

AVIATION REGULATORY UPDATE

CANADIAN REGULATOR FINALIZES DATA COLLECTION REGULATIONS

Earlier this month, Transport Canada published “Regulations Amending the Transportation Information Regulations (Air Travel Performance Data Collection)”. The objectives of the amendments are to collect from air carriers travel performance information, in order to 1) assist in assessing and monitoring the effectiveness of the agency’s Air Passenger Protection Regulations; 2) assess and monitor the air passenger experience, and make corresponding evidence-based policy changes; and 3) monitor industry performance trends and inform consumers. To effectuate these objectives the amendments will mandate information reporting requirements across the aviation sector to include large air carriers, small air carriers, the Canadian Air Transport Security Authority (CATSA), and NAV CANADA.

Specifically:

- Large air carriers will be required to submit monthly reports on data related to on-time performance; delays; and cancellations on a per-flight basis. They will also be required to report information on denied boardings; lost and damaged checked baggage; and complaints related to child seating, transportation of musical instruments, and the timely provision of information to passengers aggregated by route (flight segment).
- Small air carriers will be required to submit quarterly reports on data related to the number of cancelled and delayed flights; denied boardings; and complaints related to child seating, transportation of musical instruments, and the timely provision of information to passengers aggregated by route (flight segment). They will also be required to submit data on lost and damaged checked baggage aggregated by arrival aerodrome.
- CATSA will be required to submit monthly reports for each passenger screening checkpoint at all airports with boarding pass scanning technology, to include average security screening wait times; the number of passengers screened; and the number of security screening lanes used to screen passengers, aggregated by 15-minute periods.
- NAV CANADA will be required to submit monthly reports on aircraft movements at each aerodrome where it operates.

The amendments will come into force on December 15, 2019.

Additionally, the Canadian Transport Authority (CTA) Air Passenger Protection Regulations referenced in our May 2019 Aviation/Regulatory Update will take effect on July 15, 2019 and include rules governing tarmac delays, denied boarding, lost and damaged luggage, carrier responsibilities to provide certain real-time notices, and penalties for noncompliance. Depending on the provision or regulation violated, carriers can be fined up to C\$25,000 for any violation(s).

Please let us know if you require additional information.

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UPDATE ON NEW OFFICE OF FOREIGN ASSETS CONTROL (OFAC) RESTRICTIONS ON TRAVEL TO CUBA

On May 30, 2019, the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) amended the Cuban Assets Control Regulations (CACR) by removing the popular authorization for group people-to-people educational travel to Cuba, effective June 5, 2019. Certain previously authorized group people-to-people educational travel may continue to be authorized under a grandfathering provision that will also be added to the regulation. This restriction reflects the Trump Administration's new policy of taking a tougher stance against travel to Cuba.

Additionally, under the "Restricting the Temporary Sojourn of Aircraft and Vessels to Cuba" rule promulgated by the Bureau of Industry and Security, the U.S. Department of Commerce's Export Administration Regulations have similarly been amended to prohibit non-commercial aircraft from flying to Cuba, and passenger and recreational vessels from sailing to Cuba, including private and corporate aircraft, cruise ships, sailboats, fishing boats, and other similar aircraft and vessels. However, the following types of aircraft and vessels will remain eligible for travel to Cuba: 1) commercial aircraft operating under Air Carrier Operating Certificates and other Federal Aviation Administration certificates; 2) authorized air ambulances; and 3) cargo vessels for hire for use in transportation of separately authorized items.

Finally, on June 4, 2019, OFAC issued a clarification on the restrictions for individuals traveling to Cuba in the "Support for the Cuban People" authorized travel category – permitting the booking of hotels. United States-based travel agents and tour operators inquired into the ability to book hotels for these travelers, as the OFAC's *Frequently Asked Questions* (FAQs) did not specifically mention the use of hotels in the authorized itineraries examples. OFAC clarified in the FAQs that travelers may book hotels in Cuba so long as they comply with all other requirements when traveling under the "Support for the Cuban People" category.

