

## AVIATION REGULATORY UPDATE

### OFAC ANNOUNCES CHANGES TO CUBA REGULATIONS

The Office of Foreign Assets Control has announced changes this week amending regulations restricting exports and facilitating authorized travel between Cuba and the United States. Changes include allowing entry of U.S. and foreign air carriers into Cuba in the form of code sharing and leasing arrangements to facilitate the provision of carrier services between Cuba and the U.S., including entry into such arrangements directly with Cuban airlines. The agreement also allows for the removal of restrictions on payment and financing terms for authorized imports and exports except agricultural commodities and U.S. depository institutions, which will be allowed to provide Cuban financing. The United States will also be allowed to export and re-export other commodities, including software, telecom items and certain agricultural items. Restrictions on travel for professional meetings and public performances have been eased as well, although travel for tourist activities continues to be prohibited.

This announcement follows actions by the U.S. State Department last month that allowed Cuba and the United States to reach a new bilateral air services agreement for air services after three days of technical talks on civil aviation held in Washington D.C. Immediately following the announcement, American Airlines, which has operated charter service to Cuba since 1991, announced plans to submit a U.S. – Cuba service proposal to the U.S. DOT to begin scheduled service from Miami International Airport and its other service hubs as early as next year. United Airlines, as well as JetBlue Airways, Southwest Airlines and Spirit Airlines have also expressed interest in flying to Cuba as soon as all regulatory requirements are fulfilled.

### DEPARTMENT OF TRANSPORTATION ANNOUNCES CONSIDERATION OF NEGOTIATED RULEMAKING FOR PASSENGER DISABILITY LAWS

DOT has announced that it is exploring the feasibility of utilizing a negotiated rulemaking process to address future legal accommodations for air travelers with disabilities. Issues to be addressed include (1) access to inflight entertainment and supplemental medical oxygen; (2) the definition and accommodation of service animals on flights; (3) accessibility of lavatories on single-aisle aircraft; (4) seating accommodations; and (5) carrier reporting of disability service requests.

Following the announcement, more than 50 public comments were submitted to DOT, including several members of the aviation industry. Although consideration of the negotiated rulemaking process was generally supported, certain entities, such as the Airline Experience Association, specifically opposed the negotiated rulemaking process for the consideration of issues such as In-Flight entertainment for disabled passengers, due to its reliance on complex technology involving hardware and software content currently outside of the jurisdiction of the Department of Transportation. Additionally, the Los Angeles Airports Association protested the definition of service animals as established in the Air Carrier Access Act (ACAA) as too broad, thus opening the door for potential abuse.

Airlines 4 America requested that if the negotiated rulemaking process is to be convened, that the Department of Transportation publically provide all information required by the ACAA, including how moving forward with the process was determined to be in the public interest. Airlines 4 America also

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requested access to specific information used by the Department of Transportation to support its belief that a reasonable likelihood exists that consensus on all issues could be reached.

Similarly, Delta Airlines raised concerns for the Department's ability to reach consensus for issues including the provision of inflight medical oxygen, inflight entertainment, accessible lavatories on single-aisle aircraft, disability assistance request time monitoring and seating accommodations. However, Delta did believe that the definition and accommodation of service animals would be amenable to the negotiated rulemaking process.

The International Air Transport Association agreed with Delta's positions, although it added an additional request for the Department to consider potential abuses of current requirements to provide passengers with wheelchairs as a sixth issue as part of the Negotiated Rulemaking process.

We will continue to keep you updated on the negotiated rulemaking process. If you are interested in submitting a comment, or have concerns regarding the above, please let us know.

### DEPARTMENT OF HOMELAND SECURITY ANNOUNCES ENHANCED VISA REQUIREMENTS FOR CERTAIN TRAVELERS

On January 21, 2016, U.S. Customs and Border Protection began implementation of changes to its Visa Waiver Program (VWP) as established under the *Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015* (114th Congress, 1st Session, H.R. 158, Dec. 9, 2015) (the "Act").

The Act — which was originally passed in December 2015 — specifically allows U.S. customs officials to more closely screen travelers from 38 countries included within the purview of the VWP — including several European nations — whose citizens are allowed to travel to the U.S. without first obtaining a visa. It specifically excludes nationals of countries otherwise subject to the VWP who have travelled to, or been present in, Iran, Iraq, Sudan, or Syria on or after March 11, 2011 from VWP eligibility, with exceptions granted to individuals serving a VWP country travelling for diplomatic or military purposes. Dual nationals of both a VWP country as well as Iran, Iraq, Sudan, and Syria will similarly be excluded from participation in the VWP— although such individuals will still be able to apply for a visa using the regular immigration process. Such travelers will also be allowed to apply for a U.S. visa for urgent business, medical, or humanitarian travel to the United States via U.S. embassies and consulates on an emergent basis.

Implementation of the new program also requires travelers with current valid Electronic System for Travel Authorizations (ETSA) previously indicating dual nationality of both a VWP country and Iran, Iraq, Sudan, or Syria on their ETSA applications to have their ETSA status revoked.

However, despite imposition of new VWP requirements, such restrictions may be waived by the Secretary of Homeland Security if determined to be in the interests of U.S. law enforcement or national security interests, as established on a case-by-case basis under generalized waiver requirements under the Act. Such waivers include: (1) individuals who traveled to Iran, Iraq, Sudan, or Syria on behalf of international organizations, regional organization, and sub-national governments on official duty; (2) individuals

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travelling on behalf of a humanitarian NGO on official duty; (3) journalists travelling for reporting purposes; (4) individuals travelling for business-related purposes following the U.S./Iraq Joint Comprehensive Plan of Action reached as of July 14, 2015; and (5) others travelling for other legitimate business-related purposes.

Such changes to the VWP have generally been supported by members of the U.S. travel industry and compliment security-tightening actions taken by the White House last November after terrorist attacks in Paris, France claimed 130 lives. An updated ETSA application with additional questions addressing exceptions for diplomatic and military-related travel is expected to be released in February 2016.

### U.S. AIRPORTS TO IMPLEMENT FACIAL RECOGNITION TECHNOLOGY IN FEBRUARY 2016

U.S. Customs and Border Protection plans to adopt facial recognition technology starting next month at airports across the country. The service will be offered beginning at John F. Kennedy International Airport following a successful trial run at Washington Dulles International Airport. The program, known officially as the 1-to-1 Facial Comparison Project, will specifically be used to confirm the identity of travelers carrying electronic passports embedded with computer chips containing a digital picture of the passport holder. The system works by comparing the digitally-stored picture in the passport with one taken immediately upon presentation of the traveler to customs and border protection for entry into the United States. The technology then rates the match comparison between the two photos on a 0 to 100 scale. Although CBP officials claim that such additional biometric capability will protect legitimate travelers from issues related to identify theft and fraud, civil liberty activists have opposed the program as an overly-invasive surveillance method with the potential for widespread abuse.

### U.S. SANCTIONS LIFTED AFTER IRAN MEETS NUCLEAR ENERGY OBLIGATIONS

The United States and Europe have lifted economic sanctions against Iran, releasing approximately \$100 billion worth of assets after inspectors from the International Atomic Energy Agency (IAEA) concluded Iran had followed through on agreements to dismantle large sections of its atomic energy program by 2016. The lifting of sanctions will have several immediate consequences, including opening up Iranian access to international trade markets and financial systems, as well as lifting the ban on sales of U.S.-sourced aircraft and aircraft parts to Iranian civil aviation operators. More specifically, the agreement allows for the export, re-export, sale, lease, or transfer to Iran of commercial passenger aircraft and related parts, as well as other services, such as warranty, maintenance, repair and safety-related inspections as long as they are for commercial aviation purposes only. The announcement is set to largely benefit large aircraft manufacturers such as Airbus and Boeing, as Iranian air operators prepare to place orders for up to 400 commercial aircraft needed to supplement current aircraft in need of replacement or repair. Although direct passenger travel from the U.S. continues to be restricted, further negotiations are expected to take place in the future. Similarly, Canada has announced intentions to lift its economic sanctions against Iran, allowing for the sale of aircraft and aircraft parts by Canadian manufacturer Bombardier Aerospace, and European aircraft manufacturer Airbus Industrie has announced orders for over one hundred aircraft, including its A380 super jumbo jet to Iranian national airline Iran Air.

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### TOUGHER LITHIUM ION BATTERY SHIPPING RULES TO BEGIN APRIL 1

In response to industry safety concerns, The International Civil Aviation Organization Dangerous Goods Panel has expedited implementation of tougher shipping rules for lithium ion batteries. The new rules are set to take effect April 1, 2016. The new rules require all lithium ion batteries to be shipped in a state of 30% charge or less, unless specifically approved otherwise by the country to which the aircraft carrying the batteries is flown, and are set to prevent thermal runaway conditions that could lead to fires while in transit. Changes to the shipping requirements were originally set to begin on January 1, 2017. The new rules also prohibit unlimited bundling of rule-compliant batteries into single “overpack” packages, allowing only a maximum of eight battery cells or two batteries to be transported together at any one time.

### SUPREME COURT REFUSES JUDICIAL REVIEW OF NTSB INVESTIGATIVE ACTIONS

The U.S. Supreme Court has denied a petition requesting judicial review of National Transportation Safety Board general aviation accident reports. The petitioner — entrepreneur Yatish Joshi of Indiana — requested review after the NTSB issued an April 2006 probable cause report citing pilot error as the main cause of an accident in Indiana involving one of Joshi’s planes. The pilot flying was Joshi’s daughter — Captain Georgina Joshi — who was killed in the crash.

In his petition, Joshi argued that NTSB investigations are fatally flawed due to their over reliance on pilot error as a main causal factor in general aviation accidents. After hiring independent investigators to re-examine evidence gathered by NTSB investigators immediately following the crash, Joshi contested the NTSB’s findings as incomplete for its failure to consider other potential causes of the crash. Joshi also argued that judicial review of NTSB probable cause reports would result in increased safety standards for general aviation investigations.

The Supreme Court rejected Joshi’s petition after the D.C. Circuit Court similarly refused to hear his claim on grounds that such probable cause reports were not reviewable due to their status as “non-finalized agency actions.” “Without judicial review of NTSB probable cause determinations [...], the aviation community and the public-at-large cannot evaluate whether the NTSB is performing its most important function because the NTSB itself will be the sole arbiter of its own effectiveness,” Joshi argued in his brief. Despite the Supreme Court’s denial, Joshi and his attorneys confirmed in a statement on January 25 that they fully intend to continue pursuit of the matter through a legislative course of action.

### SEARS, DUPONT AND OTHERS OPPOSE MULTI-DISTRICT SETTLEMENT FOR AIR CARGO SERVICES

Sixty seven companies — including Sears, DuPont and General Electric Co., have objected to the proposed disbursement of settlement funds in multidistrict litigation accusing cargo carriers of fixing prices on global air cargo services, claiming they have been denied their portion of the payout. The settlement class includes all persons or entities that purchased airfreight services for shipments to, from, or within the U.S. directly from any of the defendants or their parents or subsidiaries between January 1, 2000 and September 11, 2006.

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The Claimants argue in their petition that a contractual relationship existed between the claimants and the carriers — despite services in some instances being brokered via freight forwarders — thus likening the relationship to that of a ticket purchaser and an airline, even if the passenger purchased the tickets via a third party. The lawsuit dates back from multidistrict litigation from 2006, when consumers brought more than 90 lawsuits against dozens of airlines following investigation findings of collusion and price-fixing by the air freight industry released by the U.S. Department of Justice and the European Commission. All indirect purchaser lawsuits were dismissed by the United States Second Circuit Court of Appeals in 2012 after finding that allegations of price fixing claims were preempted against foreign carriers under state antitrust laws.

### DOT CONSENT ORDERS

Violations of the Air Carrier Access Act and 14 CFR Part 382 as unfair and deceptive practices — United Airlines was fined \$2,000,000 in civil penalties for violations of the requirements of 14 CFR Part 382 (Part 382) and the ACAA (49 U.S.C. § 41705) for failure to provide passengers with a disability assistance, including assistance with enplaning and deplaning, as well as connecting assistance and assistance in moving within the terminal. To the extent that the ACAA violations occurred in interstate air carrier transportation, United's actions were also determined to violate the requirements of 49 U.S.C. § 41702 to the extent that the air carrier failed to provide safe and adequate interstate air transportation, and 49 U.S.C. § 41310, which, in part prohibits both domestic and foreign air carriers from unreasonably discriminating against a person in foreign air transportation. United also violated 14 CFR 259.5(b) (6) for its failure to adhere to a customer service plan for the commitment of the air carrier to properly accommodate passengers with disabilities as required by Part 382. The Department of Transportation also held that United's violations of the ACAA, 14 CFR Parts 259 and 382, as well as 49 U.S.C. §§ 41702 and 41310 constitute unfair and deceptive practices in violation of 49 U.S.C. § 41712. In addition to the \$2,000,000 fine, United was ordered to cease and desist from future violations of Part 382 and the ACAA.

Tarmac Delay — United Airlines was fined \$750,000 in civil penalties for failure to adhere to assurances contained in its contingency plan for lengthy tarmac delays prohibiting aircraft from remaining on the tarmac for more than three hours for domestic flights and four hours for international flights before allowing passengers to deplane in violation of 14 CFR Part 259 and 49 U.S.C. § 42301. United's actions were also determined to violate 49 U.S.C. § 41712 prohibiting unfair and deceptive practices. In addition to the \$750,000 fine, United was ordered to cease and desist from future violations of 14 CFR Part 259 and 49 U.S.C. §§ 42301 and 41712.

*This Aviation Regulatory Update is intended to keep readers current on matters affecting the industry, and is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at [esahr@eckertseamans.com](mailto:esahr@eckertseamans.com) or 202.659.6622, Drew Derco at [dderco@eckertseamans.com](mailto:dderco@eckertseamans.com) or 202.659.6665 or Reese Davidson at [rdavidson@eckertseamans.com](mailto:rdavidson@eckertseamans.com) or 202.659.6633.*

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### 2016 FAA REAUTHORIZATION ACT PASSES HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE

On February 3, 2016 House Transportation and Infrastructure Committee Chairman Bill Shuster (R-PA) and Aviation Subcommittee Chairman Frank LoBiondo (R-NJ) introduced the Aviation Innovation, Reform, and Reauthorization (AIRR) Act, a bill reauthorizing the Federal Aviation Administration (FAA) to continue federal aviation regulatory oversight until February 2022. The bill was approved by the House Committee on Transportation and Infrastructure on February 11, 2016. Should the AIRR Act be debated and approved by the House of Representatives, it will then go to the Senate for approval and to President Obama for signature. Legislators have until March 31, 2016 to decide on the bill before FAA funding expires. The AIRR Act addresses numerous aviation issues including:

#### Air Traffic Control Corporation

H.R. 4441 seeks to establish an independent, not-for-profit corporation outside of the federal government to provide air traffic control services in the United States. The federally chartered air traffic control corporation would be governed by an 11 member board comprised of representatives from airlines, controllers, general aviation and others representing the aviation system's users and the public interest.

#### Amendments to Certification Process

The bill also would streamline the FAA's aviation equipment and aircraft certification processes. Specifically, it would, among other topics, address aircraft certification performance objectives and metrics, streamline the certification process of small general aviation aircraft, revamp flight standards performance objective and metrics, and promote U.S. aerospace standards, products, and service abroad.

#### Consumer Protections

The AIRR Act would address the following consumer protection issues:

- **Baggage Fee Refunds** - Would mandate that carriers refund baggage fees anytime a bag fails to arrive with the passenger and must be delivered after the fact.
- **Cell Phone Use** - As currently drafted, the bill would prohibit en route cell phone use but permit texting and internet use.
- **Notifications to Consumers** - Would require carriers to provide explicit notification of three scenarios that could result in passenger compensation (lost/delayed luggage, denied boarding (bumping), and delays on flights to and from Europe).
- **Advisory Committee for Aviation Consumer Protection** - The current bill would reauthorize the Advisory Committee for Aviation Consumer Protections for another six years.

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- **DOT Smartphone Application** - The bill supports a smartphone interface proposed by Traveler's United which will make filing of complaints easier.
- **Nursing Rooms at Airports** - Under the bill, airports would be required to provide dedicated nursing areas for mothers.

### Unmanned Aircraft Systems

Finally, the AIRR Act would provide more tools for the safe integration of unmanned aircraft systems into the National Airspace System. Of the specific changes to UAS regulation, the AIRR Act seeks to implement a streamlined permitting process for public and commercial UAS operators, and utilization of “sense and avoid technology” to alleviate UAS safety concerns. It also seeks to address privacy issues as they relate to UAS, and relax the FAA’s previous outright prohibition against civilian operations of UAS weighing less than 55 pounds within 30 miles of Washington D.C. Lastly, the AIRR Act seeks to require all commercial operators of UAS to register and appropriately mark their aircraft, unless operating pursuant to an exception to UAS registration requirements.

### **NEW RESTRICTIONS CAUSE AIRLINES TO REASSESS LITHIUM ION BATTERY RISKS**

The FAA issued a February 11, 2016 safety alert to passenger and cargo airlines, urging them to perform safety risk assessments to properly identify and manage risks inherent with the transportation of lithium batteries as air cargo. The alert came following a decade of FAA battery fire testing that revealed the catastrophic risk potential for aircraft loss resulting from a lithium ion battery explosion or fire on board. The FAA is also issuing guidance to its inspectors to help determine whether airlines have appropriately assessed the risks of handling lithium batteries as cargo - including whether airlines have appropriately implemented new lithium ion packing and carriage instructions that become effective in April 2016.

Also effective April 1, 2016 will be the International Civil Aviation Organization’s (ICAO) comprehensive ban on all cargo shipments containing lithium ion batteries by air, which is expected to remain in place until 2018. The ban does not, however, apply to lithium ion batteries packed with or contained within equipment or batteries.

For more information on the FAA safety ban see FAA Safety Alert for Operators 16001 (January 19, 2016): [http://www.faa.gov/other\\_visit/aviation\\_industry/airline\\_operators/airline\\_safety/safo/all\\_safos/media/2016/SAFO16001.pdf](http://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/safo/all_safos/media/2016/SAFO16001.pdf).

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### CONGRESS CONSIDERS RESURRECTION OF 2014 TRANSPARENT AIRFARES ACT

U.S. Representative Carlos Curbelo (R-FL) introduced an amendment to H.R. 4441 in response to airlines concerns with a 2012 Department of Transportation (DOT) rule requiring them to prominently display total ticket prices in advertising and in internet displays, including government taxes and fees. The proposed amendment, which would essentially reverse the Department's full fare advertising rule, is being criticized by opponents for its diminutive effect on critical consumer protection measures adopted to prevent inappropriate airline advertising.

