

# CONSUMER PROTECTION AVIATION FARE ADVERTISEMENT AND DENIED BOARDING

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*The purpose of this paper is to compare and contrast the statutory and regulatory structures of the United States and the European Union with regard to commercial aviation fare advertisements and denied boarding and ticket oversales. The paper tests the hypothesis that the United States regulatory framework would be systematically more pro-business than the European Union's, due to the differences in the nature of the rule-making bodies in these two regimes. After analysis of the regulations themselves and enforcement actions undertaken under those regulations, this hypothesis is not confirmed.*

*L'objet de cet article est de procéder à une analyse comparative du régime juridique applicable dans l'industrie aérienne aux États Unis d'Amérique et dans l'Union Européenne, en matière de publicité tarifaire, de refus d'embarquement des passagers et de surréservation. L'auteur tente de tirer les conséquences du postulat selon lequel le cadre juridique des États Unis d'Amérique tendrait à l'inverse de celui en vigueur dans l'Union Européenne, à privilégier les compagnies aériennes plutôt que les usagers. Il explique que la thèse selon laquelle cette différence tiendrait à la nature des institutions qui posent les règles de ce régime, n'emporte pas véritablement la conviction.*

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## **I INTRODUCTION**

In the United States, commercial aviation for the purposes of consumer protection is regulated under the authority granted by federal laws governing air commerce and safety<sup>1</sup> to the Department of Transportation, General Counsel's

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1 See 49 USC § 41712: "(a) **In General**—On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. If the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket

Office, which generates the applicable regulations.<sup>2</sup> The two aspects of those regulations that this paper will examine are the regulation of fare advertising and the regulation of ticket oversales and denied boarding.<sup>3</sup> This is different from the manner in which general commercial activity is regulated in the United States, where, for most other industries, consumer protection regulations are written, promulgated and enforced by the Federal Trade Commission.

Within the European Union (EU), regulations of consumer protection in commercial aviation are written and promulgated by the European Commission.<sup>4</sup> Due to the nature of the EU, each of these regulations must be enforced by an appropriate body of a given member state in order to be effective.

This paper explores the nature of the regulation of consumer protection in the commercial aviation industry in the United States. In addition to providing a description of the regulations which apply in the areas of fare advertising and ticket

agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.

**(b) E-Ticket Expiration Notice**—It shall be an unfair or deceptive practice under subsection (a) for any air carrier, foreign air carrier, or ticket agent utilizing electronically transmitted tickets for air transportation to fail to notify the purchaser of such a ticket of its expiration date, if any."

2 14 CFR parts 200-399.

3 14 CFR §§250 and 399.84, which are too long to include in their entirety at this time (applicable portions of each regulation will be included as referred to).

4 Aviation fare advertising is regulated according to Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) [2008] OJ L293/3 [Regulation (EC) No 1008/2008], art 23, which reads: "1. Air fares and air rates available to the general public shall include the applicable conditions when offered or published in any form, including on the Internet, for air services from an airport located in the territory of a Member State to which the Treaty applies. The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition, to the indication of the final price, at least the following shall be specified: (a) air fare or air rate; (b) taxes; (c) airport charges; and (d) other charges, surcharges or fees, such as those related to security or fuel; where the items listed under (b), (c) and (d) have been added to the air fare or air rate. Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an 'opt-in' basis. 2. Without prejudice to Article 16(a), access to air fares and air rates for air services from an airport located in the territory of a Member State to which the Treaty applies, available to the general public shall be granted without any discrimination based on the nationality or the place of residence of the customer or on the place of establishment of the air carrier's agent or other ticket seller within the Community." Denied boarding compensation is regulated according to Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L 46/1 [Regulation (EC) No 261/2004], art 7, which is too long to include in its entirety at this time (applicable portions of the regulation will be provided as referred to).

oversales and denied boarding and how they are enforced, this paper seeks to analyse those regulations and their enforcement to determine what, if any, systematic issues are raised by having consumer protection regulated by the government agency responsible for regulating commercial aviation in general. These regulations are compared with those which prevail in the EU, where distinctions in the nature of the regulatory authority would, a priori, suggest different systematic effects. Specifically, the goal of this paper is to test the hypothesis that the regulation of consumer protection in commercial aviation in the United States should be more favourable to the commercial aviation industry than similar regulations are in the EU. This is due to the presumed closeness of the regulators at the Department of Transportation to the aviation industry as compared to the greater distance between the regulator and the regulated in the EU. By "greater distance", what is meant is that the regulator is the European Commission, a body with general jurisdiction and no specific ties to the commercial aviation industry.<sup>5</sup>

This hypothesis will be considered to be conditionally demonstrated if there appears to be systematically more favourable treatment towards the United States commercial aviation industry in the regulations than there exists towards the EU's commercial aviation industry in EU regulations.

Due to the nature of the EU, it is impractical to compare the manner in which the regulations are enforced in the United States and the EU, because enforcement is handled by each of the 28 member states in their respective jurisdictions. Instead, many different enforcement actions by the United States Department of Transportation against large airlines, small airlines, ticketing agents and charter or tour operators will be compared to each other and with the potential penalties allowed under the regulations to see what, if any, insight can be gained from the said comparisons. If the above stated hypothesis were true, it would be expected that the enforcement actions would lead to significantly lower penalties than would be available under the regulations and that the penalties for the large operators, both airlines and ticketing agents, should be less for similarly severe violations as compared to smaller operators. These smaller operators can be presumed to have less influence and access due to their smaller size and the consequential fewer resources to exhaust in seeking favourable regulatory behaviour. If the hypothesis is not supported by the available information, that information will be analysed to

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5 This hypothesis is informed by "capture theory", a part of the school of political science known as "public choice theory". For general information on this idea, see George Stigler "The Theory of Economic Regulation" (1971) 2 *Bell Journal of Economics* 3-21; and MD Reagan *Regulation: the Politics of Policy* (Little, Brown, Boston, 1987).

see what, if any, explanation is apparent for any differences in the manner of regulation or degree of penalties that can be gleaned from the data.

