

# The importance of being earnest: the DOT's code-share and change-of-gauge disclosure requirements

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In 1999, the US Department of Transportation adopted new regulations that require airlines and ticket agents to disclose to consumers that an air transportation service will be operated pursuant to a code-share arrangement, or whether services operated under a single flight number will in fact entail a change of aircraft en route.

In adopting the new rules, the Department was motivated by the best interests of the flying public. But the regulations impose significant new costs on airlines, and have left in their wake many unanswered questions with regard to how they will in practice be enforced.

## INTRODUCTION

In 1999, the US Department of Transportation ("DOT" or "Department") adopted two new regulations that require airlines and ticket agents to disclose information to the flying public: the Disclosure of Code-Sharing Arrangements and Long-Term Wet-Leases Rule ("Code-Share Rule") and the Disclosure of Change-of-Gauge Services Rule ("Change-of-Gauge Rule").

The Code-Share Rule requires airlines and ticket agents to identify in computer reservation systems ("CRSs"), and in other information provided for the public, whether an air transportation service will be operated pursuant to a code-share arrangement or a long-term wet lease. The Change-of-Gauge Rule likewise requires airlines and ticket agents to inform consumers if an air transportation service operated under a single flight number requires a change of aircraft en route.

By law, the Department has the power 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> Prior to 1999, the Department required as a matter of policy that airlines inform consumers of code-share arrangements and change-of-gauge services. But, motivated by concerns about airline customer service, including US Congressional proposals for a "Passengers Bill of Rights", the DOT now has codified these requirements as formal regulations, and has expanded both their scope and the parties subject to them.

In adopting the Code-Share Rule and the Change-of-Gauge Rule, the DOT was motivated by the best interests of the flying public. However, the new regulations may not provide many consumers with significant new information about the flights that they book. But at the same

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1. 49 USC § 41712.

time, the new regulations will impose significant new costs on airlines. Moreover, there are still many unanswered questions with regard to exactly how far the Department's code-share and change-of-gauge disclosure requirements have been extended.

Therefore, this article will examine the background and requirements of the Code-Share Rule and the Change-of-Gauge Rule; the significant costs the new regulations impose on airlines; unanswered questions about the rules that could entrap unwary or even cautious airlines and travel agents; what airlines and travel agents can do to ensure that they will not be the subject of the first enforcement action under the new regulations; and how the DOT should clarify the rules' requirements, to ensure that they are implemented in the most effective and consistent manner.

## THE CODE-SHARE RULE AND THE CHANGE-OF-GAUGE RULE

The Code-Share Rule requires that airlines that sell or issue tickets in the United States and ticket agents that do business in the United States inform consumers if an air transportation service will be operated pursuant to a code-share arrangement or a long-term wet lease. They also must identify the air carrier that actually will operate the flight. Specifically, the rule requires airlines and ticket agents to disclose code-share arrangements and long-term wet leases in:

- CRSs, the Official Airline Guide ("OAG"), and other written and electronic schedules<sup>2</sup>;
- direct oral communication between a consumer and an airline or ticket agent<sup>3</sup>;
- an itinerary or a separate written notice that accompanies a ticket, or in the case of ticketless travel, is provided when a consumer checks in for the first flight of his itinerary<sup>4</sup>; and
- print, radio and television advertisements.<sup>5</sup>

Similarly, the Change-of-Gauge Rule requires that airlines that sell or issue tickets in the United States and ticket agents that do business in the United States disclose if an air transportation service that is operated under a single flight number in fact requires a change of aircraft en route. Specifically, the rule requires airlines and ticket agents to disclose change-of-gauge services in:

- CRSs, the OAG, and other written and electronic schedules<sup>6</sup>;
- direct oral communication between a consumer and an airline or ticket agent<sup>7</sup>; and
- a written notice that accompanies a ticket, or in the case of ticketless travel, that is provided when a consumer checks in for the first flight of his itinerary.<sup>8</sup>

The DOT's concern that consumers should be well-informed about the air transportation

2. 14 CFR § 257.5(a).

3. 14 CFR § 257.5(b).

4. 14 CFR § 257.5(c).

5. 14 CFR § 257.5(d).

6. 14 CFR § 258.5(a).

7. 14 CFR § 258.5(b).

