

November 27, 2013

Docket Operations, M-30  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Room W-12-140, West Building Ground Floor  
Washington, DC 20590-0001

Re: Docket DOT-OST-2007-27057, Enhanced Consumer Protections for Charter Air Transportation

Ladies/Gentlemen:

The National Business Aviation Association, Inc. (NBAA) submits the following comments in response to the Department's air charter broker Notice of Proposed Rulemaking (NPRM) published September 30, 2013 (78 Fed. Reg. 59880). NBAA, on behalf of its over 10,000 Member companies which operate general aviation aircraft as a solution to some of their business travel challenges, is very familiar with this sector of business aviation and has a strong interest in the adoption of needed regulatory oversight. NBAA has been actively encouraging and supporting the Department's focus on the air charter brokerage community for more than a decade. Over NBAA's 65-year history, the Association and our Membership have been fundamental participants in the development, analysis and implementation of numerous regulatory initiatives that have impacted the business aviation community. We believe that this involvement has helped to produce sound and effective safety policy related to the operation of general aviation aircraft for business purposes.

NBAA welcomes the Department's efforts to provide needed regulation of brokers who facilitate the sale of single-entity charter air transportation. As the Department correctly recognized in the NPRM:

The increased market for business aviation-related air charters, primarily using small aircraft, along with the growth of the Internet, has, in turn, created a significant growth in the number and role of air charter brokers. In today's business aviation market, air charter brokers increasingly play a role in marketing air transportation services to be operated by direct air carriers and in providing charterers with convenient access to thousands of direct air carriers and a wide range of aircraft. (78 Fed. Reg. at 59882 col. 2)

Regulation of brokers should help ensure that companies and individuals seeking air charter transportation are provided necessary disclosures and other consumer protections, without limiting their freedom to enter into contractual arrangements meeting their particular needs. NBAA applauds the Department's effort to strike a balance in providing measured regulation of air charter brokers without over-regulating them, as the latter course could impede the continued growth and development of this important sector of business aviation.

At the same time, NBAA wishes to recommend modifications to a number of elements of the proposed regulations. These modifications are based primarily upon NBAA's experience in working on behalf of its Members, including direct air carriers, air charter brokers and, importantly air charter customers. NBAA is confident the proposed changes, as detailed below, will improve the final rule in this proceeding (Final Rule) while also managing the resulting regulatory burden on air charter brokers (Air Charter Brokers) and direct air carriers (DACs). We have included as an attachment to these comments a red-lined version of proposed Parts 295 and 298 (as published in the NPRM) incorporating the changes suggested in these comments.

**1. NBAA proposes a limited expansion of the rule to apply the disclosure requirements and unfair and deceptive practices prohibition to brokers acting as Bona Fide Agents.**

The Department has stated in proposed section 295.3 and the corresponding explanatory text that the purpose of Part 295 is to regulate a new indirect air carrier (IAC) segment of the single-entity air charter broker community. The Department references its 2004 policy statement, *The Role of Air Charter Brokers in Arranging Air Transportation* (2004 Broker Guidance), and states that this notice will remain the governing guidance applicable to Air Charter Brokers acting not as IACs, but as agents for the charterer, agents for the DAC, or true "middle persons" facilitating a contract directly between a charterer and a DAC. Proposed section 295.3(b) therefore excludes "*bona fide agents*" from the applicability of Part 295.

NBAA respectfully disagrees with this exclusion. Charter customers using the services of an Air Charter Broker acting as an agent are no less deserving of consumer protections than are customers of Air Charter Brokers acting as IACs. Further, the creation of separate regulatory standards within the broker community – one for brokers acting as IACs and one for brokers acting as agents – would encourage brokers to operate as agents as a means of avoiding the requirements of Part 295. The prospect that DOT, in practice, may enforce Part 295 standards against agent-brokers in any event does not address the fundamental problem.

To address this issue, NBAA recommends that proposed section 295.3(a) be modified as necessary to ensure full transparency in the contract negotiation process and otherwise between an Air Charter Broker acting as an agent and a prospective charterer. At a minimum, this would include applicability of sections 295.22 (*Misrepresentations*), 295.24 (*Disclosures*) and 295.50 (*Unfair and Deceptive Practices and Unfair Methods of Competition*) to Bona Fide Agents.<sup>1</sup>

---

<sup>1</sup> Proposed Section 295.3(a) should be amended by adding the following at the end of the first sentence:

*...and, in respect of the requirements contained in sections 295.22, 295.24 and 295.50, to Bona Fide Agents.*

The definition of Air Charter Broker contained in section 295.5(b) should be amended to read in its entirety:

*Air charter broker means a person or entity that holds out, sells, or undertakes to arrange as an Indirect Air Carrier or a Bona Fide Agent planeload, single entity passengers charter air transportation using a direct air carrier, or using another provider of air transportation.*

NBAA notes there is currently no definition of “Bona Fide Agent” in proposed Part 295. In NBAA’s view, a definition of Bona Fide Agent is essential to enable compliance with Part 295, especially given NBAA’s proposal for a limited expansion of Part 295 to apply to agents. NBAA recommends the following definition be added in section 295.5:

*Bona fide agent* means a person or entity that acts as an agent on behalf of either a single entity charterer seeking air transportation or a direct air carrier or foreign direct air carrier seeking to provide single entity charter air transportation, when such charterer, direct air carrier or foreign direct air carrier, as principal, has appointed or authorized such agent to act on the principal’s behalf.

