U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE
Washington, DC 20590

November 3, 2008

By Telecopier (512) 472-6538

Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Dear General Abbott:

Re: Response to Request No. 0719-GA

This responds to your office's June 17, 2008 request for comments from the U.S. Department of Transportation (Department or DOT) on whether 49 U.S.C. Section 41713(b)(1) of the Airline Deregulation Act (ADA) preempts certain provisions of the Texas Health and Safety Code (HSC) and Texas Administrative Code (TAC). By letter dated June 4, 2008, Donald Lakey, M.D., Commissioner of Texas' Department of Health Services, requested an opinion from your office on whether Section 41713(b)(1) preempts HSC Section 773.011 on "Subscription Programs" and the State rule at TAC Part 1, Chapter 157, Subpart B, Section 157.11(l), each of which impose requirements on companies offering air ambulance subscription services in Texas. You kindly copied the Department on your initial response to Mr. Lakey (which explained your office's intent to issue an opinion by December 1, 2008), and invited comments from DOT on the issue.

We appreciate your patience as the Department has considered the important issues presented in your letter and prepared these comments. As explained below, we believe that the State law and regulations grant State officials significant discretion in regulating matters "related to a price, route, or service of an air carrier," and thus violate Section 41713(b). We recognize, however, the State's traditional role in regulating the proper administration of medical care to patients within its borders. Thus, also as explained below, nothing in this letter is intended to prevent the State from regulating in that area.

The Express Preemption Provision in Section 41713(b)(1)

Section 41713(b)(1) of the ADA includes the following express Federal preemption provision:

> A State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation....49 U.S.C. § 41713(b)(1).

Because an air ambulance service provider qualifies as an "air carrier,"[1] the issue of whether or not Section 41713(b)(1) preempts the Texas requirements depends, in turn, on whether the State requirements are "related to a price, route, or service of an air carrier that may provide air transportation." *Id.* We believe that the State requirements, if broadly construed, are so "related."

Supreme Court Interpretations of the Preemption Provision

The U.S. Supreme Court has broadly interpreted the words "related to a price, route or service," from Section 41713(b)(1). As illustrative examples, we refer you to the decisions in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); and *Rowe v. New Hampshire Motor Transportation Association*, 128 S.Ct. 989 (2008).

In *Morales*, the Supreme Court affirmed a permanent injunction enjoining State enforcement of airline advertising guidelines developed by the National Association of Attorneys General. Among other things, the guidelines included requirements governing the font size and content of disclaimers identifying fare restrictions, and under certain circumstances prohibited the use of such words as "sale," "discount," and "reduced" in fare advertisements. The Court held that, "One

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[1] An "air carrier," as defined in 49 U.S.C. Section 40102(a)(2), includes both "direct" and "indirect" air carriers. Therefore, an air ambulance service provider that is an air carrier may be a "direct" air carrier, which has operational control over the aircraft flown, or an "indirect" air carrier, which does not itself operate aircraft but, since 1983, has been licensed by exemption to sell air ambulance air transportation services to the public on condition that it contracts with a properly licensed direct air carrier to operate the air ambulance flight. *See* Order 83-1-36 (January 12, 1983), issued by the Civil Aeronautics Board (predecessor to DOT in airline economic regulation). Thus, the term "air ambulance service provider" or "air ambulance operator" as used in this letter refers to both types of companies, which qualify as "air carriers" for purposes of Section 41713(b)(1).

cannot avoid the conclusion that these aspects of the guidelines 'relate to' airline rates. In its terms, every one of the guidelines enumerated above bears a 'reference to' airfares (citation omitted)...And, collectively, the guidelines establish binding requirements as to how tickets may be marketed if they are to be sold at given prices." *Morales v. Trans World Airlines, Inc.*, 504 U.S. at 389. Rejecting the defendant's argument that restrictions on rate advertising did not "relate to" the rates themselves, the Court interpreted the words "related to" as prohibiting any State action *"having a connection with or reference to"* airfares. *Id.* at 384 (emphasis added).[2]

