

AVIATION REGULATORY UPDATE

FAA ISSUES UAS PROPOSED RULE; COMMENTS DUE APRIL 24

The FAA has released a Notice of Proposed Rulemaking (NPRM) that proposes to establish new rules for the commercial use of small unmanned aircraft systems (sUAS) in the United States. Comments on the NPRM are due by April 24, 2015.

The NPRM would establish a new part 107 to Title 14, Code of Federal Regulations, specifically for sUAS, which are defined as unmanned aircraft with a total weight at takeoff of less than 55 pounds that are flown for commercial or research purposes. The new part 107 rules would require that registered sUAS (see below) be operated only during daylight (sunrise to sunset local time) at heights below 500 feet and speeds less than 100 miles per hour, and the sUAS must remain within the visual range of sight of the sUAS operator at all times. Observers may be used but are not required, and may not be used to extend the range of the sUAS beyond the operator's visual range.

Operation of sUAS over persons on the ground (other than those involved in operating the sUAS) is generally prohibited. Operation is allowed in most areas, including over congested areas, with appropriate clearance from air traffic control in controlled airspace. In areas not subject to air traffic control or flight restrictions (i.e. stadiums or public events) no preclearance or notification is proposed to be required, subject to the restriction on operating over persons noted above.

The NPRM would also establish a special operator's license for sUAS in lieu of a private or commercial pilot's license. The sUAS operator license would require passing an FAA administered knowledge test on ten subject areas, including the part 107 rules, basic weather, basic information on the National Airspace System, basic flight rules for avoiding other aircraft, and load and balance information regarding sUAS. The process for obtaining an operator license is expected to take six to eight weeks and includes review by the Transportation Safety Administration for threats to national security.

The publication of this NPRM is a major milestone in opening up the United States to commercial use of sUAS. The rules proposed in the NPRM eliminate the most expensive and time consuming aspects of the existing exemption regime. The new rules could be especially beneficial to companies that conduct facilities inspections in hazardous or remote environments or that could benefit from aerial imagery to manage resources. One key benefit of the proposed rule is that existing employees with expertise in the facilities or resources being managed could be used because the proposed rule only requires a new sUAS operator's license (which involves a written test) rather than a pilot's license.

All sUAS will have to be registered in advance with the FAA just like other aircraft. Registration is limited to U.S. corporations and citizens in most cases, and includes a description of the sUAS (make, model and serial number) and its capabilities, proof of ownership (a bill of

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sale, for example) and current address information. The NPRM does not require type or airworthiness certification for sUAS.

The proposed rule can be found at <https://www.federalregister.gov/articles/2015/02/23/2015-03544/operation-and-certification-of-small-unmanned-aircraft-systems>

Eckert Seamans has attorneys who can assist your company in understanding these proposed rules and providing timely comments to the FAA to address your unique operational requirements. Please contact us if you have any questions.

DOT TO AUDIT IMPACT OF TARMAC DELAY RULE

In accordance with a Congressional mandate included in the Federal Aviation Administration (FAA) Modernization and Reform Act of 2012, the Department of Transportation's (DOT) Assistant Inspector General for Surface Transportation Audits will conduct an intensive audit of DOT's tarmac delay rule. The audit, scheduled to commence in late February, will last an undetermined amount of time and assess the following: (1) the rule's effect on carriers' decisions to delay or cancel flights; and (2) OST's independent analysis of how flights have been impacted by the rule.

The tarmac delay rule, which prohibits domestic and international carriers from allowing an aircraft to remain on the tarmac without offering passengers an opportunity to deplane for three or four hours, respectively, has been in effect for several years. While evidence exists that the rule has reduced the number of tarmac delays – in the 12 months following the introduction of the rule, the number of tarmac delays exceeding 3 hours decreased from 693 to 20 – skepticism remains that these reductions are largely the result of increased cancellations. This is the issue on which DOT's audit will focus.

The question of increased cancellations was addressed in a recent study commissioned by DOT, which determined that while the tarmac delay rule did adversely impact cancellations in summer 2011, similar impacts were not seen in 2010 and 2012. Independent research, however, suggests that the industry has seen a strong surge in the number of flight cancellations under the current tarmac delay regulatory interpretation. One particular study noted that after accounting for the cost of hotel and airport fees lost, rebookings, crew accommodations, and offset fuel costs, compliance with the tarmac delay rule has been estimated to cost international carriers approximately \$80 million each year, and approximately \$907 million over the 10-year period from 2011-2020. Losses suffered by domestic carriers could potentially be much higher.

