ECKERT SEAMANS
ATTORNEYS AT LAW

JANUARY 2017

AVIATION REGULATORY UPDATE

DOT PROPOSES NEW REGULATIONS ON THE DISCLOSURE OF CUSTOMER-SPECIFIC AIRLINE BAGGAGE FEE INFORMATION

On January 19, 2017 the Department of Transportation (DOT) published a Proposed Rule on "Transparency of Airline Ancillary Service Fees" (the "2017 Proposed Rulemaking"). The comment period ends on March 20, 2017 and would require additional price-related disclosure requirements at all points of sale as it pertains to 14 C.F.R. Part 399 in order to protect consumers from hidden and deceptive fees and enable them to determine the true cost of travel in an effective manner when they price shop for air transportation. This proposed rule would apply to foreign and domestic carriers.

The current Proposed Rulemaking stems from a spring 2014 Proposed Rulemaking, "Transparency of Airline Ancillary Service Fees and Other Consumer Protection Issues" (the "2014 Proposed Rulemaking"). The 2014 Proposed Rulemaking contained a number of proposals to enhance consumer protections, including that airlines disclose certain ancillary service fees. Because the disclosure of ancillary service fees proposal garnered so many comments, DOT offers the 2017 Proposed Rulemaking to focus only on the issue of transparency of certain ancillary service fees; like the price to the consumer of checked baggage or the use of the overhead storage bins.

The concern arises out of the "unbundling" of services. Historically, various services had been included in airfare but many carriers now charge a separate fee, like a fee to check luggage, not reflected in the purchase ticket price.

The 2017 Proposed Rulemaking would require air carriers, foreign air carriers and ticket agents to clearly disclose to consumers at all points of sale customer-specific fee information, or itinerary-specific information if a customer elects not to provide customer-specific information, for a first checked bag, a second checked bag, and one carry-on bag wherever fare and schedule information is provided to consumers.

The DOT also proposes that each covered carrier provide useable, current, and accurate (but not transactable) baggage fee information to all ticket agents that receive and distribute the carrier's fare and schedule information, including Global Distribution Systems and meta-search entities. Covered carrier and ticket agent websites would be required to disclose baggage fee information at the first point in a search process where a fare is listed in connection with a specific flight itinerary, adjacent to the fare. However, the 2017 Proposed Rulemaking would permit carriers and ticket agents to allow customers to opt-out of receiving the baggage fee information when using their websites.

The 2017 Proposed Rulemaking does not however propose to require disclosure for advance seat assignments fees or for change and cancellation fees. Comments must be filed by March 20, 2017.

ECKERT SEAMANS
ATTORNEYS AT LAW

JANUARY 2017

AVIATION REGULATORY UPDATE

REMINDER: PART 382 ANNUAL REPORTS DUE TO DOT JANUARY 30, 2017

The U.S. Department of Transportation requires all carriers to report to DOT all disability-related complaints for U.S. originating or destined passengers on a yearly basis. The 2016 annual report must be submitted no later than **January 30, 2017**.

Carriers that did not receive any written disability-related complaints in 2016 are still required to file a "zero" report that shows no complaints. Failure to comply with the reporting requirement may subject a carrier to significant civil penalties.

Please let us know if you have questions or require any assistance in completing or filing this year's report with DOT.

DOT ISSUES GUIDANCE TO PREVENT DISCRIMINATION FOR AIRLINE PERSONNEL ON NON-DISCRIMINATION IN AIR TRAVEL

DOT recently published two documents to prevent discrimination in air travel. The first was a report for airline personnel, entitled *Guidance for Airline Personnel on Nondiscrimination in Air Travel*, (the "report"), that addresses the removal by airline personnel of passengers for safety or security reasons *before* takeoff. The report notes that DOT recognizes that an airline's decision to address passenger safety or security issues while airborne is often made quickly and with limited information. The Department also recognizes the difficult and important job of airlines to provide a safe and secure travel environment.

At the same time, however, DOT advised that a safe and secure travel environment is not the product of discriminatory practices. And, as a result, the report outlines scenarios to help airlines distinguish between events where a legitimate safety or security concern exists and events where airline concerns are based on assumptions and stereotypes related to a passenger's race, color, national origin, religion, sex or ancestry.

