

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 24th day of October, 2005.

Aloha Airlines,

Violations of 14 CFR Part 382 and
49 U.S.C. §§ 41310, 41702, 41705 and 41712

Served October 24, 2005

CONSENT ORDER

This order concerns violations of 14 CFR Part 382 by Aloha Airlines (Aloha). Part 382 implements the Air Carrier Access Act (ACAA), 49 U.S.C. § 41705, and violations of that Part also violate the ACAA. To the extent that the apparent ACAA and Part 382 violations occurred in foreign air transportation they constitute violations of 49 U.S.C. § 41310(a), which prohibits an air carrier from subjecting a person to unreasonable discrimination in foreign air transportation. To the extent that the apparent ACAA and Part 382 violations occurred in interstate air transportation, the incidents are also violations of 49 U.S.C. § 41702, which requires that air carriers provide safe and adequate interstate air transportation. ACAA and Part 382 violations also constitute unfair and deceptive trade practices in violation of 49 U.S.C. § 41712. This order directs Aloha to cease and desist from future violations of the ACAA and Part 382 and assesses a compromise civil penalty of \$75,000 for such violations.

BACKGROUND

Aloha operates a fleet of 11 Boeing 737-200 series aircraft and 13 Boeing 737-700 series aircraft, each with 100 or more passenger seats. The newest 737-200 aircraft in Aloha's fleet were delivered in July 1988.¹ The 737-700 aircraft, which are used to fly transpacific flights from Hawaii to the continental United States and to the South Pacific Islands, are leased and have factory delivery dates ranging from 1999 to 2003.

The investigation resulting in the instant consent order began when staff from the Department of Transportation's Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (Enforcement Office) made 14 telephone calls to Aloha's reservations center in April 2003 to determine what information Aloha employees were providing to passengers

¹ Because these aircraft are not "new" aircraft, that is, aircraft ordered after April 5, 1990, or delivered after April 5, 1992, they are not covered by 14 CFR 382.21(a)(1) or (a)(2), the Part 382 provisions at issue in this order. As such they are not addressed in a substantive way by this order.

regarding movable aisle armrests and in-cabin stowage of a passenger folding wheelchair. Specifically, staff inquired as to whether (1) Aloha has movable aisle armrests on "new" aircraft with 30 or more passenger seats;; and (2) Aloha allows for the stowage of a passenger's folding wheelchair inside the cabin of "new" aircraft with 100 or more passenger seats and if yes the size of the space or spaces designated for such stowage.

In response to the inquiry regarding movable aisle armrests, Aloha's reservation agents provided inconsistent and incorrect replies including that only middle seats have movable armrests, that aisle armrests are movable without exception, and that none of the aisle armrests move. In response to the question regarding the stowage of personal wheelchairs, most Aloha agents incorrectly explained that in-cabin wheelchair stowage was not possible and that Aloha checks all passengers' wheelchairs at the gate.

The Enforcement Office concern about these results prompted it to informally request further information regarding the existence and location of movable aisle armrests and in-cabin wheelchair stowage space on Aloha's 737-700 aircraft. With regard to its movable armrests, Aloha responded that more than half of the aisle seats have movable armrests.² With regard to in-cabin wheelchair stowage, Aloha responded that its 737-700 aircraft have space for stowage of passengers' wheelchairs in the overhead bin, which measures 28" x 13" x 78". It further stated that if a wheelchair is too large for the overhead bin, it would be stowed in the belly of the aircraft.

Based on this information, the Enforcement Office sent Aloha a formal investigation letter to which Aloha responded in full. In its response, Aloha stated that all of its aisle seats have movable armrests except those in emergency exit rows and rows with seats containing tray tables built into the armrests. Aloha supported this assertion with documentary evidence. Aloha also provided evidence that it is reeducating its reservations agents on the existence and location of the movable aisle armrests on its 737-700 aircraft by issuing supplemental written information reiterating its policies and procedures for movable aisle armrests and providing its reservations agents a drawing of its aircraft showing the layout of seats with movable aisle armrests.

