

Carrying a Code? Be Careful Where You Fly.

It is now routine for foreign air carriers serving the US to display the code of a US carrier on the foreign air carriers' flights. Codesharing offers many benefits to consumers and carriers: expanded route networks, greater connectivity, service to smaller communities, expanded service and fare options, and increased competition. Carriers seeking to codeshare must first obtain a statement of authorization under Part 212 of DOT's rules. Most carriers focus on compliance with DOT's codeshare disclosure rules located in Part 257. But for foreign air carriers transiting conflict zones, there is another issue: displaying US carrier codes in restricted (often by the FAA) airspace. In an increasingly uncertain world, beset by conflict, carriers must be mindful of issues relating to the display of US carrier codes.

What's the Catch?

DOT statements of authorization authorizing codesharing arrangements include standard conditions, including the following: "Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirement[] that . . . the operating carrier shall not permit the code of its US code-sharing partner to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition."

As DOT sees it, any violation of this condition implicates 14 CFR 213.6, which provides that any violation of DOT orders, rules, or regulations, or the terms, conditions, and limitations of a foreign air carrier permit "shall



The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with US agency regulations and policies concerning air carrier operations and consumer protection. For further information regarding the matters discussed in this article, please contact either of the following attorneys:

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constitute a failure to comply with the terms, conditions and limitations of such permit" issued pursuant to 49 U.S.C. § 41301.

Monitoring FAA Flight Prohibitions is Essential

For foreign carriers operating through conflict zones, ensuring close monitoring of FAA airspace prohibitions is essential for compliance, i.e., to ensure that no flights carrying a US carrier code are operated in prohibited airspace. Typically, these prohibitions are issued via Notices to Air Missions (NOTAMs) and Special Federal Aviation Regulations (SFARs). Although these prohibitions generally apply only to US air carriers and US-registered aircraft (excluding those operated by a foreign carrier), foreign carriers must remember that carrying a US carrier code brings them within the scope of FAA airspace prohibitions.¹ Strictly observing these prohibitions ensures both regulatory compliance and the physical safety of the passengers and crew.

DOT Enforcement

DOT continues to bring enforcement actions against foreign air carriers displaying US carrier codes in conflict zones. For example, in late 2024, DOT issued a consent order against Lufthansa and imposed a \$220,000 civil penalty for displaying a US carrier code for two years in the Baghdad Flight Information Region (ORBB FIR) in violation of SFAR 77.² Also in late 2024, DOT issued a consent order against Swiss International and imposed a \$200,000 civil penalty for displaying a US carrier code for two years in the ORBB FIR in violation of SFAR 77.³ In 2023, DOT issued a consent order against Virgin Atlantic and imposed a civil penalty of \$1,050,000 for displaying a U.S. carrier code for a period of one year (on flights between the United Kingdom and India) in the ORBB FIR, which at the time was subject to NOTAM KICZ A0036/20.⁴ NOTAM KICZ A0036/20 prohibited flight operations in the ORBB FIR at all altitudes "due to heightened militia activities and increased tensions in Iraq, which present an inadvertent risk to U.S. civil aviation operations due to the potential for miscalculation or misidentification."⁵

In an important case from 2024, DOT issued a consent order against Emirates and imposed a \$1.8 million civil penalty, also for displaying a US carrier code in the ORBB FIR for about nine months.⁶ Importantly, in its defense, Emirates argued that it had planned flights above the FAA-imposed altitude threshold in SFAR 77 (i.e., above FL320), but that its pilots had been directed by air traffic control to remain in the prohibited airspace. As stated in the order, "Emirates contends that as a result, the pilots of the flights in question were legally obliged to follow the instructions of the relevant air traffic controllers and any failure to comply with such instructions would have had significant safety implications by jeopardizing the safety of all users of the ORBB FIR and the passengers and crew on the relevant flight and resulted in a breach of law by Emirates and the pilot in charge."⁷ Emirates argued that it observed the emergency exception in SFAR 77. DOT did not accept this reasoning: "After the first few instances on that route where Emirates was instructed to fly below FL320, Emirates knew or should have known that it was likely that local air traffic control would continue to direct flights to fly below

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FL320, and as such, Emirates should and could have taken actions to avoid violating the condition of its codeshare statement of authorization but failed to do so.”⁸ This order shows that DOT will review each step of a foreign air carrier’s flight planning and integration of FAA flight restrictions into its operations. While ATC may have directed Emirates to continue in the prohibited airspace, DOT will look at the carrier’s choices prior to flight and future planning in light of such ATC directions in order to assess the carrier’s culpability and liability.

Closing Thoughts

Foreign air carriers are well advised to seek experienced legal counsel to address consumer protection and enforcement issues related to codesharing. Monitoring airspace prohibitions also requires established procedures to coordinate internally, often among many departments: legal, planning, and operations. Operations personnel and pilots must be instructed to strictly observe the FAA’s airspace prohibitions in both flight planning and flight operations, as DOT will review all aspects of carrier decision-making if an issue does arise. Legal personnel must ensure that airspace prohibitions are continually monitored and effectively coordinated internally to prevent both a penalty and a tragedy.

¹ FAA airspace restrictions generally also apply to persons exercising the privileges of an FAA-issued airman certificate, except when operating a U.S.-registered aircraft for a foreign carrier.

² Order 2024-12-20; 14 CFR 91.1605 (Special Federal Aviation Regulation No. 77—Prohibition Against Certain Flights in the Baghdad Flight Information Region (FIR) (ORBB)). “The risk environment for U.S. civil aviation in airspace other countries manage with respect to safety of flight is fluid because of the risks posed by weapons capable of targeting, or otherwise negatively affecting, U.S. civil aviation, as well as other hazards to U.S. civil aviation associated with fighting, extremist or militant activity, or heightened tensions.” 85 Fed. Reg. 65,686, 65687 (Oct. 16, 2020).

³ Order 2024-12-19.

⁴ Order 2023-1-7.

⁵ [https://www.faa.gov/air_traffic/publications/us_restrictions/media/KICZ_A0036-20_Prohibition_NOTAM-Iraq_Baghdad_FIR_\(ORBB\).pdf](https://www.faa.gov/air_traffic/publications/us_restrictions/media/KICZ_A0036-20_Prohibition_NOTAM-Iraq_Baghdad_FIR_(ORBB).pdf)

⁶ Order 2024-6-9.

⁷ *Id.* at 3.

⁸ *Id.* at 4, fn. 6.