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February 2019

AVIATION REGULATORY UPDATE

DOT TO CURTAIL EUROPEAN CARRIER WET LEASES BEYOND 14 MONTHS

The United States Department of Transportation has 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 applies to wet-leases by foreign air carriers of the EU, Iceland, Norway, and Switzerland to other such carriers. Interested parties have until **March 7, 2019** to file objections, and answers are due seven days thereafter.

If finalized, DOT will take the following actions with regard to EU-to-EU carrier statements of authorization under 14 CFR Part 212:

- Effective immediately, it will terminate the effectiveness of all applicable statements of authorization held by the affected carriers that currently have exceeded 14 months in duration and remain in effect subject to a pending timely filed renewal application under the APA. Affected carriers have until March 30, 2019, to end these operations.

- Effective immediately, it will terminate the effectiveness of all applicable statements of authorization held by the affected carriers that were granted for an indefinite duration and currently have exceeded 14 months in duration. Affected carriers have until March 30, 2019, to end these operations.

- Effective immediately, DOT intends to limit all authorizations for applicable wet-lease operations by the affected carriers to a total collective duration of 14 months. These limitations would apply to any past applicable operations for which the Department has granted authorizations effective October 3, 2012 or later, all ongoing applicable operations for which the Department has granted authorizations that have not yet reached 14 months in duration, and all future applications from affected carriers for applicable operations.

The Department's proposal comes 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 pressed for time limits to be imposed to balance their alleged competitive disadvantage. The U.S. government has imposed limits on a case-by-case basis and has been raising the issue with EU regulators since 2012. However, action by the Europeans has yet to occur. Interestingly, in what appears to be an attempt by DOT to push the EU to resolve the issue, the Show Cause Order states 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."

If you have any questions or would like to consider responding to the Order to Show Cause, please contact us.

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February 2019

AVIATION REGULATORY UPDATE

DOT 2019 REGULATORY AGENDA

The Trump Administration's recently published Unified Regulatory Agenda contains several notable regulatory initiatives to be pursued by the Department in 2019. While certain regulatory initiatives are behind their proposed schedule, they remain on the Department's agenda, with delays likely resulting from the recent government shutdown. For example, a rule on Modernizing Payment of Denied Boarding Compensation (DBC), which would allow electronic delivery of DBC notices and payment using stored value cards, was scheduled for October 2018 but has yet to be released. A rule to Modify Carrier Responses to Consumer Complaints (General and Disability), which would increase the 30-day time limit airlines have to respond to disability related complaints and eliminate the requirement that carriers acknowledge receipt of written complaints, had been scheduled for publication in January 2019. A rule on Streamlining Customer Service Commitments that would eliminate carriers' requirement to self-audit compliance with customer service plans was scheduled to be published in the Federal Register in February 2019.

The Department also plans to issue a regulation in March 2019 clarifying the meaning of "unfair and deceptive practices" and will be seeking public input. It will follow Federal Trade Commission policy statements, generally defining a practice as "unfair" if it causes or is likely to cause substantial harm, the harm cannot reasonably be avoided, and the harm is not outweighed by any countervailing benefits to consumers or to competition. A practice will generally be found "deceptive" if it misleads or is likely to mislead a reasonable consumer with respect to an issue that affects their choice.

In addition to the above regulatory agenda items, below are a few of the "Customer Service Improvements" mandated by the FAA Reauthorization Act of 2018 (signed into law by President Trump on October 5, 2018) that may be implemented in 2019.

- DOT shall conduct a rulemaking proceeding to define the term "service animal" for purposes of air transportation and to develop minimum standards for the in-cabin carriage of service animals and emotional support animals (ESAs). DOT will issue a final rule on these topics within 18 months of the bill being signed into law (April 5, 2020). A notice of proposed rulemaking is expected to be issued in March.

- Within one-year (by October 5, 2019), DOT will promulgate regulations that require covered air carriers to promptly provide refunds to passengers of any ancillary fees paid for services related to air travel that they did not receive, including on a scheduled flight, on a subsequent replacement itinerary if there has been a rescheduling, or for a flight not taken by the passenger.

