

AVIATION REGULATORY UPDATE

AMERICAN AIRLINES FINED \$1.6 MILLION FOR VIOLATING TARMAC DELAY RULE

On December 14, 2016, the U.S. Department of Transportation (DOT) issued a consent order assessing American Airlines \$1.6 million in civil penalties for failing to adhere to its contingency plan for lengthy tarmac delays during several incidents in 2013 and 2015. Specifically, for twenty domestic flights at Charlotte International Airport (CLT) on February 16, 2013; six domestic flights at Dallas/Fort Worth International Airport (DFW) on February 27, 2015; and one domestic flight at Shreveport Regional Airport (SHV) on October 22, 2015.

According to the Consent Order, US Airways (which subsequently merged with American Airlines) failed to adequately adjust its operations in response to the snowstorm and resulting airfield congestion at CLT. In particular, even though the FAA initiated a number of ground stops because of the weather and the need to slow down traffic to the airport, US Airways “failed to properly assess the situation in time to take preventative measures”. Such as, not sufficiently delaying or cancelling departing flights so as to allow de-icing operations to keep pace with departures. In addition, DOT did not see the situation at CLT on February 16, 2013, as so unique it went beyond the planning capabilities of the carrier.

With regard to the six domestic flights at DFW, DOT determined that US Airways (which subsequently merged with American Airlines) failed to “adequately adjust its operations” in response to the heavy snow and freezing rain that impacted operations at DFW on February 27, 2015. Specifically, DOT found that American failed to adequately reschedule a sufficient amount of departing flights to allow de-icing operations to successfully prepare aircraft to depart DFW before experiencing an extended tarmac delay (in excess of three hours without giving passenger the opportunity to deplane).

Finally, on October 22, 2015, DFW Airport was experiencing thunderstorms, which caused thirteen American Airlines flights to divert to SHV to avoid landing in inclement weather. During this series of diversions, American Airlines Flight 1382 experienced an extended tarmac delay and failed to successfully deplane passengers before the three hour mark. DOT determined that American’s failure to deplane passengers before the three hour mark in this situation was, at least partially, “due to the mismanagement of personnel and resources”.

\$602,000 of the assessed penalty will be credited to American Airlines for “compensation provided to passengers” on the affected flights; and \$303,000 of the assessed penalty will be credited to American Airlines to offset the carrier’s expended costs of “acquiring, operating and maintaining” a surface management and surveillance system at CLT and DFW to monitor the location of each aircraft on the airfield. The remaining \$695,000 of the assessed penalty is due and payable to DOT within 30 days of the issuance of the order.

DOT EXTENDS COMMENT PERIOD FOR SEVERAL NEW REGULATIONS

On October 31, 2016, DOT published an Advance Notice of Proposed Rulemaking (ANPRM) to solicit public comment on how to implement a requirement for airlines to refund checked baggage fees when they fail to deliver bags in a timely manner. Specifically, the Department requested comments on how to define a baggage delay, and the appropriate method for providing the refund for delayed baggage.

Two weeks later Airlines for America (A4A) requested a 48-day extension of the comment period because the ANPRM “concerns a requirement that implicates several operational and financial disciplines within the airlines,” which will require the assessment of how internal information systems should be re-worked. DOT granted the extension on November 29, 2016 and comments are now due by **January 17, 2017**.

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On Friday, December 16, 2016 DOT announced that it is also extending the response period for its Request for Information regarding industry practices on the distribution and display of airline flight schedule, fare, and availability information from December 30, 2016, to **March 31, 2017**. DOT has requested industry responses on what may harm consumers and what may constitute unfair and deceptive business practices and/or unfair methods of competition; whether any entities are blocking access to critical resources needed for competitive entry into the air transportation industry. And, whether DOT's action is unnecessary or whether DOT's action in these areas would promote a more competitive air transportation marketplace or help ensure that consumers have access to the information needed to make informed choices. Please let us know if you would like to file a response in this proceeding.

TRUMP PICKS ELAINE L. CHAO FOR TRANSPORTATION SECRETARY

On November 29, 2016, President-elect Donald Trump selected former labor secretary Elaine L. Chao to serve as his administration's Secretary of Transportation. Chao is a former Cabinet member and the wife of Senate Majority Leader Mitch McConnell (R-KY).