In *Wolens*, participants in American Airlines' frequent flier program alleged that American, through certain restrictions on program benefits, violated Illinois' Consumer Fraud Act and breached its contracts with plaintiffs. The Supreme Court found that the ADA preempted the claims under Illinois' statute, holding that the law's restrictions "related to" both rates and services:

> We need not dwell on the question whether plaintiffs' complaints state claims "relating to [air carrier] rates, routes, or services." *Morales*, we are satisfied, does not countenance the Illinois Supreme Court's separation of matters "essential" from matters unessential to airline operations. Plaintiffs' claims relate to "rates," *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to "services," *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates. *American Airlines, Inc. v. Wolens*, 513 U.S. at 226.

The Court further held that, "In light of the full text of the preemption clause, and of the ADA's purpose to leave largely to the airlines themselves, and not at all to the States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services, we conclude that [the ADA] preempts plaintiffs' claims under the Consumer Fraud Act." *Id.* at 228. The Court permitted plaintiffs, however, to pursue their State common law breach of contract claims: "...terms and conditions airlines offer and passengers accept are privately ordered obligations 'and thus do not amount to a State's enact[ment] or enforce[ment] [of] any

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[2] The Court also rejected an argument that the ADA preempts only "state laws specifically addressed to the airline industry," as opposed to laws of "general applicability" (in *Morales*, governing the travel industry generally) that happen to interfere with the ADA's preemption provision. The Court held that such a position "ignores the sweep of the 'relating to' language." *Id.* at 387.

law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of [the ADA]." *Id.* at 228-29 (citation omitted).

In *Rowe*, the Supreme Court struck down State regulations governing the delivery of tobacco products into Maine, pursuant to the preemption provision in the motor carrier deregulation statute -- for which Congress "borrowed language" from the ADA's preemption provision so as to "incorporate" judicial interpretations of the ADA. *See* 49 U.S.C. § 14501(c)(1); *Rowe v. New Hampshire Motor Transport Association*, 128 S.Ct. at 993-94. The State regulations obligated tobacco retailers to use only carriers who required a valid identification from the package addressee, and, for purposes of a prohibition against "knowingly" transporting tobacco products into Maine, imputed to carriers knowledge of the contents of any package delivered to either a licensed Maine tobacco retailer or a company included on Maine's list of "unlicensed" tobacco retailers. *Id.* at 994. The Court held that the motor carrier law preempted the challenged provisions because "the effect of the regulation is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulations, the market might dictate." *Id.* at 996.

Refusing to create a "public health" exception to the statute, moreover, the Court stated as follows:

> Maine's inability to find significant support for some kind of "public health" exception is not surprising. "Public health" does not define itself. Many products create "public health" risks of differing kind and degree. To accept Maine's justification in respect to a rule regulating services would legitimate rules regulating routes or rates for similar public health reasons. And to allow Maine directly to regulate carrier services would permit other States to do the same. Given the number of States through which carriers travel, the number of products, the variety of potential adverse public health effects, the many different kinds of regulatory rules potentially available, and the difficulty of finding a legal criterion for separating permissible from impermissible public-health-oriented regulations, Congress is unlikely to have intended an implicit general "public health" exception broad enough to cover even the shipments at issue here. *Id.* at 997.

The Court in *Rowe* summarized matters as follows, citing *Morales*:

> In *Morales*, the Court determined: (1) that "[s]tate enforcement actions having a connection with, or reference to carrier 'rates, routes, or services' are preempted...; (2) that such pre-emption may occur even if a state law's effect on rates, routes or services "is only indirect"...; (3) that, in respect to preemption, it makes no difference whether a state law is 'consistent' or 'inconsistent' with federal regulations [that is, whether compliance with both is possible]...; and (4) the preemption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and preemption-related objectives." *Id.* at 995.