- Within 180 days of the bill being signed into law (by April 3, 2019) DOT will issue a Final Rule that requires large ticket agents to adopt certain minimum customer service standards. To the extent feasible, new rules will require large ticket agents (those with at least $100 million in annual revenue) to comply with customer service and disclosure requirements consistent with responsibilities placed upon covered air carriers.

Whether these initiatives will be similarly delayed remains to be seen. If you have questions about upcoming or existing regulatory initiatives, please contact us.

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February 2019

AVIATION REGULATORY UPDATE

UNITED AIRLINES DIVERSION LEADS TO PROCEDURAL CHANGES

A United Airlines (United) flight from Newark, New Jersey to Hong Kong was forced to land at Goose Bay Airport in Newfoundland, Canada following an onboard medical emergency. After landing, a cargo door failure prevented the aircraft from departing Goose Bay. Passengers spent 16 hours on the tarmac inside the Boeing 777 due to insufficient customs staffing to facilitate deplaning and a lack of local technicians who could fix the cargo door. A variety of factors, including a winter storm on the U.S. East Coast and limits on crew working hours, affected how quickly United could dispatch a backup plane to rescue the passengers. United stated that it failed to keep the passengers well-informed as the situation evolved, including by telling them that a backup plane would arrive many hours before it actually did.

United announced in February that it was changing its procedures in response to the incident. In addition to reviewing the skills of local maintenance staff, the airline said it would only use Goose Bay Airport for emergency landings, while diversions for less urgent situations will be taken to other, better-equipped airports in the region.

DOT DENIES SEVERAL PETITIONS FOR RULEMAKING BY FLYERSRIGHTS.ORG

On February 1, 2019, the Department issued three separate decisions in response to petitions for rulemaking filed by consumer advocacy group FlyersRights.org. In each case, the Department declined to impose new regulations.

First, in Order 2019-2-1, published in Docket OST-2015-0031, the Department declined to impose caps on ticket change fees in foreign air transportation. FlyersRights.org argued that airlines were imposing fees in a manner unrelated to the actual costs of changes and that fees were exorbitant and meant to be a profit source. DOT concluded that market-rate fees make load factors more predictable, lower prices on nonrefundable tickets, and are consistent with the deregulatory policies underpinning the U.S.'s network of Open Skies agreements.

Second, in a letter filed in Docket OST-2015-0256, the Department rejected FlyersRights.org's contention that airlines were not giving passengers sufficient notice of their rights under the Montreal Convention to compensation for delays and cancellations. DOT observed that many carriers provide notice to passengers in airport signage, on tickets, and in contracts of carriage.

Third, in a letter filed in Docket OST-2016-0197, the Department declined to reinstate a "reciprocity rule" that would have required carriers to arrange replacement travel for passengers on other carriers in the event of delays exceeding two hours. DOT reasoned that consumers are already properly informed of rebooking policies in Customer Service Plans and that a reciprocity rule is not needed to address large-scale failures of computer reservation systems.

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ATTORNEYS AT LAW

February 2019

AVIATION REGULATORY UPDATE

FEDERAL AVIATION ADMINISTRATION ISSUES SEVERAL NEW UAS RULES

On February 13, 2019, the FAA published proposed rules titled "Operation of Small Unmanned Aircraft Systems Over People" to expand permitted operations of unmanned aerial systems (UAS). The proposed rules would update the FAA's existing UAS regulations in 14 CFR Part 107 for drones weighing under 55 pounds (about 25 kg). Interested parties can submit comments on the Proposed Rule through April 15, 2019.

Under the proposal, night operations will be permitted only if an operator undergoes training and the drone is equipped with an anti-collision light. Operations directly over exposed people will be permitted according to a three-category system of classification that is designed to be technology-neutral and scaled to risk of injury to persons on the ground. UAS manufacturers would bear the burden of demonstrating to the FAA that their products contain adequate safety features to meet the criteria of a given category.

