

AVIATION REGULATORY UPDATE

PROPOSED SENATE RULE WOULD CREATE AIRLINE COMPETITION COMMISSION/ REQUIRE DOT TO ISSUE PASSENGER COMPENSATION FOR BAGGAGE DELAY

Reauthorization of the Federal Aviation Administration (FAA), which is currently authorized through March 31, 2016, is now being considered by both the U.S. House of Representatives and the Senate.

Measures specific to the House Bill, H.R. 4441, include:

- A requirement for airlines to refund baggage fees for bags delayed more than 24 hours on domestic flights;
- A ban on cell phone use for in-flight voice communications on scheduled passenger flights;
- A requirement that airlines notify passengers of their consumer rights by including Customer Service Plans on their websites;
- An authorization for the Department of Transportation (DOT) to establish a smartphone application for consumer complaints;
- A requirement that large and medium airports provide private rooms in every terminal for nursing mothers; and
- A requirement that airlines notify families, before tickets are booked, if family members are assigned separated seats.

Separate measures proposed in the Senate Bill, S. 2658, are:

- A requirement that U.S. carriers develop a “fatigue risk management plan” for flight attendants to be submitted to the FAA;
- A mandate that the FAA create rules for personal space on aircraft to keep airlines from squeezing passengers closely together on flights in seats that are decreasing in size;
- A requirement that FAA airplane evacuation testing be performed using the tight seating found on aircraft with 28-inch seat pitch;
- A requirement for additional fees, such as itinerary change fees, to have a relationship to the cost of services being provided;
- A mandate to standardize the 24-hour refund rule so that all airlines provide refunds 24 hours after a fare is purchased, rather than a 24-hour grace period prior to purchase, reducing current confusion with the rule;
- The creation of an Airline Competition Commission to study the changes in the aviation system and how consolidation has affected airline competition and pricing; and
- A requirement that air carriers provide notification and refunds to consumers impacted by delays or cancellations when the carrier has a choice to cancel or delay a flight during a weather-related event, or for involuntary changes to the consumer’s flight itinerary.

AVIATION REGULATORY UPDATE

RECENT CHANGES TO U.S. CUBA AND IRAN SANCTIONS REGIME

Aviation-related commercial trade liberalized between U.S. and Iran

On March 24, 2016 the Office of Foreign Assets Control (OFAC) took an incremental step towards liberalizing aviation-related commercial trade between the U.S. and Iran by issuing a General License GL-1 intended to provide U.S. citizens greater flexibility to enter into certain preliminary contractual agreements related to the export or re-export to Iran of commercial passenger aircraft and related parts and services. The General License does not authorize U.S. entities to export aviation-related materials to Iran. Under current law, OFAC requires a specific license to contract with Iran and the General License also does not permit U.S. citizens to contract with persons or entities on the Specially Designated Nationals list. The General License does however authorize U.S. citizens to negotiate “executory contracts, executory pro forma invoices, agreements in principle, executory offers capable of acceptance such as bids or proposals in response to public tenders, binding memoranda of understanding, or any other similar agreement” that are preliminary in nature and do not consummate any particular transaction.

U.S. sanctions on Cuba eased again

On March 15, 2016, OFAC amended the Cuban Assets Control Regulations, 31 C.F.R. part 515, to ease certain sanctions related to, among others, travel between the United States and Cuba. The easing of these sanctions, which coincides with the Department of Transportation’s current proceeding to select U.S. carriers to provide scheduled service between the United States and Cuba, include the following:

- Educational Travel – Individuals will be authorized to travel to Cuba for individual people-to-people educational travel and will no longer be required to undertake such travel under the auspices of a U.S. educational organization and/or be accompanied by a representative of the sponsoring organization.
- Payment of Salaries to Cuban Nationals – U.S. companies are authorized to engage in transactions related to the sponsorship or hiring of Cuban nationals to work or perform in the United States similar to nationals from other countries with a focus on Cuban athletes, artists, performers.
- Trade in Cuban-Origin Merchandise – authorizes certain dealings in Cuban-origin merchandise by individuals for personal consumption while in a third-country, and allows individuals to receive or obtain services from Cuba or a Cuban national that are ordinarily incident to travel and maintenance within a third country.

DOT ADOPTS FINAL RULE BANNING USE OF ELECTRONIC CIGARETTES ON COMMERCIAL FLIGHTS

On March 2, 2016, DOT adopted a final rule explicitly banning the use of electronic cigarettes (or E-cigarettes) on commercial flights, effective immediately. The final rule applies to all scheduled flights of U.S. and foreign carriers involving transportation in, to, and from the U.S., as well as to nonscheduled charter

AVIATION REGULATORY UPDATE

flights of U.S. and foreign carriers that have a flight attendant as a required crewmember. The announcement was made following initial confusion as to whether prior DOT rules that banned smoking of tobacco cigarettes on commercial flights also applied to electronic cigarettes.