8. 14 CFR § 257.5(c).

services they purchase is not new. Indeed, the first government policy statements on unfair and deceptive practices in air transportation date from the 1960s. Over the years, the Department and its predecessor, the Civil Aeronautics Board, have adopted policies and rules that govern subjects ranging from flight scheduling to price advertising.<sup>9</sup> The Code-Share Rule replaces a 1985 policy statement on the disclosure of code-share arrangements, which was codified at 14 CFR § 399.88; the Change-of-Gauge Rule supplants a policy announced in a 1989 DOT consent order.<sup>10</sup>

But the new regulations are a major departure from previous Department practice. They are no longer just statements of how the DOT interprets its statutory authority to regulate unfair and deceptive practices. The Code-Share Rule and the Change-of-Gauge Rule are formal regulations, which carry the direct force of law. The regulations also have expanded the specific disclosure requirements, and for the first time ticket agents are explicitly subject to their requirements.

Although the Code-Share Rule and the Change-of-Gauge Rule first were proposed in 1994 and 1995, respectively, their final adoption in March 1999 was heavily influenced by politics. In the late 1990s, the airline industry came under increasing pressure to improve customer service, especially once the Internet had made it easy for consumers to file complaints with airlines and the DOT.<sup>11</sup> In response to this rising tide of criticism, in January 1999 Congressman Bud Shuster, Chairman of the US House of Representatives Committee on Transportation and Infrastructure, proposed a "Passengers Bill of Rights".

Among other provisions, Shuster's bill would have enacted into law the DOT's existing policy that consumers should be notified of code-share arrangements, and would have completely prohibited the use of a single flight number for an air transportation service that required a change of aircraft en route.<sup>12</sup> But these provisions of Shuster's bill—and similar provisions of alternate reform bills proposed by other members of Congress—received little public attention. Instead, the media focused on flashier issues for the flying public, such as proposals that would prohibit extended on-aircraft delays, increase compensation for lost baggage, and allow hidden-city ticketing.<sup>13</sup>

The Department announced the final version of the Code-Share Rule and the Change-of-Gauge Rule on 15 March 1999.<sup>14</sup> Their announcement was a masterstroke of timing by the DOT, due in part to the fact that the regulations were uncontroversial. Few in Congress or the public opposed requiring airlines to disclose information about code-share arrangements and change-of-gauge services—even if some would have gone further and sharply limited the practices. Further, the enforcement of the new regulations would not

9. See generally 14 CFR Part 399, Subpart G.

10. Complaint of Aerlinite Eireann, order, DOT Order 89-1-31, at 5 (19 January 1989).

11. Consumers filed 20,495 complaints about airline and air travel company service with the DOT in 1999, more than double the number filed in 1998. See "DOT Issues Airline Consumer and Disability Complaint Data for 1999", US Department of Transportation press release (1 February 2000).

12. HR 700, 106th Cong. (1999).

13. "Hidden-city ticketing" takes advantage of quirks in pricing that can make travel to an airline's hub more expensive than a flight through that hub to another destination. To get the cheaper fare, a traveller buys a ticket to a point beyond the hub city, and gets off early at the hub—his real destination. Almost all airlines except Southwest prohibit hidden-city ticketing, and most threaten to penalise travellers who use it and agents that issue such tickets.

14. US Department of Transportation, "Disclosure of Code-Sharing Arrangements and Long-Term West Leases", final rule, 64 Fed. Reg. 12838 (15 March 1999); US Department of Transportation, "Disclosure of Change-of-Gauge Services", final rule, 64 Fed. Reg. 12854 (15 March 1999).

require a significant investment of DOT time or resources. But by striking while the iron was hot, the Department assumed a leadership role in reforming customer service in the airline industry.

Now that the regulations are in effect,<sup>15</sup> however, it is only fitting to inquire into what the Department has accomplished. It remains unclear how many customers actually wanted or will now benefit from the disclosure of more information about code-share arrangements and change-of-gauge services than airlines provided on their own initiative. Further, the rest of the Passengers Bill of Rights is now in limbo: the industry has been given a chance to prove that it can police itself, through a "Customers First" plan that was launched in December 1999. Even if the new rules are important as symbols of a commitment to reform, they impose real costs. These burdens fall squarely on airlines and ticket agents—and will be passed on to consumers, if and when possible.

### THE COSTS IMPOSED BY THE CODE-SHARE RULE AND THE CHANGE-OF-GAUGE RULE

The new regulations impose significant costs on airlines and ticket agents. The expenses of ensuring that they can and do comply with the requirements of the regulations may prove to be burdensome, especially the requirements that reservations personnel must disclose if a flight will be operated pursuant to a code-share arrangement or a long-term wet lease, or if it requires a change of equipment en route.