With regard to those entities acting as “middle persons” in facilitating a contract between a charterer and a DAC, in the 2004 Broker Guidance, the Department described such arrangements as follows:

A broker would not be considered to be engaging in air transportation and thus would not need to be acting as an agent where, for example, it did not hold out air transportation and merely arranged for the charterer to sign a contract for air transportation directly with the airline. (2004 Broker Guidance, p. 2 n. 3)

In the 2004 Broker Guidance, the Department thus appears to disclaim jurisdiction over true “middle persons;” whereas, in the NPRM, the Department appears to assert jurisdiction but limit the role of “middle persons” to mere facilitators of a charter contract with a DAC. NBAA asks that the Department clarify the authorized role of a “middle person.” To the extent DOT concludes that “middle persons” are engaging in air transportation and, therefore, are subject to the Department’s jurisdiction, NBAA recommends amending proposed section 295.3 to apply sections 295.22, 295.24 and 295.50 to “middle persons,” and amending section 295.5 to include a definition of “middle persons.” Alternatively, the Department should clarify the role of “middle persons” in the Final Rule’s explanatory statement (Preamble). It is important that Charterers and DACs know where they stand in dealing with “middle persons.”

**2. NBAA recommends excluding from the coverage of Part 295 fractional ownership program managers regulated under Part 91, Subpart K of the Federal Aviation Regulations, and in-house corporate travel departments.**

NBAA is aware of two types of entities that sometimes provide air charter brokerage services for which Part 295 requirements are unnecessary. These are 1) Part 91, Subpart K fractional ownership programs in which the program managers (Fractional Program Managers) arrange charter flights for the use of fractional aircraft owners (Fractional Owners) as part of the services provided, and 2) in-house corporate travel departments which arrange charter transportation for officials, employees and guests of the company. NBAA does not believe proposed Part 295 was intended to apply to these entities.

In the case of Fractional Program Managers, as part of the contractual arrangements entered into upon the purchase of a fractional share, the Fractional Program Manager agrees to obtain supplemental air

---

The remaining sections of Part 295 should be conformed as necessary to distinguish between Air Charter Brokers acting as Bona Fide Agents and Air Charter Brokers acting as Indirect Air Carriers.

charter transportation if needed by the Fractional Owner either on the Fractional Manager's "core" fleet of aircraft, or, if not available, an alternative aircraft either from the dry-lease exchange administered by the Fractional Program Manager or from an authorized DAC. Typically, the owner grants the program manager discretion to decide how the supplemental flight requirements of the Fractional Owner will be met, without further negotiation between the parties. Since the Fractional Owner has granted decisional authority at the outset to the Fractional Program Manager and, in view of the stringent requirements in Subpart K of Part 91 applicable to fractional programs generally, there is simply no need to burden these programs with Part 295 requirements. NBAA therefore recommends that Fractional Program Managers, to the extent they are acting as Air Charter Brokers in arranging single entity charters for Fractional Owners, be excluded from Part 295.

In the case of in-house travel departments, companies commonly establish such departments to attend to and manage the business travel needs of company officials, employees and guests. Such travel departments are staffed by company employees or contractors and provide broker services only for passengers affiliated with the company whether as officials, employees or guests. While such in-house travel departments may technically meet the definition of Air Charter Broker, the consumer protections provided under Part 295 would serve no purpose in that context. NBAA recommends that these entities be excluded from the rule.

**3. NBAA seeks further guidance as to the meaning of the term "self-aggregate" in the definition of Single Entity Charter.**

The Department seeks comment on whether the definition of Single Entity Charter should include a provision allowing individuals who self-aggregate to be considered a single entity, notwithstanding that they may be sharing the cost of the charter.

NBAA requests the Department, to adequately address this issue, clarify what it means by the term "self-aggregate." NBAA understands there are existing programs in which a broker facilitates the formation of a charter group by providing an internet portal allowing individuals independently to form groups which, in turn, utilize the broker to procure single entity air charter transportation on the group's behalf. Under this process, the broker does not become involved in the actual formation of the group or the decision to travel, other than to provide a forum for the group to come together and set the desired itinerary.

Assuming the above is what DOT means by self-aggregation, NBAA supports inclusion of self-aggregated groups as single entity charterers, as proposed. But that leaves unanswered the question of how far a broker (or anyone else) can go in promoting self-aggregation. NBAA urges the Department to clarify in the Preamble the intended scope of the term "self-aggregation" as well as the permissible roles of the broker and the DAC, in order to avoid any misunderstanding by parties subject to Part 295.

**4. NBAA urges the Department to impose a simple registration requirement on air charter brokers acting as IACs.**

NBAA strongly recommends the creation of a simple registration system for Air Charter Brokers acting or proposing to act as IACs. In so doing, NBAA recognizes the Department's reluctance in this regard. A registration system limited to Air Charter Brokers acting as IACs, however, would follow logically the Department's historical regulation of domestic air freight forwarders and its current regulation of

foreign air freight forwarders, each a class of IAC, under Parts 296 and 297. A registration system would also flow logically from the Department's intent to close the gap it recognized in the 2004 Broker Guidance regarding regulation of Air Charter Brokers acting as IACs. The simple registration system we propose would accomplish this limited objective without, we believe, unduly burdening the Department's staff.

Additional reasons for registration of IAC Air Charter Brokers are fourfold.

First, there is currently only very limited and imperfect information regarding the Air Charter Broker industry. A simple registration would include, among other things, the name, address, telephone and fax numbers, e-mail address and website of each registrant.<sup>2</sup> This would give the Department, the air charter industry, including DACs, and consumers, basic information pertaining to each entity that buys and sells single entity charter air transportation for its own account – the essence of an IAC. Such information would also be important as a frame of reference for regulators in assessing whether further requirements may be advisable.

Second, for consumer protection purposes, it is important that charterers, as well as DACs, be able to confirm that a broker has taken the affirmative step of registering with the Department, especially where the broker is an IAC and, unlike a broker acting as a Bona Fide Agent, has no fiduciary relationship with the charterer or the DAC. Availability of such information is consistent with the Department's overall goal of ensuring proper disclosure, and registration would affirm the broker's commitment to comply with (or at least its awareness of) Part 295 requirements. The registrations should be accessible to the public via the Internet, providing a simple way for charterers and DACs to confirm the status of a charter broker prior to making a commitment. Additionally, over time, DACs would undoubtedly encourage unregistered brokers to come into compliance, multiplying the benefits of registration and extending the reach of Part 295.

