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DOT Final Rule on Air Charter Brokers: Paving the Way for the “Uberization” of Private Air Travel

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**DOT FINAL RULE ON AIR CHARTER BROKERS: PAVING
THE WAY FOR THE “UBERIZATION” OF
PRIVATE AIR TRAVEL**

JET MCGUIRE*

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I. INTRODUCTION

A. THESIS

THE DEPARTMENT OF Transportation's (DOT) Final Rule on air charter brokers¹ offers an important advancement in private aviation. The previously ultraexclusive industry, requiring massive capital expenditures for entry, is now accessible to new entrepreneurs planning to capitalize on the new regulatory framework.² New entrants provide more competition to the existing fractional ownership and "jet card" companies operating in the space. Meanwhile, consumer disclosure requirements keep charterers informed and safe going forward. This major regulatory shake-up will make private jet charter more user-friendly and pave the way for more Uber-like services in the industry.

B. OVERVIEW

There are essentially four ways an individual with means can gain access to the world of private aviation. These include: (1) full aircraft ownership; (2) fractional aircraft ownership; (3) membership in a jet card program; or (4) aircraft charter.

Full aircraft ownership presents a host of fixed and ongoing expenses. The major fixed expense is the high-capital requirement for purchasing the aircraft.³ Ongoing expenses include: hangar fees, pilot fees, maintenance, insurance, and registration.⁴ This option is generally only viable for entities and individuals who are committed to private aviation and fly more than 300 hours per year.⁵

¹ Increasing Charter Air Transportation Options, 83 Fed. Reg. 46,867 (Sept. 17, 2018) (codified at 14 C.F.R. pts. 295, 298).

² Jennifer M. Nowak, *DOT Publishes Long-Awaited Final Rule on Air Charter Brokers*, HOLLAND & KNIGHT AVIATION L. BLOG (Oct. 5, 2018), <https://www.hklaw.com/en/insights/publications/2018/10/dot-publishes-long-awaited-final-rule-on-air-charter> [<https://perma.cc/3WXC-4KVK>].

³ See *Mile-High Millionaires: When Should You Buy a Jet?*, CNBC (Oct. 11, 2013), <https://www.cnbc.com/2013/10/11/when-should-you-buy-a-jet-charter-plane-private-cost-and-prices.html> [<https://perma.cc/4RY4-YZLF>] (private jet prices range from an average of \$3,000,000 to \$90,000,000).

⁴ See *id.* (ongoing costs of owning a private jet range from an average of \$700,000 to \$4,000,000 per year); see also 14 C.F.R. § 91.7 (2011).

⁵ See David Baxt & James Palen, Presentation at the International Corporate Jet & Helicopter Finance Conference: Wheels Up 4 (Feb. 2014), http://www.corporatejetinvestor.com/wp-content/uploads/2014/02/950-Wheels-Up-CJI-Presentation_v8.pdf [<https://perma.cc/Z7KS-84TT>].

Fractional aircraft ownership means that a person or entity purchases or leases an interest in an aircraft.⁶ Usually, owners are entitled to use the aircraft for a specified number of hours per year based on their pro rata interest in the underlying aircraft.⁷ In most instances, the owners share the cost of a management team that is responsible for locating certified pilots and crew members, as well as the costs for maintaining, housing, insuring, and dispatching the aircraft.⁸ The management fee is normally distributed among the owners according to their percentage of ownership.⁹ Although fractional aircraft ownership is a viable option for many entrants into the private aviation space, there are still several major issues with it. Fractional ownership has a very high capital requirement for entry.¹⁰ Notably, fractional aircraft ownership is similar to owning a real estate time share. Often, the aircraft is requested by multiple owners for high travel dates.¹¹ This leaves fractional owners without access to an aircraft when they want to use that aircraft. Additionally, it is incredibly hard to value a fractional share of an aircraft.¹²

A private jet card enables a user to pre-buy time on a specified type of aircraft.¹³ The user can then book the aircraft through the company that issues the card. That company arranges the transportation in the specified aircraft and debits the user's card account. Although there are four types of private jet cards, for the purpose of this Comment, the most common charter-based private jet card is the type analyzed.¹⁴ Using the standard private jet card, the company issuing the card acts as an air charter bro-

⁶ See Mark A. Dombroff, *Liability and the Growth of Fractional Aircraft Ownership Programs*, 16 AIR & SPACE LAW. 4, 4 (2002).

⁷ *Id.*

⁸ See *id.*

⁹ *Id.*

¹⁰ See *Mile-High Millionaires: When Should You Buy a Jet?*, *supra* note 3.

¹¹ James D. Butler, *The Fundamentals of Fractional Ownership*, BUS. JET TRAVELER (Jan. 2008), <https://www.bjtonline.com/business-jet-news/the-fundamentals-of-fractional-ownership> [<https://perma.cc/T899-CYJA>].

¹² *Id.*

¹³ See Peter Myers, *Do You Want a Jet Card to Ride?*, REUTERS (Oct. 26, 2012), <https://www.reuters.com/article/uk-private-jet-card-idUSLNE89P01920121026> [<https://perma.cc/7T6L-EL5C>].

¹⁴ See Doug Gollan, *Explaining the Difference Between Broker, Fractional Fleet, Managed Fleet and Owned Fleet Jet Cards*, PRIVATE JET CARD COMPARISONS (Oct. 11, 2018), <https://privatejetcardcomparisons.com/2018/10/11/explaining-the-differences-between-broker-fractional-fleet-managed-fleet-and-owned-fleet-jet-cards/> [<https://perma.cc/6MXV-5CLP>].

ker.¹⁵ The air charter broker organizes the requested trip on a requested model of aircraft. The user pays a flat hourly rate for the service.¹⁶ The broker deducts its fee from the hourly rate before paying the charter operator or owner of the underlying aircraft.¹⁷ This method of accessing private aviation is particularly attractive and has boomed in recent years.¹⁸ The boom in usage is a primary reason why the DOT began its rulemaking on air charter brokers.¹⁹ The surge in use of private jet cards is likely due to convenience, ease of use, and low capital requirements.²⁰ Additionally, private jet card users enjoy less liability because they do not have an ownership interest in the aircraft.²¹ Instead, the aircraft is most commonly owned, operated, and maintained by an independent charter service.²²

An alternative to the jet-card option, direct aircraft charter is by far the cheapest way for a user to access the world of private aviation. Unlike using a jet card, direct aircraft charter requires a user to interact directly with the direct air carrier on his or her own behalf.²³ Aircraft charter operations provide an aircraft directly to a user and are typically governed by 14 C.F.R. Part 135.²⁴ These “Part 135” operators provide flight services directly to a consumer or through an air charter broker. The least expensive way for a user to access a private aircraft is directly

¹⁵ Myers, *supra* note 13.

¹⁶ *Frequently Asked Questions*, PRIVATE JET CARD COMPARISONS, <https://privatejetcardcomparisons.com/frequently-asked-questions/> [https://perma.cc/HM3D-NNB4] (last visited Nov. 4, 2019).

¹⁷ See Doug Gollan, *Is Private Jet Charter Ready for a New Pricing Model?*, FORBES (Feb. 28, 2018), <https://www.forbes.com/sites/douggollan/2018/02/28/is-private-jet-charter-ready-for-a-new-pricing-model/#3b859a7d688c> [https://perma.cc/W82B-B5D2].

¹⁸ See, e.g., *Jet Card Comparisons by Company*, PRIVATE JET CARD COMPARISONS, <https://privatejetcardcomparisons.com/jet-card-comparisons-by-company/> [https://perma.cc/M2KJ-U4J7] (last visited Nov. 7, 2019) (from 2000–2016, twenty-nine new major jet card companies were added, with five added in 2016 alone).

¹⁹ See Enhanced Consumer Protections for Charter Air Transportation, 78 Fed. Reg. 59,880, 59,882 (proposed Sept. 30, 2013).

²⁰ See *Fractional Jet Cards*, SHERPA RPT., <https://www.sherpareport.com/aircraft/jet-cards.html> [https://perma.cc/C8QG-YX58] (last visited Nov. 4, 2019) (twenty-five hours of flight time on an average jet card using an average light private jet costs between \$145,000 and \$165,000).

²¹ See Dombroff, *supra* note 6.

²² See *Frequently Asked Questions*, *supra* note 16.

