AVIATION REGULATORY UPDATE

1. DOT BEGINS 2012 WITH A BANG

It appears DOT will continue to impose massive fines during the 2012 calendar year. In 2011, DOT issued a record $5,694,000 in civil penalties, which was an increase of approximately $2,000,000 from 2010 levels. Of the 59 consent orders published last year, approximately one third involved fines levied against foreign carriers. Judging by the Department's activity in January 2012, especially against foreign carriers, we can likely expect to see even higher numbers in 2012.

Advertising: Total of $180,000

Icelandair Group: On January 18, 2012, DOT fined Icelandair $50,000 for violating the Department's advertising requirements, as set forth in 14 C.F.R. 399.84. DOT's investigation revealed that Icelandair had advertised fares that were followed only by an asterisk. DOT determined that this was a deceptive practice because there was no further elaboration on the asterisk, and customers had to click through several web pages in order to locate the disclosure of fees and taxes that were applicable to their flight.

Asiana Airlines: The Department levied a penalty of $70,000 against Asiana Airlines on January 23, 2012, also for advertising violations. In this case, DOT found that certain "Special Fares" advertised in the Fall of 2011 violated 14 C.F.R. 399.84. The fares advertised items such as "Beijing from $498" and included links below the fare that stated "Additional taxes, fees, and other restrictions may apply". When a customer clicked on the link the information regarding the additional taxes and fees was at the bottom of the page in fine print. The Department therefore concluded that this was a deceptive practice because consumers were not notified of the additional taxes and fees applicable to the advertised sale fares, including a carrier-imposed fuel-surcharge, until after they arrived at the landing page and only then if they scrolled down to the bottom of the next screen.

Polskie Linie Lotnicze LOT S.A.: On January 23, 2012, DOT fined Polskie Linie Lotnicze LOT ("LOT") $60,000 for advertising violations. An investigation by the Department found that for a period of time in the Fall of 2011, LOT displayed advertisements on its website that failed to provide information on additional taxes and fees that were ultimately included in the price of airfare. Specifically, once the consumer clicked on an advertised fare, they were taken to a landing page where sample routes and prices were displayed. The amounts of additional taxes and fees, however, were only disclosed in the fine print of another page that was available only after the consumer scrolled to the bottom of the landing page. The Department found this to be a deceptive practice under 14 C.F.R. 399.84.

Disability Reporting: Total of $100,000

Spirit Airlines: On January 27, 2012, DOT fined Spirit Airlines $100,000 for violations relating to the Air Carrier Access Act. An on-site investigation by DOT revealed that the carrier violated 14 C.F.R. 382.157 because it failed to adequately categorize and account for all disability-related issues raised in 2009 passenger complaints when it filed its 2010 annual disability report. The investigation also found that Spirit failed to provide dispositive responses to numerous written disability-related complaints that it received from consumers. Under DOT regulations, carriers are required to categorize all disability-related complaints according to the type of disability and nature of complaint and report this information to the Department every year. Carriers are also required to provide a dispositive written response to the complainant within 30 days of receiving a disability complaint.

2. OBAMA ISSUES EXECUTIVE ORDER TO PROMOTE INTERNATIONAL TOURISM THROUGH EXPEDITED VISA PROCESSING

In an effort to increase travel and tourism into the U.S., President Obama issued an executive order that charged several government agencies to take further action to promote tourism growth. Some of the initiatives included in the order are:

- Increasing non-immigrant visa processing capacity in China and Brazil by 40 percent.
- Expanding a visa waiver program that lets participating nationals travel to the U.S. for stays of less than 90 days without a visa.
- Ensuring that 80% of non-immigrant visa applicants are interviewed within three weeks of their application's receipt.
- Increasing efforts to expand the Visa Waiver Program.
- Issuing a final rulemaking to expand and make the Global Entry Program permanent.
- Appointing new members to the U.S. travel and tourism board.
- Nominating Taiwan to the Visa Waiver Program.

3. FAA DOWNGRADES SAFETY RATING FOR CURACAO AND ST. MAARTEN

In January, the Federal Aviation Administration announced Curacao and St. Maarten do not comply with International Civil Aviation Organization (ICAO) international safety standards. As a result, both countries were downgraded to Category 2 status, which means that carriers from Curacao and St. Maarten will not be allowed to start new services to the U.S. Such carriers will, however, be able to continue existing service to the U.S. Both Curacao and St. Maarten will be subject to stronger scrutiny from FAA inspectors.

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AVIATION REGULATORY UPDATE

1. FAA MODERNIZATION AND REFORM ACT OF 2012 SIGNED BY PRESIDENT OBAMA

On February 15th, President Obama signed the FAA Modernization and Reform Act of 2012 ("the Act") into law. The Act provides $15.9 billion annually for the Department of Transportation through 2015 for operations, facilities, airport projects, air traffic control modernization, research and development, and other programs and priorities.

Congress enacted the previous FAA reauthorization bill in 2003. It expired in 2007, and was extended for 6 months intervals from that time until now. The passage of this bill is significant because the FAA will be funded through 2015, which means that there will be no threat of an FAA shutdown.

Below are some of the more important provisions:

Passenger Facility Charges
The Act does not include an increase in the Passenger Facility Charge ("PFC"). It also makes permanent a pilot program allowing the collection of PFCs at non-hub airports. The Act also redefines PFCs as charges instead of fees. PFCs will not increase until the Act expires in 2015.

Foreign Repair Stations
The Act establishes a safety assessment system for part 145 repair stations. These stations will be subject to FAA inspection at least once a year (such inspections can be unannounced), but notably the FAA will also accept inspection results conducted by foreign aviation authorities. Workers at such stations will also have to undergo a drug and alcohol test which complies with the rules of that particular country, and which is acceptable to the DOT.

Lithium Batteries
The DOT cannot enforce any regulation regarding air transportation of lithium batteries that is stricter than the ICAO Technical Standards. If there is credible evidence that these batteries have contributed to an onboard fire, then the DOT can issue stricter regulations.

Passenger Bill of Rights
Carriers must provide the DOT an emergency contingency plan for tarmac delays and provide reports when such delays occur. Interestingly, foreign carriers are not included. However, under DOT regulations, foreign carriers must continue to provide these plans and reports.

E.U. Emissions Trading Proposal
In the Act, Congress states that it does not approve of the E.U. imposing its emissions trading proposal on international carriers without working through the International Civil Aviation Organization. Congress went on to say that the U.S. government should use all diplomatic and legal tools to ensure that the E.U.'s emissions trading program is not applied to aircraft registered by the U.S., and that carriers are not forced to purchase emissions allowances from or surrender emissions allowances to E.U. member states.

National Airport Slot Exemptions
The Act establishes sixteen new slot exemptions at National Airport (DCA). These slots are for nonstop flights between DCA and airports beyond 1,250 miles. The slots will be split evenly, with eight slots going to incumbent carriers and eight going to new entrant/limited incumbent carriers. Foreign carriers

that are certificated by Canada may also apply for these slots. Applicants must meet certain criteria, and the deadline for applications is March 12, 2012.

Business Jets
Operators of business jets operating under Stage 1 and 2 noise standards must meet Stage 3 requirements by Dec. 31, 2015. There are several exceptions under the rule.

Smoking Prohibition
The Act reaffirms the previous rule that foreign carriers must prohibit smoking in scheduled flights. In addition, foreign carriers must prohibit smoking in nonscheduled flights where a flight attendant is a required crew member, subject to certain exceptions.

Consumer Complaints
Both foreign and domestic carriers must post the following on their websites:

- the DOT's toll-free hotline phone number for customer complaints
- the e-mail address, telephone number, and mailing address of the carrier's customer complaints division
- the website and mailing address of the DOT's Aviation Consumer Protection Division

The DOT's hotline phone number must also be included on any electronic ticket confirmations, and on signs at the carrier's airport ticket counters. This requirement shall take effect on April 15, 2012.

Resolution of Disputes Concerning Airport Fees
The DOT expanded the rule allowing carriers to dispute airport fees to include foreign air carriers.

Use of Cell Phones on Passenger Aircraft
In the next four months, the DOT will study the impact of the use of cell phones in aircraft where currently permitted by foreign governments in foreign air transportation. The study will examine the policies of foreign governments and carriers regarding in-flight cell phone use and the impact of its use on safety, among other things. After the conclusion of the study, the DOT will solicit comments.

Use of Insecticides
Carriers who fly to certain countries are required by those countries to spray insecticides in the cabins of their aircraft. As of April 15, the DOT will establish a website that lists the countries that have this requirement. Air carriers, foreign air carriers and ticket agents selling tickets for such flights must refer ticket purchasers to the DOT's website. This requirement shall take effect on April 15, 2012.

2. SECURE PASSENGER FLIGHT DATA (SPFD)

The TSA has requested that all carriers collect SPFD for flights that overfly US airspace (TSA has published a list of routes impacted). SPFD includes: last name, first name, gender, and date of birth. This information must be delivered 72 hours prior to departure, and if a flight is booked less than 72 hours before, the information must be turned over to TSA at the time of booking. This requirement goes into effect on March 8, 2012. Please contact us if you would like a list of affected routes.

3. GLOBAL ENTRY PROGRAM

CBP's Global Entry program, which was started as a pilot program in 2008, will become permanent as of March 7, 2012. The program is voluntary and allows pre-approved, low-risk air travelers, including crew, to move through CBP on an expedited basis.

The program is open to U.S. citizens, permanent residents, Mexican nationals, and citizens of the Netherlands and Canada. Those who sign up for the program will be enrolled for five years. Currently, 20 airports have implemented the program.

4. DOT FINES ALLEGIANT AIR $100,000

On February 15, 2012, the Department of Transportation fined Allegiant Air $100,000 for violations of DOT's disability reporting and advertising requirements.

The Department of Transportation performed a review of disability-related complaints it had received in 2009 and 2010 pertaining to Allegiant Air. Carriers are required to submit an annual report to the Department of disability-related complaints and sort those complaints by the type of disability and the nature of the complaint. They must record each issue raised in a complaint separately. The Department found that Allegiant failed to properly categorize disability complaints in their annual reports, and did not account for all of the issues raised in the complaints.

The Department also requires carriers to provide written responses within 30 days of receiving written disability complaints. The Department found that in many instances Allegiant only followed up with a phone call in lieu of a dispositive written response.

In a separate investigation, the Department found that Allegiant had violated the Department's Full Fare Advertising rule. For a period of time in December 2010 and January 2011, Allegiant had non-compliant advertisements on their website. The first of these was a banner ad which read "Happy Holidays! Fly Free* to Vegas." The advertisement further stated, "four-night minimum stay" and "click here for details!" Although there was an asterisk, there was no information on the page where the asterisk appeared about taxes and fees. There was also no hyperlink proximate to the words "Fly Free" that took consumers to a place on a separate screen where the full amount of taxes and fees were disclosed. Rather, once consumers clicked on the link in the advertisement, they were taken to a page where they could see the taxes and fees only after scrolling to the bottom of the page.

The second advertisement was a banner ad on Allegiant's homepage which stated "Fly Free* to Tampa Bay." At the bottom of the page, next to an asterisk, the existence of applicable taxes and fees was disclosed, which included Allegiant's $14.99 convenience fee for ticket purchases (except for purchases made at one of the carrier's airport ticket offices). Under DOT rules, carrier or agent-imposed surcharges, such as convenience fees, cannot be stated separately and have to be included in the advertised fare. Because Allegiant's convenience fee applied to the "free" fares, those fares were not considered free and the convenience fee should have been included in the initial fare quote.

5. TWIN AIR CALYPSO FINED $70,000

On February 24, 2012, Twin Air Calypso ("TAC") was fined $70,000 for exceeding the scope of its exemption authority.

TAC is a U.S. based on-demand air carrier that operates from Florida to parts of the Caribbean. It is registered under 14 CFR 298. A Department of Transportation investigation found that for a period of time in 2011, TAC regularly operated more than four round-trips per week between Fort Lauderdale and the Bahamas. TAC provided a schedule of these operations to Department of Transportation investigators when inquiries were performed in person at the airport and via phone. In order to operate flights four times a week, TAC should have had authorization as a commuter air carrier, which it did not have.

