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Code-Sharing in the U.S. Airline Industry: Effective Disclosure Requirements for an Aspect of Air Transport That Is Complex, Important, and Often Misunderstood

by Daniel Friedenzohn*

Over the past twenty-five years, airlines have increasingly relied on code-share relationships to help them remain competitive. A code-share relationship is defined as a “commercial agreement between two airlines under which an airline operating a service allows another airline to offer that service to the traveling public under its own flight designator code, even though it does not operate that service.”¹ While only one carrier operates the code-share flight, each airline in a code-sharing arrangement “may hold out, market, and sell the flight as its own in published schedules.”²

This article will analyze the U.S. Department of Transportation’s (DOT) code-share disclosure requirements for larger U.S. carriers and their regional partners, and for U.S. majors and their European counterparts. This issue has received much attention over the past several years due to the fact that many commercial aviation accidents have involved carriers operating code-share flights. The six fatal airline crashes in the United States between

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¹ PAT HANLON, *GLOBAL AIRLINES – COMPETITION IN A TRANSNATIONAL INDUSTRY* 167 (2007).

² Notice of Request for Extension of a Previously Approved Collection: Disclosure of Codesharing, 73 Fed. Reg. 40,008, 40,009 (July 11, 2008).

2004 and 2009, for example, involved regional carriers operating code-share flights.³

Code-share relationships allow carriers to offer airline customers service to additional domestic and international destinations. They occur in many forms. The most common form is when an airline places its designator (marketing) code and sells seats on a flight operated by another airline. For example, one may purchase a ticket to fly between Chicago and Lima via the *ABC Airlines* website, and yet may fly *ABC Airlines*' code-share partner *DEF Airlines*, which offers the only nonstop flight in both directions.

Another way in which code-sharing relationships occur is through franchise agreements. Large carriers, such as American Airlines and Air France, enter into franchise agreements with regional airlines, which operate flights with smaller aircraft on behalf of these airlines. The regional carriers are generally identified "with the business name of the major airline partner" so as to provide the customer with a "seamless" flying experience.⁴ Mainline carriers rely on these franchise partners to help them provide greater frequency of service to markets and to offer service to smaller cities which cannot support mainline service.

With the continued growth of code-share relationships, concerns have been raised about the nature of these relationships and how they impact the traveling public. In terms of the relationship between mainline and regional carriers, some have argued that "[t]he similar paint jobs, unified reservation systems, seamless frequent flier programs . . . co-located gate[s] and the identical airline codes on flights numbers" result in many passengers being under the impression that they are flying with a major carrier whose perceived level of service and safety is well known.⁵ The passengers, however, may not have enough information to formulate an opinion about the regional carrier.

³ Joan Lowy, *New Rules Would Mean Fewer Hours for Sleepy Pilots*, ASSOCIATED PRESS, Sept. 10, 2010, available at http://news.yahoo.com/s/ap/20100910/ap_on_bi_ge/us_tired_pilots.

⁴ ALEXANDER T. WELLS & FRANKLIN D. RICHEY, *COMMUTER AIRLINES* 10 (1996).

⁵ Charlie Leocha, *The Regional Airline Code-Share Fraud – AA and UA Play It Again*, CONSUMER TRAVELER, Feb. 25, 2010, <http://www.consumertraveler.com/today/the-regional-airline-code-share-fraud-%E2%80%94aa-and-ua-play-it-again/>.

On a more basic level, the possible deception can serve to further denigrate the travel experience of many airline customers. Passengers often are unclear as to whether the ticketing (or marketing) or the operating carrier is responsible for resolving a problem when one arises.⁶ For example, a passenger may wait in line at the ticketing carrier's airport counter for twenty minutes only to be told by the customer service agent that the operating carrier is responsible for addressing the problem.

This article is divided into four parts. The first section will explain why carriers form code-share relationships and how they benefit both airlines and customers. The second section provides a history of code-share relationships between regional airlines and their larger affiliates. Section three addresses why the U.S. developed a strong international aviation policy in favor of code-sharing. Section four sets forth the legal obligations imposed on carriers to disclose to consumers certain information regarding code-share flights. The section includes an analysis of how the rules are applied and enforced by the U.S. Department of Transportation (DOT). The section concludes that the number of code-share disclosure complaints is very low, and that the current regulations and their enforcement are effective in promoting full disclosure of code-share flights.