Third, registration as proposed by NBAA would facilitate DOT surveillance of this class of Air Charter Broker. It would also assist the Department in taking enforcement action should that prove necessary in individual cases.

Fourth, in the case of non-U.S. citizen Air Charter Brokers acting as IACs, registration would enable the Department to inquire as necessary into whether the applicant's homeland provides reciprocity for U.S. Air Charter Brokers acting as IACs. This would be similar to the registration scheme for Foreign Air Freight Forwarders contained in Part 297. A definition of "Foreign Air Charter Brokers" could be patterned after the definition of "Foreign Public Charter Operator" in Part 380.

Regarding the Department's concern about limited resources, NBAA firmly believes a simple registration can be fashioned which would be efficient and largely non-burdensome. To further minimize the limited burden on DOT staff, NBAA would propose the following: 1) limit the required information to the very basic data noted above, 2) phase in the registration requirement over a six to 12 month period, and 3) require registration only by Air Charter Brokers acting or proposing to act as IACs, for the reasons explained above.

---

<sup>2</sup> For non-U.S. citizen Air Charter Brokers acting as IACs, NBAA would recommend the registration form also include country of citizenship and limited stockholder information similar to the registration form for Part 297 foreign air freight forwarders. An online form could be used in all cases.

In the event the Department rejects a registration requirement, as a distant second alternative NBAA recommends the Department adopt a requirement that each Air Charter Broker, whether acting as an IAC or a Bona Fide Agent, include the following language in each contract for Single Entity Charter transportation:

\_\_\_\_\_ is an Air Charter Broker (“Broker”). Broker’s activities are regulated under U.S. Department of Transportation (DOT) regulations, 14 C.F.R. Part 295. Broker is required to make certain disclosures to Customer, and is prohibited from engaging in any unfair or deceptive practice or unfair method of competition. Broker is NOT a licensed airline or air taxi, does not operate aircraft, and is solely arranging carriage for Customer with a licensed air carrier (the “Direct Air Carrier”). In arranging this air transportation, Broker is acting as [insert one]: an independent Air Charter Broker / a Bona Fide Agent of the customer, representing the Customer’s interests / a Bona Fide Agent of the Direct Air Carrier, representing the Direct Air Carrier’s interests. Broker certifies that it has complied with the disclosure requirements of 14 C.F.R. Section 295.24 in its transaction with the Customer. While the DOT does not enforce contractual rights of parties, if the Customer believes the Broker has violated any DOT regulation or any other legal requirement, the Customer may file its concerns with [insert online and mailing addresses of DOT Office of Aviation Consumer Protection].

Brokers should be required to present this text in a prominent manner so as to assure it is not overlooked by their customers.

- 5. NBAA agrees generally with the Department’s focus on disclosure by Air Charter Brokers. NBAA urges additional disclosure be required regarding the existence or nonexistence of a charter contract between the Air Charter Broker and the DAC. NBAA also recommends the Department include language in the Preamble stating it is an industry “best practice” for Air Charter Brokers to set forth in detail the protections, if any, provided to advance charterer payments.**

NBAA agrees with the Department’s observation that the single-entity charter industry serves businesses and high net worth individuals who generally have the means and expertise to negotiate the terms of the charter arrangement if they wish to do so, without extensive protections such as those found in the Part 380 Public Charter regulations. Vital to such negotiations, however, is the availability of sufficient and accurate information.

There undoubtedly will be occasions where an Air Charter Broker acting as an IAC will contract with, and receive money from, a charterer before it has a contract in place with a DAC. Preliminarily, NBAA asks the Department to confirm in the Preamble that this is permissible and consistent with Part 295 and the Air Charter Broker’s status as an IAC.

Additionally, NBAA would urge that in such cases, the broker be required to disclose in writing to its customer, prior to entering into a contract with the customer for a specific flight or accepting any payment from the customer, that the Air Charter Broker does not yet have a contract in place with a DAC for the flight. This disclosure requirement should be added to section 295.24.

In keeping with the Department's desire to limit the scope of Part 295, NBAA concurs that no disclosures should be *required* regarding measures the broker may take to protect funds paid by the charterer before transportation is provided. Such disclosures may, however, provide valuable information to the charterer in the negotiation and decision-making process (if not in the broker selection process). NBAA therefore recommends the Department include language in the Preamble recognizing as a "best practice" that such financial protection information should be disclosed in writing to the charterer prior to acceptance of any payment. The Department should make clear, however, that such disclosures should describe the financial protection arrangements in detail, so that customers will understand who has control of the funds once they leave the customer's hands and all applicable conditions.

**6. NBAA agrees with the disclosures required in proposed section 295.24, but seeks clarification of certain disclosure requirements.**

NBAA recognizes the need for the disclosures set forth in section 295.24 and supports the Department's efforts to identify the most important information in the context of contract negotiations. NBAA does, however, urge the Department to provide clarification on certain of the disclosure requirements.

As a general matter, NBAA asks the Department to provide detailed examples in the Preamble of the form and substance of each required disclosure. For instance, section 295.24(b)(6) requires disclosure of the existence, *if known*, of any third-party fees and their amounts to be paid by the charterer directly. Is this an "actual knowledge" standard or a "knew or should have known" standard? Such guidance will assist Air Charter Brokers in complying with Part 295 and provide charterers notice of the broker's obligations in this area.

Two other provisions requiring clarification are disclosure of corporate/business relationships in section 295.24(b)(1) and disclosure of the make and model of aircraft in section 295.24(b)(4). Regarding the former, a wide variety of corporate and business affiliations exist throughout the industry. Many of these affiliations, however, are unrelated to aviation with no meaningful bearing on the judgment of the broker in choosing one DAC over another. Conversely, on occasion there may be a relationship which would influence the broker's selection of, for example, a DAC with which it is affiliated. NBAA recommends that in order to prevent confusion and avoid disclosures that serve no purpose, the Department refine this provision to require disclosure only of relationships which may have a substantial bearing upon the Air Charter Broker's DAC selection.

