

## AVIATION REGULATORY UPDATE

### **DOT ACCESS COMMITTEE REACHES IMPASSE ON SERVICE ANIMALS BUT AGREES ON ACCESSIBLE LAVATORIES; IFE STILL UP FOR GRABS**

The U.S. Department of Transportation's ACCESS Committee conducted its final meeting on October 12-14, 2016. As previously reported, the Committee has been meeting for six months to reach industry/advocate consensus on the following disability-related issues: (1) accessible lavatories on single aisle aircraft; (2) accessible in-flight entertainment systems; and (3) the in-cabin accommodation of service and emotional support animals. We expect proposed regulations to be issued on all three topics in 2017. Below are the results of the ACCESS Committee's efforts on each issue to date:

#### **Service and Emotional Support Animals:**

DOT declared an impasse on negotiations of an agreement on service and emotional support animals. Although the Committee agreed on some of the issues being considered, it was unable to reach a consensus. The primary sticking point concerned the ability of passengers travelling with emotional support animals to self-certify their need to travel with such animals; while disability advocacy groups pushed for equal treatment of passengers who need both service and emotional support animals, industry representatives were concerned about the possibility of abuse by passengers if self-certification were to be permitted.

#### **Accessible In-flight Entertainment:**

The Committee was unable to complete its work on this issue and will hold a special session on November 2, 2016 to complete its efforts. Representatives and industry are still actively negotiating on several issues, including timing for compliance. DOT hopes carriers will be able to provide accessible content or wifi access to Portable Electronic Devices (PEDs) within one year, while industry is advocating for a longer timeframe. In addition, the Committee will also address two subtopics: accessible inflight cabin announcements and accessible touch screen entertainment devices.

#### **Accessible Lavatories:**

The Committee reached agreement on language that will form the basis for a new regulation to support accessibility for persons with reduced mobility (PRMs) to lavatories on single aisle commercial aircraft flying to, from or within the United States and its territories. DOT hopes to publish a notice of proposed rulemaking (NPRM) outlining this agreement by July 2017 with the expectation of publishing a final regulation by 2018. IATA along with almost all of the industry representatives on the Committee voted in favor of this agreement as the language reflects a reasonable timeframe for full accommodation for PRMs. Under Committee rules, since IATA voted in favor of the agreement, it is precluded from opposing this regulation when it is published as an NPRM. Member airlines can however oppose this rule during the rulemaking process.

## AVIATION REGULATORY UPDATE

### **FLYERSRIGHTS.ORG URGES DOT TO REINSTATE “RECIPROCITY” RULE**

FlyersRights.org filed a petition for rulemaking with DOT, urging the Department to reinstate the “reciprocity rule”. The reciprocity rule existed before airline deregulation and was incorporated into airlines’ contracts of carriage. It obliged carriers, when a flight was cancelled or excessively delayed, to place passengers on another carriers’ flight with no additional cost to the passenger. FlyersRights.org, a non-profit group that advocates for the rights and interests of airline passengers, proposed that the reinstated rule apply when a flight is cancelled or delayed more than two hours. The group urged DOT to reinstate the rule because of the recent series of airline computer glitches that have stranded passengers across the country as well as airline consolidation resulting in fewer seats being available in the marketplace. It claimed that without the reciprocity rule in place, carriers engage in “predatory and anticompetitive practices.” For example, it claimed that when a flight is cancelled today, it often takes six additional flights to fully re-accommodate passengers who were on the cancelled flight, because of industry-wide high load factors.

FlyersRights.org also suggests that re-instating the reciprocity rule is consistent with the Airline Deregulation Act because it will allow market forces to operate more efficiently by filling unused seats on other airlines and incentivize airlines to compete on operational reliability which should lead to fewer cancelled flights. Under DOT’s procedural rules, the agency can deny the petition, initiate rulemaking, or simply grant the petition. FlyersRights.org urged the Department to issue an emergency rulemaking to address the problem rather than begin formal rulemaking procedures, which often take many years to complete.

