



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE
Washington, DC 20590

November 26, 2008

Mr. Hanspeter Thür
Office of the Federal Data Protection
and Information Commissioner FDPIC
Feldeggweg 1
3003 Bern
Switzerland

Re: U.S.-Swiss Safe Harbor Framework

Dear Mr. Thür:

I am providing you this letter at the request of the U.S. Department of Commerce to explain the role of the Department of Transportation in protecting the privacy of consumers with respect to information provided by them to airlines.

The Department of Transportation primarily relies upon and encourages self-regulation as the least intrusive and most efficient means of ensuring the privacy of information provided by consumers to airlines and has accordingly supported the establishment of a “safe harbor” regime that enables airlines to comply with the requirements of the Swiss Federal Act on Data Protection as regards transfers between the Confederation of Switzerland and the United States. The Department recognizes, however, that for self-regulatory efforts to work, it is essential that the airlines that commit to the privacy principles set forth in the “safe harbor” regime in fact abide by them. In this regard, self-regulation is currently backed by the Department’s enforcement authority. Using its existing consumer protection statutory authority, the Department ensures airline compliance with privacy commitments made to the public, and pursues referrals of alleged non-compliance that we have received from self-regulatory organizations and others.

The Department’s authority to take enforcement action in this area is found in 49 U.S.C. 41712 which prohibits a carrier from engaging in “an unfair or deceptive practice or an unfair method of competition” in the sale of air transportation that results or is likely to result in consumer harm. Section 41712 is patterned after Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). However, air carriers are exempt from Section 5 regulation by the Federal Trade Commission under 15 U.S.C. 45(a)(2).

My office investigates and prosecutes cases under 49 U.S.C. 41712. (*See, e.g.*, DOT Orders 2005-3-9, March 7, 2005; 2004-9-13, September 10, 2004; 99-11-5, November 9, 1999; 99-8-

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23, August 26, 1999; 99-6-1, June 1, 1999; 98-6-24, June 22, 1998; 98-6-21, June 19, 1998; 98-5-31, May 22, 1998; and 97-12-23, December 18, 1997.) We institute such cases based on our own investigations, as well as on formal and informal complaints we receive from individuals, travel agents, airlines, and U.S. and foreign government agencies.

Although the failure by a carrier to maintain the privacy of information obtained from passengers would not be a *per se* violation of section 41712, once a carrier formally and publicly commits to the “safe harbor” principles of protecting the privacy of consumer information that it obtains, the Department is empowered to use the statutory powers of section 41712 to ensure compliance. Therefore, once a passenger provides information to a carrier that has committed to honoring the “safe harbor” principles, any failure to do so would likely cause consumer harm and be a violation of section 41712. My office would give the investigation of any such alleged activity and the prosecution of any case evidencing such activity a high priority.

Violations of section 41712 can result in the issuance of cease and desist orders in addition to the imposition of civil penalties for violations of those orders. Although we do not have the authority to award damages or provide pecuniary relief to individual complainants, we do have the authority to approve settlements resulting from investigations and cases brought by the Department that provide items of value to consumers either in mitigation or as an offset to monetary penalties otherwise payable. We have done so in the past, and we can and will do so in the context of the safe harbor principles when circumstances warrant. Repeated violations of section 41712 by any U.S. airline would also raise questions regarding the airline’s compliance disposition which could, in egregious situations, result in an airline being found to be no longer fit to operate and, therefore, losing its economic operating authority. (*See*, DOT Orders 93-6-34, June 23, 1993, and 93-6-11, June 9, 1993. Although this proceeding did not involve section 41712, it did result in the revocation of the operating authority of a carrier for a complete disregard for the provisions of the Federal Aviation Act, a bilateral agreement, and the Department’s rules and regulations.)

In 2003, at the request of a public interest organization, the Department initiated an investigation of Northwest Airlines for alleged violations of its stated privacy policy. Although Northwest Airlines has not notified the Department of Commerce to state that it adheres to the Safe Harbour Framework, it had adopted during the period in question, and continues to honor, a publicly stated privacy policy. In a decision that was widely reported and closely followed by the air transportation industry, the Department did not find that a violation of Northwest Airlines’ privacy policy had occurred, but emphasized that “a carrier is bound by the representations it makes to its customers, not only by the law of contract and tort, enforced by the courts, but also by the law of unfair and deceptive practices, regulated under 49 U.S.C. § 41712.” DOT Order 2004-9-13, September 10, 2004 at 9. Subsequently, the Department made clear to U.S. air carriers that the violation of a publicly stated privacy policy similar to the policy adopted by Northwest Airlines might result in a substantial civil penalty if data are sold for profit, transferred to a non-governmental entity, transferred to an entity whose data protection protocols were not at least as secure as those of the air carrier itself, or otherwise treated in a manner expressly barred by the terms of the policy. DOT Order 2005-3-9, March 7, 2005, affirming Order 2004-9-13. We note that, at this time, it appears that all U.S. certificated air carriers have adopted publicly stated privacy policies that provide significant protection to the personal information of their passengers and customers.

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I hope that this information proves helpful. If you have any questions or need further information, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Samuel Podberesky', with a stylized, sweeping flourish.

Samuel Podberesky
Assistant General Counsel for
Aviation Enforcement and Proceedings