The final rule clarifies DOT's original rule by specifically defining the term "smoking" to include the use of E-cigarettes and similar products. DOT claims the ban is justified due to the potential harmful effects of chemical aerosol products contained in E-cigarettes, especially to more vulnerable populations.

HOUSE OF REPRESENTATIVES APPROVES TSA REFORM BILL

On February 23, 2016, the U.S. House of Representatives approved a reform bill that streamlines transportation security regulations. The bill is a compilation of several pieces of legislation that seeks to:

- Implement a pilot project to establish a secure, automated biometric-based system to verify the identity of TSA PreCheck passengers at participating airports;
- Expand enrollment in the TSA PreCheck program by adding multiple private sector application capabilities;
- Ensure TSA PreCheck screening lanes are open and available during peak and high-volume travel times at airports;
- Establish a secure, automated system by December 31, 2017 at all large hub airports for verifying travel and identity documents of non TSA PreCheck passengers; and
- Develop a process within 90 days for regularly evaluating the root causes of screening errors at checkpoints across airports so that corrective measures can be identified.

The measure has been referred to the Senate Committee on Commerce, Science, and Technology.

PRECLEARANCE EXPANSION ON HOLD PENDING LEGISLATION AND FALLOUT FROM TERRORIST ATTACKS

Following various deadly terrorist attacks in France, Belgium and Turkey in 2015 and 2016, expansion of U.S. preclearance to additional locations around the world has been impacted, especially to locations in countries where recent terrorist attacks have occurred. Preclearance expansion has also been delayed due to pending Congressional approval of the Preclearance Authorization Act of 2015, which requires officials at both the Department of State (DOS) and Department of Homeland Security (DHS) to work together to prevent terrorist and other security threats from entering into the U.S.

The recent terrorist attacks have also affected the Visa Waiver Program (VWP), causing U.S. officials to threaten the possible removal of Belgium, Germany, France, Italy, and Greece from the list of VWP approved countries due to problems with passport enforcement following the Syrian refugee crisis. Because of the significant implications such action would have on all five countries considered to be allies of the United States, Secretary Kerry has been in high level negotiations with EU officials to address issues with European passport security and fraud.

AVIATION REGULATORY UPDATE

SOMALIA, LIBYA AND YEMEN RESTRICTED FROM VISA WAIVER PROTECTION PROGRAM

Following changes mandated by the VWP Improvement and Terrorist Travel Prevention Act of 2015 (“the Act”), as of March 1, 2016, citizens from Somalia, Libya and Yemen, as well as anyone wishing to gain entry into the U.S. from such countries are no longer eligible for the U.S. Visa Waiver Protection Program. The list of restricted countries also includes Syria, Iran and Iraq. Citizens of all restricted countries are required to apply for a full visa before travelling to the U.S. Customs and Border Patrol (CBP) has also begun implementation of mandated procedural changes to the Electronic System for Travel Authorization (ETSA), which includes a more extensive security check, and a new ETSA application form containing detailed questions to be completed by VWP applicants.

FAA MAKES CHANGES TO REDUCE BIRD FATALITIES

Following a series of flight tests to compare the level of attraction of birds to steady, non-flashing lights traditionally used to signify tall structures to pilots, several wildlife organizations and the Federal Communication Commission (FCC) have asked the FAA to consider using bright flashing lights instead. The tests concluded that the use of flashing versus steady-burning lights could significantly reduce the number of migratory bird fatalities due to bird strikes, as migratory birds are less attracted to intermittent flashes of light. As a result, the FAA has updated its lighting policies as of December 2015 to call for the new type of tower lighting configurations.

FAA PROPOSES RULE TO OVERHAUL SAFETY CERTIFICATION STANDARDS FOR GENERAL AVIATION AIRCRAFT

Based on industry recommendations, the FAA has proposed a rule to overhaul airworthiness standards for small, general aviation aircraft with a maximum capacity of 19 passengers or less, and a maximum takeoff weight of 19,000 pounds. The new recommendations are meant to reduce the time it takes to introduce safety enhancement technology while also reducing general aviation maintenance costs. The Notice of Proposed Rulemaking restructures the existing certification standards for small planes and replaces current prescriptive design requirements with performance-based standards that maintain the same level of safety. The proposal responds to the FAA Modernization and Reform Act of 2012, and the Small Airplane Revitalization Act of 2013, which directed the FAA to streamline the approval of safety advancements for general aviation aircraft. The comment period expires on May 13, 2016.

