

AVIATION REGULATORY UPDATE

BOEING AND EX-IM BANK FIND SUPPORT IN FEDERAL COURT AS CONGRESSIONAL REAUTHORIZATION LOOMS

With its controversial reauthorization scheduled to be brought before Congress this June, the Export-Import Bank of the United States recently found support for its loan programs to foreign airlines in federal district court in Washington, D.C.

On March 30, 2015, the U.S. District Court for the District of Columbia rejected a lawsuit by Delta Air Lines and others challenging Export-Import Bank loan guarantees for the purchase of Boeing aircraft. According to Delta, those loan guarantees were harmful in that they effectively subsidized foreign airlines to the detriment of U.S. carriers.

This most recent legal challenge is particularly timely as the Bank's reauthorization, due June 30, 2015, is being hotly debated in Washington. Opponents accuse the Bank of "crony capitalism" – supporting Boeing to the detriment of domestic airlines. As they observe, the Bank issued \$6.1 billion in loan guarantees to Boeing in 2014 alone. Critics also observe that only 11% of the Bank's loans and guarantees were necessary because the risks were too great for private financial institutions. Finally, some claim that the Bank's apparent financial independence is an accounting mirage, and that it actually is operating at a significant deficit.

Supporters of the Export-Import Bank, on the other hand, note the many benefits conferred on the public and U.S. businesses by the Bank, at no cost to American taxpayers. While a sizeable portion of the Bank's activities do support Boeing, some argue that this is merely a counterbalance to subsidies enjoyed by foreign aircraft manufacturers. Many small U.S. businesses also enjoy support from the Bank, with roughly 90% of its authorizations and \$5.1 billion in funds going to those small businesses in 2014. Not only has the bank been self-sustaining since 2008, funding itself entirely from customer receipts, but it has generated close to \$7 billion in excess revenues for the U.S. Treasury since 1992.

OFAC ISSUES FREQUENTLY ASKED QUESTIONS ON NEW CUBA POLICY

The Department of the Treasury's Office of Foreign Assets Control (OFAC) issued new and updated Frequently Asked Questions (FAQs) pertaining to its recent amendments to the Cuban Assets Control Regulations (CACR). Below are a few highlights from the FAQs pertaining to air carriers:

- The CACR allow air carriers subject to U.S. jurisdiction to provide air carrier services to, from or within Cuba, in connection with authorized travel, under a general license. While carriers do not need to obtain a specific license (as they did in the past), they must confirm that passengers traveling to Cuba fall within one of the twelve categories of authorized travel. In addition, air carriers wishing to provide service will still need to secure regulatory approvals from other concerned U.S. Government agencies, including the Department of Transportation (Office of the Secretary and the Federal Aviation Administration) and the Department of Homeland Security.
- Airlines and travel service providers subject to U.S. jurisdiction must retain for at least five years from the date of the transaction a certification from each customer indicating the provision of the CACR that authorizes the person to travel to Cuba. In the case of a customer traveling under a

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specific license, a copy of the license must be maintained on file. The names and addresses of individual travelers must also be maintained on file for at least five years.

- Depository institutions, as defined in 31 CFR § 515.333, which include certain financial institutions other than banks, are permitted to open correspondent accounts at banks in Cuba.
- While U.S. depository institutions are permitted to open correspondent accounts at Cuban banks located in Cuba and in third countries, and at foreign banks located in Cuba, Cuban banks are not generally licensed to open such accounts at U.S. banks.
- Certain Cuban nationals who have taken up residence in the United States on a permanent basis and who meet the requirements set forth in 31 CFR § 515.505 are licensed as unblocked nationals, and may participate fully in the U.S. financial system.
- Persons subject to U.S. jurisdiction are prohibited from doing business or investing in Cuba unless licensed by OFAC.
- Trade delegations are authorized to travel to Cuba only if each member of the delegation meets the criteria of an applicable general license authorizing travel to Cuba or has obtained a specific license from OFAC. Authorized trade delegations generally fall under one of two general licenses for travel authorization; either (1) 31 CFR § 515.533(d), which authorizes travel-related and other transactions incident to the exportation of certain authorized goods from the U.S. to Cuba, specifically the conduct of “market research, commercial marketing, sales negotiation, accompanied delivery, or servicing in Cuba of items consistent with the export or report licensing policy of the Commerce Department,” or (2) 31 C.F.R. § 515.564(a), which authorizes transactions related to professional research or professional meetings in Cuba.