DOT encourages all airlines to implement comprehensive anti-bias training to help prevent and reduce incidents of unlawful discrimination. The Department also encourages airlines to incorporate antidiscrimination guidance into airline training programs. Finally, DOT states that the guidance offered in the report is not prescriptive and that there may be alternative "measures, techniques, or procedures that can be effective for preventing unlawful discrimination against air travelers."

The report suggests airlines adopt the acronym "BE FAIR" when an airline inquires about suspicious passenger behavior:

Be comprehensive: Conduct a comprehensive evaluation of the facts and circumstances at the time of the event. Airline personnel should ask the question: "If it were not for the passenger's race, color, national origin, religion, sex or ancestry, would I be concerned that the passenger's behavior rises to the level of a potential safety or security threat?"

AVIATION REGULATORY UPDATE

Ensure Effective Communication: Actively communicate with all interested parties (including the passenger(s) in question) to clarify all facts known at the time of the event.
Follow Airline Protocol and Decision-Making Process: Follow airline protocol when conducting any safety or security inquiry.
Assess Each Situation Individually: Focus on specific facts to ensure that any action is based on suspicious behavior is reasonable. Any action based only on a passenger's race, color, national origin, religion, sex or ancestry is not reasonable.
Inquire about the Potential Threat: Did the airline conduct its duty to investigate?
Resolve and Remedy the Situation: Airlines should include an array of conflict resolution techniques and explain its decision to all persons involved, to include the affected passenger(s).

The second document, entitled *Passengers' Right to Fly Free from Discrimination*, uses a question-and-answer format to assist the flying public understand their rights when flying on commercial airlines. In it, the Department advises that its various sub-agencies work in tandem to make sure that passengers are afforded the right to fly free from all forms of unlawful discrimination. In particular, DOT ensures that passengers will not be denied boarding or removed from a commercial airline because the passenger appears to be Muslim, Arab, Sikh and/or South Asian or because they speak Arabic, Farsi, or another foreign language. Also, a passenger cannot be denied boarding or removed because he or she reads what appears to be materials written in Arabic, Farsi or any other foreign language.

DOT also ensures that passengers are not denied boarding or removed from a commercial airline due to their style of clothing. For example, a woman cannot be denied the right to fly because she wears a head covering such as a veil and a man cannot be denied the right to fly because he wears a turban.

However, the Department does advise that there are situations where a passenger might lawfully be denied from travel on a commercial airline. The law allows for U.S. and foreign airlines to refuse passenger transport if the airline determines that the passenger is, or might be, a threat to safety or security. This safety determination is made by the pilot in command of the flight or other airline personnel (such as a Ground Security Coordinator). It is important to note that any decision to deny a passenger travel based on a safety concern cannot be supported by arbitrary evidence. This means that the airline must conduct a reasonable inquiry into the facts supporting any action to deny a passenger transport on its airline. The DOT suggests that airline personnel, such as the pilot in command, ask the following question when determining whether or not a passenger should be denied air transport: "*But for this person's perceived race, color, national origin, religion, sex or ancestry, would I believe there is a need to remove this passenger from the flight?*" If the answer is "no", then the removal of the passenger would likely be considered unlawful.

It is important to remember that the DOT is particularly concerned with a passenger's right to fly free from discrimination. However, the pilot in command of a commercial aircraft is ultimately responsible for the safety of the passengers on the aircraft. A pilot must make sure that any effort to deny a passenger transport on the aircraft is not determined only by the passenger's race, color, national origin, religion, sex

or ancestry. Instead, a determination to deny a passenger transport must be based on some other relevant factor that the airline official is aware of at the time of the incident.

UNITED SETTLES DOL LAWSUIT OVER BAGGAGE HANDLERS

On December 27, 2016, the Occupational Safety and Health Administration (OSHA) announced a "precedent-setting" agreement with United Airlines settling a lawsuit brought by the Department of Labor (DOL) over working conditions for the airline's baggage handlers.