I. Code-Sharing: A Growing and Important Part of the Global Airline Business

A code-share agreement allows for a flight operated by one airline to be marketed by another carrier with its own flight number. The airlines "are not combining to offer a single service: on the contrary, the code-share is simply a device to allow each airline to *pretend* that it is offering an integrated service that is in fact partly operated by its partner."⁷

⁶ For example, a passenger may purchase a flight on carrier *A*, when the flight is operated by carrier *B*. The passenger arrives at the ticket counter of carrier *A* and waits in line for 25 minutes to check in luggage. Upon being told by the customer service agent that the flight is operated by carrier *B* and the passenger has to check in luggage with that carrier, the passenger spends another 30 minutes waiting to check the luggage with carrier *B*.

⁷ BRIAN F. HAVEL, *BEYOND OPEN SKIES: A NEW REGIME FOR INTERNATIONAL AVIATION* 209 (2009).

Airlines enter into code-share relationships for the primary purpose of generating more revenue.⁸ These relationships, however, also have other meaningful benefits to the participating carriers. By entering into a code-share relationship, a carrier has the ability to offer its customers a greater route network.⁹ This, in turn, allows the airline to offer a better frequent flyer program which helps to attract and retain important leisure and business travelers.¹⁰ These relationships also help carriers “squeeze competitors on particular routes through price leadership, frequency increases and/or rescheduling of flights.”¹¹ Participating carriers can increase the load factors on their flights as a result of the additional passenger traffic that is generated by these code-share relationships.¹²

Internationally, the increased use of code-share agreements allows airlines to enhance service options that they alone could not provide due to the restrictive bilateral agreements that limit the number of carriers and/or frequency of service that carriers can provide on their own.

II. *Code-Sharing: The Regional Airline Experience*

U.S. airlines began entering into code-share relationships with smaller regional airlines (referred to as commuter airlines during the 1980s) in the late 1960s when the industry was still regulated by the Civil Aeronautics Board (CAB).¹³ Commuter carriers provided service to small markets. Although they were exempt from CAB economic regulation, these carriers had strict restrictions on seating capacity and the weight of the aircraft.¹⁴ These airlines transported many passengers who would end up connecting onto flights operated by the larger trunk carriers. The deregulation of the domestic U.S. air travel market, beginning in the late 1970s, spurred tremendous growth in air service.¹⁵ One of the most im-

⁸ RIGAS DOGANIS, *THE AIRLINE BUSINESS* 73 (2d ed. 2006).

⁹ *Id.* at 87.

¹⁰ *Id.*

¹¹ *Id.*

¹² Tae Hoon Oum, Chunyan Yu & Anming Zhang, *Global Airline Alliances: International Regulatory Issues*, 7 *J. AIR TRANSP. MGMT.* 57, 60 (2001).

¹³ R. E. G. DAVIES & I. E. QUASTLER, *COMMUTER AIRLINES OF THE UNITED STATES* 136 (1995).

¹⁴ GEORGE WILLIAMS, *THE AIRLINE INDUSTRY AND THE IMPACT OF DEREGULATION* 13 (1994).

¹⁵ DAVIES & QUASTLER, *supra* note 13, at 134-35.

portant dynamics to occur in the airline industry during this period was “a practice that quickly and appropriately became known as code-sharing.”¹⁶

The highly-competitive U.S. market during the 1980s required airlines to expand their networks. Regional airlines entered into code-share agreements with their larger affiliates to operate as *feeder* carriers to the so-called major airlines.¹⁷ These carriers “deliver passengers to the mainline airline’s hubs from surrounding communities.”¹⁸ They also allowed airlines to increase the frequency of service in markets during times of the day when demand does not warrant the use of a larger aircraft operated by the larger affiliate.¹⁹ Furthermore, the regional carriers had a lower cost structure which was very appealing to their larger affiliates.

The code-share relationship between the majors and their regional partners today generally involves the larger carrier purchasing the entire capacity of the regional carrier’s flight. The regional carrier is in charge of meeting the operational requirements of its flights while leaving the larger carrier responsible for marketing the service to the traveling public. The relationship presents a situation whereby the smaller carrier becomes a “surrogate[] for the major carrier.”²⁰

Regional airlines conduct their business under the brand name of the larger carrier. For example, American Airlines currently has relationships with two regional partners: American Eagle and Chautauqua Airlines. The former is a wholly-owned subsidiary of American Airlines’ parent company, AMR. The latter, operating as AmericanConnection, is a subsidiary of Republic Airways Holdings, a company which owns other regional airlines.

Regional airlines play an important role in the U.S. airline industry today. Regional airlines operate half of the total scheduled flights in the United States.²¹ At Chicago’s O’Hare International

¹⁶ *Id.* at 135.