6. DOT FINES UNISTER USA, LLC/FLIGHTS24.COM $30,000

On March 1, DOT fined Unister USA, LLC, d/b/a Flights24.com $30,000 for failing to comply with the Department's full-fare advertising requirements and for failing to disclose codeshare arrangements.

The DOT found that from at least July 2011 through October 2011, Unister failed to properly disclose to consumers that additional taxes and fees applied to fares advertised on its Internet website, Flights24.com. Specifically, at the first point at which fares were displayed on its website Unister failed to identify the existence and amount of additional taxes and fees, one of which was Unister's service fee, which cannot lawfully be broken out from the base fare.

Until Jan. 26, 2012, only government-imposed taxes and fees assessed on a per-passenger basis, such as passenger facility charges, could be stated separately from the advertised fare, but they had to be clearly disclosed in the advertisement so that passengers could easily determine the full price to be paid. Internet fare listings were permitted to disclose these separate taxes and fees through a prominent link next to the fare stating that government taxes and fees were extra, and the link had to take the viewer directly to an explanation of the type and amount of taxes and fees. Carrier or agent-imposed surcharges, such as service fees, could not be stated separately and had to be included in the advertised fare.

Under DOT's recently adopted consumer rule, carriers and ticket agents have been required to include all taxes and fees in every advertised fare since Jan. 26. DOT's airline price advertising rules apply to both U.S. and foreign carriers as well as ticket agents.

The investigation also revealed a lack of compliance with the Department's codeshare disclosure rule. DOT requires that airlines and ticket agents inform customers before they book a flight, if the flight is operated under a code-share agreement, as well as disclose the name of the transporting carrier and any other name under which the flight is offered to the public.
From at least July through September 2011, Unister failed to properly disclose on its website the existence of codesharing arrangements when advertising code-share flights operated on behalf of a major air carrier by a regional air carrier.

7. ELECTRONIC SUBMISSION OF TARMAC DELAY CONTINGENCY PLAN

The DOT will be establishing a system to enable airlines to submit tarmac delay contingency plans electronically. The Department plans to disseminate information on how to submit the plans by April 9, 2012.

8. NOTICE OF PROPOSED RULEMAKING (NPRM) FOR FAA ENFORCEMENT APPLICATIONS

The National Transportation Safety Board (NTSB) has issued a notice of proposed rulemaking and is soliciting comments. The notice includes proposals for altering review procedures for FAA enforcement applications. The proposals include:

requiring the FAA to provide certificate holders with certain information in emergency determinations so that the certificate holder can understand the basis for the certificate action/emergency determination as soon as possible
allowing respondents to present records as evidence if they are challenging an emergency proceeding

Comments are due on April 9, 2012.

9. DOT STRIKES DOWN HAWAII INSPECTION FEE

In May 2011, the State of Hawaii increased freight inspection fees under the Inspection Fee Statute, resulting in the fee increasing from 50 to 75 cents per 1,000 pounds of imported freight. In proceedings before DOT, the Air Transport Association ("ATA") had argued that the Hawaii freight inspection fee is preempted by the Airline Deregulation Act ("ADA") and violates the Anti-Head Tax Act.

The Department found that the Inspection Fee Statute as applied to carriers (including inspection fees and potential fines) was preempted by the ADA because it regulates how carriers are likely to price the shipment of freight to Hawaii, and how carriers collect those fees.

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AVIATION REGULATORY UPDATE

1. DOT PROVIDES GUIDANCE ON FAA MODERNIZATION AND REFORM ACT OF 2012 PROVISIONS

Last month we summarized some of the more important provisions of the FAA Modernization and Reform Act of 2012 (the "Act"). Below is further guidance recently provided by DOT concerning consumer complaints and notifications regarding insecticides.

Consumer Complaints
In last month's update, we provided the following summary of the Act's consumer complaints provision:

Both foreign and domestic carriers must post the following on their websites:

- the DOT's toll-free hotline phone number for customer complaints
- the e-mail address, telephone number, and mailing address of the carrier's customer complaints division
- the website and mailing address of the DOT's Aviation Consumer Protection Division

The DOT's hotline phone number must also be included on any electronic ticket confirmations, and on signs at the carrier's airport ticket counters. This requirement took effect on April 15, 2012.

The DOT recently issued the following guidance:

DOT Hotline
DOT has advised that it is working on the hotline telephone number. Once the hotline is up and running, however, carriers must post it on their website, at ticket counters, and on all e-tickets.

Airport Signage
The Act requires carriers to include the DOT hotline telephone number on "prominently displayed signs of the carrier at the airport ticket counters" in the U.S. This requirement applies to physical signs that appear on or around the carrier's ticket counters. DOT clarified that the signs must be prominent, but the telephone number does not necessarily have to be the only, or even most prominent, piece of information on the sign. Moreover, such a sign does not necessarily have to appear at every ticketing station; a carrier might choose to place it in a central location in its ticket counter area that is accessible to all passengers in that area. Presumably, this means that if the carrier does not have any signage, it is not required to post the telephone number. DOT did confirm that the telephone number must appear on a prominently displayed sign at the ticket counter and not exclusively on a separate pamphlet that is handed out to passengers upon request.

The Department has advised that details regarding the signage requirements will be established through rulemaking and we should have additional clarification at that time. Since DOT has not yet established the hotline telephone number this is not a requirement that carriers need to worry about immediately.

Telephone Number / Consumer Complaints
Part 259 of DOT's passenger rights rule requires carriers to send a "substantive written response" to written complaints. The Act, on the other hand, requires airlines to include on their web site a telephone number "for the submission of complaints by passengers about air travel service problems." This is an additional requirement and DOT has advised that, while they would expect carriers to accept telephone

complaints because the Act is self-executing, Part 259 does not apply to telephone complaints (i.e. no written response is required for telephone complaints). Moreover, the Department advised that they have no current plans to amend Part 259 to require responses to telephone complaints.

As indicated above, the Act requires airlines to include on their web site a telephone number "for the submission of complaints by passengers about air travel service problems." DOT further advised that while Congress did not explicitly state in the Act what must be done with complaints to the telephone line, it is reasonable to assume that Congress intended for carriers to handle/respond to the complaints in some manner. Therefore, carriers must accept complaints by telephone; they will not be in compliance with this requirement if they use their telephone line to tell callers that they do not accept complaints by telephone and that complaints are only accepted in writing. However, the Act does not require that these calls be answered live and DOT would view a system that allows callers to record a complaint to be acceptable if the carrier listens to the complaints and processes and responds to the complaint in some reasonable fashion.

Email Requirement
DOT recently issued guidance on the FAA Act requirement that carriers must post an email address on their websites through which consumers can complain. The Department has advised that carriers will be considered to be in compliance if they provide an email address or a link to a web-based complaint form.

DOT Contact Information
The website and mailing address of the DOT's Aviation Consumer Protection Division are:

Website: http://airconsumer.ost.dot.gov/

Mailing Address: Aviation Consumer Protection Division, C-75
U.S. Department of Transportation
1200 New Jersey Ave, S.E.
Washington, D.C. 20590

Insecticides
DOT recently issued guidance regarding the FAA Act's requirement that carriers and ticket agents refer purchasers of tickets of foreign air transportation to the following website: http://ostpxweb.dot.gov/policy/safetyenergyenv/disinsection.htm. Carriers will have to refer passengers to the list if they purchase a ticket in the U.S. and their flight is between the U.S. and a country on the list. The website contains a list of countries that require airlines to treat the passenger cabin with insecticides.

2. DOT FINES INTERNATIONAL JET MANAGEMENT GMBH FOR CABOTAGE

On March 29, 2012, The Department of Transportation issued a consent order assessing a civil penalty of $25,000 against Austrian Air Carrier International Jet Management GmbH ("International Jet"). The Department found that International Jet, a foreign carrier, engaged in the carriage of traffic for hire between two points in the United States. The practice is commonly referred to as cabotage and is prohibited under 49 U.S.C. § 410703. A foreign carrier may carry a passenger on a flight segment that is between two points in the United States so long as that passenger flies another segment as part of that same itinerary that originates in or is destined for another country. In the case of International Jet, the passengers only flew on a segment between two points in the United States.

The Department of Transportation rarely makes exceptions for cabotage. Based on DOT guidance, one area where the DOT might grant exemptions is in the case of emergencies. An emergency 30-day exemption for cabotage may be granted to a foreign air carrier if:

1. Because of an emergency created by unusual circumstances not arising in the normal course of business, U.S. carriers cannot accommodate the traffic;
2. All possible efforts have been made to accommodate that traffic using U.S. air carriers;
3. The exemption is necessary to avoid undue hardship for the traffic; and
4. In a situation involving a labor dispute, the exemption will not result in an unreasonable advantage to any party.

3. ADVERTISING EACH-WAY FARES BASED ON A ROUND TRIP PURCHASE

The DOT's regulations permit carriers and ticket agents to advertise airfares on an each-way basis when a roundtrip is required provided that the roundtrip-purchase requirement is conspicuously noted in the advertisement and is stated proximately and prominently to the each-way fare amount. The DOT has also noted that in advertising these fares, carriers must ensure that the advertisements do not deceive customers. The DOT recently found an airline that was advertising outbound each-way fares that were deceptively low in comparison to the return flight fares. In one instance, the returning fare was 600% higher than the outbound fare. The DOT stated that the carrier intended to bait the customer with an unrealistically low outbound fare in order to induce the customer to buy a roundtrip ticket at a price higher than any person would have expected at the beginning of the search process. Such tactics constitute unfair and deceptive practices under the regulations.

The rule took effect on Friday, April 27, 2012.

4. FCC WIRELESS DEVICE REGULATIONS

Wireless devices commonly used for internal communications among ground personnel at U.S. airports operate on radio frequencies regulated by the FCC. Users of such wireless devices must work with private coordinators to select the radio frequencies least likely to cause harmful interference to other parties, and then must seek Commission approval to operate on those frequencies. All parties operating wireless devices on regulated frequencies must hold a valid FCC license, and must remain in compliance with the FCC's regulatory requirements for the licensed frequencies. Please note, the licensing processes and regulations applicable to frequencies used for internal ground communications could differ significantly from those applicable to frequencies used for on-board, air-to-ground, ground fixed and radio-navigation communications.

5. REPORTING OF ANCILLARY AIRLINE PASSENGER REVENUES

There is a public meeting on a Notice of Proposed Rulemaking (NPRM) which was issued on July 15, 2011. The NPRM proposed changes regarding reporting of airline ancillary passenger revenues, computation of mishandled baggage rates, and collection of statistics for mishandled wheelchairs and scooters used by passengers with disabilities. The NPRM applies to all large certificated carriers. The meeting will include an overview of the NPRM by DOT staff, and attendees will have the opportunity to provide input on the costs and benefits associated with the proposals.

The meeting is on May 17, 2012 from 9:30 a.m. to 11:30 a.m. and from 1 p.m. to 3 p.m. Eastern Time in the Oklahoma City Conference Room (located on the lobby level of the West Building) at the U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC. The meeting is open to the public, although anyone planning on attending must notify Charles Smith at charles.smith@dot.gov or (202)-366-9342, ten calendar days prior to the meeting for security purposes.

6. SWIFT JET FINED $10,000

Swift Jet was recently fined $10,000 for conducting a fifth-freedom charter flight from Anguilla, to Wilmington, DE to White Plains, NY without DOT authorization. Swift Jet is a foreign carrier that holds a Canadian charter air taxi registration. This authorization does not authorize Swift Jet to conduct fifth-freedom charters to or from the United States. Foreign carriers similarly situated to Swift Jet must obtain a "statement of authorization" before conducting such charters. In addition to violating DOT regulations, DOT also found that Swift's action constituted an unfair and deceptive trade practice, and an unfair method of competition.