The lawsuit was filed following a 2014 OSHA inspection at Newark Liberty International Airport, in which it determined that United's baggage handlers were exposed to various hazardous conditions that required them to repeatedly "bend, twist, reach and lift in ways that caused injuries." OSHA stated that from 2011 to early 2015, the airline's baggage handlers reported at least 622 musculoskeletal injuries. OSHA's inspection also revealed five hazardous activities and conditions in United's baggage-handling operations that contributed to the high rate of injuries. These activities and conditions included:

- Employees being exposed to repeated bending, lifting and reaching hazards due to the presence of tubular bollards in front of conveyor belts.
- The use of dual-tier conveyor belts to transport baggage in the outbound baggage room that required employees to bend over or reach overhead to access and lift baggage.
- Manually loading and unloading gate-checked baggage at passenger jet bridges in the regional terminal.
- The use of hand-held scanners at the cargo bay entrance, which exposed employees to the hazards of repeated twisting, pushing, pulling and lateral motions with the arm extended from the body.
- Prolonged loading and unloading of baggage in confined areas of the aircraft cargo bay.

As part of the settlement, United agreed to install new conveyor belts for baggage that reduce employee exposure to hazards by minimizing the amount of lifting needed. United also agreed to hire an expert to evaluate potential injury risks at United's Newark Liberty operation and to make recommendations for improvement. United will be required to adopt these recommendations, or similar measures, and to form a safety committee consisting of the expert, management, and employee representatives. United has 90 days to complete the evaluation, and two years to implement recommendations.

OFAC ISSUE FIVE NEW FAQ'S REGARDING VESSEL TRANSACTIONS WITH CUBA

On January 6, 2017 the Office of Foreign Assets Control (OFAC) of the U.S. Department of Treasury updated the Trade/Business section of its Frequently Asked Questions Related to Cuba (FAQs) document to add five questions and answers regarding vessel transactions with Cuba. The update specifically addressed the "180-day Rule" which is a statutory restriction prohibiting "any vessel that enters a port or place in Cuba to engage in the trade of goods or the purchase or provision of services there from entering any U.S. port for

the purpose of loading or unloading freight for 180 days after leaving Cuba, unless otherwise authorized by OFAC."

Some of the new FAQs pertain to exceptions to the 180-day rule, and OFAC has expanded its explanation regarding vessels that qualify for general licenses and that are not be subject to the 180-day rule or the goods/passengers-on-board rule. Among the vessels that qualify for general license are those involved in transactions incident to "exportations from the US and re-exportations of 100% US-origin items to Cuba". The "goods/passengers-on-board rule" prohibits any vessel carrying "goods or passengers to or from Cuba or carrying goods in which Cuba or a Cuban national has an interest from entering a U.S. port with such goods or passengers on board, unless authorized or exempt."

The FAQs related to Cuba are questions 86 – 90, and they read as follows:

- What are the "180-day rule" and the "goods/passengers-on-board rule?"
- Are there any exceptions to the 180-day rule and the goods/passengers-on-board rule?
- Do the exceptions to the 180-day rule authorize shipments to or from Cuba?
- If a foreign vessel is traveling to the United States via Cuba with cargo destined for the United States, may goods remain aboard the vessel for delivery to the United States while the vessel is docked in a Cuban port, and may that vessel and its cargo then enter the United States without being subject to the 180-day rule or the goods/passengers-on-board rule?
- May companies that use different ocean carriers as part of a broader shipping service utilizing code-sharing agreements take advantage of the exceptions to the "180-day rule?"

Please note that the OFAC's Cuba FAQs is an explanatory document, and does not have the force of law. It also does not supplement or modify Executive Orders, statutes, or regulations relating to Cuba. Should you have any specific questions regarding Cuba regulations, please don't hesitate to contact us for legal counsel.

The updated document is available at: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf

DOT PUBLISHES DISABILITY-RELATED TRAINING MATERIAL FOR AIRLINES AND PASSENGERS

On January 11, 2017, DOT released a series of new disability-related training materials for airlines and passengers with disabilities on the four areas where the Department receives the greatest number of air travel disability complaints: wheelchair and guide assistance; stowage, loss, delay, and damage of wheelchairs and other mobility assistive devices; aircraft seating accommodations; and travel with service animals.

ECKERT SEAMANS
ATTORNEYS AT LAW

JANUARY 2017

AVIATION REGULATORY UPDATE

The material is intended to be an additional resource that airlines can use to supplement the disability-related trainings that they are required to provide their employees and contractors under DOT rules. The new training materials also include companion pieces to provide passengers with disabilities information about their rights under the Air Carrier Access Act (ACAA) and DOT's rules.
The content includes two videos, downloadable brochures that can be printed or viewed on a mobile device, and a foldable accordion wheelchair/guided assistance tip sheet that airline personnel can carry and reference while assisting passengers with disabilities.