²³ See Doug Gollan, *How to Compare Jet Cards and Charter*, FORBES (Dec. 31, 2018), <https://www.forbes.com/sites/douggollan/2018/12/31/how-to-compare-jet-cards-and-charter/#6d4ec4031cf2> [https://perma.cc/UT5C-SUQ5].

²⁴ 14 C.F.R. § 135.1 (2014).

through a charter operation. This avoids a brokerage fee. However, for a user to track down a specific charter operation in its area that will provide a specific flight is a very tedious task.²⁵ Air charter brokers are not paid for doing nothing. In fact, an inexperienced user can end up paying significantly more if they are unprepared for back haul fees and fees incurred when the aircraft is sitting at the user’s destination.²⁶ Air charter brokers can often match users on their trips to split these costs and alleviate some of the financial burden of chartering an aircraft. As such, it takes a tremendous amount of time and expertise for a user to charter an aircraft in the most cost-effective way possible.

On September 17, 2018, the DOT finalized its rule making for air charter brokers.²⁷ These new rules allow air charter brokers a blanket exemption from the civil penalties associated with offering unauthorized air transportation.²⁸ Further, the new rules provide exact guidelines for what air charter brokers can and cannot do.²⁹ Through these regulations, the DOT has made it easier for air charter brokers to offer a wider variety of services to more passengers. This wider variety of services allows for more flexible, by-the-seat or by-the-hour charter services.³⁰ It allows expansion of the offerings of existing brokerage services and paves the way for more jet cards or “jet-app” companies to operate in the space.³¹ This “uberization” of private air travel will undoubtedly have many significant legal implications, some of which are unanticipated by regulators. Important upcoming issues likely include: (1) accountability measures; (2) ensuring maintenance of aircraft insurance; (3) tort liability; (4) jurisdictional issues; (5) potential new entrants to the business space; (6) air charter broker required disclosures; (7) meeting the definition of “air charter broker”; (8) unfair and deceptive practices litigation; and (9) corporate structuring, to name a few.³²

²⁵ See Gollan, *Is Private Jet Charter Ready for a New Pricing Model?*, *supra* note 17.

²⁶ See Gollan, *How to Compare Jet Cards and Charter*, *supra* note 23.

²⁷ Increasing Charter Air Transportation Options, 83 Fed. Reg. 46,867 (Sept. 17, 2018).

²⁸ See *id.* at 46,875 (codified at 14 C.F.R. § 295.10).

²⁹ *Id.* at 46,875–76.

³⁰ Cf. Baxt & Palen, *supra* note 5, at 9.

³¹ See *id.*

³² See generally, e.g., Dombroff, *supra* note 6; Ben Popper & Colin Lecher, *Flight Risk*, VERGE (Mar. 28, 2017), <https://www.theverge.com/2017/3/28/15055046/jetsmarter-app-membership-cost-reviews-high-prices-lawsuits> [<https://perma.cc/5PWR-QWTC>].

This rule will likely have a positive impact on the air charter industry. The new rules allow for more competition, more unique ways of flying privately, more customer access, and with increased use, more excise tax revenue for the Federal Aviation Administration (FAA) and the DOT to fund aircraft safety measures.³³ Further, the new rules allow for more ingenuity. This includes more Uber-like services in the private aviation industry.³⁴ New technology is important to revolutionize the rather stagnant area of general aviation.

Uber, Inc. is a ride-hailing technology.³⁵ Through the Uber application, a user may complete a five-step process to get a ride from point to point in a vehicle.³⁶ First, the user opens the application on his or her internet-connected device, and inputs a destination, pickup point, time, and car.³⁷ The user is then matched with a driver.³⁸ The driver picks up the rider, then takes the rider to the desired destination.³⁹ Finally, the driver and user rate and review each other.⁴⁰ This service is available in almost any major city nationwide.⁴¹ As proposed, after the new rule for air charter brokers goes into effect, there is no reason why this same business model could not apply to the air charter business.

Uber already offers a similar ride-hailing service for private jets.⁴² However, under current legislation, there is limited competition in the space, allowing UberJets (a similarly named but separate company from Uber)⁴³ to charge a \$5,000 initiation fee, plus a \$9,500 per year membership fee to access the ser-

³³ See *Airport & Airway Trust Fund (AATF)*, FED. AVIATION ADMIN., <https://www.faa.gov/about/budget/aatf/> [<https://perma.cc/VZ3Q-7TAD>] (last modified June 24, 2019) (explaining that excise taxes from passenger flights are the largest source of revenue for the FAA's Airport and Airway Trust Fund).

³⁴ See, e.g., *UBERJETS*, <https://flyuberjets.com/> [<https://perma.cc/UP2K-S64V>] (last visited Nov. 5, 2019).

³⁵ *How Uber Works*, UBER, <https://www.uber.com/about/how-does-uber-work/> [<https://perma.cc/C6J9-2Y2H>] (last visited Nov. 5, 2019).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Find Uber in Cities Around the World*, UBER, <https://www.uber.com/global/en/cities/> [<https://perma.cc/LBE5-BP49>] (last visited Nov. 5, 2019).

⁴² See *UBERJETS*, *supra* note 34.

⁴³ Mike Arnot, *These Startups Will Get You on a Private Jet—At a Fraction of the Typical Cost*, *AFAR* (Feb. 13, 2019), <https://www.afar.com/magazine/these-startups-will-get-you-on-a-private-jet-at-a-fraction-of-the-typical-cost> [<https://perma.cc/7ZMG-VMJC>].

vice.⁴⁴ It is significant to note that UberJets has a limited number of destinations it services and is in a primary stage of growth.⁴⁵ The DOT Final Rule on air charter brokers will undoubtedly invite further competition and fee compression into the air charter broker business.

This Comment will cover the DOT’s Final Rule on air charter brokers.⁴⁶ Part II will analyze the historical background of air charter broker regulation. Part III will analyze the provisions of the new Final Rule on Air Charter Brokers in text. Part IV will discuss the potential industry impact provided by this regulatory change.

II. HISTORICAL BACKGROUND

A. 2007 ADVANCED NOTICE OF PROPOSED RULEMAKING

On January 26, 2007, the DOT released its Advanced Notice of Proposed Rulemaking entitled “Consumer Information Regarding On-Demand Air Taxi Operations.”⁴⁷ The advanced notice sought input from the private aviation community.⁴⁸ The primary purpose of this inquiry was to determine industry best practices for increasing transparency between all parties involved in the charter of an aircraft.⁴⁹

1. *Dick Ebersol Disaster*

An airplane crash in Montrose, Colorado sparked the DOT’s interest in making a new set of Air Charter Broker rules.⁵⁰ On November 28, 2004, a chartered Canadair CL-600-2A12 crashed upon takeoff, killing three and seriously injuring the other three

⁴⁴ See *Initiation & Annual Membership Package*, UBERJETS, <https://flyuberjets.com/product/uberjets-initiation-annual-membership-package/> [https://perma.cc/V9TG-PM5W] (last visited Nov. 5, 2019).

⁴⁵ See, e.g., Jen Wiczner, *Uber Is Finally Offering UberJET Flights Again This Weekend*, FORTUNE (June 17, 2016), <http://fortune.com/2016/06/17/uber-uberjet-romania/> [https://perma.cc/5WVC-2VLV].

⁴⁶ Increasing Charter Air Transportation Options, 83 Fed. Reg. 46,867 (Sept. 17, 2018).

⁴⁷ Consumer Information Regarding On-Demand Air Taxi Operations, 72 Fed. Reg. 3773 (Jan. 26, 2007).

⁴⁸ *Id.* at 3773.

⁴⁹ *Id.* at 3774.