¹⁷ *Id.* at 134-35.

¹⁸ The Federal Aviation Administration’s Role in Safety Oversight of Air Carriers: Before the Subcomm. on Aviation Operations, Safety, and Security of the S. Comm. on Com., Science and Transp., 111th Cong. 8 (2009) [hereinafter FAA’s Role in Safety Oversight of Air Carriers] (statement of Hon. Calvin L. Scovel, III, Inspector Gen., U.S. Dep’t of Transp.).

¹⁹ *Id.*

²⁰ DAVIES & QUASTLER, *supra* note 13, at 140.

²¹ FAA’s Role in Safety Oversight of Air Carriers, *supra* note 18, at 7.

Airport, regional flights represent two-thirds of the departures.²² Ten years earlier, American Airlines operated two flights for every American Eagle flight, and United operated three flights for every United Express flight.²³

Regional airlines continue to grow in the U.S. In 2000, for example, regional carriers transported 82.49 million passengers.²⁴ In 2008, U.S. regional airlines carried 159.32 million passengers, a ninety-three percent increase.²⁵ For many travelers who choose to fly, regional carriers are the only way to get to their destination. Significantly, regional airlines provide the only scheduled air service to 492 U.S. airports.²⁶

III. *Code-Sharing in the International Arena*

In the international arena, the ability for airlines to enter into code-share agreements has enabled them to greatly expand their networks. The U.S. entered into its landmark Open Skies agreement with the Netherlands in 1992. The agreement – the first of its kind – allowed carriers from both the U.S. and the Netherlands to offer service between the two countries without any restrictions.²⁷ Included in the Agreement was a provision expressly allowing carriers from each signatory country to code-share.²⁸

In 1995, the U.S. Department of Transportation announced an international air transport policy that supported the continued liberalizing of aviation markets.²⁹ The Policy Statement addressed the need for the U.S. government to help its carriers expand internationally because that was where passenger growth was highest.³⁰ Between 1987 and 1993, “the number of passengers traveling on U.S. airlines between the United States and for-

²² Julie Johnsson & Jon Hilkevitch, *Smaller Jets Land Bigger Role at O'Hare*, CHI. TRIB., Feb. 11, 2010, § 1, at 4, available at http://articles.chicagotribune.com/2010-02-11/news/1002100831_1_jet-flights-regional-jets-american-airlines.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Roger Cohen, President, Regional Airline Ass'n, Address at the New York Airports Conference (June 14, 2010), available at <http://www.raa.org/Portals/0/Presentations/NYAirportsconf-FINAL061510.pdf>.

²⁷ DOGANIS, *supra* note 8, at 41.

²⁸ *Id.*

²⁹ Statement of United States International Air Transportation Policy, 60 Fed. Reg. 21,841 (May 3, 1995).

³⁰ DOGANIS, *supra* note 8, at 39-40.

eign destinations increased by 47 percent, while domestic traffic increased by only 6 percent.”³¹

The policy focused on the continued liberalization of aviation markets by gaining “greater access and traffic rights not only to key hub cities overseas, but also through and beyond them to numerous cities” in third countries.³² The U.S. government focused on achieving this objective in two ways.³³ The first was to gain rights for airlines to provide same-carrier “end-to-end” service through either direct flights or on-line service. An example of this is if *ABC Airlines* operates flights between Atlanta and Athens by either operating a nonstop flight between the two cities, or by operating it via an Atlanta-Frankfurt nonstop and then connecting onto another *ABC Airlines*-operated flight between Frankfurt and Athens.

The Policy also reflected a number of obstacles that U.S. carriers had to overcome in order to further develop their international networks using their own service.³⁴ Those obstacles included:

1. Greater access to key hub cities overseas as well as “through and beyond them to numerous other cities, mostly in third countries;”³⁵
2. Inability to acquire a large number of gates and takeoff/landing slots at some of the world’s most congested airports;³⁶
3. The high cost in establishing successful overseas hubs;³⁷ and
4. Inability to obtain infrastructure and establish market presence in a new region quickly.³⁸

Given these significant constraints, the Policy’s second objective was to ensure greater market access for U.S. carriers by giving them greater freedom in entering into code-share

³¹ U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL AVIATION: AIRLINE ALLIANCES PRODUCE BENEFITS, BUT EFFECT ON COMPETITION IS UNCERTAIN 3 (1995).

³² DOGANIS, *supra* note 8, at 41.

³³ *Id.*

³⁴ Statement of United States International Air Transportation Policy, 60 Fed. Reg. at 21,842.

