

AVIATION REGULATORY ALERT

DOT PUBLISHES NOTICE OF PROPOSED RULEMAKING REGARDING TARMAC DELAY RULE – PUBLIC COMMENTS DUE DECEMBER 24, 2019

On October 25, 2019, the U.S. Department of Transportation (DOT or Department) published in the Federal Register a notice of proposed rulemaking (NPRM) to amend the Tarmac Delay Rule and related reporting requirements (14 CFR Parts 244 and 259). The NPRM is available here: <https://www.federalregister.gov/documents/2019/10/25/2019-22973/tarmac-delay-rule>.

This rulemaking would modify U.S. and foreign air carrier obligations with respect to a number of tarmac delay-related topics, including departure delays (specifically, how the duration of a delay is calculated before and after an aircraft has left the gate), tarmac delay reporting requirements for U.S. and foreign air carriers (and the potential elimination of rules requiring carriers to report delays on international flights of more than three, but less than four, hours), record retention requirements, required reporting of excessive tarmac delays by foreign air carriers, clarification of the current safety and security exceptions, and the elimination or modification of other carrier obligations during a tarmac delay (food/water service and required announcements).

DOT is seeking public comments on the NPRM, which gives carriers an important opportunity to voice their opinions and concerns about the proposed regulatory changes. Please contact us if you would like more information on DOT's proposals, or assistance in drafting public comments to the NPRM (Note: comments are due by December 24, 2019).

U.S. TO SIGNIFICANTLY CURTAIL AIR SERVICE TO CUBA

On October 25, 2019, DOT issued a Notice prohibiting U.S. air carriers from engaging in scheduled foreign air transportation to all international airports in Cuba except José Martí International Airport (HAV) in Havana. The prohibition will take effect on December 10, 2019, after a 45-day transition window. Though the Notice bans scheduled air service to all points in Cuba except Havana, the Notice nevertheless declares that the prohibition is not meant to interfere with U.S.-Cuba charter air service.

The Notice is the latest in a series of policy changes toward Cuba by the Trump Administration designed to exert pressure on the island nation's government. As we have reported in previous newsletters, notable changes have included the tightening of Cuban sanctions regulations, as well as the enabling of private lawsuits under the 1996 Helms-Burton Act for monetary damages arising from expropriation by the Cuban revolutionary government of private property once held by U.S. persons. DOT issued its Notice in response to a request from the U.S. Department of State, which stated in a letter that suspension of U.S. carrier flights to Cuban airports would "further the [Trump] Administration's policy of strengthening the economic consequences to the Cuban regime for its ongoing repression of the Cuban people and its support for Nicolas Maduro in Venezuela, in the foreign policy interests of the United States."

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U.S. RESTRICTS AIRCRAFT RENTALS TO CUBAN AIRLINES

In tandem with DOT's forthcoming restrictions on U.S. air carrier scheduled service to non-Havana points in Cuba, on October 18, 2019, the U.S. Department of Commerce announced new restrictions on Cuba's access to rental aircraft. Tightening U.S. export controls in an effort to cut off sources of revenue for the Cuban government, the Commerce Department's Bureau of Industry and Security (BIS) by official publication on October 21, 2019, amended its Export Administration Regulations (EAR) to cancel existing licenses for aircraft leases to Cuban state-owned airlines and to declare that BIS will deny future applications for such leases. BIS stated it was amending its previous policy of approving such applications because the Cuban government generates revenue from transporting tourists on leased aircraft.

In the same notice, BIS announced an expansion of Cuba sanctions to reach a greater proportion of foreign goods containing U.S. content (items of 10% U.S. origin, down from 25%), and the imposition of additional other restrictions on exports to Cuba.

BOEING CEO TESTIFIES BEFORE CONGRESS ON 737 MAX CRISIS

On October 29, 2019, Boeing Company President and CEO Dennis Muilenburg appeared before the Senate Committee on Commerce, Science and Transportation to discuss the crash of Lion Air Flight 610, the crash of Ethiopian Airlines Flight 302, and Boeing's conduct in the design and certification of the 737 MAX. Muilenburg also appeared the following day, October 30, 2019, before the House Committee on Transportation and Infrastructure. Muilenburg stated that his company was "deeply and truly sorry" for its mistakes leading up to the current crisis and was working hard to address them. The 737 MAX remains grounded around the world, with financial losses mounting for some airlines and no announcement yet when the aircraft will return to service.