Regarding the type-of-aircraft disclosure requirement, NBAA notes that situations may arise in which a DAC needs to replace an aircraft with a similar *but not identical* aircraft type. The Department provides the example of Learjet 60 XR as adequately identifying the make and model. If the DAC substitutes a Learjet 60 (not an XR model), should this be a change requiring notification to the charterer? To address this question, NBAA suggests that language be added to the Final Rule, or included in the Preamble, clarifying that section 295.24(b) applies only if a change in aircraft make or model would affect a significant element of the charter flight, such as a decrease in passenger capacity or a change in aircraft performance such as range or cruise speed. Such clarification would avoid disclosures that serve no real purpose while ensuring that necessary aircraft information is disclosed to the charterer.

- 7. NBAA agrees that the charterer should be informed of flight changes in a timely fashion, and that a broker's failure to provide such notice within a reasonable time should afford the charterer the right to cancel the flight unless otherwise agreed.**

Regarding proposed section 295.24(d), the Department seeks comment as to what would be considered a reasonable time for a broker to inform a charterer of flight changes. The Department contemplates a flexible time frame based upon the particular circumstances, and concludes, "A 'reasonable' time would be enough time for the charterer to make an informed decision as to whether he or she wants to accept the change." (78 Fed. Reg. at 59884 col. 2)

NBAA agrees with this standard so long as a qualification is added that the "reasonable time" determination is also based upon when the Air Charter Broker knew, or should have known, about the change in circumstances. In many if not most cases, the DAC rather than the Air Charter Broker will know first of any changes to the flight and the broker may not be privy to this information until shortly before scheduled departure, if at all. In such cases, if the Air Charter Broker is presumed to know information not provided by the DAC, the broker is unfairly stuck in the middle since the charterer would be permitted *by regulation* to cancel the flight and receive a full refund from the broker, but the broker may very well have no recourse against the DAC. To prevent this scenario, NBAA believes language should be placed in the Preamble clarifying that "reasonable time" means a reasonable time after the broker has become aware, or should have become aware, of such information through reasonable diligence.

Additionally, as sophisticated business people, the Air Charter Broker and the charterer should be free to negotiate cancellation terms applicable to the situation discussed above without regulatory interference. NBAA perceives no reason to treat this particular contract term differently in all cases from other contract terms. Reliance on the sophistication of the parties to negotiate terms suited to their needs is consistent with the overall approach taken by the Department and should be retained here. Accordingly, section 295.24(d) should be introduced as follows: *"Unless otherwise agreed with the charterer in writing..."*

- 8. NBAA agrees that in cases where a refund of money paid by a charterer is due by contract or otherwise, such refund should be provided within the time frame stated in section 295.26. All other arrangements concerning refunds should be negotiable by the parties.**

NBAA agrees that Air Charter Brokers should be required to comply with generally accepted time frames for refunding credit card purchases,<sup>3</sup> and cash and check purchases,<sup>4</sup> when such refunds are due. But as discussed above, the parties should be permitted to negotiate the underlying refund requirements and conditions based upon their specific circumstances. In particular, an Air Charter Broker and its customer should be free to determine by contract the circumstances under which a flight "cannot be performed" (see proposed section 295.26), and to set any remedies for nonperformance without government intervention.

---

<sup>3</sup> Credit card refunds should be provided within seven business days of receiving complete documentation.

<sup>4</sup> Check and cash refunds should be provided within 20 days of receiving complete documentation.



NBAA therefore urges that language be added in section 295.26 as shown in the attachment to these comments. Again, there is no need for the Department to substitute its judgment on contract terms for that of sophisticated parties.

**9. NBAA agrees with the enumeration of unfair and deceptive practices and unfair methods of competition in section 295.50 and believes that requirements will help facilitate good faith negotiations consistent with the intended purpose of the NPRM.**

NBAA supports the goal of preventing Air Charter Brokers acting as IACs from making misrepresentations to charterers, and encourages the Department to extend the requirements to Air Charter Brokers acting as Bona Fide Agents. While the parties should be free to negotiate contract terms as they see fit, it is appropriate for the Department to set minimum standards of business conduct by all air charter brokers as it has done for other sellers of air transportation. NBAA believes proposed section 295.50 will help achieve this purpose provided it is applied to all brokers.

That said, NBAA requests that the Department recognize, especially in the case of proposed sections 295.50(b)(3), 295.50(b)(4) and 295.50(b)(5), that the accuracy of information provided by the Air Charter Broker to its customer is dependent upon the accuracy of information provided by the DAC to the Air Charter Broker. As a result, through no fault of the broker, incorrect information may occasionally be passed to a charterer. In fairness to brokers, NBAA urges the Department to include language in the Preamble stating that an Air Charter Broker will not be in violation of section 295.50 when it provides information communicated to it by the DAC and has no reasonable basis to question the accuracy of such information. The broker should be entitled to rely on representations made by the DAC unless such representations would be questioned by a reasonable broker. Thus, the broker should not ordinarily be required to take additional steps to confirm that information received from a DAC is accurate, although such steps should be expected if the information appears dubious.

**10. The Department appears to assume that Single-Entity Charter operations brokered under Part 295 are On-Demand Operations as that term is defined in section 110.2 of the Federal Aviation Regulations. For the avoidance of doubt, NBAA requests confirmation of this status.**

NBAA believes the majority of Single Entity Charters using small aircraft, whether arranged through brokers or not, are operated by FAA-certificated Part 135 air taxis holding On-Demand Operations Specifications.<sup>5</sup> Thus it is critical to the operation of the flights contemplated by the NPRM that single entity charters sold by the class of IACs established under Part 295 be considered on-demand operations by the FAA.

There are numerous references to the on-demand nature of Part 295 Single Entity Charter operations in the NPRM.<sup>6</sup> In addition, NBAA has been advised that as part of the Department's routine procedures,

---

<sup>5</sup> The definition of "on-demand operation" in 14 CFR section 110.2 provides in pertinent part as follows:

*On-demand operation* means any operation for compensation or hire that is one of the following:  
(1) Passenger-carrying operations ... in which the departure time, departure location, and arrival location are specifically negotiated with the customer or the customer's representative[.]

