

# United States

Timothy Lynes, James Calder and Robert Fisher

Katten Muchin Rosenman LLP

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## General

- 1** By what body or bodies is aviation regulated in your country, and under what basic laws?

Aviation in the US is regulated primarily by the US Department of Transportation (DOT) and the Federal Aviation Administration (FAA) pursuant to Title 14 of the Code of Federal Regulations (FARs), 49 USC (Transportation Code), and the corresponding regulations.

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## Regulation of aviation operations

- 2** How is air transport regulated in terms of safety?

The FAA regulates safety of commercial and private air transportation and the National Transportation Safety Board (NTSB) conducts aircraft accident investigations.

- 3** What safety regulation is provided for air operations that do not constitute public/commercial transport, and how is the distinction made?

The FARs define a commercial operator as 'a person who, for compensation or hire, engaged in the carriage by aircraft in air commerce of persons or property [...] where it is doubtful that an operator is for 'compensation or hire', the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself a major enterprise for profit' (14 CFR section 1.1). An air carrier means 'a person who undertakes directly by lease, or other arrangement, to engage in air transportation'. The operations of air carriers and commercial operators are regulated by FAR parts 119, 121 and 135. All other private operations are regulated under FAR part 91. Large private operations are also regulated under FAR part 125.

- 4** Is access to the market for the provision of air transport services regulated, and if so how?

Yes. Applicants seeking air carrier operating authority must acquire a Certificate of Public Convenience and Necessity, granted from the DOT under chapter 411 of the Transportation Code and part 201 of the FARs. For certain smaller operations, an exemption application may be filed pursuant to FAR part 298. Application for a certificate of public convenience and necessity must be made in writing and verified, and the carrier must demonstrate that it is 'fit, willing and able' to provide the proposed operations and comply with the rules and regulations. The applicant must have the managerial skills and technical ability to provide the service; it must have access to financial resources to begin

operations without posing undue risk to consumers; it must also show a willingness and ability to comply with applicable regulations. If the applicant certifies fitness, and the DOT does not learn of any special issues, the application is handled with a show cause order. The certificate specifies the terminal and intermediate points between which the air carrier is authorised to engage in transportation. The operating authority is not effective until the applicant has been certified by the FAA to conduct operations and it has obtained adequate liability insurance. See Paul Dempsey, Laurence Gesell, *Air Commerce and the Law* 226-231 (2004) (hereinafter 'Air Commerce at [page number]').

If seeking an exemption, the applicant may file an application pursuant to part 298 of the FARs. Part 298 establishes a class of air carriers known as 'air taxi operators', and provides certain exemptions to the economic regulations of the Transportation Code. An air taxi operator does not generally use large aircraft, does not hold a Certificate of Public Convenience and Necessity, has liability insurance, and has registered with the DOT as an air taxi operator.

- 5** What requirements apply in the areas of financial fitness and nationality of ownership and control of air carriers?

### Financial fitness

To acquire a certificate of public convenience and necessity, an applicant must demonstrate financial fitness. The DOT has not identified specific financial fitness criteria. For a new applicant, however, the DOT imposes a 90-day 'zero revenue test'. This test requires proof of available funding to cover pre-operating costs plus a working capital reserve adequate to fund projected expenses for three months of flight operations without revenue. See, eg, *Application of Sunbird Airways Inc*, DOT Order 94-6-30 (1994). Filing for bankruptcy is grounds for enhanced scrutiny by the DOT.

### Nationality of ownership and control

The DOT requires that an applicant for a certificate of public convenience and necessity be a citizen of the United States. The president and two-thirds of the board of directors and other managing officers of the corporation must be US citizens and 75 per cent of the voting interest in the corporation must be owned or controlled by US citizens. See FAR 204.2(3). The DOT has interpreted this requirement to mean that US citizens must also be in actual control of the carrier and must have control of at least 51 per cent of non-voting equity and 75 per cent of voting equity. See, eg, *DHL Airways Inc*, Docket No. OST-2002-13089 Recommend Decision of ALJ, p. 35-38; *Air Commerce* at 232. Foreign entities may control up to 25 per cent of the stock and no more than 49 per cent of the combined stock and debt.

- 6** What procedures are there to obtain licences or other rights to operate particular routes?

Subpart E of part 121 of the FARs prescribes rules for obtaining approval for routes by certificate holders conducting domestic or flag operations. The certificate holder must show it can conduct satisfactorily scheduled operations between each regular, provisional, and refuelling airport over that route and that the services and facilities are available and adequate.

International routes are governed by the relevant bilateral or multilateral aviation treaties. In line with these treaties, the DOT issues international routes in competitive proceedings, and the president approves them in light of foreign policy and national defence considerations (*Air Commerce* at 233). Some of the factors the DOT considers in making this determination are market structure, route integration, fare and service proposals, incumbency, and the rapidity with which the applicant could enter the market.