With regard to in-cabin wheelchair stowage, Aloha acknowledged that its 737-700 aircraft do not have in-cabin stowage space large enough to stow one passenger's standard-size folding wheelchair.³ Aloha explained that when made aware of its noncompliance with the in-cabin stowage requirements in Part 382, it began work to determine the feasibility of reconfiguring the 737-700's closet to accommodate a standard size folding wheelchair. Aloha's response further stated that it has created a space for folding wheelchairs that do not fit in the overhead bin or closet through a unique seat stowage method which the FAA has determined to be safe.

² Specifically, Aloha stated, "Rows 5-8 and rows 12-20 are equipped on both the left and right sides of the aircraft. With 22-rows on our -700's, that accounts for 13-rows, [or] two more rows than half. There are no movable armrests in our First Class sections (rows 1-3) on our -700's, as they are permanent fixtures with the service tray stowed inside."

³ The Enforcement Office notes that the following dimensions characterize a standard-size wheelchair, when folded: 13 inches wide by 36 inches high by 42-50 inches long.

APPLICABLE SECTIONS OF 14 CFR PART 382

The ACAA and its implementing regulation, 14 CFR Part 382, forbid discrimination in the provision of air transportation against qualified individuals with disabilities. See 49 U.S.C. § 41705; 14 CFR § 382.7(a)(1). Specifically at issue in this case are three sections in Part 382 related to movable armrests and in-cabin stowage of wheelchairs.

With regard to movable aisle armrests, section 382.21(a)(1)(i) requires that all new aircraft "with 30 or more passenger seats on which passenger aisle seats have armrests shall have movable aisle armrests on at least one-half of passenger aisle seats."⁴ When calculating the total number of passenger aisle seats with armrests, aisle seats "on which a movable armrest is not feasible or aisle seats which a passenger with a mobility impairment is precluded from using by an FAA safety rule," (e.g., seats with integrated trays in the armrests and exit row seating), are excluded from the count.⁵ Thus, the first step to determining compliance under § 382.21(a)(1)(i) is to count the total number of aisle seats on board an aircraft (including first class, business class and coach) and subtract, from that number, those aisle seats where the installation of movable armrests is not feasible or barred by an FAA safety rule. Fifty percent of the remainder must be movable.

Section 382.45(a)(1) requires that carriers make available to passengers, upon request, information concerning the "location of seats, if any, with movable armrests." Inherent in this responsibility is the duty to provide proper information that comports with the carrier's policies and procedures as well as the ACAA and 14 CFR Part 382.

Another aircraft accessibility requirement, section 382.21(a)(2), requires that "[a]ircraft with 100 or more passenger seats shall have a priority space in the cabin designated for stowage of at least one folding wheelchair." Under this section, the term "folding" refers to the accordion-like movement of a wheelchair, where the two sides of the frame are brought together. The term "folding" does not anticipate disassembly, including the removal of the large or small wheels of the wheelchair.⁶ The term "wheelchair" refers to standard-size wheelchairs.⁷ Taking these terms together, section 382.21(a)(2) requires that all new aircraft with 100 or more seats maintain a space that is large enough to stow at least one passenger's standard-size folding wheelchair on a priority basis.

⁴ "Having movable armrests on half the rows . . . ensure[s] that a handicapped person can use a seat in any portion of the aircraft, permitting greater overall accessibility and enhancing the provision of services in an integrated setting." Nondiscrimination on the Basis of Handicap in Air Travel, 55 FR 8008, March 6, 1990.

⁵ 14 CFR 382.21(a)(1)(ii).

⁶ This understanding relies on the plain meaning of the word "folding." For example, Webster's Ninth New Collegiate Dictionary defines the term "folding" as: "to lay one part over another part of . . . to reduce the length or bulk of by doubling over . . . to clasp together . . . a part doubled or laid over another part . . ."

⁷ Our interpretation of "wheelchair" as used in section 382.21(a)(2) is within the meaning of the generic term "wheelchair," which has no limitation in and of itself, or as used in the regulation (other than folding).

In addition to the ACAA and Part 382, the issues described above appear to involve unfair and deceptive trade practices in violation of 49 U.S.C. § 41712. To the extent that the apparent ACAA and Part 382 violations occurred in interstate air transportation, the incidents are also violations of 49 U.S.C. § 41702, which requires that air carriers provide safe and adequate interstate air transportation. Finally, to the extent that the apparent ACAA and Part 382 violations occurred in foreign air transportation they constitute violations of 49 U.S.C. § 41310(a), which prohibits an air carrier from subjecting a person to unreasonable discrimination in foreign air transportation.