Also on February 13, 2019, the FAA published an advance notice of proposed rulemaking (ANPRM) entitled "Safe and Secure Operations of Small Unmanned Aircraft Systems" that addresses the security aspects of UAS operation. The FAA has requested input on several issues, including: whether drone regulations should impose stand-off distances in certain situations; whether altitude, airspeed, or performance limitations should be imposed; whether drones can operate as part of unmanned traffic management systems; whether payload restrictions are necessary (e.g., hazardous materials rules); and whether specific safety design requirements are necessary for advanced operations. Interested parties can submit comments on the ANPRM through April 15, 2019, and the FAA is expected to propose regulations later this year.

Finally, effective February 25, 2019, any UAS must clearly display its FAA identification number on the outside the craft to facilitate easy identification. This replaces a rule that had allowed drone operators to affix the FAA number on an inside surface of the drone.

If you have questions about the above or would like help in submitting comments on the proposed regulations, please contact us.

OFAC REACHES SETTLEMENTS FOR NORTH KOREA AND CUBA SANCTIONS VIOLATIONS

On January 31, 2019, the Treasury Department's Office of Foreign Assets Control (OFAC) announced a $996,080 settlement with California-based cosmetics company, e.l.f. Cosmetics, Inc., for apparent violations of OFAC's North Korean Sanctions Regulations. The company imported false eyelash kits that appeared to contain certain materials sourced from North Korea. Because e.l.f. Cosmetics self-reported its non-egregious violation and because the company fully and promptly cooperated in the ensuing OFAC investigation, it was able to avoid a penalty that could have reached as high as $40.8 million. However, OFAC noted that "Throughout the time period in which the apparent violations occurred, ELF's OFAC compliance program was either non-existent or inadequate," the result of which was failing to notice that two China-based suppliers were using materials from the DPRK.

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ECKERT SEAMANS
ATTORNEYS AT LAW

February 2019

AVIATION REGULATORY UPDATE

On February 14, 2019, OFAC announced a $5.5 million civil penalty against AppliChem GmbH ("AppliChem"), of Darmstadt, Germany for sales of chemicals to Cuba between May 2012 and February 2016 in violation of the Cuban Assets Control Regulations. AppliChem had been acquired in 2012 by a U.S. business and was required to terminate business deals with Cuba. Instead, the company devised a program of fraudulent "Caribbean Procedures" to continue to ship products using third party logistics experts while hiding this from U.S.-based management. Whistleblowers contacted the parent company's ethics hotline to reveal the violations. The U.S. parent company's voluntary cooperation with OFAC mitigated what could have been a $20 million civil penalty.

These cases illustrate the need for supply chain due diligence programs, employee training, and attention to the applicable regulations. Please reach out to us if you have questions about how to meet these important compliance obligations.

DEADLINE FOR COMMENTS ON CANADIAN AIR PASSENGER REGULATIONS

As we reported last month, the Canadian Transport Authority ('CTA") published a draft set of "Air Passenger Protection Regulations" and sought input from industry stakeholders. The deadline to comment was February 20, 2019, and the rules are expected to go into effect this summer after revisions are finalized. All flights to, from, and within Canada (including connecting flights) will be covered by the new rules. Please contact us if you have questions about the forthcoming rules.

PHMSA UPDATES RULES FOR CARRYING LITHIUM BATTERIES

The U.S. Pipeline and Hazardous Materials Safety Administration (PHMSA) has released an interim final rule to prohibit lithium ion batteries in the cargo holds of passenger aircraft. This rule will bring U.S. requirements in line with related international standards, and most U.S. carriers have already instituted similar rules.

Under the new rule, passengers and crew will still be permitted to carry electronic devices with lithium batteries into the cabin of an aircraft. PHMSA will also mandate that batteries must have a 30 percent charge or less if they are being carried on cargo aircraft and aren't packaged with or contained in the applicable equipment or devices. The rule will also limit the number of packages that may be shipped under current provisions for small (excepted) cells and batteries to not more than one package per consignment. Additionally, under the new rule, two lithium batteries may be carried on a passenger plane if they are for a medical device. However, the intended destination must not be serviced daily by cargo aircraft and PHMSA must provide advance permission. Such batteries may also have a charge greater than 30 percent as long as they are packaged according to PHMSA specifications.