⁵⁰ *Id.*

occupants.⁵¹ Among the three survivors was the NBC Universal executive Dick Ebersol.⁵²

The National Transportation Safety Board (NTSB) crash report cites pilot inexperience and failure to ensure the wing tops were free of ice as causes for the disaster.⁵³ However, the NTSB noted other “non-causal factors that the Safety Board felt could nevertheless play a role in the safety choices that customers make when contracting for on-demand air taxi transportation with air charter companies.”⁵⁴ One of these factors was “a lack of transparency such that a customer or passenger may not know the identities of those businesses providing them with on-demand air transportation services, hindering those persons’ abilities to make decisions based on safety considerations.”⁵⁵

Consumers of on-demand air charter services often do not know exactly with whom they are contracting. For example, in the November 28, 2004, crash, the aircraft was operated by Air Castle Corporation.⁵⁶ Air Castle Corporation was “authorized to do business as California Airways, Global Airways, and Global Aviation.”⁵⁷ Further, “Air Castle Corporation was owned by Winfair Aviation Group, which also owned several other companies, including Hop-A-Jet which leased the accident aircraft to Air Castle.”⁵⁸ Air Castle Corporation had a significantly poorer safety record than Key Air.⁵⁹

It is incredibly important to have information clarity because air charter operators often sell specified trips on a secondary market.⁶⁰ In this case, Air Castle was not the original charter

⁵¹ NAT’L TRANSP. SAFETY BD., AVIATION ACCIDENT FINAL REPORT, #DEN05MA029, at 1 (2006).

⁵² See Richard Sandomir, *Ebersol Is Haunted by a Day in November*, N.Y. TIMES (June 2, 2005), <https://www.nytimes.com/2005/06/02/sports/othersports/ebersol-is-haunted-by-a-day-in-november.html> [<https://perma.cc/VD5K-98JA>] (Dick Ebersol is largely responsible for programing including the Olympics and the National Football League (NFL) being televised on NBC).

⁵³ AVIATION ACCIDENT FINAL REPORT, *supra* note 51, at 1.

⁵⁴ Consumer Information Regarding On-Demand Air Taxi Operations, 72 Fed. Reg. at 3774.

⁵⁵ *Id.*

⁵⁶ NAT’L TRANSP. SAFETY BD., SAFETY RECOMMENDATION A-06-43, at 1 (2006).

⁵⁷ *Id.* at 2.

⁵⁸ *Id.*

⁵⁹ See Walter H. Hinton, II, *New Air Charter Transparency Rules Proposed*, LEX- OLOGY (Nov. 7, 2013), <https://www.lexology.com/library/detail.aspx?g=A9203998-c340-4ef2-95f1-ea8c4076d12f> [<https://perma.cc/AP9S-EEVX>].

⁶⁰ SAFETY RECOMMENDATION A-06-43, *supra* note 56, at 2.

operator contracted.⁶¹ In fact, the “[p]assengers had arranged the flight with Key Air, an operator they had used in previous charter flights.”⁶² Key Air sold the trip on the secondary market to Air Castle Corporation.⁶³ This is normal practice in the air charter industry.⁶⁴ As such, customers often have no idea which charter operator will actually be conducting their chartered flight.⁶⁵

2. NTSB Recommendations

Currently, Part 135 and 121 operators “may not operate an aircraft . . . using a business name other than a business name appearing in the certificate holder’s operations specifications.”⁶⁶ Additionally, such an operator must “legibly display[]” the “name of the certificate holder who is operating the aircraft, or the air carrier or operating certificate number of the certificate holder who is operating the aircraft.”⁶⁷ Notably, these displays do not have to display the true name of the operator of the flight.⁶⁸ This prevents users from identifying important information about their aircraft charter, including important safety record information. The lack of transparency results in chartering entities hiring a potentially unsafe operator with no way of knowing the operator’s poor safety record before chartering the airplane.

As a result of the general lack of information transparency, the NTSB initially recommended greater disclosure requirements for Part 135 operators.⁶⁹ This initial recommendation by the NTSB to the DOT sought to require Part 135 operators to disclose: (1) “the name of the company with operational control of the flight, including any ‘doing business as’ names contained in the operations specifications”; (2) “the name of the aircraft owner”; and (3) “the name(s) of any brokers involved in arranging the flight.”⁷⁰

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See id.* at 1.

⁶⁶ 14 C.F.R. § 119.9(a) (1997).

⁶⁷ *Id.* § 119.9(b).

⁶⁸ SAFETY RECOMMENDATION A-06-43, *supra* note 56, at 2.

⁶⁹ *See id.*

⁷⁰ *Id.* at 3.

3. Department of Transportation Adoption

The DOT presented these NTSB suggestions in its 2007 Advanced Notice of Proposed Rulemaking (ANPR).⁷¹ The DOT agreed that, “adequate information is essential in order that consumers be afforded the opportunity to make informed decisions about their flight choices.”⁷² The DOT also asked the broader aviation community for suggestions on the best way to implement the NTSB recommendations.⁷³

To support this proposition, the DOT pointed to statutory authority, previous actions of the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, and the increase of Part 135 operators in recent years.⁷⁴ The DOT cited statutory authority to support the recommended disclosure requirements.⁷⁵ 14 C.F.R. § 399.80 outlines the unfair and deceptive practices of ticket agents.⁷⁶ Likewise, “it would be a deceptive practice . . . for an air taxi to misidentify to a customer the carrier actually operating a flight.”⁷⁷

B. 2013 NOTICE OF PROPOSED RULEMAKING

On September 30, 2013, the DOT released its Notice of Proposed Rulemaking (NPRM) entitled “Enhanced Consumer Protections for Charter Air Transportation.”⁷⁸ This NPRM proposed to: (1) address the NTSB disclosure recommendations; (2) create a new class of indirect air carriers called “air charter broker[s]”; (3) codify exemption authority for air ambulance services; and (4) “[c]larif[y] and codif[y] that certain air services performed under contract with the Federal government are in common carriage.”⁷⁹ This Comment discusses only the first two proposals.

⁷¹ Consumer Information Regarding On-Demand Air Taxi Operations, 72 Fed. Reg. 3773, 3773 (Jan. 26, 2007).

⁷² *Id.* at 3774.

⁷³ *Id.* at 3774–75.

⁷⁴ *Id.* at 3774.

⁷⁵ *Id.*

⁷⁶ 14 C.F.R. § 399.80 (2019).

⁷⁷ Consumer Information Regarding On-Demand Air Taxi Operations, 72 Fed. Reg. at 3774.

⁷⁸ Enhanced Consumer Protections for Charter Air Transportation, 78 Fed. Reg. 59,880 (Sept. 30, 2013).

⁷⁹ *Id.* at 59,880–81.

1. *Response to Disclosure Requirement Comments*

The 2013 NPRM addressed the four NTSB disclosure requirement recommendations.⁸⁰ The NTSB recommended that customers and passengers of aircraft charter have a right to be informed of:

- (1) The name of the company in operational control of the aircraft during flight;
- (2) any other “doing business as” names contained in the Operations Specifications of the carrier in operational control during the flight;
- (3) the name of the aircraft owner;
- and (4) the names of all brokers involved in arranging the flight.⁸¹

These disclosure requirements were met with support from the ANPR commenters.⁸² Further, the DOT adopted the NTSB’s logic and accepted that, since deceptive practices are prohibited under different circumstances, they should be more heavily regulated with respect to aircraft charter.⁸³ As such, the DOT proposed requiring air taxis and commuter air carriers to disclose: (1) “[t]he corporate name of the direct air carrier in operational control of the aircraft”; (2) “the capacity in which the air taxi is acting in contracting for the air transportation”; (3) “the existence of any corporate or pre-existing business relationship with the direct air carrier”; (4) “the make and model of the aircraft”; (5) “the total cost of the air transportation”; and (6) “the existence of any fees and their amounts.”⁸⁴

Additionally, if there is a change in operating entity after the charter contract has been signed, the operator would have to provide the customer with written notice of the change.⁸⁵ The DOT proposed a “reasonable” time requirement for the provision of this notice.⁸⁶ Per its guidelines, reasonable is defined as approximately twenty-four hours before the proposed flight.⁸⁷ A reasonable amount of time means a sufficient amount of time to give the customer time “to make an informed decision as to whether he or she wants to accept the change.”⁸⁸ The DOT proposed that a failure to provide adequate notice would entitle the

⁸⁰ *Id.* at 59,881.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 59,880, 59,883.

⁸⁴ *Id.* at 59,881.

⁸⁵ *Id.*

⁸⁶ *Id.* at 59,884.