There are requirements that affect, and limitations on, the number of flights airlines may operate out of certain high-density airports (see question 20).

- 7** What procedures are there for hearing and/or deciding contested applications for licences or other rights to operate particular routes?

Part 302 of the FARs establishes procedures for the conduct of all aviation economic proceedings before the DOT. This includes, among other things, US air carrier certificate procedures, foreign air carrier permit licensing, and certificate cases involving international rates. Administrative law judges make initial or recommend decisions and are subject to approval by the relevant DOT decision maker, which generally is the assistant secretary for aviation and international affairs. The secretary of transportation may exercise the authority of the assistant secretary if the secretary believes a decision involves an important question of national transportation policy. See FAR part 302.18.

- 8** Is there a stated policy on airline access/competition, and if so what is it?

Like other US industries, the airline industry is subject to US federal antitrust law, which is intended to preserve competition and open markets. Thus, as a general matter, the strong US policy of protecting and maintaining open, competitive markets applies to aviation.

In addition to the application of basic antitrust principles, the DOT has authority over airlines operating in the US. It, too, is authorised to apply antitrust-type policies and principles in its regulatory role to ensure that airlines operate in the 'public interest'.

- 9** Are there specific rules in place to ensure aviation services are offered to remote destinations when vital for the local economy (public service obligations)?

Yes. Subchapter 11 of chapter 417 of the Transportation Code provides for subsidised basic essential air service to underserved rural markets. This service ensures transport to a hub airport with convenient connecting flights to a number of destinations. The minimum requirements for basic essential air service include two daily round trips, six days a week; flights at reasonable times considering the needs of the passengers with connecting flights; and prices not excessive compared to the prices of other air carriers serving similar places. With certain exceptions, service must be provided in an aircraft with an effective capacity of at least 15

passengers, and at least two engines and two pilots. The requirements for essential air service in Alaska are less stringent. See also, FAR part 271.

- 10** Is there any special regulation of charter services?

Yes. In addition to acquiring from the DOT a certificate of public necessity and convenience or an exemption under FAR part 298, a charter service provider must comply with the operating rules for charter services under FAR part 135. It contains some rules in addition to FAR part 91, which governs the operation of all aircraft.

Section 41104 of the Transportation Code imposes additional restrictions on charter services. The secretary of transportation may restrict the marketability, flexibility, accessibility, or variety of charter air transportation (where there has been issued a certificate of public convenience and necessity), but only to the extent required by the public interest. An air carrier may not provide, in an aircraft designed for more than nine passenger seats, regularly scheduled charter air transportation, unless such transportation is to and from an airport with an operating certificate issued under part 139 of the FARs. This restriction does not apply where the departure time, departure location, and arrival location are negotiated with the customer or the customer's representative. This restriction does not apply in Alaska.

- 11** Are airfares regulated, and if so, how?

Domestic air fares are not regulated. International fares are regulated pursuant to chapter 415 of the Transportation Code and international rate proceedings are conducted in accordance with FAR part 302, subpart E. Rates must be reasonable and not unreasonably discriminatory and every air carrier and foreign air carrier must file tariffs with the secretary of transportation showing the prices for foreign air transportation. The secretary of transportation may not decide a fare is unreasonable on the basis that the fare is too low or too high if the proposed fare is neither 5 per cent higher nor 50 per cent lower than the 'standard foreign fare level' established by the secretary of transportation (49 USC sections 41501, 41504, 41509). Tariffs must be filed and maintained pursuant to FAR part 221.

## Aircraft

- 12** Who is entitled to be mentioned in the aircraft register? Are there any requirements/limitations applicable to the owner of an aircraft registered on your country's register?

The registration of aircraft is the responsibility of the FAA. Under the Transportation Code and the FARs, an aircraft is eligible for registration only if its owner is a US citizen and the aircraft is not registered under the laws of a foreign country. The citizenship requirement applies to individuals and partnerships, provided each member thereof is a citizen. It also applies to corporations, provided that the president, at least two-thirds of the board of directors and other managing officers, and owners of at least 75 per cent of the voting stock are citizens. See FAR part 47.

An aircraft may be registered only in the owner's name; the term 'owner' includes a buyer or a lessee under a conditional sale contract. Under part 47.9 of the FARs, the owner does not need to meet the US citizenship requirement if the owner is organised and doing business under the laws of the US or any state; the aircraft is based and primarily used in the US (which the FAA

has interpreted to mean that 60 per cent of flight hours are accumulated during non-stop flight between two points in the US in each six-month period); and the owner or lessee certifies as to the use and submits semi-annual reports to the FAA as to actual flight hours.