### **COMMENT PERIOD OPENS FOR POTENTIAL RULEMAKING ON REFUNDS OF BAGGAGE FEES FOR DELAYED BAGS**

DOT is soliciting public comments ahead of publishing a proposed rule that, if enacted, would require airlines to refund checked baggage fees when they fail to deliver bags in a timely manner. The FAA Extension Act of 2016 provides that DOT shall issue a final rule within one year of the enactment of the Act that requires U.S. and foreign carriers to promptly provide an automated refund for any ancillary fees paid by the passenger for checked baggage - if the carriers fail to deliver the bag to passengers within 12 hours of arrival for domestic flights and within 15 hours of arrival for international flights, if the passenger notifies the carrier about the delayed or lost baggage. DOT is seeking comment to help it determine the appropriate length of delay that would trigger the refund requirement, and this ANPRM will ultimately result in a requirement that airlines refund consumers’ baggage fees when their luggage is “substantially delayed”. Specifically, the Department seeks comments on how to define a baggage delay, and the appropriate method for providing the refund for delayed baggage. Interested carriers will have a chance to comment before a Final Rule is issued.

Comments are due by November 30, 2016.

## AVIATION REGULATORY UPDATE

### UPDATE ON U.S.-CUBA TRADE RELATIONS

The Department of Treasury's Office of Foreign Assets Control (OFAC) and the Department of Commerce's Bureau of Industry and Security (BIS) recently announced new amendments to the Cuban Assets Control Regulations (CACR) and Export Administration Regulations (EAR) which will:

- Expand opportunities for scientific collaboration by allowing certain transactions related to Cuban-origin pharmaceuticals and joint medical research;
- Improve living conditions for Cubans by expanding existing authorizations for grants and humanitarian-related services;
- Increase people-to-people contact in Cuba by facilitating authorized travel and commerce;
- Facilitate safe travel between the United States and Cuba by authorizing civil aviation safety-related services; and
- Bolster trade and commercial opportunities by expanding and streamlining authorizations relating to trade and commerce.

Specific aviation/travel-related changes announced include:

#### Travel-related Transactions

- OFAC is removing the monetary value limitations on what authorized travelers may import from Cuba into the United States as accompanied baggage. This includes the value limitation on alcohol and tobacco products. Persons subject to U.S. jurisdiction will be further authorized to import Cuban-origin merchandise acquired in third countries into the United States as accompanied baggage, again without value limitations. OFAC is also removing the prohibition on foreign travelers importing Cuban-origin alcohol and tobacco products into the United States as accompanied baggage. In all cases, the Cuban-origin goods must be imported for personal use, and normal limits on duty and tax exemptions will apply.
- Persons subject to U.S. jurisdiction will be authorized to make remittances to third-country nationals for travel by third-country nationals to, from, or within Cuba, provided the travel would be authorized by general license for a person subject to U.S. jurisdiction.

#### Civil Aviation

- OFAC is adding a new authorization that will allow persons subject to U.S. jurisdiction to provide civil aviation safety-related services to Cuba and Cuban nationals aimed at promoting safety in civil aviation and the safe operation of commercial aircraft.

## AVIATION REGULATORY UPDATE

### Trade and Commerce

- OFAC is amending its general license authorizing certain transactions incident to exports and reexports authorized by the BIS to eliminate references to “100% U.S.-origin items.” This is intended to minimize and clarify the circumstances in which an export or reexport authorized by BIS requires additional licensing by OFAC.
- BIS will generally authorize exports of certain consumer goods that are sold online or through other means directly to eligible individuals in Cuba for their personal use.
- OFAC is adding an authorization that will allow the importation into the United States or a third country of items that were previously exported or reexported to Cuba pursuant to a BIS or OFAC authorization. This authorization will also permit persons subject to U.S. jurisdiction to service and repair such items. Exporting or reexporting replacement items or items that have been repaired or serviced must be separately authorized by OFAC and/or BIS as appropriate.
- OFAC is adding an expanded general license that will authorize persons subject to U.S. jurisdiction to enter into certain contingent contracts for transactions currently prohibited by the embargo, provided that contract performance is made expressly contingent on prior authorization by OFAC and any other relevant Federal agency, or on authorization no longer being required. Transactions ordinarily incident to negotiating and entering into such contracts will also be authorized.
- BIS will generally authorize air cargo to transit Cuba, complementing an existing general authorization for cargo transiting Cuba aboard vessels.