OFAC ANNOUNCES SETTLEMENTS WITH EXPEDIA AND HOTELBEDS USA

On June 13, 2019, OFAC announced a \$325,406 settlement with Expedia Group, Inc. (Expedia) to settle potential civil liability for providing Cuba-related travel services in violation of the CACR. Specifically, between 2011 and 2014, Expedia had dealings in property owned by Cuba or Cuban nationals by assisting 2,221 persons — some of whom were Cuban nationals — with travel or travel-related services for travel within Cuba or between Cuba and locations outside the United States. The apparent violations were voluntarily self-disclosed to OFAC.

The apparent violations occurred because certain Expedia foreign subsidiaries were not familiar with U.S. economic sanctions laws, and Expedia employees allegedly overlooked certain aspects of Expedia's business that presented risks of noncompliance with U.S. sanctions. Specifically, electronically booked travel to Cuba resulted from failures or gaps in Expedia's technical procedures and other measures to avoid CACR violations. For at least one foreign subsidiary, Expedia failed to inform the subsidiary until approximately 15 months after Expedia had acquired the subsidiary that it was subject to U.S. jurisdiction

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and law. Expedia failed to quickly integrate the subsidiary into the Expedia corporate family, and did not fully brief the subsidiary regarding compliance obligations with U.S. sanctions. The subsidiary therefore continued operating independently during the integration period, resulting in the above-referenced violations.

OFAC separately announced on June 14 a \$222,705 settlement with Hotelbeds USA, Inc. for similar violations.

FAA INITIATING PROPOSED RULEMAKINGS FOR SUPERSONIC AIRCRAFT TESTING

The Acting Federal Aviation Administration (FAA) Administrator, Dan Elwell, announced at the 2019 Paris Air Show that the FAA is taking steps to advance the development of civil supersonic aircraft. Elwell reported that the FAA is beginning this process with the initiation of two proposed rulemaking activities on civil supersonic aircraft noise: the first will focus on streamlining and clarifying the procedures for conducting supersonic domestic flight-testing, and the second will address noise certification of supersonic aircraft.

The FAA first anticipates publishing an NPRM by December 31, 2019 that focuses on streamlining the procedures for flight authorization for testing. An additional NPRM for noise certification of supersonic aircraft is set to be published by March 31, 2020.

SUPREME COURT EXPANDS PROTECTIONS FOR CONFIDENTIAL PRIVATE BUSINESS INFORMATION

In a 6-3 decision on June 24, 2019, the U.S. Supreme Court held that the Freedom of Information Act (FOIA) permits a federal regulatory agency to keep confidential records that are submitted by a private entity, so long as the records at issue are kept secret in the normal course of business, and the agency promises to keep the records from disclosure. In *Food Marketing Institute v. Argus Leader Media*, the Argus Leader, a South Dakota newspaper, submitted a FOIA request for records that would disclose data pertaining to the U.S. Department of Agriculture's Supplemental Nutrition Assistance Program, known as "SNAP". The data being requested included certain confidential commercial information about grocery stores at which SNAP recipients shop. In trying to prevent disclosure of this information, USDA and the affected grocers argued that the retailers' market positions – which were confidential and kept secret from competitors and the public in the normal course of business – would be revealed if the FOIA request was granted.

Before this month's decision, the 8th Circuit held that the SNAP data fell outside the scope of established FOIA exemptions (and was therefore not protected) because the affected grocers could not satisfy the prevailing Exemption 4 test, which applied only to information that if disclosed, is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."

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The Supreme Court focused on interpreting the word “confidential”. Ultimately, the high court held that information that is “customarily and actually treated as private by its owner and provided to the government under an assurance of privacy” falls under the protection of FOIA's Exemption 4 for “confidential” private information. In so holding, the Court developed a new authoritative test: when information is submitted to an agency by a private sector submitter, that entity will only need to show its efforts to keep the information private, provided that it received assurances from the agency that the information would remain confidential. Submitting entities will no longer need to show any harm (substantial or otherwise) for the information to qualify for protection under Exemption 4.

Practically, the Court’s decision in *Food Marketing Institute* is a win for business, as it broadens the scope of Exemption 4, thus making it easier for private records to remain protected from disclosure. It will especially benefit entities in regulated industries that must routinely provide information to government agencies that is confidential, but may not meet the definition of a “trade secret”.