<sup>6</sup> These references include the following: "The business models of the on-demand air charter industry, including the services provided by the majority of air charter brokers that use the services of on-demand carriers, do not

the NPRM was submitted to FAA for review prior to publication. While it is reasonable to infer from these circumstances that Part 295 charter operations are on-demand in the FAA sense when operated by a DAC holding Part 135 on-demand operations specifications, there is no explicit statement in the NPRM or elsewhere to such effect. Rather than rely on inferences, and due to the importance of the matter, NBAA urges DOT to confirm in the Preamble that Single Entity Charters arranged by an Air Charter Broker and held out, sold, offered for sale or operated in accordance with Part 295 are on-demand operations within the meaning of section 110.2 of the Federal Aviation Regulations.

**11. NBAA welcomes the Department’s recognition that the price advertising rules in section 399.84 of the regulations cannot reasonably be applied to Air Charter Brokers and supports the tailored price advertising guidance provided in the NPRM.**

Under the approach to price advertising stated in the NPRM, “The fare advertising requirements in 14 CFR 399.84 would not apply.”<sup>7</sup> NBAA welcomes that statement and notes the NPRM states additionally:

With regard to the proposed requirement to provide written notice of the total cost of the air transportation prior to purchase, we recognize that, as is customary in the on-demand charter industry, the ultimate price of the air transportation normally borne by the charterer, including the amount of government taxes and fees applicable to that price, may be dependent upon factors whose cost is not known at the time a contract is signed, such as the cost of fuel at the time of travel, aircraft wait time, or aircraft repositioning costs. (78 Fed. Reg. at 59884 col. 3)

NBAA appreciates this recognition of a “disconnect” between the DOT rules addressed to price advertising of scheduled airline service and the on-demand charter industry.

In the case of Single Entity Charter flights, the NPRM indicates the requirement to disclose the total cost in writing prior to purchase would be met so long as a broker acting under Part 295 conspicuously identifies and discloses the existence of all items which would impact the total cost, including the range of fees associated with each item and any factors which could cause the fees to be in the high or low range. NBAA believes this is a reasonable approach that strikes an appropriate balance between consumer protection concerns, on one hand, and the realities of on-demand charter service, on the other. NBAA urges the Department to confirm this guidance in the Preamble.

**12. NBAA supports applicability of disclosure requirements and unfair and deceptive practice prohibitions to air taxi operators utilizing another carrier to provide air transportation contracted with a charterer.**

---

easily fit into the requirements of Part 380” (78 Fed. Reg. at 59883 col. 3); “...financial protections applicable to the small air carriers operating on-demand charter flights are minimal” (*ibid.*); “...we recognize that, as is customary in the on-demand charter industry, the ultimate price of air transportation normally borne by the charterer ... may be dependent on factors whose cost is not known at the time a contract is signed....” (*Id.* at 59884 col. 3).

<sup>7</sup> 78 Fed. Reg. at 59984 col. 3.

NBAA supports the Department's inclusion under the NPRM of Part 298 air taxi operators utilizing the services of another carrier to provide a Single Entity Charter. NBAA agrees that in cases where a Part 298 carrier acts as a broker, the charterer should be afforded protections comparable to Part 295's.

In that same vein, however, NBAA recommends that many of the modifications to Part 295 discussed in these comments, particularly concerning disclosures and unfair and deceptive practices, should be incorporated in Part 298. The suggested changes are shown in the attachment to these comments.

\* \* \*

NBAA is grateful for the opportunity to comment on the NPRM and appreciates the Department's consideration of NBAA's views.

Sincerely,

A handwritten signature in black ink that reads "Mike Nichols". The signature is written in a cursive, flowing style.

Mike Nichols  
Vice President, Operational Excellence & Professional Development

**PART 295—AIR CHARTER BROKERS**

Sec.

**Subpart A—General**

- 295.1 Purpose.  
295.3 Applicability.  
295.5 Definitions.

**Subpart B—Exemption Authority**

- 295.10 Grant of economic authority; exemption from the Statute.  
295.12 Suspension or revocation of exemption authority.  
295.17 Contract with government entities.

**Subpart C—Consumer Protection**

- 295.20 Use of duly authorized direct air carriers.  
295.22 Misrepresentations.  
295.24 Disclosures.  
295.26 Refunds.

**Subpart D—Violations**

- 295.50 Unfair and deceptive practices and unfair methods of competition.  
295.52 Enforcement.

**Authority:** 49 U.S.C. Chapters 401, 411, 413, and 417.

**Subpart A—General****§ 295.1 Purpose.**

This part creates a new class of indirect air carrier—air charter brokers—to provide indirect air transportation of passengers on single entity charters aboard large and small aircraft by granting exemptions to such air charter brokers from certain provisions of Subtitle VII of Title 49 of the United States Code (Transportation), and establishes rules, including consumer protection provisions, for the provision of such air transportation by air charter brokers. This part also imposes consumer protection requirements on Bona fide agents for charterers or direct air carriers.

**§ 295.3 Applicability.**

(a) This part applies to any person or entity acting as an air charter broker as defined in this part with respect to single entity charter air transportation that the air charter broker, as a principal in its own right, holds out, sells or undertakes to arrange aboard large and small aircraft. ~~and, in respect of the requirements contained in Sections 295.22, 295.24, and 295.50, the part applies to Bona Fide Agents.~~ Except for the disclosure requirements found at section 295.24, this part also applies to persons or entities authorized by Civil Aeronautics Board Order 83–1–36 to engage in air transportation as indirect air carriers in connection with air ambulance services and described in that order as air ambulance operators.

