

AVIATION REGULATORY UPDATE

CANADIAN PASSENGER PROTECTION REGULATIONS TO TAKE EFFECT ON JULY 15, 2019

The Canadian Transport Authority (CTA) Air Passenger Protection Regulations will take effect on July 15, 2019. All flights to, from, and within Canada (including connecting flights) will be covered by the new rules (i.e., a flight from Shanghai to New York via Toronto would be covered). CTA is rolling out the new requirements in a two-part process. Rules governing tarmac delays, denied boarding, lost and damaged luggage, carrier responsibilities to provide certain real-time notices, and penalties for noncompliance with these requirements are among the included topics and will take effect July 15th. On December 15, 2019, the remaining regulations will come into effect, including rules governing compensation for delays and cancellations, refunds, food service during long tarmac delays, and seating children with their families.

In complying with the regulations, carriers will need to provide specific disclosures when a key event occurs, and will be required to take remedial steps depending on the situation and the amount of control the carrier exercises over the source of the problem. For example, when the rules become effective passengers generally must be allowed to disembark after a tarmac delays exceeds three hours. Regarding compensation for flight delays, the rules fix amounts due for delays (e.g. C\$400 for 3-6 hours) and denied boarding (e.g. C\$900 for less than 6 hours) – with escalating amounts the longer the delay persists – the rules will also impose requirements on carriers to provide food, communications, rebooking on other carriers, or overnight accommodations in certain situations. Regarding children, the rules will require carriers to seat children under the age of 14 with their parents at no additional cost and will incorporate ICAO standards on unaccompanied minors. Depending on the provision or regulation violated, carriers can be fined up to **C\$25,000** for any violation(s).

In addition to complying with the regulations, carriers will be required to update their tariffs, policies and websites accordingly. Please let us know if we can assist or answer any questions regarding these new rules.

TRAVELERS WITH SEVERE NUT ALLERGIES MUST BE ALLOWED TO PREBOARD

On May 16, 2019, the U.S. Department of Transportation's (DOT) Office of Aviation Proceedings and Enforcement issued Order 2019-5-12 regarding the rights of U.S. air travelers with severe nut allergies. The Order stated that such travelers are "passengers with disabilities" within the meaning of 14 CFR Part 382, the Department's regulation mandating nondiscriminatory treatment of passengers with disabilities in air travel. Because some passengers with severe nut allergies must wipe down their seating area to prevent skin contact with allergens, they may require extra time to be seated. If so, they qualify to preboard under 14 CFR 382.93. Carriers should review and update their policies accordingly: if a passenger with a severe nut allergy presents themselves at the gate and asks to preboard to wipe down their seat, the carrier must grant the request.

DOT issued Order 2019-5-12 in response to complaints against American Airlines by an individual disabled traveler and by Food Allergy Research and Education, Inc., (FARE), a non-profit that advocates for

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individuals with food allergies. Because American Airlines had voluntarily updated its preboarding policy following these complaints, DOT declined to impose any penalties in that case, although it did lead to the publication of a new Departmental policy on the subject.

FAA UPDATES COUNTER-DRONE GUIDANCE FOR U.S. AIRPORTS

On May 7, 2019, the Federal Aviation Administration's (FAA) Office of Airports Safety and Standards released up-to-date guidance on the use of unmanned aircraft systems (UAS) detection or prevention systems near commercial airports. Such systems are referred to as counter-UAS, or C-UAS for short, and may be further categorized as "detection" or "countermeasure" systems depending on their capabilities. The FAA stated that security staff might consider the use of "detection" C-UAS that can spot and track drones, but that they should not at this time use active "countermeasure" systems that could jam or destroy drones. Any airport seeking to deploy a "detection" C-UAS system must work closely with the FAA, other federal government agencies, and local government partners to ensure safe operations. The U.S. government is continuing to develop more comprehensive policies for UAS security around airports, and it continues to study the appropriate role of C-UAS technology in the airspace system.

The FAA's update came in response to high-profile air traffic interruptions at UK's Gatwick Airport in late 2018 and at Liberty International Airport in Newark, New Jersey earlier this year. In both cases, unidentified UAS flying near runways caused significant delays to air service, and officials struggled to locate the responsible drone operators. While the FAA recognized that this problem is likely to recur and requires better solutions, it observed that existing C-UAS technology may present aeronautical safety problems by its physical presence near flight operations or by difficult-to-predict interactions with the complex radio frequency environment of an airport. Therefore, high-risk "countermeasure" technology is discouraged, and airports are encouraged to move cautiously and involve all relevant government entities in any UAS detection planning.

FAA UPDATES RECREATIONAL DRONE OPERATION RULES

On May 17, 2019, the FAA published a Notice, *Exception for Limited Recreational Operations of Unmanned Aircraft*, to begin implementing new rules for small hobbyist drone flights as required by the 2018 FAA Reauthorization Act. Section 349 of that law cancelled an older set of rules governing recreational UAS and replaced them with new safe harbor criteria. Recreational drone operations meeting these safe harbor criteria are exempt from the requirements of 14 C.F.R. Part 107 which otherwise govern UAS operations. The new rules are designed to facilitate easy, safe access to the national airspace system, without cumbersome licensing requirements, for educational and hobbyist operators of small UAS.

