ECKERT SEAMANS
ATTORNEYS AT LAW

August 2019

AVIATION REGULATORY UPDATE

DOT PUBLISHES FINAL STATEMENT OF ENFORCEMENT PRIORITIES REGARDING SERVICE ANIMALS

On August 21, 2019, the U.S. Department of Transportation (DOT) published in the Federal Register its *Final Statement of Enforcement Priorities Regarding Service Animals* to address certain issues that were not included in the Interim Statement (published on May 23, 2018) and to further define the Department's enforcement focus with respect to issues relating to service animals, or those with special training to assist passengers with disabilities, e.g. seeing eye dogs, and emotional support and psychiatric support animals (ESAs and PSAs, respectively), or those without special training, but that provide therapeutic support to passengers through affection and companionship. The policies in the Final Statement became effective upon its publication date, August 21, 2019, but DOT intends to refrain from taking enforcement action against airlines that are noncompliant with the Final Statement for 30 days – until **September 20, 2019**, after which time carriers are expected to achieve full compliance.

Below are summaries of the pertinent terms in the Final Statement:

Species and Breed Restrictions. DOT will focus its resources on ensuring that *U.S. carriers* continue to accept the most commonly used service animals (i.e., dogs, cats, and miniature horses) for travel. Categorically refusing to transport all service animals that are not dogs, cats, or miniature horses violates the current disability regulation, however, carriers may continue to deny transportation of snakes, other reptiles, ferrets, rodents, and spiders. *Foreign carriers* may still continue to limit service animals, including ESAs and PSAs, to dogs, however, carriers may not restrict the type of dog breed used to assist a passenger with a disability (e.g., a carrier may not have a policy banning "pit bull type dogs").

Number Restrictions. Airlines that limit passengers to one ESA and a total of three service animals if needed will not be subject to enforcement action.

Weight Restrictions. Airlines may not impose a categorical restriction on service animals over a certain weight, without regard to specific factors that would preclude transport of that animal in the cabin.

Age Restrictions. DOT does not anticipate exercising its enforcement resources to ensure the transport of service animals that are *clearly* too young to be trained to behave in public. Specifically, DOT stated that it would not take enforcement action against an airline for having a policy that denies the transportation of service animals younger than four months, as DOT does not expect service animals to have completed public training within four months.

Flight-Length Restrictions. Airlines may not categorically restrict service animals on flights scheduled to last eight hours or more. On flights scheduled to last eight hours or more, airlines may ask for 48 hours' advance notice, early check-in, and documentation that the animal will not need to relieve itself on the flight or that it can do so in a way that does not create a health or sanitation issue on the flight.

AVIATION REGULATORY UPDATE

Proof that an Animal is a Service Animal. If a passenger's disability is unclear, airlines may ask limited questions to determine the passenger's need for the animal even if the animal has other indicia of being a service animal such as a harness, vest, or tag.

Documentation Requirements. DOT does not anticipate taking enforcement action against an airline for asking users of any type of service animal to present documentation related to the animal's vaccination, training, or behavior, so long as it is reasonable to believe that the documentation would assist the airline in determining whether an animal poses a direct threat to the health or safety of others. DOT will monitor airlines' animal documentation requirements to ensure that they are not being used to unduly restrict passengers with disabilities from traveling with their service animals. Airlines may ask or encourage an ESA and PSA user to submit the medical form provided on the airline's web site, but may not reject documentation provided by an ESA or psychiatric support animal (PSA) user from a licensed mental health professional treating the passenger that meets all of the criteria found in the rule itself.

Lobby Verification. Airlines may require passengers with ESAs or PSAs to present service animal documentation in the lobby/ticket counter area, rather than the gate/sterile area.

Advance Notice/Check-In. Airlines may require ESA/PSA users to provide up to 48 hours' advance notice of travel with an ESA/PSA, and may require ESA/PSA users to appear in the lobby for processing of service animal documentation up to one hour prior to the check-in time for the general public. However, airlines may not require non-ESA/PSA users to provide advance notice of travel with a service animal, or require non-ESA/PSA users to appear in the lobby for processing of service animal documentation.

Containment. DOT will exercise its discretion with respect to containment issues for all service animals on a case-by-case basis, with a focus on reasonableness. For example, in general, tethering and similar means of controlling an animal that are permitted in the ADA context would appear to be reasonable in the context of controlling service animals in the aircraft cabin. Other factors bearing on reasonableness include, but are not limited to, the size and species of the animal, the right of other passengers to enjoy their own foot space, and the continued ability of the animal to provide emotional support or perform its task while being restrained or kept in a pet carrier.