Under part 47.8 of the FARs, a shareholder voting trust may also be used to qualify a domestic corporation which is owned by foreign shareholders as a US citizen for the purpose of registration of an aircraft. The applicant must submit to the FAA registry a copy of the voting trust agreement, which identifies each voting interest of the applicant and is binding on each voting trustee, the applicant corporation, all foreign stockholders and each party to the transaction. The applicant must submit affidavits from each voting trustee, wherein they represent that each voting trustee is a US citizen and that there is no reason why any other party to the agreement might influence the voting trustee's independent judgment. The voting trust agreement must provide for the succession of a voting trustee, and if the voting trust is modified such that US citizens hold less than 75 per cent control of the voting interests, the holder loses citizenship.

Finally, pursuant to FAR part 47.7 an owner's trust over the aircraft may also be used to satisfy the US citizenship registration requirements. In this case, the foreign beneficial owner of the aircraft places the aircraft in a trust with a US citizen owner trustee. The US citizen owner trustee must also submit an affidavit to the FAA which states that it is not aware of any reason or relationship that the non-US citizen beneficiary as a result of which would have more than 75 per cent aggregate power to influence or limit the trustee's authority. The trust itself must contain similar provisions.

**13** Is there a register of aircraft mortgages/charges, and if so how does it function?

Yes. Section 44107 of the Transportation Code provides for a system for recording conveyances, bills of sale, mortgages, contracts, and other instruments affecting interest in or title to an aircraft. Part 49 of the FARs covers the recording of titles and security documents. There is no US citizenship requirement or other limit as to who may be a mortgagee. To be recorded, the instrument must identify all aircraft by make, mode, serial number and US registration number. The fee for recording any conveyance or instrument is US\$5.

Recorded documents may be amended, and any amendment must be signed by both parties to the original instrument and filed for recordation by the registry. Each mortgage or other conveyance filed with the Registry for recordation is valid and perfected from the time of filing as to all persons with whatever priority is given by state law.

The United States has also ratified the Convention on International Interests in Mobile Equipment, which permits liens, contracts for sale, and international interests in aircraft objects to be perfected by notation on an electronic international registry. The Convention creates an international interest which is recognised in all contracting states and provides creditors with a range of default remedies.

**14** What rights are there to detain aircraft, in respect of unpaid airport or air navigation charges, or other unpaid debts?

Air navigation authorities in the US generally do not have specific rights to detain aircraft for unpaid navigation charges. To the extent that an air carrier has unpaid debts to any party and the

air carrier is not otherwise under bankruptcy court protection, creditors that obtain a judgment against any aircraft operator have the same rights as any other judgment creditors under applicable state or federal law. Aircraft creditors that are consensual lien holders of aircraft also generally have the ability to foreclose upon their liens upon the occurrence of an event of default and seize the aircraft, again subject to applicable state laws and federal bankruptcy laws.

**15** Are there specific rules in place regulating the maintenance of aircraft?

Yes. Part 43 of the FARs stipulates that any aircraft repair requires the services of a certificated mechanic or repairman, as provided in FAR part 65. The holder of an air carrier operating certificate or an operating certificate issued under part 121 or part 135 may perform maintenance, preventive maintenance and alternatives as provided in parts 121 or 135. See FAR part 43.3.

## Airports

**16** Are all airports state-owned? If not, how are they owned?

Airports in the United States are privately and publicly owned, though the vast majority of airports that significantly contribute to air traffic are publicly owned and operated. Most of the privately owned airstrips and airfields are closed to public air traffic. Generally, either a county, municipality or sub-governmental entity ('authorities' or 'special districts') owns the public airport. A few state-owned airports present exceptions to this rule, particularly in Alaska.

**17** What system is there for the licensing of airports?

Airports must be certified by the FAA, which in turn has promulgated rules in FAR part 119 setting forth the procedures required to receive an operating licence. Although the procedures depend on the size and type of the airport up for certification, all potential airport administrators must submit to the FAA a written application and an airport certification manual. The manual contains a description of operating procedures, facilities and equipment, responsibility assignments, along with other specific details depending again on the size and type of the proposed airport. Additionally, the airport must submit to a blanket inspection provision.

Even after satisfying federal requirements, airports may also be subject to state or other local municipal regulation.

**18** Is there a system of economic regulation of airports, and if so, how does it function?

Federal oversight of airport administration is animated by the concern that airports might use airport revenue for non-airport purposes. To that end, several federal laws have been enacted providing economic regulation for airports.

The Anti-Head Tax Act of 1973 limits airports to collecting reasonable and non-discriminatory rental charges, landing fees and other service charges. Building off of this provision, the Airport and Airway Improvement Act of 1982 put into place a fee and rental structure that makes the airport as self-sustaining as possible, insisting that charges be reasonable and used only for airport purposes. Also, in order to receive federal funding airports are required to promise that they "will be available for public use on reasonable conditions and without unjust discrimination" (49 USC section 47107(a)(1)).

