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Docket Management Facility
U.S. Department of Transportation
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West Building Ground Floor, Room W12-140
Washington, DC 20590-0001

**Comments of Consumers Union
to the U.S. Department of Transportation
on “Enhanced Consumer Protections for Charter Air Transportation”
Docket No. DOT-OST-2007-27057-0025**

Introduction

Consumers Union (CU)¹ submits the following comments to the U.S. Department of Transportation (“DOT”) in the above-referenced matter. We believe the provisions of the proposed rule, as recommended by the National Transportation Safety Board, specifying required disclosures and prohibited practices, will strengthen legal protections for consumers of charter air transportation, and promote reliability, safety, and accountability. We therefore support these provisions, with additional recommended improvements, as discussed below.

Background

In recent years, the DOT has undertaken a number of efforts to increase protections for the flying public, including in the areas of extended tarmac delays, fare and fee disclosures, airline codesharing disclosures, overbooking, and baggage handling.²

¹ Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts this work in the areas of telecommunications reform, health reform, food and product safety, financial reform, and other areas, including air travel. Consumer Reports is the world’s largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

² See www.dot.gov/briefing-room/new-dot-consumer-rule-limits-airline-tarmac-delays-provides-other-passenger-
[www.dot.gov/briefing-room/us-department-transportation-expands-airline-passenger-protections.](http://www.dot.gov/briefing-room/us-department-transportation-expands-airline-passenger-protections)

Consumers Union has long been active in advocating for clearer and more secure passenger rights and protections, via DOT public forums; participation in DOT's Future of Aviation Advisory Committee; Consumer Reports and its other publications; cooperation with other consumer organizations; and public and media outreach. We have supported and commended DOT for constructive measures it has taken, even as we have continued to advocate for additional protections.

To date, these DOT measures have been primarily directed at protecting passengers flying on scheduled airline flights. Passengers choosing to book charter service have remained more vulnerable. There are several attributes of charter service that contribute to this vulnerability for passengers:

- Charter airline operators often are unfamiliar to consumers, so there are fewer word-of-mouth reviews, and fewer resources to find additional information. For example, DOT's monthly Air Travel Consumer Reports rate only scheduled flights.
- Charter airline operators are smaller than most scheduled airlines, and are more susceptible to bankruptcy and shutdowns.
- Unlike many scheduled airline tickets, charter tickets are generally non-transferable from carrier to carrier.
- Passenger rights on charter carriers can be quite unclear in the event of irregularities, such as when flights are delayed or canceled.

Although millions of passengers worldwide continue to purchase charter flights annually, the charter airline industry has not been as active in recent years as previously. Traditionally, tour operators and travel agents selling charter flights could offer a pricing advantage compared to scheduled fares, with fares sometimes as much as 70% less. The pricing advantage has decreased, however, and the use of charter air services has fallen off. In 1977, the year before the U.S. airline industry was deregulated, nearly a third of all passengers flying across the North Atlantic traveled on charter carriers; today that number is less than 5%.³ And charter carriers do not operate between North America and the Pacific Rim.⁴

DOT's "Plane Talk: Public Charter Flights" website⁵ notes that charter flights can still offer clear advantages for consumers, with fares not "capacity-controlled" and therefore not subject to fluctuation, and without the restrictions such as advance-purchase, Saturday night-stayover, and 30-day maximum stay requirements typically found with scheduled fares. But the website also notes a number of potential disadvantages, among them:

- There can be significant penalties for cancellations, and these penalties can increase closer to the departure date.

³ Flying Off Course IV: Airline Economics and Marketing, Rigas Doganis; Routledge Publishers, 2010.

⁴ IATA Economics Briefing No. 9: Air Travel Demand, Mark Smyth & Brian Pearce; IATA, April 2008 (www.iata.org/whatwedo/Documents/economics/air_travel_demand.pdf).

⁵ www.dot.gov/airconsumer/plane-talk-public-charter-flights.