Despite the Supreme Court's broad interpretation of "related to" as used in Section 41713(b)(1), the Court in *Morales* made clear that Federal law does not preempt those State laws affecting rates, routes, or service in only a "tenuous, remote, or peripheral...manner." *Morales v. Trans World Airlines, Inc.*, 504 U.S. at 390. Thus, as examples, Federal courts have rejected preemption challenges to State prevailing wage laws and State whistleblower statutes, which affect transportation providers only as members of the general public and have only a tenuous relationship to their particular operations. *See, e.g., Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998) (prevailing wage law case); *Blanche v. Airtran Airways, Inc.*, 342 F.3d 1248 (11th Cir. 2003) (ADA did not preempt claim against airline under Florida Whistleblower statute).

Air Ambulance Cases Under the ADA

A few courts have faced, specifically, preemption challenges to State laws governing air ambulances. In *Hiawatha Aviation of Rochester v. Minnesota Department of Health*, 389 N.W.2d 507 (Minn. 1986), the Minnesota Supreme Court affirmed a decision that the ADA preempted a law authorizing a State official to deny a license to an air ambulance operator based on an analysis of the need for such services within the State. The Court recognized the Federal Aviation Administration's regulations on air taxi operators -- including air ambulance operators -- and held that, "If an air carrier registers under 14 C.F.R. § 298 to operate as an air taxi operator and is authorized by the [Civil Aeronautics Board] to provide an air ambulance service to an area including a portion of Minnesota, then the statement that a license from the state is required before that authority can be exercised would be directly contrary to [the ADA]." *Id.* at 509. The Court clarified its holding as follows: "Our ruling that the state is preempted from controlling entry

into the field of air ambulance service does not, however, oust the state from its traditional role in the delivery of medical services -- the regulation of staffing requirements, the qualifications of personnel, equipment requirements, and the promulgation of standards for maintenance of sanitary conditions." *Id.*[3]

Recently, the U.S. District Court for the Eastern District of North Carolina also struck down a series of State laws governing air ambulances. In *Med-Trans Corp. v. Benton*, Case No. 5:07-CV-222-FL (D.N.C. September 26, 2008), the court rejected a law requiring an air ambulance to obtain a Certificate of Need ("CON") from the State's Office of Emergency Medical Services, a requirement based on the State's belief that rising health care costs and the potential unavailability of health care services in parts of the State, given market conditions, required the CON program. After the State denied the plaintiff's application for a CON, the plaintiff appealed to the court. In rejecting the CON requirement, the court stated: "The purposes underlying the CON law directly contravene the pro-competition purposes underlying the ADA.... the [State] statute constitutes a 'direct substitution of the [State's] own governmental commands for competitive market forces' in contravention of the Supreme Court's mandate in *Rowe*." *Id.* at 18 (citation omitted). The court further held that the CON law "significantly affects the rates, routes, and services of an air carrier in that it bars plaintiff from performing flights from point to point in North Carolina." *Id.* The court also rejected a provision requiring an air ambulance provider to obtain an Emergency Medical Services license from the State, and a requirement that the provider "have an EMS Peer Review Committee in place if it is to so operate as a Specialty Care Transport Program in the state." *Id.* at 20-21. Recognizing that these provisions come closer to "medical oversight" properly left to the States, the court nevertheless struck them down:

> Although the establishment of medical oversight is an important public goal in the provision of emergency health care services, it may not be obtained through unlawful means. The collective effect of the challenged regulations is to provide local government officials a mechanism whereby they may prevent an air carrier from operating at all within the state. Such a total bar to entry relates to a carrier's routes and service and violates Congress' clear mandate in

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[3] *Cf. In the Matter of the License Application of Rochester Ambulance Service*, 500 N.W.2d 495 (Minn. Ct. App. 1993) (distinguishing *Hiawatha*, court found no preemption of a State Commissioner's decision denying license to company seeking to offer ground air ambulance services -- in addition to its air ambulance services -- based on a lack of need: "In essence, Rochester Ambulance argues the state cannot prohibit any business from operating if it is run by a company that also runs an aviation business. We disagree. This case involved ground ambulance service, not air ambulance service.").