If accepted in its present form, the amendment would allow lower base ticket prices without government taxes and fees to be presented first to travelers purchasing tickets on the internet, as long as the total fare price is disclosed at some point during the transaction in a manner that, "clearly presents the information to the consumer." The amendment would also apply to internet advertising and solicitation provisions, thus allowing airlines to conspicuously display lower base ticket prices on initial screens and allow additional information as to the exact price of taxes and fees on other parts of the website apart from the main webpages, such as in pop-up screens or other links.

### MEDICAL AIRLIFTER SUES TO BLOCK PRICE REGULATION IN TEXAS

Air ambulance company Air Evac EMS (Air Evac) has filed suit in Texas, accusing the state of illegally regulating transportation fees for patients who were injured at work in violation of the Airline Deregulation Act of 1978 (ADA). Specifically, Air Evac argued that fee caps imposed on air ambulance companies via the Texas Worker's Compensation Program equated to fare regulation, which is prohibited under the ADA.

Air Evac specifically targeted the Texas Workers Compensation Act, due to its establishment of a fee schedule that sets maximum allowable reimbursements for health care providers received for medical services rendered to injured workers. Under this restrictive fee schedule, Air Evac has only been able to recover a small fraction of its charges in the last year for providing flights for dozens of patients who were injured at work.

Air Evac is seeking an injunction from the court preempting the State of Texas from using the Texas Workers Compensation Act to cap the price of air ambulance services. If that fails, Air Evac has asked the court to free air carriers from the portion of the same Texas law that prohibits health providers from billing patients for the balance of money owed for services. The case is due to be heard later this year.

### VISA WAIVER STATUS THREATENED FOR FIVE EUROPEAN COUNTRIES

Due to recent concerns over rampant passport fraud and theft in Europe following the Syrian refugee crisis, the United States has threatened to remove France, Belgium, Germany, Italy and Greece from its list of visa waiver program participants unless specific "loopholes" in passport fraud prevention laws in those countries are closed. Although United States Secretary of State John Kerry had imposed a February 1, 2016 deadline for the passport issues to be addressed, no announcement as to the five countries' compliance



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with that deadline has been made. President Obama is expected to address the issue publically after Homeland Security Secretary Jeh Johnson gives his anticipated report on the issue to Congress in the coming weeks. Updates will be furnished as soon as additional information becomes available

### CONSENT ORDERS

Hazardous Materials Violations — The FAA has proposed seven civil penalties totaling \$455,000 against DHL Express (USA), Inc. for violations of the Hazardous Materials regulations. In each case, the FAA alleges that DHL Express accepted shipments that were improperly prepared for air transportation, and failed to confirm employees and agents handling the materials were properly trained to handle dangerous goods. The discoveries of the improperly packaged goods were made at various times at a DHL Express sorting facility in Erlanger, KY between December 2013 and September 2014. The improperly packaged goods consisted of various automobile parts, including a fuel control assembly, a fuel/defuel cart with a corrosive battery, a box containing lithium ion batteries and an airbag module — all of which were either improperly packaged or incorrectly labeled and identified. DHL Express will be meeting with FAA representatives to discuss the cases.

Improper Aircraft Maintenance — The FAA has proposed a \$275,000 civil penalty against Atlas Air, Inc. of Purchase, N.Y. for allegedly operating a Boeing 747 after improper maintenance was performed on the aircraft. The allegation stems from an improper repair of the aircraft's landing gear after it failed to retract on departure from Sydney, Australia. Atlas Air mechanics allegedly repaired the gear using the wrong part, requiring installation of the component upside down in order to fit. The FAA alleges that due to the improper part installation, Atlas Air subsequently failed to operate the aircraft in an airworthy condition on 24 cargo flights over a 10 day period, and will be meeting with FAA representatives to discuss the case.

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### PROPOSED SENATE RULE WOULD CREATE AIRLINE COMPETITION COMMISSION/ REQUIRE DOT TO ISSUE PASSENGER COMPENSATION FOR BAGGAGE DELAY

Reauthorization of the Federal Aviation Administration (FAA), which is currently authorized through March 31, 2016, is now being considered by both the U.S. House of Representatives and the Senate.

Measures specific to the House Bill, H.R. 4441, include:

- A requirement for airlines to refund baggage fees for bags delayed more than 24 hours on domestic flights;
- A ban on cell phone use for in-flight voice communications on scheduled passenger flights;
- A requirement that airlines notify passengers of their consumer rights by including Customer Service Plans on their websites;
- An authorization for the Department of Transportation (DOT) to establish a smartphone application for consumer complaints;
- A requirement that large and medium airports provide private rooms in every terminal for nursing mothers; and
- A requirement that airlines notify families, before tickets are booked, if family members are assigned separated seats.

Separate measures proposed in the Senate Bill, S. 2658, are:

- A requirement that U.S. carriers develop a “fatigue risk management plan” for flight attendants to be submitted to the FAA;
- A mandate that the FAA create rules for personal space on aircraft to keep airlines from squeezing passengers closely together on flights in seats that are decreasing in size;
- A requirement that FAA airplane evacuation testing be performed using the tight seating found on aircraft with 28-inch seat pitch;
- A requirement for additional fees, such as itinerary change fees, to have a relationship to the cost of services being provided;
- A mandate to standardize the 24-hour refund rule so that all airlines provide refunds 24 hours after a fare is purchased, rather than a 24-hour grace period prior to purchase, reducing current confusion with the rule;
- The creation of an Airline Competition Commission to study the changes in the aviation system and how consolidation has affected airline competition and pricing; and
- A requirement that air carriers provide notification and refunds to consumers impacted by delays or cancellations when the carrier has a choice to cancel or delay a flight during a weather-related event, or for involuntary changes to the consumer’s flight itinerary.

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### RECENT CHANGES TO U.S. CUBA AND IRAN SANCTIONS REGIME

#### Aviation-related commercial trade liberalized between U.S. and Iran

On March 24, 2016 the Office of Foreign Assets Control (OFAC) took an incremental step towards liberalizing aviation-related commercial trade between the U.S. and Iran by issuing a General License GL-1 intended to provide U.S. citizens greater flexibility to enter into certain preliminary contractual agreements related to the export or re-export to Iran of commercial passenger aircraft and related parts and services. The General License does not authorize U.S. entities to export aviation-related materials to Iran. Under current law, OFAC requires a specific license to contract with Iran and the General License also does not permit U.S. citizens to contract with persons or entities on the Specially Designated Nationals list. The General License does however authorize U.S. citizens to negotiate “executory contracts, executory pro forma invoices, agreements in principle, executory offers capable of acceptance such as bids or proposals in response to public tenders, binding memoranda of understanding, or any other similar agreement” that are preliminary in nature and do not consummate any particular transaction.

#### U.S. sanctions on Cuba eased again

On March 15, 2016, OFAC amended the Cuban Assets Control Regulations, 31 C.F.R. part 515, to ease certain sanctions related to, among others, travel between the United States and Cuba. The easing of these sanctions, which coincides with the Department of Transportation’s current proceeding to select U.S. carriers to provide scheduled service between the United States and Cuba, include the following:

- Educational Travel – Individuals will be authorized to travel to Cuba for individual people-to-people educational travel and will no longer be required to undertake such travel under the auspices of a U.S. educational organization and/or be accompanied by a representative of the sponsoring organization.
- Payment of Salaries to Cuban Nationals – U.S. companies are authorized to engage in transactions related to the sponsorship or hiring of Cuban nationals to work or perform in the United States similar to nationals from other countries with a focus on Cuban athletes, artists, performers.
- Trade in Cuban-Origin Merchandise – authorizes certain dealings in Cuban-origin merchandise by individuals for personal consumption while in a third-country, and allows individuals to receive or obtain services from Cuba or a Cuban national that are ordinarily incident to travel and maintenance within a third country.

### DOT ADOPTS FINAL RULE BANNING USE OF ELECTRONIC CIGARETTES ON COMMERCIAL FLIGHTS

On March 2, 2016, DOT adopted a final rule explicitly banning the use of electronic cigarettes (or E-cigarettes) on commercial flights, effective immediately. The final rule applies to all scheduled flights of U.S. and foreign carriers involving transportation in, to, and from the U.S., as well as to nonscheduled charter

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flights of U.S. and foreign carriers that have a flight attendant as a required crewmember. The announcement was made following initial confusion as to whether prior DOT rules that banned smoking of tobacco cigarettes on commercial flights also applied to electronic cigarettes.

The final rule clarifies DOT's original rule by specifically defining the term "smoking" to include the use of E-cigarettes and similar products. DOT claims the ban is justified due to the potential harmful effects of chemical aerosol products contained in E-cigarettes, especially to more vulnerable populations.

### HOUSE OF REPRESENTATIVES APPROVES TSA REFORM BILL

On February 23, 2016, the U.S. House of Representatives approved a reform bill that streamlines transportation security regulations. The bill is a compilation of several pieces of legislation that seeks to:

- Implement a pilot project to establish a secure, automated biometric-based system to verify the identity of TSA PreCheck passengers at participating airports;
- Expand enrollment in the TSA PreCheck program by adding multiple private sector application capabilities;
- Ensure TSA PreCheck screening lanes are open and available during peak and high-volume travel times at airports;
- Establish a secure, automated system by December 31, 2017 at all large hub airports for verifying travel and identity documents of non TSA PreCheck passengers; and
- Develop a process within 90 days for regularly evaluating the root causes of screening errors at checkpoints across airports so that corrective measures can be identified.

The measure has been referred to the Senate Committee on Commerce, Science, and Technology.

### PRECLEARANCE EXPANSION ON HOLD PENDING LEGISLATION AND FALLOUT FROM TERRORIST ATTACKS

Following various deadly terrorist attacks in France, Belgium and Turkey in 2015 and 2016, expansion of U.S. preclearance to additional locations around the world has been impacted, especially to locations in countries where recent terrorist attacks have occurred. Preclearance expansion has also been delayed due to pending Congressional approval of the Preclearance Authorization Act of 2015, which requires officials at both the Department of State (DOS) and Department of Homeland Security (DHS) to work together to prevent terrorist and other security threats from entering into the U.S.

The recent terrorist attacks have also affected the Visa Waiver Program (VWP), causing U.S. officials to threaten the possible removal of Belgium, Germany, France, Italy, and Greece from the list of VWP approved countries due to problems with passport enforcement following the Syrian refugee crisis. Because of the significant implications such action would have on all five countries considered to be allies of the United States, Secretary Kerry has been in high level negotiations with EU officials to address issues with European passport security and fraud.

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### **SOMALIA, LIBYA AND YEMEN RESTRICTED FROM VISA WAIVER PROTECTION PROGRAM**

Following changes mandated by the VWP Improvement and Terrorist Travel Prevention Act of 2015 (“the Act”), as of March 1, 2016, citizens from Somalia, Libya and Yemen, as well as anyone wishing to gain entry into the U.S. from such countries are no longer eligible for the U.S. Visa Waiver Protection Program. The list of restricted countries also includes Syria, Iran and Iraq. Citizens of all restricted countries are required to apply for a full visa before travelling to the U.S. Customs and Border Patrol (CBP) has also begun implementation of mandated procedural changes to the Electronic System for Travel Authorization (ETSA), which includes a more extensive security check, and a new ETSA application form containing detailed questions to be completed by VWP applicants.

### **FAA MAKES CHANGES TO REDUCE BIRD FATALITIES**

Following a series of flight tests to compare the level of attraction of birds to steady, non-flashing lights traditionally used to signify tall structures to pilots, several wildlife organizations and the Federal Communication Commission (FCC) have asked the FAA to consider using bright flashing lights instead. The tests concluded that the use of flashing versus steady-burning lights could significantly reduce the number of migratory bird fatalities due to bird strikes, as migratory birds are less attracted to intermittent flashes of light. As a result, the FAA has updated its lighting policies as of December 2015 to call for the new type of tower lighting configurations.

### **FAA PROPOSES RULE TO OVERHAUL SAFETY CERTIFICATION STANDARDS FOR GENERAL AVIATION AIRCRAFT**

Based on industry recommendations, the FAA has proposed a rule to overhaul airworthiness standards for small, general aviation aircraft with a maximum capacity of 19 passengers or less, and a maximum takeoff weight of 19,000 pounds. The new recommendations are meant to reduce the time it takes to introduce safety enhancement technology while also reducing general aviation maintenance costs. The Notice of Proposed Rulemaking restructures the existing certification standards for small planes and replaces current prescriptive design requirements with performance-based standards that maintain the same level of safety. The proposal responds to the FAA Modernization and Reform Act of 2012, and the Small Airplane Revitalization Act of 2013, which directed the FAA to streamline the approval of safety advancements for general aviation aircraft. The comment period expires on May 13, 2016.

### **NTSB TRAINING PROGRAM FOR CARRIER FAMILY ASSISTANCE PLAN**

The National Transportation Safety Board’s (NTSB) Transportation Disaster Assistance Division is hosting a training program for carriers on Family Assistance Plan compliance. The goal of the training program is to “train the trainers” so that carriers can begin to standardize procedures for responding to emergency situations. The course will be held on April 19-21, 2016 at the NTSB Training Center in Ashburn, Virginia.

## AVIATION REGULATORY UPDATE

### DOT CONSENT ORDERS

**Porter Airlines** Violations of 14 C.F.R. 399.84(a) full fare advertising rule as unfair and deceptive practice — Porter Airlines, Inc. (Porter Airlines) was fined \$50,000 for multiple violations of DOT's full fare advertising rule by Porter Escapes, a Canadian ticket agent selling pre-packaged tour products including air travel products on Porter Airlines. Porter Escapes' website had multiple instances of display advertisements for air transportation and hotel packages from U.S. cities to Canadian destinations with prices listed "per traveler plus tax," in violation of 14 C.F.R. Part 399, which requires any advertisement by a direct air carrier or its agent to state the entire price to be paid by a potential consumer purchasing an airfare or tour, including tax. Porter Escapes agreed to settle the matter with DOT and took remedial actions by suspending the offending marketing activity and working with its booking engine supplier to correct fare displays.

**British Airways** Violations of 14 C.F.R. 302.404 full fare advertising rule as unfair and deceptive practice — British Airways, PLC (British Airways) was fined \$40,000 and ordered to cease and desist from future violations after a third party complaint was filed against British Airways alleging violations of DOT's full-fare advertising rule after an inadvertent programming error prevented passengers using frequent traveler rewards to purchase one-way flights to and from the U.S. from viewing the total cost of a ticket on the carrier's website. British Airways admitted that it had become aware of the error by a prior consumer complaint, and states that it took steps to identify and resolve the issue the next day. British Airways then reached a settlement with DOT in order to avoid litigation and in compromise of civil penalties otherwise payable pursuant to 49 U.S.C. § 46301.

**Dynamic Airways** Violations of 14 C.F.R. 380 public charter operation regulations, 14 C.F.R. Part 382 passengers with disabilities and Article 17 of the Montreal Convention as unfair and deceptive practice and unfair methods of competition — Dynamic Airways, Inc. (Dynamic) was fined \$200,000 and ordered to cease and desist from future violations after a compliance visit at Dynamic's headquarters revealed that, for a period of time in 2014 and 2015, Dynamic failed to ensure that passengers' funds were deposited into the carrier's escrow account in a timely manner. Dynamic had also cancelled a number of flights fewer than ten days from the scheduled departure without notifying DOT, and failed to notify passengers of their rights to obtain refunds for such flights in violation of 14 C.F.R. 380. Provisions in Dynamic's operator-participant contract were found to violate Article 17 of the Montreal Convention by containing over two dozen categories of items in checked baggage for which liability was disclaimed. Article 17 of the Montreal Convention specifically prohibits carriers from disclaiming liability for valuable items. Other violations included Dynamic's failure to adequately train Complaint Resolution Officials (CROs) and make them available to customers at each airport it serves, as well as failure to file an annual report of disability-related passenger complaints to DOT prior to 2015 under 14 C.F.R. 382. Without admitting or denying the violations, Dynamic consented to the terms of the cease and desist order issued by DOT, and to the assessment of \$200,000 in compromise of potential penalties otherwise due and payable pursuant to 49 U.S.C. Section 46301.

## AVIATION REGULATORY UPDATE

### CIVIL PENALTIES PROPOSED BY FAA

**\$917,000 penalty against Puerto Rico Ports Authority for alleged aircraft rescue and firefighting violations at three of its commercial airports** — The FAA alleges that on March 25, 2015 at Rafael Hernandez Airport, it discovered multiple firefighting deficiencies, including inability of fire trucks to correctly mix firefighting foam and water, failure to apply an extinguishing agent within the required three minutes of an alarm sounding at a fire fighting demonstration, a damaged firefighting suit, and failure of fire fighters to receive recurrent aircraft familiarization training. Additional violations included failure of the airport to inspect its tenant fueling facilities between July 2014 and March 26, 2015, incorrect execution of daily self-inspections, improper repair of fire fighting vehicles, and large holes in the airport's runway. FAA also alleges that at Mercedita Airport, the airport failed to conduct daily self-inspections at sunrise, and at Antonio Rivera Rodriguez Airport, fire fighting vehicles failed to have two-way radio communications with the airport fire station on March 24, 2015.

*This Aviation Regulatory Update is intended to keep readers current on matters affecting the industry, and is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at [esahr@eckertseamans.com](mailto:esahr@eckertseamans.com) or 202-659-6622; Drew Derco at [dderco@eckertseamans.com](mailto:dderco@eckertseamans.com) or 202-659-6665; or Reese Davidson at [rdavidson@eckertseamans.com](mailto:rdavidson@eckertseamans.com) or 202-659-6633.*

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## AVIATION REGULATORY UPDATE

### SENATE PASSES FAA REAUTHORIZATION BILL

The United States Senate has passed the Federal Aviation Administration (FAA) Reauthorization Act of 2016 (S. 2658), which reauthorizes the FAA and its policies and programs for the remainder of Fiscal Year (FY) 2016 through FY 2017. Key components of the bill include:

- Aircraft certification reforms to improve FAA processes for certification of aircraft development and design;
- Measures to strengthen airport employee screening processes by expanding the vetting process for airport employees and performing random physical inspections of employees in secure areas;
- Measures to safeguard passengers in non-secure airport areas by securing airport perimeters and reducing crowds waiting for security screenings by vetting passengers before they arrive at the airport and expanding the Transportation Security Administration (TSA) PreCheck program;
- Increased security measures for international flights bound for the U.S. by expanding information sharing between the U.S. and other countries, and by requiring a security risk assessment of all airports with nonstop flights to the U.S.;
- Recommendations to improve the FAA's transition to 21st century "NextGen" air traffic control technologies; and
- Implementation of new consumer protection requirements for domestic and foreign carriers such as:
  - Requirements for DOT to review the number of airlines providing information on decisions to delay or cancel flights due to weather-related causes;
  - Requirements for airlines to provide families with information about the availability of seats together at the time of booking;
  - Creation of a standard method for airlines to disclose ancillary fees;
  - Requirements for airlines to return baggage fees when items are lost or delayed;
  - Requirements for airlines to automatically return fees for services purchased but not received, such as seat assignments, early boarding and carry-on baggage; and
  - Creation of a DOT advisory committee to improve air travel for persons with disabilities by reviewing training and best practices by airports and airlines.