- The charter operator or airline is permitted to cancel a flight for any reason up until ten days before departure.
- Itineraries and even prices are subject to change, and only “major changes” may give a right to cancelation or refund.
- Delays of up to 48 hours are permitted.
- Liability for mishandled baggage may not be the responsibility of the charter airline, as it would be for a scheduled airline.
- The burden for many irregularities falls on the passenger, including delayed connecting flights via scheduled airlines. As DOT states: “Charter reservations are only good for one flight. If you miss it for any reason, you’re probably out of luck.”

While some of these attributes may be inherent in the nature of charter air service, the passenger vulnerabilities they create highlight the importance of appropriate disclosure and accountability.

The charter operator Direct Air’s abrupt cessation of operations in March 2012, due to previously undisclosed financial insolvency, brought passenger vulnerabilities into sharp relief, and prompted DOT to issue revised policies for approval of public charter service, strengthening certain passenger protections.⁶ Under the new policies, the public charter operator must contract with the direct air carrier for the full cost of all components of the air service; must retain all passenger reservation records, and share them with the direct air carrier, to ensure responsiveness and accountability in the event of any disruption in service; and must accept payment only by credit card or other means that provide an equivalent charge-back mechanism, and only as part of a contract providing specific flight dates.

DOT enforcement actions in recent years clearly demonstrate that the air charter industry continues to warrant vigilant oversight. A few examples:

- In February 2013, DOT fined Sky King \$500,000 for violating multiple passenger protection rules after Sky King canceled flights in the wake of the shutdown of its partner Direct Air.⁷
- In August 2011, DOT fined Aviation Advantage Inc. \$150,000 for violations including a) advertising flights without listing the name of the charter operator or airline, b) selling tickets for public charter flights without obtaining the necessary DOT authority, and c) contracting for air service with an unlicensed operator.⁸
- Also in August 2011, DOT fined Swift Air \$100,000 for abruptly canceling a public

⁶ www.dot.gov/individuals/air-consumer/news-digest.

⁷ www.dot.gov/briefing-room/dot-fines-sky-king-charter-violations-related-direct-air's-ceasing-service.

⁸ www.dot.gov/briefing-room/dot-fines-two-companies-violations-air-charter-rules.

charter flight just minutes before its scheduled departure.⁹

- In January 2011, DOT fined Capital Airways \$175,000 for operating and marketing charter flights without necessary authority.

Support for Proposed New Authority and Protections

In this proposed rule, DOT would establish protections for consumers who purchase charter air transportation through intermediaries who rely on someone else to perform as the carrier – including air taxi operators, commuter air carriers, and air charter brokers – similar to protections already applicable when charter air transportation is purchased from carriers or their authorized agents. As part of this, DOT would formally define air charter brokers as a new class of indirect air carrier. These are entities who sell or arrange “single entity” charter service, as an entire planeload for one customer. This would permit air charter brokers to act independently, without being an agent of a carrier or the agent of the passenger, or an agent of the charterer purchasing the air travel on behalf of a group of passengers.

The proposed rule would impose specified disclosure and notification requirements, and specified prohibitions, on all these charter air intermediaries, with violations treated as unfair and deceptive practices and unfair methods of competition.

Among the cornerstone requirements is a requirement that customers be informed, at the time an air charter contract is arranged, and anytime thereafter if the information changes, as to: (1) the name of the carrier that will be in operational control of the aircraft during flight; (2) any other “doing business as” names contained in the Operations Specifications of that carrier; (3) the name of the aircraft owner; and (4) the names of all brokers involved in arranging the flight.

This proposed rule is consistent with the rules that already apply to public charter flights, on which tickets are sold individually to the public – 14 CFR 380.30 and 380.32 require that public charter participants be told the name of the direct carrier operating the charter flight. As Transportation Secretary Anthony Foxx noted in September, in calling for a new rule requiring air charter broker disclosures, “We believe that all consumers purchasing air transportation have a right to basic information about the flight they are taking, such as who is operating the flight and how much it will cost. We will insist on transparency from air charter brokers, just as we do from major commercial airlines and public charter companies.”

Consumers Union supports the requirements and prohibitions set forth in the proposed rule. We believe they are appropriate for the protection of consumers, and reasonable to impose. And we believe they should apply broadly, so that there are no gaps in protection.