TSA TO MAKE U.S. AIRPORT SECURITY ENHANCEMENTS

On April 20, 2015 DHS Secretary Jeh Johnson ordered the Transportation Security Administration (TSA) to immediately implement certain recommendations made by the Aviation Security Advisory Committee (ASAC) to address the insider threat posed by aviation employees at U.S. airports. The ASAC made these recommendations in a recently issued report on TSA’s policies, procedures and resource allocations, prepared in response to a December 2014 incident whereby an FAA employee used his employment status to access a secure area at Atlanta International Airport and then flew to New York with a gun in his carry-on luggage.

In an effort to increase screening of airport and airline workers, the Secretary directed TSA to take the following immediate actions:

- Until TSA establishes a system for “real time recurrent” criminal history background checks for all aviation workers, require fingerprint-based Criminal History Records Checks every two years for all airport employee SIDA badge holders.
- Require airport and airline employees traveling as passengers to be screened by TSA prior to travel.

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- Require airports to reduce the number of access points to secured areas to an operational minimum.
- Increase aviation employee screening, to include additional randomization screening throughout the workday.
- Re-emphasize and leverage the Department of Homeland Security “If You See Something, Say Something™” initiative to improve situational awareness and encourage detection and reporting of threat activity.

TSA will continue to analyze the recommendations in the ASAC report and will identify additional measures for future implementation.

FAA USES SUMMARY GRANT PROCESS TO APPROVE 30 UAS EXEMPTIONS

The FAA recently issued 30 Section 333 UAS exemptions via the summary grant process. Pursuant to Section 333, the Secretary of Transportation has the ability to determine if certain low-risk UAS operations can be authorized prior to the finalization of the UAS rule. The FAA typically reviews each Section 333 application individually when issuing exemptions. While still having the ability to review applications on a case-by-case basis, the FAA can also issue a summary grant when it has already granted a previous exemption similar to a new request. The summary grant process increases efficiency because it does not require the FAA to perform as detailed an analysis, but instead allows the FAA to repeat the analysis performed for the original exemption on which it is based.

INDIA UPGRADED TO CATEGORY 1

The FAA recently announced that it has upgraded India’s International Aviation Safety Assessment (IASA) rating to Category 1, which means that India’s civil aviation authority complies with ICAO safety standards. A Category 1 rating also allows carriers from India to add flights to the U.S. using their own aircraft and to carry the code of U.S. carriers. India was first awarded a Category 1 rating in 1997, but was downgraded to a Category 2 in 2012 due to certain deficiencies in its Directorate General of Civil Aviation.

FAA VOLUNTARY DISCLOSURE PROGRAM UNDER SCRUTINY

A recent investigation by a DOT-appointed inspector found that, in numerous instances, the FAA did not penalize U.S. carriers for carrying dangerous goods on aircraft when it should have. Under the FAA’s Voluntary Disclosure Program (instituted in 2006), carriers are allowed to self-report violations to the Administration within 24 hours and avoid civil penalties, so long as the reporting carrier completes comprehensive mitigation and performs subsequent self-audits for compliance. The FAA, in turn, is required to evaluate reports submitted by carriers and determine whether the carrier’s mitigation efforts are sufficient. If they are not, the FAA may initiate an enforcement action.

According to DOT’s investigation, the FAA did not pursue enforcement action against numerous airlines under the program, and failed to provide documentation demonstrating that reporting carriers had in fact

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instituted mitigation and performed the required self-audits. The FAA's failure to properly implement its Voluntary Disclosure Program resulted in carriers repeatedly shipping forbidden hazardous materials on passenger aircraft with no penalty because they self-reported.

The DOT inspector made recommendations for improving the program, including a requirement for air carriers to provide the FAA with sufficient evidence that mitigation and self-audits have been completed, that regional managers receive additional training, and that airlines be provided with more clarity on program requirements. The FAA expects to implement these and other recommendations by year-end.