One principal difference between the old and new rules is that the procedure to contact ATC for flights within five miles of an airport will be replaced by use of FAA's Low Altitude Authorization and Notification Capability (LAANC) to receive prior approval for flight into any controlled airspace. LAANC is already used by Part 107 commercial drone operators and the FAA is updating its online tool for recreational operators to use. Recreational operators will no longer contact ATC directly but will use LAANC to notify the FAA of

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planned operations. Until the system upgrade is complete, no recreational flights can occur in controlled airspace except at certain fixed sites. The FAA announced on May 23, 2019 that it has added 109 contract control towers to the LAANC system, which now covers 400 towers and around 600 airports.

The May 17, 2019 Notice is the first step in the implementation of FAA Reauthorization Act Section 349, and several elements of the new rules are ongoing. First, the FAA is still developing guidance on which organizations may qualify as “community-based organizations” and what the contours of their safety guidelines will be. In the interim, recreational operators may follow existing best practices from modelling clubs and the FAA’s basic safety recommendations. Second, the FAA is still developing the aeronautical knowledge and safety test required by the statute. Until it is finalized, recreational operations may continue if they otherwise meet the new safe harbor criteria. We expect the FAA will issue further updates regarding recreational UAS in the near future.

US EPA WILL IMPLEMENT CO2 STANDARDS FOR AIRCRAFT ENGINES

The U.S. Environmental Protection Agency (EPA) announced this month that it will issue regulations to implement International Civil Aviation Organization (ICAO) design certification standards for CO2 emissions from aircraft engines. The EPA rules are slated to be published in September 2019 and will be at least as stringent as the standards that ICAO set forth in 2017 as Annex 16 (Environmental Protection), Volume III of the Chicago Convention. ICAO’s standards will apply to new aircraft type designs starting in 2020, and to designs already in production in 2023.

While the Trump Administration is generally skeptical of climate and environmental regulation, the U.S. has continued to move forward with climate commitments under the Chicago Convention. This trend is also illustrated, separately, by the U.S.’s continuing participation in ICAO’s Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), which is articulated by Chicago Convention Annex 16, Volume IV. The EPA’s engine emissions rulemaking had been suspended, but U.S. aircraft engine manufacturers pressed the agency to issue regulations since they participate in a global market and require certainty about future obligations.

UPDATES ON THE BOEING 737 MAX GROUNDING, INVESTIGATIONS

Investigations of the 737 MAX design and the FAA’s certification process have been launched by multiple entities, including a DOT commission, experts from other government agencies such as NASA and the U.S. Air Force, Congressional oversight committees, the DOT Inspector General’s Office, and even the Department of Justice. These investigations include a focus on the FAA’s practice of outsourcing safety reviews to private actors, including Boeing employees, under a program called “Organization Designation Authorization”. In response to news reporting and the above investigations, the FAA has defended its practice of making safety decisions based on scientific analysis of data and has stated that cooperative relationships between the FAA and regulated entities have improved aviation safety.

On May 23, 2019 the FAA hosted a meeting of global aviation regulators in Dallas, Texas, to discuss the investigations, the process of certifying a fix to the 737 MAX, and the return of the aircraft to commercial

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service. One goal of the meeting was to restore trust among the world's civil aviation authorities (CAAs) which has been strained by the staggered grounding of the 737 MAX by CAAs following the Ethiopian Airlines crash.

The FAA will not commit to a timeline for returning 737 MAXs to the skies aside from stating the agency will take as much time as necessary to ensure the plane is safe. The International Air Transport Association (IATA) has stated that it expects it could take until August of this year before the 737 MAX returns to service. Once the aircraft is ultimately cleared by the FAA, it remains to be seen if other CAAs will follow suit or take additional time to conduct their own evaluations. The European Aviation Safety Agency (EASA) has stated that the following prerequisite conditions must be met in order to lift the operations suspension of the Boeing 737 MAX:

Design changes proposed by Boeing must be EASA approved and mandated.
An additional independent design review by EASA must be completed.
737 MAX flight crews must be adequately trained.

OFAC PUBLISHES BEST PRACTICE GUIDE FOR U.S. SANCTIONS COMPLIANCE

On May 2, 2019 the Treasury Department's Office of Foreign Assets Control (OFAC) published "A Framework for Compliance Commitments." The Framework provided informal guidance on how companies should maintain risk-based sanctions compliance programs (SCPs) to ensure compliance with the U.S. government's economic and trade sanctions against countries such as North Korea, Cuba, and Venezuela. A strong SCP generally implements five key principles: (1) management commitment, (2) risk assessment, (3) internal controls, (4) testing and auditing, and (5) training. A company's diligent implementation of a compliance program can be a positive factor to mitigate OFAC civil penalties if a sanctions violation does occur.

