer service plan which, among other things, requires the airline to either hold a reservation at the quoted fare, or

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allow a reservation to be cancelled without penalty, for 24 hours after the reservation is made, provided the reservation was made seven days or more prior to departure. Airlines must disclose this 24 hour hold/cancellation option: (i) on their websites wherever general cancellation and refund policies are provided to the public; and (ii) orally via their telephone reservation department and ticketing locations upon direct inquiry from a consumer.

## Other Media

The DOT has special standards for advertising via television, radio, and billboards, because of the limited opportunities for disclosures to be made (e.g., for radio and billboards, a general statement such as “some restrictions apply” may be used instead of specific disclosures, but for television, essential terms should appear on-screen).

## Telephone Bookings

Generally, many of the standards which apply to traditional print media also apply to bookings made by telephone. For example, telephone reservations agents must state an all-inclusive price to consumers, as well as state essential terms before a booking is made and disclose any codeshare arrangement. Additionally, consumers should be warned if an airline or ticket agent charges more for fares that are not purchased via the Internet.

## Price Increases

For prices that are subject to increase before full payment (particularly air-inclusive tours), the DOT requires sellers to obtain written consumer consent to the price increase policy before accepting any consumer payment. Price increases after full payment are prohibited, except for changes attributable to increases in government-imposed taxes or fees, and then only with the same advance written consumer consent. To meet these requirements, the DOT has adopted special enforcement policies for transactions conducted over the Internet or by telephone.

## Display Biasing

The DOT also has issued regulations applicable to airlines and ticket agents that operate any “electronic airline information system” or EAIS, defined as any “system that combines [multiple airlines’] schedule, fare or availability information for transmission or display to airlines, ticket agents, other business entities or consumers,” when displayed on (i) websites marketed to consumers in the U.S., or (ii) on proprietary displays available to travel agents, business entities, or a limited segment of consumers in the U.S. 14 C.F.R. § 256.3. Under these regulations, if any factor relating to airline identity and not based on user selection or corporate contract travel arrangement is used to order the presentation of airline flight information, a notice must be clearly and conspicuously displayed at the top of search results presented in response to user-selected criteria, disclosing that flights are not displayed in a neutral order and that the presentation of certain airlines’ information is given preferential treatment.

## Additional DOT Enforcement Matters and Rulemaking Initiatives

Although one of the primary enforcement areas for the Office of Aviation Enforcement and Proceedings has been around advertising issues, it also enforces other DOT regulations. In recent years it has assessed significant fines for airline violations such as:

- failing to adequately compensate passengers for lost or damaged baggage;
- violating regulations for the accommodation of passengers with disabilities;
- violating regulations for denied boarding compensation;
- failing to file mandatory financial and traffic data reports; and
- holding out services for which they lacked DOT economic authority.

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The DOT also has issued notices requiring airlines and other sellers to refer purchasers to the DOT's website listing countries require aircraft passenger cabin insecticide treatment. Additionally, in 2015 DOT regulations governing the accessibility of airline websites and U.S. airport automated kiosks for persons with disabilities went into effect.

Finally, in 2014, DOT proposed a series of enhanced aviation consumer protection requirements that still are undergoing internal agency rulemaking and review, including (i) a proposal to codify the DOT's interpretation of the term "ticket agent" under 49 U.S.C. § 40102(a)(40), to expressly include entities acting as intermediaries involved in the sale of air transportation, if the entity holds itself out as "a source of information about, or reservations for, the air transportation industry" and receives compensation "in any way related to the sale of air transportation"; (ii) whether large travel agencies (i.e., agencies with more \$100 million in annual revenues) should be required to adopt and adhere to minimum customer services standards similar to those required of airlines under the DOT's regulations, including standards governing: the timing for ticket refunds; the holding/cancellation of reservations within 24 hours of booking; the disclosure of airline cancellation policies, aircraft seating configurations and lavatory availability; the timing for communicating airline-initiated itinerary changes; and the handling of customer complaints; and, (iii) whether to amend the DOT's prohibition on post-purchase price increases to include baggage fees and address so-called "mistake fares." The proposal addressing large travel agency customer service standards recently gained additional relevance, when Congress directed DOT in Section 427 of the FAA Reauthorization Act of 2018 (which the president signed into law on October 5, 2018) to issue a final rule no later than April 3, 2019, requiring such entities to adopt minimum standards as may be determined by the DOT, and to consider, to the extent feasible when establishing such standards, consistency with airline customer service and disclosure requirements applicable under existing DOT regulations. Under Section 427, sales by travel agencies made pursuant to a specific corporate or government fare management contract are exempted from the minimum customer service standards.

Airlines and ticket agents are well-advised to consult with regulatory counsel to ensure that their practices comply with the underlying statutes, regulations, and policies applicable to advertising and other matters regulated by the DOT, in order to minimize their potential exposure to public enforcement action, costly litigation and significant civil penalties (currently up to \$33,333 per violation, and per day of continuing violation).