Coincidentally, in 2014, carriers reported the lowest number of tarmac delays longer than three hours on record. According to the Department's most recent Air Travel Consumer Report, 2014 saw 30 tarmac delays of more than three hours for domestic flights and nine tarmac delays of four hours or more on international service. This is down from the 2013 figures of 84 domestic

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flight delays and 55 international flight delays. U.S. airlines canceled approximately 1.5% of scheduled domestic flights in the last month of 2014, up from .9% in November 2014.

We will continue to keep our readers updated on this issue and provide a summary of the findings of the Department's audit as soon as they become available.

PRESIDENT'S 2016 BUDGET INCLUDES PROPOSED INCREASE IN PASSENGER FACILITY CHARGE

A proposal in President Obama's 2016 budget would increase the Passenger Facility Charge (PFC), which is used to help fund airport improvement projects. PFCs have been capped at \$4.50 since 2000 and generated \$2.8 billion in 2013. The President's proposal would raise the maximum PFC to \$8 per traveler per flight segment, which would result in an additional \$2.3 billion in 2016 revenue.

Travel industry trade groups and airport operators support the proposed increase, arguing that airport improvements are needed and such improvements will boost the travel industry. To wit, Airports Council International-North America (ACI-NA) reported a backlog of \$15.14 billion in airport improvement projects to date.

U.S. carriers oppose the increase, arguing it would discourage travelers from flying. Airlines for America said "...consumers are very price sensitive when it comes to air travel, an unnecessary tax increase will reduce demand." The trade group added that an increase in PFCs would set back job growth, have a negative impact on tourism because of decreased demand and possibly limit air service to small communities.

INTEREST GROUPS SEEK TO CAP CHANGE FEES IN FOREIGN AIR TRANSPORTATION AND BETTER REGULATE FUEL SURCHARGES

On February 11, 2015, FlyersRights.org, a nonprofit airline passenger organization, submitted a petition to DOT requesting that a \$100 cap be placed on change fees for foreign air transportation. International change fees have increased to as much as \$750 in recent years.

Carriers generally opposed the petition, arguing that lower change fees will encourage consumers to "speculatively" purchase tickets far ahead of actual travel, and that high change fees are necessary due to the potential lost revenue associated with customers purchasing cheaper regular fares rather than high priced flexible or refundable fares. Carriers further argue that change fees are meant to discourage itinerary changes after a purchase has been made.

FlyersRight.org notes that even if a passenger changes flights, the airline can resell the seat to another passenger and generate revenue from the original passenger on their new flight. FlyersRights.org also noted that on average, a refundable ticket is 350% more expensive than a

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non-refundable ticket and purchasing refundable tickets at such a high cost is not an option for most customers.

A second initiative, targeted at the sizeable fuel surcharges charged by many airlines, was brought by the Business Travel Coalition (BTC). BTC argues that the industry practice of billing consumers for fuel surcharges violates DOT's 2012 guidance that such surcharges must be tied to the actual cost of fuel.

TSA PRECHECK PROGRAM SOLICITS PROPOSALS AND UNDERGOES GAO AUDIT

In December 2014, TSA announced that it will be soliciting proposals from the private sector to increase enrollment in its PreCheck program. TSA is seeking proposals to enroll and pre-screen applicants. TSA is specifically interested in proposals that would include options to collect fingerprints or iris scans to validate identity, and to perform a criminal history records check. The solicitation was originally posted on December 22, 2014, but due to an error, the solicitation was removed on February 6, 2015 and will be reposted once the issue is corrected.

In addition, the Government Accountability Office (GAO) released an audit report in December 2014 evaluating how TSA has expanded expedited screening. In assessing whether a passenger is eligible for expedited screening, TSA currently looks at (1) whether passenger is included on an approved TSA PreCheck list of known travelers; (2) results from the automated risk assessments of all passengers; and (3) threat assessments of passengers conducted at airport checkpoints known as Managed Inclusion. GAO cited concerns that TSA's use of Managed Inclusion (which uses different layers of security, including procedures that randomly select passengers for expedited screenings) had flaws and recommended that TSA take actions to strengthen the process by testing it and ensuring that it adheres to established evaluation design practices, among other things. In response to the report, several Congressmen cited concerns that Managed Inclusion was putting the aviation system at risk because behavioral indicators can often not be used to identify persons who may pose a threat to aviation security. TSA concurred with GAO's recommendations.

TSA REQUESTS PUBLIC COMMENT ON NEW INFORMATION COLLECTION REQUEST

Under the Secure Flight Program, the Transportation Security Administration (TSA) collects information from carriers which aids in identifying passengers who may be a lower risk to transportation security and therefore may be eligible for expedited screening. By law, TSA is required to collect public comment on its information collection proposal. TSA is requesting comments in order to (1) Evaluate whether the proposed information collection is necessary for TSA to perform its functions; (2) Evaluate the accuracy of TSA's estimate of the reporting burden; (3) Improve the quality, utility and clarity of the information to be collected; and (4)

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Minimize the burden of the information collection on those who respond using technological collection techniques.