⁸⁷ *Id.*

⁸⁸ *Id.*

customer to a full refund.⁸⁹ The notice requirement does not require confirmation or customer receipt.⁹⁰

2. *Creation of the Air Charter Broker Terminology*

In the 2013 NPRM, the DOT defined an “air charter broker” as “persons or companies that do not currently hold DOT economic authority to function either as an indirect air carrier or as a direct air carrier, but that arrange air transportation services for prospective charter customers (charterers) to be provided by direct air carriers.”⁹¹ This distinction was made to require certain disclosures for entities falling within the definition of air charter broker.⁹² At the time of the NPRM, brokers “ha[d] no authority to hold out air transportation in their own right as a direct or an indirect air carrier”⁹³ As a result, the majority of brokers acted as a charter or charterer agent.⁹⁴ At the time, an air charter broker was considered a “ticket agent.”⁹⁵ Ticket agents are defined as “a person . . . that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.”⁹⁶

The growth of the business aviation market and the advent of the internet have increased the scope of the air charter broker’s role.⁹⁷ In response, the DOT has conducted extensive “industry outreach” to dissuade air charter brokers from misleading the public and has taken action against those who have.⁹⁸

Under current regulations, “an air carrier may provide air transportation only if the air carrier holds a certificate . . . authorizing the air transportation.”⁹⁹ However, an air carrier may operate pursuant to an exemption granted by the DOT.¹⁰⁰ It is important to note that this certification requirement applies equally to Direct Air Carriers (DAC) and Indirect Air Carriers

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 59,882.

⁹² *See id.* at 59,884.

⁹³ *Id.* at 59,882.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 49 U.S.C. § 40102(a)(45) (2012).

⁹⁷ Enhanced Consumer Protections for Charter Air Transportation, 78 Fed. Reg. at 59,882.

⁹⁸ *Id.*

⁹⁹ 49 U.S.C. § 41101(a)(1) (2012).

¹⁰⁰ Enhanced Consumer Protections for Charter Air Transportation, 78 Fed. Reg. at 59,880.

(IAC).¹⁰¹ A DAC is a “certificated commuter . . . that directly engages in the operation of aircraft,” while an IAC is “any person who undertakes to engage indirectly in air transportation operations and who uses for such transportation the services of a direct air carrier.”¹⁰² An air charter broker is considered an IAC.¹⁰³

The DOT stressed its important mission of letting the marketplace self-govern as the main reason it had allowed IAC’s to engage in air transportation in the past.¹⁰⁴ The DOT has regulated the activities of air charter brokers acting as ticket agents by prohibiting them from misleading the public.¹⁰⁵ Ticket agents are prohibited from:

- (1) [m]isleading the public into believing they are air carriers;
- (2) misleading the public about the qualifications of pilots or the safety record or certification of air carriers, aircraft, or crew;
- (3) misleading the public about the quality or kind of service . . . ;
- and (4) selling air transportation without a binding commitment with a direct air carrier for that transportation.¹⁰⁶

In 2013, the DOT notified the air charter broker community of these prohibitions through an official NPRM.¹⁰⁷ Although not allowed, the DOT recognized the economic benefit for air charter brokers if they were allowed “to act as a principal in providing air transportation.”¹⁰⁸

By its own admission, the DOT agreed that “the regulations that now exist to authorize indirect air carriers to engage in passenger air transportation are not conducive to the industry served by air charter brokers.”¹⁰⁹ This is due to the expansive growth in the role of air charter brokers in recent years.¹¹⁰ It has prevented air charter brokers from taking advantage of “the authorizations . . . for other indirect air carriers,” thus, stifling “innovation and consumer benefits.”¹¹¹

¹⁰¹ *Id.* at 59,882.

¹⁰² 14 C.F.R. § 380.2 (2005).

¹⁰³ Enhanced Consumer Protections for Charter Air Transportation, 78 Fed. Reg. at 59,883.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 59,882.

¹⁰⁶ *Id.* at 59,883.

¹⁰⁷ *Id.* at 59,880.

¹⁰⁸ *Id.* at 59,883.

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *Id.*

The unique position of air charter customers required revisiting the rules regulating air charter brokers.¹¹² Air charter customers are often high net worth individuals or business.¹¹³ An inherent issue with this customer base is that their flight itinerary is subject to change at any time, including during the flight.¹¹⁴ This is a major reason why the DOT did not lump air charter brokers into the existing Part 380 regulations.¹¹⁵ It is this unique set of circumstances that prompted the DOT to propose that air charter brokers operate as IACs, “subject to appropriate consumer protection provisions.”¹¹⁶ In fact, the proposal creates a subsection of IACs specific to air charter brokers.¹¹⁷

Air charter brokers would “self-identify” as IACs under the proposal.¹¹⁸ This would mean no formal licensure requirement.¹¹⁹ It would also allow “individuals who self-aggregate to form a single entity” to be air charter brokers.¹²⁰ Presumably, this would allow fractional ownership programs to self-identify as IAC air charter brokers. The DOT also sought comment on requirements for licensure of non-U.S. citizen air charter brokers.¹²¹

It is important to note that the proposal to create the air charter broker classification would require air charter brokers to make all of the proposed disclosure requirements (described in section II.A) and one additional disclosure.¹²² This additional disclosure is “the existence or absence of liability insurance held by the air charter broker . . . and the monetary limits of any such insurance.”¹²³ The DOT proposes the same reasonable notice requirement described above.¹²⁴ The penalty for failure to provide reasonable notice of the required disclosures would be a full refund of the charter fee.¹²⁵

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 59,880.

¹¹⁸ *Id.* at 59,884.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 59,883.

¹²¹ *Id.* at 59,884.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

Under this DOT proposal, the total cost of the air charter disclosure requirement would be satisfied if the air charter broker “discloses the existence of all items that may impact the total cost, including the range of fees associated for each item, as well as any factors which would cause the fees to be in the high or low range.”¹²⁶ This flexible approach is needed due to the inherent nature of aviation.¹²⁷ Many times, fuel, hangar, and de-icing prices vary in real time.¹²⁸ This flexible approach allows wiggle room for the final total cost and protects the consumer by informing them of the range of possible process.¹²⁹

Final proposals included: (1) requiring air charter brokers to maintain a dedicated cash fund for refund purposes; (2) enumerating “unfair and deceptive practices” and “unfair methods of competition”; and (3) record maintenance requirements.¹³⁰

III. CURRENT STATE OF THE LAW

On September 17, 2018, the DOT issued its final rule entitled “Increasing Charter Air Transportation Options.”¹³¹ The stated mission of the final rule is to “facilitate innovation and growth in the air charter industry while strengthening the legal protections provided to consumers of charter air transportation.”¹³² Most importantly, it allows air charter brokers to act as principals “to provide single entity charter air transportation of passengers.”¹³³ Additionally, the final rule prescribes the required disclosures and prohibited deceptive practices for air charter brokers.¹³⁴ The rule went into effect on February 14, 2019.¹³⁵

A. NEW CLASS OF INDIRECT AIR CARRIER

There are several changes from the NPRM to the final rule with respect to air charter brokers. The term air charter brokers includes bona fide agents.¹³⁶ Additionally, the DOT decided it

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 59,882–85.

¹³¹ Increasing Charter Air Transportation Options, 83 Fed. Reg. 46,867 (Sept. 17, 2018).

¹³² *Id.* at 46,867.

¹³³ *Id.*

¹³⁴ *Id.* at 46,868.

¹³⁵ *Id.*

¹³⁶ *Id.* at 46,869.

was not necessary to create a registry of air charter brokers.¹³⁷ Finally, the DOT adopted the definition of “single entity charter” to include “self-aggregated individuals.”¹³⁸ These changes were made as a result of industry comments.¹³⁹

New Code of Federal Regulations sections relevant to air charter brokers generally include: 14 C.F.R. §§ 295.1, 295.3, 295.5, 295.7, 295.10, and 295.12.¹⁴⁰

Purpose. The DOT defines an air charter broker as “an indirect air carrier, foreign indirect air carrier or a bona fide agent.”¹⁴¹ Air charter brokers provide “indirect air transportation of passengers on single entity charters aboard large and small aircraft.”¹⁴² It is important to note that the term “single entity” includes “self-aggregated individuals.”¹⁴³

Applicability. These rules apply to “any person or entity acting as an air charter broker.”¹⁴⁴

Definitions. An air charter broker is “a person or entity that, as an indirect air carrier, foreign indirect air carrier, or a bona fide agent, holds out, sells, or arranges single entity air transportation using a direct air carrier.”¹⁴⁵ A bona fide agent is an agent “appointed or authorized” to act on behalf of an air charter broker, charterer, or direct air carrier.¹⁴⁶ A charterer is the person or entity who charters the aircraft.¹⁴⁷ A direct air carrier offers air transportation and has operational control of the aircraft.¹⁴⁸ An indirect air carrier “arranges air transportation and separately contracts with direct air carriers.”¹⁴⁹ A large aircraft has a capacity of “more than 60 seats or a maximum payload capacity of more than 18,000 pounds.”¹⁵⁰ A small aircraft has a “capacity of 60 seats or fewer or a maximum payload capacity of 18,000 pounds or less.”¹⁵¹

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 46,888.