Airlines' internal computer systems and CRSs by now should have been reprogrammed to comply with the new requirements. The DOT correctly recognised that this work was a one-time expense,<sup>16</sup> but the Department also estimated that the total cost to the industry would be between \$432,000 and \$2.3 million.<sup>17</sup> These figures may in fact be too low, although an exact calculation is not possible given that no airline that filed comments with the DOT included an estimate of its total costs. It is also true that during the year 2000 the airline industry already had additional technicians available to ensure that their systems were Y2K compliant,<sup>18</sup> and airlines and CRSs do have experience in updating their systems on the order of the Department.<sup>19</sup>

But Continental estimated that the cost to update its internal computer system and the System One CRS to disclose corporate name and network information for wet leases alone would be \$200,000; US Airways estimated the cost of likewise updating its PACER system would be \$225,000.<sup>20</sup> The DOT estimated that the total cost to the industry of disclosing

15. The regulations originally were intended to enter into effect on 13 July 1999. In response to complaints that the industry could not simultaneously implement their requirements and ensure Y2K compliance, the DOT suspended the effectiveness of the regulations, to the extent that they depended on information provided by CRSs and other computer systems, until 15 March 2000. See US Department of Transportation, "Petitions Involving the Effective Dates of the Disclosure of Code-Sharing Arrangements and Long-Term Wet Leases Final Rule and the Disclosure of Change-of-Gauge Services Final Rule," 64 Fed. Reg. 38111 (15 July 1999) and 64 Fed. Reg. 46818 (27 August 1999).

16. 64 Fed. Reg. 12838, at 12843.

17. *Ibid.*, at 12850.

18. See, e.g., 64 Fed. Reg. 38111, at 38113.

19. See, e.g., DOT Order 89-1-31, at 5.

20. 64 Fed. Reg. 12838, at 12841.



code-share and change-of-gauge information on printed tickets, a proposal it later abandoned as too burdensome, would have been over \$3.8 million.<sup>21</sup> In this light, it seems likely that the total reprogramming costs were at least at the upper end of the range estimated by the Department.

Ensuring compliance with the regulations in the long-term—especially by reservations personnel—will be even more costly. The DOT estimated that the disclosure requirements of the Code-Share Rule would add an additional 15 seconds to 102 million telephone calls per year. Taking into account wages and telephone line expenses, the Department concluded that the rule would increase the airline industry's annual operating costs by \$3.4 million and the travel agent industry's costs by \$12 million, as well as result in a \$11.8 million loss of productive time for consumers. The average increase in the price of a ticket to cover these costs would be \$0.56.<sup>22</sup>

The Department did not perform a similar calculation for the Change-of-Gauge Rule. The DOT concluded that it would affect between 24.7 and 74.1 million telephone calls per year. But because no airline or other party had filed specific evidence to show that the rule would impose undue customer service or administrative costs, it went no further in its calculations.<sup>23</sup>

In addition, the DOT observed that many airlines had described the new regulations as unnecessary, because they already complied with most or all of the notice requirements. The Department reasoned that, if that were so, any additional costs imposed by the new requirements would be minimal.<sup>24</sup> The DOT also decided that any added burden would not be prohibitive, in light of the wealth of the airline and travel agent industries: The former receives \$68 billion in annual passenger revenues, and the latter generates \$94 billion in annual sales, \$56 billion of it from airlines.<sup>25</sup>

But in fact it appears that the Department has underestimated the costs that the new rules will impose on airlines and ticket agents in the long term. The industry did not present a convincing case in the comments it filed with the DOT, so it does share some fault. However, the Department also should have realised that the costs of compliance will involve far more than just the added time reservations personnel will need to read disclosure notices to consumers.

For example, ongoing training will be necessary to ensure that reservations personnel not only know about, but know the importance of, the new regulations. Even if many airlines and ticket agents already disclose code-share arrangements and en route changes of aircraft, the DOT will expect strict compliance with the rules. In enforcing its 1985-vintage code-share policy, the Department held that airlines must disclose whether *any* flight they discussed with a caller would be operated pursuant to a code-share agreement, regardless of whether the caller actually booked a reservation on that flight.<sup>26</sup>

In effect, the DOT previously mandated that airlines disclose at the earliest opportunity—and without any prompting—if a flight was operated by a code-share partner. Given the

21. *Ibid.*, at 12839.