The US Supreme Court answered the question as to what constitutes a reasonable airport charge in 1994. Such a charge is reasonable when: “(1) it is based on some fair approximation of the use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce.” This test permits broad discretion on the part of airports as to how to collect fees and set rates. *Northwest Airlines v County of Kent*, 510 US 355, 369 (1994); see also *Air Commerce* at 474-75.

The Federal Aviation and Administration Authorization Act of 1994 (FAAA) requires that airport charges, fees or taxes must be used for airport or aeronautical purposes only, again predicating federal funding on an affirmative recital by the airport similar to that required by the Airport and Airway Improvement Act.

The FAAA contains a provision that authorises the secretary of transportation to determine whether airport fees are reasonable, though this power does not extend to the setting of fee levels. Either an airline or an airport may trigger this provision by filing a complaint or making a request for review. Once the FAAA has been triggered, an administrative law judge makes a finding which, absent a contrary statement by the secretary of transportation within a set period of time, becomes the final decision of the DOT on the matter.

In 1995, the DOT issued a policy capping airport charges by requiring them not to charge any more than was required to break even. Under this policy, the department ordered refunds of certain airport fees determined to be excessive.

The FAAA also imposed restrictions on any airport accepting funding coming from federal taxes on tickets. Such an airport must spend its revenues exclusively on capital or operating costs, the local airport system, or facilities owned or operated by the airport directly and substantially related to the air transportation of people and property.

Additionally, the FAA regulates airport access projects, requiring that such projects preserve or enhance the capacity, safety or security of the national air transportation system, reduce noise, or provide an opportunity for enhanced competition between carriers. Access projects must be for the exclusive use of airport patrons and employees, be built on airport-owned land or rights of way and be connected to the nearest public access of sufficient capacity.

Finally, airport sponsors may charge fees to recoup operation costs.

#### 19 Are there laws/rules restricting or qualifying access to airports?

Two types of regulations restrict or qualify access to airports, though the recent trend has been towards their elimination.

First, runway time is divided into specific periods called slots, whereby air carriers reserve time on airport runways to accommodate their flights. Slots are the traditional means by which the government has restricted or qualified access to the airport, originally in order to reduce air traffic congestion and delay.

Second, the government has utilised ‘perimeter rules’ to restrict access to certain airports. For example, under the Washington Metropolitan Airport Act of 1986, Congress restricted all air traffic taking off from or landing at Ronald Reagan Washington National Airport to flights taking off from or landing at an airport within a 1,250-mile radius.

Many of these restrictions, however, have been relaxed by President Clinton’s Aviation Investment and Reform Act for the 21st Century, passed in 2000. That act eliminates a number of the previously imposed slot rules and permits discretionary exceptions

to specific perimeter rules.

#### 20 How are slots allocated at congested airports?

The first way slots at certain congested airports are allocated is under the High Density Slot Rule. Originally created in 1968, this rule identified a number of high traffic airports and imposed specific slot restrictions. Administrative oversight is delegated to scheduling committees which oftentimes feature representatives from incumbent airlines, though the FAA does have the power to intervene if necessary. The number of slots under this scheme varies from airport to airport and slots are allocated among specific classes of users. Additionally, slots must be used 80 per cent of the time over a two-month period or they will lapse, though certain exceptions are sometimes granted in the case of bankruptcy.

The second way slots are allocated is under the Buy-Sell Slot Rule. This rule permits airlines holding slots in identified high-density airports to sell them at market-dictated rates. The use provision found in the High Density Slot Rule also applies to this rule. Any lapsed or newly available slots may be distributed by the FAA via lottery. Additionally, the FAA may revoke or seize traded slots. The rule treats international and general aviation slots separately. Non-carriers are permitted to hold slots, making them available to be used as collateral on loans for financing purposes. Finally, slot owners may lease their slots in order to avoid the lapse-provision. See 14 CFR sections 93.121-33; 93.211-27.

The FAAA purported to remove a number of these restrictions by permitting the Secretary of Transportation to grant exemptions, though this power has been construed narrowly and exercised rarely. Recently, however, a more generous exemption policy has been adopted by the DOT (*Air Commerce* at 495).

#### 21 Are there any laws/rules specifically relating to ground handling at airports?

Ground handling is typically done by private commercial enterprises called fixed base operators (FBOs). The FBOs service the military and commercial airlines, and are tenants within the publicly held airports. Because the government landlord is partially insulated from liability arising from its actions, FBOs are afforded limited opportunities to negotiate for what they might consider ideal rental terms and conditions.

Oftentimes, only one FBO services a particular airport. This gives rise to a potential special relationship between the airport sponsor and the FBO, which has raised the concern of possible competition-stifling preferential treatment. On the other hand, should the FBO fall out of the sponsor’s good graces, the FBO might be the target of discriminatory treatment.