¹⁴¹ 14 C.F.R. § 295.1 (2019).

¹⁴² *Id.*

¹⁴³ *See id.* § 295.5(h).

¹⁴⁴ *Id.* § 295.3.

¹⁴⁵ *Id.* § 295.5(b).

¹⁴⁶ *Id.* § 295.5(c).

¹⁴⁷ *Id.* § 295.5(d).

¹⁴⁸ *Id.* § 295.5(f).

¹⁴⁹ *Id.* § 295.5(g).

¹⁵⁰ *Id.* § 295.5(j).

¹⁵¹ *Id.* § 295.5(k).

One of the most important definitions of Part 295 is that of “single entity charter.”¹⁵² Under Part 295, 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 when individual passengers self-aggregate to form a single entity for flights to be operated using small aircraft.”¹⁵³ The “self-aggregation” distinction allows passengers who band together to charter a small aircraft and distribute the associated costs amongst themselves.¹⁵⁴

Agency Relationships. An air charter broker can act as a “bona fide agent” with express authorization from a “charterer, direct air carrier, or foreign direct air carrier.”¹⁵⁵

Authority and Exemptions. Air charter brokers are exempt from provisions of the United States Code pertaining to air carrier certificates,¹⁵⁶ foreign air transportation,¹⁵⁷ and pricing.¹⁵⁸ However, they are still required to abide by the foreign air transportation anti-discrimination statute.¹⁵⁹ The DOT can revoke this exemption “in the public interest” or “to protect the traveling public” without a hearing.¹⁶⁰

B. CONSUMER PROTECTIONS

Concluding that “consumers, regardless of sophistication level, would benefit from an increased amount of information,” the DOT decided to require three of the proposed disclosures and make the other three available on request.¹⁶¹ The DOT dropped entirely the requirement that the “type of aircraft be disclosed” because that information is already disclosed through contract negotiations virtually every time.¹⁶² The DOT also dropped the insurance requirement and adopted a reasonable time requirement for making the required disclosures.¹⁶³ There

¹⁵² *See id.* § 295.5(h).

¹⁵³ *Id.*

¹⁵⁴ *See* Increasing Charter Air Transportation Options, 83 Fed. Reg. 46,867, 46,869 (Sept. 17, 2018).

¹⁵⁵ 14 C.F.R. § 295.7.

¹⁵⁶ Increasing Charter Air Transportation Options, 83 Fed. Reg. at 46,875 (exempting brokers from 49 U.S.C. §§ 41101–41113).

¹⁵⁷ *Id.* (exempting brokers from 49 U.S.C. §§ 41301–41313).

¹⁵⁸ *Id.* (exempting brokers from 49 U.S.C. §§ 41501–41511).

¹⁵⁹ *Id.* (citing 49 U.S.C. § 41310).

¹⁶⁰ 14 C.F.R. § 295.12 (2019).

¹⁶¹ Increasing Charter Air Transportation Options, 83 Fed. Reg. at 46,870.

¹⁶² *Id.*

¹⁶³ *Id.*

is no confirmation requirement for notice.¹⁶⁴ The DOT adopted the refund requirement for failure to provide notice.¹⁶⁵

New Code of Federal Regulations sections relevant to the disclosure requirements for air charter brokers include: 14 C.F.R. §§ 295.20, 295.23, 295.24, and 295.26.¹⁶⁶

Air charter brokers are not permitted to arrange charter services with direct air carriers that lack authority to provide their services from the DOT or the FAA.¹⁶⁷ All advertising produced by air charter brokers must contain an accompanying disclosure.¹⁶⁸ This disclosure must state that “the air charter broker is an air charter broker” and “it is not a direct air carrier . . . in operational control of aircraft, and that the air service advertised shall be provided by a properly licensed direct air carrier.”¹⁶⁹ The air charter broker may advertise on aircraft so long as the direct air carrier’s name is displayed in a way that is not confusing to consumers.¹⁷⁰

Prior to entering into a contract for a flight with a charterer, the air charter broker must at least disclose: (1) the corporate name of the direct air carrier including any “doing business as” (d/b/a) names; (2) whether the air charter broker is the DAC’s agent; and (3) the existence of the air charter broker’s liability insurance and its limit.¹⁷¹ Upon request of the charterer, an air charter broker must disclose: (1) the existence of a business relationship with the direct air carrier, if acting as the charterer’s agent; (2) the “total cost of the air transportation,” including taxes and fees; and (3) any third-party fees and their amount if known or a reasonable estimate if unknown.¹⁷² If the air charter broker does not know any of this information or it changes, they must disclose the change within a reasonable time after it becomes known.¹⁷³ As discussed in the notice, a reasonable time is approximately twenty-four hours after such information becomes known, as long as the charterer can make an informed decision as to whether he or she wants to accept the additional

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* at 46,869.

¹⁶⁷ *See* 14 C.F.R. § 295.20 (2019).

¹⁶⁸ *Id.* § 295.23(a).

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* § 295.23(b).

¹⁷¹ *Id.* § 295.24(a)(1)–(2), (6).

¹⁷² *Id.* § 295.24(a)(3)–(5).

¹⁷³ *Id.* § 295.24(b).

information or the change.¹⁷⁴ Failure to disclose this information results in a “full refund of any monies paid for the charter air transportation and services” within twenty days of a request by the charterer.¹⁷⁵

C. UNFAIR AND DECEPTIVE PRACTICES

The DOT decided to codify all deceptive practices enumerated in the NPRM.¹⁷⁶ This is because of the significant enforcement actions the DOT has already taken against air charter brokers regarding deceptive practices.¹⁷⁷ Also cited for the enumeration is clarification and notice of what is and is not an unfair practice.¹⁷⁸ The DOT did not codify a specific record retention period requirement for air charter brokers.¹⁷⁹

The new Code of Federal Regulations sections relevant to the unfair and deceptive practices for air charter brokers include: 14 §§ C.F.R. 295.22 and 295.50.¹⁸⁰

Air charter brokers are prohibited from engaging in “unfair or deceptive practice[s] or unfair method[s] of competition.”¹⁸¹ The new rule enumerates eleven deceptive or unfair practices.¹⁸² Such enumerated unfair practices are in violation of the United States Code.¹⁸³ Enumerated unfair or deceptive practices include: (1) inducing the public to “reasonably believe” an air charter broker is a direct air carrier; (2) “[m]isrepresentations as to the quality or kind of service or type of aircraft”; (3) “[m]isrepresentations as to the 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”; and (4) “[m]isrepresentations as to the qualifications of pilots or safety record or certification of pilots, aircraft, or air carriers.”¹⁸⁴ An air charter broker may not make misrepresentations with respect to insurance, fares, charges, or membership in an air char-

¹⁷⁴ Increasing Charter Air Transportation Options, 83 Fed. Reg. 46,867, 46,870 (Sept. 17, 2018).

¹⁷⁵ *See id.* at 46,876.

¹⁷⁶ *See id.* at 46,871.

¹⁷⁷ *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 46,870.

¹⁸¹ 14 C.F.R. § 295.22 (2019).

¹⁸² *Id.* § 295.50(b)(1)–(11).

¹⁸³ *Id.* § 295.50(b) (citing 49 U.S.C. § 41712).