> establishing the ADA. The court is loath to disturb the carefully coordinated state and local EMS systems, and it does not do so lightly. The Supreme Court's pronouncement, however, is clear; the ADA is broadly preemptive, *Morales*, 504 U.S. at 383-84, and a state law that is "prescriptive" and "controls the primary conduct of those falling within its governance" is preempted. *Id.* at 21-22 (citing *Wolens*, 513 U.S. at 227).

The *Med-Trans* court also rejected a law requiring each air ambulance operator to provide service on a 24-hour/7-day-a-week basis: "The 24 hour requirement, like the receipt verification procedure in *Rowe*, 'would freeze into place services that carriers might prefer to discontinue in the future.'" *Id.* at 23 (citing *Rowe*, 128 S.Ct. at 995).

As in *Hiawatha*, however, the court made clear that the ADA does *not* preempt requirements that serve "primarily a patient care objective properly within the states' regulatory authority." *Id.* at 23. Thus, the court upheld a provision requiring air ambulances to synchronize voice radio communications with local EMS resources and other medically-related requirements: "Although the FAA has preemptive control of aviation safety measures, the regulations regarding EMS related equipment would not intrude on its domain. For example, the two way radio required under [North Carolina law]..., which is necessary for communication with various public safety entities in order to facilitate *patient care*, is not preempted, while the VHF aircraft frequency transceivers required by [another North Carolina law] relate primarily to *aviation safety* and would be preempted by the federal scheme." *Id.* at 26 (emphasis added). The court added other examples of acceptable State requirements: "The [State] Commission may still, for example, adopt rules specifying medically related equipment, sanitation, supply and design requirements for air ambulances, and the [State] may still inspect air ambulances for compliance with these *medically-related* regulations." *Id.* (emphasis added).[4]

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[4] The *Med-Trans* court's holding that the ADA preempted requirements for "affiliation with an EMS system" and the establishment of an EMS "peer review committee" on the grounds that collectively, the requirements amounted to a "mechanism" capable of banning entry to the market, *Med-Trans Corp. v. Benton*, Slip Op. at 21-22, seems to have been influenced by the fact that North Carolina required that local government officials -- and not medical professionals -- serve on the committee. To the extent such requirements concern legitimate *medical* standards (such as ensuring prompt transport to the medical facility appropriate to each patient's needs, or coordinating with 9-1-1 systems during emergencies), rather than broadly permit economic regulation in the process, in DOT's view (and perhaps the *Med-Trans* court's view, we posit), the ADA would not displace them.

We recognize that not every court necessarily would agree with *Med-Trans* and *Hiawatha* on the ADA's application to emergency air ambulances. In a recent case, the U.S. District Court for the District of Colorado stayed a challenge to State laws governing air ambulance operators, pending the resolution of State administrative proceedings under those laws brought against the plaintiff. Applying the Younger Abstention doctrine, the court found that it was not "facially conclusive" that ADA preempted State laws related to emergency medical air transportation service, and thus rejected the plaintiff's request to bypass the State proceedings entirely. *Eagle Air Medical Corp. v. Colorado Board of Health*, 2008 WL 3271975 (D. Colo. July 31, 2008) (appeal pending). The court did not, however, rule on the ultimate merits of the preemption claim -- leaving that for another day under the Younger Abstention doctrine -- and ruled only that preemption was not "facially conclusive." From the Department's perspective, the ADA refers to "air carriers," which includes air ambulance operators, and the law makes no exception for emergency medical transportation providers. We certainly respect the *Eagle Air* court's concern, applied at the preliminary injunction stage, over legislative intent generally; however, because the ADA makes no exception for air ambulance operators, the Department does not believe that, in the end, the legislative history need resolve some statutory ambiguity. The ADA applies to "air carriers," and that includes air ambulances.