³⁵ *Id.* at 21,841.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

relationships.³⁹ Although they occur in many forms, the primary reason airlines enter into these relationships is the “need to generate more revenue.”⁴⁰ The additional revenue is generated in part as a result of the additional passenger traffic that is fed from the airline’s code-share partner.

Code-share relationships also help airlines reduce costs.⁴¹ The higher traffic volumes generated by the code-share relationships help lower “unit costs through increased frequencies, higher load factors, switching to larger aircraft and higher utilization of fixed assets such as terminal facilities.”⁴² In addition, as a result of coordinating schedules, code-share partners can reduce their aircraft fleet requirements.⁴³ Code-share relationships also allow the carrier with the higher operating cost structure to take advantage of its partner’s lower cost structure. Finally, in some cases, code-share partners can leverage their buying power by entering into joint procurement contracts for various goods and services.⁴⁴

Important benefits are derived by consumers from airlines being able to enter into code-share relationships. Passengers have increased international service options and have additional ways to earn more frequent flyer points by flying on an airline’s code-share partner-operated flight.⁴⁵ Furthermore, passengers prefer “online service from beginning to end through coordinated scheduling, baggage- and cargo-handling and other elements of single carrier service.”⁴⁶ Code-share partners may also “locate gates near each other to make connections more convenient.”⁴⁷

IV. *Legal Disclosure*

The practice of code-sharing continues to grow. Almost every U.S. airline is in at least one code-share relationship. In 2000,

³⁹ *Id.* at 21,842.

⁴⁰ DOGANIS, *supra* note 8, at 73.

⁴¹ *Id.* at 91.

⁴² *Id.* at 92.

⁴³ *Id.*

⁴⁴ *Id.* at 93.

⁴⁵ Statement of United States International Air Transportation Policy, 60 Fed. Reg. at 21,842.

⁴⁶ DOGANIS, *supra* note 8, at 73; *see also* U.S. DEP’T OF TRANSP., OFFICE OF THE SEC’Y, INTERNATIONAL AVIATION DEVELOPMENTS: GLOBAL DEREGULATION TAKES OFF (1999).

⁴⁷ Notice of Request for Extension of a Previously Approved Collection: Disclosure of Codesharing, 73 Fed. Reg. at 40,009.

there were 1.1 million code-share flights originating in the U.S.⁴⁸ In 2006, some 4.3 million flights originating in the U.S. had at least one or more code-share partners selling the flight.⁴⁹

While code-share relationships, in their various forms, provide many benefits to the traveling public, concerns have been raised about the practice and its impact on consumers. In the late 1990s, there was growing concern that the practice was “confusing and misleading” and that it presented a truth-in-advertising problem.⁵⁰ Code-share flights provided customers with the impression that airlines “fly to more destinations than they do and more often than they do.”⁵¹

Some critics claimed that the code-share practice deceived passengers who were paying one airline to deliver a service that was being provided by one or more different companies.⁵² Another concern was that passengers were being misled when they purchased their airline tickets.⁵³ For example, a customer may purchase a flight from New York to Paris with *ABC Airlines’* flight number on the carrier’s website. *ABC Airlines* does not operate a flight on the New York-Paris route. The flight is operated by *ABC Airlines’* code-share partner, *DEF Airlines*. Allowing customers to purchase tickets to a destination that the airline does not serve is misleading. The deception and full disclosure of who was actually operating the flight could be of serious consequence inasmuch as the passenger had a particular preference as to carrier and perhaps did not want to fly on a particular airline because of concerns related to safety, poor on-time record, or some other customer service-related matter.

Another criticism of the practice was that a passenger may purchase a ticket on the marketing carrier *ABC Airlines’* website and pay \$250. The operating carrier, *DEF Airlines*, may offer the

⁴⁸ Michelle Higgins, *Decoding the Mysteries of the Code Share*, N.Y. TIMES, Dec. 17, 2006, § 5, at 6.

⁴⁹ *Id.*

⁵⁰ David Bear, *Be Conscious of Code Sharing*, PITT. POST-GAZETTE, July 15, 2007, at E-2.

⁵¹ Jane Engle, *Code Shares Share the Confusion*, L.A. TIMES, Nov. 21, 2004, at 2.

⁵² Higgins, *supra* note 48. See John Gallagher, *Airline Alliances Are a Bother, Not a Boon, Some People Say: Questions Raised About Money, Service, Even Safety*, KAN. CITY STAR, July 4, 1999, at F4.