## ***II CURRENT AVIATION CONSUMER PROTECTION REGIME IN THE UNITED STATES***

As stated above, fare advertising, ticket oversales and denied boarding compensation to passengers are regulated under the authority of the Secretary of Transportation.<sup>6</sup>

### ***A Advertising***

#### ***1 Regulations***

Fare advertising regulations<sup>7</sup> were amended on 25 April 2011<sup>8</sup> with new language in effect as of 24 January 2012.<sup>9</sup> The amendments codified what had been, under the old regulations, long standing precedent, and thus did not result in any substantial policy shift.<sup>10</sup>

The current regulations read as follows:<sup>11</sup>

The Department considers any advertising or solicitation by a direct air carrier, indirect air carrier, an agent of either, or a ticket agent, for passenger air transportation, a tour (i.e., a combination of air transportation and ground or cruise accommodations) or tour component (e.g., a hotel stay) that must be purchased with air transportation that states a price for such air transportation, tour, or tour component to be an unfair and deceptive practice in violation of 49 USC 41712, unless the price stated is the entire price to be paid by the customer to the carrier, or agent, for such air transportation, tour, or tour component. Although charges included within the single total price listed (e.g., government taxes) may be stated separately or through links or "pop ups" on websites that display the total price, such charges may not be false or misleading, may not be displayed prominently, may not be presented in the same or larger size as the total price, and must provide cost information on a per passenger basis that accurately reflects the cost of the item covered by the charge.

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6 49 USC § 41712.

7 14 CFR § 399.84.

8 76 FR 23166, 25 April 2011.

9 76 FR 45181, 28 July 2011.

10 *Thai Airways International Public Company Limited, Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-8-21 (25 August 2011) [Thai Airways]* at 1-2.

11 14 CFR § 399.84(a).

As can be inferred from the language of these regulations, any advertisement is required to state the "entire price to be paid by the customer." However, this "entire price to be paid" is not, as one might think, the actual effective entire price that a given customer will actually be asked to pay. This is because:<sup>12</sup>

Through its enforcement case precedent, the Department has allowed taxes and fees collected by carriers and other sellers of air transportation, such as passenger facility charges (PFCs) and departure taxes, to be stated separately in fare advertisements so long as the charges are levied by a government entity, are not *ad valorem* in nature, are collected on a per-passenger basis, and their existence and amount are clearly indicated in the advertisement so that the consumer can determine the full fare to be paid.

While the charges are not required to be included in the stated fare, all other charges, such as fuel surcharges and all taxes not collected on a per-passenger basis, must be included in the stated price.<sup>13</sup> However, the separate per-passenger taxes and charges mentioned above must be identified in print advertisements, in both "nature and amount" by an "asterisk or other symbol" which refers the reader to the bottom of the advertisement.<sup>14</sup> In online advertisements, they must be disclosed "through a prominent link placed adjacent to the stated fare."<sup>15</sup>

## 2 Penalties

Penalties for violations of the regulations are governed by penalty provisions in the United States Code<sup>16</sup> and regulations adopted under them.<sup>17</sup> Specifically, a "general civil penalty of not more than [USD]27,500" per violation by large businesses applies<sup>18</sup> whereas "[a] maximum civil penalty of [USD]2,500" applies to small businesses for violations of consumer protection rules.<sup>19</sup>

For the purposes of this regulation, a small business is defined as an air carrier with a maximum number of 1,500 employees between itself and its affiliates.<sup>20</sup> The

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12 *Expedia, Inc, Violations of 49 U.S.C. § 41712 and 14 CFR 399.84*, Order 2011-4-18 (21 April 2011) [*Expedia, Inc*] at 1.

13 *Thai Airways*, above n 10, at 1-2.

14 14 CFR § 399.84(a).

15 14 CFR § 399.84(a).

16 49 USC § 46301(a).

17 14 CFR § 383.2.

18 14 CFR § 383.2(a).

19 14 CFR § 383.2(b)(3).

20 13 CFR § 121.201.

number of employees is calculated according to small business association regulations, which in the applicable section states: "In determining a concern's number of employees, SBA [Small Business Administration] counts all individuals employed on a full-time, part-time or other basis."<sup>21</sup> This statement is clarified within the regulations: "[p]art-time and temporary employees are counted the same as full-time employees."<sup>22</sup>

### 3 *Enforcement Examples*

All concluded enforcement actions under the applicable regulations for 2011 are provided below in two tables. Each of these actions ended in a consent order, reflecting a settlement reached between the respondent airline or ticket agent or charter/tour operator and the Department of Transportation. A search of the standard online legal databases, Westlaw and Lexis, as well as the relevant Department of Transportation<sup>23</sup> and United States federal government<sup>24</sup> websites yielded no contested actions. Consequently, it may be concluded that these are the only enforcement actions completed in 2011.<sup>25</sup>

The two tables reflect enforcement actions against airlines (table 1) and actions against ticketing agents and charter/tour operators (table 2). Each table provides the name of the respondent in column one, the total amount of penalty in column two, the amount of penalty due immediately in column three, and conditional penalties, which only become due if the respondent violates the cease-and-desist provisions of the consent order, in column four (all figures are in USD).

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21 13 CFR § 121.106

22 13 CFR § 121.106(b)(2).

23 See <<http://dot.gov/airconsumer>>.

24 Specifically, <[www.regulations.gov](http://www.regulations.gov)>, the site where all Department of Transportation enforcement actions and all pleadings and orders are posted.

25 This paper was originally written in January of 2012. The author has reviewed the enforcement actions from 2012 and 2013 and has found that there has been no substantial change in the nature of the enforcement actions nor have any consent orders strayed from the general dollar ranges represented by 2011. Therefore, 2011 remains a representative year and no consent orders subsequent to 2011 are presented or analysed here. All enforcement actions from 2002 to present are available at <[www.dot.gov/airconsumer/advertising](http://www.dot.gov/airconsumer/advertising)>.

*Airlines – Table 1*

RESPONDENT NAME	PENALTY AMOUNT	AMOUNT DUE	CONDITIONAL
SkyWest Airlines, Inc <sup>26</sup>	\$40,000.00	\$20,000.00	\$20,000.00
Spirit Airlines, Inc <sup>27</sup>	\$50,000.00	\$25,000.00	\$25,000.00
LAN Airlines, SA <sup>28</sup>	\$50,000.00	\$25,000.00	\$25,000.00
South African Airways PTY Limited <sup>29</sup>	\$55,000.00	\$55,000.00	None
Virgin Atlantic Airways, Ltd <sup>30</sup>	\$50,000.00	\$25,000.00	\$25,000.00
JetBlue Airways, Ltd <sup>31</sup>	\$50,000.00	\$25,000.00	\$25,000.00
Thai Airways International Public Company Limited <sup>32</sup>	\$70,000.00	\$35,000.00	\$35,000.00
Ethiopian Airlines Enterprise <sup>33</sup>	\$50,000.00	\$25,000.00	\$25,000.00
Air Canada <sup>34</sup>	\$50,000.00	\$25,000.00	\$25,000.00
China Airlines, Ltd <sup>35</sup>	\$80,000.00	\$40,000.00	\$40,000.00
TACA International Airlines, SA <sup>36</sup>	\$55,000.00	\$27,500.00	\$27,500.00
US Airways, Inc <sup>37</sup>	\$45,000.00	\$45,000.00	None