(b) ~~This part does not apply to a person or entity that, as an employee or as a bona fide agent of an air carrier, holds out, sells, or undertakes to arrange air transportation. This part does not apply to a person or entity acting as the bona fide agent of a charterer in arranging for air transportation for that charterer.~~ This part does not authorize air charter brokers to hold out, sell, or undertake to arrange scheduled air transportation in their individual capacity or on behalf of air carriers.

(c) ~~This part does not apply to fractional ownership program managers or to in-house corporate travel~~

~~departments acting as air charter brokers.~~

**§ 295.5 Definitions.**

For the purposes of this part:

(a) *Air transportation* means interstate or foreign air transportation, as defined in 49 U.S.C. 40102(5), 40102(23), and 40102(25).

(b) *Air charter broker* means a person or entity that holds out, sells, or undertakes to arrange as an indirect air carrier or a bona fide agent ~~planeload, single entity passenger charter air transportation, other than as an employee or bona fide agent of an air carrier or a charterer,~~ using a direct air carrier, or using another provider of air transportation.

(c) *Bona fide agent* means a person or entity that acts as an agent on behalf of either a single entity charterer seeking air transportation or a direct air carrier or foreign direct air carrier seeking to provide single entity charter air transportation, when such charterer, direct air carrier, or foreign direct air carrier, as principal, has appointed or authorized such agent to act on the principal's behalf.

(d) *Charterer* means the person or entity that contracts with an air charter broker or direct air carrier for the transportation of the passengers flown on a charter flight.

(e) *Charter air transportation* means charter flights in air transportation and foreign air transportation authorized under Part A of Subtitle VII of Title 49 of the United States Code.

(f) *Direct air carrier* means a U.S. or foreign air carrier that provides or offers to provide air transportation and that has control over the operational functions performed in providing that transportation.

(g) *Fractional ownership program manager* means the entity that offers fractional ownership program management services to fractional owners, and is designated in the multi-year program agreements referenced in Section 91.1001 of the Federal Aviation Regulations (FARs) to fulfill requirements of Subpart K, to Part 91 of the FARs applicable to the manager of the program containing the aircraft being flown.

(h) *Indirect air carrier* means a person or entity that, as a principal, holds out, sells, or arranges air transportation and separately contracts with direct air carriers or other providers to perform such air transportation.

(i) *In-house corporate travel department* means an entity that holds out, sells, or undertakes to arrange air transportation for such entity's officials, employees, or guests or those of its subsidiary, parent, a subsidiary of its parent, or an affiliate thereof.

(j) *Single entity charter* means a charter for the entire capacity of the aircraft, the cost of which is borne by the charterer and not directly or indirectly by individual passengers, except in cases in which individual passengers self-aggregate to form a single entity.

(k) *Statute* means Subtitle VII of Title 49 of the United States Code (Transportation).

(l) *Large aircraft* means any aircraft originally designed to have a maximum passenger capacity of more than 60 seats or a maximum payload capacity of more than 18,000 pounds.

(m) *Small aircraft* means any aircraft originally designed to have a maximum passenger capacity of 60 seats or fewer or a maximum payload capacity of 18,000 pounds or less.

**§ 295.7 Agency Relationships.**

An Air charter broker acting as an indirect air carrier may choose to act as a bona fide agent in individual cases

[where a charterer or a direct air carrier has expressly authorized such agency relationship.](#)

## **Subpart B—Exemption Authority**

### **§ 295.10 Grant of economic authority; exemption from the statute.**

To the extent necessary to permit air charter brokers, [acting as indirect air carriers](#), to hold out, sell, or undertake to arrange single entity charter air transportation, [such](#) air charter brokers are exempted from the following provisions of Subtitle VII of Title 49 of the United States Code, except for the provisions noted below, only if and so long as they comply with the provisions and the conditions imposed by this part: Chapter 411, Chapter 413, Chapter 415, and Chapter 419. Air charter brokers are not exempt from the following provisions: Section 41310 (nondiscrimination) with respect to foreign air transportation.

### **§ 295.12 Suspension or revocation of exemption authority.**

The Department reserves the power to suspend or revoke the exemption authority of any air charter broker [acting as an indirect air carrier](#), without a hearing, if it finds that such action is necessary in the public interest or is otherwise necessary in order to protect the traveling public.

### **§ 295.17 Contracts with government entities.**

Contracts by air charter brokers [acting as indirect air carriers](#) with the Federal government arranged under the GSA Schedule for air transportation are in common carriage and must meet the requirements of 49 U.S.C. 40118.

## **Subpart C—Consumer Protection**

### **§ 295.20 Use of duly authorized direct air carriers.**

Air charter brokers are not authorized under this part to hold out, sell, or otherwise arrange charter air transportation to be operated by a person or entity that does not hold the requisite form of economic authority from the Department and appropriate safety authority from the Federal Aviation Administration and/or, if applicable, a foreign safety authority. Air charter brokers are not authorized under this part to hold out air transportation to be performed by a direct air carrier that the direct air carrier would not in its own right be able to hold out.

### **§ 295.22 Prohibited unfair and deceptive practices and unfair methods of competition.**

An air charter broker or foreign air charter broker shall not engage in any unfair or deceptive practice or unfair method of competition.

### **§ 295.24 Disclosures.**

(a) All solicitation materials and advertisements, including Internet Web pages, published or caused to be published by air charter brokers shall clearly and conspicuously state that the air charter broker is an air charter broker, and

that it is not a direct air carrier in operational control of aircraft, and that the air service advertised will be provided by a properly licensed direct air carrier.

(b) Before entering into a contract for a specific flight or series of flights, air charter brokers must disclose the following information in writing to the charterer, which may be accomplished through electronic transmissions. If the transaction occurs orally, the following information must be disclosed orally, and again in any written correspondence, including correspondence confirming the purchased air transportation.

(1) The corporate name of the direct air carrier in operational control of the aircraft on which the air transportation is to be performed and any other names in which that direct air carrier holds itself out to the public.

(2) The capacity in which the air charter broker is acting in contracting for the air transportation, i.e., as an indirect air carrier, as an agent of the charterer, or as an agent of the direct air carrier that will be in operational control of the flight.