⁵³ Gallagher, *supra* note 52, at F4.

same itinerary for \$200.⁵⁴ Some have argued that this “presents a truth-in-advertising problem.”⁵⁵

In 1985, when the practice of code-sharing was still in its early stages, the DOT issued a policy statement directing carriers to inform consumers of code-share arrangements.⁵⁶ Pursuant to federal law, DOT has broad authority to prohibit “unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.”⁵⁷

With growing pressure by both the public and Congress to address airline customer service issues, the DOT issued a Notice of Proposed Rulemaking in 1994 to convert this policy into a federal regulation. In March 1999, the DOT promulgated its Code-Share Rule. The key components of the rule are:

- (1) to require travel agents doing business in the United States, foreign air carriers, and U.S. air carriers (a) to give consumers reasonable and timely notice if air transportation they are considering purchasing will be provided by an airline different from the airline holding out the transportation, and (b) to disclose the identity of the airline that will actually operate the aircraft; and
- (2) for tickets issued in the United States, to require U.S. and foreign air carriers and travel agents to provide written notice of the transporting carrier’s identity at the time of purchase of air trans-

⁵⁴ Charles Lockwood, *Airlines’ Code-Sharing Can Provide Benefits, but Understand the Pitfalls*, CHI. TRIB., Apr. 5, 1998, § 8, at 24, available at http://articles.chicagotribune.com/1998-04-05/travel/9804050499_1_code-share-british-midland-united-airlines. See *Buyers of Code Share Airline Tickets Beware*, DALLAS MORNING NEWS, Jan. 26, 1999, at 12A. See Gallagher, *supra* note 52, at F4.

⁵⁵ Editorial, *When Airlines Share Codes, Truth-in-Labeling Suffers*, USA TODAY, Dec. 17, 2009, at 10A.

⁵⁶ Jol A. Silversmith, *The Importance of Being Earnest: The DOT’s Code-Share and Change-of-Gauge Disclosure Requirements*, 2000 THE AVIATION Q. 281, available at <http://www.thirdamendment.com/codeshare.html>.

⁵⁷ 49 U.S.C. § 41712(1994); See Jol A. Silversmith, *DOT Enforcement of its Prohibitions on Unfair and Deceptive Practices*, 2009, available at <http://www.zsrlaw.com/publications/articles/2009%20DOT%20Enforcement%20Article.pdf>. See also Silversmith, *supra* note 56.

portation involving a code-sharing or long-term wet-lease arrangement.⁵⁸

The rule requires airlines and any other party selling airline travel to inform the public whether an air transportation service will be operated pursuant to a code-share arrangement or a long-term wet lease.⁵⁹ The DOT, in enacting this rule, was concerned with making sure that the passenger booking air travel “knows about the code share at critical junctures” in the trip planning process.⁶⁰

There are many tools available to the DOT in responding to deceptive practices related to code-share activity.⁶¹ In the least severe type of cases, the agency may issue a letter warning a party that it is in violation of the code-share regulations.⁶² For the most serious violations, the agency can bring a formal enforcement action before an administrative law judge. The most common way by which the Office of Aviation and Enforcement and Proceedings (OAEP) addresses the most serious air travel consumer protection rule violations is by consent order. The order generally includes a finding of violations, a cease-and-desist provision, and an assessment of civil penalties.⁶³

In the last ten years, the DOT has issued only nine consent orders pertaining to code-share disclosure matters.⁶⁴ Most of these cases involved a violation of 14 C.F.R. Part 257.5(b), which requires a ticket agent or carrier to “disclose to prospective consumers before they book the flight the existence of the code-share

⁵⁸ Disclosure of Code-Sharing Arrangements and Long-Term Wet Leases, 64 Fed. Reg. 12,837, 12,838 (Mar. 15, 1999) (codified at 14 C.F.R. pt. 257).

⁵⁹ 14 C.F.R. § 257.5.

⁶⁰ Disclosure of Code-Sharing Arrangements and Long-Term Wet Leases, 64 Fed. Reg. at 12,847.

⁶¹ The Office of Aviation Enforcement and Proceedings (OAEP) is the division within the DOT’s Office of the General Counsel that enforces code-share and other air travel consumer protection rules.

⁶² Silversmith, *supra* note 56.

⁶³ See Delta Air Lines, Inc. and Northwest Airlines, Inc., DOT Consent Order 2010-7-4, Docket No. OST-2010-0005 (July 9, 2010); United Airlines, Inc., DOT Consent Order 2009-7-6, Docket No. OST-2009-0001 (July 9, 2009).