26 *SkyWest Airlines Inc, Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-11-25 (22 November 2011).*

27 *Spirit Airlines, Inc, Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-11-23 (21 November 2011).*

28 *LAN Airlines, SA, Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-10-18 (26 October 2011).*

29 *South African Airlines PTY Limited, Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-10-12 (24 October 2011).*

30 *Virgin Atlantic Airways, Ltd, Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-9-18 (26 September 2011).*

31 *JetBlue Airways, Ltd, Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-8-25 (30 August 2011) [JetBlue Airways].*

32 *Thai Airways, above n 10.*

33 *Ethiopian Airlines Enterprise, Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-8-20 (18 August 2011).*

34 *Air Canada, Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-8-8 (4 August 2011) [Air Canada].*

35 *China Airlines, Ltd, Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-6-20 (21 June 2011).*

36 *TACA International Airlines, SA, Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-6-5 (3 June 2011).*

37 *US Airways, Inc., Violations of 49 USC § 41712 and 14 CFR 399.84, Order 2011-6-2 (2 June 2011).*

Continental Airlines, Inc <sup>38</sup>	\$120,000.00	\$60,000.00	\$60,000.00
OpenSkies SAS <sup>39</sup>	\$20,000.00	\$10,000.00	\$10,000.00
Cayman Airways, Ltd <sup>40</sup>	\$40,000.00	\$20,000.00	\$20,000.00
Virgin America, Inc <sup>41</sup>	\$40,000.00	\$20,000.00	\$20,000.00
Aerovias de Mexico, SA de CV	\$60,000.00	\$30,000.00	\$30,000.00

***Ticketing Agents and Charter/Tour Operators – Table 2***

<b>RESPONDENT</b>	<b>PENALTY AMOUNT</b>	<b>AMOUNT DUE</b>	<b>CONDITIONAL</b>
Destination Southern Africa, Inc <sup>42</sup>	\$20,000.00	\$10,000.00	\$10,000.00
Orbitz Worldwide, LLC <sup>43</sup>	\$60,000.00	\$60,000.00	
LBF Travel, Inc <sup>44</sup>	\$30,000.00	\$15,000.00	\$15,000.00
Globester, LLC <sup>45</sup>	\$40,000.00	\$20,000.00	\$20,000.00
Expedia, Inc <sup>46</sup>	\$29,000.00	\$29,000.00	
Tour Beyond, Inc <sup>47</sup>	\$35,000.00	\$17,500.00	\$17,500.00

38 *Continental Airlines, Inc, Violations of 49 USC § 41712 and 14 CFR 399.84*, Order 2011-6-1 (2 June 2011).

39 *OpenSkies SAS, Violations of 49 USC § 41712 and 14 CFR 399.84*, Order 2011-4-26 (29 April 2011).

40 *Cayman Airways, Ltd, Violations of 49 USC § 41712 and 14 CFR 399.84*, Order 2011-3-25 (18 March 2011).

41 *Virgin America, Inc, Violations of 49 USC § 41712 and 14 CFR 399.84*, Order 2011-2-5 (7 February 2011).

42 *Destination Southern Africa, Inc, Violations of 49 USC § 41712 and 14 CFR 399.84*, Order 2011-10-11 (24 October 2011).

43 *Orbitz Worldwide, LLC, Violations of 49 USC § 41712 and 14 CFR 399.84*, Order 2011-10-5 (17 October 2011).

44 *LBF Travel, Inc, Violations of 49 USC § 41712 and 14 CFR 399.84*, Order 2011-6-34 (30 June 2011).

45 *Globester, LLC, Violations of 49 USC § 41712 and 14 CFR 399.84*, Order 2011-6-33 (30 June 2011).

46 *Expedia, Inc*, above n 12.

47 *Tour Beyond, Inc, Violations of 49 USC § 41712 and 14 CFR 399.84*, Order 2011-2-6 (9 February 2011).



## ***B Ticket Oversales and Denied Boarding Compensation***

### *1 Regulations*

Ticket oversales also are regulated according to the authority of the Secretary of Transportation.<sup>48</sup> The specific aspect of ticket oversales analysed here is the regulation of compensation to passengers who are denied boarding. Before discussing the details of the applicable regulations,<sup>49</sup> a short description of what ticket oversales and denied boarding are is necessary. Under aviation regulations, air carriers are allowed to sell more tickets for a given flight than there are seats on the flight.<sup>50</sup> This is because there are often people who hold tickets who, for whatever reason, are a "no show"; through overselling tickets for a given flight, airlines can better ensure a full flight. However, airlines are obligated to ensure that the "smallest practicable number of persons holding confirmed reserved space on that flight are denied boarding involuntarily."<sup>51</sup> Airlines are required first to seek volunteers before involuntarily denying anyone boarding.<sup>52</sup>

For those who are denied boarding involuntarily, the regulations provide for compensation to be paid to those passengers. The amount of compensation is determined by a combination of two factors, specifically: whether the flight is a domestic or international flight; and the amount of time the passenger's arrival at their destination is delayed compared to the scheduled arrival time.<sup>53</sup> The compensation available is a percentage of the price of the passenger's ticket up to a specific maximum dollar amount.<sup>54</sup> Table 3 provides the compensation scheme available for passengers on domestic flights while table 4 provides the

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48 14 CFR § 250.

49 14 CFR § 250.5.

50 14 CFR § 250.

51 14 CFR § 250.2b. For discussions of passengers being involuntarily denied boarding, see *Frontier Airlines, Inc, Violations of 14 CFR Part 250 and 49 USC § 41712*, Order 2008-11-1 (5 November 2008) at 1-2; *US Airways, Inc, Violations of 14 CFR Part 250 and 49 USC § 41712*, Order 2008-12-13 (23 December 2008) [*US Airways, Inc* Order 2008-12-13] at 2; *Delta Air Lines, Inc, Violations of 14 CFR Part 250 and 49 USC § 41712*, Order 2009-7-7 (9 July 2009) [*Delta Air Lines* Order 2009-7-7] at 2; *Southwest Airlines Co, Violations of 14 CFR Part 250 and 49 USC § 41712*, Order 2010-4-14 (27 April 2010) [*Southwest Airlines Co*] at 2-3; *Comair, Inc, Violations of 14 CFR Part 250 and 49 USC §§ 41708 and 41712*, Order 2010-7-18 (26 July 2010) at 3; *American Airlines, Inc, Violations of 49 USC § 41712*, Order 2011-2-14 (28 February 2011) [*American Airlines, Inc*] at 1-2.