While a provision of the Transportation Code, 49 USC section 47107(a)(4), expressly prohibits exclusive partnerships, the FAA unofficially supports a protectionist policy for FBOs and other airport operators (*Air Commerce* at 464). The tension between fostering an environment of open competition while desiring to protect certain businesses has made this area exceptionally litigious. Accordingly, Congress granted airports limited immunity from resulting antitrust lawsuits, only permitting awards of injunctive relief (15 USC sections 34-36).

#### 22 Who provides air traffic control services? And how are they regulated?

Air traffic control services are primarily administered through the FAA. The FAA directly employs nearly all air traffic controllers and any new controllers must enroll in an FAA-approved training programme after passing a pre-employment exam. The agency



also put into place a number of policies setting forth the specific procedures to be followed by air traffic controllers.

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### Liability and accidents

**23** Are there any special rules in respect of death of, or injury to, passengers and/or loss or damage to baggage/cargo in respect of domestic carriage?

Under tort law, common carriers or other tortfeasors may be found liable for death or injury to passengers and property. A common carrier is defined as one who engages in the transportation of persons or things from place to place for hire, and which holds itself out to the public as serving it indiscriminately. Courts have held that common carriers have a duty of care to their passengers that is higher than reasonable care, and to demonstrate negligence, the plaintiff must show duty, breach, causation and damages.

If the negligence of any employee of the federal government acting within the scope of his employment is alleged to have caused injury or death, the Federal Tort Claims Act provides a judicial remedy against the US for damage claims.

Under part 254 of the FARs, airlines must pay for lost or damaged luggage, and may not limit their liability to less than US\$2,500 per passenger. The DOT reviews the minimum limit on liability every two years.

Section 44112 of the Transportation Code provides aircraft financiers with immunity from liability for aircraft accidents, provided that such financing party was not involved in the direct operations of the aircraft.

**24** Are there any special rules about the liability of aircraft operators for surface damage?

No. The only instrument governing the liability of air carriers for surface damage is the Rome Convention of 1952, but the US did not ratify or sign the convention, which aimed to improve access to compensation for injured third parties by using strict and limited liability.

**25** What system is there for the investigation of air accidents, including procedures?

Pursuant to chapter 11 of the Transportation Code, the NTSB is responsible for investigating accidents involving civil aircraft (49 USC sections 1101-1155). Accident investigations are conducted pursuant to part 831 of Title 49 of the Code of Federal Regulations (DOT Regulations). Public hearings may be conducted as provided for in DOT Regulations part 845. The NTSB must report the facts, conditions and circumstances relating to each accident and the probable cause. The results are presented to an examiner who later prepares a report to aid the NTSB in preparing its required final report. This report, which usually is released six months after the accident, will describe the probable cause, and identify problems and propose changes so the same type of accident does not reoccur. The NTSB is not responsible for prosecuting criminal behaviour or assigning blame.

All reports of investigations and findings are made public, and NTSB reports relating to any accident or investigation may be admissible into evidence in actions for damages subject to certain constraints.

**26** Is there a mandatory accident/incident reporting system, and if so, how does it operate?

Yes. Part 830 of the DOT Regulations requires aircraft operators to notify the NTSB of aviation accidents and certain incidents. An accident is an occurrence associated with the operation of an aircraft that occurs between the time any person boards the aircraft with the intention of flight and the time when all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage. An incident is an occurrence other than an accident that affects or could affect the safety of operations.

The report should be filed with the nearest NTSB regional office. An initial phone call is sufficient but must be followed up in writing.

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### Competition law

**27** Are there sector-specific competition law rules applying to the aviation sector? If not, do the general competition law rules apply in the aviation sector?

The aviation sector is governed by both US antitrust law rules and sector-specific competition law rules, which are similar to basic US antitrust principles.

The primary US antitrust laws, the Sherman Act and the Clayton Act, both apply to aviation. Significantly, the US Federal Trade Commission is not empowered to enforce the Federal Trade Commission Act's prohibition against 'unfair methods of competition' and 'unfair or deceptive acts or practices' against air carriers subject to the Transportation Code. Nor does the Robinson-Patman Act's prohibition of certain kinds of price discrimination apply to airlines. The Transportation Code, which is enforced by the DOT, contains airline-specific antitrust rules similar to those contained in section 5 of the Federal Trade Commission Act.

The Sherman Act, inter alia, prohibits all contracts, combinations and conspiracies that unreasonably restrain trade. Price-fixing, market allocation and customer allocation agreements are the classic examples of such illegal agreements. The Sherman Act also prohibits monopolisation and attempts to monopolise. The Clayton Act is the primary antitrust tool used to attack mergers and acquisitions that are anti-competitive.

The competition laws applicable exclusively to the aviation sector are the Transportation Code and the Airline Deregulation Act. Section 41712 of the Transportation Code grants to the secretary of transportation authority to enjoin air carriers from engaging in 'an unfair or deceptive practice or unfair method of competition', both domestically and internationally, if the secretary of transportation finds that such action would be in the public interest. The DOT also has the authority to issue regulations, such as regulations governing the display of code-sharing agreements in computer reservation systems, under this provision.