The material can be found here: https://www.transportation.gov/airconsumer/disability-training/

DHS ELIMINATES "WET FOOT/DRY FOOT" POLICY FOR CUBANS AND THE CUBAN MEDICAL PROFESSIONAL PAROLE PROGRAM

On January 12, 2017 the U.S. Department of Homeland Security (DHS) announced the elimination of several policies relating to travel from Cuba. First, DHS is eliminating a special parole policy for arriving Cuban nationals commonly known as the "wet-foot/dry-foot" policy. "Wet-foot/dry-foot" refers to an understanding under which Cuban migrants traveling to the United States who are intercepted at sea ("wet foot") are returned to Cuba or resettled in a third country, while those who make it to U.S. soil ("dry foot") are able to request parole and, if granted, lawful permanent resident status under the Cuban Adjustment Act (CAA). The CAA became law on November 2, 1966. This means that Cuban nationals arriving in the United States as of January 12, 2017 will be treated as any other national from any other country for purposes of immigration status. Meaning, they will no longer be granted work permits and US Permanent Residence (Green Cards) within a year of arrival.

DHS is additionally eliminating a policy for Cuban medical professionals known as the Cuban Medical Professional Parole Program (CMPP). The CMPP allowed certain Cuban medical personnel in third countries (i.e., not Cuba or the United States) to apply for parole. Applicants under the CMPP program were required to show, at a U.S. Citizenship and Immigration Services office, or U.S. embassy or consulate, located in the third country, that they were medical professionals conscripted to study or work in a third country under the direction of the Cuban Government. Their immediate family members were also potentially eligible for parole.

DHS is also eliminating an exemption that previously prevented the use of expedited removal proceedings for Cuban nationals apprehended at ports of entry or near the border. The existing Cuban Family Reunification Parole Program, however, is not affected by this announcement and will remain in effect.

DHS explained that the policies being eliminated were historically justified "by certain unique circumstances, including conditions in Cuba, the lack of diplomatic relations between our countries, and the Cuban Government's general refusal to accept the repatriation of its nationals." However, considering the reestablishment of full diplomatic relations, Cuba's signing of a Joint Statement obligating it to accept the repatriation of its nationals who arrive in the United States after the date of the agreement, and other

factors, DHS concluded that, with the limited exception of the Cuban Family Reunification Parole Program, the parole policies discussed above were "no longer warranted."

Information on these new developments is available at: https://www.gpo.gov/fdsys/pkg/FR-2017-01-17/pdf/2017-00914.pdf

GEN. KELLY: 'GOOD IDEA' TO INCREASE VISA WAIVER SECURITY, GROW PRECLEARANCE

On January 10, 2017, during his DHS confirmation hearing, Retired U.S. Marine Corps General John Kelly said that it is "a good idea" to expand security requirements for the Visa Waiver Program (VWP) and to continue expanding the PreClearance program to new foreign airports.
The Preclearance program allows travelers to clear customs and immigration before boarding planes in Canada, Ireland, Abu Dhabi and several Caribbean countries. Jeh Johnson, the current Secretary of Homeland Security, has begun talks to expand the program to another dozen airports.

The VWP (created by the Immigration Reform and Control Act of 1986) allows citizens of certain countries to visit the U.S. for less than 90 days for tourism and business purposes without the need to obtain a visa. Participating countries generally provide reciprocal visa-free 90-days travel to U.S. citizens for the same tourism and business purposes. The VWP has undergone several updates, however, "to adapt to current threats". These updates include a requirement that visitors seeking to visit the U.S. under the Program must obtain an authorization via the Electronic System for Travel Authorization (ESTA). ESTA collects travelers' biometric information and basic admissibility-related questions prior to travel to the US. In addition, the VWP has recently disallowed certain categories of individuals from eligibility. Such as, citizens of VWP countries "who have traveled to Iran, Iraq, Sudan, Libya, Somalia and Yemen after March 1, 2011."

IMO'S SECRETARY GENERAL "CONCERNED" THAT INCLUDING SHIPPING IN EU-ETS WOULD SERIOUSLY IMPACT IMO'S WORK ON GHG REDUCTION

On January 9, 2017, the International Maritime Organization (IMO) Secretary-General Kitack Lim sent a letter to Martin Schulz (President of the European Parliament), Jean-Claude Juncker (President of the European Commission) and Donald Tusk (President of the European Council) expressing his concern that "a final decision to extend the European Union Emissions Trading System (EU-ETS) to shipping emissions would not only be premature but would seriously impact on the work of IMO to address greenhouse gas (GHG) emissions from international shipping."