(3) The existence of any corporate or business relationship between the air charter broker and the direct air carrier that will be used for the air transportation [which may have a substantial bearing upon the air charter broker's selection of a direct air carrier](#).

(4) The make and model of the aircraft to be used for the transportation (e.g., Learjet 60 XR).

(5) The total cost of the air transportation ~~paid~~payable to the air charter broker, including any air charter broker or carrier-imposed fees, or government-imposed taxes and fees.

(6) The existence of any fees and their amounts, if known, including fuel, landing fees, and aircraft parking or hangar fees, charged by third parties for which the charterer will be responsible for paying directly.

(7) The existence or absence of liability insurance held by the air charter broker covering the charterer and passengers and property on the charter flight, and the monetary limits of any such insurance.

[\(8\) Applicable to air charter brokers acting as indirect air carriers: The existence or absence of a written contract with a direct air carrier for provision of the single entity charter flight, or series of flights, negotiated between the air charter broker and the charterer.](#)

(c) If the information required to be disclosed in paragraph (b) of this section is not known at the time the contract is entered into, air charter brokers must provide the information in paragraph (b) of this section to the charterer within a reasonable time after such information becomes available [to the air charter broker in the exercise of reasonable diligence](#).

(d) Unless otherwise agreed with the charterer in writing, if the information in paragraph (b) of this section is not provided to the charterer within a reasonable time after such information becomes available to the air charter broker in the exercise of reasonable diligence, ~~becoming available~~, air charter brokers must provide the charterer with the opportunity to cancel the contract for air transportation, including any services in connection with such contract, and receive a full refund of any monies paid for the charter air transportation and services.

(e) In all circumstances, air charter brokers must disclose the information in paragraph (b) of this section to the charterer prior to the start of the air transportation.

(f) If the information in paragraph (b) of this section changes after the air transportation covered by the contract has begun, air charter brokers must provide information regarding any such changes to the charterer within a reasonable time after such information becomes available to the air charter broker in the exercise of reasonable diligence.

(g) Unless otherwise agreed with the charterer in writing, if the changes in information described in paragraph (f) of this section are not provided to the charterer within a reasonable time after becoming available, air charter brokers must provide the charterer with the opportunity to cancel the remaining portion of the contract for air transportation, including any services paid in connection with such contract, and receive a full refund of any monies paid for the charter air transportation and services not yet provided.

#### **§ 295.26 Refunds.**

Air charter brokers must make prompt refunds of all monies paid for charter air transportation when such transportation cannot be performed (unless otherwise agreed with the charterer in writing) or when such refunds are otherwise due, as required by 14 CFR 374.3 and 12 CFR Part 226 for credit card purchases, and within 20 days after receiving a complete refund request for cash and check purchases.

### **Subpart D—Violations**

#### **§ 295.50 Unfair and deceptive practices and unfair methods of competition.**

(a) Violations of this Part shall be considered to constitute unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. 41712.

(b) In addition to paragraph (a) of this section, the following enumerated practices, among others, by an air charter broker or foreign air charter broker are unfair or deceptive practices or unfair methods of competition in violation of 49 U.S.C. 41712:

(1) Misrepresentations that may induce members of the public to reasonably believe that the air charter broker or foreign air charter broker is a direct air carrier.

(2) Using or displaying or permitting or suffering to be used or displayed the name, trade name, slogan or any abbreviation thereof, of the air charter broker, in advertisements, on or in places of business, or on or in aircraft or any other place in connection with the name of an air carrier or with services in connection with air transportation, in such manner that it may mislead or confuse the traveling public with respect to the status of the air charter broker.

(3) Misrepresentations as to the quality or kind of service, type or size of aircraft, time of departure or arrival, points served, route to be flown, stops to be made, or total trip-time from point of departure to destination.

(4) Misrepresentations as to qualifications of pilots or safety record or certification of pilots, aircraft or air carriers.

(5) Misrepresentations that passengers are directly insured when they are not so insured. For example, where the only insurance in force is that protecting the air carrier in event of liability.

(6) Misrepresentations as to fares, charges, or special priorities for air transportation or services in connection therewith.

(7) Misrepresentations as to membership or involvement with a particular organization that audits air charter brokers or direct air carriers, or that the air charter broker or any direct air carrier\* to be used for a particular flight meets a particular standard set by an auditing organization.

(8) Representing that a contract for a specified direct air carrier, aircraft, space, flight, or time, has been arranged, without a binding commitment with a direct air carrier for the furnishing of such definite reservation or charter as represented.

(9) Selling or contracting for air transportation while knowing or having reason to know or believe that such air transportation cannot be legally performed by the entity that is to operate ~~for~~ the air transportation.

(10) Misrepresentations as to the requirements that must be met by charterers in order to qualify for charter flights.

#### **§ 295.52 Enforcement.**

In case of any violation of any of the provisions of the Statute, or of this part, or any other rule, regulation, or order issued under the Statute, the violator may be subject to a proceeding under section 46101 of the Statute before the Department, or sections 46106 through 46108 of the Statute before a U.S. District Court, as the case may be, to compel compliance. The violator may also be subject to civil penalties under the provisions of section 46301 of the Statute, or other lawful sanctions, including revocation of the exemption authority granted in this part. In the case of a willful violation, the violator may be subject to criminal penalties under the provisions of section 46316 of the Statute.

Subpart E—Registration for Exemption by Air Charter Brokers

§ 295.71 Filing for registration by air charter brokers acting as indirect air carriers.

(a) Except as provided in paragraph (b) of this section, each air charter broker proposing to act as an indirect air carrier under this part shall register with the Department not later than ten (10) days prior to the commencement of such indirect air carrier operations.

(b) Each air charter broker acting or proposing to act as an indirect air carrier as of [insert effective date of this part], the effective date of this part, shall register with the Department no later than one year after such effective date.

(c) The registration of an air charter broker shall remain in effect until it is amended by the air charter broker or canceled by the Department.