### EMBRAER SA SETTLES FCPA CASE FOR \$205 MILLION

The U.S. Department of Justice (DOJ) and Brazilian aerospace firm Embraer SA recently agreed to a \$205 million settlement concerning allegations that the company violated the Foreign Corrupt Practices Act (FCPA) by paying bribes to officials in three countries to and falsifying financial records.

The settlement ends claims that Embraer paid bribes through its U.S. subsidiary to secure contracts with the Dominican Air Force, and state-owned entities in Saudi Arabia and Mozambique and concealed questionable payments involving sales to the Indian military. The settlement includes a \$107 million penalty imposed by the DOJ and more than \$98 million disgorgement in profits to the U.S. Securities and Exchange Commission, which will be offset by up to \$20 million in profits which Embraer will give to the Brazilian authorities.

The company received a lower penalty because of its cooperation with the DOJ, but it could have paid less if it had adequately disciplined a senior executive who knew about part of the alleged bribery.

## AVIATION REGULATORY UPDATE

### ICAO FINALIZES GLOBAL EMISSIONS SCHEME

Earlier this month, ICAO worked to finalize a global scheme to regulate GHG emissions from commercial aviation. At the 39th Assembly in Montreal, ICAO parties agreed to the so-called Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), which is the first climate agreement intended to cap the sector's rapidly growing GHG emissions.

Under CORSIA, emissions from commercial aviation will be capped in 2020 in participating countries. The agreement will then proceed in phases, but not all of the ICAO parties have agreed to participate in all phases. The pilot phase will run from 2021 to 2023; Phase II will follow, from 2024 to 2026. Phase III will run from 2027 to 2035. The pilot phase and Phase II will be voluntary; Phase III will be mandatory for all states, with limited exceptions. Most major emitters, including the United States, the European Union, and China, have agreed to take part in the initial phases, but Russia and India have so far refused to do so.

The scheme will initially rely primarily on offsets: Instead of reducing their own emissions, airlines will purchase carbon credits from GHG-abatement projects, such as forestry conservation and renewable energy projects, to compensate for their rising emissions.

Airlines are also free to pursue other measures to reduce their carbon footprint. For example, JetBlue, United, Virgin, Alaska Airlines and Lufthansa have started blending traditional fuel with biofuels, and some airlines are striking multi-decade supply agreements with biofuel producers. The deal also opens the door to national rulemaking in the commercial aviation sector. We expect to see new regulations from the U.S., EU, and other countries on this issue.

### FAA PROPOSES NEW REGULATIONS FOR PILOT DEVELOPMENT

On October 7, 2016 the Federal Aviation Administration (FAA) published a NPRM proposing to modify the requirements primarily applicable to air carriers conducting domestic, flag and supplemental operations to enhance the professional development of pilots in those operations. The proposal would require air carriers conducting domestic, flag and supplemental operations to provide new-hire pilots with an opportunity to observe flight operations (operations familiarization) to become familiar with procedures before serving as a flightcrew member in operations; revise the upgrade curriculum; provide leadership and command and mentoring training for all pilots in command (PICs); and establish Pilot Professional Development Committees (PPDC). The proposal also includes a number of additional conforming changes related to flight simulation training devices and second in command (SIC) pilot training and checking, and other miscellaneous changes. The FAA will be accepting public comments until January 5, 2017 and a final rule will be issued thereafter. Please contact us if you are interested in filing a comment.

A full copy of the NPRM is available at: <https://www.federalregister.gov/documents/2016/10/07/2016-23961/pilot-professional-development>

## AVIATION REGULATORY UPDATE

### DRY DAYS IN NEWARK AS UNITED FAILS TO RENEW LIQUOR LICENSE

Two United Clubs in Terminal C of Newark Liberty International Airport were forced to stop serving beer, wine, and spirits in late September due to a lapse in the airline's liquor license. According to press reports, a renewal package for the liquor license was mailed to United in May but was never returned, forcing the carrier to temporarily suspend the provision of alcohol to travelers at one of its most important hub airports. The City of Newark's press secretary, Marjorie Harris, reported that airlines seeking permission to sell alcohol in the jurisdiction must pay two separate fees to obtain a liquor license: one to the New Jersey state government and another to Newark's Alcoholic Beverage Control Division. United's check to the state was cashed but its application to the city was not completed, leading to the closure. Press reports indicate that United is using its license from the City of Elizabeth for its Terminal A lounge to serve liquor in Terminal C until Newark's Alcoholic Beverage Control Board can renew the carrier's Newark license at a hearing on October 17, 2016.