Below is the information that TSA is collecting:

1. Secure Flight Passenger Data for passengers of covered domestic and international flights within, to, from, or over the continental United States.
2. Secure Flight Passenger Data for passengers of charter operators and lessors of aircraft with a maximum takeoff weight of over 12,500 pounds.
3. Certain identifying information for non-traveling individuals that U.S. airport operators or points of contact (POCs) seek in order to authorize entry into a sterile area (for example, to patronize a restaurant, to escort a minor or a passenger with disabilities or for another approved purpose).
4. Computer-Assisted Passenger Prescreening Systems (CAPPS) risk assessments. The assessments are generated by analyzing the underlying passenger and other prescreening data obtained by the aircraft operator when the passenger makes his or her reservation. TSA's Secure Flight receives only the assessment generated from the applicable data and NOT the underlying data.
5. Frequent Flier Code Words generated by aircraft operator to validate that a passenger is a Frequent Flier program member who may be eligible for expedited screening.
6. Contact information or the data format/mechanism the aircraft operator uses to transmit Secure Flight Passenger Data.

Comments are due by April 6, 2015. Please let us know if you would like assistance in submitting a comment.

DOT FINES AIR EUROPA

In response to a third-party complaint alleging a violation of the Department's full fare advertising rule, DOT recently fined Air Europa Lineas, S.A.U. (Air Europa) \$100,000 on December 16, 2013. The complaint alleged that Air Europa misrepresented carrier-imposed surcharges during the booking procedure and the Department agreed, finding that Air Europa committed unfair and deceptive trade practices by including a carrier-imposed fees within an amount described as "taxes" on its U.S. website. In addition to the monetary penalty, Air Europa was directed to cease and desist from further violations.

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FAA PROPOSES HAZMAT PENALTIES AGAINST TWO COMPANIES

The FAA recently proposed civil penalties of \$54,000 and \$96,800 against two companies for allegedly violating the Hazardous Materials Regulations (HMR). In both cases, the FAA alleged certain shipments were not accompanied by proper shipping papers to indicate the hazardous nature of their contents and were improperly marked, labeled or packed.

- \$96,800 against Rheem Manufacturing Co. for shipping three shipments containing a total of 19 metal cans of flammable paint by air. The packages were not declared to contain hazardous materials and were not labeled, marked or packed in accordance with HMR requirements. The company also failed to provide hazardous materials training for its employees.
- \$54,000 against Amazon.com for shipping a package containing a handgun cleaning kit by air. The kit included a two ounce plastic container of flammable, corrosive liquid. The shipment did not include shipping papers to indicate the nature or quantity of the hazardous material and Amazon did not provide required emergency response information.

ADDITIONAL FAA PROPOSED PENALTIES

In addition to those mentioned above, the FAA has proposed the following penalties:

- \$1.6 million against Alaska Airlines, Inc. (two penalties) for allegedly operating aircraft that were not in compliance with Federal Aviation Regulations. The first penalty, for \$900,000, involved the installation of systems to pulse external lights on 66 Boeing 737s without conducting proper ground and flight tests. The second, for \$700,000, involved an improper repair to a cracked engine thrust lever that obstructed the pilot's access to the aircraft's take-off/go-around button.
- \$147,375 against ExpressJet Airlines (two penalties) for allegedly violating drug and alcohol testing and aircraft maintenance regulations. The first penalty, for \$97,375, involved a failure by ExpressJet to conduct required drug tests and receive verified, negative results before hiring or transferring four people into safety-sensitive positions and failed to include one of these employees in its random drug and alcohol testing pool. The second, for \$50,000, alleged that ExpressJet failed to ensure that an Embraer EMB-145 regional jet underwent required testing and measurement of the aircraft surface in connection with the repainting of the jet.
- \$122,000 against Trans States Airlines, Inc. for allegedly operating an aircraft that was not in compliance with Federal Aviation Regulations.

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SAVE THE DATE: NTSB TDA AIR CARRIER INDUSTRY DISASTER RESPONSE AND FAMILY ASSISTANCE MEETING

The National Transportation Safety Board's Transportation Disaster Assistance Division (NTSB TDA) will hold its 2015 NTSB TDA Air Carrier Industry Disaster Response and Family Assistance Meeting (Chicago Meeting) on May 21, 2015. The meeting will be hosted by Southwest Airlines at their headquarters in Dallas, TX. The meeting will be from 8:30 am to 3:30 pm. The address for the meeting: Southwest Airlines, 2702 Love Field, Dallas, TX 75235. Additional information will be released closer to the meeting date.

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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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