(d) Registration by air charter brokers acting as indirect air carriers shall be accomplished by filing with the Department the following:

(1) Air Charter Broker Registration (OST Form xxx), executed in duplicate. This form shall be certified by a responsible official and shall include the following information:

(i) The name of the air charter broker and its mailing address;

(ii) The air charter broker's principal place of business, if different from its mailing address, and its telephone number, fax number, e-mail address, and website;

(iii) Whether the air charter broker is a citizen of the United States; and

(iv) A certification that the registration is complete and accurate, and that the registrant understands and will comply with the requirements of 14 CFR part 295.

(e) A \$xx registration filing fee payable via pay.gov.

(f) If any information contained in the registration changes, the air charter broker shall submit an amended OST Form xxx reflecting the updated information no later than 30 days after the change occurs.

§ 295.73 Cancellation of the registration.

The registration of an air charter broker may be canceled by the Department if any of the following occur:

(a) The air charter broker permanently ceases indirect air carrier operations;

(b) The air charter broker fails to file an amended registration when required; or

(c) The Department determines that it is otherwise in the public interest to cancel the registration.

## PART 298—[AMENDED]

■ 2. The authority citation for 14 CFR Part 298 continues to read as follows:

**Authority:** 49 U.S.C. 41102, 41708, and 41709.

■ 3. A new § 298.90 is added to read as follows:

### § 298.90 Disclosures.

(a) Air taxi operators or commuter air carriers are prohibited from contracting with charterers for charter flights that will be operated by another direct air carrier without first clearly and conspicuously disclosing in writing to the charterer that the flight will be operated by another direct air carrier and providing the following disclosures to the charterer:

(1) The corporate name of the direct air carrier in operational control of the aircraft on which the air transportation is to be performed, and any other names in which that direct air carrier holds itself out to the public.

(2) The capacity in which the air taxi operator or commuter air carrier is acting in contracting for the air transportation, i.e., as a principal, as an agent of the charterer, or as an agent of the direct air carrier that will be in operational control of the flight.

(3) The existence of any corporate or business relationship between the air taxi operator or commuter air carrier and the direct air carrier that will be in operational control of the charter flight which may have a substantial bearing upon the air taxi operator or commuter air carrier's selection of the direct air carrier that will be in operational control of the charter flight.

(4) The make and model of the aircraft to be used for the transportation (e.g., Learjet 60 XR).

(5) The total cost of the air transportation, including any carrier-imposed fees or government-imposed taxes and fees.

(6) The existence of any fees and their amounts, if known, including fuel, landing fees, and aircraft parking or hangar fees charged by third-parties for which the charterer will be responsible for paying directly.

(7) The existence or absence of a written contract between the air taxi

operator or commuter air carrier and the direct air carrier that will be in operational control of the flight for provision of the charter air transportation negotiated between the air taxi operator or commuter air carrier and the charterer.

(b) If the information required to be disclosed in paragraph (a) of this section is not known at the time the contract is entered into, air taxi operators or commuter air carriers must provide in writing the information in paragraph (a) of this section to the charterer within a reasonable time after such information becomes available to the air taxi or commuter air carrier in the exercise of reasonable diligence.

(c) Unless otherwise agreed with the charterer in writing, if the information in paragraph (a) of this section is not provided to the charterer within a reasonable time after becoming available to the air taxi or commuter air carrier in the exercise of reasonable diligence, air taxi operators or commuter air carriers must provide the charterer with the opportunity to cancel the contract for air transportation, including any services in connection with such contract, and receive a full refund of any monies paid for the charter air transportation and services.

(d) In all circumstances, air taxi operators or commuter air carriers must disclose the information in paragraph (a) of this section to the charterer prior to the start of the air transportation.

(e) If the information required to be disclosed in paragraph (a) of this section changes after the air transportation covered by the contract has begun, air taxi operators or commuter air carriers must provide information regarding any such changes to the charterer within a reasonable time after such information becomes available to the air taxi operator or commuter air carrier in the exercise of reasonable diligence.

(f) Unless otherwise agreed with the charterer in writing, if the changes in information described in paragraph (e) of this section are not provided to the charterer within a reasonable time after becoming available to the air taxi operator or commuter air carrier, air taxi operators or commuter air carriers must provide the charterer with the opportunity to cancel the remaining portion of the contract for air

transportation, including any services paid for in connection with such contract, and receive a full refund of any monies paid for the charter air transportation and services not yet provided.

■ 4. A new § 298.100 is added to read as follows:

### § 298.100 Prohibited unfair and deceptive practices and unfair methods of competition.

An air taxi or commuter air carrier subject to this part shall not engage in any unfair or deceptive practices or unfair method of competition in holding out, selling, or operating charter flights. The following enumerated practices, among others, by an air taxi or commuter air carrier are unfair or deceptive practices or unfair methods of competition:

(a) Misrepresentations that may induce members of the public to reasonably believe that the air taxi or commuter air carrier will be, or is, in operational control of a flight when that is not the case.

(b) Misrepresentations as to the quality or kind of service, type or size of aircraft, and points served.

(c) Misrepresentations as to the quality or kind of service, type or size of aircraft, time of departure or arrival, points served, route to be flown, stops to be made, or total trip-time from point of departure to destination.

(d) Misrepresentations that passengers are directly insured when they are not so insured. For example, where the only insurance in force is that protecting the air taxi or commuter air carrier in the event of liability.

(e) Misrepresentations as to fares, charges, or special priorities for air transportation or services in connection therewith.

(f) Representing that a contract for a specified direct air carrier; or aircraft; space, flight, or time, has been arranged, without a binding commitment with a direct air carrier for the furnishing of such definite reservation or charter transportation as represented.

(g) Selling or contracting for air transportation while knowing or having reason to know or believe that such air transportation cannot be legally performed by the entity that is to operate the air transportation.

[FR Doc. 2013-23142 Filed 9-27-13; 8:45 am]

BILLING CODE 4910-9X-P