### U.S.-EU PRIVACY SHIELD FRAMEWORK GOES INTO EFFECT

On July 12, 2016, the EU-U.S. Privacy Shield Framework went into effect. This agreement will replace the U.S.-EU Safe Harbor Framework which was declared invalid by the European Court of Justice in October 2015. The EU-U.S. Privacy Shield Framework focuses on three main issues: Handling European's personal data, U.S. Government access to data, and protection of EU citizen's rights. Under the agreement, EU citizens who believe that their data has been misused will have several redress possibilities, and companies to which complaints are directed will have deadlines to respond to such complaints. European data protection authorities may refer complaints to the relevant enforcement authority, either the U.S. Federal Trade Commission (FTC) or DOT, and for complaints of suspected access to information by national intelligence authorities in the United States, a new ombudsperson will be created within the U.S. Department of State.

As under Safe Harbor, the decision by a U.S.-based organization to join the Privacy Shield program is entirely voluntary. Furthermore, once an eligible organization publicly commits to participate in the Privacy Shield and comply with the Privacy Shield Principles through an annual self-certification to the U.S. Department of Commerce (DOC), that commitment is enforceable under U.S. law by the relevant enforcement authority (FTC or DOT). As of August 1, the Department of Commerce stopped accepting new submissions for self-certification to the U.S.-EU Safe Harbor Framework. And as of October 31, the Department will stop accepting U.S.-EU Safe Harbor re-certifications.

### FAA PROPOSED CIVIL PENALTY

The FAA has proposed a civil penalty of \$78,000 against Amazon.com Inc. for violating the Hazardous Materials Regulations. The FAA alleges that on August 7, 2016, Amazon offered for shipment via FedEx an undeclared package containing two 14-ounce bottles of an ethanol-based hair tonic --a flammable liquid.

## AVIATION REGULATORY UPDATE

The package was not properly packaged, marked and labeled as containing hazardous materials, and Amazon did not provide the required emergency response information with the shipment.

### DOT CONSENT ORDERS

Silver Airways LLC- Silver Airways was fined \$25,000 for failing to timely process consumer refund requests as required by the Consumer Credit Protection Act and Regulation Z of the board of Governors of the Federal Reserve System and the statutory prohibition against unfair and deceptive trade practices, 49 U.S.C. § 41712.

The Office of Aviation Enforcement and Proceedings found that during 2014 and 2015, Silver Airways did not issue refunds to certain consumers who made purchases by credit cards within the specified time limitations in the regulations and the carrier's contract of carriage and customer plan. Under Part 374 and Regulation Z, if a refund is due for tickets purchased with a credit card, an airline carrier must send a credit card statement to the credit-card issuer within seven business days of receipt of all documentation for the refund request. If a refund is due for a ticket purchased with cash, the carrier must provide the refund within twenty business days of receipt of all documentation for the request.

Philippine Airlines, Inc. (PAL)- PAL was fined \$20,000 for failing to submit accurate data in its Part 244 tarmac delay report.

Part 244 requires covered carriers to file a Bureau of Transportation Statistics (BTS) Form 244 "Tarmac Delay Report" for each month in which there is a tarmac delay of three hours or more. The data is then published and made available to the public in the Department's monthly Air Travel Consumer Report (ATCR), which includes all regularly scheduled international flights with tarmac delays of four hours or more.

On May 17, 2015, a PAL flight experienced mechanical difficulty requiring maintenance prior to its departure from JFK and reported a tarmac delay of 270 hours in its original certified BTS Form 244 filing. Following an investigation by the Enforcement Office into the circumstances of the delay, PAL provided data that the tarmac delay was 300 minutes. Upon reexamining its data, PAL concluded it had filed an erroneous report and the actual delay was no more than 200 minutes. Their inaccurate filing wasted DOT resources because Enforcement Office had to initiate an investigation and the ATCR had to be revised.

*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](mailto:esahr@eckertseamans.com) or 202-659-6622; Drew Dero at [dderco@eckertseamans.com](mailto:dderco@eckertseamans.com) or 202-659-6665; or Reese Davidson at [rdavidson@eckertseamans.com](mailto:rdavidson@eckertseamans.com) or 202-659-6633.*