⁶⁴ E-mail from Bill Mosley, U.S. Dep’t of Transp., Public Affairs Office, to Daniel Friedenzohn, Assistant Professor of Aeronautical Science, Embry-Riddle Aeronautical University, (Sept. 10, 2010, 10:45 EST) (on file with author).

arrangement, the corporate name of the transporting carrier, and any other name under which the flight is held out to the public.”⁶⁵

A recent case reveals the complexity of the airline industry today as it relates to the vast number of code-share partners that an airline has, as well as the additional challenges involved when a merger occurs. In 2009, Delta Air Lines and Northwest Airlines submitted schedule and fare data to the Official Airline Guide (OAG).⁶⁶ OAG provides schedule and fare information to several Internet travel sites such as Orbitz and Travelocity, as well as Delta’s website.⁶⁷ The data provided by OAG allows the traveling public to search for flight and fare information on Delta via its own and other websites.

The data that Delta and Northwest provided to OAG, however, failed to disclose that flights operated by Delta’s and Northwest’s twelve regional affiliates would be provided under the “Delta Connection” trade name.⁶⁸ This is a violation of sections 257.5(a) and 257.5(d). Section 257.5(a) states the following:

Notice in schedules. In written or electronic schedule information provided by carriers in the United States to the public, the Official Airline Guides and comparable publications, and, where applicable, computer reservations systems, carriers involved in code-sharing arrangements or long-term wet leases shall ensure that each flight in scheduled passenger air transportation on which the designator code is not that of the transporting carrier is identified by an asterisk or other easily identifiable mark *and that the corporate name of the transporting carrier and any other name under which that service is held out to the public is also disclosed* (emphasis added).⁶⁹

Section 257.5(d) states:

In any printed advertisement published in or mailed to or from the United States (including those published through the Internet) for service in a city-pair market that is provided under a code-

⁶⁵ United Airlines, Inc., *supra* note 63.

⁶⁶ Delta Air Lines, Inc. and Northwest Airlines, Inc., *supra* note 63, at 2.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 14 C.F.R. § 257.5(a) (1999).

sharing arrangement or long-term wet lease, the advertisement shall prominently disclose that the advertised service may involve travel on another carrier and clearly indicate the nature of the service in reasonably sized type and shall identify all potential transporting carriers involved in the markets being advertised by corporate name and by any other name under which that service is held out to the public. In any radio or television advertisement broadcast in the United States for service in a city-pair market that is provided under a code-sharing or long-term wet lease, the advertisement shall include at least a generic disclosure statement, such as “Some services are provided by other airlines.”⁷⁰

The DOT stated that “[t]he omission affected the marketing of hundreds of flights, across all major online sales channels, and potentially impacted the purchasing and travel decisions of thousands of customers across a period of at least three to four months.”⁷¹ The DOT further noted that the omission by both carriers “likely resulted in confusion for and inconvenience to many passengers, increasing the risk of missed connections or missed flights,” especially in airports like Ronald Reagan Washington National Airport, where the two carriers operated out of separate terminals.⁷²

Delta claimed that it took corrective actions to address the problem once it was made aware of the error by the DOT.⁷³ The carrier dedicated “extensive resources to, among other things, communicating as clearly as possible to Delta and Northwest passengers where they needed to check-in for Delta and Northwest flights (including those of the regional Delta Connection partners) operated during the transitional period of the merger.”⁷⁴ It also claimed that “prior to correction, the schedules published by both Delta and Northwest disclosed the existence of a code-share rela-

⁷⁰ 14 C.F.R. § 257.5(d) (1999).

⁷¹ Delta Air Lines, Inc. and Northwest Airlines, Inc., *supra* note 63, at 2.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 3.

tionship, where appropriate, and the identity of the operating carrier.”⁷⁵

Delta was unable to convince the DOT that the extra steps it took to make customers aware that certain flights would be operated under the “Delta Connection” name was sufficient to mitigate the violations under the code-share regulations.⁷⁶ Delta agreed to a civil penalty of \$80,000, with half of that amount payable only if the carrier violated the cease-and-desist provision set forth in the Consent Order.⁷⁷

The Order reveals that the DOT is committed to assuring that carriers comply with the requirements of the regulations. A carrier’s additional efforts to inform customers of service changes, even if they go beyond what the regulations require, will not serve to mitigate its failure to comply with the rules.⁷⁸ It also reflects the DOT’s desire to ensure that customers have clear information as to who is operating the flight at all critical “junctions” of the travel experience.⁷⁹

In 2009, the DOT pursued code-share disclosure violation actions against Hawaiian Airlines, United Airlines, and U.S. Airways for failing to comply with section 257.5(b), which requires a ticket agent or carrier to disclose to prospective customers – before they book the flight – the existence of the code-share arrangement, the corporate name of the transporting carrier, and any other name under which the flight is held out to the public.”⁸⁰

All three cases involved the carriers’ telephone reservation agents. In each instance, the agents failed to disclose to customers the “code-share status of the flights in question.”⁸¹ A civil penalty, along with a commitment to cease and desist from further violations of section 257, was included in the Consent Order for each case.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 4.