The FAA Reauthorization Act of 2016 does not include provisions for the privatization of the U.S. air traffic control system, which was contained in previous versions of the bill passed by the U.S. House of Representatives. Although House Transportation and Infrastructure Committee Chairman Bill Shuster (R-PA) applauded the efforts of the Senate in passing the Reauthorization bill, Mr. Shuster – who originally introduced the FAA Reauthorization Act in the House – stated that he would continue to push Congress to pass the House version of the bill privatizing air traffic control before the final bill is presented to President Obama for review.



## AVIATION REGULATORY UPDATE

### PRECLEARANCE AUTHORIZATION ACT BECOMES LAW

The Preclearance Authorization Act of 2015 (PAA) was passed into law on February 24, 2016 as part of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). The PAA requires officials at the U.S. Departments of State (DOS) and Homeland Security (DHS) to work together to prevent terrorist attacks and other security risks from entering into the U.S. The bill also requires Congressional approval of proposed expansions of preclearance facilities abroad not less than 60 days before an agreement with a foreign government operations enters into force. Congress must evaluate the impact such expansion will have on legitimate trade and travel, U.S. Customs and Border Protection (CBP), as well as anticipated homeland security benefits.

Before Congressional approval of preclearance operation expansions can be given, Congress must review the anticipated funding sources, as well as perform a homeland security assessment for the country in which preclearance operations are to be established. Under the PAA, Congress may only grant approval if at least one U.S. passenger carrier operates at the proposed site, and if U.S. passenger carriers wishing to participate in preclearance operations are provided comparable access to non-U.S. passenger carriers operating at the same site. Before preclearance operations may be approved, Congress must produce a report certifying that CBP consulted with stakeholders, including providers of commercial air service to the U.S., employees of such providers, security experts, and any other parties the Secretary of Homeland Security deems appropriate.

### DOT RELEASES NOTICE OF INTENT TO CONVENE NEGOTIATED RULEMAKING COMMITTEE TO AMEND DISABILITY REGULATIONS

On April 7, 2016, DOT released a Notice of Intent (NOI) to establish an Accessible Air Transportation Advisory Committee (ACCESS) as part of a Negotiated Rulemaking to amend DOT rules concerning Nondiscrimination on the Basis of Disability in Air Travel. The ACCESS Committee will address three primary issues: (1) basic accessibility and strengthening of accessibility requirements for in-flight entertainment (IFE) and communications; (2) lavatory accessibility on new single-aisle aircraft over a certain size; and (3) clarification of the definition and utilization of “service animals” by disabled passengers on flights. Applications to fill twenty-five spots on the ACCESS Committee were due on April 21, 2016 and a roster of applicants selected to serve on the Committee is expected to be announced this month by DOT.

Numerous comments were filed in the response to the NOI. These included remarks from Airlines For America (A4A) and the International Air Transport Association (IATA), both of which disagreed with DOT’s proposal for the size and scope of the ACCESS Committee. A4A and IATA proposed resizing the Committee so that the number of consumer advocate and disability association representatives is more in line with the number of industry and carrier representatives directly affected by the proposed rulemaking. A4A also advocated for the relegation of IFE experts, aircraft manufacturers, and charter representatives to technical working groups instead of to the full ACCESS Committee.

## AVIATION REGULATORY UPDATE

### EUROPEAN COMMISSION PROPOSES SUSPENSION OF VISA WAIVERS FOR FIVE EUROPEAN COUNTRIES FOR U.S. AND CANADIAN CITIZENS

The European Commission has proposed the suspension of visa waivers for U.S. and Canadian citizens visiting Bulgaria, Croatia, Cyprus, Poland and Romania. The five countries are part of the “Schengen Area” – an area consisting of twenty-six European countries that have abolished all passport and other immigration controls at mutual borders to allow the area to function as a single country for international travel purposes. The proposal would exclude the five nations because citizens of those countries do not enjoy the same reciprocal visa waivers when visiting Canada or the U.S. According to the European Commission, the suspension proposal is a result of multiple ignored requests to the Obama Administration and the U.S. State Department to waive the visa requirement over a span of twenty-one months.

### THIRD CIRCUIT COURT OF APPEALS HOLDS FAA DOES NOT PREEMPT STATE PRODUCTS LIABILITY LAWS

In *Sikkelee v. Precision Airmotive Corp.*, the U.S. Court of Appeals for the Third Circuit has held that the Federal Aviation Act does not preempt the field of aircraft design and manufacturing products liability claims based on state law. More specifically, the Court clarified its previous reading of *Abdullah v. American Airlines, Inc. et al.*, 181 F.3d 363 (3rd Cir. 1999), holding that language in both the Federal Aviation Act and the General Aviation Revitalization Act of 1994 previously found to signify Congress’ clear intent to preempt state law for aviation safety claims does not apply to aircraft design and manufacturing products liability claims, expressly rejecting Plaintiff’s argument that the issuance of a type certificate constituted a per se preemption of state law.

### ICAO ISSUES LITHIUM ION BATTERY SAFETY ADVISORY NOTICE

On April 7, FAA issued a Safety Advisory Notice to advise carriers engaged in commercial transportation of lithium batteries of recent International Civil Aviation Organization (ICAO) actions to enhance safe transportation of these materials by air.

Based on test data by the FAA and recommendations developed at the ICAO Multidisciplinary Lithium Battery Transport Coordination Meeting(s), ICAO amended the 2015-2016 edition of the Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO TI) concerning the transport of lithium ion cells and batteries to include:

- A prohibition on the transport of lithium ion cells and batteries as cargo aboard passenger carrying aircraft. This prohibition applies to lithium cells and batteries not contained in or packed with equipment when transported as cargo and does not include batteries contained in personal electronic devices carried by passengers or crew;

## AVIATION REGULATORY UPDATE

- A requirement for lithium ion cells and batteries to be shipped at a state of charge of no more than 30 percent of their rated capacity on cargo aircraft (such materials are currently forbidden on passenger aircraft); and
- A limit on the number of packages of both lithium ion and lithium metal batteries that may be offered for transportation on cargo aircraft under current provisions for small cells and batteries to not more than one package per consignment or over pack.

The amendments are effective April 1, 2016 and a copy of the Safety Advisory Notice is available at: <https://www.federalregister.gov/articles/2016/04/07/2016-07936/hazardous-materials-icao-lithium-ion-battery-prohibition-safety-advisory-notice>.

### DOJ DROPS SUIT AGAINST UNITED FOR NEWARK SLOT ALLOCATION

The U.S. Department of Justice (DOJ) has dropped a federal antitrust lawsuit against United Airlines after it agreed to terminate an agreement with Delta Airlines to take over twenty-four takeoff and landing slots at Newark Liberty International Airport (EWR). The announcement comes after the FAA agreed to lift slot controls at EWR after determining that the airport had additional flight capacity due to an under-utilization of existing slots. Had the United/Delta agreement gone through, Delta would have given United control of approximately 75% of the 1,230 slots available at EWR. Due to the FAA determination, EWR will be reclassified as a Level 2 airport, dropping the current Level 3 slot-controlled status and allowing for potential improvements in access to some of the most in-demand airspace in the country. According to the FAA, the reclassification from Level 3 to Level 2 could also lead to more options for local consumers.

### FAA DOUBLES “BLANKET” ALTITUDE FOR UAS

After completing a comprehensive risk analysis, the FAA has raised the “blanket” altitude authorization for 14 C.F.R. Section 333 exemption holders and government aircraft operators of unmanned aircraft systems (UAS) to 400 feet. The new altitude is a significant increase over the previous 200 foot limitation as stated by Certificate of Waiver of Authorization (COA) requirements and allows small UAS to fly up to the blanket altitude authorization anywhere in the country except in restricted airspaces such as airports and major cities. The new blanket authorization is expected to reduce workload for COA applications and FAA regulators, reducing the need for individual COA by 30 to 40 percent. However, other FAA UAS authorization provisions, such as registration and pilot certification, still apply.

## AVIATION REGULATORY UPDATE

### DOT WEBSITE ACCESSIBILITY REQUIREMENT REMINDER

DOT's website accessibility rule requires all pages of a carrier's primary website used to advertise or sell air transportation that begins or ends in the U.S. must be accessible to individuals with disabilities under the Web Content Accessibility Guideline (WCAG) standards developed by the Web Accessibility Initiative of the World Wide Web Consortium. The core WCAG requirements are defined as:

- Booking or changing a reservation (including all flight amenities);
- Checking-in for a flight;
- Accessing a personal travel itinerary;
- Accessing the status of a flight;
- Accessing a personal frequent flyer account;
- Accessing flight schedules;
- Accessing carrier contact information.

DOT extended the Phase 1 compliance deadline for core website functions to June 30, 2016. The Phase 2 compliance deadline, which requires that all remaining components of the carrier's website be made accessible, remains December 12, 2016. DOT recently advised that:

If the page is not owned or controlled by the carrier, DOT does not consider the page to be part of the airline's primary website, and therefore, no requirement exists that it be accessible;

If the page is owned or controlled by the carrier, DOT will review the URL for that page. If the URL has the same domain as the primary website, DOT would consider it part of the carrier's primary website and it would need to be accessible, even if the URL is not exactly the same.

Please contact us if you have any questions or require additional information on this rule.

### DOT CONSENT ORDERS

Air France, Lufthansa, and British Airways violations of 14 C.F.R. Part 382 failure to adequately respond to complaints filed by passengers with disabilities — Air France and Lufthansa were each fined \$200,000 and British Airways was fined \$150,000 for failure to adequately respond to complaints filed by passengers with disabilities. Under 14 C.F.R. Part 382, carriers are required to provide a written dispositive response to written complaints alleging a violation of the ACAA within 30 days of receipt. The consent orders are the result of several on-site regulatory compliance inspections of each airline conducted in 2012 and 2013 by DOT's Office of Aviation Enforcement and Proceedings. During these inspections, DOT reviewed a number of disability-related complaint files and found that, in many occasions, Air France, Lufthansa, and British Airways failed to provide dispositive responses to passenger complaints. In some cases, British Airways failed to include a summary of the facts, stating instead that the complaint would be forwarded to the relevant airport authority for response. British Airways also failed to inform complainants of their right to pursue enforcement action with DOT. Lufthansa similarly did not inform passengers of their right to pursue

## AVIATION REGULATORY UPDATE

enforcement action with DOT and improperly referred passengers to an attachment titled “Travel Tips” that failed to include adequate information to assist passengers with disabilities to file complaints against Lufthansa with DOT. Air France systematically failed to respond to passengers with disabilities requests altogether, and for those to which it did reply, failed to summarize the facts of the complaint or systematically admit or deny the violation as required by Part 382.

SeaPort Airlines, Inc. (SeaPort) violations of 49 U.S.C. § 41734 and 14 CFR part 323 for terminating service without proper notice in the DOT Essential Air Service (EAS) Program — SeaPort was fined \$30,000 for unlawful conduct related to its participation in the EAS Program and was ordered to cease and desist from future similar violations. Specifically, the carrier violated DOT rules and federal statutes by terminating service to Greenville, MS despite orders from DOT for SeaPort to maintain service until another carrier could begin service to those communities as required under the EAS. Program. Through the EAS program, carriers provide air transportation to communities that would not otherwise receive scheduled air service. DOT subsidizes those carriers through the program. The carrier has to provide 90 days advanced notice to the affected community, the appropriate state authority and DOT prior to ending, suspending or reducing service to the community. This gives the community and DOT the opportunity to find alternative providers in a timely manner. The notice requirement also gives interested parties the chance to file any objections to the change in service.

### CIVIL PENALTIES PROPOSED BY FAA

\$52,000 against The Home Depot for offering for shipment aboard a UPS flight 16 cans of flammable spray paint — The FAA alleges that the shipment was discovered by a UPS employee before being loaded onto the aircraft without accompaniment of shipping papers to indicate the hazardous nature of their contents and were improperly marked, packed or labeled. Home Depot also failed to provide emergency response information with the shipments.

\$162,500 against Airbus Defence and Space for offering for shipment on a passenger carrying aircraft from Seville, Spain to Miami Florida — two Protective Breathing Equipment Units, each containing a chemical oxygen generator. The chemical can cause combustion in other materials and HMR prohibits transporting the devices on passenger carrying aircraft. Upon arrival in Miami, the shipment was offered undeclared to FedEx for shipment to Kansas. The shipment also was not accompanied by shipping papers to indicate the hazardous nature of their contents and were improperly marked, packed or labeled. Airbus Defence and Space also failed to provide emergency contact information with the shipments.

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### DEPARTMENT OF TRANSPORTATION HOLDS FIRST NEGOTIATED RULEMAKING ACCESS COMMITTEE MEETING IN WASHINGTON D.C.

On April 7, 2016, the Department of Transportation (DOT) announced its intent to establish an Accessible Air Transportation Advisory Committee (ACCESS) as part of a Negotiated Rulemaking to develop regulations on the following topics:

1. Basic accessibility and strengthening of accessibility requirements for in-flight entertainment (IFE) and communications;
2. Lavatory accessibility on new single-aisle aircraft over a certain size; and
3. Clarification of the definition and utilization of “service animals” by disabled passengers on flights.

On May 17-18 2016, DOT convened the first in a series of six, two-day meetings of the ACCESS Committee to begin the collaborative development of guidelines and suggestions for future regulations. Convener Richard W. Parker chaired the meeting, which was attended by DOT representatives and industry stakeholders appointed to serve on the twenty-five member ACCESS Committee, as well as members of the general public. Key issues discussed at the meeting included several procedural matters, such as the scope and applicability of committee “Ground Rules,” as well as the leadership and composition of three distinct voting committees, or “Working Groups” organized for each topic of discussion. Substantive issues were also considered, such as the viability of achieving consensus for each of the three issues and discussions on what questions should be answered in a potential rulemaking.

One of the main topics of discussion was service animals, including the overarching issue of whether to amend the current definition of “service animal” in the Air Carrier Access Act as “any animal that is individually-trained or able to provide assistance to a qualified person with a disability; or any animal shown by documentation to be necessary for the emotional well-being of a passenger.” The Committee also identified key questions that must be addressed in any potential rulemaking, including:

- What species of animals should be allowed as service animals?
- Should a distinction be made between psychiatric service animals (“emotional support animals”) and service animals?
- What documentation should be required for service animals, and who may provide it?
- If documentation is required, how can the industry prevent fraud and abuse in the documentation process?
- Should carriers be allowed to deny boarding to ineligible service animals?
- What procedures, if any should be in place to allow carriers to challenge eligibility determinations for service animals, and should there be a limit on the number of service animals brought on board by a single passenger or in total on a single aircraft?

The Committee also discussed other accessibility issues, such as the viability of achieving consensus on accessibility of in-flight entertainment, incidental costs associated with such a rule, and whether DOT can

## AVIATION REGULATORY UPDATE

properly assert jurisdiction over this topic. The next open meeting of the ACCESS Committee will be held June 14-15, 2016 in Washington, D.C. We will continue to keep you updated on new developments.

### **U.S. CUSTOMS AND BORDER PROTECTION ANNOUNCES 2016 PRECLEARANCE EXPANSION OPEN SEASON**

On May 15, 2016, U.S. Customs and Border Protection (CBP) announced the commencement of the 2016 Preclearance expansion open season, which is from May 15, 2016 to August 1, 2016. As part of this initiative, foreign airports interested in hosting a preclearance facility are invited to submit a letter detailing their interest in offering CBP preclearance operations. Submissions will be reviewed by the Department of Homeland Security (DHS) and CBP, in coordination with the Transportation Security Administration (TSA), the U.S. Department of State (DOS) and other government stakeholders as required by the Preclearance Expansion Act of 2015, which was passed by Congress as part of the Trade Facilitation and Trade Enforcement Act of 2015. At the conclusion of the open season, all applicants will then be evaluated and prioritized based upon each location's potential benefit to national security, travel facilitation, and economic hardships.

This initiative is the first open season since 2014, at which time CBP identified ten priority locations as potential preclearance expansion sites. Those locations were: Brussels International Airport in Belgium, Punta Cana International Airport in the Dominican Republic, Narita International Airport in Japan, Amsterdam Schiphol Airport in the Netherlands, Oslo Gardermoen Airport in Norway, Madrid-Barajas Airport in Spain, Stockholm Arlanda Airport in Sweden, Istanbul Ataturk Airport in Turkey, and London Heathrow Airport and Manchester Airport, both in the United Kingdom. Although all ten locations were listed as potential preclearance sites, to date, none have been approved by Congress as required by the PAA before expansion of preclearance operations may commence.

Foreign airports interested in preclearance expansion are invited to submit a letter to CBP at [preclearance.expansion@cbp.dhs.gov](mailto:preclearance.expansion@cbp.dhs.gov) expressing their interest in hosting preclearance operations before the 2016 initiative closes on August 1, 2016.

### **DOT BANS E-CIGARETTES FROM CHECKED BAGGAGE**

The DOT Pipeline and Hazardous Materials Safety Administration (PHMSA) on May 18, 2016 issued a final rule prohibiting passengers and crew members from carrying battery-powered portable electronic cigarettes (e-cigarettes) or similar electronic nicotine delivery systems in checked baggage, or from charging such devices and/or batteries for such devices on board aircraft. The prohibition against carrying e-cigarettes or similar devices in baggage follows similar recommendations made by the Federal Aviation Administration (FAA) in a Safety Alert issued to operators on January 22, 2015. Passengers may still carry e-cigarettes for personal use in carry-on baggage or on their person, but may not use them during flights. The final rule does not prohibit passengers from carrying other battery-driven devices for personal use (e.g., laptop computers, cell phones, cameras, etc.) in checked or carry-on luggage, nor does it restrict

## AVIATION REGULATORY UPDATE

passengers from transporting batteries for personal use in carry-on baggage, although other limitations on the carriage of lithium ion batteries in checked and carry-on luggage imposed by both the International Civil Aviation Organization (ICAO) and the FAA still apply.

