

**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, DC**

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**CLARIFICATION OF NOVEMBER 2012  
GUIDANCE ON REVIEW AND APPROVAL OF PUBLIC CHARTER  
OPERATIONS AND PROSPECTUSES**

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**NOTICE**

On November 13, 2012, the Department's Office of International Aviation and Office of Aviation Enforcement and Proceedings issued a joint notice regarding future filings under 14 CFR Part 380, the Department's rule on public charters and enforcement policy under those rules.<sup>1</sup> That notice, which was an effort to prevent the kind of harm to consumers that took place when the charter operator Southern Sky Air & Tours, LLC d/b/a Direct Air ceased service, explained that the Department would in the future not approve prospectuses under Part 380 absent certain supplemental assurances designed to avoid practices evident in the Direct Air case that were in violation of the public charter rules.

Specifically, the notice described the Department's plan to reject public charter prospectus filings that do not affirmatively state that: (1) the contract between the charter operator and the direct air carrier is for the full price of the air transportation; and (2) the charter operator will retain control and access to its reservations records, and share those records with the direct air carriers. Furthermore, we stated that we would not permit the charter operator to accept payment by debit card (although we did state our willingness to consider waivers from this prohibition on demonstration that consumers would receive the protections of the Fair Credit Billing Act). The notice also stated that voucher programs, such as that offered by Direct Air, are not acceptable and will be considered to be *per se* violations of 14 CFR Part 380.

Shortly after issuance of this notice, the Department received a number of comments from the public charter community. Some comments questioned the legality of the notice. Other comments sought clarification or revision of aspects of the guidance addressed in the notice. In order to have sufficient time to review and consider these comments, we extended the effective

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<sup>1</sup> In addition to being published in the *Federal Register* (77 Fed Reg. 69692 (Nov. 20, 2012)), the notice was also posted at [www.regulations.gov](http://www.regulations.gov) and on the Enforcement Office website <http://www.dot.gov/airconsumer/guidance-aviation-rules-and-statutes> and was widely distributed by e-mail to persons who regularly communicate with the office.

date of the guidance to January 14, 2013.<sup>2</sup> Then, on January 4, 2013, after considering the comments received on our November 13 guidance, we issued a draft clarification and invited additional public comments by January 8, 2013. We received six comments from four attorneys who represent public charter industry participants, one charter company and a prospective charter operator.<sup>3</sup>

We have now fully considered the comments previously received and additional comments we solicited on the draft clarification, and we are convinced that requiring supplemental assurances to prospectus filings is within our authority and is needed to prevent consumer harm. However, we agree with the public charter community that further clarification and revision of the guidance is needed to make certain that the assurances to be filed as part of the prospectus filings address the practical business problems raised in the comments we received but still prevent the problematic situation that took place when Direct Air ceased service. As such, this notice modifies the prior guidance by providing citations to the existing laws that are the basis for the guidance, further clarifying the supplemental information/assurances that should be included in public charter prospectus filings and further clarifying our enforcement policy with respect to certain matters discussed in the guidance. In response to comments that the charter operator, the bank, and the direct air carrier should not be asked to make assurances in areas where they have no responsibility, the required assurances will only be expected with respect to the portions of the charter operations in which the entity making the assurance is directly involved.

Our prior notice stated that charter operators could not have contracts with direct air carriers that are limited to providing aircraft, crew, maintenance and insurance (ACMI). We stated that the contract between the charter operator and the direct air carrier must be for the full price of the air transportation.<sup>4</sup> This guidance is based on section 380.11 which provides that a direct air carrier shall be paid in full for the cost of the charter transportation prior to the scheduled date of flight departure. However, as a matter of enforcement policy, we have decided not to take action against public charter operators that have ACMI contracts provided that the charter operators and their escrow banks offer assurances that all passenger funds in charter programs are deposited in the relevant escrow and that the escrow banks involved maintain accounts and full and accurate accounting of disbursements to vendors such as fuel or ground handling providers in accordance with 14 CFR 380.34(b). For charter operators using a security instrument under section 380.34(a), ACMI contracts may also be utilized provided that the amount of the security instrument is unlimited or for the full cost of the air transportation. (See footnote 4). Further, in the limited circumstances where a government requires payment directly from a public charter operator rather than the escrow bank as required by section 380.34(b)(2)(v), as a matter of

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<sup>2</sup> 77 Fed. Reg. 74729 (Dec. 17, 2012).

<sup>3</sup> Attached is a discussion of the comments received on the draft clarification we posted on our website (<http://www.dot.gov/airconsumer/latest-news>) and placed in DOT-OST-2013-0002 at <http://regulations.gov> on January 4, 2013.