DOT VACATES PLAN TO CURTAIL EUROPEAN CARRIER WET LEASES BEYOND 14 MONTHS

As our readers may recall, in February 2019 DOT issued a Show Cause Order, Order 2019-2-17, proposing limitations on certain current and future statements of authorization for long-term wet-leasing. The Order was to apply to wet-leases by foreign air carriers of the EU, Iceland, Norway, and Switzerland to other such carriers. The Department's Show Cause Order came in response to European Commission Regulation No. 1008/2008, which limits non-EU carriers' wet-leases to EU carriers to a duration of seven months plus one possible extension of seven more months, notwithstanding U.S.-EU Open Skies provisions that call for liberal wet-leasing. DOT regulations contain no equivalent restrictions, so U.S. carriers have consistently pressed for time limits to be imposed to balance their alleged competitive disadvantage. Interestingly, in what seemed at the time to be an attempt by DOT to push the EU to resolve the issue, the Show Cause

Order stated that the Department is prepared to vacate the order or not finalize the proposed tentative decision if the EU Commission "takes the necessary steps to proceed to the provisional application of the standalone Wet-Lease Agreement negotiated in February 2018."

On March 8, 2019, delegations representing the United States, the European Union, Iceland, and Norway initialed the text of a standalone agreement on wet leasing, which would effectively eliminate the time limitations imposed on U.S. carriers wet-leasing to affected carriers. This in turn prompted DOT to issue a Notice suspending the Show Cause Order (and any limitation of wetleasing by European airlines) until August 30, 2019. On August 27, 2019, the United States, the European Union, Iceland, and Norway signed, and began provisionally applying, the standalone agreement on wet leasing. DOT deemed this to be a "satisfactory resolution" which will eliminate the competitive disadvantage U.S. carriers have allegedly suffered under European Commission Regulation No. 1008/2008. As such, on August 27, 2019, DOT issued an "Order Vacating Order 2019-2-17 and Terminating Proceeding." (See Order 2019-8-20)

In effect, this decision should provide additional opportunities for expanded, and longer term (i.e., beyond 14 month) wet-leasing opportunities for foreign air carriers of the EU, Iceland, Norway, and Switzerland. We also expect that applications for statements of authorizations involving long-term wet-leasing between such carriers will be met with less scrutiny and fewer objections from U.S. carriers since they can now enjoy the same rights and competitive opportunities in Europe.

U.S. ACCESS BOARD PUBLISHES VOLUNTARY GUIDELINES FOR ONBOARD WHEELCHAIRS; SEEKS PUBLIC COMMENT

On August 21, 2019, the U.S. Access Board, which is a U.S. federal agency that promotes equality for people with disabilities, released a set of advisory guidelines for wheelchairs used on commercial passenger aircraft. The equipment at issue in the advisory guidelines are those onboard wheelchairs that are provided by air carriers to facilitate the transfer of passengers with disabilities to aircraft lavatories, as personal wheelchairs are not currently permitted to be used in the cabin. The stated purpose of the advisory guidelines is to "provide air carriers and onboard wheelchair manufacturers with technical assistance in meeting their obligations under the Air Carrier Access Act." While the guidelines are non-binding, they do specify dimensions, features, and capabilities for onboard wheelchairs that are being published to permit air carriers to transport passengers with disabilities in a safer, efficient, and more comfortable manner.

The Board has posed a number of questions to the public about specific provisions in the guidelines but welcomes input on all portions of the document, which are due on or before October 21, 2019. Related information, is available in the Federal Register publication (https://www.federalregister.gov/documents/2019/08/20/2019-17873/advisory-guidelines-for-aircraft-onboard-wheelchairs). In addition, on September 12, 2019, the Board will hold a public hearing that will provide an opportunity to submit comments either in person or by phone.

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AVIATION REGULATORY UPDATE

If you have any questions about the advisory guidelines, or are interested in submitting a comment, please contact us.

DELTA PILOTS RAISE CONCERNS OVER AIR FRANCE-VIRGIN-DELTA JOINT VENTURE

DOT issued tentative approval for antitrust immunity (ATI) on August 2, 2019, for Delta, Air France-KLM, and Virgin to operate an expanded joint venture between the U.S., UK and continental Europe (Order 2019-8-2). In July 2018, the three airlines announced their intention to engage in a joint venture which would essentially combine Delta's two parallel joint ventures with Virgin and Air France.

On August 16, 2019, the Delta Master Executive Council (MEC) of the Air Line Pilots Association filed a comment on behalf of its more than 14,000 pilots in response to the Department's Order to Show Cause which tentatively approved the airlines' ATI request. The MEC raised concerns regarding a potential reduction in Delta's financial incentive to expand its operations in the U.S., UK and continental Europe markets.

Following Delta's joint venture with Virgin in 2013, MEC noted that Delta's operation failed to expand an in any significant way, and nearly all benefits seen from the joint venture went to the Virgin crews. The MCE asked the Department to expand the scope of its proposed five-year review of the joint venture to include an assessment of flying opportunities generated under the alliance and its impact on U.S. aviation jobs. It also requests an interim review on December 31, 2019, to evaluate progress in this regard.

EIGHT AVIATION GROUPS COMMENT ON FAA'S COMMERCIAL SPACE LICENSING RULEMAKING

Eight aviation interest groups, including the Air Line Pilots Association, Airlines for America, Aircraft Owners and Pilots Association, Airports Council International – North America, American Association of Airport Executives, the Cargo Airline Association, the National Air Traffic Controllers Association, and the Regional Airline Association, (the Group) filed a comment on the FAA's proposed rule to streamline the commercial space launch and reentry requirements. The Group's comment requested that the FAA prioritize safety and efficiency, by integrating commercial space users into the National Airspace System (NAS).