The Texas Rules Are "Related to" Price, Route and Service

Dr. Lakey's June 4, 2008 letter to you describes subscription services as follows:

> An EMS subscription program is a concept in which an EMS provider, as defined at HSC 773.003(3) and 25 TAC 157.2(30), offers to residents of a certain geographical area a membership in its subscription program for a single annual fee, generally from approximately $50 to $100. Per this contractual arrangement, members are either not charged a fee or are charged a reduced fee for any emergency medical services and transport to a hospital that the EMS provider may give the member when requested or needed. Some EMS providers will discount their fees by accepting what the patient's insurers pay as payment in full in exchange for the advance payment of a subscription membership fee. Some may argue that the advanced payment of a subscription fee is a prepayment for that part of an air carriers' transport fare that is not covered by the patient's insurance.

The statute at HSC Section 773.111, entitled "Subscription Programs," requires the Texas Department of State Health Services (TDSHS) to "adopt rules establishing minimum standards for the creation and operation of a subscription program." The law requires the TDSHS to "adopt a rule that requires an emergency medical services provider to secure a surety bond in the amount of sums to be subscribed before soliciting subscriptions and creating and operating a subscription program." The law further states that TDSHS "may adopt rules for waiver of the surety bond," and that "the Insurance Code does not apply to a subscription program established under this section."

TDSHS promulgated such rules at TAC Part 1, Chapter 157, Subpart B. You have asked specifically about Section 157.11(l) of those regulations. That section requires that an emergency medical services [EMS] provider "who operates or intends to operate a subscription or membership program for the provision of EMS within the provider service area shall...obtain department approval prior to soliciting, advertising or collecting subscription or membership fees." The rule imposes several requirements for such approval, including written authorizations from the highest official in each political subdivision falling within the proposed service area (§ 157.11(l)(l)); the submission to State officials of the contracts used to enroll participants, the advertising used to promote the subscription service, the names, addresses, dates of enrollment, and fees paid by each subscriber, and the total amount of annual fees collected (§§ 157.11(l)(2), (3), (8), and (10)); compliance with all State and Federal rules on billing and reimbursement (§ 157.11(l)(4)); "evidence of financial responsibility" through the procurement of a surety bond "in an amount equal to the funds to be subscribed," issued by a company licensed in Texas, or through "satisfactory evidence of self insurance in an amount equal to the funds to be subscribed if the provider is a function of a governmental entity" (§ 157.11(l)(5)); non-denial of service to non-subscribers and non-current subscribers (§ 157.11(l)(6)); subscription program reviews by State officials at any time, and at least once each year (§ 157.11(l)(7)); subscription periods lasting one year or less, with only pro-rated fees charged for amounts beyond any enrollment period (§ 157.11(l)(9)); and a prohibition against service for Medicaid clients (§ 157.11(l)(11)).

Notably, Section 157.11(l), at least on its face, addresses neither the operations of an EMS provider during emergencies, nor its coordination with the State's EMS system. Rather, the provision governs a particular *economic* arrangement between EMS providers -- including air carriers -- and their customers. It bears repeating that the Department agrees with the *Hiawatha* Court, that the ADA does "not...oust the state from its traditional role in the delivery of medical services -- the regulation of staffing requirements, the qualifications of personnel, equipment requirements, and

the promulgation of standards for maintenance of sanitary conditions." *Hiawatha Aviation of Rochester v. Minnesota Department of Health*, 389 N.W.2d at 509. As written, however, Section 157.11(l) grants State officials broad discretion in regulating air carriers' economic arrangements with customers, and thus, we believe Section 41713(b)(1) preempts the vast majority of, if not the entire, regulation. Taking the provisions separately:

- *State approval "prior to soliciting, advertising or collecting subscription or membership fees";* and *Written authorizations from the highest officials within all political subdivisions falling within the proposed service area* (§§ 157.11(l) and 157.11(l)(1)). The courts in both *Med-Trans* and *Hiawatha* rejected such barriers to market entry. As the *Med-Trans* court held, the "collective effect of the challenged regulations is to provide local government officials a mechanism whereby they may prevent an air carrier from operating at all within the State. Such a total bar to entry relates to a carrier's routes and service and violates Congress' clear mandate in establishing the ADA." *Med-Trans Corp. v. Benton,* Slip Op. at 21-22*; see also Hiawatha Aviation of Rochester v. Minnesota Department of Health*, 389 N.W.2d 507. We agree. Such barriers to market entry violate the ADA's preemption provision. We also agree with the *Med-Trans* court, however, that nothing prevents a State from ensuring that any air carrier entering the market must take the measures necessary to "facilitate patient care," *Med-Trans*, Slip Op. at 26, such as maintaining "equipment necessary for communication with public safety entities." *Id.*