52 14 CFR § 250.3.

53 14 CFR § 250.5.

54 14 CFR § 250.5.

compensation available for passengers on international flights originating in the United States (all figures in USD).

### ***Domestic Flights – Table 3***

Number of Hours of Arrival After Schedule	COMPENSATION: Percentage of Passenger's Fare	COMPENSATION: Maximum Dollar Amount
<1 Hour <sup>55</sup>	0%	\$0.00
1-2 Hours <sup>56</sup>	200%	\$650.00
>2 Hours <sup>57</sup>	400%	\$1300.00

### ***International Flights – Table 4***

Number of Hours of Arrival After Schedule	COMPENSATION: Percentage of Passenger's Fare	COMPENSATION: Maximum Dollar Amount
<1 Hour <sup>58</sup>	0%	\$0.00
1 Hour – 4 Hours <sup>59</sup>	200%	\$650.00
>4 Hours <sup>60</sup>	400%	\$1,300.00

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- 55 14 CFR 250.5(a)(1) reads: "(1) No compensation is required if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination not later than one hour after the planned arrival time of the passenger's original flight ..."
- 56 14 CFR 250.5(a)(2) reads: "(2) Compensation shall be 200% of the fare to the passenger's destination or first stopover, with a maximum of [USD]650, if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination more than one hour but less than two hours after the planned arrival time of the passenger's original flight ..."
- 57 14 CFR 250.5(a)(3) reads: "(3) Compensation shall be 400% of the fare to the passenger's destination or first stopover, with a maximum of [USD]1,300, if the carrier does not offer alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination less than two hours after the planned arrival time of the passenger's original flight."
- 58 14 CFR 250.5(b)(1) reads: "(1) No compensation is required if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if not, the airport of the passenger's final destination not later than one hour after the planned arrival time of the passenger's original flight ..."
- 59 14 CFR 250.5(b)(2) reads: "(2) Compensation shall be 200% of the fare to the passenger's destination or first stopover, with a maximum of [USD]650, if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if not, the airport of the passenger's final destination more than one hour but less than four hours after the planned arrival time of the passenger's original flight ..."
- 60 14 CFR 250.5(b)(3) reads: "(3) Compensation shall be 400% of the fare to the passenger's destination or first stopover, with a maximum of [USD]1,300, if the carrier does not offer alternate transportation that, at the time the arrangement is made, is planned to arrive at the

## 2 Enforcement Examples

The same facts exist for enforcement actions for denied boarding as exist for advertising, specifically that the available concluded actions are uniformly consent orders reflecting a settlement between the respondent entity and the Department of Transportation. However, unlike advertising, denied boarding regulations only apply to air carriers, and as such only a single table is necessary to detail the various enforcement actions.<sup>61</sup> Additionally, cases under denied boarding regulations are brought far less frequently than those for advertising regulations and as such, rather than limiting the examples to 2011 as was done above, all actions which are available over the last several years are included in table 5 (all figures in USD), so as to have a reasonably sized sample to analyse. There is one additional column in table 5 not present in tables 1 and 2, reflecting the amount of the penalty which will be credited to the air carrier for any compensation paid to passengers within the amount of time allotted.<sup>62</sup>

### Part 250.5 Enforcement Actions – Table 5

RESPONDENT	PENALTY AMOUNT	AMOUNT DUE	CONDITIONAL	COMPENSATION AMOUNT/TIME PERIOD
Delta Air Lines Inc <sup>63</sup>	\$750,000.00	\$325,000.00		\$425,000.00/15 months
American Airlines Inc <sup>64</sup>	\$90,000.00	\$45,000.00	\$45,000.00	
Comair Inc <sup>65</sup>	\$275,000.00	\$275,000.00		
Southwest Airlines Co <sup>66</sup>	\$200,000.00	\$90,000.00	\$90,000.00	\$20,000.00/12 months
Delta Air Lines Inc <sup>67</sup>	\$375,000.00	\$175,000.00		\$200,000.00/18 months

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airport of the passenger's first stopover, or if not, the airport of the passenger's final destination less than four hours after the planned arrival time of the passenger's original flight."

61 14 CFR 250.

62 If the order so allows, the total penalty paid to the United States Treasury is reduced by the amount of compensation paid to passengers within a certain number of months after the order is issued up to an amount specified in the order.

63 *Delta Air Lines, Inc, Violations of 49 USC § 41708, 49 USC § 41712, and Order 2009-7-7, Order 2013-6-18 (26 June 2013) [Delta Airlines Order 2013-6-18].*

64 *American Airlines, Inc*, above n 51.

65 *Comair, Inc*, above n 51.

66 *Southwest Airlines Co*, above n 51.

US Airways Inc <sup>68</sup>	\$140,000.00	\$140,000.00		
Frontier Airlines Inc <sup>69</sup>	\$40,000.00	\$40,000.00		
Northwest Airlines Inc <sup>70</sup>	\$40,000.00	\$40,000.00		

### **III EUROPEAN UNION CONSUMER PROTECTION REGULATIONS**

The EU consumer protection regulations applicable in both the areas of fare advertisements and ticket oversales and denied boarding in the EU are promulgated by the European Commission. In this part, the regulatory schemes in each of these two areas will be discussed, and as will be shown below, they are found to be fairly similar to their counterpart regulations in the United States, but with certain, potentially significant, differences.

#### **A Advertising Fares**

Aviation advertising is regulated in the EU according to Regulation (EC) No 1008/2008.<sup>71</sup> Specifically, art 23(1) of the Regulation is comparable to United States regulations addressing fare advertisements. It reads as follows:

Air fares and air rates available to the general public shall include the applicable conditions when offered or published in any form, including on the Internet, for air services from an airport located in the territory of a Member State to which the Treaty applies. The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition, to the indication of the final price, at least the following shall be specified: (a) air fare or air rate; (b) taxes; (c) airport charges; and (d) other charges, surcharges or fees, such as those related to security or fuel; where the items listed under (b), (c) and (d) have been added to the air fare or air rate. Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an "opt-in" basis.