AMADEUS RESPONDS TO RECENT IATA CLAIMS IN DOT ADVISORY COMMITTEE ON TRANSPARENCY OF ANCILLARY SERVICE FEES PROCEEDING

Amadeus, one of the industry’s leading Global Distribution Systems (GDSs), responded on June 4, 2019 to comments made by IATA at the April 2019 Aviation Consumer Protection Advisory Committee meeting. In a five page letter to the DOT Office of Aviation Enforcement and Proceedings’ Assistant General Counsel, Amadeus responded to a number of statements made by IATA; most notably that Amadeus is “holding back” or otherwise hindering the development of IATA’s New Distribution Capability (NDC), which is an internal travel industry communications standard that IATA has been developing and promoting. Amadeus highlighted several important facts, including that the NDC was developed by IATA without any travel agency or GDS participation, that the first sixteen versions of the NDC lacked a number of essential capabilities for travel agents, that Amadeus has been actively engaged with IATA and other industry stakeholders on the project, and that Amadeus is helping airlines to develop NDC-based solutions that satisfy airlines, travel agents, and the larger aviation industry as a whole.

In response to IATA statements that GDSs are a roadblock on innovation, Amadeus noted that it has invested EUR 3 billion in research and development since 2015, and ranks as the second-largest research and development investor in the Software & Services sector in Europe. In response to a statement by IATA that GDSs exert significant market power, Amadeus highlighted that less than one third of airline bookings are made using a GDS (most are done via airline websites, ticket offices, agency portals, etc.). Regarding a reference by IATA that GDSs engage in “monopoly business practices” Amadeus responded by stating that it has less than 20% of the airline distribution market, and is strictly regulated under the EU Code of Conduct for CRSs, which mandates non-discriminatory treatment of airlines and travel agents, and that its business is fundamentally focused on providing a comprehensive and unbiased distribution service.

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WALMART TO PAY \$282 MILLION FOREIGN CORRUPT PRACTICES ACT (FCPA) SETTLEMENT

On June 20, 2019, Walmart agreed to pay over \$282 million to U.S. authorities in order to settle allegations that it violated the Foreign Corrupt Practices Act (FCPA), by failing to ensure subsidiaries in Brazil, China, India and Mexico had sufficient anti-corruption programs and processes in place. Of the settlement, \$144 million will be paid to the U.S. Securities and Exchange Commission (SEC) and \$138 million will be paid to resolve criminal charges pursued by the U.S. Department of Justice.

Specifically, for approximately 11 years, Walmart subsidiaries in a number of countries allegedly paid bribes to local officials in connection with local projects and otherwise failed to comply with internal anti-corruption policies. For example, in Brazil, a Walmart subsidiary paid \$527,000 to a third-party intermediary in order to obtain construction permits for stores while ignoring “red flags”, such as the fact that the intermediary was formerly a government official. Walmart alerted the SEC about potential FCPA violations in Mexico and other countries in 2011 after the SEC had already opened its investigation. In addition to the above-referenced payments, Walmart will hire compliance personnel to improve its global anti-corruption program and processes.

NATIONAL TRANSPORTATION SAFETY BOARD’S TRANSPORTATION DISASTER ASSISTANCE (TDA) DIVISION TO HOLD WEBINAR WITH AMERICAN RED CROSS

On Wednesday, July 10, 2019 at 11:30 am EDT, NTSB TDA will host in coordination with the American Red Cross (Red Cross) National team, a webinar for air carriers to provide an overview of the following areas:

- Federal Family Assistance Legislation and the Designated Organization
- Overview of the revised NTSB-Red Cross Memorandum of Understanding (MOU)
- Red Cross National update on new and revised staffing positions and training for transportation disasters
- Red Cross new post-scene support services
- Red Cross local response & activation in the immediate aftermath of a transportation accident
- Question & Answer Session

Registration can be completed at the following website:

<https://attendee.gotowebinar.com/register/1530731691835469069>

After registering, you will receive a confirmation email containing information about joining the webinar.

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FAA PROPOSES \$715,438 CIVIL PENALTY AGAINST ALLEGIANT AIR

On June 12, 2019, the FAA proposed a \$715,438 civil penalty against Allegiant Air, LLC for allegedly operating an aircraft on more than two dozen flights following improper engine maintenance, thus violating the terms of its FAA-issued operations specifications.