ANALYSIS

This order focuses on the stowage of a passenger's folding wheelchair inside the cabin of Aloha's 737-700 aircraft.⁸ The evidence shows that when Aloha contracted for the lease of its 737-700 aircraft it failed to ensure the existence of a stowage space inside the cabin of such aircraft of a sufficient size to stow a standard-size folding wheelchair with dimensions of 13 inches wide by 36 inches high by 42 inches long. When notified of these lapses by the Enforcement Office, Aloha implemented a FAA approved cabin stowage method, by which it will stow one passenger's folding wheelchair on top of passenger seats in the last row of seats of its aircraft if requested by a disabled passenger. Although the Enforcement Office appreciates Aloha's willingness to quickly create a space to stow a passenger's standard-size folding wheelchair, the office views the carriers failure to initially provide the required accommodation under 14 CFR § 382.21(a)(2) seriously.

In mitigation, Aloha states that it makes every effort to satisfy the special needs of Hawaii's residents as well as its West Coast and South Pacific passengers who rely on Aloha's service; that Aloha enjoys an above average reputation with its passengers including those members of the disabled community whom Aloha regularly serves; that Aloha has incurred extra expense to better convenience its disabled passengers in ways beyond that required by Part 382 including, among others, by installing movable aisle seat armrests on more than half of the rows of seats on its B-737-700 aircraft and by installing fore and aft curtains around the rear lavatory to provide for greater disabled passenger privacy. Aloha states that safety constraints associated with its long range over water flights limit the closet space available to stow a wheelchair. According to Aloha, of the relatively few complaints it received during the April 2000 – November 2003 period from disabled passengers, none of those complaints addressed in-cabin storage and, in response to the Department's investigation, Aloha also intends to promptly move forward to develop a better informational website and other systems to assist disabled passengers in using Aloha's service. Aloha also states that it intends to provide enhanced levels of training to better familiarize Aloha's employees with the requirements of Part 382 as well with the services Aloha offers to accommodate disabled passengers.

While we appreciate the points raised by Aloha, we wish to make clear the seriousness with which we view all carriers' obligations to comply with the Department's rules designed to ensure

⁸ In light, in part, of prompt action taken by Aloha to remedy the misinformation given to the public by its reservations agents regarding movable aisle armrests, the Enforcement Office is not pursuing violations of section 382.45(a)(1), which requires that carriers make available information concerning the location of seats with movable aisle armrests.

nondiscriminatory accessibility for air travelers with disabilities. Also, Aloha has not produced any evidence that safety regulations precluded the creation of a space inside the cabin large enough to stow a standard size folding wheelchair. After careful consideration of this omission, the Enforcement Office believes that enforcement action is warranted. In order to avoid litigation on this matter, and without admitting or denying the alleged violations, Aloha has agreed to settle these matters and enter into a consent order to cease and desist from future similar violations.

By this order, the Department finds that Aloha failed to act in accordance with the ACAA and Part 382 in failing to provide a space for the in-cabin stowage of at least one passenger's standard-size folding wheelchair on new aircraft with at least 100 seats. This order directs Aloha to cease and desist from similar violations in the future and assesses a civil penalty of \$75,000 in compromise of the penalties otherwise assessable under 49 U.S.C. § 46301 subject to offsets of up to \$67,500 as provided in subparagraph 8(b). Aloha agrees that the Department shall have an allowed prepetition \$75,000 claim against the air carrier. In addition, this order directs that Aloha complete the attached accessibility checklist and return it to the Enforcement Office within 30 days of the date of this order. The penalty assessment provisions of this order have been fashioned to take into account Aloha's bankruptcy proceedings and are not a demand for payment to the extent prohibited by section 362(a) of the Bankruptcy Code. The Department filed a general unsecured proof of claim regarding this matter on June 28, 2005, with the U.S. Bankruptcy Court for the District of Hawaii. Aloha will seek any necessary approvals of this order from the Bankruptcy Court. The Department and the Enforcement Office acknowledge that they do not hold any of the trade creditors of Aloha responsible for causing any of the violations that are the subject of this order. The Enforcement Office believes that this consent order and the penalty it assesses will provide a strong incentive for Aloha and other carriers to comply with the ACAA and 14 CFR Part 382.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 382.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Aloha Airlines violated the requirements of 14 CFR § 382.21(a)(2) by failing to provide a priority space to stow one passenger's standard-size folded wheelchair in the passenger cabin of its new aircraft with at least 100 seats;
3. We find that Aloha Airlines, in the instances described in ordering paragraph 2, violated the Air Carrier Access Act, 49 U.S.C. § 41705;
4. We find that to the extent the violations described in ordering paragraph 2 occurred in foreign air transportation, the conduct violated 49 U.S.C. § 41310(a);
5. We find that to the extent the violations described in ordering paragraph 2 occurred in interstate air transportation, the conduct violated 49 U.S.C. § 41702;