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67 *Delta Air Lines* Order 2009-7-7, above n 51.

68 *US Airways, Inc* Order 2008-12-13, above n 51.

69 *Frontier Airlines, Inc*, above n 51.

70 *Northwest Airlines, Inc, Violations of 14 CFR Part 250 and 49 USC § 41712*, Order 2007-6-12, (18 June 2007) [*Northwest Airlines, Inc*].

71 Regulation (EC) No 1008/2008, above n 4.

Article 23(1) thus contains a similar requirement to that in the United States regulations: the entire fare, inclusive of surcharges, fees, taxes and charges, must be stated as one "all inclusive" price. However, in addition to stating the single "all inclusive" price, art 23(1) also requires the price's component elements (taxes, airport charges, other charges, surcharges and fees) to be individually stated. Another difference between the regulations in the United States and the EU is that there is no exception provided in art 23(1) for taxes assessed on a per-passenger basis as exists in the equivalent regulations in the United States.

One issue which is significantly different between the United States and the EU in this area relates to penalties. Due to the nature of the EU, rather than stipulating explicitly detailed penalties for specific violations the law, Regulation (EC) No 1008/2008 provides:<sup>72</sup>

Member States shall ensure compliance with the rules set out in this Chapter and shall lay down penalties for infringements thereof. Those penalties shall be effective, proportionate and dissuasive.

Due to the above, it is quite clear that penalties cannot be compared between the EU as a whole and the United States, since no specific penalties are contained in this regulation. Instead, art 24 of that regulation delegates penalty determinations to the member states by directing them to "lay down" penalties in their laws, merely requiring those penalties to be "effective, proportionate and dissuasive", which could be interpreted either so as to lead to far greater or lesser penalties than those that exist in the United States. Due to the complexity of assessing these issues across the 28 different member states, the actual effect of this regulation is outside the bounds of the present paper.

### ***B Ticket Oversales – Denied Boarding Compensation***

Denied boarding compensation and ticket oversales are regulated in the EU under Regulation (EC) No 261/2004.<sup>73</sup> In its other provisions, the regulation addresses the same issues as the United States regulations do, such as requirements regarding first asking for volunteers before denying anyone boarding involuntarily.<sup>74</sup>

Where the EU and the United States differ as regards denied boarding is the scheme for passenger compensation. As seen above, the United States regulations provide for compensation based on the price of the passenger's ticket and the

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72 Regulation (EC) No 1008/2008, above n 4, art 24.

73 Regulation (EC) No 261/2004, above n 4, art 7.

74 Article 4.

amount of time by which the passenger is delayed as well as whether the flight is domestic or international in nature.<sup>75</sup> The EU regulations provide for compensation entirely independent of the passenger's fare. Instead, compensation is based upon the distance of the flight and the amount of time a passenger is delayed in reaching their destination. Table 6 details the specific compensation scheme found in the EU.

***Compensation Under Article 7 – Table 6***

<b>TIME TO DESTINATION DELAYED</b>	<b>FLIGHT DISTANCE</b>	<b>COMPENSATION</b>
<2 Hours <sup>76</sup>	<1,500km	EUR 125
<3 Hours <sup>77</sup>	> 1,500km intracommunity	EUR 200
<3 Hours <sup>78</sup>	1,500km-3,500km external	EUR 200
<4 Hours <sup>79</sup>	>3,500km	EUR 300
>2 Hours <sup>80</sup>	<1,500km	EUR 250
>3 Hours <sup>81</sup>	>1,500km intra-community	EUR 400
>3 Hours <sup>82</sup>	1,500km-3,500km	EUR 400
> 4 Hours <sup>83</sup>	>3,500km	EUR 600

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75 14 CFR § 250.5. See tables 3 and 4.

76 Regulation (EC) No 261/2004, above n 4, art 7(2) reads: "When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked, (a) by two hours, in respect of all flights of 1 500 kilometres or less; or (b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometres and for all other flights between 1 500 and 3 500 kilometres; or (c) by four hours, in respect of all flights not falling under (a) or (b), the operating air carrier may reduce the compensation provided for in paragraph 1 by 50%."

77 Regulation (EC) No 261/2004, above n 4, art 7(2)(b).

78 Article 7(2)(b).

79 Article 7(2)(c).

80 Article 7(1) reads: "Where reference is made to this Article, passengers shall receive compensation amounting to: (a) EUR 250 for all flights of 1 500 kilometres or less; (b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres; (c) EUR 600 for all flights not falling under (a) or (b)."

81 Regulation (EC) No 261/2004, above n 4, art 7(1)(b).

82 Article 7(1)(b).

83 Article 7(1)(c).

#### ***IV ANALYSIS OF DATA***

In this part, the information provided above is analysed in several dimensions. First, the regulatory structures of the United States and the EU for fare advertisements are directly compared with any substantial differences noted and their implications discussed. Next, the same analysis is applied to the regulations for ticket oversales and denied boarding. Finally, the enforcement actions contained in table 5 are analysed to see if any systematic differences exist in the treatment of large, influential operators and smaller, less influential operators.

##### ***A Advertising: Comparison of Regulatory Structure***

While the rules of the EU and the Department of Transportation for fare advertising appear, upon initial analysis, to be quite similar in their substantive nature, there are several important differences between them.

The first difference is readily apparent upon reading the United States<sup>84</sup> and EU<sup>85</sup> regulations. The EU regulation requires the inclusion of "applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication," whereas the United States regulations require the inclusion of "the entire price to be paid by the customer." On the face of the regulations, the largest difference is that in the EU there is an implied exception for charges which are unforeseeable at the time of publication, while no similar exception is made in the United States. Depending on the way the wording of the EU regulation is interpreted in a given member state and how it is enforced, this exception for unforeseeable taxes, surcharges and fees could allow for a ticket advertised many months in advance of the flight to have a significantly different final price to be paid by the consumer than the price stated in the advertisement. The manner in which such a difference could happen is found in the now standard practice of including a fuel surcharge as part of air fares. Such fuel surcharges tend to change as the highly volatile and seasonally dependent price of crude oil shifts and consequentially alters the price of aviation fuel. Many aviation customers who purchase tickets many months in advance to take advantage of various sales can lower the stated price of an air fare by a significant amount if a ticket is purchased sufficiently in advance of the intended time of flight. This appears, therefore, to allow for the actual price to be paid by EU customers to be significantly different from the stated price in the advertising, so long as the change in the value of the fuel surcharge is unforeseeable.

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84 14 CFR § 399.84.