In 2001 Chao became the first Asian American woman to be named to a Cabinet post and went on to head the Labor Department under George W. Bush for eight years. Before entering government service, Chao served as a vice president of Bank of America and as an international banker at Citicorp. After departing the Bush administration, Chao served as a fellow at the Heritage Foundation and also as a contributor to Fox News. Chao also has a background in aviation, as she was a director at pre-merger Northwest Airlines before the airline was acquired by Delta.

Chao is expected to play a critical role in the administration if the President-elect follows through on his campaign promise to invest \$1 trillion in restoring bridges, roadways and transit systems over the next 10 years.

ALASKA AIRLINES' \$2.6B VIRGIN AMERICA BUY CONDITIONALLY APPROVED BY DOJ

On December 6, 2016, the U.S. Department of Justice (DOJ) approved Alaska Airlines' proposed \$2.6 billion purchase of Virgin America, contingent on a significant reduction in the scope of Alaska Airlines' codeshare agreement with American Airlines. Under a proposed settlement with the DOJ, Alaska Airlines will be prohibited from codesharing on routes where Virgin America and American Airlines already compete and on routes where Alaska Airlines would otherwise be likely to compete with American Airlines post-merger. The settlement would also require Alaska Airlines to obtain regulatory approval before selling or leasing any gates or slots that were divested to Virgin America as part of the American Airlines-US Airways merger. The Alaska-Virgin settlement must still be approved by a D.C. federal judge.

OVERFLIGHT FEE INCREASE

On November 28, 2016 the Federal Aviation Administration (FAA) increased the rates for enroute and oceanic overflights, which have been static since 2011. The FAA is phasing in this rate increase over three years in equal percentage terms. The current rates for enroute and oceanic overflights are \$56.86 and \$21.63, respectively. From January 1, 2017 to January 1, 2018 rates will increase to \$58.45 and \$23.15. On January 1, 2018 to January 1, 2019 rates will be \$60.07 for enroute and \$24.77 for oceanic, and as of January 1, 2019 rates will be \$61.75 and \$26.51. Overflight fees are charges for aircraft flights that transit U.S.-controlled airspace, but neither land in nor depart from the United States.

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JPMORGAN PAYS \$264M FCPA FINE FOR HIRING PROGRAM IN ASIA

On November 17, 2016, the SEC Enforcement Division reported that JPMorgan Chase will pay \$264 million in sanctions to the U.S. Department of Justice, the U.S. Securities and Exchange Commission and the Federal Reserve to settle claims that it violated the Foreign Corrupt Practices Act by awarding jobs to friends and relatives of government officials in Asia. The SEC found that JPMorgan hired 100 interns and full-time employees over a seven-year period, “helping the firm win or retain business that produced more than \$100 million in revenue for JPMorgan”.

JPMorgan Chase settled the charges and will pay \$130 million to the SEC without admitting or denying the agency’s allegations. In addition, its subsidiary, JPMorgan Securities (Asia Pacific) Ltd., will pay a \$72 million criminal penalty to the DOJ in a nonprosecution agreement that includes admissions. Finally, the bank will pay \$61.9 million to the Federal Reserve board of governors.

DOT PROPOSES RULE TO PROTECT AIRLINE PASSENGERS FROM BEING UNWILLINGLY EXPOSED TO VOICE CALLS ON AIRCRAFT

On December 14, 2016, DOT published a Notice of Proposed Rulemaking (NPRM) aimed at protecting airline passengers from being unwillingly exposed to voice calls within the confines of an aircraft. The Department is proposing to require sellers of air transportation to provide adequate advance notice to passengers if the carrier operating the flight allows passengers to make voice calls using mobile wireless devices. The Department is also seeking comments on whether it should prohibit airlines from allowing voice calls via passenger mobile wireless devices on domestic and/or international flights. The rule would apply to all flights operated with large aircraft (i.e. more than 60 seats) by U.S. and foreign carriers to, from, or within the United States.

The proposed rule would cover voice calls on passenger-supplied cellular telephones and other passenger-supplied mobile wireless devices, regardless of whether the call is made on a commercial mobile frequency, Wi-Fi, or other means. Under this proposal, the Department would not prohibit voice calls (although they are seeking further comment on that issue), but airlines would remain subject to any technical, safety, or security rules that do prohibit or restrict voice calls. Comments are due by **February 13, 2017**.