In addition, the Airline Deregulation Act grants to the DOT the discretionary authority to grant immunity to anti-competitive carrier agreements, if it determines that such agreements are 'necessary to meet a serious transportation need', or are needed to achieve an important public benefit that cannot be achieved by reasonable and less anti-competitive alternatives (49 USC section 41309(b)(1)(A), (B)). Thus, for example, the DOT has granted limited antitrust immunity to code-sharing agreements between US and foreign air carriers because it has determined that such agreements are beneficial to the public.

**28** Is there a sector-specific regulator and/or are competition rules applied by the regular competition authority?

The two principal antitrust regulators of the aviation sector are the DOT and the US Department of Justice. Neither the Federal Trade Commission nor the individual states have authority to enforce competition rules in the aviation industry.

The DOT has three main areas of regulatory authority: the discretionary authority to grant antitrust immunity to anti-competitive carrier agreements; the authority to enjoin air carriers from engaging in unfair or deceptive practices or methods of competition, such as predatory pricing; and the authority to oversee carrier 'joint venture agreements', such as code-sharing and frequent flyer programmes.

The Department of Justice is responsible for enforcing the Sherman and Clayton Acts. Additionally, the Department of Justice is vested with the authority to review airline mergers and acquisitions.

**29** How is the relevant market for the purposes of a competition assessment in the aviation sector defined by the competition authorities?

Competition assessment in the aviation sector focuses on the relevant geographic market and the relevant product market. The relevant product or service market will depend on the actual product or service being provided. The relevant product market in commercial aviation could, in the appropriate circumstances, be defined as scheduled passenger transportation. The geographic market will also vary with the circumstances. However, in cases involving mergers, code-sharing alliances, and joint ventures among carriers, competition will be examined in each 'city pair' in which the merging, code-sharing or joint-venturing carriers both offer service. In a merger, such as the one between Air France and KLM, where the merging airlines are members of competing code-sharing alliances, the Department of Justice will analyse the merger as a combination of the competing alliances and will analyse all the city pairs involving US cities in which the two alliances both offer service.

**30** What are the main standards for assessing the competitive impact of a transaction?

The standard for assessing the competitive impact of an agreement examined under section 1 of the Sherman Act is whether the agreement unreasonably restrains trade in the relevant market. The standard for assessing the competitive impact of conduct challenged as monopolisation is whether someone with monopoly power in the relevant market has engaged in conduct that has the effect of expanding or maintaining that monopoly. For attempted monopolisation, the standard is whether the party with substantial market (but not monopoly) power has engaged in conduct that creates a 'dangerous probability of success' in monopolising the relevant market. For mergers and acquisitions, the test is whether the effect of the transaction 'may be substantially to lessen competition, or to tend to create a monopoly' in the relevant market. Finally, the Transportation Code provides that a transaction is anti-competitive if it represents an unfair method of competition or a deceptive practice, and is against public interest.

**31** What types of remedies have been imposed to remedy competition concerns identified by the competition authorities?

Both civil and criminal penalties can be imposed for antitrust violations. Violations of the Clayton Act can only result in civil liability. Violations of the Sherman Act can result in both civil and criminal liability. Criminal penalties can be as high as US\$10 million for individuals and US\$100 million for corporations, for each violation. In addition, individuals can be imprisoned for criminal violations of the Sherman Act. Only the most serious ('per se') violations of the Sherman Act – such as price fixing, bid rigging and market allocation – are prosecuted criminally. In addition, the Department of Justice can seek injunctive relief barring private parties from continuing to engage in conduct that violates the antitrust laws. Injunctive relief is the standard form of relief sought when the Department of Justice seeks to block a merger.

Violations of the antitrust laws also create liability to third parties who are injured by antitrust violation. Injured parties are entitled to recover treble damages for injury to their business or property caused by the antitrust wrongdoers. They are also entitled to recover their attorneys' fees.

Finally, the DOT has the authority to enjoin activities that violate the Transportation Code.

### Financial support/state aid

**32** Are there sector-specific rules regulating direct or indirect financial support to individual companies by the government or government-controlled agencies or companies (state aid) in the aviation sector? If not, are there general state aid rules that apply in the aviation sector?

Although most airlines in the US are held by private shareholders, they can receive federal subsidies in particular contexts. First, under the Air Transportation Safety and System Stabilization Act (ATS Act), airlines could apply for federal assistance in the aftermath of the September 11 attacks in 2001. The ATS Act does not cover aid for damages incurred after 31 December 2001. Second, the government currently provides for war risk insurance. Third, Congress granted the DOT authority to exempt airlines from certain economic regulations, subject to the extent the secretary determines necessary. Other exemptions are permissible, depending on public need. Fourth, airlines serving certain small communities receive federal subsidies (see question 9).