The comment requests that the safety requirements for commercial space certification and operations correspond with the expectations of the flying public. Specifically, the Group asks that the Final Rule:

- Formalize the time-based launch procedures under development by the Joint Space Operations Group (JSpOG) located at the Air Traffic Control System Command Center;
- Develop new procedures to improve launch planning;
- Create ATC surveillance and tracking capabilities to include automated depictions of hazard areas and launch vehicles;
- Improve and uniform the hazard mitigation policies; and
- Implement a space-based ADS-B that provides enhanced surveillance capabilities.

Finally, the Group requests that commercial space licensees pay into the government's air traffic management system to help cover the costs they will impose on the system. The FAA estimated that commercial space operations could double by 2023, and the Group is calling for the safe and efficient integration of commercial space into the NAS.

FEDERAL JUDGE REFUSES TO DISMISS HELMS-BURTON SUIT AGAINST CARNIVAL CRUISE LINES

Plaintiff Javier Garcia-Bengochea, who is a descendant of a Cuban business owner, recently sued Miami-based Carnival Corporation for doing in business in Cuba using assets that were expropriated by the Fidel Castro government under a newly activated provision of the 1996 Helms-Burton Act — or Libertad Act — that allows U.S. nationals and naturalized Cubans to seek damages for property seized by Cuba's government after the communist revolution in 1959. Since the Libertad Act was passed in 1996, U.S. administrations have historically declined to let certain portions of the Act to take effect, for fear of angering trading partners whose businesses are tied to Cuba. The Trump administration reversed this trend, and effective May 2, 2019, those portions of the Act that had been stayed by prior administrations became effective.

Plaintiff filed suit on that same day, arguing that it had a certified claim to port buildings and piers in Santiago de Cuba where Carnival cruise ships have docked since 2016, following the Obama Administration's loosening of Cuba travel related restrictions. On May 30, the Cruise line filed a motion to dismiss the case, arguing that the Libertad Act did not define trafficking to mean using docks for "lawful travel to Cuba," and that General Licenses from the U.S. Department of Treasury's Office of Foreign Assets Control gave it sufficient permission to operate cruises to Cuba and to do business there.

On August 26, 2019, the United States District Court for the Southern District of Florida denied Carnival's request, stating Based on the text and structure of Helms-Burton, the Court holds that the lawful travel exception is an affirmative defense to trafficking that must be established by Carnival, not negated by Plaintiff" and that "…Carnival's reading of the statute would substantially undermine Congress's goal of deterring trafficking." Immediately following the Court's decision, on August 28, 2019, the former owner of the Havana Cruise Port Terminal sued three additional cruise lines (Norwegian Cruise Lines, MSC Cruises, and Royal Caribbean Cruises) under the Libertad Act. We expect to see this trend continue, especially if the plaintiff succeeds against Carnival Corporation.

AMERICAN AIRLINES FINED $22.1 MILLION FOR FAILING TO TIMELY DELIVER MAIL

On August 20, 2019, American Airlines (American) agreed to a $22.1 million settlement with the U.S. Department of Justice concerning claims that it falsely reported the times that it transferred possession of U.S. mail to foreign postal administrators or other intended recipients. American, like many other carriers, contracts with the United States Postal Service (USPS) to deliver mail. In this particular case, American had contracted with USPS to take possession of receptacles of U.S. mail at U.S. locations or at various Department of Defense and State Department locations abroad, and subsequently deliver them to a

number of international and domestic end points. In fulfilling these obligations American was required to submit electronic scans of the mail receptacles to USPS, and report the time that the mail was delivered at a given location. The contract with USPS specified penalties in the event that mail was delivered late, or to the wrong location. A 2015 investigation by the Justice Department of American's 2009 and 2011 USPS contracts seems to be the origin of the penalty, and American confirmed in a statement that "The allegations focused on conduct that was remedied years ago, and we have invested in new equipment and procedures to ensure that we are in full compliance with our commitments."

JUSTICE DEPARTMENT SUES TO BLOCK SABRE'S ACQUISITION OF FARELOGIX

On August 20, 2019, the U.S. Department of Justice filed a civil antitrust lawsuit in the U.S. District Court of Delaware to block Sabre Corporation's $360 million acquisition of Farelogix, Inc. DOJ alleges in its complaint that the acquisition would eliminate a head-to-head competitor in the airline service booking market. Both Sabre and Farelogix provide IT solutions to airlines that allow them to sell tickets and ancillary products through traditional brick-and-mortar and online travel agencies to the public. DOJ argues that if Sabre acquires Farelogix, it will lead to higher prices and less innovation for airlines and their customers.

Sabre operates a global distribution system (GDS) and is the dominant provider of booking services in the U.S., with over 50 percent of the booking through travel agents market.

Sabre issued a statement saying that it has done all it could to address DOJ's concerns during its nine month review of the acquisition, which it argues is pro-competitive as the companies offer complementary services.

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; Drew Derco at dderco@eckertseamans.com or 202-659-6665; Alexander Matthews at amatthews@eckertseamans.com or 202.659.6633.