U.S. lawmakers aggressively questioned whether Boeing had concealed key information about new automated systems from pilots and regulators that contributed to the fatal accidents. They also questioned whether Boeing enjoys too much power to influence the certification of safety-critical systems through the U.S. Federal Aviation Administration's (FAA) delegation of certain review procedures to manufacturer employees. The high-profile scrutiny and a number of overlapping reviews will likely lead to new legislative reform efforts. For example, on October 24, 2019, two members on the Senate Committee on Commerce, Science and Transportation introduced a bill to require the FAA to more thoroughly examine cockpit automation when certifying aircraft.

TSA ADVANCES ON MODERNIZATION ACT GOALS, INCLUDING BIOMETRICS

One year ago this month, Congress enacted and President Trump signed into law the FAA Reauthorization Act of 2018. This major legislation incorporated a previously stand-alone bill, the TSA Modernization Act, which comprehensively reauthorized the Transportation Security Administration (TSA) for the first time since that agency's inception following the September 11, 2001, terrorist attacks. The TSA Modernization Act included a number of one-year deadlines, and

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the agency's Acting Director reported on progress toward these goals during a House Transportation & Maritime Security Subcommittee hearing on October 29, 2019.

Notably, TSA is finalizing process improvements for international aviation security directives, periodic recertification of checkpoint equipment, insider threats and public area security plans, 100% TSA Pre-Check screening lanes, as well as public awareness campaigns surrounding the approaching October 1, 2020, deadline for 100% REAL ID compliance for passengers passing through checkpoints. Publication of these initiatives is expected from the coming weeks into early 2020.

Additionally, TSA this month provided a report to Congress regarding deployment of biometric technologies by itself and by U.S. Customs and Border Protection (CBP). This report detailed CBP's Traveler Verification Service (TVS), a facial image matching service drawing on U.S. Department of Homeland Security data sources. TSA and CBP envision a near future in which integrated biometrics technologies greatly streamline identity verification and screening processes for air travelers. For its part, CBP intends to implement biometric exit at the nation's top 20 airports by the year 2022, which would capture 97% of departing commercial air travelers.

CALIFORNIA RELEASES NEW CONSUMER DATA PRIVACY REGULATIONS

The California Consumer Privacy Act (CCPA) is a landmark law governing consumer privacy rights in personal data for California consumers. On October 11, 2019, several finalizing amendments were signed by California Governor Gavin Newsom, and on October 10, 2019, California Attorney General Xavier Becerra released draft regulations that will govern compliance. The public is invited to comment on these draft regulations through December 6, 2019. The regulations will go into effect six months after a final version is published, or on July 1, 2020, whichever comes first.

Once the regulations go into effect in 2020, businesses will have new compliance responsibilities:

- **Notice.** The proposed rules detail the kinds of notice that must be given at the time a business collects personal information from a California resident or consumer, including a consumer's right to "opt out" of having their information sold. Airlines and other consumer-facing businesses will need to update their websites and purchase processes to ensure appropriate notice and opt out opportunities are provided.
- **Handling Consumer Requests to "Opt Out."** If a consumer does exercise their right to opt out, the business concerned must notify all third-parties who received the consumer's information and that information must be deleted. This rule will require businesses to build compliance procedures to map the flows of data in and out of their organization so that requests can be effectively followed up.
- **Privacy Policies.** The proposed rules require businesses to publish a privacy policy that includes a comprehensive description of a business's online and offline practices regarding the collection, use, disclosure, and sale of personal information and of the rights of consumers regarding their personal information. Additionally, the proposed rules require businesses to state affirmatively whether they have sold personal information to third parties

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in the preceding 12 months and disclose categories of third parties with whom they have shared.

- **Training and Record-Keeping.** The proposed regulations require that all individuals responsible for handling consumer inquiries receive training about CCPA requirements. Businesses must maintain records of consumer requests made pursuant to the CCPA for at least 24 months. As with tracking opt-outs and communicating them forward to any data partners, these requirements will entail businesses building CCPA compliance controls.