NTSB TRAINING PROGRAM FOR CARRIER FAMILY ASSISTANCE PLAN

The National Transportation Safety Board’s (NTSB) Transportation Disaster Assistance Division is hosting a training program for carriers on Family Assistance Plan compliance. The goal of the training program is to “train the trainers” so that carriers can begin to standardize procedures for responding to emergency situations. The course will be held on April 19-21, 2016 at the NTSB Training Center in Ashburn, Virginia.

AVIATION REGULATORY UPDATE

DOT CONSENT ORDERS

Porter Airlines Violations of 14 C.F.R. 399.84(a) full fare advertising rule as unfair and deceptive practice — Porter Airlines, Inc. (Porter Airlines) was fined \$50,000 for multiple violations of DOT's full fare advertising rule by Porter Escapes, a Canadian ticket agent selling pre-packaged tour products including air travel products on Porter Airlines. Porter Escapes' website had multiple instances of display advertisements for air transportation and hotel packages from U.S. cities to Canadian destinations with prices listed "per traveler plus tax," in violation of 14 C.F.R. Part 399, which requires any advertisement by a direct air carrier or its agent to state the entire price to be paid by a potential consumer purchasing an airfare or tour, including tax. Porter Escapes agreed to settle the matter with DOT and took remedial actions by suspending the offending marketing activity and working with its booking engine supplier to correct fare displays.

British Airways Violations of 14 C.F.R. 302.404 full fare advertising rule as unfair and deceptive practice — British Airways, PLC (British Airways) was fined \$40,000 and ordered to cease and desist from future violations after a third party complaint was filed against British Airways alleging violations of DOT's full-fare advertising rule after an inadvertent programming error prevented passengers using frequent traveler rewards to purchase one-way flights to and from the U.S. from viewing the total cost of a ticket on the carrier's website. British Airways admitted that it had become aware of the error by a prior consumer complaint, and states that it took steps to identify and resolve the issue the next day. British Airways then reached a settlement with DOT in order to avoid litigation and in compromise of civil penalties otherwise payable pursuant to 49 U.S.C. § 46301.

Dynamic Airways Violations of 14 C.F.R. 380 public charter operation regulations, 14 C.F.R. Part 382 passengers with disabilities and Article 17 of the Montreal Convention as unfair and deceptive practice and unfair methods of competition — Dynamic Airways, Inc. (Dynamic) was fined \$200,000 and ordered to cease and desist from future violations after a compliance visit at Dynamic's headquarters revealed that, for a period of time in 2014 and 2015, Dynamic failed to ensure that passengers' funds were deposited into the carrier's escrow account in a timely manner. Dynamic had also cancelled a number of flights fewer than ten days from the scheduled departure without notifying DOT, and failed to notify passengers of their rights to obtain refunds for such flights in violation of 14 C.F.R. 380. Provisions in Dynamic's operator-participant contract were found to violate Article 17 of the Montreal Convention by containing over two dozen categories of items in checked baggage for which liability was disclaimed. Article 17 of the Montreal Convention specifically prohibits carriers from disclaiming liability for valuable items. Other violations included Dynamic's failure to adequately train Complaint Resolution Officials (CROs) and make them available to customers at each airport it serves, as well as failure to file an annual report of disability-related passenger complaints to DOT prior to 2015 under 14 C.F.R. 382. Without admitting or denying the violations, Dynamic consented to the terms of the cease and desist order issued by DOT, and to the assessment of \$200,000 in compromise of potential penalties otherwise due and payable pursuant to 49 U.S.C. Section 46301.

AVIATION REGULATORY UPDATE

CIVIL PENALTIES PROPOSED BY FAA

\$917,000 penalty against Puerto Rico Ports Authority for alleged aircraft rescue and firefighting violations at three of its commercial airports — The FAA alleges that on March 25, 2015 at Rafael Hernandez Airport, it discovered multiple firefighting deficiencies, including inability of fire trucks to correctly mix firefighting foam and water, failure to apply an extinguishing agent within the required three minutes of an alarm sounding at a fire fighting demonstration, a damaged firefighting suit, and failure of fire fighters to receive recurrent aircraft familiarization training. Additional violations included failure of the airport to inspect its tenant fueling facilities between July 2014 and March 26, 2015, incorrect execution of daily self-inspections, improper repair of fire fighting vehicles, and large holes in the airport's runway. FAA also alleges that at Mercedita Airport, the airport failed to conduct daily self-inspections at sunrise, and at Antonio Rivera Rodriguez Airport, fire fighting vehicles failed to have two-way radio communications with the airport fire station on March 24, 2015.

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; or Reese Davidson at rdavidson@eckertseamans.com or 202-659-6633.

©Eckert Seamans Cherin & Mellott, LLC, 2016, all rights reserved.