### DOS AND NTSB HOST JOINT WEBINAR ON FAMILY ASSISTANT PLAN REQUIREMENTS

The National Transportation Safety Board (NTSB) and DOS hosted a joint Family Assistance Plan web conference on May 11, 2016, which discussed many issues, including departmental interpretations of foreign carrier responsibilities in the event of an air disaster as established by 49 USC § 41313. Noteworthy discussions held during the conference included:

- Differences between foreign and domestic carrier assurance requirements as stated in 49 USC § 41113 (domestic carrier requirements) and § 41313 (foreign carrier requirements), specifically:
  - Foreign carriers are not required to provide support and compensation to the American Red Cross, or to compensate family members of victims for travel expenses and physical care, as long as the carrier provides a description of adequate substitute measures in its Family Assistance Plan;
  - All assurances stated in § 41313 are the minimum legal requirements to satisfy the rule. Foreign carriers are encouraged to offer additional assistance to passengers and next-of-kin as necessary;
- Foreign carriers are not required to provide simultaneous electronic transmission of NTSB hearings, except for those held in any U.S. location if the departure or arrival of the flight was in the U.S.;
- Public posting of passenger manifest information does not constitute notification for purposes of 49 USC § 41113, although foreign carriers are highly encouraged to keep passengers and next-of-kin informed of all issues/concerns related to the accident as they occur, including proactive notification of all passengers/next-of-kin included on manifests;
- Foreign carriers must collect and store family contact information obtained during the notification process and provide to local/state authorities as necessary during the victim accounting process, specifically:
  - Foreign carriers are encouraged to work with consular offices regarding country-specific notification requirements;
  - Any notification issues to passengers/next-of-kin abroad should be expressed to the U.S. Department of State Bureau of Consular Affairs; and
  - Foreign carriers should notify the Bureau of Consular Affairs Overseas Citizen Services for issues regarding the protection and safety of U.S. citizens abroad.



## AVIATION REGULATORY UPDATE

### UAS UPDATE

#### Congressional developments on small UAS

On March 16, 2016, the U.S. Senate Commerce, Science and Transportation Committee approved an amended version of Senate Bill 2658, the Federal Aviation Administration Reauthorization Act of 2016. The bill included a mandate for the FAA Administrator to initiate a collaborative process to develop risk-based, consensus industry airworthiness standards related to the safe integration of small UAS (sUAS) (55 pounds or less) into the National Air Space (NAS) - the culmination of which must result in the development of an approval process without type certification requirements (or exemptions or certificates of waiver therefrom) already in place under current FAA regulations. After approval by the Senate Commerce, Science and Transportation Committee, Senate Bill 2658 will be considered by the entirety of the Senate later this year.

#### FAA advisory committees convened to propose potential UAS and MicroUAS regulations

Following Congressional mandates issued in both the FAA Modernization and Reform Act of 2012 and the FAA Reauthorization Act of 2016, and in conjunction with general sUAS policies proposed by DOT and the FAA in a joint NPRM released on February 15, 2015, the FAA has announced its intention to establish a broad-based UAS advisory committee to provide an open venue for FAA and other key decision-makers to develop policies to support the safe integration of UAS into the NAS. The Committee is an outgrowth from the already successful stakeholder-based UAS registration task force and MicroUAS aviation rulemaking committees previously set up to identify and prioritize UAS integration challenges and improvements, while also creating broad support for an overall integration strategy to be implemented by the FAA in a final rule at a later date.

### REMINDER: WEBSITE ACCESSIBILITY PHASE I DEADLINE IS JUNE 30, 2016

As a reminder, DOT's grace period for compliance with Phase I of the website accessibility rule ends on **June 30, 2016**. At that time, all core website functions defined under 14 C.F.R. § 382.43(c)(1)(i) as:

1. Booking or changing a reservation, including all flight amenities;
2. Checking in for a flight;
3. Accessing a personal travel itinerary;
4. Accessing the status of a flight;
5. Accessing a personal frequent flyer account;
6. Accessing flight schedules; and
7. Accessing carrier contact information

*must* conform to all Success Criteria and all Conformance Requirements from the World Wide Web Consortium (W3C) Web site Content Accessibility Guidelines (WCAG) 2.0 AA. All remaining web pages on a carrier's website must meet the same accessibility standards by the Phase II deadline of **December 12, 2016**. Please let us know if you have any questions or if you will not be able to comply with these deadlines.

## AVIATION REGULATORY UPDATE

### CONSENT ORDER

**Aeroenlaces Nacionales, S.A. de C.V., t/a VivaAerobus (VivaAerobus) violations of 14 C.F.R. Part 382** — VivaAerobus was fined \$150,000 in civil penalties for violating general DOT consumer protection regulations, including rule 14 CFR § 399.84(a); 14 CFR § 399.84(c), and the statutory prohibition against unfair and deceptive trade practices, 49 U.S.C. § 41712.

In the course of its investigation, the Enforcement Office determined that the carrier advertised fares in its initial fare matrix that did not include the issuance fee, which is mandatory. The “issuance fee” was added at the end of the booking purchase when the customer was required to select from several methods of payment. The fee amount varied by the method of payment and was not disclosed to the customer until the final step of the booking process. Also, VivaAerobus failed to have a reasonable amount of seats available for an advertised fare, and when the seats were no longer available, the carrier did not act promptly to discontinue advertisement of the fare.

Additionally, the carrier used the opt-out method for selling optional services. The “opt out” rule states that an airline cannot offer optional services in connection with air travel when the service is automatically added to the ticket purchase if the customer takes no action or fails to opt out. Finally, VivaAerobus did not prominently disclose on its U.S. facing website fee information for all optional services available when purchasing air transportation.

*This Aviation Regulatory Update is intended to keep readers current on matters affecting the industry, and is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at [esahr@eckertseamans.com](mailto:esahr@eckertseamans.com) or 202-659-6622; Drew Derco at [dderco@eckertseamans.com](mailto:dderco@eckertseamans.com) or 202-659-6665; or Reese Davidson at [rdavidson@eckertseamans.com](mailto:rdavidson@eckertseamans.com) or 202-659-6633.*

## AVIATION REGULATORY UPDATE

### FAA-OST RELEASES FINAL RULE ON PORTABLE OXYGEN CONCENTRATORS (POC)

On May 24, 2016 the U.S. Federal Aviation Administration (FAA) published a final rule on passenger-supplied Portable Oxygen Concentrators (POC) on board aircraft. Under the final rule, POC manufacturers must follow standards set forth to test and label POCs they intend to market for air travel. The final rule differs from the previous Notice of Proposed Rule Making released in 2014 in three aspects: (1) it replaces the proposed prescriptive requirement for radio frequency (RF) emissions evaluation with a performance-based standard that allows POC manufacturers to determine the means by which to assess whether a POC will radiate RF emissions that interfere with aircraft systems; (2) it modifies label requirements to include indication that the POC conforms with FAA acceptance criteria; and (3) it retains the Special Federal Aviation Regulation (SFAR) No. 106 prohibition against exit row seating for passengers using a POC and the SFAR No. 106 requirements pertaining to POC stowage. The final rule also amends the U.S. Department of Transportation's (DOT) rules on the nondiscriminatory treatment of passengers with disabilities in air travel (Part 382) to reflect the changes to the POC rule and to ensure that all POCs meeting FAA's safety requirements are accepted for air travel.

### FAA ISSUES NEW RULE REGULATING COMMERCIAL USES OF UNMANNED AERIAL SYSTEMS (UAS)

On June 21, 2016 the FAA released new guidelines under Part 107 of the FAA Modernization Act of 2012 governing the use of small unmanned aircraft systems (sUAS) in U.S. airspace. The new Part 107 grants operators the ability to operate without seeking a special airworthiness certificate, exemption, or waiver previously required by the FAA for commercial sUAS operations under Section 333 of the FAA Modernization Act. Under the new guidelines, applications for commercial sUAS operations will be placed into one of three categories, which depending on FAA assessment, will allow the prospective applicant to commence sUAS operations either: (1) entirely under Part 107 without a waiver or exception; (2) with a waiver under Part 107 approved or denied based upon the operator's application for exemption; or (3) under Part 107 with waiver pending further regulatory review.

The highly-anticipated rule, which regulates both commercial and non-commercial uses of sUAS, includes several operational rules and requirements, including:

- Restriction of operations to sUAS weighing 55 pounds or less;
- Restriction of all sUAS operations to remain within operators' Visual Line of Sight (VLOS) at all times;
- Prohibition against sUAS operations over any persons not directly participating in the operation, under a covered structure, or inside a covered stationary vehicle;
- Prohibition against sUAS operations at night;
- Prohibition against sUAS operations higher than 400 feet above ground level (AGL) or at a speed faster than 100 mph (87 knots);
- Prohibition against sUAS carriage of hazardous materials;

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- Requirement for all sUAS operators to perform a pre-flight inspection prior to any sUAS flight;
- Requirement that all sUAS operators must satisfy Remote Pilot in Command Certification and sUAS piloting responsibilities, such as:
  - possession of a Remote Pilot Airman certificate with an sUAS rating, or be under the direct supervision of a person holding a Remote Pilot Certificate;
  - demonstration of adequate aeronautical knowledge proficiency by either:
  - passage of an initial aeronautical knowledge test at an FAA-approved knowledge testing center; or
  - holding an FAA part 61 pilot certification other than a student pilot designation;
  - completion of both a flight review within the previous 24 months and an sUAS online training course provided by the FAA;
  - vetting by the Transportation Security Administration (TSA);
  - being at least 16 years old, and;
  - Hold at least a temporary Remote Pilot Certificate issued upon submission of an application for a permanent certificate, which will be issued by the FAA within ten days of receipt of an application for a permanent certificate.

### HOUSE PASSES TSA ACT TO ALLEVIATE LONG WAITING TIMES AT AIRPORTS

On June 6, 2016 the U.S. House of Representatives passed the “Checkpoint Optimization and Efficiency Act” (H.R. 5338) to speed up airport security wait times for passengers. The bill is the first piece of legislation passed since congressional hearings held in May highlighted the issue of overwhelming security lines at U.S. airports. The bill, sponsored by Representative John Katco (R-NY), allows the U.S. Transportation Security Administration (TSA) more flexibility to shift additional officers to screening duties; gives authority to Federal Security Directors at local airports to make resourcing decisions; establishes a “staffing advisory committee” to coordinate the local airports and stakeholders; and reallocates dog teams to high-volume airports and checkpoints. The bill also requires TSA to assess its current staffing allocation model and establish minimum staffing requirements with air carriers and airports. Prior to approving the bill, Congress had already approved a \$34 million shift within TSA’s current budget to hire and train new officers, but TSA is still waiting for another \$28 million reprogramming approval later this year in order to ensure the agency continues to be adequately staffed. The bill was referred to the Senate Committee on Commerce, Science, and Transportation on June 8, 2016.

### SENATE APPROPRIATIONS COMMITTEE VOTES TO PASS PRO-ENGAGEMENT CUBA AMENDMENTS

Following the U.S. Department of Transportation’s June 10, 2016 order authorizing scheduled passenger service to certain points in Cuba, as part of a bipartisan Congressional effort to change obsolete American foreign policy with Cuba, the U.S. Senate Appropriations Committee overwhelmingly voted to include four pro-Cuba engagement amendments in the Fiscal Year 2017 appropriations bill. Offered by Senators John Boozman (R-AR) and Jon Tester (D-MT), the amendments conclusively lift the travel ban for Americans

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wishing to travel to Cuba, allow for the exportation of telecommunication services, and permit the refueling of planes at Bangor International Airport in Maine for flights en route to Cuba. The amendments also allow Americans to offer private credit for the exportation of American agricultural commodities to Cuba and repeal the prohibition against U.S. vessels loading or offloading freight within 180 days after entering a port in Cuba without first procuring a license issued by the U.S. Department of the Treasury. The appropriations bill for Fiscal Year 2017 will most likely pass later this year.

### DOT HOLDS SECOND NEGOTIATED RULEMAKING ACCESS COMMITTEE MEETING

Following the initial meeting of the DOT Negotiated Rulemaking Accessible Air Transportation Advisory Committee (ACCESS) in May, the DOT ACCESS Committee convened a second time on June 14-15, 2016 to discuss several topics including the identification of key issues related to the definition of “service animals,” and the appropriate role of such animals in assisting passengers with disabilities on aircraft. Such issues included whether disability mitigation training should be required for service animals on board aircraft as a condition of access; whether rules related to the admission of service animals on board should distinguish between psychiatric service animals and other service animals, and whether requirements related to emotional support animals should be considered separately from those in effect for service animals; what and whether some, but not all types of species should be allowed on board as service animals; and whether carriers should require documentation for service animals, and if so, what documentation should be required. The ACCESS Committee also discussed the accessibility of in-flight entertainment and communications as well as the feasibility of requiring accessible lavatories on some single aisle aircraft. Working Groups focusing on these issues will be gathering data and information from airlines and trade associations to report back to the ACCESS Committee at the next plenary meeting in July.

### FAA INTRODUCES NEW AIRMAN CERTIFICATION STANDARDS

Effective June 15, 2016, the FAA replaced the Practical Test Standards (PTS) for private pilot airplane certificate and instrument rating certifications with new corresponding Airman Certification Standards (ACS). The new ACS standards incorporate additional aeronautical knowledge and risk management elements that support PTS skill tasks, and are viewed by the FAA as the foundation of its transition to a more integrated and systemic approach to airman certification. The new ACS is part of the Safety Management System (SMS) framework the FAA uses to mitigate risks associated with airman certification training and testing.

The new private pilot airman certification standards can be found at:

[http://www.faa.gov/training\\_testing/testing/acs/media/private\\_airplane\\_acs.pdf](http://www.faa.gov/training_testing/testing/acs/media/private_airplane_acs.pdf);

The new instrument rating certification standards can be found at:

[http://www.faa.gov/training\\_testing/testing/acs/media/instrument\\_rating\\_acs.pdf](http://www.faa.gov/training_testing/testing/acs/media/instrument_rating_acs.pdf)

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### CARRIER NOT LIABLE FOR DENYING TRANSPORT TO SURLY TICKET-HOLDER

On April 28, 2016, a New York federal court determined that an individual denied boarding on an international flight departing from Cairo, Egypt was unable to maintain claims against Royal Air Maroc (RAM). The passenger had refused to pay an overweight baggage fee and spoke inappropriately to RAM agents. Under Articles VIII and IX of RAM's Conditions of Carriage, RAM was allowed to charge an overweight baggage fee and deny boarding to the plaintiff, who had refused to pay the fee and behaved aggressively towards RAM staff. As part of his breach-of-contract claim, the passenger asserted that RAM had discriminated against him on the basis of his national origin, religion, and marital status, and that he had suffered economic damages as a result of the denied boarding. The passenger did not dispute that RAM Conditions of Carriage governing his ticket purchase contained the relevant contract terms allowing RAM to deny boarding due to his behavior and refusal to pay baggage fees. The court found that neither federal anti-discrimination statutes nor New York state laws applied to discriminatory conduct that occurred outside of the U.S. The court also found that, because the passenger admitted that he had spoken inappropriately to ticket counter agents and refused to pay baggage fees, no reasonable jury could find that the carrier had breached its Conditions of Carriage when it revoked the passenger's boarding passes. The court then granted summary judgment in favor of RAM.

### TREATY PREEMPTS DOWNGRADED AIR TRAVELER'S CLAIMS

On April 18, 2016, a federal court in California ruled against an 86-year-old claimant who brought suit after he accepted a downgrade (instead of taking a later flight) and was allegedly injured on board. The passenger had purchased two first class roundtrip tickets from Los Angeles, California to Tel Aviv, Israel, with a layover in Newark, New Jersey. Although the Plaintiff and a companion travelled first class from Los Angeles to Newark without incident, the two passengers were downgraded to Premium Economy on the Newark-Tel Aviv portion of the itinerary due to an insufficient number of BusinessFirst seats. The court found that the passenger's claims that the airline's failure to accommodate his request for priority seating due to a pre-existing medical condition and for injuries incurred on board were preempted by the Montreal Convention, which exclusively limits recovery for passengers travelling on international itineraries for damages arising from international flights. As a result, the passenger was precluded from bringing additional breach of contract claims under local law.

Furthermore, the court held that the carrier's failure to accommodate the passenger's request for priority seating due to his pre-existing medical condition did not constitute an "accident" under Article 17 of the Montreal Convention allowing for the award of damages. Additionally, the exacerbation of the passenger's edema was found not to be an "accident" under Article 17, because swelling in one's legs and feet is a common physiological reaction to inactivity in a seated position during lengthy international air travel.

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### FEDERAL FOOD AND DRUG ADMINISTRATION (FDA) RELEASES NEW FOOD LABELING REQUIREMENTS APPLICABLE ON AIRCRAFT

The FDA has released a revision to its nutrition and supplemental food fact labeling laws. The final rule updates the list of nutrients that are required or permitted to be declared on food packaging, provides updated Daily Reference Values and Reference Daily Intake values that are based on current dietary recommendations from dietary reports, and revises the format and appearance of the Nutrition Facts Label. The new rule is applicable for all packaged foods, including those served on aircraft.

Please contact us if you have any questions regarding the impact of the rule on your operations. The rule can be accessed at:

<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm>

### FAA ISSUES FINAL POLICY ON THE USE OF AIRPORT HANGARS

The FAA has issued a final policy clarifying the use of hangars for non-aviation purposes, including those located at airports receiving federal funding. The policy is scheduled to become effective on July 1, 2017. The policy, which strikes a balance between hangar usage for aviation and non-aviation purposes, aims to ensure that hangar availability is prioritized for aviation-related needs, as well as for non-aviation activities, as needed. The policy also regulates the types of aircraft that may be built or housed in a hangar, as well as the types of equipment and other items stored. The policy also monitors the role of airport hangar sponsors to ensure tenants pay fair market value for hangar space, and requires airport sponsors of non-aviation related activities to receive approval from the FAA before hangars can be used for non-aviation related purposes.

### CIVIL PENALTIES PROPOSED BY FAA

**\$735,000 against the City of Cleveland** for reports of the city's failure to adequately staff snow removal teams and deice taxiways and runways — the FAA reached a comprehensive settlement agreement with the City of Cleveland resolving four cases opened last year due to reports of the city's failure to adequately staff snow removal teams and deice taxiways and runways at Cleveland Hopkins International Airport — causing unsafe conditions and forcing planes to divert to other airports. Under the agreement, the City of Cleveland pledges to build and maintain existing improvements to its airfield snow and ice removal plan. Under the settlement, the City of Cleveland must make a payment to the United States Treasury of \$200,000 within 30 days of the signed agreement however, the FAA has agreed to waive the remaining balance of the proposed civil penalty if the City meets certain conditions related to airport staffing, reporting requirements, and procurement of new and replacement snow removal equipment by 2019.