**33** What are the main principles of the state aid rules applying in the aviation sector?

The ATS Act delegated the power to dispense funds, both direct compensation and lines of credit, to the Air Transportation Stabilization Board. In order to qualify for a grant of direct aid, the air carrier must show the precise financial loss suffered, either through sworn financial statements or 'other appropriate data' (ATS Act section 103(a)). To qualify for a federal credit instrument, the board must determine that the applicant is an air carrier otherwise unable to secure credit, that the intended obligation is 'prudently incurred', and that the credit agreement would be necessary to the maintenance of a safe, efficient and viable commercial aviation system (ATS Act section 103(c)(1)).

Also, Congress created subsidies to airlines that provide service to specific small communities through its Essential Air Services Program. This programme ensures that rural communities will continue to receive airport services, despite the fact that it might otherwise not be economically feasible (see question 9).

**34** Are there exemptions to the state aid rules or situations in which they do not apply?

Exemptions to the state aid rules are not required, due to the specific and targeted nature of federal subsidies to airlines such as those found in the ATS Act and Essential Air Services Program.

**35** Must clearance from the competition authorities be obtained before state aid can be granted?

In most cases, no. The ATS Act provided a forward-looking application process by the Airline Transportation Stabilization Board, while competition authority procedures permit backwards-looking analysis of potential violations. Applications for ATS Act aid covering direct losses suffered after 31 December 2001 are not permitted. See responses to questions 27 to 30.

Clearance is required, however, for subsidies under the Essential Air Services Program. This programme is regulated by the DOT. See question 9.

**36** If so, what are the main procedural steps to obtain clearance?

Not applicable. See question 9.

**37** If no clearance is obtained, what procedures apply to recover state aid unlawfully granted to a particular company?

Not applicable.

### Miscellaneous

**38** Is there any aviation-specific passenger protection legislation?

FAR part 374 gives responsibility to the DOT for enforcing air carrier compliance with the Consumer Credit Protection Act (the Act). A violation of the Act is also a violation of the Transportation Code.

For carriers holding certificates of public convenience and Necessity, FAR part 250 provides that for oversold flights, carriers must ensure that the smallest number of passengers with confirmed reservations be denied boarding involuntarily. The carrier should ask for volunteers to receive compensation for giving up their seats. For passengers who are denied boarding involuntarily, the carrier must pay 200 per cent of the sum of

the passenger's remaining flight coupons up to his next stopover, up to a maximum of US\$400. The carrier's liability will be capped at US\$200 if it arranges for comparable transport that will arrive not later than two hours after the planned arrival of the original flight, if domestic, and not later than four hours after the planned arrival of the original flight, if foreign. Carriers may offer free or reduced transportation in lieu of the cash if its value is equal to or greater than the amount owed to the passenger. Every carrier must file quarterly a report of passengers denied confirmed space.

Federal regulations also govern false and misleading advertising, lost and damaged baggage, handicapped access, smoking aboard aircraft, gambling, and code sharing. Since computer reservation systems have been deregulated, most of the relevant regulations have been repealed.

In order to protect passengers that have purchased package holidays, FAR part 212 provides that air carriers operating charter flights must file with the Department of Transportation a currently effective agreement between the air carrier and an FDIC-insured bank, stating that all advanced charter payments will be held in escrow by the bank. The charterer is to make all advanced payments to the designated bank, and the bank is to pay out the balance only after the carrier certifies in writing that the charter has been completed. Alternatively, the carrier may elect to file with the DOT a surety bond with guaranties to the US government for the performance of all charter trips. The bond must provide that the charterer has 60 days after the cancellation of a charter trip in which to file a claim against the carrier. If no such claim is made, the surety shall be released from all liability.

**39** Are there any mandatory insurance requirements in respect of the operation of aircraft?

US and foreign direct air carriers must have in effect aircraft accident liability insurance coverage that satisfies federal requirements. The minimum air carrier insurance requirements in the US is US\$300,000 for bodily injury or death, or for damage to the property of others, for any one person in any one occurrence, and a total of US\$20 million per involved aircraft for each occurrence, except that for aircraft of 60 seats or fewer or 18,000lbs maximum payload capacity, carriers only need coverage of US\$2 million per involved aircraft.

**Timothy J. Lynes**

Partner  
 Washington, District of Columbia  
 p\_ 202.625.3686  
 f\_ 202.298.7570  
 timothy.lynes@kattenlaw.com

Timothy J. Lynes is a Partner of Katten Muchin Rosenman LLP and a member of the Corporate Department and head of the Aviation Practice.