6. We find that the violations described in ordering paragraph 2 involved unfair and deceptive practices and thereby violated 49 U.S.C. § 41712;
7. We order Aloha Airlines and its successors and assigns to cease and desist from further violations of 14 CFR Part 382 and 49 U.S.C. §§ 41310, 41702, 41705, and 41712 by engaging in the conduct described in ordering paragraph 2;
8. Aloha Airlines is assessed a civil penalty of \$75,000 in compromise of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2 through 6, subject to the payment schedule set forth in subparagraphs 8 (a) through (c) below, and subject to credit offsets of up to \$67,500 as provided in subparagraphs 9 (a) through (d) below:
 - (a) \$7,500 shall be paid as a non-priority, pre-petition general unsecured claim to be administered pursuant to the Plan of Reorganization;
 - (b) \$67,500 shall be satisfied by expenditures that will be made in the 12 months after the service date of this order to improve its quality of service to disabled air travelers above what is required by 14 CFR Part 382 in accordance with ordering paragraph 9. Within 14 months of the service date of this order, Aloha shall provide the following:
 - (i) written certification to the Office of Aviation Enforcement and Proceedings that it has funded and implemented the offsets as set forth in paragraphs 9 (a) through (d) below;
 - (ii) a detailed explanation of the method used by Aloha to determine the total expenditures; and
 - (iii) a sworn statement from an appropriate company official certifying that the total expenditures were properly expended to the best of that official's knowledge after completion of a reasonable inquiry to establish the accuracy of the sworn statement;
 - (c) To the extent the carrier fails to provide adequate documentation verifying the appropriate expenditures of the \$67,500 offset, that amount shall become due and payable 15 months after the service date of this order; and
 - (d) Any failure by Aloha Airlines, Inc to make the expenditures in accordance with ordering paragraphs 8(b) and 9 (a) through (d) or to document them adequately to the Enforcement Office shall constitute a violation of this consent order and subject Aloha Airlines, Inc. to enforcement action that may include the assessment of civil penalties and interest;
9. The improvements described in ordering paragraph 8(b) shall consist of one or more of the following:

- (a) Set up a special needs hotline for disabled passengers;
 - (b) Improve Aloha's website to include a passenger with disabilities web page to permit passengers with a disability to request special services including wheelchair service through the world wide web;
 - (c) Enhance Aloha's initial and recurrent training to improve employees' understanding and implementation of the requirements of Part 382 above what is required by the regulations and of the services that Aloha provides to passengers with a disability; and
 - (d) Incorporate on Aloha's website broader information regarding services and other relevant information for passengers with a disability;
10. Aloha Airlines shall notify the Enforcement Office within 30 days if it changes in any manner its designated space to stow one passengers' standard-size folding wheelchairs in the passenger cabin of its Boeing 737-700 aircraft, or other aircraft governed by 14 CFR 382.21(a)(2);
11. Within 120 days of the service date of this order, Aloha Airlines shall make reasonable efforts to train and/or retrain its personnel on its policies and/or procedures regarding the in-cabin stowage of wheelchairs, regardless of whether the policies and/or procedures have been amended in any manner;
12. Aloha Airlines shall complete the attached accessibility checklist and return it to the Enforcement Office within 30 days of the service date of this order; and
13. All payments made pursuant to this order shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. Failure to pay the penalty as ordered will subject Aloha Airways to the assessment of interest, penalty, and collection charges under the Debt Collection Act.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

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(SEAL)

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