⁷⁸ *Id.* at 3.

⁷⁹ Disclosure of Code-Sharing Arrangements and Long-Term Wet Leases, 64 Fed. Reg. at 12,847.

⁸⁰ Hawaiian Airlines, Inc., DOT Consent Order 2009-8-4, Docket No. OST-2009-0001, at 1 (Aug. 10, 2009); *See* United Air Lines, Inc., *supra* note 63; US Airways, Inc. DOT Consent Order 2009-8-2, Docket No. OST-2009-0001 (Aug. 10, 2009).

⁸¹ *Id.*

Overall, carriers seem to be doing a good job of complying with the code-share regulations. The DOT receives only about thirty complaints a year related to code-share disclosure issues.⁸² Of those complaints that are investigated, very few result in the issuance of a consent order with a civil penalty. Moreover, the number of code-share disclosure complaints filed with the DOT is relatively small compared with the overall number of consumer-related complaints filed with the agency.

In 2009, the DOT received 8,819 complaints concerning a number of consumer travel issues including advertising, flight problems, and oversales.⁸³ The filing of about thirty code-share disclosure complaints during this period represents less than one percent of all air travel consumer grievances filed with the agency.⁸⁴

There are many reasons why the problem may not be as bad as some code-share critics would have us believe. Code-sharing is in a rather mature stage and has gained public acceptance worldwide.⁸⁵ When most customers purchase a ticket today, they are certainly aware that they are flying on a code-share flight.⁸⁶ This is due, in part, to the fact that the code-share regulations require disclosure of this information prior to the purchasing of the ticket. Because the practice has become so pervasive, many customers understand that they will be flying on a code-share flight.

For customers who live in small communities, there is a clear understanding that a code-share partner will be operating their flight. This is because regional airlines, serving as code-share

⁸² Telephone Interview with Tim Kelly, U.S. Dep't of Transp., Office of Aviation Enforcement & Proceedings (Sept. 9, 2010).

⁸³ OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS, AVIATION CONSUMER PROT. DIV., U.S. DEP'T OF TRANSP., AIR TRAVEL CONSUMER REPORT 45, 48 (Feb. 2010). This number represents complaints filed against U.S. and foreign airlines, as well as travel agents, tour operators, and others.

⁸⁴ Telephone Interview with Tim Kelly, *supra* note 82.

⁸⁵ Notice of Request for Extension of a Previously Approved Collection: Disclosure of Codesharing, 73 Fed. Reg. at 40,009. *See also* Peter Wiener, Associate, Steer Davies Gleave, Presentation at the 6th Conference on Applied Infrastructure Research (INFRADAY): Airline Code-shares and Competition (Oct. 6, 2007), *available at* http://www.infraday.tu-berlin.de/fileadmin/documents/infraday/2007/papers/presentation_wiener_v01_jew_02.10.2007.pdf

⁸⁶ 14 C.F.R. § 257.5 (1999).

partners to the larger U.S. airlines, provide the only scheduled service to about three-quarters of the nation's airports.⁸⁷

Other aviation stakeholders have also played a role in helping to generate greater public acceptance of code-share relationships. In 1999, the Air Transport Association of America (ATA) announced that each of the major U.S. air carriers would develop a voluntary customer service plan guided by a twelve-part "Airline Customer Service Commitment" (CSC).⁸⁸ Commitment 12 is a pledge by the carriers to ensure good customer service from their respective code-share partners.

There are some weaknesses to the ATA's plan. First, the CSC does not "define the meaning of terms used in some of the 12 parts" of its plan.⁸⁹ In general, neither the ATA nor individual carriers elaborated on what the twelfth commitment entails. Therefore, it is "difficult for both passengers and the Department [of Transportation] to evaluate the specific guarantees of service provision[s] that are being made by the carriers."⁹⁰

Concerns about this issue have increased over the past several years due to the fact that code-sharing is so pervasive in the industry and can lead to complications for passengers affected by any single mishap. Regional carriers generally have agreements to operate services on behalf of several major carriers. Questions have been raised concerning their ability to operate safely. These concerns are only heightened when passengers are not made properly aware of the carrier operating a particular flight at the time they make their reservations.