7. PILATUS PC-12 CENTRE CANADA, INC. FINED FOR UNLAWFULLY MARKETING PRIVATE AIR AS A DIRECT AIR CARRIER

On April 13, 2012, the Department of Transportation fined Pilatus PC-12 Centre Canada, Inc. ("PCC") $20,000 for its involvement in the marketing, sale and operation of Private Air, Inc.'s ("Private Air") charter flights between Canada and the United States.

An investigation found that Private Air was conducting charter flights to the US from Canada using aircraft bearing Private Air's livery, when in fact the flights were being operated by its sister company, PCC. Private Air was not listed as a "doing-business-as" name on PCC's Part 294 registration, a violation of 14 CFR 294.31. In addition, the DOT found that by facilitating Private Air's conduct, PCC was engaging in unfair and deceptive trade practices and unfair methods of competition.

8. PRIVATE AIR, INC. FINED FOR HOLDING ITSELF OUT AS A DIRECT AIR CARRIER

On April 13, 2012, the Department of Transportation fined Private Air, Inc. ("Private Air") $25,000 for holding itself out as a direct air carrier when it was not and engaging in air transportation as an indirect air carrier without economic authority to do so. This is a violation of 49 U.S.C. § 41301 and is consider an unfair and deceptive trade practice and an unfair method of competition.

An investigation revealed that Private Air had operated charter flights into the US from Canada on aircraft registered to Pilatus PC-12 Centre Canada, Inc. ("PCC"). Records showed that neither PCC's operations specifications nor its Part 294 registration listed "Private Air" as a "doing-business-as" name. In addition to these operations, the investigation found that Private Air held itself out as an direct air carrier in printed brochures, on its website and entered into contracts for trans-border flights when, in fact, PCC was operating the flights and acting as the direct air carrier.

In addition, Private Air did not have the appropriate economic authority from DOT to engage in indirect air transportation.

9. FRONTIER AIRLINES, INC. FINED $50,000 FOR PART 382 VIOLATIONS

On April 13, 2012 the Department of Transportation fined Frontier Airlines $50,000 for violations of the Air Carrier Access Act and 14 CFR Part 382 ("Part 382") relating to the transport of an individual passenger identified as "Mr. M."

Mr. M is a quadriplegic who has no use of his arms, legs and torso. Mr. M's combined treatment on multiple flights by Frontier was the basis for the fine.

Due to his disability he is unable to sit upright in an aircraft seat without proper support. On two flights, Frontier allowed Mr. M to be strapped to his seat using seatbelt extenders. This method is not approved by the FAA.

On a subsequent flight, Mr. M asked for seatbelt extenders to restrain himself. He was told that this was not an approved restraining method and was later taken off the plane in a embarrassing and endangering fashion.

The DOT concluded that Frontier led Mr. M to believe that this seatbelt extender method was acceptable and led to him being unprepared with his own device for support while flying.
An investigation by the Office of Aviation Enforcement and Proceedings found that Frontier violated Part 382 by failing to inform him of the company's limitations and the use of improper restraining methods.

The investigation also cited Frontier for inadequate pre boarding assistance and failure to ensure that its contractors meet the training requirements of Part 382. Mr. M made numerous requests to pre-board, but was forced to wait until virtually all other passengers had boarded. This was a result of the airline's wheelchair service vendor not responding to a service call. In addition, those traveling with Mr. M had to help lift him which was evidence that the airline's assistance was inadequate. In addition, the aisle chair used for enplaning and deplaning Mr. M were missing shoulder straps, causing him to fall out of the chair onto a passenger.

10. ATLANTIC SOUTHEAST FINED $25,000

On May 2, 2012 Atlantic Southeast was fined $25,000 for violations of Federal law which bar airlines from subjecting any air traveler to discrimination on the basis of race, color, national origin, religion, sex, or ancestry.

This penalty action stems from an incident on May 6, 2011 at the Memphis International Airport in which two religious leaders (Imams) were removed and denied re-boarding on flight 5452, operated as a Delta Connection flight by Atlantic Southeast. The two religious leaders were initially removed to conduct secondary screening due to safety concerns. After their removal, the passengers' seating area was searched by uniformed TSA officials --- nothing of consequence was uncovered. The Imams were cleared and TSA requested that they be re-boarded. The captain then made the decision to not re-board the two passengers in question because the removal of the Imams and the search of their seating areas caused safety concerns resulting in passenger concern and unrest.

The Department of Transportation found that the denial of re-boarding was a discriminatory process. According to the Department, once passengers are determined not to be a security threat, the carrier must

allow those individuals to re-board unless a valid safety or security concern exists. Atlantic Southeast disagreed with the Department of Transportation's findings and denied that any violation of Federal law occurred. However, Atlantic Southeast elected to settle this matter with the Enforcement Office rather than to engage in costly and protracted litigation.

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ECKERT SEAMANS

JUNE 2012

AVIATION REGULATORY UPDATE

1. UPDATE ON DOT'S E-TICKET RULE

On July 24, 2012 the U.S. Department of Transportation ("DOT") will start enforcing 14 CFR 399.85(c) and 399.87 of the Enhancing Airline Passenger Protections regulations as they are written. These provisions relate to the disclosure and application of baggage fees on interline and code-share itineraries involving international flights. Under these provisions, carriers will have to provide baggage information (including the baggage policies of codeshare and interline partners that apply on a passenger's itinerary) on all e-ticket confirmations in full text form.

2. GUIDANCE FROM DOT ON ADVERTISING "FREE" AIRFARE

On May 17, 2012, the Department of Transportation's Aviation Enforcement Office issued guidance on the use of the term "free" in airfare advertisements and also guidance on the disclosure of costs that carriers may assess in connection with the booking of frequent-flyer award travel. Carriers and covered entities have sixty (60) days, or until July 16, 2012, to ensure materials comply with the rule.

Essentially, carriers are prohibited from holding out a fare as "free" when in fact the consumer, in order to take advantage of the offer, is liable for the payment of significant additional mandatory charges. If a carrier advertises an air fare as "free", the carrier cannot assess the consumer any monetary charge (i.e. government-imposed taxes and fees as well as mandatory carrier-imposed charges) when the consumer attempts to obtain the "free" travel. The guidance also notes that there is nothing prohibiting a carrier from saying that air transportation may be obtained "free of carrier charges" or "without carrier charges", but still disclose government fees and taxes.

Frequent flyer rewards programs are also included in the "zero fare" guidance. If there are taxes, fees or mandatory carrier charges that must be paid by passengers in a frequent flyer rewards program, carriers must display these fees on their websites together with mileage award levels required to obtain the ticket. The same prominence must be given to the taxes, fees and mandatory carrier charges as to the mileage award requirements.

The Office of Aviation Enforcement will consider failure to follow this guidance an unfair and deceptive practice which will subject the carrier to a possible enforcement action.

3. REMINDER: NEW HAZMAT NOTIFICATION REQUIREMENTS FROM PHMSA

In January 2011, the Pipeline and Hazardous Materials Safety Administration (PHMSA), the U.S. agency in charge of regulating, among other things, the transportation of hazardous materials by air, amended certain rules to harmonize them with international standards. The amendments include changes to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport limited quantities, and vessel stowage requirements. The amendments were necessary in order to maintain alignment with recent changes made to the International Civil Aviation organization's (ICAO) Technical Instructions for the Safe Transport of Dangerous Goods by Air, and the United Nations Recommendations on the Transport of Dangerous Goods Model Regulations.

Part of these rule changes are that by January 1, 2013 all passenger notifications regarding dangerous goods must be structured so that the final ticket purchase cannot be completed until the passenger or a person acting on the passenger's behalf has indicated that they understand the restrictions on hazardous materials in baggage. The FAA is planning to issue specific guidance on complying with the regulation's various requirements although no date has been set for the issuance of this guidance.

DOT has solicited public comments on this and other sections of its January 19, 2011 final rule. Comments are due by July 24, 2012.

4. DOT FINES VIRGIN AMERICA $100,000 FOR PART 382 VIOLATIONS

On May 24, 2011 DOT fined Virgin America $100,000 for violating the Department's rules concerning nondiscrimination on the basis of disability in air travel. The fine is the result of a July 2011 on-site regulatory compliance inspection that reviewed all of Virgin America's disability-related complaints from 2009 through 2011.

The inspection found that in numerous instances, Virgin America failed to provide written responses to written Part 382 complaints. Under 14 CFR 382.155 carriers are required to provide dispositive written responses to disability-related complaints within 30 days.

Additionally, the inspection revealed that Virgin America failed to properly categorize and account for all disability-related issues raised in complaints received for 2008 and 2009. The failure to properly categorize disability-related complaints is a violation of 14 CFR 382.157.

5. PEOPLE EXPRESS AIRLINES FINED $10,000

In early May the Department of Transportation's Office of Aviation Enforcement assessed People Express Airlines, Inc. ("People Express") a $10,000 fine.

Between February 19, 2012 and March 27, 2012 People Express began offering memberships in its "Club Travelati" program over the internet. The program offered "ultra low discount offers" and certificates towards the purchase of a customer's first ticket. During this time period People Express sold 130 memberships. The Department found that this was a violation of 49 U.S.C. § 41101 and 14 CFR 201.5(a) because People Express did not hold economic authority or an exemption from the requirement to hold economic authority. On March 19, 2012 People Express applied for the necessary authority, but it did not hold authority during the time period during which it was selling memberships.

6. TSA UPDATES POLICY ON U.S.-EU AND U.S.-CANADA CARGO SCREENING

On June 1, 2012 the U.S. Department of Homeland Security announced that its Transportation Security Administration has unveiled an air cargo security reciprocal agreement with the European Union and Switzerland, as well as a separate but related agreement with Canada.

This reciprocal recognition of security programs will allow private companies to move cargo through the 27 EU member states, Switzerland and the U.S. under a single set of cargo security rules. Similar treatment will be given to cargo being shipped between the U.S. and Canada.

In a press release, TSA Administrator John S. Pistole was quoted as saying "This agreement with the EU and Switzerland will ease the burden on industry and allow for the free movement of goods and commerce between our nations. It will also strengthen security by ensuring that we share information and work together towards our common interests."
The recognition of the security program is effective immediately.

7. CANADA ADVISES ON TARIFF SIGNAGE REQUIREMENTS

The Canadian Transportation Agency has released a new Interpretation Note to assist carriers in meeting their obligations with respect to the prominent display of carrier tariff signage and the public's right to inspect tariffs.

The Note reiterates that air passengers in Canada are entitled to have information readily available regarding their contractual rights with respect to air transportation services. It also reminds carriers that they must have prominent display signs at their business offices that indicate their tariffs are available for public inspection. Business offices include: an airport terminal where an air carrier operates (including ticket purchase locations and baggage pickup locations within the terminal), city ticket offices and the carrier's website.

The Note also contains useful information for carriers about the recommended wording of signs, sign types, and considerations when developing a sign.

If you would like a copy of these recommendations or a review of proposed signs for use in Canada, please feel free to contact us.

8. THE PITFALLS OF RUNNING A SWEEPSTAKES OR CONTEST IN THE U.S.

If a company wants to run a sweepstakes or contest in the U.S., it is important to remember that such promotions are subject to both federal and state law and there are several requirements that must be satisfied before any sweepstakes or contest begins. First, U.S. laws make it illegal to include a promotion with the following three elements: prize, chance, and consideration (this means the payment of money or expenditure of effort in order to participate). To comply, companies must ensure that their promotion or contest contains only two of these three elements. Second, there must be complete official rules drafted prior to the start of the promotion. These rules should be drafted or reviewed by legal counsel to ensure that they contain all required language and disclaimers. In addition, the rules – or their abbreviated counterparts, as counsel may advise – must be present on all advertising and media related to the promotion (whether in print or online). Third, a few states have registration and bonding requirements when certain prize thresholds are met. In these states, when the total approximate retail prize value is above a certain value, the promotion or contest itself must be registered and/or bonded, and the full rules must be presented to the state's Attorney General in advance of its start (often several weeks prior to launch).

There is a myriad of specific requirements in the U.S. for promotions and contests. Not following the prize/chance/consideration prohibition, not having rules, or not registering and bonding as appropriate render a promotion illegal under several states' laws and expose the sponsor to liability for failure to meet such state laws.