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**\$350,000 and \$78,000 against Amazon.com for violations of hazardous materials regulations** – Amazon.com (Amazon) was fined \$350,000 and \$78,000 in civil penalties for violations of hazardous materials regulations for failure to properly package hazardous materials. Amazon failed to ship the packages with a proper Shipper’s Declaration for Dangerous Goods, and failed to properly label the materials to indicate their hazardous nature. Furthermore, Amazon failed to provide emergency response information for the packages, and as related to the \$350,000 penalty, Amazon employees handling the hazardous materials failed to receive proper materials handling training. The \$350,000 violation occurred after Amazon offered a package to United Parcel Service (UPS) containing corrosive drain cleaner for transportation from Louisville, KY to Boulder, CO. While in transit, the package leaked through the fiberboard box in which it was contained and came into contact with nine UPS employees. The \$78,000 penalty occurred after Amazon offered two boxes of corrosive rust stain preventer to Federal Express (FedEx) from Plainfield, IL to Davenport, FL.

**\$20,000 against Orange Air, LLC (Orange Air) for violations of accounting and reporting requirements under 49 U.S.C. § 41708 and 14 C.F.R. Part 241** – Orange Air was fined \$20,000 in civil penalties for violating DOT reporting requirements for failure to submit timely and complete Form 41 and Form T-100 data reports during certain times in 2014 and 2015, despite repeated requests from the U.S. Bureau of Transportation Statistics (BTS).

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### U.S. SENATE PASSES FEDERAL AVIATION ADMINISTRATION EXTENSION, SAFETY AND SECURITY ACT OF 2016

On July 13, 2016 the U.S. Senate passed H.R. 636, the Federal Aviation Administration (FAA) Extension, Safety, and Security Act of 2016 (FAAESSA) which was sponsored by Senators Bill Nelson (D-FL) and John Thune (R-SD). The Act funds all current FAA programs through September 30, 2017, and introduces several aviation safety and security reforms, including the adoption of new passenger and employee airport screening requirements and new rules for the operation and registration of unmanned aircraft systems (UAS). The FAAESSA was signed by President Obama on July 15, 2016. Specific requirements of the Act include:

#### General Transportation Security Administration (TSA) Requirements:

- A mandate for the TSA to conduct comprehensive security risk assessments of all last point of departure airports outside the United States within 180 days after passage of the bill;
- Workforce assessments of all TSA personnel, including review of personnel assignments to ensure they are being performed in a risk-based, intelligence-driven manner;
- Determination of whether TSA's current staff allocation model is sufficient to maintain minimal passenger waiting times while maintaining maximum security effectiveness;
- Incorporation by TSA of canine explosives detection teams and other technology designed to assist screeners in conducting security checks; and
- Threat assessments of the risks posed by unescorted individuals with access to airport secure areas, and how vulnerabilities associated with such access can be identified and rectified in a way that retains airport operative efficiency.

#### TSA PreCheck Program:

- Expansion of TSA's PreCheck Program through the use of secure online enrollment and the collection of biographic and biometric passenger information at kiosks, tablets or staffed laptop stations where interested candidates may apply;
- Utilization of Department-held data and technology programs to verify applicant citizenship and leveraging existing airport resources to conduct fingerprint and background checks to expedite identity verification; and
- Ensure that all PreCheck Program screening lanes are kept open during high-volume travel times.

#### Consumer Protection Measures

- Requires DOT to issue final regulations requiring both domestic and foreign air carriers to provide automatic refunds of ancillary baggage fees if carriers fail to deliver checked baggage more than 12 hours after the arrival of a domestic flight, or 15 hours after the arrival of an international flight.

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- Reduces the frequency of flight cancellations prompted by excessive tarmac delays by allowing airlines to comply with DOT's tarmac delay rule by beginning to return the aircraft to the gate within three hours for domestic flights and four hours for international flights, and begin deplaning passengers not later than one hour after beginning the return to the gate.
- Requires carriers to establish policies that enable children (13 years of age or younger) to be seated in an adjacent seat to an accompanying family member at no additional cost, except in such cases when an assignment would require an upgrade to another cabin class or a seat with extra legroom or seat pitch.

### Small Unmanned Aircraft Systems (sUAS) Directives:

- Develop consensus-based standards for remote identification of sUAS owners and operators by imposing separate public and private classification systems, such as an online database;
- Authorization for the development of airspace hazard mitigation programs at airports and other critical infrastructure using sUAS detection technology providing for continued development of sUAS traffic management in coordination with the National Aeronautics and Space Administration (NASA); and
- Development of specific UAS system pilot certification programs.

## U.S. DEPARTMENT OF TRANSPORTATION HOLDS THIRD NEGOTIATED RULEMAKING COMMITTEE MEETING

The DOT Accessible Air Transportation Advisory (ACCESS) Committee held its third plenary session on July 13-14, 2016 in Washington D.C. Discussions included the feasibility of requiring accessible lavatories on single-aisle aircraft, the appropriate definition and utilization of service and emotional support animals, and accessibility of inflight entertainment and communications. Specific topics discussed included:

### Accessible Lavatories on Single-Aisle Aircraft

The Committee concluded:

- (1) Any extension of existing single-aisle lavatories would result in a loss of seats or galley space on current aircraft;
- (2) A fully accessible lavatory solution allowing room for passengers and attendants is not possible given existing aircraft configurations; and
- (3) Boeing and Airbus single-aisle assembly lines are locked, preventing any lavatory reconfiguration for several years.

Other issues presented were proposed phase-in times for lavatory accessibility, the need for a standardized metric to assess which aircraft need to be made accessible, and an estimate for the cost of losing a row or more of seats or galley space for the accommodation of accessible lavatories.

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### Service Animals

The U.S. Department of Housing and Urban Development (HUD) gave a presentation on HUD's management of requests for service animals and emotional support animals in public housing units, and participating airline representatives presented a survey of foreign regulations on service animal access in jurisdictions other than the United States. Airline representatives also voiced their concern that any proposal must address the issue of passenger abuses of service and/or emotional support animal designations to avoid paying transport fees.

### Accessible Inflight Entertainment and Communication

Inflight entertainment accessibility advocates presented a proposal at the meeting requesting: (1) passengers with disabilities travelling on aircraft without fully accessible IFE be provided a portable device allowing for accessibility; (2) any new aircraft placed in service be made fully accessible; and (3) should any aircraft upgrades be performed, such upgrades must include fully accessible IFE. All proposals presented included the additional requirement that inflight communications be made similarly accessible as inflight entertainment.

The next plenary session of the ACCESS Committee will be held on August 16-17, 2016 in Washington D.C.

### **LAN AIRLINES SA SETTLES FCPA CASE FOR \$22 MILLION**

South American airline LAN Airlines SA and the U.S. Department of Justice recently agreed to a \$22 million settlement concerning allegations that the airline violated the Foreign Corrupt Practices Act (FCPA) by facilitating bribes to certain officials during a labor dispute.

The FCPA generally prohibits (1) giving "anything of value;" (2) to a foreign government official; (3) to influence that official to assist in "obtaining or retaining business." "Anything of value" is defined broadly for the purposes of the FCPA and includes both tangible benefits (i.e., cash, gifts) and intangible benefits (i.e., employment, business opportunities). "Foreign government officials" include officers or employees of a department, agency, or instrumentality of a foreign government. In order to violate the FCPA, a defendant must act "corruptly," with an intent to wrongfully influence the recipient and the penalties for non-compliance can be quite severe.

Here, the settlement included a \$12.75 million penalty as part of a deferred prosecution agreement and a \$9.4 million disgorgement and interest to the U.S. Securities and Exchange Commission, without an admission or denial of charges that its CEO approved payments to an Argentine government official in 2006 who funneled the money to Argentine labor union officials in exchange for the union accepting lower wages.

Please let us know if you have any questions or would like us to review your company's FCPA compliance policies or offer advice on "best practices" for complying with the applicable regulations.

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### UNITED STATES-MEXICO AIR TRANSPORT AGREEMENT TO ENTER INTO FORCE NEXT MONTH

On July 22, 2016, the United States and Mexico exchanged diplomatic notes to implement a new Air Transport Agreement between the countries which will enter into force next month and significantly liberalize U.S.-Mexico aviation relations.

The Agreement will permit U.S. and Mexican passenger carriers to conduct 3rd-, 4th- and 5th- freedom scheduled and charter flights. Although the new Agreement does not include 7th-freedom passenger-carrier charter rights, DOT will consider applications on the basis of comity and reciprocity, similar to how the Department handles 7th-freedom charter applications for passenger carriers from other countries. The new Agreement also includes unrestricted 3rd-, 4th-, 5th- and 7th-freedom rights for U.S. and Mexican cargo carriers for both scheduled and charter service. The new Agreement does not allow for any cabotage.

We understand that DOT will be announcing in the coming days how it intends to license U.S. and Mexican carriers under the new Agreement and will keep our readers apprised of new developments.

### U.S. CUSTOMS AND BORDER PROTECTION (CBP) GLOBAL ENTRY EXPANDED TO UNITED KINGDOM CITIZENS

CBP has announced an expansion of its Global Entry International Trusted Traveler Program, which will allow open enrollment for all British citizens capable of providing valid documentation of British citizenship, such as a valid United Kingdom passport. The expansion comes after the conclusion of a 2013 pilot program which permitted certain British citizens to enroll in U.S. Global Entry. As part of the expansion, a number of U.S. citizens will be similarly eligible to enroll in the United Kingdom's Registered Traveler program, as long as the enrollee is at least 18 years old and either has a British visa, or has visited the United Kingdom at least four times within the last year. The expansion of both programs was announced on July 6, 2016 and will continue indefinitely.

### U.S. ENVIRONMENTAL PROTECTION ADMINISTRATION (EPA) DECLARES AIRCRAFT EMISSIONS THREAT TO THE ENVIRONMENT

The U.S. Environmental Protection Agency (EPA) issued a finding that greenhouse gas emissions from aircraft can endanger the environment. This finding will allow the EPA to adopt broader federal regulations regarding airplane emissions in the future. The EPA finding specifically noted the dangers posed by carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride emissions from aircraft. The finding applies to a wide variety of commercial aircraft from small 70-seat regional jets to the largest jumbo jets. The EPA said that the covered aircraft account for approximately 90% of the total greenhouse gas emissions by aircraft in the United States.

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Although the finding does not create any new legal obligations or requirements, it does set the stage for the EPA to create subsequent rules to address aircraft emissions. The International Civil Aviation Organization (ICAO) recently agreed on the first-ever international standards to regulate carbon dioxide emissions from aircraft. The EPA finding will allow the agency to issue rules in the future to address and possibly adopt the ICAO standards as U.S. domestic law. Some environmental groups, such as the sustainable-transport group Transport & Environment (T&E), have urged the United States to adopt standards even more strict than those issued by ICAO. These groups are advocating for a “technology-leading” standard rather than what they believe is a “technology-following” ICAO standard. Any decisions and the chances for success are likely to be impacted by the Presidential election in November. We will keep our readers apprised of any new developments.

### **FAA AMENDS PROPOSAL OF SAFETY MANAGEMENT SYSTEM FOR CERTIFIED AIRPORTS**

On June 12, 2016 the FAA published a Supplemental Notice of Proposed Rulemaking (SNPRM) proposing to integrate safety management systems (SMS) into day-to-day airport operations. SMS is a formal approach to managing organizational safety through safety policy, safety risk management, safety assurance, and safety promotion. The proposal requires implementation of the SMS program at any Part 139-certificated small, medium, or large airport identified by U.S. Customs and Border Protection (CBP) as: (1) a port of entry; (2) designated as an international airport requiring landing rights; or (3) identified as having more than 100,000 total annual operations per year, including takeoffs and landings. The SNPRM can be accessed at: <https://federalregister.gov/a/2016-16596>. Interested parties have until September 12, 2016 to file comments.

### **INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA) AND INTERNATIONAL FEDERATION OF FREIGHT FORWARDERS (FIATA) ANNOUNCE NEW AIR CARGO PROGRAM**

On July 18, 2016 IATA and FIATA signed an agreement to implement the IATA-FIATA Air Cargo Program (IFACP). The IFACP aims to refine and re-engineer the existing Cargo Agency Program to accommodate recent changes in the role of freight forwarders from airline selling agents to purchasing customers. The IFACP also eliminates unnecessary administrative procedures and corresponding costs in order to dedicate additional resources towards regulatory compliance, safety, and security initiatives, as well as for the introduction of new technologies. Public endorsement of the IFACP is scheduled in October at the FIATA World Congress in Dublin, Ireland. The program will begin in Canada in early 2017, with full global rollout projected by late 2018.

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### DOJ FINES SHIPPING COMPANY FOR PRICE-FIXING

The U.S. Department of Justice recently fined Norwegian shipping company Wallenius Wilhelmsen Logistics AS \$98.9 million for conspiring to fix prices on shipping services for cars and other vehicles. In addition to paying the fine, Wallenius Wilhelmsen will cooperate with the DOJ.

The DOJ states that the price fixing scheme dates back to at least February 2000 and continued until September 2012 and alleges that Wallenius Wilhelmsen and other companies had a long running scheme to rig bids to inflate the costs for roll-on, roll-off cargo shipping to and from the U.S. and elsewhere.

Wallenius Wilhelmsen is the fourth company to plead guilty in DOJ's investigation, which has so far resulted in more than \$230 million in fines. The Wallenius Wilhelmsen criminal fine is the largest fine to date arising from this investigation.

If you have any questions, please contact Evelyn Sahr ([esahr@eckertseamans.com](mailto:esahr@eckertseamans.com), 202-659-6622) or Drew Derco ([dderco@eckertseamans.com](mailto:dderco@eckertseamans.com), 202-659-6665).

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## AVIATION REGULATORY UPDATE

### DOT INCREASES CIVIL PENALTY AMOUNTS

The United States Department of Transportation (DOT) recently published an interim final rule to adjust for inflation the maximum civil penalty amounts for violation of certain economic statutes, and the rules and orders issued pursuant to these statutes.

Under Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 methodology, the following increases became effective August 5, 2016:

- 49 U.S.C. 46301(a)(1) - General civil penalty for violations of certain aviation economic regulations and statutes. From \$27,500 to \$32,140 (base line penalty \$25,000);
- 49 U.S.C. 46301(a)(1) - General civil penalty for violations of certain aviation economic regulations and statutes involving an individual or small business concern. From \$1,100 to \$1,414 (base line penalty \$1,100);
- 49 U.S.C. 46301(a)(5)(A) - Civil penalties for individuals or small businesses for violations of most provisions of Chapter 401 of Title 49, including the anti-discrimination provisions of sections 40127 and 41705 and rules and orders issued pursuant to these provisions. From \$11,000 to \$12,856 (base line penalty \$10,000);
- 49 U.S.C. 46301(a)(5)(C) - Civil penalties for individuals or small businesses for violations of 49 U.S.C. 41719 and rules and orders issued pursuant to that provision. From \$5,500 to \$6,428; and
- 49 U.S.C. 46301(a)(5)(D) - Civil penalties for individuals or small businesses for violations of 49 U.S.C. 41712 or consumer protection rules and orders issued pursuant to that provision. From \$2750 to \$3214.

### CBP ACCEPTS IATA XML STANDARD FOR CARGO

On August 8, 2016, the International Air Transport Association (IATA) announced that IATA's Cargo-XML messaging standard will be utilized by the U.S. Customs and Border Protection Agency (CBP) to collect advance cross-border data on U.S. export shipments.

As background, Cargo-XML messages and standards are developed by the IATA Cargo-XML Task Force (CXMLTF) by reusing certain components from the United Nations Center for Trade Facilitation and Electronic Business core component library.

CBP's utilization of these new standards is due to begin within the next few months. CBP is working to reduce the considerable number of Electronic Data Interchange (EDI) message formats currently supported to process international import, export cargo and cargo release information. IATA is assisting in this effort by permitting the US-CBP to publish to the minimal data file specifications for the IATA Cargo-XML messages.

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IATA's Cargo-XML Toolkit will simplify current processes as it will contribute to standardization of data submission for air cargo shipments. IATA's Cargo-XML purpose is to ensure uniformity, mutual understanding, accuracy and economy in electronic data exchanges. Agencies such as the Cargo Committee, Cargo Services and Cargo Agency Conferences have accepted these new Cargo-XML standard messages already. However, CBP's adoption of IATA's standard is seeing in the industry as an important step towards standardization on a global scale.

### GAO STUDY FINDS THAT AIRLINE POLICIES FOR CONTRACTING OUT MAINTENANCE REMAIN CONSISTENT

The Federal Aviation Administration, which is responsible for overseeing nearly 4,800 FAA-certificated repair stations (both in the United States and abroad), recently tasked the Government Accountability Office (GAO) with performing a comprehensive review of maintenance contracting trends and FAA oversight of repair stations. GAO's report, published last month, assesses: (1) trends and factors that influence airline maintenance; (2) FAA's oversight of foreign and domestic repair stations; and (3) efforts taken by FAA to improve its risk-based oversight. In preparing its report GAO analyzed BTS data on maintenance spending from 2010-2014 by certain U.S. commercial airlines. GAO also conducted interviews, visited multiple foreign repair stations, and analyzed FAA inspection and enforcement data for repair stations during the same time period.

After conducting this research GAO determined that the amount of aircraft maintenance contracted out to domestic and foreign repair stations (as opposed to being performed in-house) has remained relatively steady from 2010 through 2014. GAO's report indicates that annual contracted maintenance spending ranged from 58 to 64 percent of total annual maintenance spending for the airlines surveyed. GAO also reported that the type of aircraft maintenance can affect an airline's decision to contract out maintenance. For example, GAO notes that airlines generally indicated that the majority of light, routine maintenance is performed in-house while more complicated maintenance and repairs are typically outsourced. Representatives interviewed by GAO during the course of its study identified three key influencing factors that may affect airline maintenance decisions: (1) service quality available at repair stations; (2) cost considerations; and (3) the use of service contracts with OEMs.

The GAO report recommended that FAA should: (1) develop and implement a process for incorporating data for U.S. airlines' maintenance contracted to repair stations into FAA's Safety Assurance System (SAS); and (2) develop a process to evaluate the effectiveness of SAS.

### FIFTH CIRCUIT UPHOLDS EXCISE TAX ON FRACTIONAL AIRCRAFT PROGRAMS

On July 25, 2016, the U.S. Court of Appeals of the Fifth Circuit unanimously upheld a district court ruling that Bombardier Aerospace Corp. was liable for \$32 million in aviation excises taxes. The Internal Revenue Service ruled in March 2015 that Bombardier's fractional aircraft ownership program, Flexjet, was required to remit federal excise taxes on fees collected from participants. Bombardier challenged the finding and a



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Texas district court ruled in favor of the government on cross-motions for summary judgment. The Fifth Circuit decision upholds the district court's ruling.