On December 16, 2016, and to meet commitments under the Paris Agreement (ratified on October 5, 2016), the European Parliament's Environment, Public Health and Food Safety Committee proposed a new "Effort Sharing Regulation" or "Climate Action Regulation implementing the Paris Agreement" that will cover sectors outside of the scope of the EU-ETS, including transport, agriculture, and emissions from international shipping This approach by EU-ETS has the potential to be at odds with some of the IMO's

goals in the same area. The IMO is the specialized agency of the United Nations responsible for "safe and secure shipping and preventing marine and atmospheric pollution from ships."

This Effort Sharing Regulation stems from a 2013 strategy set out by the European Commission to progressively integrate maritime emissions into the EU's policy for reducing its GHG emissions. The strategy consists of 3 consecutive steps:

Step 1: Monitoring, reporting and verification (MRV) of CO2 emissions from large ships using EU ports – In 2013, the EU adopted MRV Shipping Regulation requiring large ships (over 5000 gross tones) at European Economic Area ports to monitor their CO2 emissions. It set out a compliance schedule as follows:

- By August 30, 2017 submit to an accredited MRV shipping verifier a Monitoring Plan;
- From January 1, 2018, monitor and report to an accredited MRV shipping verifier, data on each ships' CO2, fuel consumption and other parameters, so as to determine the ships' average energy efficiency;
- From 2019, by April 30 of each year submit electronically to the Commission satisfactorily verified Emissions report for each of the ships concerned;
- From 2019, by June 30 of each year ensure that, all ships having performed activities in the precedent reporting period and visiting EU ports, carry on board a document of compliance issued by an accredited MRV shipping verifier.

Step 2: Greenhouse gas reduction targets for the maritime transport sector.
Step 3: Further measures, including market-based measures, in the medium to long term.

The Paris Agreement – which does not make reference to emissions from international shipping, sets out the goal to keep global temperature increase below two degrees Celsius, and to strive for no more than a 1, 5 degrees Celsius temperature increase. The Paris Agreement also requires that net-zero emissions must be achieved in the second half of this century (2050).

FAA PROPOSES CIVIL PENALTIES FOR ALLEGED HAZARDOUS MATERIALS VIOLATIONS

On January 12, 2017, the Federal Aviation Administration (FAA) proposed civil penalties against Jegs Automotive Inc. and Amazon.com, Inc., for $201,250 and $91,000, respectively, for allegedly violating hazardous materials regulations.

The FAA alleges that on May 7, 2016, Jegs Automotive (an automotive parts and supplies company) offered an undeclared hazardous material shipment to FedEx for air transportation from Delaware, Ohio, to Edgewater, Florida. The shipment at issue contained three 32-ounce metal cans of race gas fuel concentrate, which is a flammable and toxic liquid.

AVIATION REGULATORY UPDATE

With regard to Amazon.com, the FAA alleges that Amazon offered an undeclared hazardous material shipment to FedEx for air transportation from Hebron, Kentucky to Marshall, Minnesota. The shipment at issue contained one 2.5 gallon plastic container of toxic clear diesel fuel and tank cleaner, concentrated formula, both of which are hazardous materials.

In each instance, the FAA alleges that shipments were not accompanied by a shipper's declaration for dangerous goods, were not properly marked, labeled or packaged, parties did not provide emergency response information with the shipment, and parties failed to ensure its employees had received required hazardous materials training. Amazon and Jegs have been in communication with the FAA about their respective cases.

FAA AND SKYPAN INTERNATIONAL, INC., REACH AGREEMENT ON UNMANNED AIRCRAFT ENFORCEMENT CASES

On January 17, 2017, the U.S. Department of Transportation's Federal Aviation Administration (FAA) announced a comprehensive three-year settlement agreement with SkyPan International, Inc., of Chicago involving a $1.9 million civil penalty that the FAA proposed against SkyPan in October 2015, the largest civil penalty the FAA has proposed against a UAS operator. The agreement resolves enforcement cases that alleged the company operated unmanned aircraft (UAS) in congested airspace over New York City and Chicago, and violated airspace regulations and aircraft operating rules.