22. *Ibid.*, at 12850–51.

23. 64 Fed. Reg. 12854, at 12856. Indeed, the DOT observed that only Qantas had, in the context of the Code-Share Rule proceeding, made such a claim. *See ibid.*, at 12858. *See also* 64 Fed. Reg. 12838, at 12846.

24. *See, e.g.*, 64 Fed. Reg. 12838, at 12840; 64 Fed. Reg. 12854, at 12859.

25. 64 Fed. Reg. 12838, at 12843.

26. *In re Delta Air Lines*, consent order, DOT Order 99–3–2 (3 March 1999); *In re Northwest Airlines*, consent order, DOT Order 99–3–1 (3 March 1999).

current political situation, the Department can be expected to be at least as strict in enforcing the Code-Share Rule and the Change-of-Gauge Rule. DOT already has stated that the Code-Share Rule requires that code-share agreements and wet leases be disclosed to consumers during the "information" and "decisionmaking" parts of their conversations with reservations personnel.<sup>27</sup>

Airlines and ticket agents therefore would be ill-advised to not invest in the training and monitoring of reservations personnel. In a typical investigation, the DOT has made 40–60 test calls to an airline, inquiring about flights operated by a code-share partner. The investigators tracked how many times they were not told of the code-share arrangements, or were told of it only after they booked a reservation. The DOT consistently has fined airlines that failed to disclose a code-share arrangements, timely or at all, in 50 per cent or more of the test calls.<sup>28</sup> During the 15 years the DOT's 1985 code-share policy was in effect, it entered into more than 20 consent orders with airlines. Although the airlines did not admit guilt, they agreed to take remedial measures and pay fines ranging from \$9,500 for some first-time offenders<sup>29</sup> up to \$350,000 for a repeat offender.<sup>30</sup>

Further, the Department consistently has held that an airline's lack of knowledge of how the DOT interprets a policy or rule, or a lack of intent to violate a rule, are not defences.<sup>31</sup> The Department also has a long memory for the subjects of consent orders. In 1999—just two weeks before it announced the new regulations—the Department invoked its code-share policy for the first time in four years. An investigation had revealed routine failures at Delta and Northwest to disclose code-share arrangements to consumers. The DOT assessed larger fines—\$25,000 for Delta, and \$45,000 for Northwest—than it typically had for airlines with clean records<sup>32</sup>; the Department expressed "serious" and "particular" concern, because Delta already had been the subject of a consent order in 1991, and Northwest had entered into consent orders in 1987 and 1991.<sup>33</sup>

Finally, the DOT's analysis of the costs imposed by the new regulations was limited to expenses rooted in their oral disclosure requirements. But the regulations also apply to face-to-face meetings, and schedules published electronically and in print; the Code-Share Rule also regulates some types of advertising. True, the Department's pre-1999 policy statements also addressed some of these subjects, and some airlines already make voluntary

27. 64 Fed. Reg. 12838, at 12846.

28. DOT Order 99–3–2; *In re Trans World Airlines*, consent order, DOT Order 95–3–8 (3 March 1995); *In re Trans World Airlines*, consent order, DOT Order 93–1–1 (5 January 1993).

29. *In re United Air Lines*, consent order, DOT Order 88–6–21, at 2 (15 June 1988); *In re Piedmont Aviation*, consent order, DOT Order 87–11–38, at 2 (18 November 1987).

30. *In re Trans World Airlines*, consent order, DOT Order 95–3–8, at 3 (3 March 1995).

31. *In re Eastern Air Lines*, consent order, DOT Order 89–8–50, at 3 (30 August 1989); *In re Pan American World Airways*, consent order, DOT Order 88–2–44, at 2 (19 February 1988). The Department has in a few cases recognised that lack of intent may be a mitigating factor, however. *See, e.g.*, DOT Order 99–3–1, at 2 (citing "agent stress and fatigue due to labour circumstances"); DOT Order 93–1–1, at 2 (citing closure of airline reservations office and layoff of agents). *Cf.* DOT Order 95–3–8, at 3 (noting that airline's disclosure performance had improved since previous DOT telephone survey).