We also support the proposal to give air charter brokers the additional flexibility to operate independently so as to better adapt to the needs of the consumers they serve, provided that the protections apply fully. Protecting consumers in the evolving air charter environment will require acknowledging the important role air charter brokers now play. It is important to ensure that air charter brokers comply with the same rules that are in place for other sellers of air

⁹ Id.

travel, that consumers fully understand that the brokers are not direct air carriers themselves, and that consumers are assured that only properly licensed direct air carriers will operate charter flights.

Recommended Improvements.

While we support the proposed new protections, we believe they can be clarified and strengthened in a number of respects.

First, the rights as against air charter brokers and other intermediaries are given to the charterer. That may be appropriate in the typical single entity charter situation, where the charterer represents the passengers in a close-knit community such as a sports team and its players, a company and its employees, or a church and its congregation. But we would urge DOT to consider whether the rule as drafted might also reach atypical situations, in which the charterer is not as closely identified with and intimately tied to the individual passengers, but is in more of a commercial relationship with them – for example, a travel club. If there are such instances that would be covered, the requirements should be revised so that the individual passengers have rights as against the air charter broker or other intermediary, or as against the charterer, with similar duties imposed in either case. (Perhaps the requirement in section 295.5(g) that in a “single entity charter” the cost must be borne by the charterer and not directly or indirectly by individual passengers prevents such commercial relationships from being covered. If so, that should be stated clearly in the explanation for the final rule.)

Second, while it may be appropriate to exempt air charter brokers from most of the requirements that apply to carriers, as proposed – provided that the requirement in section 295.20 ensures that the air charter broker is legally accountable for the operating carrier to be in compliance with those requirements – we would recommend that air charter brokers, and all intermediaries, be required to carry an appropriate amount of insurance and bond, analogous to what is required for carriers under section 41112. While the required disclosures in section 295.24(b)(7) and section 298.100(d) are helpful, they are not as protective.

Third, attention should be given to ensuring that, with the addition of air taxi operators, commuter air carriers, and air charter brokers, all those who hold out, sell, arrange, or otherwise provide for charter air transportation are covered, so that there are no gaps in protection for consumers who fly by charter air.

Fourth, we believe the protections should be strengthened further. As written, section 295.24(b) seems to require that the disclosures must take place before the contract is entered into. But then 295.24(c) says that if the information is not yet “known” at that time, it can be provided “within a reasonable time after [it] becomes available.” It is not clear what “available” means, what effort that requires on the part of the air charter broker to diligently inquire, or how much delay in notification would be deemed “reasonable.” And then, if the information subsequently changes, the air charter broker must merely notify the charterer “within a reasonable time after such information becomes available” – even if the air travel has already begun, and apparently even if the air charter broker could have found out about the change much earlier. Furthermore, the only right is to get a refund, regardless of the actual consequences to

the charterer or to the passengers – and even that refund right is apparently available only if the notification is not given in a timely manner. And there are similar shortcomings in sections 298.90 and 298.100 for air taxi operators and commuter air carriers acting as intermediaries.

We believe that each of those protections stops a step short of where it should. The air charter broker or other intermediary should be required to make all reasonable effort to notify the charterer as promptly as possible, and to make all reasonable effort to monitor arrangements being made for the travel so as to learn of any change as close to immediately as possible. The term “within a reasonable time” simply does not provide enough guidance to the air charter broker and other intermediaries, or enough protection to the consumer. Furthermore, the charterer should have the right to cancel and obtain a full refund if the circumstances of the flight change in any respect material to the contract, regardless of when the notice comes. And finally, if the notice is not given in a timely fashion, and travel plans are materially disrupted as a result, there should be a right not only to cancellation and refund, but also to consequential damages, including reimbursement of the reasonable cost of making suitable alternative arrangements for travel and accommodations. And when the notice comes after the travel has begun, it should be presumed that it is not reasonably timely.

These risks can be effectively borne by the air charter broker or other intermediary carrying an appropriate amount of insurance and bond.

Drafting Issues

We also notice a number of places in which the language in the proposed new rule could benefit from clarification.