The Framework suggests performance criteria to measure implementation of each of the five principles. For example, "management commitment" can be assessed in terms of senior leadership support, delegation of SCP authorities to point persons, and producing a culture of compliance within the company. "Risk assessment" entails a level of due diligence appropriate to a company's size and resources, along with its level of foreseeable risk (e.g., transactions with counterparties who might trade with sanctioned countries require stronger due diligence). "Internal controls" and "training" speak to the need for companies to design SCP safeguard mechanisms, such as reporting processes and adequate oversight, and also to ensure that employees are regularly informed of and understand their SCP responsibilities.

OFAC noted that, while companies are not formally required by law to have an SCP, the likelihood of sanctions violations is higher when a company whose business presents some regulatory risk does not implement a program. An SCP tends to help a company think through possible issues in advance, such as misunderstanding OFAC regulations or inadequate or decentralized due diligence. If you have questions about OFAC regulations or designing and implementing an SCP, please let us know.

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IATA FEES AND COMMISSION PROCESSES CALLED INTO QUESTION IN AA-LATAM JOINT VENTURE DOT PROCEEDING

On May 13, 2019 as part of an antitrust immunity proceeding for a proposed joint business venture between American Airlines (AA) and LATAM Airlines, the U.S. Department of Transportation published an ex parte letter from Assistant Secretary for Aviation and International Affairs Joel Szabat to Ms. Lorena Arriagada, Secretary General of the Asociación Chilena de Empresas de Turismo (Chilean Association of Tourism Businesses, or ACHET). ACHET is a Santiago-based trade organization representing the interests of Chilean travel agencies and tour operators. The organization had written to the DOT Secretary on January 23, 2019, to express serious doubts about the proposed joint venture's effect on competition in Latin American air serve and to critique IATA processes for commissions and fees.

ACHET argued that even with some pro-competitive conditions imposed, an immunized alliance would produce "a dominance over South America and its connections with North America and Europe unprecedented in air transportation markets . . . to the detriment of consumers [who would] face a consolidated oligopoly with an antitrust immunity to coordinate prices, quantities and the sharing of profits." ACHET alleged that structural characteristics of IATA and market power in certain airlines tended to lead to undue control by carriers over fees and commissions affecting the business of ACHET's travel agent members. ACHET called for U.S. and European regulators to increase their antitrust scrutiny of the aviation sector and cited with favor the European Commission's recent competition enforcement action against Google for anticompetitive conduct in the search results market.

The Department's May 13, 2019 letter requested that ACHET resubmit its letter in the upcoming public comment period for the AA-LATAM joint venture proceeding, which was opened on April 3, 2019, and promised the Department's full consideration.

DATA BREACH LAWSUIT AGAINST DELTA TESTS AIRLINE PRIVACY POLICIES

A proposed consumer class action lawsuit in California federal court is testing the ability of passengers to receive a remedy for breaches of their personal data when those data are held by an airline. The case of *McGarry v. Delta Air Lines, Inc.* arises from a major breach of Delta Air Lines' customer data that occurred in 2017. The lawsuit alleges that Delta created a misleading perception among consumers that its data protection policies were adequate, while in fact not providing sufficient security, and also that Delta failed to inform victims of the hack in a timely fashion once their information had been compromised.

On May 13, 2019, as part of preliminary litigation, Delta moved to dismiss the complaint. The carrier argued that its "Privacy Policy" does not form a contract which can be enforced by a passenger against the company despite the fact that, as part of the purchase process, passengers were directed to review the company's privacy policy. Delta also argued that the state law causes of action alleged by plaintiffs were pre-empted by federal law under the Airline Deregulation Act. The California court's decision on these issues will impact whether the suit proceeds toward class certification, and in turn should develop the law around passenger remedies for airline data breaches in California and across the country.

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FAA RELEASES 2019-2039 AEROSPACE FORECAST

As part of its long-term planning for the needs of the U.S. aviation system, the FAA released this month its Aerospace Forecast Fiscal Years (FY) 2019-2039. The report examined data from 2018 and projected future trends in the commercial passenger, air cargo, general aviation, UAS, and commercial space sectors.

Aviation sector growth tracks largely with global economic activity, which is expected to show moderate growth over the coming years despite rising trade tensions and regional economic slowdowns. Overall, the FAA wrote, “we see a competitive and profitable aviation industry characterized by increasing demand for air travel and airfares growing more slowly than inflation, reflecting over the long term a growing U.S. and global economy.”

With regard to foreign air transportation, the FAA projects that total passenger volume in and out of the U.S. across all foreign air carriers will reach 253.8 million passengers in 2019. The fastest-growth region for this traffic is the Pacific and Asia, at 3.6 percent per year, followed by Latin America (3.5%), Canada (3.3%) and the Atlantic (3.0%). The FAA projects greater than three percent annual growth in overall international passenger volume each year in the 2019-2039 timeframe.

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.