32. DOT Order 99–3–2; DOT Order 99–3–1. In consent orders in the mid- and late-1990s, DOT often suspended part of the fine, on the condition that the airline does not violate the policy again within a year. DOT suspended half—\$22,500—of the fine against Northwest. *See* DOT Order 99–3–1, at 2. In 1995, the DOT fined TWA \$350,000, but suspended \$50,000 of the fine, and allowed TWA to offset an additional \$250,000 against expenditures made to retain its reservations personnel. DOT Order 95–3–8, at 3.

33. DOT Order 99–3–2, at 2; DOT Order 99–3–1, at 2.

disclosures. But because the DOT did not examine the costs of compliance for these additional requirements, we simply do not know how much of a burden the new regulations will impose on the industry.

What is certain, however, is that airlines and ticket agents will try to pass on these new costs to consumers—and that the figure will be more than the 56 cents per ticket estimated by the Department, perhaps much more. It is also likely that for some ticket agents, already squeezed by Internet bookings on one side and reduced commissions on the other, these new costs will be the final straw. Already many agents have begun to charge consumers a fee for their services. The fact that travel agents generate nearly \$100 billion in sales each year does not mean that they can easily absorb new overhead costs, as the DOT suggests. It would be ironic if the Code-Share Rule and the Change-of-Gauge Rule, intended to protect the interests of consumers, actually had the effect of limiting the choices of the flying public for purchasing air transportation services.

## UNANSWERED QUESTIONS ABOUT THE CODE-SHARE RULE AND THE CHANGE-OF-GAUGE RULE

There are many unanswered questions about how the Code-Share Rule and the Change-of-Gauge Rule will be enforced in practice. Although the DOT spent several years drafting and revising the regulations, it still may have acted too hastily when it announced them in 1999, at the moment when public scrutiny of customer service in the airline industry was at a peak. The rules as enacted can be traps for unwary airlines and ticket agents—or even for airlines and ticket agents that scrupulously try to comply with all of the new requirements. The demands of politics may have, unfortunately, diminished the ultimate benefits of the rules for consumers, especially due to omissions and inconsistencies that the Department apparently was unable to correct.

### Will the new regulations benefit the flying public?

A principal question is to what extent the new regulations will benefit the flying public. The DOT may have relied more on instinct than on hard data when it concluded that the new rules would benefit consumers. Between 1995 and 1998, the Department received only 191 complaints about change-of-gauge services and 39 complaints about code-share arrangements.<sup>34</sup> Moreover, other than anecdotal statements such as that “passengers may prefer to avoid certain carriers because of prior negative experiences”,<sup>35</sup> the DOT has not explained on what grounds it believes that, if armed with the new information that the regulations require to be disclosed, a significant number of consumers would book different air transportation services.

The DOT's instincts may be correct. It does stand to reason that complaints will increase as code-sharing arrangements and change-of-gauge services become more common.<sup>36</sup> But it is unfortunate that if airlines and ticket agents are to carry the burden of the new rules, they

34. 64 Fed. Reg. 12854, at 12856.

35. 64 Fed. Reg. 12838, at 12842.

36. *Ibid.*

(much less the public) have not been provided with any convincing evidence that the rules actually "will result in broader, more immediate and more reliable protection both to the travelling public and to airline competition".<sup>37</sup> The Department could improve its working relationship with the industry—as well as the public—by regularly including data on the number of and reasons for such complaints in its periodic air travel consumer reports, as well as any other information it assembles about how effective the rules are in practice.

### What is the scope of the new regulations?

The regulations sweep more broadly than the policy statements that preceded them. The Code-Share Rule, for example, also now regulates long-term wet leases. But the Department has not fully explained the intended reach of the new rules, especially with regard to their application to new technologies. The Code-Share Rule's restrictions on advertising, for example, do not explain how—or even if—they apply to the Internet. The Code-Share Rule's predecessor, 14 CFR §399.88, applied to the disclosure of code-share arrangements in the "advertising media" in general. But the new rule applies only to print, radio, and television advertising; web sites and e-mail are not included.<sup>38</sup> This may have been an accidental oversight by the Department, but no airline or ticket agent wishes to be the subject of a consent order in which the DOT explains what it really meant—but still assesses a fine against the unfortunate party that violated the rule.