¹⁸⁴ *Id.* § 295.50(b)(1)–(4).

ter broker auditing committee.¹⁸⁵ An air charter broker may not tell a charterer that a flight has been arranged without a binding commitment from the direct air carrier.¹⁸⁶ Further, an air charter broker may not advertise in a confusing manner or misrepresent charterer requirements.¹⁸⁷

IV. ANALYSIS

The DOT has delivered an impressive set of regulations with Part 295. With the stated purpose of revolutionizing the world of private air charter, Part 295 will undoubtedly have a long-lasting impact.¹⁸⁸ The new classification of air charter broker gives potential entrants a set of rules with which to structure their enterprises.¹⁸⁹ Prior to these regulations, the world of air charter brokerage was essentially the “wild west.” Now, air charter consumers will have mandatory access to all the information needed to make informed decisions about their charter transportation.¹⁹⁰ Previously, these consumers rarely knew what they were purchasing. The lack of transparency led to accidents, death, and significant enforcement action by the DOT.¹⁹¹ It also allowed a few established charter broker operations to capitalize on the lack of clear information.¹⁹² Now that air charter brokers are required to disclose information, consumers can make more informed financial decisions as well. Required disclosures result in smaller brokerage fees, more competition, and a closer relationship between air charterers and Part 135 charter operators,¹⁹³ while also increasing the safety of aircraft charter as an alternative to conventional commercial aviation, fractional ownership, and full ownership programs.

¹⁸⁵ *Id.* § 295.50(b)(5)–(7).

¹⁸⁶ *Id.* § 295.50(b)(8).

¹⁸⁷ *See id.* § 295.50(b)(9)–(11).

¹⁸⁸ *See id.* § 295.1.

¹⁸⁹ *See id.*

¹⁹⁰ *See id.* §§ 295.20, 295.23–295.26.

¹⁹¹ *See* Enhanced Consumer Protections for Charter Air Transportation, 78 Fed. Reg. 59,880, 59,881–82 (Sept. 30, 2013).

¹⁹² *Cf.* SAFETY RECOMMENDATION A-06-43, *supra* note 56, at 1–2.

¹⁹³ *See* NAT’L TRANSP. SAFETY BD., NTSB/AAB-06/03, CRASH DURING TAKEOFF IN ICING CONDITIONS CANADAIR, LTD., CL-600-2A12, N873G, MONTROSE, COLORADO, NOVEMBER 28, 2004, at 24–27 (2006) (concurring statement of NTSB member Deborah A.P. Hersman); Enhanced Consumer Protections for Charter Air Transportation, 78 Fed. Reg. at 59,882; *cf.* Gollan, *Is Private Jet Charter Ready for a New Pricing Model?*, *supra* note 17.

The first part of this Section hypothesizes how an Uber-type company could expand into the aircraft charter space. It analyzes how the company could fully comply with Part 295 while introducing a market-disrupting technology. The second part of this Section discusses the important increase in safety provided by Part 295. Increasing safety in the private air charter industry will undoubtedly entice more consumers and ensure the continued vitality of Part 135 aircraft charter operations.

A. THE IMPACT OF SELF-AGGREGATION

UberJets is a private jet service that allows users to use a similar app platform as the Uber ride hailing service to summon private aircraft.¹⁹⁴ This is one of the most progressive services of its kind at this time. Due to the new regulations released by the DOT, more ride-hailing type services are likely to spring up. The allowance of self-aggregation by the new rules allows this type of service.¹⁹⁵ While Part 295 applies only to single entity air charter, it defines self-aggregated groups as a single entity.¹⁹⁶ Self-aggregation allows charterers seeking charter air transportation to band together and charter an aircraft as a single entity.¹⁹⁷ These persons may self-aggregate and charter a small aircraft.¹⁹⁸ While the term “small aircraft” may not sound that impressive, as defined, a “small aircraft” may hold up to sixty passengers and have a maximum payload of 18,000 pounds.¹⁹⁹ The most important aspect of this distinction is that these persons may charter aircraft from Part 135 operators through an air charter broker.²⁰⁰ This means that there is no need to comply with ticketing requirements and the extensive Part 121 Air Carrier Certification process.²⁰¹

Charterers can now self-aggregate to charter an entire aircraft while splitting the cost of the charter between themselves.²⁰² This makes chartering aircraft significantly more cost effective for the individual charterer. It also ushers in use of an applica-

¹⁹⁴ See Wieczner, *supra* note 45.

¹⁹⁵ See 14 C.F.R. § 295.5(h) (2019).

¹⁹⁶ *Id.* §§ 295.3, 295.5(h).

¹⁹⁷ See *id.* § 295.5(h).

¹⁹⁸ *Id.*

¹⁹⁹ See *id.* § 295.5(k).

²⁰⁰ See *id.* § 295.5(f); see also 14 C.F.R. pt. 135.

²⁰¹ See *id.* § 295.10, see also 14 C.F.R. pt. 121.

²⁰² See *id.* § 295.10.

tion or “app”²⁰³ for chartering aircraft.²⁰⁴ Uber, Inc. already employs a similar technology in their ride-hailing app, but the company has not extended the exact same technology to its private aviation service.²⁰⁵ Using the Uber ride-hailing app, consumers may request a ride to and from any destination.²⁰⁶ An Uber driver may accept or pass up the ride.²⁰⁷ Users input basic categories, such as the size and status of the vehicle they request.²⁰⁸ However, they may not request a specific make and model of car.²⁰⁹ Similar technology is now applicable to chartering aircraft. The software can act as an air charter broker. Users may request the route and general type of aircraft they desire.²¹⁰ The Part 135 charter operator (the driver, by analogy in this instance) would then accept or decline the proposed air transportation route. Users would be able to self-aggregate for popular routes and split the fee demanded by the Part 135 operator on a pro rata basis.²¹¹

The more users that take a proposed trip, the cheaper the pro rata rate becomes. Wheels Up, an aircraft charter membership program, already offers a similar service.²¹² This service is available through its proprietary app.²¹³ Under its Core Membership plan, users have access to only two models of aircraft in a fixed pool of aircraft managed by Wheels Up.²¹⁴ Additionally, users must be members of Wheels Up to use the service.²¹⁵ The most basic membership fee is \$2,995, plus \$2,495 per year thereaf-

²⁰³ See *App*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/application> [<https://perma.cc/SUM4-MZ8Q>] (last visited Nov. 7, 2019) (an app is a computer application “designed for a mobile device (such as a smartphone)”).

²⁰⁴ See *Tap-To-Book*, UBERJETS, <https://flyuberjets.com/tap-to-book/> [<https://perma.cc/HB3T-Q9NH>] (last visited Nov. 7, 2019).

²⁰⁵ See Arnot, *supra* note 43.

²⁰⁶ *How Uber Works*, *supra* note 35.

²⁰⁷ See *id.*

²⁰⁸ *Id.*

²⁰⁹ See *id.*

²¹⁰ Cf. *Empty Legs*, UBERJETS, <https://flyuberjets.com/empty-legs/> [<https://perma.cc/T4H2-NDTD>] (last visited Nov. 7, 2019).

²¹¹ See Baxt & Palen, *supra* note 5, at 9.

²¹² *Shared Flights*, WHEELS UP, <https://wheelsup.com/socialaviation> [<https://perma.cc/WS4C-42GU>] (last visited Nov. 7, 2019).

²¹³ *Id.*

²¹⁴ See *Wheels Up Core Membership*, WHEELS UP, <https://wheelsup.com/individual-membership> [<https://perma.cc/LZZ6-HY7K>] (last visited Nov. 7, 2019).

²¹⁵ See *Wheels Up Connect Membership*, WHEELS UP, <https://wheelsup.com/connect-membership> [<https://perma.cc/BM5W-R3VN>] (last visited Nov. 7, 2019).

ter.²¹⁶ This is manifestly different than the standard Uber app. The Uber app requires no associated fees aside from the fees for car transportation.²¹⁷ Due to the new additions of Part 295, it is possible to have a direct relationship between the Part 135 operator and the charterer, much like Uber matches a user to a driver.

To build a qualifying app that provides air transportation for charterers in the same manner as Uber, one would have to ensure that it falls within the definition of air charter broker as an indirect air carrier. The app would likely qualify as an “entity acting as an air charter broker.”²¹⁸ Additionally, it would arrange single entity air transportation aboard small aircraft.²¹⁹ As such, the proposed app would fall within the purview of Part 295.