SkyPan conducts aerial panoramic photography operations above private property in urban areas. The SkyPan's flights involved in the FAA settlement agreement were conducted before the FAA's first rule for commercial UAS operations, commonly referred to as Part 107, went into effect in August 2016, and some were conducted before the FAA began to issue exemptions to authorize commercial UAS operations in September 2014 under the Section 333 process. SkyPan obtained a section 333 Exemption in 2015.

Under the terms of the agreement, SkyPan agreed to pay a $200,000 civil penalty and the FAA, in exchange, made no finding of violation. The company will pay an additional $150,000 if it violates Federal Aviation Regulations in the next year, and $150,000 more if it fails to comply with the terms of the settlement agreement. SkyPan also agreed to work with the FAA to release three public service announcements in the next 12 months to support the FAA's public outreach campaigns that encourage drone operators to learn and comply with UAS regulations.

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

ECKERT SEAMANS
ATTORNEYS AT LAW

FEBRUARY 2017

AVIATION REGULATORY UPDATE

TRUMP ADMINISTRATION ISSUES EXECUTIVE ORDER ON REDUCING REGULATION AND CONTROLLING REGULATORY COSTS; ORDERS CREATION OF TASK FORCES

On January 30, 2017, the Trump Administration published an Executive Order (EO) on "Reducing Regulation and Controlling Regulatory Costs." Notably, Section 2 of the EO states that "Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed." In complying with the EO, executive departments and agencies will be required to issue two "deregulatory" actions for each new significant regulatory action that imposes costs.

How the EO will affect existing and future rulemakings remains to be seen; however, the Director of the Office of Management and Budget did publish interim guidance on the EO, which addresses issues of coverage, and clarifies that the EO applies to "significant final regulations for which agencies issued a Notice of Proposed Rulemaking before noon on January 20, 2017". The interim guidance also addresses issues of accounting, processes and waiver.

More recently, on February 24, 2017, President Trump ordered government agencies to create regulatory task forces to begin identifying rules for elimination. According to the Administration, the move is a part of the assault on regulations that damage the economy according to the trump administration. The executive order specifically directs each agency to establish a task force to review existing regulations and rules that are costly and unnecessary to be repealed or modified.

The Executive Order is available at: https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling

The Interim Guidance is available at: https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/eo_iterim_guidance_reducing_regulations_controlling_regulatory_costs.pdf

DOT EXTENDS COMPLIANCE DEADLINE FOR CERTAIN PROVISIONS IN ENHANCING AIRLINE PASSENGER PROTECTIONS III

The U.S. Department of Transportation (DOT) has extended the deadline for complying with two provisions of its latest consumer protection rule, Enhancing Airline Passenger Protections III. Specifically, on February 14, 2017, the Department announced that the rule's requirements concerning codeshare disclosures and the prohibition of undisclosed flight display biases have been extended from February 15, 2017 to **March 17, 2017**.

As we have previously reported, the original compliance date for these requirements was December 5, 2016 and, after receiving petitions from Airlines for America (A4A) and Carson Wagonlit Travel, DOT agreed to initially extend this deadline to February 15th, 2017. The Department's latest decision to further extend

the compliance deadline was made in response to requests by A4A and Delta Air Lines (Delta) citing a January 20, 2017 White House memorandum to department heads directing a "Regulatory Freeze Pending Review," which instructs departments and agencies to temporarily postpone the effective date of regulations that have been "published in the Federal Register but have not taken effect." While DOT's latest extension covers the codeshare disclosure and display bias portions of the rule, it does not change the compliance deadlines for any other provisions of the Enhancing Airline Passenger Protections III.

A copy of DOT's notice is available at: https://www.transportation.gov/airconsumer/airline-passenger-protections-rule-date-extension.

NAI SECURES OPERATIONAL APPROVAL FROM FAA

On February 22, 2017, Norwegian Air International secured approval from the Federal Aviation Administration to conduct flights to the United States. The carrier's Part 129 Operations Specifications will allow it to provide international air transportation service to several mid-sized U.S. cities including Newburgh, New York, Providence, Rhode Island, and Windsor Locks, Connecticut. Flights to these cities will be operated with Boeing 737-800 aircraft and originate in Belfast, Bergen, Dublin, Cork, Shannon, and Edinburgh.

