July 14, 2000

John Mogg
Director, DG XV
European Commission
Office C 107-6/72
Rue de la Loi, 200
1049 Brussels
BELGIUM

Dear Director General Mogg:

I am providing you this letter at the request of the U.S. Department of Commerce to explain the role of the Department of Transportation in protecting the privacy of consumers with respect to information provided by them to airlines.

The Department of Transportation encourages self-regulation as the least intrusive and most efficient means of ensuring the privacy of information provided by consumers to airlines and accordingly supports the establishment of a "safe harbor" regime that would enable airlines to comply with the requirements of the European Union's privacy directive as regards transfers outside the EU. The Department recognizes, however, that for self-regulatory efforts to work, it is essential that the airlines that commit to the privacy principles set forth in the "safe harbor" regime in fact abide by them. In this regard, self-regulation should be backed by law enforcement. Therefore, using its existing consumer protection statutory authority, the Department will ensure airline compliance with privacy commitments made to the public, and pursue referrals of alleged non-compliance that we receive from self-regulatory organizations and others, including European Union member states.

The Department's authority to take enforcement action in this area is found in 49 U.S.C. 41712 which prohibits a carrier from engaging in "an unfair or deceptive practice or an unfair method of competition" in the sale of air transportation that results or is likely to result in consumer harm. Section 41712 is patterned after Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). However, air carriers are exempt from Section 5 regulation by the Federal Trade Commission under 15 U.S.C. 45(a)(2).

My office investigates and prosecutes cases under 49 U.S.C. 41712. (See, *e.g.*, DOT Orders 99-11-5, November 9, 1999; 99-8-23, August 26, 1999; 99-6-1, June 1, 1999; 98-6-24, June 22, 1998; 98-6-21, June 19, 1998; 98-5-31, May 22, 1998; and 97-12-23, December 18, 1997.) We institute such cases based on our own investigations, as well as on formal and informal complaints we receive from

individuals, travel agents, airlines, and U.S. and foreign government agencies.

I would point out that the failure by a carrier to maintain the privacy of information obtained from passengers would not be a *per se* violation of section 41712. However, once a carrier formally and publicly commits to the "safe harbor" principles of providing privacy to the consumer information it obtains, then the Department would be empowered to use the statutory powers of section 41712 to ensure compliance with those principles. Therefore, once a passenger provides information to a carrier that has committed to honoring the "safe harbor" principles, any failure to do so would likely cause consumer harm and be a violation of section 41712. My office would give the investigation of any such alleged activity and the prosecution of any case evidencing such activity a high priority. We will also advise the Department of Commerce of the outcome of any such case.

Violations of section 41712 can result in the issuance of cease and desist orders and the imposition of civil penalties for violations of those orders. Although we do not have the authority to award damages or provide pecuniary relief to individual complainants, we do have the authority to approve settlements resulting from investigations and cases brought by the Department that provide items of value to consumers either in mitigation or as an offset to monetary penalties otherwise payable. We have done so in the past, and we can and will do so in the context of the safe harbor principles when circumstances warrant. Repeated violations of section 41712 by any U.S. airline would also raise questions regarding the airline's compliance disposition which could, in egregious situations, result in an airline being found to be no longer fit to operate and, therefore, losing its economic operating authority. (See, DOT Orders 93-6-34, June 23, 1993, and 93-6-11, June 9, 1993. Although this proceeding did not involve section 41712, it did result in the revocation of the operating authority of a carrier for a complete disregard for the provisions of the Federal Aviation Act, a bilateral agreement, and the Department's rules and regulations.)

I hope that this information proves helpful. If you have any questions or need further information, please feel free to contact me.

Sincerely,

Samuel Podberesky
Assistant General Counsel for
Aviation Enforcement and Proceeding