DOT CERTIFIES UPS FLIGHT FORWARD AS AN AIR CARRIER

On October 1, 2019, DOT Secretary Elaine Chao announced that U.S. regulators made their first-ever award of Part 135 air carrier certification to UPS Flight Forward, Inc., a division of United Parcel Service, Inc. (UPS), for an unmanned aerial system (UAS or drone) delivery airline. UPS Flight Forward had previously participated in DOT's Unmanned Aircraft Systems Integration Pilot Program as part of technical research on integration of UAS into the U.S. airspace system. As part of the Pilot Program, UPS Flight Forward practiced time-sensitive medical supply deliveries at a hospital campus in Raleigh, North Carolina.

UPS says it plans to scale up operations to eventually transport items for customers in many industries using a centralized operations control center, new custom-built cargo drones, and ground-based navigation and collision-avoidance technologies. Its new certification allows operation of an unlimited number of drones and collection of revenue for deliveries. Additionally, UPS may fly UAS whose combined aircraft and cargo weight exceeds 55 pounds and it may conduct nighttime and beyond-visual-line-of-sight operations.

ICAO'S 40th ASSEMBLY INCLUDES SUSTAINABILITY EMPHASIS

The International Civil Aviation Organization's (ICAO) 40th Triennial Assembly took place from September 24, 2019 to October 4, 2019, and sustainability in international air travel was an important agenda topic alongside economic development and security. Regarding carbon emissions, ICAO Member States continue to move forward with the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), which is an offsetting mechanism for international flights that includes fuel analysis, standardizing emissions measurement, a central registry, and Member State capacity-building.

States currently implement CORSIA through Monitoring, Reporting, and Verification (MRV) Programs which track emissions and provide a data baseline. In the U.S., the FAA has been implementing CORSIA since March 2019. The U.S. MRV, covering emissions by U.S.-based companies, records more than 97% of covered international emissions despite participation being entirely voluntary for companies. According to the FAA, the U.S. continues to support CORSIA's goals and participate in data collection provided that CORSIA is "the exclusive market-based measure applying to international aviation . . . [ensuring] fair and reciprocal commercial competition by avoiding a patchwork of country- or regionally-based regulatory measures."

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ICAO REVISES MONTREAL CONVENTION LIABILITY LIMITS

ICAO announced this month that revisions to air carrier liability limits under the Montreal Convention of 1999 that were first proposed on June 28, 2019, have been approved by States Parties and will go into effect on December 28, 2019. The revisions mark a 13.9% increase over the limits that have been in effect since late 2009. Airlines should review their claims and insurance documentation, along with their websites, Conditions of Carriage, Tariffs and notices to consumers during the purchase process, to ensure that references to the Montreal Convention limits are up-to-date.

The table below shows the current limits and those set to take effect on December 28, 2019, as expressed using the Convention's international standard of Special Drawing Rights (SDR):

Provisions of the Montreal Convention	Current Limits (effective Dec. 30, 2009)	New Limits effective Dec. 28, 2019)
Article 21 <i>Death or injury of passengers</i>	113,100 SDR	128,821 SDR
Article 22, paragraph 1 <i>Delay to passengers</i>	4,694 SDR	5,346 SDR
Article 22, paragraph 2 <i>Destruction, loss, damage or delay of baggage</i>	1,131 SDR	1,288 SDR
Article 22, paragraph 3 <i>Destruction, loss, damage or delay of cargo</i>	19 SDR per kilogram	22 SDR per kilogram

FAA REVOKES REPAIR STATION CERTIFICATE OF XTRA AEROSPACE

On October 25, 2019, the FAA issued an order revoking the repair station certificate of Xtra Aerospace, LLC ("Xtra"), a repair provider in South Florida, for making repairs beyond the list of parts acceptable to the FAA that it was capable of repairing, and also for failing to comply with Federal Aviation Regulations procedures in its repair station manual. FAA began its investigation of Xtra in November 2018. The agency determined that from November 2009 to May 2019, Xtra failed to complete and retain records in accordance with procedures in its repair station manual to support parts on its capability list. Additionally, the company was unable to demonstrate that it had adequate facilities, tools, test equipment, technical publications, and trained and qualified employees to repair parts on its capability list.

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.