AIRPORT ACCIDENT INFORMATION WORKSHEET

The Transportation Disaster Assistance Division of the National Transportation Safety Board (NTSB TDA) has developed an Airport Accident Information Worksheet as a guidance tool to assist Part 121 air carriers with providing information related to Persons on Board (POB) to airport rescue personnel for the purpose of rescue and lifesaving efforts that occur immediately after an accident happens. The worksheet is guidance for carriers to use within their emergency response planning process and can be tailored for individual air carrier emergency response procedures. NTSB TDA expects that local air carrier station managers/operations personnel can complete the worksheet during an accident/evacuation/event and provide it to the ARFF Chief/Incident Commander and/or the Airport Emergency Operations Center. The intent of this worksheet is to help eliminate confusion and open the lines of communication between airports and local air carrier management as it relates to information about Persons on Board an aircraft.

The worksheet was developed after NTSB’s recent accident report for the “Runway Excursion During Landing Delta Airlines Flight 1086 Boeing MD-88, N909DL, New York, New York, March 5, 2015” and reoccurring concerns found in

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other emergency evacuations such as, having precise information about the number of passengers onboard an airplane, including lap-held children, and making this information available to emergency responders after an accident to facilitate timely search and rescue operations.

The worksheet can be found at: <http://www.nts.gov/tda/Documents/NTSB-TDA-Accident-Supp-Form-2016.pdf>

NEW U.S.-HAVANA FLIGHTS & POTENTIAL TRUMP ADMINISTRATION REACTION

On November 25, 2016 the U.S.-Cuba Trade and Economic Council issued a statement regarding the re-establishment of regularly-scheduled non-stop commercial flights from the United States to Havana, Cuba and how U.S.-Cuba relations could be impacted by the new administration. The statement noted that individuals associated with the President-elect, have expressed - both officially and unofficially - that they will not be enthusiastic about the resumption of regularly-scheduled non-commercial flights to Havana from the U.S. chiefly, because they view the passengers on those flights as tourists being transported in violation of United States law. The Council anticipates that increased enforcement of TSREEA by the Office of Foreign Assets Control is expected, and that it would result in a decrease in the number of passengers travelling commercially between the U.S. and Cuba.

The Council also anticipates that President-elect Trump, his transition team, and supporters may initiate a discussion relating to the implementation of Title III of the Libertad Act of 1996, which enables those with assets expropriated by the government of the Republic of Cuba to bring lawsuits in United States Federal Courts. The Libertad Act requires the President to either enable or suspend the provision every six months. Presidents Clinton, Bush and Obama have done so. The current suspension expires in late January 2017, at which time a decision will have to be made as to whether the Libertad Act will be suspended further.

PRINCESS CRUISE LINES TO PAY LARGEST-EVER CRIMINAL PENALTY FOR DELIBERATE VESSEL POLLUTION

On December 1, 2016 Princess Cruise Lines Ltd. (Princess) agreed to plead guilty to seven felony charges stemming from its deliberate pollution of the seas and intentional acts to cover it up. Princess will pay a \$40 million penalty – the largest-ever criminal penalty involving deliberate vessel pollution – and plead guilty to charges related to illegal dumping of oil contaminated waste from the Caribbean Princess cruise ship which visited various U.S. ports in Florida, Maine, Massachusetts, New Jersey, New York, Puerto Rico, Rhode Island, South Carolina, Texas, U.S. Virgin Islands and Virginia.

The U.S. Department of Justice's investigation was initiated after information was provided to the U.S. Coast Guard by the British Maritime and Coastguard Agency indicating that a newly hired engineer on the Caribbean Princess reported that a so-called "magic pipe" had been used on Aug. 23, 2013, to illegally discharge oily waste off the coast of England. It was determined that the Caribbean Princess had been making illegal discharges through bypass equipment since 2005, one year after the ship began operations. The discharge on Aug. 23, 2013, involved approximately 4,227 gallons, 23 miles off the coast of England within the country's Exclusive Economic Zone. At the same time, engineers simultaneously ran clean seawater through the ships overboard equipment in order to create a false digital record for a legitimate discharge.

If approved by the court, \$10 million of the \$40 million criminal penalty will be devoted to community service projects to benefit the maritime environment; \$3 million of the community service payments will go to environmental projects

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in South Florida; \$1 million will be earmarked for projects to benefit the marine environment in United Kingdom waters.

ROYAL JORDANIAN AIRLINES FINED 35,000 FOR VIOLATING TARMAC DELAY RULE

On November 30, 2016, DOT assessed \$35,000 in civil penalties against Royal Jordanian Airlines for failing to file required tarmac delay data for a lengthy tarmac delay that occurred at Detroit International Airport (DTW) in July 2014.