<sup>4</sup> The full cost of the direct air transportation includes the cost of aircraft, crew, maintenance, insurance, fuel, ground handling, landing fees, reservations costs, passenger facility fees and taxes, and all other costs associated with the direct air transportation.

enforcement policy, we will not pursue enforcement action against the public charter operator for doing so.<sup>5</sup> In addition, in situations where a public charter operator is required to pay government taxes and fees in advance of the passenger date of travel, we will not take action against these entities for paying the fees out of the escrow account prior to payment to the direct air carrier irrespective of the requirement in section 380.34(b)(2)(ii) for the direct air carrier to be paid in full prior to other payments being made, so long as the bank and public charter operator maintain a full accounting of records of such disbursements.<sup>6</sup> Our rules require that disbursements be identified on an individual flight by flight basis. Our primary intent is to reaffirm that all passenger funds must be deposited initially in the escrow accounts, apart from certain deductions allowed in travel agent sales.

Another area of clarification concerns control by public charter operators of passenger reservation records and the sharing of these records with direct air carriers. Our prior notice indicated that we would not approve public charter prospectus filings that do not include an assurance that the public charter operator will retain direct control of all passenger reservation records and will share those records with the direct air carrier to ensure that, in the event of a major disruption in the program, the direct air carrier would be able to identify and contact tour participants regarding returning flights. Representatives of charter operators contended that the Department was creating new requirements through guidance. However, a number of sections in Part 380 require public charter operators to provide notifications to passengers under certain specific circumstances. See, e.g., sections 380.12 and 380.33. In addition, sections 249.21 and 380.36 require public charter operators to maintain passenger records for six months after the completion or cancellation of the flight or series of flights. To comply with these obligations, public charter operators must have access to passenger reservation records. In addition, section 14 CFR 212.3(f) requires direct air carriers conducting public charter operations to return passengers who purchased round trip transportation on the charter and who were transported by that carrier on their outbound flights to their point of origin. Without passenger reservation records, direct air carriers would be unable to comply with this existing requirement. Therefore, we view the existing requirements as mandating that public charter operators share these records with direct air carriers when needed to return passengers to their points of origin.

Representatives of charter operators also appeared to believe that the guidance would not allow charter operators to rely on reservations systems provided by third-parties. This is not correct. Direct air carriers and charter operators can rely on such outside vendors for these services but must ensure that they still have access to the records. Our intent was and remains to emphasize, to both the charter operator and the direct carrier, the importance of the obligation to return passengers under section 212.3, and not to preclude the use of third-party vendors. Both the public charter operator and the direct air carrier have discretion in how to meet this obligation, but the Department needs assurances in the prospectus filings that the public charter operator will maintain access to the reservation records as required by existing rules and share this information

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<sup>5</sup> We are aware of markets, for example Cuba, in which payments for ground services may only be made by the charter operator.

<sup>6</sup> In case the charter is cancelled, the charter operator must also be prepared to make full refunds to consumers, including amounts disbursed as pre-paid taxes (14 CFR 380.32(k)).

with the direct air carrier in case of a disruption in a charter program to comply with the requirement to return passengers under section 212.3.

The third issue that we addressed in our guidance concerned the use of debit cards in the purchase of charter transportation. Our November 13 notice prohibited the use of debit cards in the purchase of charter transportation, citing the explicit language of section 380.31<sup>7</sup>, which only provides for payment by check, money order or credit card, but not by debit card. We were particularly concerned that debit cards lack the chargeback protections afforded credit card users under the Fair Credit Billing Act (15 U.S.C. 1601 et seq.). As a matter of enforcement policy, we have now determined not to pursue action against charter operators that accept payment by debit card if they can provide assurances to the Department that their merchant banks and credit card/debit card processors will provide the same chargeback protections to those using debit cards as credit card users receive. If a charter operator cannot obtain such assurances then it may not accept debit card payments for transportation.<sup>8</sup>

Finally, we wish to clarify our position regarding vouchers. We stated in our November 13 notice that the Enforcement Office would consider any voucher program similar to that offered by Direct Air to be a *per se* violation of 14 CFR Part 380. In the case of Direct Air, the charter operator sold vouchers for travel at unspecified dates in the future. Consumer funds did not, as a result, receive the escrow protection required under Part 380. However, the proscription on the use of vouchers applies only to voucher programs for which the charter operator receives money. Purely gratuitous or complimentary vouchers distributed for passenger goodwill are not affected by this policy and they will not be considered to be *per se* violations.<sup>9</sup>