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ECKERT SEAMANS

JULY 2012

AVIATION REGULATORY UPDATE

1. FULL FARE ADVERTISING CANADIAN STYLE! CANADA PROPOSES PRICE ADVERTISING RULES

The Canadian Transportation Agency has announced that it has published proposed amendments pertaining to the price advertising of air transportation.

The proposed amendments will require any person who advertises the price of air service to display the total price, inclusive of all taxes, fees and charges. The amendments will apply to the advertising of air service from and within Canada.

The amendments would require advertisements to include the total price, inclusive of all taxes, fees and charges, that are needed to complete the air service. Advertisements would also have to meet a minimum level of description of services offered and include origin and destination, whether the service is one-way or round-trip and any limitations on the booking or periods available. Passengers also must be provided a breakdown of taxes, fees and charges.

The proposed amendments will also require that a customer have access to a listing of any optional services (i.e., checked baggage, preferred seat selections and meals) offered by the service provider for a fee or charge and that the price of each service be displayed using an all-inclusive price format that includes third party charges.

Comments from interested parties are due to the Canadian Transportation Agency by September 13, 2012. The Canadian Transportation Agency anticipates the final rules will go into effect this winter but has not set a specific date.

If you would like to file comments on these proposed regulations, please let us know.

2. KEEP YOUR CONTRACT OF CARRIAGE UP TO DATE TO AVOID FINES BAHAMASAIR HOLDINGS FINED $70,000

Bahamasair Holdings ("Bahamasair") has been fined $70,000 by the Department of Transportation for violations regarding refunds and providing inaccurate notice of liability limits on flights covered by the Montreal Convention.

Under U.S. Federal Regulations (12 CFR Part 226, and 14 CFR Part 374), refund requests involving airline tickets purchased with a credit card must be refunded by the creditor within seven (7) business days of receipt of full documentation for the refund requested. Additionally, if carriers have a practice of charging a penalty or fee for refunds, passengers must be provided conspicuous written notice of the penalty or fee on or with their tickets.

Customer complaints regarding Bahamasair's refund practices led to an investigation by the Department of Transportation's Enforcement office. The investigation revealed that on numerous occasions Bahamasair failed to provide refunds within seven (7) business days. Additionally, Bahamasair charged a processing fee for refunds without notifying the passengers.

Under the Montreal Convention, there are limitations for carrier liability in regard to lost or delayed baggage. The limitations are periodically adjusted for inflation. In 2009 the limitation was increased from

1,000 to 1,131 Special Drawing Rights. The Department of Transportation's investigation also revealed that Bahamasair failed to revise its contract of carriage to reflect the increased baggage liability limit.

3. DOT ASSESSES $130,000 PENALTY AGAINST MEXICO'S VOLARIS FOR VIOLATIONS

On June 22, 2012, Concesionaria Vuela Compania de Aviacion, S.A.P.I. de C.V. d/b/a Volaris ("Volaris") was assessed a $130,000 civil penalty for failing to conform with baggage fee disclosure rules on its website. Under Department of Transportation regulations, airlines are required to clearly and prominently disclose on the first screen in which the carrier offers a fare that additional fees for baggage may apply.

According to DOT, for a period of time after January 24, 2012, when the baggage fee disclosure rule went into effect, Volaris advertised fares without a link to applicable baggage fees. The Department of Transportation viewed this as an unfair and deceptive practice and issued a civil penalty against Volaris.

4. DON'T FORGET TO FILE YEAR END DISABILITY REPORTS DOT FINES CARRIER FOR USE OF ASTERISK DOT FINES VISION AIRLINES $75,000 FOR MULTIPLE VIOLATIONS

On July 12, 2012, the Department of Transportation's Office of Enforcement announced that it was fining Vision Airlines for multiple violations of the Department's full fare advertising rules and violations of the Department's annual disability reporting rules.

Under the Department of Transportation full fare advertising rules, every fare advertised must include all government taxes and fees. An investigation found that Vision advertised fares followed by asterisks that referred consumers to a statement below each fare that stated the fares "excluded taxes and fees," but gave no information regarding the nature or amount of those taxes and fees. The Department viewed this as an unfair and deceptive practice.

Under the Air Carrier Access Act and corresponding Federal Regulations, the Department of Transportation requires all carriers to submit an annual report summarizing their disability complaints from the previous year. These reports are due to the Department of Transportation on the last Monday in January.

Vision Airlines failed to submit a report to the Department for calendar year 2009 and submitted its report for 2010 four months late. For these reasons the Department concluded that Vision violated the Air Carrier Access Act and 14 CFR 382.157(d). Vision air was fined $75,000 for the above violations.

5. TICKET AGENT FINED FOR FONT SIZE IN ADVERTISEMENT BAD CODESHARE DISCLOSURE PRACTICES TRIPADVISOR FINED $80,000 BY DOT

On July 13, 2012, the Department of Transportation announced that it was fining TripAdvisor, a ticket agent, $80,000 for internet advertisements made by TripAdvisor that failed to comply with the Department's full fare advertising rules and did not provide appropriate code share disclosures.

Under the Department of Transportation full fare advertising rules, every fare advertised must include all government taxes and fees. While taxes and fees may be listed separately in pop-up windows or through other means, the listing of base fares, taxes, or fees may not be displayed as prominently as the total price. They also may not be presented in the same or larger font size as the total price. An investigation by the Department found that for a period of time in 2012, TripAdvisor failed to display its total fares more prominently than its base fares which did not include taxes and fees.

The investigation also revealed that TripAdvisor did not properly disclose codeshares. Department of Transportation regulations require that ticket agents disclose the name of the operating carrier providing the service for each segment of a passenger's itinerary "on the first display of the Web site following a search of a requested itinerary in a format that is easily visible to a viewer." TripAdvisor failed to notify customers of codeshare arrangements between large U.S. carriers and regional carriers. The actual operating carrier was only identifiable through a hover text feature. The Department viewed this as a violation and ordered TripAdvisor to cease this practice.

6. DEPARTMENT OF TRANSPORTATION SOLICITS COMMENTS ON DRAFT TECHNICAL ASSISTANCE MANUAL FOR 14 CFR PART 382 NONDISCRIMINATION ON THE BASIS OF DISABILITY IN AIR TRAVEL

On July 5, 2012, The Department of Transportation published a draft of its updated Technical Assistance Manual ("TAM"). The purpose of the TAM is to provide guidance to carriers and contractors in implementing Part 382.

This comprehensive manual is set up in chapters that follow the chronological path of air travelers. It has chapters regarding:

- Assisting air travelers with disabilities planning a trip
- Assisting air travelers with disabilities at the airport
- Assisting air travelers with disabilities boarding
- Deplaning and during the flight
- Assisting air travelers with disabilities with their complaints

The TAM also has a chapter on sensitivity and interacting with passengers with disabilities. Additionally the TAM has four appendices providing a date of effectiveness table for regulations, tips for travelers with disabilities, airline management related issues and service animal issues.

The deadline for submitting comments on the proposed Technical Assistance Manual is October 3, 2012.

7. DEADLINE TO FILE CLAIMS APPROACHING IN GLOBAL AVIATION BANKRUPTCY CASE

Earlier this year, Global Aviation Holdings, Inc., the parent company of World Airways and North American Airlines, filed for Chapter 11 bankruptcy in the Eastern District of New York.

The deadline for filing proofs of claim is July 30, 2012. Any entity that believes it is owed any money from one of the debtors in this case must complete a proof of claim form and submit it to the court on or before July 30, 2012.

The debtors in this case are (1) Global Aviation Holdings, Inc.; (2) North American Airlines, Inc.; (3) Global Aviation Ventures SPV, LLC; (4) Global Shared Services, Inc.; (5) New ATA Acquisition, Inc.; (6) New ATA Investment, Inc.; (7) World Air Holdings, Inc.; (8) World Airways, Inc.; and (9) World Airways Parts Company, LLC.

Please feel free to contact us if you have a claim against any of the above entities.

8. DEADLINE TO FILE CLAIMS APPROACHING IN PINNACLE AIRLINES BANKRUPTCY CASE

In April 2012, Pinnacle Airlines Group, which provides regional flights for Delta Airlines Inc. and United Continental Holdings, Inc., filed for Chapter 11 bankruptcy. Proofs of claim in this matter must be filed by August 6, 2012.

The debtors in this case are (1) Colgan Air, Inc. (PinnPro); (2) Mesaba Aviation, Inc. (Mesaba Airlines); (3) Pinnacle Airlines Corp.; (4) Pinnacle Airlines, Inc.; and (5) Pinnacle East Coast Operations, Inc.

Please feel free to contact us if you have a claim against any of these entities.

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ECKERT SEAMANS

AUGUST 2012

AVIATION REGULATORY UPDATE

USE OF GDSS TO DISCLOSE ANCILLARY FEES TOPS DOT CONSUMER PROTECTION COMMITTEE'S AGENDA

On August 7, 2012, the DOT's Advisory Committee for Aviation Consumer Protection met at DOT headquarters in Washington, D.C. Topics covered during the meeting included the tarmac delay rule, Part 382 (DOT's disability rule), and regulatory concerns regarding the display and sale of airline ancillary services via GDSs.

DOT representatives announced that the Department will issue a report at the end of this summer regarding the impact of the tarmac delay rule. DOT also announced that the majority of Part 382 complaints which they receive involve a carrier's failure to provide appropriate assistance to passengers who require the use of a wheelchair and that the second largest class of complaints from passengers with disabilities involves the provision of seating accommodations.

With those two items out of the way, the remainder of the meeting was used to discuss regulatory issues concerning the display and sale of airline ancillary services and fees though GDSs. The Committee is concerned that many airlines make it difficult for customers to see all of the ancillary fees associated with a particular ticket before its purchase. DOT is considering the merits of requiring airlines to distribute information about ancillary fees through GDSs.

Representatives from airlines, including Delta and American Airlines, voiced their concern that such a regulation would be a detriment to the industry. The airlines contended that they are able to provide ancillary fee information in a format comparable to the GDSs, and at a much lower cost. Representatives of the GDSs, including Sabre, however, argued that airlines are not being transparent about ancillary costs and that they should be using the systems created by GDSs in order to give consumers adequate information. The Committee will continue to consider the need for regulation – no regulations were proposed at this time.

The DOT also stated that a final rule on access to kiosks will be published in the fall. The Department also plans to issue a revised technical assistance manual and expects to publish a Notice of Proposed Rulemaking regarding medical oxygen, access to in-flight entertainment for passengers with disabilities, and service animals by the end of the year. The Committee expects to meet again in September, but has not yet set a date.

PRESIDENT OBAMA SIGNS PILOT'S BILL OF RIGHTS

The Pilot's Bill of Rights (S.B. 1335), which was championed by U.S. Senator Jim Inhofe (R-Okla.) along with more than 60 co-sponsors, recently passed in both the U.S. Senate and U.S. House of Representatives. After more than a year of consideration, S.B. 1335 was signed into law by President Obama on August 3, 2012.

Among its many protections, the Pilot's Bill of Rights makes FAA enforcement proceedings and NTSB review fair for pilots by, among other things, requiring NTSB review of FAA enforcement actions to conform, as much as possible, with the Federal Rules of Evidence and Federal Rules of Civil Procedure. To promote this goal, the FAA must provide timely notice to a pilot who is the subject of an investigation, advise the pilot that their responses may be used against them, and allow the pilot to review all evidence at least 30 days before deciding to proceed with an enforcement action.

The Pilot's Bill of Rights also makes contractor-run flight service station and contract tower communications available to airmen, removes the special statutory deference as it relates to NTSB review of FAA actions, allows for Federal district court review of appeals from the NTSB, requires that the FAA undertake a NOTAM Improvement Program, and mandates GAO review of the FAA's medical certification review process.