When there is an absence of an individual and charter transportation is being arranged by a computer, there are unique issues for disclosure. To address these, the required disclosures could be prepared through the app’s interface. There would be no issues with inadvertently representing as a direct air carrier.²²⁰ By its design, the app would be an intermediary between the direct air carrier and the charterer. Further, by including the required disclosure in all advertisements for the app, there would be no issues with confusing the public as to its nature.²²¹ There would be no need to advertise the app on the chartered airplanes, but if a developer wished to do so, they could by ensuring that the direct air carrier’s name is displayed prominently on the aircraft as well.²²²

To satisfy the disclosure specific requirements of Part 295, a similar strategy may be employed. As part of the listing within the app, the corporate name of the direct air carrier would be listed.²²³ A disclosure of the capacity in which the air charter brokering app is acting as an indirect carrier would be displayed on every page of the app, as would the air charter broker’s insurance information.²²⁴ Those documents would be available to the

²¹⁶ *Id.*

²¹⁷ See *How Much Does a Ride with Uber Cost?*, UBER, <https://www.uber.com/us/en/price-estimate/> [<https://perma.cc/36GS-8CSL>] (last visited Nov. 9, 2019).

²¹⁸ See 14 C.F.R. § 295.3 (2019).

²¹⁹ See *id.*

²²⁰ See *id.* § 295.23 (requiring charter materials to make clear the entity is not a direct carrier).

²²¹ See *id.* §§ 295.23–295.24(a).

²²² See *id.* § 295.23(b).

²²³ See *id.* §§ 295.23(b)(1), 295.24(a)(1).

²²⁴ See *id.* § 295.24(b)(2), (6).

charterer prior to entering into a contract for air service.²²⁵ Disclosure of the air charter broker's relationship with the direct air carrier, the total cost of the air transportation, and any associated fees would be made available in real time prior to contracting.²²⁶ This is similar to the way the Uber ride-hailing app shows the user the estimated total cost of the trip prior to the user confirming the ride and entering into a contract.²²⁷ In the event of a disclosure mistake, when a user requests a refund, the app would allow for prompt repayment of any monies paid by the user through an electronic refund process.²²⁸ This could be accomplished immediately through electronic bank transfer.²²⁹

An app-based air charter brokerage operation would not be permitted to engage in unfair or deceptive trade practices.²³⁰ To steer clear of these types of violations through misrepresentation, the app would need to take steps not to confuse the public into thinking it was a direct air carrier. The best way to deal with this is through transparency. The app should state that it is an indirect air carrier acting as an air charter broker only.²³¹ It should make all information about each aircraft registered with the app available to the user.²³² It should not make any misrepresentations as to available routes or trip times.²³³ These times should be given as estimates and clearly delineated as such. In addition to aircraft information, all registered pilot and crew member information should be accurate and made available to the user prior to contracting a charter aircraft.²³⁴ Likewise, insurance information, contract details, and organizational involvement of the air charter broker should be available to the user at all times to avoid misrepresentation, including before and after contract execution.²³⁵ In the app's settings, each of

²²⁵ See *id.* § 295.24(a).

²²⁶ See *id.* § 295.24(b)(3)–(5) (listing the disclosures that may be requested by the charterer).

²²⁷ See *How Much Does a Ride with Uber Cost?*, *supra* note 217.

²²⁸ See 14 C.F.R. § 295.26.

²²⁹ See, e.g., *How It Works*, VENMO, <https://venmo.com/about/product/> [<https://perma.cc/B8H5-CMKW>] (last visited Feb. 4, 2019). Venmo is an incredibly popular app that employs electronic bank transfers to immediately transfer funds between user accounts. This same technology could be utilized to satisfy refund requirements.

²³⁰ See 14 C.F.R. § 295.22.

²³¹ See *id.* § 295.50(b)(1).

²³² See *id.* § 295.50(b)(2).

²³³ See *id.* § 295.50(b)(3).

²³⁴ See *id.* § 295.50(b)(4).

²³⁵ See *id.* § 295.50(b)(6)–(9).

these pieces of information could be easily displayed.²³⁶ As long as they are, the air charter broker would be complying with the requirements prohibiting deceptive trade practices.

From a practical standpoint, the proposed app would work in a similar manner to a combination of Tinder and Uber, but for charter aircraft. Tinder is a dating application that allows users to post a profile including relevant information about themselves.²³⁷ Users then indicate interest in their counterparts by swiping either left or right on their profile.²³⁸ A swipe right indicates interest, while a swipe left indicates disinterest.²³⁹ This app has become a cultural phenomenon due to its ease of use, success rate, and intuitive interface.²⁴⁰

In the air charter context, direct air carriers or Part 135 operators could post a profile to the app for each aircraft they operate.²⁴¹ This profile would include all required information by Part 295, including estimated hourly cost. Additionally, it would include available dates for each aircraft. Users would make a similar profile including personal information. The app would then allow users to filter based on destination, proposed time of travel, estimated hourly cost, and desired type of aircraft.²⁴² Once the user finds a potential match, they would swipe right on the aircraft indicating to the charter operator that the user is interested in chartering the specific aircraft for a specific trip. The charter operator could then confirm or deny the proposal and a contract would be entered into. The broker operating the app would receive a flat percentage fee for every trip booked.²⁴³

²³⁶ See *id.* § 295.24(a) (permitting disclosures through electronic means).

²³⁷ See *What Is Tinder?*, TINDER, [https://www.help.tinder.com/hc/en-us/articles/115004647686-What-is-Tinder-\[https://perma.cc/2CR2-UJ7D\]](https://www.help.tinder.com/hc/en-us/articles/115004647686-What-is-Tinder-[https://perma.cc/2CR2-UJ7D]) (last visited Nov. 7, 2019).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See Taylor Soper, *Tinder Founder Sean Rad Explains Why the Dating App Is So Popular*, GEEKWIRE (Mar. 20, 2015), <https://www.geekwire.com/2015/tinder-founder-sean-rad-explains-why-the-dating-app-is-so-popular/> [<https://perma.cc/E39D-UBDS>].

²⁴¹ See, e.g., Arnot, *supra* note 43.

²⁴² Here, the desired type of aircraft means aircraft classification; for example, a user could choose between single piston engine, single turboprop engine, twin piston engine, twin turboprop engine, and twin jet engine.

²⁴³ This is similar to the operation of Airbnb or Vrbo, which are apps that provide a platform for individuals wishing to rent out their property for a short period of time. See *What Is the Airbnb Service Fee?*, AIRBNB, <https://www.airbnb.com/help/article/1857/what-is-the-airbnb-service-fee> [<https://perma.cc/KQH6-B383>] (last visited Nov. 7, 2019); *Accommodation Fee Collection*

Due to the allowance of self-aggregation by Part 295, users of the app could propose trips and date ranges. These proposals could also feature a number of additional passengers that the initial user is willing to allow onboard the chartered aircraft.²⁴⁴ Other users could see and filter these proposals. This is app based self-aggregation. When additional users split a charter, the app would automatically charge the user for only their pro rata share of the charter fee.²⁴⁵

An adequate payment system would be paramount. For this proposed app, electronic direct bank account transfers would be available through the same interface.²⁴⁶ This would allow self-aggregated single entities to instantly split a charter fee and pay only their individual portion. It would also allow the charter operation to be paid in a more expedient method than traditionally employed.

An app of this nature would completely disrupt the air charter, air charter brokerage, fractional ownership, and complete ownership industries. By increasing competition and decreasing the necessity for human air charter brokers, an app could serve more users at a greatly compressed brokerage fee. Air charter operators and charterers would enjoy easier access to each other, free from incredibly expensive initiation fees and yearly fees. Both parties would enjoy more money in their respective pockets due to Part 295.

B. THE IMPACT OF INCREASED SAFETY AND DISCLOSURES

The boom of air charter brokerage in recent years requires an equal boom in disclosure and transparency measures.²⁴⁷ One of the main reasons cited by the DOT for Part 295 is this increase in air charter consumption by corporations and the general public.²⁴⁸ As with any market boom, regulation has lagged behind enterprise.²⁴⁹ This lag contributed to the Montrose, Colo-

Agreement, VRBO, <https://www.vrbo.com/legal/terms-and-conditions/hap-terms-conditions> [<https://perma.cc/WW5N-FS4G>] (last visited Nov. 7, 2019).

²⁴⁴ See Baxt & Palen, *supra* note 5, at 9.