Bombardier charges three types of fees to Flexjet participants: a monthly management fee, a variable rate fee, and a fuel component adjustment fee. The IRS held that any "amount paid for taxable transportation" is subject to federal excise tax. Bombardier argued that it was not engaged in "commercial aviation" and that the monthly management fee was not taxable under the statute.

The district court and Fifth Circuit agreed with the IRS's position that the "possession, command, and control" test warranted the fees at issue being taxable because Bombardier was in possession, command, and control of the aircraft involved in the transportation. Bombardier sought to rely on a 1992 IRS memo to a competitor regarding the taxes at issue. The Fifth Circuit dismissed this argument because the 1992 memo was not complete, was not specific about which fees were taxable, and was not directed to Bombardier but rather to a competitor. The Fifth Circuit found a more recent 2004 memo to be sufficient enough to inform Bombardier of its tax obligations.

### ASIANA SEEKS TO HAVE CARGO ANTITRUST CLAIMS DROPPED

More than 90 lawsuits have been filed following a joint investigation by the U.S. Department of Justice and the Federal Trade Commission investigation of an alleged price-fixing scheme of the air freight industry dating back to 2006. According to DOJ, the conspirators allegedly used meetings, conversations and other forms of communication to determine the rates that airlines should charge for various routes, and then imposed rates on consumers. Lawsuits related to this investigation were filed against numerous airlines, including Asiana Airlines Inc. (Asiana).

On August 16, 2016, Asiana petitioned a New York federal judge to dismiss claims against it by a subsidiary of Deutsche Bahn AG, arguing that the \$370 million antitrust suit should be dropped because the claimant isn't a U.S. company. The claim, originally filed by Schenker AG, seeks damages for air freight purchases that Schenker or its affiliates made from air carriers including Asiana over a six year period. The complaint fails to identify any of the purported affiliates and as such, Asiana argues, "Neither the Constitution nor the Federal Rules permit Schenker to represent a group of absent, unidentified 'affiliates' under the guise of an 'opt-out' complaint." Asiana also argues that to make Sherman Antitrust Act claims, Schenker must prove the actions of the defendants affected U.S. export commerce and that it is a U.S. exporter, which Schenker is unable to do under the Foreign Trade Antitrust Improvements Act.

We will keep readers updated on any new developments in this case.

### NEW FAA RULES FOR SMALL UNMANNED AIRCRAFT SYSTEMS GO INTO EFFECT

On August 29, 2016 the FAA announced the implementation of Part 107 – Small Unmanned Aircraft Rule (published as of June 21, 2016) for routine non-hobbyist use of small unmanned aircraft systems (sUAS or drones).

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Provisions of Part 107 that recently became effective include those that pertain to waivers on some rule's restrictions based on Section 333 of the FAA Modernization and Reform Act of 2012 (Part 101), airspace authorization and aeronautical knowledge tests. For instance, the FAA can waive some of the rule's restrictions if an operator can demonstrate that the proposed flight "may operate safely in the national airspace system". Moreover, users of sUAS can operate their unmanned aircraft in Class G (uncontrolled) airspace without air traffic control permission. But, operations in Class B, C, D and E airspace need air traffic approval. Access to controlled airspace can be requested via the FAA's electronic portal. Finally, operators can now take the Aeronautical Knowledge Test required under Part 107. After an operator passes the test, he or she must complete an FAA Airman Certificate and/or Rating Application to receive a remote pilot certificate required under Part 107.

Importantly, Part 107 does not apply to model aircraft. Model aircraft operators must continue to satisfy all the criteria specified in Section 336 of Part 101, including the stipulation they be operated only for hobby or recreational purposes.

### **DOT ASSESSES CIVIL PENALTIES AGAINST FOUR DOMESTIC AIRLINES FOR PROVIDING INACCURATE COMPENSATION INFORMATION**

American Airlines, Alaska Airlines, Southwest Airlines and United Airlines were each assessed civil penalties ranging from \$35,000 to \$45,000 for violating several DOT regulations, including the Department's oversales rules, 14 C.F.R. Part 250, the domestic baggage liability rule, 14 C.F.R. Part 254, and failing to adhere to the Customer Service Plan requirements found in 14 C.F.R. § 259.5. These fines are the result of violations uncovered during compliance inspections by the Department's Office of Aviation Enforcement and Proceedings at various U.S. airports.

\$45,000 against American Airlines - The Enforcement Office found that American Airlines agents at boarding gates and ticket counters failed to produce proper copies of the carrier's written denied boarding statement (250.9 Notice) upon request. In some cases agents produced outdated copies of the 250.9 Notice with compensations amounts being more than five years out of date. American Airlines agents also provided ticket notices or displayed signs which limited the carrier's domestic baggage liability to amounts less than \$3,500. Pursuant to 14 C.F.R. Part 254, "an air carrier shall not limit its liability for provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's baggage to an amount less than \$3,500 per passenger for travel on or after August 25, 2015".

\$40,000 against Alaska Airlines - The Enforcement Office found that Alaska Airlines agents at boarding gates and ticket counters failed to produce accurate copies of the carrier's written denied boarding statement upon request. In many instances, the agents provided outdated copies with compensation amounts below the minimum value as stated in 14 C.F.R. § 250.5. Additionally, some compensation amounts were more than five year out of date. Alaska agents also produced ticket notices or displayed signs which limited the carrier's domestic baggage liability to amounts less than \$3,500.

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\$40,000 against Southwest Airlines – The Enforcement Office found that Southwest Airlines agents at some boarding gates and ticket counters could not provide proper copies of the carrier’s written denied boarding statement upon request. One agent provided a partial copy of Southwest’s denied boarding statement, which contained compensation amounts less than the actual amounts stated in 14 C.F.R. § 250.5. Furthermore, agents produced ticket notices or displayed signs which limited the carrier’s domestic baggage liability to amounts less than \$3,500.

\$35,000 against United Airlines - The Enforcement Office found that United Airlines agents at some boarding gates and ticket counters could not provide proper copies of the carrier’s written denied boarding statement upon request. Some agents could not produce a copy of the written denied boarding statement at either the ticket counter or the boarding gate. In some instances agents produced outdated copies of the statement with compensation amounts below the minimum value as stated in 14 C.F.R. § 250.5.

### AIR CANADA FINED FOR DISABILITY VIOLATIONS

Air Canada violations of 14 C.F.R. Part 382 – Air Canada was fined \$225,000 for violations of 14 C.F.R. Part 382 for failing to provide dispositive responses to written disability complaints and for failing to allow passengers with service animals to travel in the cabin. By engaging in the above practices, Air Canada also violated 49 U.S.C. § 41712 which prohibits carriers from engaging in unfair and deceptive practices. More information on the alleged violations is below:

Failure to Provide Dispositive Responses to Disability Complaints - The Enforcement found that Air Canada’s responses to disability-related complaints frequently failed to inform complainants of their right to pursue enforcement action with DOT. Furthermore, Air Canada regularly failed to specifically admit or deny that a violation of the substantive portions of Part 382 that were at issue in the complaints occurred.

Service Animal Harness and Training Documentation Policy - In 2008 Air Canada submitted a conflict of law waiver request which requested the Department grant a waiver to the carrier regarding compliance with 14 C.F.R. 382.117. In its request Air Canada stated that section 149 of the Canadian Transportation Agency’s (CTA) Air Transport Regulations (ATR) limited the carrier’s acceptance of service animals to animals that have been trained by specific organizations and are harnessed in-flight. The Department denied the waiver request and a subsequent appeal, noting that the language of CTA’s Air Transport Regulations did not prevent Air Canada from accepting other types of service animals. Upon review of the carrier’s website and personnel training manuals during the regulatory compliance inspection, the Enforcement Office noted that Air Canada had a policy in place that was not in compliance with 14 C.F.R. § 382.117.

### CIVIL PENALTIES PROPOSED BY FAA

Airworthiness Directives – The FAA has proposed a \$500,000 civil penalty against SeaPort Airlines, Inc. for allegedly operating three Cessna Caravans on a total of 583 flights when inspections were overdue. The FAA alleges SeaPort did not perform the initial and recurring inspections of the turbine compressor blades for the aircraft. These required inspections are intended to prevent compressor turbine blade failures,

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which could cause an engine to lose power. Because the inspections were overdue, the aircraft were not airworthy. Furthermore, the FAA alleges SeaPort did not record the method of compliance with the Airworthiness Directive and when the next recurring inspection was required for the aircraft.

Hazardous Materials Violations – The FAA has proposed a \$54,000 civil penalty against Gordon Food Service for violations of the Hazardous Materials Regulations. The FAA alleges that Gordon Food Service offered for shipment via UPS 30 four-ounce Fryer Boil-Out Foaming tablets. The tablets are made of corrosive sodium hydroxide. The package was not properly marked and the company did not provide the required emergency response information for the shipment. Also, the FAA alleges Gordon Food Services did not ensure its employees received required hazardous materials training.

If you have any questions, please contact Evelyn Sahr ([esahr@eckertseamans.com](mailto:esahr@eckertseamans.com), 202-659-6622) or Drew Derco ([dderco@eckertseamans.com](mailto:dderco@eckertseamans.com), 202-659-6665).

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### OFAC APPROVES EXPORTS TO IRAN AIR

The U.S. Treasury Department's Office of Foreign Assets Control (OFAC) made history on September 21, 2016 when it approved the sale of aircraft by Boeing and Airbus to Iran Air. The OFAC license issued to Airbus, which is the first of two applied for, gives authorization for "short-term" deliveries of seventeen A320 and A330 aircraft to Iran Air. The OFAC license issued to Boeing allows it to complete negotiations with Iran Air for the purchase of up to eighty aircraft of various types, including 737s, 777s and 787s. Boeing has also agreed to help arrange the lease of another twenty-nine of its aircraft to Iran Air.

Airbus and Iran Air recently signed a contract covering orders for twenty-two airplanes from the current A320 family, twenty-four A320neo-family airplanes, twenty-seven of the current A330 family, eighteen A330-900s, sixteen A350-1000s and twelve A380s. Boeing will reportedly deliver up to one hundred and nine aircraft to Iran Air. These new developments are made possible by the Joint Comprehensive Plan of Action, which was implemented in January and mandates a significant reduction in Iran's nuclear ambitions together with regular access to Iranian nuclear facilities by the International Atomic Energy Agency. Boeing's contract will be the first aircraft order from an Iranian airline since the U.S. government placed sanctions on Iran following the country's 1979 Islamic Revolution. It would also be the largest commercial deal between U.S. and Iranian companies since January, when the Obama Administration lifted sanctions against Iran.

### U.S. DEPARTMENT OF TRANSPORTATION ABANDONS PROPOSED CONTROVERSIAL GDS REGULATION

The U.S. Department of Transportation (DOT) has quietly removed some of the most controversial elements from its proposed "Transparency of Airline Ancillary Fees and Other Consumer Protection Issues", more commonly known as Enhancing Airline Passenger Protections III (EAPP3). EAPP3 initially proposed a variety of new requirements for airlines including disclosing fee information for basic ancillary services, such as advance seat selection or checked luggage, to Global Distribution Systems (GDSs) and including GDSs in the definition of "ticket agent" as it relates to compliance with DOT's consumer protection rulemaking regime. Many of the proposed requirements were widely criticized by various industry stakeholders. DOT has indicated that the issues raised in an initial Notice of Proposed Rulemaking "were separated into three proceedings to avoid the risk of any delay in finalizing one issue, resulting in a delay in finalizing other issues." Some commentators have suggested that this is a symbolic way for DOT to avoid issuing a highly controversial rule regarding GDSs. There is no timeline for the issuance of the new regulation.

### FAA ISSUES GUIDANCE ON RECALLED SAMSUNG GALAXY NOTE 7 DEVICES

Following a Consumer Product Safety Commission recall of the Samsung Galaxy Note 7 device on September 16, 2016, the Federal Aviation Administration (FAA) has issued a Safety Alert for Operators (SAFO), in conjunction with a Pipeline and Hazardous Materials Safety Administration (PHMSA) safety

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advisory establishing general guidance to airlines about the rules for carrying recalled or defective lithium devices on board aircraft as cargo or in carry-on luggage. U.S. hazardous material regulations currently prohibit air cargo shipments of recalled or defective lithium batteries or lithium battery-powered devices, and passengers may not turn on or charge such devices when carried on board a plane. Passengers are also required to protect the devices from accidental activation, including disabling any features that may turn on the device, such as alarm clocks.

The SAFO urges airlines to ensure that cargo and passenger processing employees as well as those responsible for cabin safety are aware of the new guidelines to ensure that cargo customers are additionally aware of the rules, and to include information and guidance on airline websites about damages or recalled lithium batteries and devices.

The SAFO additionally notes that hazardous material regulations do not preclude airlines from proactively placing their own restrictions on passengers carrying or using specific lithium battery products on board aircraft prior to an official governmental recall or advisory.

The text of the SAFO may be accessed at:

[http://www.faa.gov/other\\_visit/aviation\\_industry/airline\\_operators/airline\\_safety/safo/all\\_safos/](http://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/safo/all_safos/)

## WTO PANEL ISSUES COMPLIANCE REPORT ON US CHALLENGE TO EU AIRCRAFT SUBSIDIES

On September 22, 2016, the World Trade Organization (WTO) determined that the European Union, along with France, Germany, Spain and the United Kingdom, failed to comply with a 2011 Appellate Body decision that faulted European governments for providing \$22 billion worth of illegally subsidized financing to cover costs for the development of a number of Airbus aircraft.

In its complaint, the United States maintained that the European Union and certain Member States failed to comply with the Dispute Settlement Body (DSB) recommendations and rulings for two main reasons. First, that the European Union and certain Member States failed to act in conformity with the obligation to “take appropriate steps to remove the adverse effects,” or “withdraw the subsidy,” because not only do the subsidies found to have caused adverse effects in the original proceeding continue to cause adverse effects today, but also because by agreeing to provide Airbus with Launch Aid/Member State Financing (LA/MSF) (for Airbus' A350XWB), France, Germany, Spain and the United Kingdom caused “additional adverse effects” to the United States' interests as it “continued and even expanded” the subsidization of Airbus' Large Civil Aircraft (LCA) activities. Second, the United States claimed that France, Germany, Spain and the United Kingdom failed to comply with the recommendations and rulings adopted by the DSB because, according to the United States, the Airbus A350XWB LA/MSF measures are prohibited export and/or import substitution subsidies within the meaning of Articles 3.1 and 3.2 of the SCM Agreement – claims the United States also made in relation to the Airbus A380 LA/MSF subsidies.

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The decision is significant in that it opens a path for the U.S. to implement trade sanctions against the EU. The Compliance Report is available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/316abrwe.pdf](https://www.wto.org/english/tratop_e/dispu_e/316abrwe.pdf)

### IATA SURVEYS NON U.S. MEMBER AIRLINES ON PERSONS WITH REDUCED MOBILITY ISSUES

The International Air Transport Association (IATA) has requested immediate input from all Non-U.S. Member Airlines regarding potential new Persons with Reduced Mobility (PRM) regulations that IATA is currently negotiating with the U.S. Department of Transportation (DOT). The following topics are being considered in IATA's survey:

#### **Service Animals:**

To avoid continuing issues of fraud and abuse of current rules allowing dogs and other trained service or support animals on board aircraft for no additional fee, IATA is negotiating the potential introduction of a "decision tree" approach to replace third party documentation requirements in situations where a passenger cannot provide credible assurances that an animal is a service animal. Under this approach, passengers wishing to bring a service or emotional support animal on board would have to submit an on-line questionnaire in order to certify under penalty of perjury that: (1) the passenger is a PRM in need of a service/emotional support animal; and (2) the animal is trained to provide the required service.

IATA is asking all Non-U.S. Member airlines to answer the following questions, the responses to which will be de-identified prior to being provided to DOT:

1. Does your carrier prefer that the current regulation remain unchanged and that carriers can require people who are seeking to bring emotional support animals to produce third party medical certification or are you willing to accept the decision tree approach?
2. If you prefer that the regulation remain the same, please provide examples of countries you fly to that would require passengers with emotional support animals to have medical certification.
3. Are there other factors IATA should consider when arguing against a decision-tree approach?

#### **Accessible In-Flight Entertainment:**

IATA, Airlines For America (A4A) and airline representatives have indicated a willingness to make new in-flight entertainment systems fully accessible to PRMs by a specific date to be determined. IATA is opposed to any requirement to retrofit existing IFE's due to costs and the lack of availability of accessible content to be accessed by IFE's. IATA has also opposed requirements to offer PRMs personal entertainment devices until such time that accessible IFE's are made available.

IATA has asked all Non-U.S. Member airlines to answer the following questions:

1. How much of your current fleet is equipped with IFE equipment? Please provide fleet type, fleet counts, IFE system manufacturer, and IFE system.

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2. How much of your current IFE equipment can support closed captioning for deaf and hard of hearing passengers? Please provide fleet type, fleet counts, IFE system manufacturer, and IFE system.
3. How much of your current IFE equipment can support audio descriptions for blind passengers? Please provide fleet type, fleet counts, IFE system manufacturer, and IFE system.
4. How much of your current content (e.g. movies, TV shows, games, carrier-created videos, etc.) is accessible (i.e. supports closed captioning and audio descriptions) to blind, deaf, and/or hard of hearing passengers? Please provide individual percentages for movies, TV shows, games, and carrier-created content.
5. How much of your content is produced in the U.S. and in the English language?
6. Does your airline have the ability to stream content to a carrier-owned portable electronic device (PED)? If yes, please provide the total number of planes that have this capability, including fleet type, fleet counts, and streaming supplier information.
7. Does your airline have the ability to stream content to a passenger-owned PED? If yes, please provide the total number of planes that have this capability, including fleet type, fleet counts, and streaming supplier information.
8. Does your airline currently offer PEDs (either free or for a fee) for customers to view content?
9. How much of your current content is edited specifically for your airline? Please provide individual percentages for movies and TV shows.

If you are interested in responding, please send us the information and we will ensure it is submitted in an anonymous fashion.

### SENATE TRANSPORTATION LEADERS INTRODUCE MULTI-MODE SECURITY BILL

On September 21, 2016 U.S. Senate Commerce, Science, and Transportation Committee Chairman John Thune (R-SD) and ranking member Bill Nelson (D-FL) introduced legislation to expand and enhance security efforts for the nation's rail, transit, highway, and maritime passenger and freight transportation modes.