85 Regulation (EC) No 1008/2008, above n 4, art 23.

From the above, what is clear is that although both the United States and the EU claim to require advertisements to include the full price to be paid by the consumer, there are actually potentially significant charges which may not be included in the stated price for an air fare. Under the EU regulation, unforeseeable charges, are not required to be included in the stated price in advertisements. What this most likely means in effect is that when one purchases an air fare in the EU, the amount of the fuel surcharge at the time of purchase, for instance, is included as is required; however, any difference in the surcharge that exists at the time of the flight could be required to be paid by the customer before allowing them to board the airplane.<sup>86</sup>

In comparison, since no similar exception exists within either the United States regulations or the enforcement precedents, United States consumers lock in the amount of fuel surcharge they will pay upon the purchase of a ticket. This could result in significantly different effects for the consumers, where the fuel surcharge included in the price of an United States ticket likely includes a greater attempt to "hedge" against potential fuel price fluctuations than EU advertisements would include, as they seemingly can add additional fuel surcharges at the time of the flight, so long as they or their amount can be said to have been unforeseeable at the time of purchase. Unfortunately, due to the sheer number of different factors which apply in the determination of air fares, it would require significantly more space than available here to confirm whether United States fuel surcharges reflect the anticipated "hedge". Were sufficient space available, this determination would be made by analysing a large number of fuel surcharges for United States and EU flights between, for instance, New York and Paris, and vice versa respectively, advertised similar amounts of time in advance of the flights. Were the "hedge" to be true, it would be expected that the fuel surcharge included in United States tickets to be higher than EU tickets and to be higher by an increasing degree the longer the distance in time between the advertisement and the flight.<sup>87</sup> Such an analysis would have to first account for variables such as differential fuel costs in

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86 This appears to be implied by the limitation of the regulation to "foreseeable," however, no English language source appears to relate this situation having occurred as of the time of writing. Further research by those with the ability to access non-English language EU sources could reveal more information on this point.

87 For examples of discussions of fuel surcharges in United States and EU ticketing, see Jessica Dickler "Airline fees: The \$500 surprise" CNN Money (2 May 2011) <<http://money.cnn.com>>; United Kingdom Office of Fair Trading "British Airways to pay record £121.5m penalty in price fixing investigation" (1 August 2007) <<http://oft.gov.uk>>; Air Transport Department, Cranfield University *Fuel and air transport. A report for the European Commission* (2008) <<http://ec.europa.eu>>.



France, for example, and the United States due to different taxation and market forces at work in each country.

A potential difference which is not immediately apparent from the regulations arises from the standard practices of the Department of Transportation in its enforcement of the regulations. As is explained in the statement of the "Applicable Law" in most of the consent orders issued by the Department of Transportation, the "full price to be paid by the consumer" somewhat paradoxically is not the actual total price that a consumer should expect to pay for their air fare. The consent orders<sup>88</sup> include the explanation that:<sup>89</sup>

[u]nder long-standing enforcement case precedent, the Department has allowed taxes and fees collected by carriers and ticket agents, such as passenger facility charges and departure taxes, to be stated separately from base fares in advertisements.

These separate charges must be "clearly indicated at the first point in the advertisements where a fare is presented"<sup>90</sup> but are allowed to be stated separately, either in smaller print on the bottom of a print advertisement or via a hyperlink in an online advertisement.<sup>91</sup> These charges represent fees and taxes which are certainly both unavoidable and foreseeable and as such they would be required to be included within the initially stated price as part of the full fare under art 23 of Regulation (EC) No 1008/2008. As such, for European consumers there would be a single price advertised for the fare, while United States consumers would have to do the math for themselves, adding together the stated "full fare" and these additional taxes and charges, "levied by a government entity" and "collected on a per-passenger basis."<sup>92</sup> These additional taxes and charges can be as small as the "September 11<sup>th</sup> Security Fee", which is merely "[USD]2.50 per enplanement on passengers of domestic and foreign carriers originating at airports in the United States."<sup>93</sup> Such small taxes and fees, if there are several of them, can add up to a significant amount of money, while simultaneously appearing to be individually insignificant and not worth it to the consumer to "do the math" to determine the total price.

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88 This precedent has been incorporated into the regulations published on 25 April 2011. See 14 CFR § 399.84(a).

89 *Air Canada*, above n 34.

90 At 1.

91 See for instance *Air Canada*, above n 34; *JetBlue Airways, Ltd*, above n 31; *Expedia, Inc*, above n 12.

92 *Air Canada*, above n 34, at 1.

93 *Thai Airways*, above n 10, at 2.

The differences in the full fare advertising requirements under EU and United States regulations that are outlined above create interesting differences in the conditions of ticket purchasing under the two regimes. These differences lead to a situation in which the price stated in the advertisement, unless the consumer does the math and adds the additional fees to the quoted ticket price, will be different from the price paid when reserving the ticket by a United States consumer. Meanwhile, the EU consumer will pay the amount advertised, without having to do any mathematical calculations, when they book the ticket. Conversely, the United States consumer will not be asked to pay any additional amount over and above what they paid when booking the ticket upon attempting to check in on the day of the flight, while the EU consumer could be asked to pay a significant additional amount of money upon attempting to board the flight in order to use their ticket, an amount which is presented in no place in the advertisement itself nor which is easily ascertainable by a conscientious passenger.

Thus, the total price of any given air fare can be determined based on the information in the advertisement by a United States consumer, so long as they are willing to take the time and expend the energy to add the various additional taxes and fees to the stated price, whereas the EU consumer is unable to entirely determine the actual price to be paid for any given flight until the day of flight when they attempt to check in.

## ***B Ticket Oversales and Denied Boarding***

### ***1 Regulations***

While both the EU and the United States maintain regimes providing for passengers to be compensated if they are denied boarding, the two regimes provide for very different compensation amounts with different circumstances triggering the various levels of compensation provided.

The first notable difference in the compensation schemes is that if the delay in a passenger's arrival at their final destination is less than one hour in the United States, the passenger is not entitled to compensation, whereas in the EU, if there is any delay in the passenger's arrival, they are entitled to some compensation.<sup>94</sup> This difference works in the favour of airlines operating flights departing from United States airports and against passengers; however, other differences in the compensation schemes cut in the other direction, being less favourable for the airlines and more favourable for the passengers in the United States.

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94 Compare tables 3 and 4 with table 6.