The investigation was prompted by a consumer complaint, and DOT's Office of Aviation Enforcement and Proceedings found that on July 5, 2014, Royal Jordanian flight RJ264 was delayed on the tarmac for more than four hours in violation of the tarmac delay rule, after the flight diverted to DTW on a scheduled flight from ORD to Queen Alia International Airport, Jordan.

As our readers may be aware, DOT regulations require carriers to file a BTS Tarmac Delay Report with the Department whenever they experience a lengthy tarmac delay of more than three hours at a U.S. airport. Failure to file the required report has resulted in fines against numerous other carriers, such as Jet Airways (India) and Copa Airlines, since the reporting obligation was established.

FAA PROPOSES \$218,000 CIVIL PENALTY AGAINST RESORTS WORLD COMPANIES FOR ALLEGEDLY CONDUCTING UNAUTHORIZED AIR CARRIER OPERATIONS

On December 6, 2016 the FAA proposed a \$218,000 civil penalty against Resorts World Aviation and Resorts World Bimini for allegedly transporting passengers without an FAA air carrier certificate or with pilots who had not been trained and checked for commercial operations.

The FAA alleges that Resorts World Aviation provided Resorts World Bimini casino players and other guests with nine for-hire flights between July 10 and July 19, 2015. The flights were between the Miami area and Bimini in the Bahamas. The FAA alleges that the companies operated the flights when they did not hold the required FAA certificate to carry passengers for hire or the economic authorization from the DOT to operate as an air carrier. Additionally, the FAA alleges that the pilots flying the planes had not undergone required training and proficiency checks to conduct the operations involved. Finally, the FAA alleges that the companies advertised to perform the operations in spite of not having FAA authorization for the operations.

DELTA AIR LINES, JETBLUE AIRWAYS, FRONTIER AIRLINES CONSENT ORDERS

On December 9, 2016 DOT issued three consent orders assessing civil penalties of \$40,000, \$40,000 and \$60,000 against Delta Air Lines, Inc., JetBlue Airways Corporation, and Frontier Airlines, Inc., respectively.

Delta's order stems from a failure by the airline to file an incident report within 30 days following a series of excessive tarmac delays. Unlike foreign airlines, U.S. carriers are required to file a detailed written incident description every time they experience a lengthy tarmac delay (in addition to the BTS Part 244 tarmac delay report that must be filed by foreign carriers). An investigation by the Department's Enforcement Office revealed that Delta had inadvertently failed to file the required incident report for five lengthy tarmac delays.

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JetBlue was fined for allegedly violating 14 C.F.R. Parts 250 and 259. An investigation by the Department's Enforcement Office of JetBlue's oversales practices revealed instances in which JetBlue did not provide appropriate compensation as required under its customer service plan and "Customer Bill of Rights", in violation of DOT regulations.

Finally, DOT found that Frontier violated 14 C.F.R. 399.84(a) (the full-fare advertising rule) by advertising base fares, such as the "Buck Fares", or "\$1 + taxes and fees" in the same font size as the corresponding total fares. In particular, Frontier advertised base fares (without taxes and fees) in the same sized font as the total fare inclusive of taxes and fees. Frontier's email advertisement was also found to be problematic in that the carrier advertised only the base fare ("a buck") in the email subject line, in violation of the requirement that charges included within the single total price, which may be stated separately, may not be false or misleading and may not be displayed prominently.

FAA PROPOSES CIVIL PENALTIES AGAINST THREE COMPANIES FOR ALLEGED HAZARDOUS MATERIALS VIOLATIONS

On December 23, 2016, the FAA proposed civil penalties against three companies for allegedly violating the Hazardous Materials Regulations. Namely, \$72,000 against Posan Industry Co. Ltd., of South Korea, \$63,000 against Power Distributors of Columbus, Ohio, and \$57,400 against Consolidated Container Company, LLC, of Atlanta, Ga.

All three proposed penalties allege a failure by each company to use proper packaging for a shipment; properly mark and label it; and provide shipping papers indicating the amount, type and hazardous nature of the material inside. The FAA also alleged that the companies failed to provide required emergency response information with the shipment and failed to ensure the person who prepared it had received required hazardous materials training.

Posan has been in communication with the FAA about the case. Both, Power Distributors and Consolidated Container are scheduled to meet with the FAA in early January to discuss their respective cases.

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.