²⁴⁵ See *id.*

²⁴⁶ See *What Is ACH?*, NACHA, <https://www.nacha.org/content/what-is-ach> [<https://perma.cc/977H-XTV9>] (last visited Nov. 7, 2019).

²⁴⁷ See SAFETY RECOMMENDATION A-06-43, *supra* note 56, at 1.

²⁴⁸ Enhanced Consumer Protections for Charter Air Transportation, 78 Fed. Reg. 59,880, 59,882–83 (Sept. 30, 2013).

²⁴⁹ See generally Mark Fenwick et al., *Regulation Tomorrow: What Happens When Technology Is Faster than the Law?*, 6 AM. U. BUS. L. REV. 561 (2017).

rado, airplane crash involving Dick Ebersol.²⁵⁰ It is also responsible for numerous enforcement actions by the DOT.²⁵¹ In the interim, many air charter brokers have sprung up with less than satisfactory business practices.²⁵²

Part 295 codifies best practices for air charter brokers with a single and vitally important mission—ensuring disclosure.²⁵³ By ensuring disclosure, Part 295 arms charterers with the vital information they need to make safer charter decisions.²⁵⁴ Important information relating to the air charter broker’s allegiance to certain direct air carriers will also arm consumers with the information they need to compress fees.²⁵⁵

This information is worthless unless it is used by the charterer. The major counterargument to disclosure requirements under Part 295 is that they will not matter.²⁵⁶ Charterers generally lack the patience and knowledge to use information required to be disclosed. If this information is not used to make safer choices at the consumer level, then a major supporting reason for the disclosure requirement falls out of favor. To combat this, a ratings system should be employed.

As a society, the incredible increase in information exchanged on the internet has led to numerous, unprecedented advancements.²⁵⁷ One of these is the advent of ratings websites.²⁵⁸ A ratings website allows users to review their experience for virtually anything.²⁵⁹ These websites are so popular that they have been adapted to fit nearly every industry.²⁶⁰ To increase safety in the air charter community, information related to the required disclosures could be arranged into a ratings website or as part of an

²⁵⁰ Cf. SAFETY RECOMMENDATION A-06-43, *supra* note 56, at 1–3.

²⁵¹ Enhanced Consumer Protections for Charter Air Transportation, 78 Fed. Reg. at 59,883.

²⁵² *Id.*

²⁵³ See generally 14 C.F.R. pt. 295.

²⁵⁴ See SAFETY RECOMMENDATION A-06-43, *supra* note 56, at 1–2.

²⁵⁵ See generally 14 C.F.R. §§ 295.20, 295.23–296.26.

²⁵⁶ Increasing Charter Air Transportation Options, 83 Fed. Reg. 46,867, 46,869 (Sept. 17, 2018).

²⁵⁷ Micha Kaufman, *The Internet Revolution Is the New Industrial Revolution*, FORBES (Oct. 5, 2012), <https://www.forbes.com/sites/michakaufman/2012/10/05/the-internet-revolution-is-the-new-industrial-revolution/#7875846147d5> [<https://perma.cc/X4YW-NVMZ>].

²⁵⁸ See Chris Campbell, *Online Reviews Are the New Social Proof*, ENTREPRENEUR (Sept. 27, 2016), <https://www.entrepreneur.com/article/281600> [<https://perma.cc/BN28-HEL8>].

²⁵⁹ See *id.*

²⁶⁰ See *id.*

app proposed in the previous section. On such a website, past charterers could review both the direct air carrier and the air charter broker on a variety of metrics. The metrics for the air charter broker could include: (1) aviation knowledge; (2) “process expertise”; (3) “responsiveness”; and (4) “negotiation skills.”²⁶¹

The metrics for rating a direct air carrier would not be user generated. This is an important distinction. Due to the disclosures required by Part 295, air charter brokers have to disclose the direct air carrier, and they may not misrepresent the aircraft that will be supplied for the charter trip.²⁶² Because this information must be disclosed, the website could automatically link to the aviation accident database.²⁶³ This database is already publicly available through the NTSB’s website.²⁶⁴ The registration number on each individual aircraft would be a definitive link to any NTSB reports filed with regard to that aircraft, an entity with operational control of that aircraft, or a crew member of that aircraft.²⁶⁵ Other aircraft accident information that a ratings website could use for this purpose includes: (1) accident date; (2) accident location; (3) air carrier number; (4) purpose of flight; and (5) the NTSB accident report number.²⁶⁶ In essence, the required disclosures give charterers the key to unlocking past information about the charter aircraft and operator they are contracting with.

An NTSB report is required to be filed in a multitude of situations.²⁶⁷ Due to the expansive reporting requirements to the

²⁶¹ See *How to Find Your Perfect Real Estate Agent*, ZILLOW, <https://www.zillow.com/home-buying-guide/what-is-a-real-estate-broker> [https://perma.cc/7BAQ-WAV2] (last visited Nov. 7, 2019). This mirrors the metrics tracked by Zillow, a popular real estate rating website. Similar to real estate agents, air charter brokers are in a brokerage industry often requiring disclosures and usually in a principal-agent relationship.

²⁶² 14 C.F.R. §§ 295.24(a)(1), 295.50(b)(2) (2019).

²⁶³ See *Aviation Accident Database & Synopses*, NAT’L TRANSP. SAFETY BD., https://www.nts.gov/_layouts/nts.aviation/index.aspx [https://perma.cc/9TJK-UE6K] (last visited Nov. 7, 2019).

²⁶⁴ *Id.*

²⁶⁵ See *id.*

²⁶⁶ See *id.*

²⁶⁷ See 49 C.F.R. § 830.5 (2016) (the NTSB shall be notified if there is: (1) “[f]light control system malfunction or failure”; (2) “[i]nability of any required flight crewmember to perform normal flight duties as a result of injury or illness”; (3) engine component failure; (4) fire; (5) in-flight collision; (6) property damage of more than \$25,000; (7) “[r]elease of all or a portion of a propeller blade from an aircraft”; (8) “complete loss of information . . . for more than 50 percent of an aircraft’s cockpit display[]”; (9) violation of minimum clearance area be-

NTSB, if a ratings website utilized this publicly available information, it would give charterers a clearer picture of the safety record of the direct air carrier. This does not just include aircraft accidents. The reporting requirement covers unique insights into the direct carrier’s operation. For example, if a direct air carrier has had trouble with its crew’s ability to perform in the past, the required NTSB reports would reveal that fact.²⁶⁸ If a ratings platform such as the one proposed were implemented, a charterer could be informed of this fact automatically and prior to the trip. Another example is when a direct air carrier lands on the wrong runway; there would be a required NTSB report that would be revealed to the charterer in this scenario.²⁶⁹

This information about direct air carriers has been publicly available since 1995.²⁷⁰ However, through the deceptive practices of air charter brokers in the past, charterers often lacked the required information to access these records.²⁷¹ Part 295 has given consumers the key to access important information. Now that information is more freely available to all parties to a charter transaction, safety will undoubtedly increase. The end consumer now has the ability to contribute to industry oversight. Consumers may vote with their dollars, incentivizing fully compliant direct air carriers to provide a higher quality service. This paradigm is increasingly important as the air charter industry continues to grow with no end in sight.²⁷²

V. CONCLUSION

Part 295 is a useful set of regulations. It paves the way for the future of charter operations and private, general aviation. It also allows consumers to be more informed before they make decisions about chartering an aircraft. The free flow of information incentivizes air charter brokers to maintain insurance and place trips with more reputable charter operators. Due to Part 295, in the future, technology will allow ease of access to the general

tween aircraft on an instrument flight rules flight plan; (10) damage to a helicopter requiring “major repair or replacement” of its blades; (11) landing or departure on the wrong runway; (12) runway incursion; or (13) “[a]n aircraft is overdue and is believed to have been involved in an accident.”).

²⁶⁸ See *id.* § 830.5(a)(2).

²⁶⁹ See *id.* § 830.5(a)(12)(i).

²⁷⁰ See *id.* § 830.5.

²⁷¹ See SAFETY RECOMMENDATION A-06-43, *supra* note 56, at 1–2.

²⁷² See *id.* at 2.

aviation charter market. Not only will the industry become more cost effective, it will attract more customers. With an influx of customers, capital, and further growth, the industry will undoubtedly require more employees. The net result of Part 295 is an entrepreneurial environment fostering safety and increasing employment opportunities.