PHMSA's updated rule was mandated by the October 5, 2018 FAA Reauthorization Act, in which Congress ordered DOT to conform its lithium battery rules to ICAO standards by January 2019. This deadline was missed as a result of the recent government shutdown.

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February 2019

AVIATION REGULATORY UPDATE

BILL TO STOP DIVERSION OF TSA SECURITY FEES TO TREASURY GENERAL FUND INTRODUCED IN U.S. HOUSE OF REPRESENTATIVES

In response to the recent government shutdown, a group of lawmakers has introduced the "Funding for Aviation Screeners and Threat Elimination Restoration Act," or "FASTER Act." This bill would eliminate a rule that requires a portion of 9/11 Passenger Security Fees assessed on domestic airline tickets to be credited to the U.S. Treasury. Instead, the full value of the fees would be used for security purposes by the Transportation Security Administration (TSA).

Last year, approximately one third of funds collected from passengers' 9/11 Passenger Security Fees, or about $1.3 billion, was remitted (or diverted) to the U.S. Treasury. The purpose of the FASTER Act is to ensure that this money is used for program and technology improvement and, in the event of another lapse in appropriations, made available as an emergency fund to cover day-to-day TSA operating expenses including the salaries of TSA officers who staff checkpoints at the nation's airports.

CONGRESS PROPOSES RETROFITTING EXISTING PASSENGER AIRCRAFT WITH SECONDARY COCKPIT DOORS

Several members of the House of Representatives have introduced a bill that would require the installation of secondary cockpit doors on U.S. (domestic) commercial passenger aircraft. This follows 2018 legislation that required all newly-manufactured passenger jets to include secondary doors. The doors are typically wire-mesh barriers and provide an extra layer of security when a pilot exits the flight deck while the aircraft is en route. Some airlines have already adopted the technology on certain aircraft. The bill is H.R. 911, the Saracini Enhanced Aviation Safety Act of 2019, named for a pilot who lost his life in the September 11, 2001 terrorist attack.

DOT PENALIZES AIR TAXI FOR UNAPPROVED SCHEDULED SERVICE

On February 6, 2019, DOT issued a consent order and a $50,000 civil penalty against AirGate Aviation, Inc., a Florida-based air taxi that operates charter flights. DOT alleged that AirGate had advertised apparently regular "Bahamas Service" between New Smyrna Beach, Florida and Marsh Harbour, Bahamas, on its website and with the help of several resort and tourism websites. Though specific flight times were not posted on the websites, DOT investigators called AirGate's reservation phone number and were offered choices among regularly operating flights. Given that "flights departed and arrived consistently within a 15-30-minute window, such that a lay person could surmise that flights were generally available at specific times of day," DOT found that AirGate was operating as a commuter carrier in excess of its exemption authority.

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February 2019

AVIATION REGULATORY UPDATE

DOT PENALIZES AIR CARRIER FOR FAILURE TO SUBMIT TIMELY REPORTS

On February 6, 2019, DOT issued a consent order and a $45,000 compromise penalty against Sky Lease I, Inc. for failure to submit timely and complete traffic and financial reports to the Department. DOT found that Sky Lease failed to send the proper reports for a period in 2016; it made efforts to improve, but some additional deficiencies were discovered in 2017 in 2018. The reports were allegedly lost when Sky Lease relocated its operating base from Greensboro, North Carolina to Miami, Florida during the period in question. The carrier advised DOT it had corrected the problem by centralizing its reporting functions and adding new internal procedures.

FAA PROPOSES CIVIL PENALTY FOR OUTDATED FUSE CARTRIDGES

On February 15, 2019, FAA proposed a $150,000 penalty against Pacific Coast Aviation of Brookings, Oregon for operating a Hawker 800XP jet with two expired fuse cartridges in the engine fire-suppression system. The cartridges were due for replacement on March 26, 2017, but were not serviced until August 17, 2017. In the meantime, the aircraft was operated on 94 flights while not in airworthy condition as a result of the oversight. Pacific Coast and the FAA will meet to discuss the fine.

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.

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