Highlights of the legislation, as noted in a recent press release by the Committee, include, enhancements in risk-based security planning, canine explosive detection teams for surface transportation, increased transparency, enhanced rail security, and reforms to the Port Security and the Transportation Worker Identification Credential (TWIC) Program. A full copy of the Surface Transportation and Maritime Security Act is available at: [https://www.commerce.senate.gov/public/\\_cache/files/a004011d-eb2d-4869-8f4f-5c72b9f26b10/834F471C39E637CB43A583853C620E0C.sftsafe.12.pdf](https://www.commerce.senate.gov/public/_cache/files/a004011d-eb2d-4869-8f4f-5c72b9f26b10/834F471C39E637CB43A583853C620E0C.sftsafe.12.pdf)

### FAA ADVISORY BODY RECOMMENDS CYBER SECURITY MEASURES

The FAA's top technical advisory group adopted language on September 22, 2016 seeking to ensure cyber security protections will be incorporated into all future industry-wide standards affecting everything from aircraft design to flight operations and maintenance practices. The move by the FAA stops short of mandating detailed engineering requirements or safeguards, however, which are reserved for FAA-created



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committees of experts focused on drafting specific standards for individual industry segments. The decision also means that cyber issues must now be considered by manufacturers, carriers, maintenance facilities and airports, who will be required to include cyber security factors in routine activities. The guidelines will apply to all aviation standards that ultimately become regulations, advisories or guidance documents adopted by the FAA.

Cyber security concerns have escalated throughout the aviation industry, with U.S. and European regulators scrambling to coordinate efforts against cyber security attacks. A report by the technical advisory group, which has yet to be released, is being called a drafting guide for performance standards, and lists “signal detection spoofing capabilities” as one technique to guard against potential cyber-attacks. Such features typically relate to new cockpit-warning systems that can alert pilots of unauthorized digital transmissions.

### FAA LAUNCHES REBATE PROGRAM FOR NEXTGEN AVIONICS UPGRADES FOR GENERAL AVIATION AIRCRAFT

On September 19, 2016, the FAA announced the launch of its Automatic Dependent Surveillance-Broadcast website, which gives general aviation aircraft owners the opportunity to redeem a \$500 rebate to offset the cost of updating eligible aircraft with Next Generation (NextGen) avionics technology. According to a final rule on Performance Standards for Critical NextGen Avionics Systems published by the FAA in 2010, all general aviation aircraft are required to be updated with NextGen avionics by January 1, 2020.

The FAA will issue twenty thousand rebates on a first-come, first-served basis for one year or until all twenty thousand rebates are claimed – whichever comes first. The rebate is available only to owners of U.S.-registered, fixed-wing, single-engine piston aircraft first registered before January 1, 2016.

The FAA estimates that one hundred and sixty thousand aircraft need to be equipped with NextGen avionics by the January 1, 2020 deadline. Aircraft that fly only in uncontrolled airspace where no transponders are required, and aircraft without electrical systems, such as balloons and gliders, are exempt from the mandate.

### DRONE ADVISORY COMMITTEE HOLDS INAUGURAL MEETING

The inaugural Drone Advisory Committee meeting was held on September 16, 2016 in Washington at the offices of the Radio Technical Commission for Aeronautics (RTCA). RTCA’s President Margaret Jenny, along with FAA Administrator Michael Huerta and Intel CEO Brian Krzanich, presided over the day long affair. Attendees included 35 RTCA members, representing diverse interests of aviation and Unmanned Aircraft Systems (UAS) as well as other interested parties. The goal of the meeting was to begin to develop consensus on the best way to integrate UAS into the National Airspace System (NAS).

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A diverse cross section of the industry was represented, including the leaders of Google [X], Amazon Prime Air, and Facebook, the Mayor of San Francisco, the CEO of Los Angeles World Airports, the President and CEO of Aircraft Owners and Pilots Association, the Presidents of American Airlines, and the President and CEO of Helicopter Association, International. The FAA was also significantly represented.

Moving forward, at least initially, the group's top priorities include answering the questions, "What do I need to do to fly a drone in the airspace?", and "What are the most pressing privacy concerns and what are the respective roles, responsibilities and authorities of local, state and federal entities in resolving those issues?" The Committee agreed that remaining issues will be evaluated by a soon-to-be-formed DAC Subcommittee to prioritize. A more detailed summary of the meeting will be posted on the Drone Advisory Committee website at: <http://www.rtca.org/content.asp?pl=33&sl=216&contentid=216>

### FAA FINALIZES REPAIR STATION HOUSING REQUIREMENTS

Effective September 26, 2016, the FAA adopted as final a rule that will assist the repair station industry by eliminating the housing requirement that is costly and not necessary in many cases. The final rule addressed comments submitted on the subject, and adopting the interim final rule published on July 27, 2016, ultimately removed the requirement that a repair station with an airframe rating provide suitable permanent housing to enclose the largest type and model aircraft listed on its operations specifications. The FAA also revised its general housing and facilities regulation to provide that a repair station's housing for its facilities, equipment, materials, and personnel must be consistent not only with its ratings, but also with its limitations to those ratings. Finally, the FAA added an additional general purpose limited rating to cover maintenance work not covered by the existing 12 limited rating categories. A copy of the final rule is available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-09-26/pdf/2016-23121.pdf>

### FAA INSTITUTES NEW REPORTING TERMINOLOGY

According to the FAA, effective October 1, 2016, at 0900 UTC, airports in the United States will begin using new reporting terminology to describe contaminated runways in both Field Condition Notices to Airmen (FICON NOTAMs) and on Automatic Terminal Information Service (ATIS) radio messages. This revised reporting terminology is associated with the Takeoff and Landing Performance Assessment (TALPA) initiative under which Mu (friction) values will NOT be provided to pilots or operators. Alternatively, a three-digit Runway Condition Code (RwyCC) will be assigned to paved runways when their surfaces are more than 25% covered by: water to include "wet" (which is damp or 1/8 inch depth or less of water), frost, snow, slush, and/or ice. Similar to Mu values, a RwyCC will be assigned to each runway third (i.e. touchdown, midpoint, and rollout). To help carriers interpret a RwyCC's meaning, a Runway Condition Assessment Matrix (RCAM) has been developed, which is available at: <http://www.faa.gov/about/initiatives/talpa/>

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### FAA CIVIL PENALTY

The FAA has proposed a civil penalty of \$892,500 against Air Methods Corp. for allegedly transporting passengers on an Airbus EC-135 helicopter, which was not air worthy. During an inspection on November 4, 2014, the FAA inspector found that the helicopter's pitot tubes – components in a system that measures an aircraft's airspeed – were severely corroded. Air Methods was immediately notified but continued to operate the helicopter on fifty-one passenger-carrying revenue flights between November 4 and November 11, 2014 without replacing the pitot tubes.

The FAA alleges Air Methods operated the aircraft when it was not airworthy, which violated its operations specifications by failing to correct a known defect in the aircraft and acting in a manner that endangered lives and property.

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

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

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

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

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

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

#### **Accessible Lavatories:**

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

## AVIATION REGULATORY UPDATE

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

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

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

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

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

Comments are due by November 30, 2016.

## AVIATION REGULATORY UPDATE

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

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

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

Specific aviation/travel-related changes announced include:

#### **Travel-related Transactions**

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

#### **Civil Aviation**

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

## AVIATION REGULATORY UPDATE

### Trade and Commerce

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

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

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

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

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

## AVIATION REGULATORY UPDATE

### ICAO FINALIZES GLOBAL EMISSIONS SCHEME

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

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

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

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

### FAA PROPOSES NEW REGULATIONS FOR PILOT DEVELOPMENT

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

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



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

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

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

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

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

### FAA PROPOSED CIVIL PENALTY

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

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

### DOT CONSENT ORDERS

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

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

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

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

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

*This Aviation Regulatory Update is intended to keep readers current on matters affecting the industry, and is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at [esahr@eckertseamans.com](mailto:esahr@eckertseamans.com) or 202-659-6622; Drew Derco at [dderco@eckertseamans.com](mailto:dderco@eckertseamans.com) or 202-659-6665; or Reese Davidson at [rdavidson@eckertseamans.com](mailto:rdavidson@eckertseamans.com) or 202-659-6633.*

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### U.S. DEPARTMENT OF LABOR RELEASES NEW REGULATIONS ON EMPLOYEE CLASSIFICATIONS FOR OVERTIME – EFFECTIVE DECEMBER 1, 2016

The U.S. Department of Labor published sweeping new regulations that broaden federal overtime pay regulations to cover nearly five million employees. The regulations effectively raise the minimum salary threshold required to qualify for the Fair Labor Standards Act's "white collar" (i.e., executive, administrative and professional employee classifications) exemption -- from \$23,660 to \$47,476 per year. The new threshold will become effective on December 1, 2016.

Practically, what this means for your U.S. operations is that many employees currently identified as being "exempt" from overtime may have to be reclassified as "non-exempt" and thus be made eligible for overtime after working 40 hours in a week solely on the basis of the amount they are paid.

We recommend you put together a list of all currently exempt employees that make less than \$47,476 on December 1, 2016 and confer with counsel in order to evaluate the ramifications of this new regulatory scheme on your business and discuss potential responses which could include raising salaries, paying overtime above a salary, reorganizing workloads/adjusting schedules/spreading work hours, and adjusting wages.

### ACCESS COMMITTEE REACHES AGREEMENT ON IFE

On November 2, 2016, the ACCESS Committee met for a final time to finalize their work on potential regulations mandating accessible in-flight entertainment, the third and final issue that was before the committee. Note: we reported the status of the other two issues, accessible lavatories and service animals, in last month's update. The Committee reached agreement on a draft term sheet that will provide the framework for a future proposed regulation in this area. Barring a change due to the new administration, which is possible, we expect a Notice of Proposed Rulemaking to be published in mid-2017, with a final rule expected in late 2017 or early 2018. Any regulations promulgated in this area would apply to carriers that fly to, from or within the United States.

The following are the highlights of that draft term sheet:

#### IFE Hardware/Software:

- Carriers do not have to retrofit existing seatback In Flight Entertainment (IFE) systems to be accessible.
- Any IFE system on a newly delivered aircraft or any newly installed IFE on an existing aircraft must be capable of supporting closed captions in either bitmap format or user-customizable text after the effective date of the final rule.
- Carriers must ensure that new IFE systems support closed captions in user-customizable text. (This requirement applies to aircraft ordered three or more years after the effective date of the final rule)

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and delivered five or more years after the effective date of the rule for single-aisle aircraft, and delivered more than six years after the effective date of the rule for wide body aircraft).

- Carriers must install any software upgrade needed to ensure that any user interface that connects to the Internet on all aircraft is accessible within 120 days of the final rule when upgrading your IFE system or within two years of the final rule on all aircraft. An accessible user interface is operable by people who are blind or visually impaired.
- If a carrier's existing IFE does not support closed captioning in either bitmap or user customizable format, carriers must within three years of the effective date of the final rule at your choice either (1) provide carrier supplied Personal Electronic Devices (PEDs) with comparable content ; (2) offer comparable content streamed wirelessly from an onboard serve on passenger supplied PEDs; or (3) offer access to Wi-Fi streaming of entertainment content on the same terms offered to other passengers on passenger-supplied PEDs. Accessible IFE content must be offered to disabled passengers at the same or lower price than that offered passengers in same class of service
- Carriers are not required to display closed captions or audio descriptions on overhead screens or distributed video displays.

### IFE Content:

- Covered content under this future rule includes English-language theatrical movies as well as English and Spanish language television programming (for programs where the spoken language is Spanish) licensed by the content owner that has been produced by a U.S. distributor and displayed via a U.S. broadcast station or paid TV provider (e.g. cable/satellite) on television or provided in theaters in the U.S. with closed captions and/or audio-description.
- Subject to limited exceptions, beginning one year after the effective date of the rule, carriers shall request a closed caption and audio described version of all covered content from their content provider.
- DOT will require carriers to report on an annual basis on its accessible content and DOT will reserve the right to revisit the regulation if there is not a substantial increase in that accessible content
- Carriers will provide clear information on their accessible IFE options to passengers in advance of travel.

### Cabin Announcements:

The ACCESS Committee did not have the opportunity to debate the issue of accessible cabin announcements; however, DOT will likely address this issue in its future rulemaking as follows:

- **One year after the effective date of the rule** carriers that use an audio/video pre-recorded announcement machine (PRAM) to convey pre-recorded cabin announcements via overhead or pre-recorded cabin announcements must include a text equivalent.
- **Three years after the effective date of the rule**, any pre-recorded announcement machine (not just PRAMs) must be capable of conveying text equivalents.

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### DHS NAMES 11 NEW FOREIGN AIRPORTS AS POSSIBLE PRECLEARANCE SITES

The Department of Homeland Security (DHS) announced that 11 more non-U.S. airports have been selected for possible Customs and Border Protection Preclearance expansion. Preclearance allows travelers to complete immigration, customs and agriculture inspection before boarding a flight to the United States. Upon arrival to the United States, pre-cleared flights are treated similar to domestic flights. CBP has indicated that Preclearance is successful at preventing certain high-risk travelers from boarding aircraft bound for the United States as well as minimizing delays at U.S. airport customs facilities. More than 10 million travelers currently fly to the United States from the 11 identified cities, which were:

Bogota, Colombia  
Edinburgh, United Kingdom  
Keflavik, Iceland  
Mexico City, Mexico  
Milan, Italy  
Osaka, Japan  
Rio de Janeiro, Brazil  
Rome, Italy  
Sao Paulo, Brazil  
St. Maarten

In 2015, 10 airports in nine countries were selected for possible expansion, including Stockholm, Sweden. The United States and Sweden recently signed an agreement that would allow the preclearance facility to open in Stockholm as early as 2019. Other countries identified in 2015 for possible preclearance sites included Belgium, the Dominican Republic, Japan, the Netherlands, Norway, Spain, Turkey and the United Kingdom. CBP currently operates 15 preclearance facilities in Aruba, the Bahamas, Bermuda, Canada, Ireland and the United Arab Emirates.

Please contact us if you would like further details on DHS' requirements for establishing preclearance facilities.

### DOT AND SOUTHWEST AIRLINES AGREE ON ACCESSIBLE AIRPORT KIOSKS

On November 1, 2016 the U.S. Department of Transportation (DOT) reached an agreement with Southwest Airlines in which Southwest will ensure that at least 50 percent of its kiosks at U.S. airports are accessible to passengers with disabilities by September 30, 2017 as opposed to the earlier deadline of December 12, 2016 as required by DOT's accessible kiosk rule. Any automated kiosk that Southwest installs after that date will also be an accessible model, so that in the future, 100 percent of its kiosks will be accessible to passengers with disabilities.

The agreement stems from Southwest self-reporting to DOT its temporary inability to comply with the Department's final rule on kiosk accessibility within the time period specified due to the scheduled

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deployment of a new reservation system which interfaces with its automated kiosks. Southwest requested an extension until September 30, 2017, (9.5 months after the regulatory deadline and three months after the final system release completing the migration to its new reservation system), to integrate, activate, and test accessible software on all kiosks installed on or after December 12, 2016.

Pursuant to the parties' agreement DOT's Office of Aviation Enforcement and Proceedings will refrain from taking enforcement action against Southwest for its temporary noncompliance with the Department's kiosk accessibility requirements from December 12, 2016, to September 30, 2017, provided that Southwest undertakes the compensatory measures outlined in the agreement, and submits verifications and certifications within that timeframe. Some of the compensatory measures agreed to by the parties include:

### Compliance and Mitigation Plan:

No later than September 30, 2017, Southwest must: (1) Provide at least 50 percent accessible kiosks across its entire proprietary kiosk fleet in service at U.S. airports with annual enplanements of 10,000 passengers or more; and (2) Ensure that any inaccessible CUSS software that it provided to covered U.S. airports for kiosks installed on or after December 12, 2016, is replaced with accessible CUSS software.

After September 30, 2017, Southwest agreed to install only accessible kiosks in its proprietary kiosk fleet system-wide to ensure that 100 percent of new kiosk installations are accessible models in the future and to deliver only accessible kiosk software to be run on accessible CUSS kiosks in service at U.S. airports with annual enplanements of 10,000 passengers and to ensure that 100 percent of the Southwest software running on accessible CUSS kiosks is accessible.

### Verification and Certification of Plan Implementation:

By October 31, 2017, Southwest must provide, with supporting documentation, a sworn statement from a responsible company official verifying and certifying: (1) the total number of its proprietary kiosks (accessible and inaccessible) in service at U.S. airports with annual enplanements of 10,000 passengers or more as of September 30, 2017; (2) the total number of its accessible proprietary kiosks in service at U.S. airports with annual enplanements of 10,000 passengers or more as of September 30, 2017; (3) the total number of CUSS kiosks in service at U.S. airports with annual enplanements of 10,000 passengers or more on which Southwest kiosk software (accessible and inaccessible) runs; (4) the total number of CUSS kiosks in service at U.S. airports with annual enplanements of 10,000 passengers or more on which Southwest accessible kiosk software runs; and (5) the total number of accessible CUSS kiosks on which accessible Southwest kiosk software runs that were installed on or after December 12, 2016, at U.S. airports with annual enplanements of 10,000 passengers or more.

See: <https://www.regulations.gov/document?D=DOT-OST-2016-0202-0001>

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### FEDERAL EXPRESS SUCCESSFULLY ENFORCES CONTRACTUAL LIABILITY LIMITATION AGAINST SHIPPER'S CLAIM

On October 4, 2016, the U.S. District Court for the Eastern District of Michigan's Southern Division found in favor of defendant Federal Express and granted a motion for partial summary judgment regarding the alleged loss of two shipments of precious metals and gems. The case involved a lawsuit by Golden Hawk Metallurgical, Inc., a shipper of precious metals and gems, alleging that FedEx failed to deliver the shipments at issue, and that a FedEx employee likely stole the goods, replacing them with rocks from one of the shipping locations. Golden Hawk had asserted three claims: 1) breach of contract; 2) breach of duty as a bailee; and 3) conversion. The terms and conditions of the parties' contracts appear on the applicable airbills, and expressly limited FedEx's liability to \$100 "unless a higher value was declared and paid for". Golden Hawk neither declared nor paid for a value higher than \$100 for either shipment. In finding for Federal Express, the Court dismissed the conversion and breach of duty as bailee claims, and declared that the claim for breach of contract was limited to \$100.

See:

<http://law.justia.com/cases/federal/district-courts/michigan/miedce/2:2015cv14005/306095/14/>

### FAA WITHDRAWS PASSENGER FACILITY CHARGE PROGRAM DRAFT

The FAA recently rescinded a draft Passenger Facility Charge (PFC) order that was initially intended to clarify its authority and update recently enacted statutory changes to the program. The PFC Program allows the collection of PFC fees up to \$4.50 for every enplaned passenger at commercial airports controlled by public agencies. These fees are used by airports to fund FAA approved projects.

The draft PFC order was published on August 5, 2016 and officially withdrawn on November 4, 2016 after significant pushback from industry trade groups that argued the draft went "well beyond the limited number of new congressional mandates and would increase the regulatory burden on airports."

