

AVIATION REGULATORY UPDATE

TWO EUROPEAN AIRLINES CEASE OPERATIONS IN SEPTEMBER

On September 23, 2019, Thomas Cook Group, a high-profile and historic travel company in the United Kingdom which owned and operated a number of entities including Thomas Cook Airlines, entered insolvency and ceased operations. The sudden collapse stranded over 150,000 travelers around the world.

To assist these travelers, the U.K.'s Civil Aviation Authority (CAA) launched an emergency repatriation effort for passengers stranded outside the U.K., which is scheduled to continue until October 6, 2019. Travelers stranded inside the U.K., in contrast, are not eligible for emergency travel assistance. The CAA describes its program, code-named "Operation Matterhorn," as "hugely complex" and involving the chartering of replacement flights and rebooking of passengers with other airlines. The operation reportedly involves operations by approximately 45 wet-leased aircraft conducting up to 1,000 flight segments, and is expected to cost the U.K. government hundreds of millions of British pounds. The International Air Transport Association (IATA) also requested that member airlines voluntarily provide rescue fares where capacity permitted to facilitate the return of stranded passengers.

On September 19, 2019, French airline XL Airways filed for restructuring, ultimately announcing a total cessation of service on September 30, 2019. Although the situation is still developing, France's Directorate General for Civil Aviation has requested that IATA members voluntarily provide rescue fares on routes to the U.S., Mexico, Cuba, and the Dominican Republic.

ADS-B OUT YEAR-END DEADLINE APPROACHING

As we enter the final quarter of 2019 we want to remind readers that the Federal Aviation Administration's (FAA) mandate for implementation of Automatic Dependent Surveillance-Broadcast (ADS-B) Out is fast approaching. Unless an operator has secured an FAA exemption, all aircraft operating in controlled U.S. airspace must be ADS-B equipped by January 1, 2020.

ADS-B is a critical element of the U.S. NextGen program, and is also a part of the International Civil Aviation Organization (ICAO) Global Air Navigation Plan endorsed by Member States at the 38th Assembly in 2013. Both domestic and foreign operators must comply with FAA mandates in order to maintain access to U.S. airspace in 2020. The FAA has encouraged foreign regulatory authorities to ensure appropriate procedures are in place to approve their operators' requests for approval of ADS-B Out installations.

FAA TO CONDUCT SEAT SIZING, EVACUATION TESTING IN NOVEMBER

On September 26, 2019, Department of Transportation (DOT) Undersecretary for Policy Joel Szabat and Federal Aviation Administration Deputy Administrator Dan Elwell appeared before the U.S. House Transportation Committee's Subcommittee on Aviation to discuss ongoing efforts by their respective agencies to implement the 2018 FAA Reauthorization Act ("the Act"). Undersecretary Szabat observed that the Act requires over 360 regulatory deliverables from DOT, inclusive of mandates to the FAA, so much work remains incomplete despite a number of imminent one-year deadlines. Deputy Administrator Elwell

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noted that his agency has been delayed on certain items by technical complexity and workload challenges brought on by this year's Boeing 737 MAX grounding crisis.

FAA did note upcoming plans to conduct live-action testing of cabin evacuations over a 12 day period in November 2019. In light of trends toward tighter economy seating and an increasingly diverse flying public, the Act directed FAA to study minimum dimensions for seat pitch, width, and length necessary for the safety of passengers. Deputy Administrator Elwell also discussed ongoing efforts to implement various other Reauthorization provisions, including mandates on flight attendant rest, study of secondary cockpit barriers, cabin air quality, and unmanned aircraft system (UAS) remote identification. Our team continues to follow the development of these regulations and will update our readership as new information becomes available.

DOT ANNOUNCES FORMATION OF ADVISORY COMMITTEE FOR AIR AMBULANCE PATIENT BILLING

On September 12, 2019, DOT announced the formation of its Air Ambulance and Patient Billing Advisory Committee (AAPB Advisory Committee), which is a 13-person group composed of experts from the health insurance, patient advocacy, emergency medicine, and air ambulance sectors. The Committee's task is to make recommendations to DOT regarding charges and fees for air ambulance services, with the goal of improving consumer understanding of associated costs and insurance options, as well as protecting against balance billing. The Committee will also explore how state and federal authorities can work together to supervise the market.

As a reminder, Congress directed DOT in last fall's 2018 FAA Reauthorization Act to establish the AAPB Advisory Committee, in consultation with the Department of Health and Human Services, to study air ambulance billing. This mandate followed from a 2017 Government Accountability Office (GAO) report entitled *Air Ambulance: Data Collection and Transparency Needed to Enhance DOT Oversight (GAO-17-637)*, which found that prices for air ambulance services were rising sharply and often being passed through to consumers due to gaps in insurance coverage.

DOT UPDATES CONSUMER PROTECTION WEBSITE REGARDING FAMILY SEATING POLICIES

DOT's Aviation and Consumer Protection Division this month updated its website to provide more information to consumers on U.S. airline family seating policies. No changes in Departmental policy were announced, and DOT does not prescribe how U.S. airlines must seat family members together. However, DOT does "recognize the importance that families place on sitting together when flying" and encourages passengers who experience dissatisfaction with family seating accommodations to register complaints with their airline and with the Aviation Consumer Protection Division. On its website, DOT has provided summaries of and links to the family seating policies of major U.S. carriers as well as a number of tips for consumers.

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DOT's announcement followed a review of family seating policies as required by the FAA Extension, Safety, and Security Act of 2016. The Department's limited update and lack of new guidance suggest that U.S. carriers' policies are generally appropriate, but the family seating issue remains in the purview of DOT's Aviation and Consumer Protection Division.