Society as a whole has accepted code-share as part of the panacea of the air transport experience in the United States. Passenger concerns about code-share travel, however, may be displaced. It is possible that the concerns they raise have more to do with

⁸⁷ Roger Cohen, President, Reg'l Airline Ass'n, Address at the New York Airports Conference (June 14, 2010), *available at* <http://www.raa.org/Portals/0/Presentations/NYAirportsconf-FINAL061510.pdf>.

⁸⁸ Air Transport Association, Customers First 12-Point Customer Service Commitment, <http://www.airlines.org/PassengersCargo/PassengerInfo/Pages/CustomersFirst12-PointCustomerServiceCommitment.aspx> (last visited Sept. 17, 2010); CRS REPORT FOR CONGRESS, AIRLINE PASSENGER RIGHTS LEGISLATION IN THE 107TH CONGRESS (Aug. 17, 2001).

⁸⁹ ECONOMETRICA, INC., REPORT FOR OFFICE OF THE ASSISTANT GENERAL COUNSEL, CONSUMER RULEMAKING NPRM: ENHANCING AIRLINE PASSENGER PROTECTIONS II 13 (2010).

⁹⁰ *Id.*

how the code-share relationship is managed from a customer service perspective, and less with the code-share concept in principle.

One of the biggest challenges that consumers face when traveling on code-share flights is figuring out whether the ticketing or the operating carrier is responsible for resolving an issue related to their flight. This confusion only serves to further strengthen the deception argument put forth by code-share critics.⁹¹

For example, on both domestic and international code-share itineraries, the ticketing carrier is generally responsible if a problem arises. If a passenger purchases a ticket on *ABC Airlines'* website for a flight that is operated by *ABC Airlines'* code-share partner, *DEF Airlines*, and *DEF Airlines* cancels the flight, then it is generally up to *DEF Airlines*, pursuant to the contract of carriage, to address the situation. But if the problem is related to the passenger's reservation, then the ticketing carrier generally is responsible for the issue.⁹²

Confusion as to which airline is responsible for handling baggage problems can also raise the ire of the traveling public. A passenger may assume incorrectly that she should go to the ticketing airline's airport counter to check her luggage. After waiting in line for twenty-five minutes, she is told that the luggage has to be checked in with the airline's code-share partner, which is operating the flight. The passenger may be incensed as a result of the additional time that she will have to spend in line. She may also miss her flight as a result of not having enough time to run to the other carrier's counter to check her luggage.

In 2009, the DOT reiterated its policy as it applies to international code-share services.⁹³ The Department stated that in order to approve a petition for international code-share services, the marketing (ticketing) carrier must "accept responsibility for the entirety of the code-share journey for all obligations established in the contract of carriage with the passenger."⁹⁴

These areas of confusion are an inconvenience for passengers and do little to instill public confidence in the airline industry. A

⁹¹ Higgins, *supra* note 48.

⁹² *Id.*

⁹³ Guidance on Airline Baggage Liability and Responsibilities of Code-Share Partners Involving International Itineraries, 74 Fed. Reg. 14,837 (Apr. 1, 2009).

⁹⁴ *Id.*

combination of the regulations and their enforcement by the DOT, along with the increased familiarity with code-share flights by the traveling public, has resulted in greater acceptance and understanding of how code-share flights affect their travel plans. There still, however, appears to be room for improvement in terms of how the industry deals with some of these issues.

V. *Conclusion*

Code-share practice in the airline industry continues to grow and will continue to evolve. It is clear that code-share relationships benefit both airlines and the traveling public. The code-share regulations have provided a solid foundation in setting forth requirements that airlines disclose which partner airlines will be operating one or more flights in an itinerary.

The traveling public has accepted code-sharing and the airline industry has done fairly well in complying with the regulations. When compared to the other types of complaints that are filed with the DOT, it appears that both the Department and the airline industry have served the public well in addressing concerns about disclosure of code-share flights.

There are other problems related to customer service and operational issues that continue to plague the industry. Finding customer-friendly solutions to some of these problems will be challenging. They are complex and are, in part, a reflection of the complexity of the industry.

To its credit, both the DOT and the industry continue to find ways to address an array of problems that affect the traveling public. Doing so, while continuing to allow code-share relationships to develop, will help foster a better air transport system.