STATUS UPDATE ON ETS LEGISLATION

The U.S. Congress is continuing to take action against ETS. The U.S. House of Representatives recently passed an amendment to the Transportation, Housing and Urban Development Appropriations bill for fiscal year 2013 which prevents DOT and the FAA from using funds to impose the EU's Emissions Trading Scheme. Additionally, on October 24, 2011, the House of Representatives passed a bill that directs the Secretary of Transportation of the DOT to prohibit all operators of U.S. civil aircraft from participating in any emissions trading scheme unilaterally established by the EU.

Most recently, on July 31, 2012, the U.S. Senate's Committee on Commerce, Science and Transportation passed their own version of House of Representatives' bill to prohibit U.S. carriers from participating in ETS. With the Senate Committee's approval of the bill, it will now be scheduled for Senate consideration. The Senate version of this Bill has very few changes from the version that was previously approved by the House of Representatives in 2011. One of the most interesting changes, however, is that the Senate version calls for the Secretary of DOT to hold a public hearing at least 30 days before imposing any prohibition.

If this legislation passes in the Senate it will likely be signed into law by President Obama, who's administration has strongly come out against ETS. Most notably, Secretary of Secretary of State Hillary Clinton stated in a letter to the European Commission that the U.S. would be "compelled to take appropriate action" if ETS application to US carriers is not removed.

GLOBAL OFFICIALS MEET TO DISCUSS ETS

Representatives from seventeen countries including the U.S., Russia, China, Brazil, India, Canada, and Australia recently met in Washington to discuss the EU's controversial emissions trading system. In the meeting the attendee countries reaffirmed their opposition to the application of the EU ETS to non-EU carriers. None of the EU's 27 member states were invited.

The purpose of the meeting was to informally discuss ETS and a plan for unified opposition of its application to non-EU carriers. Therefore, although there were two full days of discussion, the participants did not put forth a declaration of opposition or a formal complaint to the International Civil Aviation Organization (ICAO).

Each of the participant countries have agreed that further policy discussions are necessary to "facilitate a way forward within ICAO", but at this point no follow-up meeting has been scheduled. We will of course continue to keep you updated on ETS-related issues.

U.S. COURT OF APPEALS RULES IN SPIRIT AIRLINES CASE

The United States Court of Appeals for the D.C. Circuit published its decision in Spirit Airlines, Inc. v. United States Department of Transportation (2012 WL 3002593) on July 24, 2012. Spirit, along with

several interested parties, challenged three sections of DOT's recently enacted "Enhancing Airline Passenger Protections" rule (76 Fed. Reg. 23,110 (Apr. 25, 2011)).

At issue were the rule's requirement that the most prominent figure displayed on print advertisements and websites be the total price, inclusive of taxes (as arbitrary and capricious and a violation of the First Amendment); the requirement that airlines allow consumers who purchase their tickets more than a week in advance the option of canceling their reservations without penalty for twenty-four hours following purchase (as arbitrary and capricious); and the prohibition against increasing the price of air transportation and baggage fees after consumers purchase their tickets (as procedurally defective and otherwise arbitrary and capricious).

After considering the available precedent and merits of each claim, the Court of Appeals denied all three petitions for review. This is a significant blow to the airline industry and gives DOT a published court opinion with language that will surely be used as justification that the full fare advertising rules protect against unfair and deceptive practices.

The opinion's full text is available at:
http://www.cadc.uscourts.gov/internet/opinions.nsf/B3C8FBE2AB1F6A9185257A45004EE709/$file/11-1219-1385164.pdf

NETJETS TAX DECISION: MANAGERS OF FRACTIONALLY OWNED AIRCRAFT CAN BE TAXED IN CALIFORNIA

In 2007, the California legislature enacted new legislation assessing a personal property tax for fractionally owned aircraft. The tax would be assessed on the managers of fractionally owned aircraft, not individual fractional owners. Before 2007, fractionally owned aircraft were not taxed because of their hybrid nature. The legislation stated that a fleet of fractionally owned aircraft would be taxed by the county where it landed based on an allocation factor established by the respective county. The "allocation factor is a fraction, the numerator of which is the total number of landings and departures made by the fleet type in the county during the previous calendar year and the denominator of which is the total number of landings and departures made by the fleet type worldwide during the previous calendar year." The legislation also stated that the tax would be assessed from 2007 forward, as well as retroactively "for years for which an assessment was not made."

NetJets Aviation, among others, challenged the legislation saying that managers should not be taxed because managers neither "own, control nor possess the aircraft in question." They also objected to the retroactive application of the tax. On June 21, 2012, the California Court of Appeals found that the law is constitutional and can be assessed against managers because managers control the fleets. The court also ruled that the tax cannot be applied retroactively (pre-2007).

AIRLINE ORGANIZATIONS REQUEST 30-DAY EXTENSION ON ANIMAL INCIDENT REPORTING RULE

Airlines for America (A4A), the Regional Airline Association (RAA), and the Air Carrier Association of America, Inc. (ACAA) (collectively, "Airline Organizations") have filed a request to extend the comment period 30 for a proposed amendment to DOT's rule regarding animal incident reporting. Comments for this rule are currently due August 28, 2012.

The proposed rule would expand DOT's existing animal incident reporting rule to include U.S. carriers that operate scheduled service with at least one aircraft with a design capacity of more than 60 seats. It would also expand the definition of "animal" to include all dogs and cats, regardless of whether the animal was shipped as a pet or by the owner or as part of a commercial shipment. Carriers would also have to include in their December year end reports the total number of animals that were lost, injured, or died during air transport.

Please note that should they be finalized, these new requirements are not applicable to foreign air carriers that operate flights to and from the U.S. or to charter flights. However, many DOT regulations that initially apply only to U.S. carriers are ultimately expanded to capture the operations of foreign air carriers as well.

FINES AND PENALTIES UPDATE

DOT and the FAA continued to actively fine carriers for violations of the Department's consumer protections rules, as well as FAA's Hazardous Materials and Federal Aviation Regulations.

Pacific For Less Fined $20,000

On August 2, 2012, Pacific For Less, Inc. was fined $20,000 by the Department for internet advertising violations that were deemed to be unfair and deceptive practices.

An investigation by DOT's Office of Aviation Enforcement and Proceedings revealed that for a period of time after January 2012, Pacific For Less was advertising tour packages with an air component that did not include the entire price to be paid by the consumer. Instead of including the entire price, Pacific For Less included a price with an asterisk that corresponded with an asterisk on the bottom of the page informing customers that taxes and fees were additional. The Department determined that this was a violation of its full far advertising rule and an unfair and deceptive practice.

Philippine Airlines Fined $80,000

DOT fined Philippine Airlines $80,000 on August 2, 2012 for violations of its price advertising regulations.

An investigation by the Department found that for a period of time in 2012, Philippine Airlines displayed a fare matrix on its website that separately listed out the base fare for inbound and outbound flights. This fare matrix, which was displayed in response to consumer queries, failed to disclose additional taxes and fees and only informed consumers of the base fare. Even though the additional fees and taxes were disclosed at the bottom of the webpage, DOT determined that this practice is nonetheless a violation of the full fare advertising rule, which requires the entire price to be provided to the consumer when price is first stated.

Caribbean Sun d/b/a World Atlantic Airlines fined $180,000

Caribbean Sun d/b/a World Atlantic Airlines ("Word Atlantic") was fined $180,000 for violating DOT's consumer protection regulations on public charters.

World Atlantic serves as a direct air carrier for a number of Public Charter programs filed by Direct Air. In early 2012 World Atlantic operated numerous flights for Direct Air without first receiving the full charter price for the flights from Direct Air, thereby operating on a prospective payment or credit basis. Due to an unpaid balance of $125,072, World Atlantic abruptly stopped operating charter flights for Direct Air on March 13, 2012, cancelled several flights less than ten days before their departure, and failed to provide return trips to passengers that it had previously provided out bound transportation.

World Atlantic's actions violated numerous DOT regulations including 14 C.F.R. 212.39(e) and 380.11, which provide that the full charter price must be received by the charter carrier prior to the operation of the pertinent flight, 14 C.F.R. 380.43, which prohibits the cancellation of flights within 10 days of their departure, and 14 C.F.R. 212.3(f), which makes U.S.-originating passenger charter operators responsible for the return to his or her point of origin any passenger who purchased round trip transportation on that charterer. DOT also found that World Atlantic failed to make reasonable efforts to ascertain before undertaking public charter flights that the charter operator was in compliance with the law. The Department determined that World Atlantic's actions constituted unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. 41712.

Travelocity Fined $180,000

Travelocity was fined $180,000 for violating DOT's price advertising rules. An investigation in September 2011 by the Office of Aviation Enforcement and Proceedings found that Travelocity's "flexible dates tool" airfare search path was not compliant with DOT's full fare advertising rule because some of Travelocity's advertised airfares did not include fuel surcharges. This resulted in those fares being ranked on the search engine above airfares that did include surcharges when all available fares were displayed in price order to consumers. In addition, Travelocity also did not include paper ticket delivery fees when a selected itinerary required (the minimum additional delivery fee for paper tickets was $29.95). Because the full price to be paid by the consumer was not listed, the Department deemed these practices to be unfair and deceptive.

Santa Barbara Airlines Fined $80,000

Santa Barbara Airlines was recently fined $80,000 for unfair and deceptive business practices regarding internet advertisements of fares. A DOT investigation revealed that for a period of time in January 2012 Santa Barbara failed to disclose that additional fees for baggage may apply on the first screen in which it offered a fare quotation for a specific itinerary. Since January 24, 2012, the DOT has enforced this rule, which requires carriers to inform passengers that additional fees for baggage may apply at the first point a price is quoted.

FAA Proposes $681,200 Civil Penalty Against FedEx

The FAA has proposed a $681,200 civil penalty against Federal Express Corp. (FedEx) for allegedly violating DOT's Hazardous Materials Regulations. In its press release the FAA alleges that FedEx employees in multiple locations improperly accepted several dozen shipments containing hazardous materials for transportation by air and that in 19 instances the airline failed to provide pilots of flights to and from Los Angeles with the required "accurate and legible written information" about shipments of hazardous materials it accepted for transportation by air. FedEx also allegedly failed to document hazardous materials training and testing for certain individuals who were accepting hazmat shipments for the company.

AVIATION REGULATORY UPDATE

Proposed $1,005,000 Civil Penalty Against Horizon Air

The FAA has proposed a civil penalty of $1,005,000 against Horizon Air of Seattle, for allegedly operating 22 Bombardier DHC-8-402 turboprop airliners on more than 186,000 revenue flights when the aircraft were not in compliance with the Federal Aviation Regulations.

It is alleged that when Horizon installed new security flight deck doors on the aircraft it used blind rivets instead of solid rivets, and that those aircraft were operated on 186,189 revenue passenger flights between December 2007 and June 2011, before the rivets were eventually replaced. Moreover, the FAA also alleged that Horizon was told the aircraft were not in compliance but nonetheless operated one of the aircraft on another 22 passenger-carrying revenue flights before replacing the rivets.

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ECKERT SEAMANS

AUGUST 2012

AVIATION REGULATORY UPDATE

JETBLUE TARMAC DELAY FINE: A REMINDER TO MAKE SURE YOUR TARMAC DELAY PLANS ARE COMPLETE AND ENSURE CREW ARE AWARE OF NOTIFICATION REQUIREMENTS

JetBlue Airways Corporation (JetBlue) was recently fined $90,000 by DOT for failing to properly inform passengers on a delayed flight that they had the opportunity to deplane and for failing to include certain required assurances in its contingency plan for lengthy tarmac delays (see Order 2012-8-25, attached). Pursuant to 14 C.F.R. 259.4(b)(6), carriers must notify passengers on a delayed flight beginning 30 minutes after scheduled departure time and every 30 minutes thereafter that they have the opportunity to deplane from an aircraft if the opportunity to deplane actually exists. It is important to note that this requirement applies even in situations where the aircraft's door is open and passengers have the opportunity to deplane, as it is possible that passengers seated in the rear of the aircraft may not know the aircraft's door is open.