Specifically, Allegiant had asked the FAA if it could deactivate an MD-80's functioning automatic reverse thrust system when the aircraft engine's exhaust gas temperature exceeds normal limits. The FAA did not deem this safe as the temperature exceedance could be due to other causes. Despite this, Allegiant did not determine the cause of the excess temperature and, instead, deactivated the MD-80's while installing an inoperative placard.

DEUTSCHE LUFTHANSA FINED \$50,000 FOR VIOLATIONS OF THE FULL FARE ADVERTISING RULE

On June 4, 2019, the U.S. Department of Transportation issued a consent order fining Lufthansa \$50,000 for violations of the full fare advertising rule for displaying prices that incorrectly included an excise tax on non-revenue tickets, as well as improperly collecting and remitting the tax. Half of the penalty will be forgiven in one-year so long as Lufthansa does not repeat the violation.

The enforcement action by DOT was triggered by a consumer complaint alleging that Lufthansa was engaging in a practice of improperly collecting taxes that were not due on non-revenue international tickets sold through its U.S.-facing website. DOT determined that Lufthansa became aware of these issues in November 2016, but continued to collect the \$17.80 tax through 2016 and then increased the tax amount collected to \$18.00 in 2017. A correction was not implemented by the airline until November 2017, after over 6,900 consumers had been improperly charged.

In response, Lufthansa stated that it was only made aware of two instances of the tax being inappropriately applied to non-revenue tickets, which Lufthansa believed to be isolated incidents. In both cases, the taxes were refunded, and Lufthansa stated that the improper application of the taxes was due to an inadvertent software modification. Lufthansa noted that it did not benefit from the collection of the tax and immediately corrected the problem, including by issuing refunds for nearly all affected tickets.

FAA PROPOSES \$97,500 CIVIL PENALTY AGAINST AGRARFLUG HELILIFT OF GERMANY FOR ALLEGED HAZARDOUS MATERIALS VIOLATIONS

On June 7, 2019, the FAA proposed a \$97,500 civil penalty against Agrarflug Helilift GMBH & Co. of Ahlen, Germany, for allegedly shipping an ill-conditioned helicopter containing approximately 300 gallons of flammable aviation fuel from Humble, Texas to Ahlen, Germany where it was later discovered that fuel was leaking from the helicopter upon its arrival in Scotland. Consequently, the FAA alleges that Agrarflug failed to not only drain and securely close the fuel tank, but that it also failed to provide emergency response information and required documentation describing the shipment.

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FAA REVOKES REPAIR STATION CERTIFICATE OF TANDEM AVIATION, INC.

On June 7, 2019, the FAA issued an Emergency Order revoking the repair station certificate of Tandem Aviation, Inc. (Tandem). The FAA alleged that Tandem had performed an incomplete overhaul of an air compressor that was part of an aircraft braking system and failed, on multiple occasions between September 2016 and July 2017, to use proper equipment to test power drive units that were part of an aircraft pneumatic system as prescribed in the methods of their aircraft maintenance manual.

FAA PROPOSES \$203,100 CIVIL PENALTY AGAINST GEE-BEE AEROPRODUCTS

On June 7, 2019, the FAA proposed a \$203,100 civil penalty against GEE-BEE Aeroproducts for not having the required approvals or authorizations for production of parts for installation on FAA-certified aircraft—especially parts that had been issued in the FAA’s 2000 Unapproved Parts Notification. Additionally, GEE-BEE advertised at least 22 different types of unapproved parts for sale and installation on FAA-certified aircraft both before and after the FAA issued a revised Unapproved Parts Notification in October 2017.

FAA PROPOSES \$742,677 CIVIL PENALTY AGAINST AAR AIRLIFT GROUP OF PALM BAY, FLA.

On June 7, 2019, the FAA proposed a \$742,677 civil penalty against AAR Airlift Group, Inc. for allegedly failing to properly document the replacement of components on 13 Sikorsky S-61N helicopters between February 16, 2016 and January 27, 2017 and operating helicopters in violation of its operations specifications after it failed to use the required special equipment to replace the components.

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.