Similarly, web sites that enable consumers to purchase air transportation services online—such as Travelocity, Expedia and most airline sites—do not fit easily into any of the categories of the Code-Share Rule and the Change-of-Gauge Rule. Consumers using a web site are not in communication with a human being, so their transactions are unlike a phone call or meeting with a reservations agent. But on-line booking sites are also much more than just electronic schedules: in many ways, they resemble CRSs. In the short time since the new rules were first proposed, sophisticated booking engines have become available to consumers. Therefore, some of the Department's reasoning already should be re-evaluated. In response to a comment on the Code-Share Rule, for example, the DOT stated that the use of an asterisk in a CRS to signify that a flight is operated pursuant to a code-share arrangement would not cause any confusion, because travel agents understand its meaning and consumers do not use CRSs.<sup>39</sup> In effect, this is no longer true.<sup>40</sup>

Ticketless travel also poses a dilemma for the Department. If a consumer purchases an "e-ticket", he need not be notified of code-share arrangements or change-of-gauge services until he checks in for the first segment of his itinerary.<sup>41</sup> This policy is consistent with the DOT's 1997 decision that airlines need not make mandatory disclosures to passengers

37. 64 Fed. Reg. 12854, at 12856.

38. Since 1995, the DOT has held that its prohibition of unfair and deceptive airfare advertisements applies to the Internet. But the underlying regulation, 14 CFR § 399.84, like the former § 399.88, is not limited to advertising in specific media. See, e.g., *In re Northwest Airlines*, consent order, DOT Order 99-8-23 (26 August 1999); *In re Southwest Airlines*, consent order, DOT Order 96-4-33 (16 April 1996); *In re Virgin Atlantic Airways*, consent order, DOT Order 95-11-37 (21 November 1995).

39. 64 Fed. Reg. 12838, at 12848.

40. Moreover, until 1999, a simplified version of the SABRE CRS, "EasySABRE", had been available to the public via on-line services such as America Online and Prodigy, and later via the Internet. See, e.g., Todd Woody, "Airline sites take off fast", (9 June 1999) <<http://www.cnn.com/TECH/computing/9906/09/airline.idg>>.

41. 64 Fed. Reg. 12854, at 12859; 64 Fed. Reg. 12838, at 12847.



travelling without a ticket until they first check in, for a flight.<sup>42</sup> But as a result, a growing number of consumers will not receive these disclosures until they check-in. As noted *supra*, if a consumer shops for a ticket solely online, it does not appear that the current regulations require web advertisements or booking engines ever to inform him of code-share arrangements or change-of-gauge services.<sup>43</sup>

Indeed, since 1997 ticketless travel and on-line bookings have surged. By 1999, over 70 per cent of Southwest's passengers travelled without a ticket,<sup>44</sup> and United and US Airways had crossed the 50 per cent threshold.<sup>45</sup> Therefore, if the DOT truly wishes to ensure that consumers are informed a code-share arrangements and change-of-gauge services before they purchase air transportation services, the new regulations will not be very effective. And the problem will only become more severe with time, as yet more passengers purchase air transportation services through the Internet and/or travel without a ticket. Regulatory developments frequently do lag the marketplace. But it is already evident that the DOT should re-examine its decision to allow mandatory disclosures to be deferred until check-in, so that Departmental policies are not working at cross-purposes.

An additional problem for airlines and ticket agents are differences between the Code-Share Rule and the Change-of-Gauge Rule. For example, the Code-Share Rule allows airlines and ticket agents to send a consumer, at his request, the disclosure notice that must accompany a ticket by fax or electronic mail. But the Change-of-Gauge Rule includes no such alternative provisions; only a printed disclosure notice will fulfill the latter rule's requirements.<sup>46</sup> There is no obvious explanation for this disparity—and it is a significant trap for the unwary and even the cautious airline and ticket agent. The DOT could aid both the industry and the flying public by harmonising the rules' requirements, or at least explaining and clarifying its intentions; no one will benefit if the Department waits until a consent order must be drafted to explain how the new regulations will be enforced in practice.

### Who is subject to the new regulations?

The regulations not only have expanded the code-share and change-of-gauge disclosure requirements; they also have expanded the list of parties that are subject to them. However, the terms of the new regulations are again not entirely clear, leaving some guesswork as to who they will affect in practice. Ticket agents, for example, fit uncomfortably into the existing DOT enforcement regime. When it adopted the Code-Share Rule and the Change-of-Gauge Rule, the Department concluded that they would not have a significant economic impact on small business entities.<sup>47</sup> But many if not most ticket agents are small business entities—and many already are reportedly being squeezed out of business by competition from the Internet on one side and by reduced commissions from airlines on the other.<sup>48</sup>

42. US Department of Transportation, "Ticketless Travel: Passenger Notices", statement of compliance policy, 62 Fed. Reg. 19473, 19477 (22 April 1997).