In addition, every covered carrier's tarmac delay plan must include ten specific assurances, including that passengers on the delayed flights will receive notifications regarding the status of the delay every 30 minutes and that they will be informed every 30 minutes that they can deplane if such an opportunity exists. While not required, carriers are also encouraged to inform passengers that should they choose to deplane, they are doing so at their own risk and that the flight could depart at any time without them if that is in fact the case.

Most carriers do have the proper representations in their Tarmac Delay Contingency Plans but carriers should double check their Plans as these are published on your website and are easily accessible by DOT. In addition, carriers should ensure that flight and cabin crews are instructed on the required notifications.

Should you have any questions, please do not hesitate to contact us.

AVIATION REGULATORY UPDATE

DOT FINES FIRST NON-U.S. CARRIER FOR LENGTHY TARMAC DELAY

On September 29, the DOT fined Pakistan International Airlines (PIA) $150,000 for failing to adhere to the assurances in its tarmac delay contingency plan and not allowing passengers to deplane during a tarmac delay that lasted over four hours. This is the first time DOT has fined an international flight and a non-U.S. carrier for violating the four-hour limit. On October 29, 2011, PIA flight 711 was scheduled to arrive at JFK, but was diverted to Dulles after a lengthy hold when fuel ran low. The entire Northeast corridor experienced an early winter weather event causing significant equipment outages at JFK and EWR. PIA was not allowed to divert to BOS, its principal diversion airport. After landing, the flight was instructed by IAD to park at a remote aircraft bay/de-icing pad. Refueling was delayed due to increased demand for fuel by other diverted aircraft from JFK.

PIA officials decided not to deplane passengers via air stairs because of the inclement weather, and the high number of small children and passengers needing wheelchairs on board. According to PIA, the passengers did not indicate a desire to deplane during the delay nor did any passengers complain about the delay.

DOT's fine appears to be issued primarily because PIA made no attempts to deplane the passengers via a gate or a mobile lounge or to solicit assistance from the airport operator. PIA also did not contact CBP to inquire about deplaning passengers.

UPCOMING U.S. FEDERAL AGENCY DEADLINES

1. HARMONIZATION OF DOT'S HAZARDOUS MATERIALS REGULATIONS

The U.S. Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) is seeking comments on a proposal to "amend the Hazardous Materials Regulations to maintain alignment with international standards by incorporating various amendments, including changes to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport quantity limitations, and vessel stowage requirements." 77 FR 49168.

The Department determined that these revisions were necessary to harmonize the Hazardous Materials Regulations with recent changes made to the International Maritime Dangerous Goods Code, the ICAO's Technical Instructions for the Safe Transport of Dangerous Goods by Air, and the UN Recommendations on the Transport of Dangerous Goods - Model Regulations.

Some of the specific issues being harmonized via the NPRM include expanded packaging authorizations, flexible bulk container requirements, specific minimum size requirements for identification markings on non-bulk packages, revised vessel stowage codes, HMT entries, and the adoption of chemical under pressure provisions. DOT's proposed rulemaking should not adversely affect international carriers, in general, because those carriers already operate in compliance with the various international hazardous materials guidelines from ICAO, the UN, and other organizations, and the NPRM is intended to harmonize existing DOT regulations with these and other international standards.

Comments must be received by October 15, 2012. A complete version of the NPRM can be found at: http://www.gpo.gov/fdsys/pkg/FR-2012-08-15/pdf/2012-18431.pdf.

2. COMMENT PERIOD FOR REPAIR STATIONS NPRM EXTENDED

In late Spring, the FAA published a Notice of Proposed Rulemaking that would amend its current regulations for repair stations by revising the system of ratings, the repair station certification requirements, and the regulations on repair stations providing maintenance for air carriers. According to the NPRM, the FAA determined action is necessary because many parts of the existing regulations were outdated and did not reflect current repair station aircraft maintenance and business practices or advances in aircraft technology.

The NPRM examines three primary issues: (1) the ratings system; (2) certification requirements; and (3) repair stations providing maintenance for carriers. With respect to the system of ratings, FAA's proposal would reduce the current system from eight ratings to five, and the ratings definitions would be revised to clearly indicate the type of work that a repair station is authorized to perform. For the certification requirements, the FAA will add a question to the repair station application asking whether the applicant has a repair station certificate currently being revoked, or previously held a repair station certificate that was revoked. This change does not mean that denial is automatic, and the NPRM notes that if the agency were to deny a certificate to an applicant under the proposed rule, the affected entity could appeal that denial. In addition, the FAA is also proposing to clarify the certification requirements for equipment, personnel, technical data, and housing and facilities that must be in place for inspection at the time of certification or rating approval by the FAA. Finally, the FAA proposes language to clarify that when a repair station performs work as a maintenance provider to an air carrier, the repair station must perform that work in accordance with the maintenance instructions provided by the carrier or air operator.

Comments from interested parties were originally due on August 20, 2012. However, on August 17, 2012, the FAA extended the deadline for submitting comments to November 19, 2012.

3. CARRIER REPORTS FOR INCIDENTS INVOLVING ANIMALS

DOT recently published a Notice of Proposed Rulemaking seeking to implement a requirement for air carriers to report incidents involving the loss, injury, or death of an animal during air transport. (See 77 FR 38747). While only applicable to U.S. carriers at this time, the NPRM proposed to: (1) expand the reporting requirement to U.S. carriers that operate scheduled service with at least one aircraft with a design capacity of more than 60 seats; (2) expand the definition of “animal” to include all cats and dogs transported by the carriers, regardless of whether the cat or dog is transported as a pet by its owner or as part of a commercial shipment (e.g., shipped by a breeder); and (3) require all covered carriers to provide in their December reports for each year the total number of animals that were lost, injured, or died during air transport for the calendar year.

4. PART 382 TECHNICAL ASSISTANCE MANUAL TO BE UPDATED

On July 5, 2012, DOT published a draft of its updated Technical Assistance Manual (“TAM”) to provide guidance to carriers and contractors in implementing the Department’s regulations concerning the non-discrimination of passengers with disabilities (Part 382).

This comprehensive manual is set up in chapters that follow the chronological path of air travelers. It has chapters regarding:

· Assisting air travelers with disabilities planning a trip

· Assisting air travelers with disabilities at the airport
· Assisting air travelers with disabilities boarding, deplaning and during the flight
· Assisting air travelers with disabilities with their complaints

The TAM also has a chapter on sensitivity and interacting with passengers with disabilities and four appendices that provide a date of effectiveness table for regulations, tips for travelers with disabilities, airline management related issues and service animal issues.

The deadline for submitting comments on the proposed Technical Assistance Manual is October 3, 2012. The draft TAM is available at: http://www.gpo.gov/fdsys/pkg/FR-2012-07-05/pdf/2012-15233.pdf

UPCOMING U.S. DEPARTMENT OF TRANSPORTATION RULEMAKINGS

The DOT is planning on publishing additional rulemakings on passenger rights and disability issues. The rulemakings were initially expected to be published in 2012, but are now expected to be published in early 2013. The following is a list of items that DOT plans to address in these rulemakings.

1. PASSENGER RIGHTS

(1) whether the Department should require a marketing carrier to provide assistance to its code-share partner when a flight operated by the code-share partner experiences a lengthy tarmac delay;

(2) whether the Department should enhance disclosure requirements on code-share operations, including requiring on-time performance data, reporting of certain data code-share operations, and codifying the statutory amendment of 49 U.S.C. 41712(c) regarding website schedule disclosure of code-share operations;

(3) whether the Department should expand the on-time performance "reporting carrier" pool to include smaller carriers;

(4) whether the Department should require travel agents to adopt minimum customer service standards in relation to the sale of air transportation;

(5) whether the Department should require ticket agents to disclose the carriers whose tickets they sell or do not sell and information regarding any incentive payments they receive in connection with the sale of air transportation;

(6) whether the Department should require ticket agents to disclose any preferential display of individual fares or carriers in the ticket agents' internet displays;

(7) whether the Department should require additional or special disclosures regarding certain substantial fees, e.g., oversize or overweight baggage fees;

(8) whether the Department should prohibit post-purchase price increase for all services and products not purchased with the ticket or whether it is sufficient to prohibit post-purchase prices increases for baggage charges that traditionally have been included in the ticket price; and

(9) whether the Department should require that ancillary fees be displayed through all sale channels.

The new projected publication date is January 29, 2013, with comments due by March 30, 2013.

2. DISABILITY ISSUES

(1) whether there are safety-related reasons for excluding service animals other than dogs that may be specific to foreign carriers;

(2) whether carriers should be required to supply in-flight medical oxygen for a fee to passengers who require it to access air transportation;

(3) whether providing accessible in-flight entertainment to passengers with disabilities is technically and economically feasible;

(4) whether certain changes should be made to provisions allowing carriers to require medical documentation and 48 hours advance notice from users of emotional support and psychiatric service animals;

(5) whether carriers should be required to report to the Department annually the number of requests for wheelchair assistance they receive;

(6) the feasibility of requiring accessible lavatories on certain single-aisle aircraft;

(7) expanding the applicability of certain required seating accommodations; and

(8) clarifications of certain requirements pertaining to the carriage of service animals.

The new projected publication date is April 24, 2013, with comments due by June 23, 2013.

DECEMBER 3, 2012 SCREENING DEADLINE FOR INCOMING CARGO

Beginning December 3, 2012, passenger carriers must screen all cargo coming into the United States on international flights. This fulfills a requirement of the Implementing Recommendations of the 9/11 Commission Act. It is doubtful that all carriers will meet this requirement unless their home country has entered into a reciprocity agreement with the United States. To date, only Canada, Switzerland and the EU have signed such agreements whereby both countries recognize the security programs of the other, thereby satisfying the 100% cargo screening requirement. If you would like further information on the process for obtaining a reciprocity agreement, please do not hesitate to contact us.

This Aviation Regulatory Update is intended to keep readers current on matters affecting immigration, and is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at 202.659.6622, James Ehrig at 202.659.6672, Drew Derco at 202.659.6665, or any other attorney with whom you have been working.

ECKERT SEAMANS

NOVEMBER 2012

AVIATION REGULATORY UPDATE

DOT-REQUIRED CUSTOMER SERVICE PLAN AUDITS – DUE DECEMBER 31, 2012

Pursuant to Section 259.5(c) of DOT's passenger rights rule, carriers are required to self-audit adherence to their Customer Service Plan. While carriers are not required to submit the results of the audit to DOT, they must keep such records on file for two years and make them available for review upon the Department's request.

DOT has not established specific guidelines for how a carrier should conduct their audit and it is up to the carrier to develop and implement an audit plan that works for its specific business model. Essentially, it is up to the carrier to determine how best to conduct its audit. The audit should, however, show that the carrier reviewed internal records or contacted the relevant department for each of the Plan's requirements and there should be a physical record that documents the carrier's actions and its findings (carriers cannot simply put a note in the file stating that they are compliant). When the audit is complete, a record of the carrier's findings must be maintained for two years and carriers should of course use what they learn in the audit to improve operations for the next year.

NEW DEVELOPMENTS FOR EU'S EMISSIONS TRADING SCHEME

One day after the EU's decision to delay implementation of the its Emissions Trading Scheme (ETS), the U.S. House of Representatives passed the "European Union Emissions Trading Scheme Prohibition Act of 2011" (S. 1956) by voice vote. This bill bars U.S. airlines from participating in ETS and will go to the White House for approval by President Obama, who is expected to sign the bill into law despite pressure from environmentalists to veto the bill. In passing the bill, members of Congress stated that the EU's decision to delay implementation of ETS is just a temporary fix, and that the House needed to act to protect U.S. airlines and jobs created by those airlines, which could be threatened by the EU's emissions tax.

As mentioned above, on November 12, 2012 EC Commissioner for Climate Action Connie Hedegaard unveiled a new Commission proposal to "stop the clock" on enforcing all international aspects of the EU's ETS for one year. Originally, international airlines operating flights into the EU were expected to start paying for emissions in April 2013; however, with the Commission's announcement there will be no implementation of the international aspects of ETS for all of 2013. Intra-European flights, however, will still be affected by ETS.