- *The submission to State officials of "the contract used to enroll participants"* as a prerequisite to obtaining State approval to enter the market (§ 157.11(l)(2)); and *Program reviews by State officials at any time, and at least annually* (§ 157.11(l)(7)). Because any such contract necessarily would address the prices charged, the relevant service area (routes), and the services promised by the provider, this requirement "bears a 'reference to'" (*Morales*, 504 U.S. at 389), and thus is "related to," air carriers' prices, routes, and services. 49 U.S.C. § 41713(b)(1). That the rule only mentions the "submission" of the contract makes little difference, because the required submission apparently contemplates a State official's review of the contract, either as a prerequisite to market entry or otherwise. For similar reasons, the ADA preempts a requirement that an air carrier's subscription "program," which necessarily includes its prices, routes, and services, undergo unspecified reviews by approving State officials annually, if not more frequently. Again, however, nothing prevents the State from monitoring an EMS provider (an air

carrier or otherwise) for compliance with the State's medically-related requirements.

- *The submission to State officials of all advertising used to promote the subscription service within ten days after the beginning of any enrollment period* (§ 157.11(l)(3)). The Supreme Court in *Morales* held that States may not enforce laws governing an air carrier's advertisements, because such laws are "related to" their prices, routes, and services. *Morales*, 504 U.S. at 389. As with the contract submission requirement, moreover, we see no different result from the fact that the rule overtly mentions only submission of the advertisements. The rule would serve no purpose if the State planned to do literally nothing with the submitted advertisements, and State action against an air carrier's advertising practices would violate Section 41713(b)(1). In any event, the failure to submit the required materials -- and for that matter, the failure to comply with any of the provisions in Section 157.11(l) -- could lead to disapproval of a license to operate within Texas, resulting in another prohibited barrier to market entry.

- *"Evidence of financial responsibility"* through bonding or self-insurance (§ 157.11(l)(5)). This provision imposes a significant financial expense upon air carriers. The court in *United Parcel Service v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003), faced this very issue, striking down a bonding requirement for shippers doing business in Puerto Rico. The court found that the expenses incurred by UPS to satisfy the bonding requirement "*necessarily* ha[d] a negative effect on UPS' prices." *Id.* at 336 (emphasis added). Here, too, the State's requirement "necessarily" affects -- and thus is "related to" -- an air carrier's prices, contrary to Section 41713(b)(1).

- *Non-denial of service to non-subscribers or non-current subscribers* (§ 157.11(l)(6)). The court in *Med-Trans* struck down a requirement, related to the availability of service, that any entity offering air ambulances make service available on a 24-hour/7-day-a-week basis: "The 24 hour requirement, like the receipt verification procedure in *Rowe*, 'would freeze into place services that carriers might prefer to discontinue in the future.'" *Med-Trans v. Benton*, Slip Op. at 23 (citing *Rowe*, 128 S.Ct. at 995). The Texas provisions also regulate the terms of service and its availability -- in this case, requiring that service be available to all persons, including paying subscribers and non-subscribers alike -- and thus are "related to" an air carrier's service, contrary to Section 41713(b)(1). Moreover, a requirement that obligates an air carrier to incur the significant expenses associated with transporting non-subscribers and non-current members would substantially

affect the prices it needs to charge to paying members. For this reason as well, the requirements are "related to" an air carrier's prices.[5]

- *Subscription periods lasting one year or less, with only pro-rated fees charged for amounts beyond any enrollment period* (§ 157.11(l)(9)). This rule directly regulates both the financial terms and service periods of an air carrier's contracts with its customers. The rule thus "bears a reference to" an air carrier's prices and services, and violates Section 41713(b)(1). *See Morales*, 504 U.S. at 389.