He has represented manufacturers, lessors, airlines and their insurers for more than 19 years. His practice routinely involves aircraft sale agreements, cross-border and tax leases, loans, chattel mortgages, residual value and credit support agreements and aviation insurance policies. He also regularly advises clients on Department of Transportation and Federal Aviation Administration regulatory issues. He has participated in multidistrict litigation arising from aircraft crash disasters and served as lead trial counsel in numerous commercial disputes and damages trials arising from aircraft crashes. He is listed in the Guide to the World's Leading Aviation Lawyers Expert Guides published by the Legal Media Group and in the Aviation 2005 Who's Who Legal, an extract from The International Who's Who of Business Lawyers. Mr. Lynes was also an adjunct professor at the University of Maryland School of Law and taught a course on Sales and Sales Financing.

Mr. Lynes is a member of the American Bar Association, Business Law and Litigation Sections, The Federal Bar Association and the New York State Bar Association.

Mr. Lynes received his undergraduate degree (B.A., 1981) from Fairfield University and his law degree (J.D., 1984 Cum Laude) from Gonzaga University School of Law where he was Associate Editor of the Gonzaga Law Review. Mr. Lynes was the Law Secretary to the Honorable Richard Newman, Superior Court of the State of New Jersey, Essex County. He is a member of the bars of the States of New Jersey, Virginia, Maryland, New York and the District of Columbia.

**James J. Calder**

Partner  
 New York, New York  
 p\_ 212.940.6460  
 f\_ 212.940.3817  
 james.calder@kattenlaw.com

James J. Calder devotes his practice to antitrust and antitrust litigation.

Mr. Calder's antitrust practice includes litigation, counseling and responding to Government antitrust investigations. He has handled matters involving price fixing, market allocation, group boycotts and other horizontal restraints, monopolization, intellectual property licensing and other intellectual property issues, industry-wide standard setting efforts, vertical restraints, distribution issues and Robinson-Patman Act problems.

Mr. Calder also represents parties to U.S. and cross-border mergers and acquisitions. His M&A work includes substantive antitrust merger analysis, Hart-Scott-Rodino and foreign merger clearance compliance, responding to U.S. and foreign Government merger investigations and negotiating or litigating resolutions in contested merger situations. He also provides antitrust representation in the structuring and operation of domestic and international joint ventures and other collaborative efforts among competitors.

Mr. Calder's litigation practice includes antitrust, competitive tort, commercial and related cases and arbitrations.

Mr. Calder received his undergraduate degree, with high distinction, from the University of Virginia (B.A., 1974), where he was a member of Phi Beta Kappa. He received his law degree from the University of Virginia Law School (J.D., 1977), where he was a Hardy Dillard fellow.

**Robert I. Fisher**

Partner  
 New York, New York  
 p\_ 212.940.8827  
 f\_ 212.940.8776  
 robert.fisher@kattenlaw.com

Mr. Fisher has extensive experience in representing foreign and domestic clients in all aspects of corporate, securities, and commercial law. He represents underwriters, corporate clients and financial institutions in a broad range of domestic and foreign financing and other commercial transactions. He has significant experience in securitization, structured finance and the corporate aspects of sophisticated real estate transactions.

Mr. Fisher is a member of The Association of the Bar of the City of New York, the New York State Bar Association and the American Bar Association and is listed in Who's Who in America and Who's Who in American Law.

Mr. Fisher has lectured before professional organizations on numerous topics related to corporate and commercial law and real estate finance. Mr. Fisher's most recent article was "The Securitization of Aircraft Lease Receivables," which appeared in the Handbook of Airline Finance.

Mr. Fisher received his undergraduate degree from Columbia University and his law degree cum laude from Harvard University. He also received a Master's Degree in International Law from New York University and a Fulbright Fellowship.

# Katten

Katten Muchin Rosenman LLP

[www.kattenlaw.com](http://www.kattenlaw.com)

401 S. Tryon Street  
 Suite 2600  
 Charlotte, NC 28202-1935  
 704.444.2000 tel  
 704.444.2050 fax

525 W. Monroe Street  
 Chicago, IL 60661-3693  
 312.902.5200 tel  
 312.902.1061 fax

5215 N. O'Connor Boulevard  
 Suite 200  
 Irving, TX 75039-3732  
 972.868.9058 tel  
 972.868.9068 fax

1-3 Frederick's Place  
 Old Jewry  
 London EC2R 8AE  
 +44.20.7776.7620 tel  
 +44.20.7776.7621 fax

2029 Century Park East  
 Suite 2600  
 Los Angeles, CA 90067-3012  
 310.788.4400 tel  
 310.788.4471 fax

575 Madison Avenue  
 New York, NY 10022-2585  
 212.940.8800 tel  
 212.940.8776 fax

260 Sheridan Avenue  
 Suite 450  
 Palo Alto, CA 94306-2047  
 650.330.3652 tel  
 650.321.4746 fax

1025 Thomas Jefferson Street, NW  
 East Lobby, Suite 700  
 Washington, DC 20007-5201  
 202.625.3500 tel  
 202.298.7570 fax