First, the definitions of “air charter broker” in section 295.5(b) and “single entity charter” in 295.5(g) need to be conformed. Specifically, “air charter broker” is defined in terms of selling or arranging “single entity passenger charter air transportation.” That phrase should be revised to read “single entity charter passenger air transportation,” so as to explicitly include the defined term “single entity charter.”

Second, there is an apparent inconsistency between section 295.5(b) and section 295.24(b)(2). The former seems to say an air charter broker can never be an employee or agent of an air carrier or a charterer, but the latter seems to say the opposite, that an air carrier can indeed be an indirect air carrier itself, or an agent of a charterer, or an agent of the direct air carrier.

Third, further attention needs to be given to the definition for “charterer” in section 95.5(c). As written, charterer is defined only in terms of the charterer’s relationship with an air charter broker. Even if the new part 295 is intended to apply only when there is an air charter broker involved in the transaction, the definition as written could potentially lead to unintended results. One potential result is that if there are two air charter brokers involved in a transaction, both of them would, under the terms of the definition, also be charterers. One way to avoid this result might be to rewrite the definition to read something like “the person or entity who

contracts on behalf of a group of passengers for their transportation on a single entity charter flight, but who is not an air charter broker.”

Fourth, the term “charter flight” is used a number of times in the definitions in section 295.5, but is not defined. Since Part 295 is intended to apply only when there is an air charter broker involved, and that occurs only for single entity charter flights, perhaps the phrase should be revised to read “single entity charter flight,” to more closely conform it in scope to the other terms.

Fifth, in section 295.24(b), the air charter broker is required, if the contract occurs orally, to make the disclosures “orally, and again in any written correspondence, including correspondence confirming the purchased air transportation.” This leaves open the possibility that there will be no follow-up written correspondence, or that such correspondence will come very late in the process, in which case written disclosures might never be required, or would be required only at the last minute. This should be revised to clarify that prompt written follow-up with the disclosures is required. (Section 298.90 already requires that these disclosures be made in writing by air taxi operators and commuter air carriers before the contract is executed.)

Sixth, the requirement in section 295.24(b)(5) that the air charter broker disclose “the total cost of the air transportation paid to the charter broker” would seem to imply that the cost has already been paid; but the disclosure must be made before the contract is entered into. The phrase should probably read “to be paid to.”

Seventh, section 295.24(c) gives the air charter broker additional time to disclose if some of the information required to be disclosed “is not known” at the time the contract is entered into, until “a reasonable time after such information becomes available.” As written, this potentially excuses the broker for all disclosures if just part of the information is not known at that time, and it seems to require only that the information not be actually known, not that the air charter broker have made any effort to know it. It would be more protective to be clear that the air charter broker is under a duty to inquire with reasonable diligence so as to get the information as soon as reasonably possible, including before the contract is signed. A similar clarification should be made in section 298.90(b) for air taxi operators and commuter air carriers acting as intermediaries.

Eighth, section 295.50(b)(2) prohibits using the name or logo of a carrier in a way that may confuse or mislead “with respect to the status of the air charter broker.” It may not be clear what “status” in this regard refers to. We would recommend clarifying, such as by revising to read “with respect to the air charter broker’s relationship with the carrier or with respect to its status as an air charter broker.”

Ninth, section 295.50(b)(9) is ambiguous; it is not clear whether “cannot be legally performed” only includes situations where the carrier does not have the required licenses and other legal authority, or also includes situations where the broker knows or has reason to know that the carrier is not capable of reliably and safely and competently carrying out the transportation, or that the carrier is impaired as a result of some “force majeure” circumstance outside its control. We would urge DOT to consider clarifying to include these other

considerations. A similar clarification should be made in section 298.100(g) for air taxi operators and commuter air carriers acting as intermediaries.

Conclusion

We believe that all airline passengers should have the right to know in advance which carrier will operate their flight, as part of their fundamental right to transparency. This proposed rule is another important step in ensuring that all air travel passengers receive this right and other fundamental protections, regardless of who is arranging the flight and selling the tickets. We urge DOT to strengthen the proposed rule as necessary to reach all varieties of charter air service arrangements.

Accordingly, Consumers Union strongly supports these proposed increased protections for consumers of charter air service, with the additional recommendations discussed above.

Respectfully submitted,

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