SOUTHWEST AIRLINES DEFEATS CLASS ACTION CLAIM ARISING FROM SHORTAGE OF DE-ICING FLUID

An Illinois passenger has failed to prevail in a class action lawsuit against Southwest Airlines Co. (Southwest) which sought damages arising from Southwest running out of de-icing fluid and being forced to cancel certain flights. Specifically, the plaintiff had sued over his cancelled flight to Chicago's Midway International Airport on February 11, 2018, as well as on behalf of passengers whose flights on several other winter days had been cancelled due to the airline's alleged failure to stock enough de-icing fluid. The case was heard in U.S. federal court in Chicago.

Southwest successfully argued that Conditions of Carriage (CoC) terms relating to meteorological and force majeure cancellations covered a situation where there was insufficient de-icing fluid available to maintain full operations, as cancellation related to de-icing was clearly within the ambit of "aviation safety." The court relied on contract language to settle the case, concluding that there was no implied promise in Southwest's CoC – and thus no legal duty to ensure – that the airline would always have enough de-icing fluid to support operation of every flight.

NEW HELMS-BURTON ACT LAWSUITS TARGET AIRLINES

Last month we reported on lawsuits against cruise lines under the 1996 Helms-Burton (Libertad) Act, which allow U.S. nationals and naturalized Cubans to seek damages for property seized by Cuba's revolutionary government. The theory of those cases is that by sailing to docks in Havana that were once expropriated, the cruise lines are "trafficking" in property (i.e., the docks themselves) and owe damages to the pre-revolutionary owners.

On September 25, 2019, the first lawsuit against an airline using a similar legal theory was filed in a U.S. federal court in Florida. American Airlines, Inc. and LATAM Airlines Group S.A. were named as co-defendants by a plaintiff who alleged that his family were the former owners of José Martí International Airport, and that the airlines are "trafficking" in that property. The case remains in its early stages, and we do expect to see additional similar suits filed against other airlines operating to, from, or within Cuba.

DEPARTMENT OF LABOR ISSUES FINAL RULE ON WHITE-COLLAR EXEMPTION, OVERTIME PAY REQUIREMENTS

The Wage and Hour Division of the U.S. Department of Labor (DOL) has announced a final rule, effective January 1, 2020, which will modify the "white collar" overtime exemptions applicable to executive, administrative, and professional employees. The Department expects the final rule to result in more than

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1.3 million employees becoming eligible for overtime compensation when it takes effect on January 1, 2020. Important changes in DOL's final rule include:

- The standard salary level threshold will be increased from \$455 to \$684 per week (\$35,568 annually). This figure represents an increase in the minimum salary over the current rule which was implemented in 2004.
- The highly compensated employee (HCE) total annual compensation level will be increased from \$100,000 to \$107,432 per year. HCEs must also receive at least the new standard salary level of \$684 per week.
- Employers may apply non-discretionary bonuses or similar incentives, including commissions, to satisfy up to 10% of the minimum salary threshold, so long as the payments are made at least annually.
- Unlike the invalidated 2016 Regulations, the final rule does not contain an automatic escalator provision. Instead, the Department proposes to adjust the salary threshold through future notice and comment rulemaking.

Employers should review existing policies and consult with their labor and employment counsel. If you have questions, please feel free to contact us.

MAJOR U.S. COMPANIES CALL FOR NATIONAL DATA PRIVACY LAW

The Business Roundtable, an organization of senior leadership of American corporations, published a letter to Congress on September 10, 2019, calling for "a comprehensive consumer data privacy law that strengthens protections for consumers and establishes a national privacy framework." The letter's 51 signatories included leaders from some of the nation's highest-profile tech sector, financial services, telecom, and transportation companies.

As several states such as California and Illinois have enacted consumer data privacy rules, and as other states consider doing the same, concerns have grown among businesses that collect and use consumer data. Compliance across varying state law regimes is increasingly complex and burdensome, especially companies that conduct business online. Relevant stakeholders therefore believe that a single national law that partially or wholly preempts state regulation could produce a more predictable regulatory environment and facilitate faster innovation.

NEW DEVELOPMENTS IN U.S. INVESTMENT SECURITY, SANCTIONS LAWS

The Trump Administration announced a number of updates this month as part of its continuing agenda of reviewing and extending U.S. foreign investment laws and sanctions programs. The principal development was the release of draft regulations by the Committee on Foreign Investment in the United States (CFIUS or Committee), which is the Treasury Department's bureau that examines foreign investment and national security. In general, the CFIUS process may apply to foreign companies that purchase significant shares of

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U.S. business dealing in high-tech industry, large-scale data collection, infrastructure, or real estate near sensitive military and government installations.

The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) also published an update to its Cuban Assets Control Regulations (CACR). The changes affect "U-turn" bank transactions and also limit remittances that may be sent to Cuba. On the same day, OFAC issued Venezuela-related General License 34, which carves out U.S. citizens, permanent residents, visa holders, and former employees of the Government of Venezuela from the ban on dealing with the Venezuelan government that was imposed under Executive Order 13884 of August 5, 2019.

FAA ANNOUNCES CIVIL PENALTY FOR AEROSPACE SUPPORT INTERNATIONAL

On September 6, 2019, the FAA announced it is seeking a \$514,558 civil penalty against Aerospace Support International, LLC, of Doral, Florida, for allegedly selling ball bearings without proper airworthiness documentation. Between March 2015 and July 2017, Aerospace Support International allegedly duplicated airworthiness paperwork for some bearings sold for use in onboard electrical power equipment. The company allegedly also duplicated paperwork attesting that bearings were made to industry standards by an approved manufacturer. The FAA alleged that Aerospace Support International's deliberate and intentional action resulted in a serious risk to the flying public. The company has asked to meet with the FAA to discuss the case.

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.