This is clear in what occurs if the delay is greater than one hour. If a passenger's flight is delayed for between one and two hours on domestic United States or intra-community flights in the EU, the compensation due to the passenger is, under most circumstances, greater in the United States. For such a delay, a passenger is entitled to 200 per cent of their ticket price for that leg of their journey up to USD650.<sup>95</sup> Comparatively, depending on the distance of the flight, the compensation available under the EU regulation ranges between EUR125<sup>96</sup> and EUR300<sup>97</sup> or approximately USD175 and USD415 respectively. Only if the United States passenger's air fare is less than USD86.33 for flights under 1,500 km or USD207.19 for flights over 3,500 km is the United States passenger entitled to less compensation than the EU passenger. Considering the existence of such things as fuel surcharges and other similar charges, there are very few situations in which a United States passenger's full fare will equal less than those amounts on flights of those distances. The maximum amount available to a United States passenger of USD650 is about USD236 more than the maximum amount available to an EU passenger. Furthermore, the amount of compensation for a delay within this time frame in the EU is additionally dependent upon the distance of the flight, a requirement which is not contained in the United States regulations. As such, a passenger purchasing a last minute ticket, or other ticket without any applicable discount, could very well end up being entitled to the full amount of USD650 for a flight of less than 1,500km, whereas a similarly situated passenger in the EU would only receive approximately the equivalent of USD175, meaning the United States passenger can receive almost four times the compensation due the EU passenger.

If the delay is greater than two hours, the same issues apply as for delays of more than one hour but less than two. For all domestic flights in the United States, the compensation for a delay of more than two hours is the lesser of 400 per cent of the passenger's fare or USD1300.<sup>98</sup> In the EU, for a delay of more than two hours but less than three hours intra-community, the passenger is entitled to compensation of EUR200,<sup>99</sup> EUR250<sup>100</sup> or EUR300,<sup>101</sup> depending on the total distance to be travelled. In order for a United States passenger to receive less

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95 14 CFR 250.5(a)(2).

96 Regulation (EC) No 261/2004, above n 4, art 7(2)(a).

97 Article 7(2)(c).

98 14 CFR 250.5(a)(3).

99 Regulation (EC) No 261/2004, above n 4, art 7(2)(b).

100 Article 7(1)(a).

101 Article 7(2)(c).

compensation than the EU passenger, their total fare would have to be approximately USD70, USD85 or USD105, depending on the distance to be travelled. The same arguments apply to these amounts as did to the equivalent amounts for shorter delays discussed above, namely that these amounts are very likely to be less than what a passenger's fare would be for flights of the relevant distances.<sup>102</sup>

Beyond a two hour delay, the amount of compensation in the United States does not increase, whereas, depending on the distance of travel involved, there are additional levels of compensation available in the EU for delays of greater than three hours and delays of greater than four hours. The largest of these sums, available for a delay of greater than four hours on a flight in excess of 3,500km, is EUR600.<sup>103</sup> This amount is roughly equivalent to USD830, meaning that for flights of such a distance, in order for the United States passenger to receive less compensation than the similarly situated EU passenger, their ticket would have to be worth less than about USD210, a price which, if purchased during a significant sale or far enough in advance, is possible but under most circumstances is highly unlikely for flights of that distance. Comparatively, the United States passenger in that situation can receive up to USD1300, slightly more than 50 per cent more than they would receive on an EU flight.

Without discussing the details, the same issues as outlined above exist for international flights out of the United States and for flights leaving the EU. The precise circumstances as to when passengers need to be compensated are different, but in each case, unless the United States passenger's fare is significantly lower than one would expect for a given flight, that passenger is entitled to greater compensation than their EU equivalent.<sup>104</sup>

## 2 *Enforcement Actions*

Table 5 contains all of the available enforcement actions undertaken by the Department of Transportation regarding ticket oversales and denied boarding over the past seven years. Unlike in the area of advertising regulations, the total penalties assessed can be seen to vary significantly between the individual enforcement actions, ranging from as low as USD40,000 in the case of Northwest Airlines, Inc.<sup>105</sup> to USD750,000 for Delta Air Lines, Inc.<sup>106</sup> There does not appear to

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102 See table 6 for specifics regarding the distances involved.

103 Regulation (EC) No 261/2004, above n 4, art 7(1)(c).

104 Compare the amounts contained in table 4 with table 6 lines 1, 3, 4, 5, 7 and 8 for the precise amounts.

105 *Northwest Airlines, Inc*, above n 70.

be any consistent distinction between the smaller and the larger airlines in the total amounts due, with large airlines being assessed both the smallest and the largest penalty amounts. Perhaps the most notable issue in the enforcement actions reviewed is the existence of the ability of some of the airlines to offset their penalty due by retroactively providing the required compensation to consumers or expending money to cure defects in their notification schemes. This is seen in both Southwest Airlines Co and Delta Air Lines, Inc, where up to USD20,000 and USD425,000 respectively are discounted from the total amount of penalty due in each of these cases if the airline provides that amount in compensation to passengers within 12 and 15 months, respectively. Using Southwest Airlines Co as an example, the same issue of level of penalty as applied in the case of advertising applies in this area, specifically that the penalty amounts contained in the consent orders are significantly lower than the maximum penalty set in the applicable statute.<sup>107</sup> A maximum penalty of USD27,500 per violation applies in this matter, with each violation being defined a failure to compensate a single passenger correctly, or for the number of days in which an airline fails either to provide the compensation due or to properly and adequately notify passengers of their entitlement to compensation.<sup>108</sup> In Southwest's case, the issue was its failure to notify passengers of the proper available compensation in an unstated number of situations.<sup>109</sup> Of the USD200,000 penalty assessed against Southwest, only USD90,000 is unconditionally due, with USD90,000 only becoming due if Southwest fails to adhere to the terms of the order and USD20,000 to be expended by Southwest in improving its notification regime.<sup>110</sup> In other words, if the USD20,000 is counted as part of the penalty to be paid, the total penalty due is equivalent to approximately four violations. Although the number of passengers effected and the number of days in which these violations occurred go unsaid in the consent order, considering that Southwest handles over 100,000,000 passengers per year<sup>111</sup> and the order states that there were "numerous examples" of part 250 violations,<sup>112</sup> it is quite clear that the underlying number of violations giving rise to this order was greater than four. Most likely, considering that rather than enumerating the violations the order says that there were "numerous examples" of

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106 *Delta Air Lines* Order 2013-6-18, above n 63.

107 49 USC § 46301.

108 49 USC § 46301(a) and 14 CFR § 383.2.

109 *Southwest Airlines Co*, above n 51.