The FAA advised a revised draft would be issued soon.

### DOT CONSENT ORDER

Qatar Airways Q.C.S.C. - Qatar Airways was fined \$185,000 for operating a flight carrying the AA\* designator code of American Airlines over a conflict zone for which the FAA had issued a flight prohibition in violation of 49 U.S.C. §§ 41301 and 41712.

Effective February 20, 2013, DOT approved a blanket statement of authorization giving Qatar Airways permission to carry the AA\* designator code in conjunction with foreign air transportation. The authorization was subject to the conditions regarding FAA flight prohibitions. The Office of Aviation Enforcement and Proceedings found that in late 2014 and early 2015, Qatar Airways flights carrying the

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AA\* designator code operated in certain foreign flight information regions that were under a FAA flight prohibition.

*This Aviation Regulatory Update is intended to keep readers current on matters affecting the industry, and is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at [esahr@eckertseamans.com](mailto:esahr@eckertseamans.com) or 202-659-6622; Drew Derco at [dderco@eckertseamans.com](mailto:dderco@eckertseamans.com) or 202-659-6665; or Reese Davidson at [rdavidson@eckertseamans.com](mailto:rdavidson@eckertseamans.com) or 202-659-6633;*



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### AMERICAN AIRLINES FINED \$1.6 MILLION FOR VIOLATING TARMAC DELAY RULE

On December 14, 2016, the U.S. Department of Transportation (DOT) issued a consent order assessing American Airlines \$1.6 million in civil penalties for failing to adhere to its contingency plan for lengthy tarmac delays during several incidents in 2013 and 2015. Specifically, for twenty domestic flights at Charlotte International Airport (CLT) on February 16, 2013; six domestic flights at Dallas/Fort Worth International Airport (DFW) on February 27, 2015; and one domestic flight at Shreveport Regional Airport (SHV) on October 22, 2015.

According to the Consent Order, US Airways (which subsequently merged with American Airlines) failed to adequately adjust its operations in response to the snowstorm and resulting airfield congestion at CLT. In particular, even though the FAA initiated a number of ground stops because of the weather and the need to slow down traffic to the airport, US Airways “failed to properly assess the situation in time to take preventative measures”. Such as, not sufficiently delaying or cancelling departing flights so as to allow de-icing operations to keep pace with departures. In addition, DOT did not see the situation at CLT on February 16, 2013, as so unique it went beyond the planning capabilities of the carrier.

With regard to the six domestic flights at DFW, DOT determined that US Airways (which subsequently merged with American Airlines) failed to “adequately adjust its operations” in response to the heavy snow and freezing rain that impacted operations at DFW on February 27, 2015. Specifically, DOT found that American failed to adequately reschedule a sufficient amount of departing flights to allow de-icing operations to successfully prepare aircraft to depart DFW before experiencing an extended tarmac delay (in excess of three hours without giving passenger the opportunity to deplane).

Finally, on October 22, 2015, DFW Airport was experiencing thunderstorms, which caused thirteen American Airlines flights to divert to SHV to avoid landing in inclement weather. During this series of diversions, American Airlines Flight 1382 experienced an extended tarmac delay and failed to successfully deplane passengers before the three hour mark. DOT determined that American’s failure to deplane passengers before the three hour mark in this situation was, at least partially, “due to the mismanagement of personnel and resources”.

\$602,000 of the assessed penalty will be credited to American Airlines for “compensation provided to passengers” on the affected flights; and \$303,000 of the assessed penalty will be credited to American Airlines to offset the carrier’s expended costs of “acquiring, operating and maintaining” a surface management and surveillance system at CLT and DFW to monitor the location of each aircraft on the airfield. The remaining \$695,000 of the assessed penalty is due and payable to DOT within 30 days of the issuance of the order.

### DOT EXTENDS COMMENT PERIOD FOR SEVERAL NEW REGULATIONS

On October 31, 2016, DOT published an Advance Notice of Proposed Rulemaking (ANPRM) to solicit public comment on how to implement a requirement for airlines to refund checked baggage fees when they fail to deliver bags in a timely manner. Specifically, the Department requested comments on how to define a baggage delay, and the appropriate method for providing the refund for delayed baggage.

Two weeks later Airlines for America (A4A) requested a 48-day extension of the comment period because the ANPRM “concerns a requirement that implicates several operational and financial disciplines within the airlines,” which will require the assessment of how internal information systems should be re-worked. DOT granted the extension on November 29, 2016 and comments are now due by **January 17, 2017**.

## AVIATION REGULATORY UPDATE

On Friday, December 16, 2016 DOT announced that it is also extending the response period for its Request for Information regarding industry practices on the distribution and display of airline flight schedule, fare, and availability information from December 30, 2016, to **March 31, 2017**. DOT has requested industry responses on what may harm consumers and what may constitute unfair and deceptive business practices and/or unfair methods of competition; whether any entities are blocking access to critical resources needed for competitive entry into the air transportation industry. And, whether DOT's action is unnecessary or whether DOT's action in these areas would promote a more competitive air transportation marketplace or help ensure that consumers have access to the information needed to make informed choices. Please let us know if you would like to file a response in this proceeding.

### TRUMP PICKS ELAINE L. CHAO FOR TRANSPORTATION SECRETARY

On November 29, 2016, President-elect Donald Trump selected former labor secretary Elaine L. Chao to serve as his administration's Secretary of Transportation. Chao is a former Cabinet member and the wife of Senate Majority Leader Mitch McConnell (R-KY).

In 2001 Chao became the first Asian American woman to be named to a Cabinet post and went on to head the Labor Department under George W. Bush for eight years. Before entering government service, Chao served as a vice president of Bank of America and as an international banker at Citicorp. After departing the Bush administration, Chao served as a fellow at the Heritage Foundation and also as a contributor to Fox News. Chao also has a background in aviation, as she was a director at pre-merger Northwest Airlines before the airline was acquired by Delta.

Chao is expected to play a critical role in the administration if the President-elect follows through on his campaign promise to invest \$1 trillion in restoring bridges, roadways and transit systems over the next 10 years.

### ALASKA AIRLINES' \$2.6B VIRGIN AMERICA BUY CONDITIONALLY APPROVED BY DOJ

On December 6, 2016, the U.S. Department of Justice (DOJ) approved Alaska Airlines' proposed \$2.6 billion purchase of Virgin America, contingent on a significant reduction in the scope of Alaska Airlines' codeshare agreement with American Airlines. Under a proposed settlement with the DOJ, Alaska Airlines will be prohibited from codesharing on routes where Virgin America and American Airlines already compete and on routes where Alaska Airlines would otherwise be likely to compete with American Airlines post-merger. The settlement would also require Alaska Airlines to obtain regulatory approval before selling or leasing any gates or slots that were divested to Virgin America as part of the American Airlines-US Airways merger. The Alaska-Virgin settlement must still be approved by a D.C. federal judge.

### OVERFLIGHT FEE INCREASE

On November 28, 2016 the Federal Aviation Administration (FAA) increased the rates for enroute and oceanic overflights, which have been static since 2011. The FAA is phasing in this rate increase over three years in equal percentage terms. The current rates for enroute and oceanic overflights are \$56.86 and \$21.63, respectively. From January 1, 2017 to January 1, 2018 rates will increase to \$58.45 and \$23.15. On January 1, 2018 to January 1, 2019 rates will be \$60.07 for enroute and \$24.77 for oceanic, and as of January 1, 2019 rates will be \$61.75 and \$26.51. Overflight fees are charges for aircraft flights that transit U.S.-controlled airspace, but neither land in nor depart from the United States.

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### JPMORGAN PAYS \$264M FCPA FINE FOR HIRING PROGRAM IN ASIA

On November 17, 2016, the SEC Enforcement Division reported that JPMorgan Chase will pay \$264 million in sanctions to the U.S. Department of Justice, the U.S. Securities and Exchange Commission and the Federal Reserve to settle claims that it violated the Foreign Corrupt Practices Act by awarding jobs to friends and relatives of government officials in Asia. The SEC found that JPMorgan hired 100 interns and full-time employees over a seven-year period, “helping the firm win or retain business that produced more than \$100 million in revenue for JPMorgan”.

JPMorgan Chase settled the charges and will pay \$130 million to the SEC without admitting or denying the agency’s allegations. In addition, its subsidiary, JPMorgan Securities (Asia Pacific) Ltd., will pay a \$72 million criminal penalty to the DOJ in a nonprosecution agreement that includes admissions. Finally, the bank will pay \$61.9 million to the Federal Reserve board of governors.

### DOT PROPOSES RULE TO PROTECT AIRLINE PASSENGERS FROM BEING UNWILLINGLY EXPOSED TO VOICE CALLS ON AIRCRAFT

On December 14, 2016, DOT published a Notice of Proposed Rulemaking (NPRM) aimed at protecting airline passengers from being unwillingly exposed to voice calls within the confines of an aircraft. The Department is proposing to require sellers of air transportation to provide adequate advance notice to passengers if the carrier operating the flight allows passengers to make voice calls using mobile wireless devices. The Department is also seeking comments on whether it should prohibit airlines from allowing voice calls via passenger mobile wireless devices on domestic and/or international flights. The rule would apply to all flights operated with large aircraft (i.e. more than 60 seats) by U.S. and foreign carriers to, from, or within the United States.

The proposed rule would cover voice calls on passenger-supplied cellular telephones and other passenger-supplied mobile wireless devices, regardless of whether the call is made on a commercial mobile frequency, Wi-Fi, or other means. Under this proposal, the Department would not prohibit voice calls (although they are seeking further comment on that issue), but airlines would remain subject to any technical, safety, or security rules that do prohibit or restrict voice calls. Comments are due by **February 13, 2017**.

### AIRPORT ACCIDENT INFORMATION WORKSHEET

The Transportation Disaster Assistance Division of the National Transportation Safety Board (NTSB TDA) has developed an Airport Accident Information Worksheet as a guidance tool to assist Part 121 air carriers with providing information related to Persons on Board (POB) to airport rescue personnel for the purpose of rescue and lifesaving efforts that occur immediately after an accident happens. The worksheet is guidance for carriers to use within their emergency response planning process and can be tailored for individual air carrier emergency response procedures. NTSB TDA expects that local air carrier station managers/operations personnel can complete the worksheet during an accident/evacuation/event and provide it to the ARFF Chief/Incident Commander and/or the Airport Emergency Operations Center. The intent of this worksheet is to help eliminate confusion and open the lines of communication between airports and local air carrier management as it relates to information about Persons on Board an aircraft.

The worksheet was developed after NTSB’s recent accident report for the “Runway Excursion During Landing Delta Airlines Flight 1086 Boeing MD-88, N909DL, New York, New York, March 5, 2015” and reoccurring concerns found in

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other emergency evacuations such as, having precise information about the number of passengers onboard an airplane, including lap-held children, and making this information available to emergency responders after an accident to facilitate timely search and rescue operations.

The worksheet can be found at: <http://www.nts.gov/tda/Documents/NTSB-TDA-Accident-Supp-Form-2016.pdf>

### NEW U.S.-HAVANA FLIGHTS & POTENTIAL TRUMP ADMINISTRATION REACTION

On November 25, 2016 the U.S.-Cuba Trade and Economic Council issued a statement regarding the re-establishment of regularly-scheduled non-stop commercial flights from the United States to Havana, Cuba and how U.S.-Cuba relations could be impacted by the new administration. The statement noted that individuals associated with the President-elect, have expressed - both officially and unofficially - that they will not be enthusiastic about the resumption of regularly-scheduled non-commercial flights to Havana from the U.S. chiefly, because they view the passengers on those flights as tourists being transported in violation of United States law. The Council anticipates that increased enforcement of TSREEA by the Office of Foreign Assets Control is expected, and that it would result in a decrease in the number of passengers travelling commercially between the U.S. and Cuba.

The Council also anticipates that President-elect Trump, his transition team, and supporters may initiate a discussion relating to the implementation of Title III of the Libertad Act of 1996, which enables those with assets expropriated by the government of the Republic of Cuba to bring lawsuits in United States Federal Courts. The Libertad Act requires the President to either enable or suspend the provision every six months. Presidents Clinton, Bush and Obama have done so. The current suspension expires in late January 2017, at which time a decision will have to be made as to whether the Libertad Act will be suspended further.

### PRINCESS CRUISE LINES TO PAY LARGEST-EVER CRIMINAL PENALTY FOR DELIBERATE VESSEL POLLUTION

On December 1, 2016 Princess Cruise Lines Ltd. (Princess) agreed to plead guilty to seven felony charges stemming from its deliberate pollution of the seas and intentional acts to cover it up. Princess will pay a \$40 million penalty – the largest-ever criminal penalty involving deliberate vessel pollution – and plead guilty to charges related to illegal dumping of oil contaminated waste from the Caribbean Princess cruise ship which visited various U.S. ports in Florida, Maine, Massachusetts, New Jersey, New York, Puerto Rico, Rhode Island, South Carolina, Texas, U.S. Virgin Islands and Virginia.

The U.S. Department of Justice's investigation was initiated after information was provided to the U.S. Coast Guard by the British Maritime and Coastguard Agency indicating that a newly hired engineer on the Caribbean Princess reported that a so-called "magic pipe" had been used on Aug. 23, 2013, to illegally discharge oily waste off the coast of England. It was determined that the Caribbean Princess had been making illegal discharges through bypass equipment since 2005, one year after the ship began operations. The discharge on Aug. 23, 2013, involved approximately 4,227 gallons, 23 miles off the coast of England within the country's Exclusive Economic Zone. At the same time, engineers simultaneously ran clean seawater through the ships overboard equipment in order to create a false digital record for a legitimate discharge.

If approved by the court, \$10 million of the \$40 million criminal penalty will be devoted to community service projects to benefit the maritime environment; \$3 million of the community service payments will go to environmental projects

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in South Florida; \$1 million will be earmarked for projects to benefit the marine environment in United Kingdom waters.

### **ROYAL JORDANIAN AIRLINES FINED 35,000 FOR VIOLATING TARMAC DELAY RULE**

On November 30, 2016, DOT assessed \$35,000 in civil penalties against Royal Jordanian Airlines for failing to file required tarmac delay data for a lengthy tarmac delay that occurred at Detroit International Airport (DTW) in July 2014.

The investigation was prompted by a consumer complaint, and DOT's Office of Aviation Enforcement and Proceedings found that on July 5, 2014, Royal Jordanian flight RJ264 was delayed on the tarmac for more than four hours in violation of the tarmac delay rule, after the flight diverted to DTW on a scheduled flight from ORD to Queen Alia International Airport, Jordan.

As our readers may be aware, DOT regulations require carriers to file a BTS Tarmac Delay Report with the Department whenever they experience a lengthy tarmac delay of more than three hours at a U.S. airport. Failure to file the required report has resulted in fines against numerous other carriers, such as Jet Airways (India) and Copa Airlines, since the reporting obligation was established.

### **FAA PROPOSES \$218,000 CIVIL PENALTY AGAINST RESORTS WORLD COMPANIES FOR ALLEGEDLY CONDUCTING UNAUTHORIZED AIR CARRIER OPERATIONS**

On December 6, 2016 the FAA proposed a \$218,000 civil penalty against Resorts World Aviation and Resorts World Bimini for allegedly transporting passengers without an FAA air carrier certificate or with pilots who had not been trained and checked for commercial operations.

The FAA alleges that Resorts World Aviation provided Resorts World Bimini casino players and other guests with nine for-hire flights between July 10 and July 19, 2015. The flights were between the Miami area and Bimini in the Bahamas. The FAA alleges that the companies operated the flights when they did not hold the required FAA certificate to carry passengers for hire or the economic authorization from the DOT to operate as an air carrier. Additionally, the FAA alleges that the pilots flying the planes had not undergone required training and proficiency checks to conduct the operations involved. Finally, the FAA alleges that the companies advertised to perform the operations in spite of not having FAA authorization for the operations.

### **DELTA AIR LINES, JETBLUE AIRWAYS, FRONTIER AIRLINES CONSENT ORDERS**

On December 9, 2016 DOT issued three consent orders assessing civil penalties of \$40,000, \$40,000 and \$60,000 against Delta Air Lines, Inc., JetBlue Airways Corporation, and Frontier Airlines, Inc., respectively.

Delta's order stems from a failure by the airline to file an incident report within 30 days following a series of excessive tarmac delays. Unlike foreign airlines, U.S. carriers are required to file a detailed written incident description every time they experience a lengthy tarmac delay (in addition to the BTS Part 244 tarmac delay report that must be filed by foreign carriers). An investigation by the Department's Enforcement Office revealed that Delta had inadvertently failed to file the required incident report for five lengthy tarmac delays.

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JetBlue was fined for allegedly violating 14 C.F.R. Parts 250 and 259. An investigation by the Department's Enforcement Office of JetBlue's oversales practices revealed instances in which JetBlue did not provide appropriate compensation as required under its customer service plan and "Customer Bill of Rights", in violation of DOT regulations.

Finally, DOT found that Frontier violated 14 C.F.R. 399.84(a) (the full-fare advertising rule) by advertising base fares, such as the "Buck Fares", or "\$1 + taxes and fees" in the same font size as the corresponding total fares. In particular, Frontier advertised base fares (without taxes and fees) in the same sized font as the total fare inclusive of taxes and fees. Frontier's email advertisement was also found to be problematic in that the carrier advertised only the base fare ("a buck") in the email subject line, in violation of the requirement that charges included within the single total price, which may be stated separately, may not be false or misleading and may not be displayed prominently.

### FAA PROPOSES CIVIL PENALTIES AGAINST THREE COMPANIES FOR ALLEGED HAZARDOUS MATERIALS VIOLATIONS

On December 23, 2016, the FAA proposed civil penalties against three companies for allegedly violating the Hazardous Materials Regulations. Namely, \$72,000 against Posan Industry Co. Ltd., of South Korea, \$63,000 against Power Distributors of Columbus, Ohio, and \$57,400 against Consolidated Container Company, LLC, of Atlanta, Ga.

All three proposed penalties allege a failure by each company to use proper packaging for a shipment; properly mark and label it; and provide shipping papers indicating the amount, type and hazardous nature of the material inside. The FAA also alleged that the companies failed to provide required emergency response information with the shipment and failed to ensure the person who prepared it had received required hazardous materials training.

Posan has been in communication with the FAA about the case. Both, Power Distributors and Consolidated Container are scheduled to meet with the FAA in early January to discuss their respective cases.

*This Aviation Regulatory Update is intended to keep readers current on matters affecting the industry, and is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at [esahr@eckertseamans.com](mailto:esahr@eckertseamans.com) or 202-659-6622; Drew Derco at [dderco@eckertseamans.com](mailto:dderco@eckertseamans.com) or 202-659-6665.*