43. Of course, airlines and ticket agents could *voluntarily* provide this information at any time.

44. "Want to Escape?" Southwest Airlines press release (8 July 1999).

45. Paul Tolme, "Americans are waving goodbye to paper airline tickets," AP Wire (July 1999).

46. Compare 14 CFR § 257.5(c) with 14 CFR § 258.5(c).

47. 64 Fed. Reg. 12854, at 12859; 64 Fed. Reg. 12838, at 12850.

48. See, e.g., "ASTA Calls on DOT to Halt Unlawful Airline Practices and Rescind Commission Cuts", American Society of Travel Agents press release (25 October 1999).

Moreover, the DOT cannot expect that the procedures it has used to test whether 192 US airlines and 205 foreign airlines conform with its disclosure requirements to be appropriate, at least without substantial modification, to regulate the 33,500 travel agents in the United States.<sup>49</sup> Although the investigators are unlikely to face a 8400 per cent increase in their workload, many ticket agents at least are small enough that the DOT simply cannot make dozens of anonymous test calls, as is today the norm in investigations of violations of Department disclosure requirements.

The DOT also has left open some debate as to what entities are "ticket agents" subject to the new regulations. The regulations do cite the statutory definition of 49 USC §40102(40).<sup>50</sup> But in responding to comments on the rules, the Department used the phrases "travel agent" and "ticket agent" as if they were interchangeable.<sup>51</sup> The DOT later clarified that all travel agents are ticket agents, but not all ticket agents are travel agents: Certain tour operators, which do not use CRSs but do deal directly with the public, are subject to the requirements of the Code-Share Rule and the Change-of-Gauge Rule.<sup>52</sup> This statement still leaves uncertainty, however.

Likewise, the DOT has left open under what circumstances ticket agents will themselves be held liable for violations of the new regulations, and when it will be passed through to airlines. The Department has stated that decisions will be made on a case-by-case basis.<sup>53</sup>

Lastly, the new regulations do not definitively explain how CRSs fit in their framework. CRSs are not directly subject to the new regulations. But, under separate regulations, CRSs are obligated to identify change-of-gauge services,<sup>54</sup> and Department policy requires them to accurately display all data provided to them by airlines.<sup>55</sup> The DOT is currently conducting a proceeding to consider revisions to its CRS rules<sup>56</sup>; the DOT should use this opportunity to ensure that there is a clear explanation of the disclosure obligations of CRSs relative to the obligations of their users.

In brief, unanswered questions about how the Code-Share Rule and the Change-of-Gauge Rule will work in practice reveal the challenges for airlines and ticket agents in complying with their requirements. The Department is not alone responsible for all of these issues; few in or out of the government anticipated how the Internet would change ticket booking practices, and the DOT has been prudent in not rushing to adapt regulations that might prove to be unsuitable. But the Department should not leave the airline industry to guess how the regulations it has adopted will be enforced. There should be continuing communication between the Department and industry, to ensure that the Code-Share Rule and Change-of-Gauge Rule best achieve their purpose of arming the flying public with information about the air transportation services they purchase, while at the same time assuring the industry that the costs of so doing are worthwhile.

49. 64 Fed. Reg. 12854, at 12860.

50. A "ticket agent" is a "person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation".

51. See, e.g., 64 Fed. Reg. 12854, at 12856; 64 Fed. Reg. 12838, at 12844.

52. 64 Fed. Reg. 38111, at 38113 n.7.

53. 64 Fed. Reg. 12838, at 12844.

54. 14 CFR § 255.4(b)(2).

55. Application of Carnival Air Lines, order, DOT Order 94-5-35, at 6 (24 May 1994); DOT Order 89-1-31, at 5.

56. Docket OST-97-2881.

## ENSURING COMPLIANCE WITH THE CODE-SHARE RULE AND THE CHANGE-OF-GAUGE RULE

The DOT recognises that it cannot expect "absolute compliance" from entities which may have thousands of employees who regularly deal with consumers. It has explained that the Department focuses its priorities "where there is a significant number of verifiable complaints, where there is a pattern of disregard of the various regulatory requirements, or where such verifiable complaints are not corrected when carrier management becomes aware of them".<sup>57</sup>

Nevertheless, airlines and ticket agents should be vigilant in ensuring that they comply with the requirements of the Code-Share Rule and the Change-of-Gauge Rule. In the 15 years that the DOT's 1985 code-share policy was in effect, most major US airlines, as well as some foreign carriers, were the subject of consent orders, some repeatedly.<sup>58</sup> If the Department uses similar investigative techniques to enforce the new rules, airlines and ticket agents can best protect themselves by implementing and maintaining practices that were effective before 1999.