This revised policy regarding approval of charter prospectuses clarifies the notice of November 13, 2012, and will take effect 60 days from the date of this notice. Prospectuses filed after that date will not be approved without the supplemental assurances, outlined above. The Enforcement Office intends to undertake enforcement action, where appropriate, if it obtains evidence of violations of commitments made in those statements, or of the acceptance of debit purchases without the appropriate assurances as discussed above, or of sales initiatives such as the voucher program described above. Moreover, 14 CFR 380.24 continues to require the Department “to deny the exemption authority of any charter operator, without hearing, if [the Department] finds that such action is necessary in the public interest or is otherwise necessary in order to protect the rights of the travelling public” and it will do so. Questions regarding this notice may be addressed to the Office of Aviation Enforcement and Proceedings (C-70), 1200 New Jersey Avenue, S.E., Washington, D.C. 20590 or you may contact Lisa Swafford-Brooks,

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<sup>7</sup> The provision cited should have been 14 CFR 380.34(b)(2)(i).

<sup>8</sup> With respect to charters protected by a security agreement covering the full cost of the air transportation (14 CFR 380.34(a)), our rules allow charter operators to accept payment in any form. (See, 63 Fed. Reg. 28225, 28232, May 22, 1998; fn. 10).

<sup>9</sup> Complimentary vouchers will, however, continue to be subject to statutory provisions on unfair and deceptive trade practices (49 U.S.C. § 41712) and unauthorized holding out of air transportation (49 U.S.C. § 41101) wherever applicable. For example, distributing vouchers in excess of the capacity of aircraft contracted for in a specific program would constitute such a violation.

Chief, Aviation Licensing Compliance Branch ([lisa.swafford-brooks@dot.gov](mailto:lisa.swafford-brooks@dot.gov)) , or Nicholas Lowry, Senior Attorney ([nick.lowry@dot.gov](mailto:nick.lowry@dot.gov)) in that office, at (202) 366-9342.

By:

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Paul L. Gretch  
*Director*  
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Samuel Podberesky  
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Dated: January 14, 2013

*An electronic version of this document is available at <http://www.regulations.gov>*

## **Attachment**

**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, DC**

### **Discussion of Comments on Draft Clarification of November 2012 Guidance on Review and Approval of Public Charter Operations and Prospectuses**

In our draft notice placed in DOT-OST-2013-0002 on the clarification of our November 13 guidance, we invited public comments by January 8, 2013 on our revised guidance on the review and approval of public charter prospectuses under 14 CFR Part 380. We received six comments from four attorneys who represent public charter industry participants, one charter company and a prospective charter operator. The notice, as revised, is included above this summary of comments.

With respect to AMCI contracts, one commenter states that assurances regarding depositing all funds in escrow accounts, as the notice suggests, is redundant, as it is already part of the rule but did not offer any further objection. A second comment queried whether payments to vendors and tax payments would be paid by the escrow bank or the charter operator and whether payments could be made prior to the flight completion date. The notice explains that payment may be made by the charter operator in limited circumstance subject to certain conditions. We also clarify that we will allow prepayment of fees out of escrow if required by a government entity.

On reservations records, again we received a comment stating that assurances regarding access to passenger records are redundant since they are already implicitly required by the rule. Another comment pointed out that charter carriers and operators are not able to maintain independent reservations systems. Our notice recognizes this and states that the carriers and charter operators have discretion in how they maintain records and can use third party vendors, so long as they are in a position to make reasonable efforts to contact passengers in case of a stranding.

With respect to the use of debit cards, two commenters point out that bond-only programs should be free to accept debit cards without the assurances described in the order because the bonds cover the full amount of the air transportation. We agree and have modified the notice to reflect that qualification.

In addition, the comments of a prospective charter operator generally denied that the Department had authority to prohibit the use of debit cards or voucher programs or to seek assurances regarding AMCI contracts. We believe he is wrong on these points. He also asserts that the Department should provide free bonding protection for all public charter programs. These comments are outside the scope of our notice and beyond our authority. Another charter

operator suggested, with respect to voucher programs, that pre-paid voucher programs should be in compliance with Part 380, provided all consumer funds remained in a general escrow account until the consumer selected a date and then could be allocated to a specific flight date. In addition, the commenter suggests that carriers should be free to enter into AMCI contracts with charter operators if special security accounts were established to cover flight expenses, such as fuel, not covered in the AMCI contract. We remain open to consider such proposals in the context of waiver or exemption requests so long as we are convinced that consumer funds receive adequate protection.

Several of the commenters expressed interest in the exact form the assurances discussed in the notice should take. We plan to place sample assurances in the docket for public review and comment shortly (DOT-OST-2013-0002; at <http://regulations.gov>) .