

AVIATION REGULATORY UPDATE

REQUIRED UPDATES TO FAMILY ASSISTANCE PLANS AND POST-ACCIDENT NOTICES

The recently passed FAA Reauthorization Act of 2018 contained several changes to the scope of assistance plans for families of air crash victims (i.e. Family Assistance Plans), which each airline operating flights to, from, or within the United States must have in place and on file with the U.S. Department of Transportation and National Transportation Safety Board. Specifically, Congress struck the words “major” or “significant” loss of life and replaced them with the word “any”. The effect of this modification is to lower the threshold at which Family Assistance Plan obligations are triggered – namely, Plan activation is required upon “any” loss of life. Additionally, airlines are also now required to assist the families of people on the ground who are seriously or fatally injured, as opposed to just those that were on the aircraft.

Congress also tightened the requirement for airlines to inform property owners on the ground of damage caused by an accident, making a similar substitution of “any” for “significant”. In the case of an accident that results in any damage to a man-made structure or other property on the ground, the carrier should promptly provide notice to the affected property owner.

As a result of the above, carriers must review their plans and adjust as needed to comply with these new requirements. Please contact us for further details on compliance with the new requirements.

DOT INCREASES MINIMUM CIVIL PENALTY AMOUNTS

The Department of Transportation (DOT) recently announced changes to the amounts it can penalize airlines and travel agents for regulatory violations. Effective November 27, 2018, the maximum general civil penalty that can be imposed for violations of DOT’s aviation economic regulations and statutes was increased from \$32,140 to \$33,333.

Adjustments to FAA penalty amounts included, among others:

- Violation of hazardous materials transportation law – increased from \$78,376 to \$79,976;
- Violation of hazardous materials transportation law resulting in death, serious illness, severe injury, or substantial property destruction – increased from \$182,877 to \$186,610; and
- Violation by a person other than an individual or small business concern under 49 U.S.C. 46301 – increased from \$32,666 to \$33,333.

DOT NOTICE OF PROPOSED RULEMAKING REGARDING THE DEFINITION OF “UNFAIR OR DECEPTIVE PRACTICES”

On March 11, 2019, DOT will publish a Notice of Proposed Rulemaking regarding the definition of the phrase “unfair or deceptive practice” in the Department’s aviation consumer protection statute. The public comment period will close on May 10, 2019.

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The Department noted that its aviation consumer protection statute is modeled after a similar statute granting the U.S. Federal Trade Commission (FTC) the authority to regulate unfair or deceptive practices. Based on the FTC's policy statements, DOT currently finds a practice to be "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." To date, DOT has also deemed a practice "deceptive" if it "misleads or is likely to mislead a consumer acting reasonably under the circumstances with respect to a material issue (one that is likely to affect the consumer's decision with regard to a product or service)"

This rulemaking would codify DOT's current interpretation of the phrase "unfair or deceptive practice" and solicit public comment on whether any changes are needed. The Department noted that the rulemaking is not expected to impose monetary costs, and will benefit regulated entities by providing a clearer understanding of DOT's interpretation of the statute.

Please contact us if you would like assistance with submitting comments when the public comment period opens on March 11, 2019.

DOT ISSUES NEW POLICIES ON REPORTING DATA FOR MISHANDLED BAGGAGE AND WHEELCHAIRS

DOT issued in November a Technical Directive and an Enforcement Policy related to reporting requirements for mishandled baggage and wheelchair data that will go into effect on January 1, 2019 for U.S. carriers. At this time, the Technical Directive and Enforcement policy will not be applicable to foreign airlines operating to or from the United States.

In general, those air carriers captured by the Technical Directive must report to DOT all bags (including wheelchairs and scooters) reported by or on behalf of passengers as lost, damaged, delayed, or pilfered, that occurred in the custody of the air carrier or the custody of its code-share partner for domestic flights to or from any U.S. large, medium, small or non-hub airport. Under the revised rules, instead of being required to submit a monthly tally of mishandled bag reports by passengers, reporting carriers will be required to report the actual number of mishandled bags. Reporting carriers also will be required to separately report the number of wheelchairs and scooters that were enplaned and the number of these items that were mishandled.

In its Enforcement Notice, the Department noted that carriers have cited the practical obstacles to reporting the number of actual mishandled bags when the bags pass through the custody of more than one carrier on a single itinerary. DOT plans to address these complexities in a future rulemaking, *Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters in Aircraft Cargo Compartments II*. In the interim, for domestic itineraries that span multiple carriers on a single ticket, reporting carriers will be deemed compliant if they either identify which carrier mishandled a bag, and that carrier reports it, or if the carrier operating the last flight segment reports the mishandling.