The intent behind the Commission's decision is to give the International Civil Aviation Organization (ICAO) enough time to craft a global solution on climate change. The EU noted its decision was based, in part, recent meetings of ICAO's council on market-based measures for emissions mitigation, which took place this month in Montreal, stating that "the EU is convinced that a global solution for addressing the fast growing aviation emissions from international aviation is within reach at the upcoming ICAO Assembly in 2013." The delay must still be approved by the EU's member nations, however, and if ICAO cannot render a decision in time the EU will reinstate its plan for non-EU airlines.

REMINDER ON DOT HAZMAT NOTIFICATION REQUIREMENT

On January 19, 2011, DOT published a final rule that sought to harmonize the U.S. DOT hazardous materials regulations with the ICAO dangerous goods requirements. While most of the rule's requirements have already become effective, certain notification requirements found in 49 C.F.R. 175.25 must be complied with beginning January 1, 2013.

Generally, Section 175.25 requires that all passengers be notified of DOT's hazardous materials regulations and informed of what items they are not permitted to bring onboard. However, beginning January 1, 2013 all passenger notifications must be structured so that the final ticket purchase cannot be completed until the passenger or a person acting on the passenger's behalf has indicated that they understand the restrictions on hazardous materials in baggage. Although DOT and the FAA have not offered any guidance on this subject, a "check box" type of confirmation during the booking process is one possibility.

This of course raises logistical issues for many carriers and DOT is considering an extension to the effective date. The FAA is planning to issue specific guidance on complying with the regulation's various requirements (no date has been set for the issuance of this guidance). While an extension of this requirement is possible we would recommend carriers begin working on a solution now so that they are compliant by the January 2013 deadline.

ADVISORY COMMITTEE ON AVIATION CONSUMER PROTECTION CONDUCTS FINAL MEETING; ISSUES REPORT

The third and final meeting of the Advisory Committee on Aviation Consumer Protection took place on October 2, 2012 in Washington, D.C. Sam Podberesky began the meeting with an update on the next set of Enhancing Airline Passenger Protections rulemakings (Consumer Rules III and IV), both of which are currently in the planning and development stages. Although neither rule has been finalized, Mr. Podberesky noted that the following topics will likely be covered in Consumer Rule III: codeshares, expanded flight delay and mishandled baggage reporting requirements, minimum customer service standards for travel agents, disclosure of incentives to ticket agents, disclosure of preferential display of fares or carriers by ticket agents, special disclosure of substantial fees, and display of ancillary fees through all sale channels.

The following topics will likely be included in Consumer Rule IV (most of which come from the FAA Modernization and Reform Act of 2012): additional tarmac delay requirements, smoking prohibitions on charter flights, accepting musical instruments in the aircraft cabin, review and approval of airport and airline tarmac delay plans, website listing countries that may require insecticide spraying, and a toll-free hotline for consumer complaints. We note that while DOT has not yet issued a rulemaking, some of these requirements became effective on April 15, 2012 under the Act.

Following this presentation, the Committee began a discussion on initiatives to propose to the U.S. Secretary of Transportation. The Committee discussed many topics, including traveler complaint resolution processes, complaint statistics for codeshare service, posting definitions of terms commonly used in contracts of carriage to the DOT website, disability rights issues, airline personnel training, and ancillary fee transparency.

Based on its meetings and the testimony presented therein, the Committee made the following recommendations to DOT Secretary LaHood:

1. DOT should take steps to address continuing problems for travelers with disabilities. The Committee recommended the following issues be examined: accessible kiosks, service animal relief areas, and assisting passengers who cannot sit for a long time during layovers without their specially made wheelchairs.

2. DOT should remind the airlines of their obligation to avoid discrimination on the basis of race, religion, national origin, or gender and should stress this obligation in its initial and recurring personnel training.
3. DOT should improve its informal air travel consumer complaint resolution process by providing more information to consumers about their complaint.
4. DOT should place its guidance on consumer rights and related FAQs on its website in a prominent place so that consumers can better understand their rights and responsibilities as air travelers.
5. DOT should work with the airlines to survey how the airlines define certain terms frequently used in their contracts of carriage and customer service plans.
6. DOT should ensure transparency in air carrier pricing.
7. DOT should require all ticket agents, including on-line ticket agents, to disclose the fact that they do not offer for sale all airlines' tickets, if that is the case, and that additional airlines may serve the route being searched.
8. DOT should mandate that data be reported to the Bureau of Transportation Statistics for all flights and airlines, as opposed to only those that account for 1% of domestic scheduled passenger revenue.

A full text of the report is available at: http://airlineinfo.com/ostpdf86/96.pdf.

FAA APPROVES USE OF ADDITIONAL POCS

On October 16, 2012 the Federal Aviation Administration published a final rule regarding the use of Portable Oxygen Concentrators (POCs) onboard aircraft. Beginning in the summer of 2005, the FAA began to compile a list of certain POCs that it had reviewed, tested, and approved for use during flight. Periodically this list, called Special Federal Aviation Regulation 106, is updated as new POCs become available and are sufficiently tested.

Effective October 31, 2012, the FAA has approved in-flight use of the following POCs: AirSep Focus, AirSep FreeStyle 5, Inogen One G3, Inova Labs LifeChoice Activox, Respironics Simply Go, Precision Medical EasyPulse, and SeQual SAROS.

The final rule's full text is available at: http://www.gpo.gov/fdsys/pkg/FR-2012-10-16/pdf/2012-25412.pdf.

AIR WISCONSIN NOT IMMUNE FROM DEFAMATION FOR WARNING TSA ABOUT SUSPICIOUS ACTIVITY

Under the Aviation and Transportation Security Act (ATSA), airlines who inform the TSA about suspicious activity are immune from civil liability; however, a recent court case involving Air Wisconsin Airlines Corp. (Air Wisconsin) has challenged this immunity.

The case involves an Air Wisconsin pilot, William Hoeper, who failed a certification test. An Air Wisconsin manager alleged that when Hoeper was informed he had failed the test, he became very angry. Hoeper was scheduled to fly back to his home as a passenger that same day. The manager called the TSA

in advance of Hoeper's flight, warning them that Hoeper could be a possible threat because he had been terminated from his job, was mentally unstable, and was potentially armed. TSA pulled Hoeper from his flight, searched him, but found no firearm. Hoeper subsequently sued Air Wisconsin for defamation.

A Colorado jury found Air Wisconsin liable for defamation and awarded Hoeper $1.4 million in damages, which was upheld by the Court of Appeals. The court found that Air Wisconsin was not immune because the manager's statements about Hoeper were made with "reckless disregard to their truth or falsity." The court stated that the manager had no way of assessing Hoeper's mental stability, and had no good reason to suspect that Hoeper was armed (Hoeper's status as a Federal Flight Deck Officer, which authorized him to carry a firearm, was not a good enough reason). Opponents of the ruling fear that it will have a chilling effect on airlines reporting suspicious activity, thereby endangering the safety of passengers. The case has been submitted to the U.S. Supreme Court for review. The Supreme Court will decide whether to hear the case sometime next year.

DOT FOCUSES ON LIABILITY DISCLAIMERS

In October 2012, both British Airways and Jetstar Airways were fined for disclaiming liability for certain items in their tariffs and Conditions of Carriage.

In a 2011 review of British Airways tariff filings DOT's Office of Aviation Enforcement and Proceedings (Enforcement Office) became aware of a rule which purported to exclude the carrier from liability for loss of certain items even when accepted in checked baggage. This list of items included "fragile or perishable articles, money, jewelry, silverware, negotiable papers, securities, or other valuables" This type of disclaimer is an improper limitation of the carrier's liability which is not permitted under the Montreal Convention. These blanket exclusions combined with some minor advertising violations earned British Airways a fine in the amount of $250,000.

Jetstar Airways was fined $30,000 and ordered to cease and desist from certain practices regarding disclaiming liability. The Department discovered that Jetstar had a blanket exclusion on reimbursement for a class of items contained in lost bags on Jetstar flights to or from the U.S. These exclusions were included in Jetstar's Contract of Carriage. Article 7.4 of the Contract of Carriage stated that passengers:

> "must not include in [their] checked Baggage: fragile, delicate or perishable items, computers, items with a special value, such as money, jewelry, precious metals, silverware, negotiable papers, share certificates, securities or other valuable documents, cameras, electronic equipment, commercial goods or business documents, or passports and other travel documents. As [Jetstar's] liability is limited (see 14), [it] will not be liable for any inconvenience or Damage [passengers] suffer if [they] have ignored [Jetstar's] requirements and included the item/s as Checked Baggage."

Article 14.3(a) of Jetstar's Contract of Carriage provides:

> Except to the extent required by law, [Jetstar is] not liable for Damage to items which [passengers] are asked not to include in… checked baggage (under 7.4).

Under Article 17 of the Montreal Convention, carriers are liable for the loss or damage of baggage while that baggage is under the carrier's control, except to the extent that the damage resulted from an inherent defect of the baggage. Article 19 imposes similar liability for baggage that is delayed, except to the

extent that the carrier proves it took all reasonable measures to prevent the delay. Thus, once the carrier accepts the checked baggage, it is liable (up to 1,131 SDRs of provable damage) for the loss of, damage to, or delay of the baggage itself, as well as its contents. Carriers may not limit their liability to less than that which is imposed by the Convention. Moreover, DOT has stated that liability-limiting provisions such as these are regarded as an unfair and deceptive business practice that violates 49 U.S.C. 41712.

AMERICAN AIRLINES, SABRE SETTLE LAWSUIT

American Airlines and Sabre recently settled their lawsuit regarding control of the distribution of flight and fare information. American alleged that Sabre, which runs Travelocity, took steps to eliminate and prevent American Airlines from utilizing its Direct Connect Ticket Service. It was also alleged that Sabre, along with other Global Distribution Systems, engaged in anticompetitive conduct because of their monopoly over the distribution of tickets. In its complaint American stated that it "suffered significant harm in the form of exorbitant booking fees, outdated and inflexible technology, lost sales, and loss of goodwill with the travel agency community". Before the settlement was reached, American was seeking $993 million dollars in damages.

Specific terms of the settlement were not disclosed, but America Airlines will receive monetary compensation. In addition, the two parties renewed a distribution agreement. Due to American Airlines' current Chapter 11 bankruptcy status, the settlement still needs to be approved by a bankruptcy judge. Interestingly, American Airlines has ongoing federal suits against global distribution systems Orbitz and Travelport for anticompetitive practices.

ECKERT SEAMANS

DECEMBER 2012

AVIATION REGULATORY UPDATE

DOT ANNUAL DISABILITY REPORTING DEADLINE

Under the Department of Transportation's ("DOT") regulations concerning Nondiscrimination on the Basis of Disability in Air Travel (14 C.F.R. Part 382), carriers are required to report to DOT all disability-related complaints they received in 2012 for U.S. originating or destined passengers. This report must be submitted no later than January 28, 2013.

Carriers that did not receive any written disability–related complaints in calendar year 2012 are still required to file a "zero" report that shows no complaints. Failure to comply with the reporting requirement may subject a carrier to civil penalties of up to $25,000 per day per violation. Both foreign and U.S. carriers have been fined by DOT in the past for failing to submit the required report.

The form must be filed through the following website: http://382reporting.ost.dot.gov/. If you do not already have a BTS account to complete this on-line filing, you can register to create an account on the website as well.

Please let us know if you require any assistance in completing or filing this form with DOT.

PROTECT YOURSELF AGAINST ERRONEOUS FARES

For a brief period in September 2012, erroneously priced one-way, first class travel from Yangon, Myanmar to Montreal, Canada was sold by numerous on-line ticket agents for approximately $150.00. Under normal circumstances this fare sells for more than $15,000. The erroneous fare at issue was generated by a third party and impacted numerous international carriers because even though tickets were not sold by the individual airlines, the automated purchasing and reservation process of the on-line ticket agents resulted in the electronic issuance of erroneous fare "e-tickets" on the ticket stock of the affected carriers.

Some carriers cancelled the erroneous fare tickets and others chose to honor them. Regardless of how a particular carrier addressed the situation, to protect themselves against future erroneous fares we recommend carriers consider including protective language in their ATPCO rules tariff. Should you be interested in further information on this concept or suggested language for your tariff please feel free to contact us..