- *Compliance with all State and Federal rules on billing and reimbursement* (§ 157.11(l)(4)); *Submission to State officials of the names, addresses, dates of enrollment, and fees paid by each subscriber* (§ 157.11(l)(8)); and *Submission to State officials of the total annual subscription fees collected* (§ 157.11(l)(10)). Although no doubt well-intentioned, these apparent "consumer protection" provisions, unrelated to the proper administration of medical care within Texas, are inappropriate for State regulation under the ADA.[6] *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374.

<u>The Limits of ADA Preemption</u>

There are limits, of course, on the preemptive effect of Section 41713(b)(1), even as it relates to air ambulances. State laws and regulations aside, the ADA would not preempt a breach of contract claim against an air ambulance operator for breach of the subscription contract. As the Supreme Court stated in *Wolens*, contractual terms are "privately ordered obligations 'and thus do not amount to a State's

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[5] We recognize that during an emergency, State employees may not be able to determine whether the patient is a subscriber or non-subscriber to a licensed EMS provider with the nearest available air ambulance. Thus, to the extent the State is involved in a particular emergency and depending on the State's apparatus for emergency response, Section 157.11(6), which requires service to subscribers and non-subscribers alike, may warrant further consideration as potentially falling into the category of "medically-related" requirements. Moreover, to the extent that the State can establish that its access requirements are medically-related such requirements would be permissible.

[6] The only provision within Section 157.11(l) on which we do not comment is Section 157.11(l), prohibiting the acceptance of Medicaid clients into a subscription program. We recommend that you contact the U.S. Department of Health and Human Services (HHS) on this issue, and we have reached out to our HHS colleagues with an offer to consult on the potential effect of the ADA if they receive a request from your office.

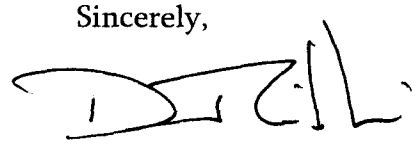
enact[ment] or enforce[ment] [of] any law, rule, regulations, standard, or other provision having the force and effect of law' within the meaning of [the ADA]." *American Airlines v. Wolens*, 513 U.S. at 228-29 (citation omitted). Thus, the ADA does not prevent private enforcement of subscription contracts through civil breach of contract claims.

Moreover, we state again our agreement with the holdings in both *Hiawatha* and *Med-Trans*, that State regulations serving "primarily a patient care objective are properly within the states' regulatory authority." *Med-Trans v. Benton,* Slip Op. at 23; *Hiawatha,* 389 N.W.2d at 509. To the extent that Texas imposes "medically-related" requirements on air ambulance service providers -- as examples, rules on the adequacy of medical equipment, the qualifications of medical personnel, and the need to maintain sanitary conditions -- the ADA does not preempt them.

This point warrants further emphasis. As you may know, improving the quality of EMS nationwide is an important component of the Department's National Highway Traffic Safety Administration's (NHTSA) comprehensive approach to reducing traffic fatalities and lessening the impact of crash injuries. Through its Office of Emergency Medical Services, NHTSA seeks "to reduce death and disability by providing leadership and coordination to the EMS community in assessing, planning, developing, and promoting comprehensive evidence-based emergency medical services and 9-1-1 systems." *See* http://www.ems.gov. The Department takes this work seriously, and fully supports the critically important work of State EMS authorities in providing medical oversight of air ambulances. Thus, in no way should this letter be construed as intending any interference with the State's oversight and coordination of EMS systems.

We appreciate the opportunity to provide input for your impending opinion, and again, we appreciate your patience in awaiting this response. If you have any questions, please do not hesitate to contact the Department's Assistant General Counsel for Operations, Ron Jackson, at (202) 366-4710.

Sincerely,



D.J. Gribbin
General Counsel