110 At 4-5.

111 At 3.

112 At 3.

violations, there were significantly more than four violations. Similarly, over the period between July 2007 and July 2008, "numerous instances" of violations were found for US Airways, Inc;<sup>113</sup> yet its total amount due was a mere USD140,000, equivalent to a total of five violations.<sup>114</sup>

These consent orders represent settlements of significantly less than the statutory civil penalty available for the underlying violations of federal aviation regulations.<sup>115</sup> This appears to be a systematic issue, as each and every one of the consent orders referenced above in table 5 contain penalties representing a very small number of violations; yet the orders' wording suggests a significant number of violations underlying the actions, through speaking of "numerous violations."<sup>116</sup>

The one possible exception to the above systematic issue is found in the second Delta Air Lines, Inc consent order.<sup>117</sup> This represents a unique case, whereby Delta Air Lines, Inc violated the cease and desist order contained within the previous consent order, Order 2009-7-7.<sup>118</sup> This likely explains the substantially greater penalty in the second consent order than found in any other case, as Delta's failure to comply with the prior order is noted within the opinion as something of "serious concern."<sup>119</sup> Though the order does not expressly state that this pattern of non-compliance increased the amount demanded by the Department of Transportation to avoid full litigation of this matter, it does appear to have served as a factor in determining the settlement amount.

## **V IS THE HYPOTHESIS SUPPORTED BY THE DATA?**

The paper sought to test the hypothesis that, by having an agency or office within an agency which is specifically responsible for the regulation of the industry in general regulate consumer protection for that industry,<sup>120</sup> the United States would systematically have a regime which is more favourable to that industry than the EU, where the regulation is conducted by general bodies such as the EU Parliament and the European Commission. Within the area of fare advertising

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113 *US Airways, Inc*, above n 51, at 2.

114 At 3.

115 14 CFR § 250.

116 *See US Airways, Inc* Order 2008-12-13, above n 51; *Southwest Airlines Co*, above n 51.

117 *Delta Airlines* Order 2013-6-18, above n 63.

118 *Delta Air Lines* Order 2009-7-7, above n 51.

119 At 3-4.

120 The regulations for the United States are generated by the Department of Transportation, an agency which exists for the sole purpose of regulating the transportation industry.

regulations, the above facts and analysis show that the hypothesis is disproven and the regulations are not systematically more favourable to the industry in the United States than is the case in the EU.

There are differences in the regulation of fare advertising between the two regimes discussed above, but those differences act in some parts to the favour of the consumer and in others to the favour of the airlines. The EU regime does not provide for the exception to the "full fare" stated in a single price:<sup>121</sup>

... [for] taxes and fees ... such as passenger facility charges (PFCs) and departure taxes, to be stated separately in fare advertisements so long as the charges are levied by a government entity, are not *ad valorem* in nature, are collected on a per-passenger basis,

which the United States regime does. In this regard, it is better for consumers, in that they are given a single price at the time of ticket purchase, whereas the United States regulation requires passengers to add the stated price to the fine print of the above stated types of taxes and fees. However, the United States system does not make any exception for charges which are "unforeseeable"<sup>122</sup> at the time the advertising is published. In this way, the United States system is less favourable to the airlines as they are required to "eat" the costs of any unforeseeable expenses that come into existence between the publication of the advertisement and the booking by not being able to pass those costs onto the consumers, whereas in the EU they can.

Much as in the area of fare advertising, on the issue of denied boarding compensation, the two regimes differ so that in some ways the United States system is less favourable to airlines and in other ways the EU system is less favourable. For short delays of less than one hour, the EU system requires air carriers to compensate passengers,<sup>123</sup> whereas the United States regulations do not require carriers to compensate passengers for those same delays.<sup>124</sup> In this way, the United States regulations are more favourable to air carriers than the EU regulations; however, for delays of greater than one hour, the degree of

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121 *Expedia, Inc*, above n 12, at 1.

122 Regulation (EC) No 1008/2008, above n 4, art 23(1), which only requires that "[t]he final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and *foreseeable* at the time of publication" (emphasis added). This leaves unforeseeable taxes, and charges, surcharges and fees uncovered and not required to be included in this requirement.

123 Regulation (EC) No 261/2004, above n 4, art 7.

124 14 CFR 250.5(a)(1).

"favourability" to air carriers reverses. As the analysis of tables 3, 4 and 6 shows, unless the United States passenger's fare is remarkably cheap, if the delay is greater than one hour, the compensation air carriers are required to pay their passengers is greater in the United States than it is in the EU. So, as with fare advertising, the regulations cut both ways, with the United States regulations being in some ways more and in some ways less favourable to air carriers and other regulated entities than their EU equivalent.

The analysis of the available enforcement actions in the United States – which there were no available EU actions to compare to<sup>125</sup> – presents a picture of a rather favourable approach to regulation for the carriers and other entities. In each of the actions, the Department of Transportation consent orders issued civil penalties far below the statutorily stated available civil penalties. While the available penalties equal USD27,500 per day per violation,<sup>126</sup> the actual amounts assessed, in the area of fare advertising, were often below the available penalty for a single day's worth of a single violation.<sup>127</sup> While the differences between the consent order based penalties and the available penalties were not as stark in the area of denied boarding compensation and ticket oversales as in fare advertising, based on the available data, the consent order penalties were still significantly below what could have been assessed.<sup>128</sup> These low penalty assessments, and the fact that the Department of Transportation appears to rely almost entirely upon consent orders and settlements to determine civil penalties in these matters, do show a significant degree of favourable treatment to the regulated air carriers and other entities.

## **VI CONCLUSION**

From the analysis undertaken in this paper, it is apparent that there are no systematic effects resulting from the regulation of air fare advertising and denied boarding compensation being under the authority of a specialised agency with close ties to the regulated industry in the United States. In some respects, the regulations promulgated by a general body with no specific industry ties in the EU are more favourable to industry while in others they are less favourable than the Department of Transportation's regulation of the airline industry in the United States. Due to issues such as the "revolving door" between regulated industries and the government agencies responsible for regulating them, this finding is not what was expected before the available information was analysed. Further research into

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125 Due to enforcement being delegated to each EU member state.

126 14 CFR § 383.2.

127 See tables 1 and 2.

128 See table 5.



the other areas of consumer protection in the passenger air travel industry is required to be able to answer the questions raised in this paper's hypothesis more fully. However, at least in these two areas of regulation, the findings are quite clear that there are no systematic differences that result from the different methods of regulation embodied in the United States and EU regulatory structures.