In consent orders, airlines often have informed the Department of the remedial measures that they intended to take to ensure future compliance, which included practices such as:

- Conducting periodic internal audits, including test calls, to ensure that reservations personnel are complying with the disclosure requirements;
- Checking that their computer reservations systems prompt and remind reservations personnel of the disclosure requirements;
- Including the disclosure requirements in the curriculum of training programs for new hires as well as in refresher courses;
- Issuing periodic bulletins and memoranda to reservations personnel reinforcing the importance of compliance with disclosure requirements;
- Including compliance with the disclosure requirements as a factor in personnel performance evaluations; and
- Initiating a program to reservations personnel who comply with the disclosure requirements with letters of commendation or cash incentives.<sup>59</sup>

In light of the expanded scope of the new regulations, airlines and ticket agents also should ensure that monitoring and training programmes are in place for all personnel that work on tasks that are now subject to disclosure requirements, such as advertising. Moreover, they also should be aware of the resources DOT has made available to help them comply with the new rules. Because of the many questions that were asked in the rulemaking process about what types of disclosure would be sufficient in advertisements, the Department has made its Office of Aviation Enforcement and Proceedings available to review ads prior to publication, and to advise whether they comply with the letter and spirit of the Code-Share Rule disclosure requirements.<sup>60</sup>

57. DOT Order 88-2-44, at 3.

58. Trans World Airlines was a subject of a consent order four times; Northwest Airlines three times; Delta Air Lines, Eastern Air Lines, Pan American World Airways, US Airways/Piedmont, and United Airlines, twice; and Air New Zealand, Alaska Airlines, Aloha Airlines, Continental Airlines, and Sabena Belgian World Airlines, once.

59. See, e.g., DOT Order 99-3-2, at 2; DOT Order 99-3-1, at 2; DOT Order 95-3-8, at 2.

60. 64 Fed. Reg. 46818, at 46820 & n.2.



But airlines and ticket agents also should remember that the DOT can be a stern parent. Only once has the Department decided that an airline that it had found to have violated its code-share disclosure policy should not be sanctioned. The DOT concluded that because SABRE had been incapable technologically of identifying Carnival Airlines' code-share arrangements, and because Carnival had worked with the CRS to find a solution, the airline was not at fault. But the Department also warned Carnival to comply in the future, as well as sternly reminded CRSs that they must make reasonable efforts to develop software that will display all airlines' services properly.<sup>61</sup> Barring unique circumstances, it is unlikely that the DOT will be so lenient with an airline (or another party) again. Indeed, given the current political pressures on the Department and Congress, the only likely direction of change is towards a more severe regulatory regime.

## CONCLUSION

The Code-Share Rule and Change-of-Gauge Rule are intended to ensure that consumers will be equipped with complete information about code-share arrangements, long-term wet leases, and change of gauge services before they purchase air transportation services. Few would dispute the importance of customer service in the airline industry, but the enactment of these specific regulations owed much to politics. They are a symbol of the DOT's sincere intent to protect the interests of consumers. But the regulations are not without flaws. They do not address the issues that are at least perceived to be the most significant concerns of the flying public. Moreover, at the same time, they impose significant costs on airlines and ticket agents, without any reassurance as to exactly what benefits passengers will derive in return.

But now that the regulations are in force, the Department and the industry should work together to ensure that at least the scope and the parties subject to the regulations are understood. The DOT should address issues such as how the Code-Share Rule and Change-of-Gauge Rule apply to the Internet, before they can be resolved through an enforcement action. Likewise, the Department should address the apparent conflicts between the rules and some of the other subjects on its regulatory agenda, such as ticketless travel. No one—neither the Department, nor the industry, and especially not the flying public—benefits if DOT regulatory requirements are confusing. The Code-Share Rule and Change-of-Gauge Rule are the product of good intentions, but they require fine-tuning to ensure that in practice they will be as effective as possible.

61. DOT Order 94-5-35, at 5. American Airlines had opposed Carnival Airlines' application to renew its code-share arrangement with Lan Chile on the grounds that the arrangement was not properly identified in CRSs.