OBAMA SIGNS EMISSIONS BILL

On November 27, 2012, President Obama signed into law the ''European Union Emissions Trading Scheme Prohibition Act of 2011", which directs the Secretary of Transportation to prohibit all operators of civil aircraft of the United States from participating in the emissions trading scheme that was unilaterally established by the European Union. Besides banning U.S. airlines from participating in ETS, the Act also directs the Secretary of Transportation to conduct international negotiations in pursuit of a worldwide approach to address aircraft emissions.

The passage of this law comes shortly after the EU proposed to "stop the clock" on enforcing all international aspects of ETS for one year so that ICAO could develop international standards for airline emissions. Both of these developments mean that ICAO's work in 2013 will likely be dominated by discussions regarding emissions. In the event the EU's proposal is reenacted, U.S. carriers will be unable to participate in ETS. It remains to be seen how the EU would treat U.S. carriers under such circumstances..

ECKERT SEAMANS

DECEMBER 2012

AVIATION REGULATORY UPDATE

AIRLINES APPEAL TO SUPREME COURT

Spirit Airlines Inc., Allegiant Air and Southwest Airlines Co. (collectively, "airlines") recently filed an appeal to the Supreme Court of the United States in regard to an earlier decision by the United States Court of Appeals for the District of Columbia ("District Court") on DOT's price advertising rules. Specifically, the airlines object to having to display in advertisements one total price that includes taxes, fees, and carrier-imposed surcharges.

The following issues are raised in the airlines' appeal:

> (1) Whether DOT violated the First Amendment by mandating "total cost" advertising and restricting airlines' truthful speech about the large (and ever-growing) share of each ticket that consists of government taxes and fees; and
>
> (2) Whether DOT exceeded its statutory mandate and acted arbitrarily and capriciously by reregulating - down to the size of typeface and the length of mandatory refunds - an industry that Congress expressly chose to deregulate.

The Supreme Court should decide in early 2013 whether or not it will grant certiorari.

NEW YORK EMPLOYER RESPONSIBILITIES UNDER WAGE THEFT PREVENTION ACT IN 2013

Carriers with New York-based employees must meet certain annual requirements under the Wage Theft Prevention Act. Beginning in April 2011, employers with New York-based employees are required to provide annual notifications to those employees between January 1st and February 1st regarding the respective employee's pay. These notifications must include the following information:

- The employee's rate or rates of pay;
- The overtime rate of pay, if the employee is subject to overtime regulations;
- The basis of wage payment (per hour, shift or week, piece rate, commission, etc.);
- Any allowances the employer intends to claim as part of the minimum wage including tip, meal, and lodging allowances;
- The regular pay day;
- The employer's name and any names under which the employer does business (DBA);
- The physical address of the employer's main office or principal place of business and, if different, the employer's mailing address; and
- The employer's telephone number.

Each notification must be signed by the employee and the employer and be retained for six years. Employers who fail to meet these requirements can face lawsuits from employees of up to $2,500, plus attorneys' fees. Please let us know if you need sample notification forms or require further guidance on New York's Wage Theft Prevention Act.

AVIATION REGULATORY UPDATE

U.S. HEALTH CARE REFORM: IMPLICATIONS FOR EMPLOYERS

Under the Patient Protection and Affordable Care Act (PPACA) certain employers who do not provide health coverage, and some employers who do, will have to start paying penalties in 2014.

The PPACA requires employers with 50 or more employees that do not offer coverage (and that have at least one employee that receives a federal insurance subsidy) to pay a penalty of $2,000 annually for each "full-time employee" over the first 30. Full time employees are those that work 120 hours per month or more (roughly 30 hours per week). For those employers that offer coverage, but that have employees that receive federal insurance subsidies, the PPACA requires they pay $3,000 for each worker receiving a subsidy OR $2,000 per full-time employee (minus the first 30 FTEs), whichever is less.

"Health Care Federal Subsidies" are provided to people/employees to ensure that they can obtain affordable coverage. In order to receive a federal subsidy, an employee must meet two criteria. First, the eligible employee must have an income between 100%-400% of the federal poverty level ($89,400 for a family of four in 2011). Second, the employee's contribution to his/her health care coverage must exceed 9.5% of his/her household income, or the employer plan must cover less than 60% of total allowed costs.

Form W-2 Reporting of Group Healthcare Coverage Cost

Beginning with the 2012 Form W-2 (which is furnished to participants in January 2013), most employers will have to report the cost of group health coverage provided to their employees. Small employers (who are required to file fewer than 250 Form W-2s in 2011) are not subject to the new reporting requirements.

The reporting is meant to provide employees information about the cost of their health care benefits. At this time, the reporting requirement does not cause the employer-sponsored health care benefits to become taxable to employees.

Employers must report the cost of coverage for the group health plan benefits they make available to their employees. However, certain costs are excluded, such as: (1) HSAs, HRAs and Archer MSAs; (2) stand-alone dental and vision plans that are not otherwise integrated or incorporated into a comprehensive medical plan; (3) accident and disability coverage; (4) long-term care coverage; (5) liability insurance and workers' compensation insurance; (6) specified disease (e.g., cancer coverage) and certain hospitality indemnity plans; (7) EAPs, wellness programs and on-site medical clinics, but only if a COBRA premium is not charged for such coverage; and (8) employee contributions to health flexible spending accounts offered through a cafeteria plan.

IRS Notice 2012-9 provides guidance to employers on calculating the reportable cost of coverage. Please contact us if you would like further information on these issues.

Other Tax Provisions Impacting Employee Benefit Plans or Payroll Beginning in 2013

- Medicare Payroll Tax Increase: increasing by 0.9% (no indexing of inflation, for a total of 2.35%) on wages in excess of: $200,000 for single filers and $250,000 for married filing jointly. Employers must withhold on wages paid to any employee in excess of $200,000, regardless of their marital status.
- $2,500 Annual Limitation on Salary Reduction Contributions to Health Flexible Spending Accounts.

- Patient-Centered Outcomes Research Institute Fees are to be contributed to the Patient-Centered Outcomes Research Trust Fund that will fund comparative effectiveness research. The fees are payable by insurers of "specified health insurance policies", and also by employer-sponsored plans providing accident or health coverage, any portion of which is provided other than through an insurance policy. This only applies to plans ending after September 30, 2012. The fee is $2.00 ($1.00 for policy or plan years ending before October 1, 2013) times the average number of covered lives under the policy or plan.

WINTER IS COMING…ARE YOU PREPARED FOR TARMAC DELAYS?

Under DOT's passenger rights rule all carriers that operate to the U.S. must develop and implement a Contingency Plan for Lengthy Tarmac Delays. 14 C.F.R. 259.4. Pursuant to Section 259.4, carriers must coordinate their Plan with the Transportation Security Administration (TSA), Customs and Border Protection (CBP), and the relevant airport authority at all of the U.S. airports to which they operate.

Notwithstanding the above, when the snow starts to fall this winter, minimal coordination efforts will in most cases not help carriers avoid a lengthy tarmac delay. We therefore recommend you take the time now to discuss and implement internal procedures with your airport staff, station managers, and ground handlers to determine what actions will be taken when a flight is diverted or delayed due to inclement weather. For instance, documentation of all communications and other efforts with CBP, the airport and/or terminals to deplane the passengers are crucial to a successful defense of a DOT tarmac delay investigation. These extra efforts are very important, as DOT has the statutory ability to fine carriers up to $27,500 per passenger in the event that a tarmac delay exceeds three or four hours (for U.S. and international carriers, respectively).

TSA EXPANDING PRE-CHECK PROGRAM

Throughout 2012, the TSA has been working to expand its Pre-Check program at the busiest airports in the U.S. Eligible participants for this risk-based screening program include certain frequent flyers from participating airlines as well as members of CBP's Trusted Traveler Programs (Global Entry, SENTRI, and NEXUS) who are U.S. citizens and fly on a participating airline.

If passengers are deemed eligible for the program by TSA, their boarding passes receive special barcodes and they are permitted to pass through a separate, expedited screening line. This expedited screening line may include no longer removing the following items:

- Shoes
- 3-1-1 compliant bag from carry-on
- Laptop from bag
- Light outerwear/jacket
- Belt

Pre-Check is currently available at 35 U.S. airports, including major hubs such as JFK, ORD, MIA, ATL, SFO, and PHL. TSA intends to expand the program to additional airports in 2013 and has stated its goal is to eventually have 70% of passengers screened with the Pre-Check program.

ECKERT SEAMANS

DECEMBER 2012

AVIATION REGULATORY UPDATE

TSA TO FINALIZE FOREIGN REPAIR STATION SECURITY RULES

The TSA has stated it will issue a final rule on aircraft repair station security in January 2013. This rule should have been published in 2008 and, once the TSA rule on aircraft repair station security is published, the Federal Aviation Administration will be able to certify new foreign repair stations. To date, U.S. companies have been prohibited from opening repair stations abroad because TSA had not yet issued guidelines on the security requirements for such facilities.

CONGRESS PASSES "NO-HASSLE FLYING ACT"

On December 12, 2012 the U.S. House of Representatives approved the Senate version of a Bill intended to streamline baggage security measures for international flights arriving from select airports in Canada, the Caribbean, and Ireland that have U.S. CBP pre-clearance facilities. The "No-Hassle Flying Act of 2012" (S.3542), gives TSA discretion to determine whether additional screening of bags already screened at CBP pre-clearance airports is necessary when such bags arrive in the U.S. Airlines for America supported the bill, stating that "U.S. law today requires all baggage entering the United States to be re-screened regardless of where it originated, which creates additional work and hassle for customers, without providing meaningful additional security". The Bill now goes to President Obama for signature.

New Filing Requirements For CTA's Cargo Tariffs

The Canadian Transportation Agency (CTA) requires that all carriers who transport cargo to Canada file an international cargo tariff. For many years, ATPCO made these filings on behalf of carriers. ATPCO recently decided to stop filing cargo tariffs with CTA, and each carrier now must file its own cargo tariff with the organization. The current options for meeting this requirement are to:

1. Transcribe and use the carrier's ATPCO tariff;
2. Adopt the IATA TACT tariff, in part or wholly (this will require the permission of IATA); or
3. Use a sample tariff created by the CTA (please contact us if you would like a copy of the sample tariff).

ATPCO's cargo tariffs will be discontinued as of December 31, 2012. The CTA realizes that it will not be possible for many carriers to file new tariffs with CTA by then, and is currently in the process of deciding how it will handle this new development. Please contact us if you would like assistance in filing international cargo tariffs with CTA. Please note that carriers with Open Skies Agreements with Canada need not file rates tariffs but still must file terms and conditions.

FINES UPDATE

The following DOT fines were issued in November and December 2012:

- Societe Air France: $85,000 for violations of the Department's full fare advertising rules. (November 1, 2012);Mauiva, LLC: $50,000 for violations of the Federal aviation economic licensing statute and of certain consumer protection provisions of the Department of Transportation's Public Charter regulations. (November 6, 2012);
- AeroSvit Airlines: $20,000 for violations of Part 382 annual reporting requirements. (November 8, 2012);

- Malaysia Airline System Bhd: $30,000 for violations of Article 17 of the Montreal Convention and for unfair and deceptive practices. (November 21, 2012);
- STI Travel, LLC: $20,000 for violations of the Department's full fare advertising rules. (November 23, 2012);
- Travelzoo, Inc.: $50,000 for violations of the Department's codeshare notification rules. (November 26, 2012);
- AirTrade International, Inc: $150,000 for violations of the Department's codeshare notification rules. (November 30, 2012);
- Vision Airlines, Inc: $50,000 for certain consumer protection provisions of the Department of Transportation's Public Charter regulations. (December 1, 2012).

This Aviation Regulatory Update is intended to keep readers current on matters affecting immigration, and is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at 202.659.6622, James Ehrig at 202.659.6672, Drew Derco at 202.659.6665, or any other attorney with whom you have been working.