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GAO EXAMINES DOT'S SUPERVISION OF AIRLINE CONSUMER PROTECTION

The Government Accountability Office (GAO) this month issued a report, *Airline Consumer Protections: Additional Actions Could Enhance DOT's Compliance and Education Efforts*, on customer service quality in the domestic airline industry. GAO examined government data on the twelve largest domestic airlines for the period 2008 to 2017 to identify trends in airline service, the effectiveness of the Department of Transportation (DOT's) compliance efforts, and how DOT's passenger education efforts aligned with industry best practices. In general, GAO observed that airline customer service quality was mixed: while late flights, denied boardings, and mishandled baggage have decreased, the rate of passenger complaints increased from 1.1 to 1.2 complaints per 100,000 in the period studied. Third-party studies of consumer perceptions indicated travelers were generally more satisfied with airline service in 2017 compared to 2013, though that trend might have plateaued in 2018.

The report recommended the following actions for DOT:

- improve the rigor of its analysts' training and coding of complaints;
- improve its complaints case management system;
- establish internal performance measures for its key compliance activities (consulting on compliance with airlines, processing complaints from passengers, conducting inspections, and enforcement); and
- reach out directly to consumers to understand what they do or don't know about their rights even as the Department regularly consults with stakeholder groups

In a letter dated November 6, 2018, DOT concurred with GAO's recommendations, and pledged to improve while also recognizing the significant work the Department has done over the past decade to ensure airline customer service quality. From 2008 to 2017, DOT's Enforcement Office processed over 142,000 consumer complaints, conducted approximately 2,500 investigations, issued approximately 400 consent orders, and developed 25 guidance documents for airlines.

CALIFORNIA ADJUSTS ITS FORMAT FOR PROPOSITION 65 WARNINGS

California's Proposition 65 has long required public warnings for applicable toxic substances, including a posted statement that "This Product Contains Chemicals Known to the State of California..." This year, that familiar statement is getting a make-over, and the changes affect the aviation industry directly among many others in California. In 2016, the California Office of Environmental Health Hazard Assessment (OEHHA) updated its regulations that implement the chemical warning program, and these regulations became mandatory on August 30, 2018. Companies who already post the required signage on jetways (or any other applicable public area) should update their signage accordingly. These changes are particularly relevant to all carriers operating at LAX.

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Safe-harbor compliant signs must now: (1) use at least 72-point type, (2) clearly identify one or more sources of exposure and state at least one chemical by name, (3) be in English and in any other language used on other signage in the affected area, (4) display the new standard warning symbol – a black exclamation point in a yellow equilateral triangle with a bold black outline – to the left of the word “WARNING:” in all capital letters and bold print, and (5) use precise wording depending on the number of chemicals involved and the categories of harm (cancer, reproductive) they relate to. As a practical matter, signs must be updated to include the exclamation point graphic, the name of at least one suspect chemical and where it comes from, and the relevant specific language in order to remain presumptively compliant with the law’s reasonable notice standard. Non-compliant signs create risk that a business may be sued under Proposition 65’s private attorney general provision.

NEW DOT AVIATION CONSUMER PROTECTION ADVISORY COMMITTEE WILL ESTABLISH SEXUAL MISCONDUCT TASK FORCE

The first public meeting of DOT’s recently reconstituted Aviation Consumer Protection Advisory Committee (ACPAC) will take place on January 16, 2019, and will focus on several consumer-related issues, including the establishment of a National In-Flight Sexual Misconduct Task Force (Task Force) as an ACPAC Subcommittee.

The subcommittee Task Force is called for by the FAA Reauthorization Act and will include representatives from the DOT, DOJ, HHS, national organizations which specialize in providing services to sexual assault victims, national consumer protection organizations, national travel organizations, labor organizations representing flight attendants and pilots, State and local law enforcement agencies, airports, and air carriers. Its mandate is to review current practices of U.S. airlines in responding to allegations of sexual misconduct by passengers on board aircraft, and to develop recommendations for best practices for handling misconduct.