VISA TO PROVIDE BREAKDOWN OF AIRLINE FEES ON CREDIT CARD STATEMENTS

In an effort to make airline ancillary fees more transparent to consumers, Visa will begin categorizing airline charges for ancillary services separately from those for the purchase of airfare. Charges that will be listed separately will include, but not be limited to, those assessed for checked bags, in-flight meals, and seat upgrades. Visa did not provide a specific date, but said that the new policy would be put in place in the coming months. American Express already breaks out such charges, and MasterCard has announced that it will soon offer the same service.

DOT FINES FLYBLADE FOR OPERATING WITHOUT PROPER AUTHORITY

On April 10, 2015, DOT fined FlyBlade, Inc. \$80,000 for engaging in air transportation without the necessary economic authority. Flyblade is an air charter broker and provides air transport services by using Liberty Helicopters, Inc., a Part 135 on-demand air carrier, to operate flights for passengers seeking air transportation. An investigation by the Department's Office of Aviation Enforcement and Proceedings found that FlyBlade's website and smartphone applications contained language and pictures that could lead consumers to assume that FlyBlade was a direct carrier.

FAA ISSUES MORE HAZMAT PENALTIES

The FAA recently proposed civil penalties against three additional companies for alleged violations of the Hazardous Materials Regulations (HMR). In two of the cases - S. Vitale Pyrotechnic and Optisource - the FAA alleged that certain shipments were not accompanied by shipping papers to indicate the hazardous nature of their contents and were improperly marked, labeled or packed. The FAA further alleged that the affected companies failed to provide emergency response information and ensure their employees had received required training in packaging and shipping hazardous materials. The following penalties were issued:

- \$170,000 against Optisource, for offering shipments containing ink remover and aerosol lens spray for shipment aboard a UPS aircraft. Both substances are flammable.
- \$195,000 against S. Vitale Pyrotechnic Industries, for offering a shipment containing four 20-gallon tanks containing propane for shipment aboard a Delta Air Lines passenger flight. Propane is a flammable gas, and FAA regulations prohibit propane from being transported on a passenger-carrying aircraft.

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- \$96,200 against FedEx Corp., for accepting three shipments containing methanol, printer ink and sodium hydroxide. The shipments were not prepared in accordance with the HMR. The shipments were improperly marked, and the printer ink drums did not meet the minimum specifications for containers used to transport this type of substance.

FAA PROPOSES ADDITIONAL PENALTIES

- \$1.54 million against Air Methods Corp. of Colorado for operating Eurocopter EC-130 helicopters that were not in compliance with FAA regulations. Air Methods is an emergency medical transport company and operated non-compliant helicopters on 83 flights over water when they lacked flotation devices and flotation gear for all occupants. The flights took place in and around Pensacola, Florida.
- Two civil penalties totaling \$328,550 against Southwest Airlines for violating Federal Aviation Regulations:
- \$265,800 – failure to complete mandatory inspection of an aircraft that had experienced a cabin depressurization. Southwest allegedly operated the aircraft on 123 more flights before completing the inspection.
- \$62,750 – failure to accurately record repairs in an aircraft’s logbook as required by regulations. Maintenance personnel tried to resolve a problem involving ice and water coming from a jetliner’s galley vent which was traced to a faulty component in one of the jetliner’s air-conditioning units. The FAA alleges Southwest did not comply with its FAA approved maintenance procedures and the mechanics improperly applied an MEL exemption to the situation.
- \$430,000 against Beechcraft Corp. for failing to follow its FAA-approved quality control process. Customers reported fuel leaks on 43 aircraft recently manufactured by Beechcraft. Investigators found the leaks were caused by improperly installed fuel bladders.
- \$142,750 against GoJet Airlines, LLC for allegedly violating drug and alcohol testing regulations. The FAA alleges that GoJet violated federal regulations by not including six employees (four pilot trainees and two aircraft dispatcher trainees) in the random drug and alcohol testing pool, and testing two other employees for drugs, but not alcohol, as part of its random testing program.

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If you have any questions, please contact Evelyn Sahr (esahr@eckertseamans.com, 202-659-6622) or Drew Derco (dderco@eckertseamans.com, 202-659-6665).

This Aviation Regulatory Update is intended to keep readers current on matters affecting the industry, and is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at esahr@eckertseamans.com or 202.659.6622 or Drew Derco at dderco@eckertseamans.com or 202.659.6665.

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