FAA SEEKS COMMENT ON AIRMAN CERTIFICATION STANDARDS (ACS) FOR AIRLINE TRANSPORT PILOT (ATP) AND TYPE RATING FOR AIRPLANE

The FAA is requesting public comment on new draft standards for obtaining an Airline Transport Pilot (ATP) certificate in the airplane category, or for obtaining an airplane type rating. The notice and updated draft Airman Certification Standards (ACS) serve as additional measures being implemented by the FAA to move toward a systematic and cohesive process for pilot certification and airplane type ratings. By way of history, in June 2016, the FAA replaced the prior Practical Test Standards for the private pilot (airplane) certificate and the instrument (airplane) rating with the new corresponding ACS with a goal of ensuring that testing and training standards are commensurate with current operations.

The proposed draft ACS contain information on pilot requirements when preparing for the FAA ATP knowledge and practical tests. If the applicable standards are met, a pilot should ultimately receive an ATP

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certificate or appropriate airline type rating. The new draft standards focus on the areas of preflight preparation, takeoffs and landings, inflight maneuvers, stall prevention, instrument procedures, emergency operations and postflight procedures.

TREASURY DEPARTMENT CONTINUES TO IMPLEMENT IRAN SANCTIONS

The U.S. Treasury Department stepped up its enforcement of Iranian sanctions violations as the Trump administration focuses on curtailing flows of sanctioned currency and technology to Iran. This month marked the expiration of a six-month transition period following the U.S. withdrawal from the Iran Nuclear Deal. On November 5, the Treasury Department's Office of Foreign Assets Control (OFAC) imposed sanctions on more than 700 individuals, entities, aircraft, and vessels as part of its return to a policy of maximum pressure against elements of the Iranian government. In the aviation sector, OFAC listed Iran Air and 67 of its aircraft as specially designated nationals (SDNs). OFAC also cautioned that "persons that engage in certain transactions with the entities designated and identified [pursuant to Executive Orders] may themselves be exposed to enforcement action, designation, or blocking sanctions."

OFAC and the Department of Justice continue to vigorously pursue Iran-related sanctions and export control violations. For instance, on November 8, an Iranian citizen named Arash Sepehri pled guilty in federal court in Washington, D.C. for conspiracy to unlawfully export goods to Iran, to defraud the U.S., and money laundering. Sepehri and his co-conspirators used fake names and companies to ship Department of Commerce-controlled items, and as well as items controlled by the U.S. Munitions List, to Iran via intermediary countries. He will be sentenced early next year.

RECENT OFAC CIVIL COMPLAINT SETTLEMENTS FOR SANCTIONS VIOLATIONS

Société Générale, S.A. - \$54 Million

On November 19, 2018, OFAC announced a nearly \$54 million global settlement between the French bank Société Générale, S.A. (SG) and the Board of Governors of the Federal Reserve System, the U.S. Department of Justice, the New York County District Attorney's Office, the U.S. Attorney for the Southern District of New York, and the New York State Department of Financial Services.

SG voluntarily disclosed violative transactions totaling around \$5.5 billion over the course of an investigation that involved multiple regulators and ran from 2012 to 2017. The investigation scope covered transactions in retail, corporate, correspondent, and investment divisions from January 1, 2003 to December 31, 2013, as well as policies and procedures during that time. According to the settlement, "SG's review revealed that the bank processed certain transactions in a non-transparent manner that removed, omitted, obscured, or otherwise failed to include references to OFAC-sanctioned parties." At one point in the early 2000s, some individuals in the bank had circulated guidance how to process transactions without alerting U.S. authorities. Later, the bank improved its compliance programs, but some business units continued to improperly process transactions or delete required documentary information.

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Cobham Holdings, Inc. - \$87,000

On November 27, OFAC announced an \$87,507 civil settlement with Cobham Holdings, Inc. of Arlington, Virginia on behalf of its former subsidiary Aeroflex/Metelics, Inc. Aeroflex/Metelics was involved in indirectly exporting components of a commercial air traffic control radar to a specially designated national in violation of the Ukraine Related Sanctions Regulations, 31 C.F.R. Part 589. Cobham self-disclosed the violations and OFAC concluded they constituted a non-egregious case.

SCANDINAVIAN AIRLINE SYSTEM FINED \$200,000 BY DOT

On November 16, 2018, DOT's Enforcement Office fined Scandinavian Airline System (SAS) \$200,000 for allegedly failing to comply with various requirements relating to DOT's website accessibility rule for individuals with disabilities.

In this case, SAS violated DOT's website accessibility requirements when it created a separate website for individuals with disabilities instead of ensuring that its primary website met the Web Content Accessibility Guidelines (WCAG) under Part 382. In order to avoid litigation, SAS consented to the issuance of the order to cease and desist from future similar violations and the assessment of \$200,000 in civil penalties.

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.