TRUMP ADMINISTRATION PROPOSES SOCIAL MEDIA CHECKS FOR CHINESE VISITORS

In late 2016 former President Obama implemented a social media screening procedure for travelers entering the U.S. from Visa Waiver Program countries. The Trump Administration is now proposing to expand this to Chinese visitors to the United States.

In so doing, CBP agents would ask Chinese visitors to provide their social media handles or identifiers on common social media platforms like Facebook, Google+, Instagram, LinkedIn, and YouTube during the entry process. The disclosure would be completed online as part of the electronic system used by Chinese travelers holding long term business and visitors visas. According to the notice set for publication in the Federal Register, the question would be optional and those not wishing to provide such information would have their travel requests processed without negative interference.

Proponents of the proposal cite to homeland security concerns and the need to protect American citizens. Critics of the proposal are concerned about its impact on American travelers who visit other countries. Whereas many governments grant visas on a reciprocity basis, critics argue that other governments may begin requiring U.S. citizens to make similar disclosures when traveling abroad. Additionally, online privacy advocates and technology firms are wary of the privacy implications of this idea and the general effectiveness of this proposed practice as a whole.

ECKERT SEAMANS
ATTORNEYS AT LAW

FEBRUARY 2017

AVIATION REGULATORY UPDATE

Following the proposal's publication in the Federal Register, interested parties will have 60 days to file public comments.

DOT FINES AIR INDIA $115,000 FOR FAILING TO MAKE REQUIRED ANNOUNCEMENTS DURING DELAY

The Department of Transportation recently fined Air India $115,000 for allegedly violating 14 C.F.R. Part 259 and 49 U.S.C. ?41712 when it carrier failed to notify passengers that they were able to deplane an aircraft during a lengthy delay.

Specifically, Air India was scheduled to operate Flight 144 from Newark International Airport to Chhatrapati Shivaji International Airport on July 3, 2014. The aircraft experienced a mechanical problem after the boarding process had been completed and remained at the gate with the aircraft door open. Though the door remained open and passengers had the opportunity to deplane, the carrier's personnel did not inform those on board of their ability to get off the aircraft, as is required under 14 C.F.R. Part 259.4, which states that "every 30 minutes after scheduled departure and every 30 minutes after passengers will be notified that they have the opportunity to deplane an aircraft that is at the gate". The captain believed the mechanical problem would be solved within a short period and advised passengers of the problem and progress of the issue as it developed. However, no announcement regarding passenger's ability to leave the aircraft was made.

Air India's failure to notify passengers resulted in a penalty of $115,000 and an order to cease and desist from any future violations to 14 CFR Part 259 and 49 U.S.C. ?41712.

U.S. CDC AMENDS DOMESTIC AND FOREIGN QUARANTINE REGULATIONS

On January 19, 2017, the U.S. Centers for Disease Control and Prevention (CDC) issued a final rule that amends its existing domestic and foreign quarantine regulations "to best protect the public health of the United States" from communicable diseases. Domestically, the amendment adds a mandatory requirement that commercial passenger flights report deaths or illnesses directly to the CDC. It also includes a provision that requires individuals traveling under a federal quarantine, isolation, or conditional release order to apply for and secure a travel permit before flying. Finally, the rule clarifies when an individual who is moving between U.S. states is "reasonably believed to be infected" with a quarantinable communicable disease in a "qualifying stage." These determinations are made when the CDC considers the need to apprehend or examine an individual for potential infection with a quarantinable communicable disease.

On the international side, the final rule includes new regulatory authority for the CDC Director to (1) prohibit the importation of animals, articles or products from designated foreign countries that pose a threat to public health; and (2) designate the foreign countries or places and the periods of time or conditions under which the introduction of imports into the U.S. should be suspended.

ECKERT SEAMANS
ATTORNEYS AT LAW

FEBRUARY 2017

AVIATION REGULATORY UPDATE

The rule took effect on February 21, 2017. A copy of the Final Rule is available at: https://www.regulations.gov/document?D=CDC-2016-0068-15586

UNITED KINGDOM CONFIRMS PLAN TO SEEK OPEN SKIES WITH THE U.S. POST-BREXIT

On February 2, 2017 Theresa May, the Prime Minister of the United Kingdom (UK) and David Davis, Secretary of State for Exiting the European Union (EU), released a white paper that addresses specific topics regarding the UK's withdrawal (Brexit) from the EU.

Notably, the white paper assures the aviation sector that the UK will seek bilateral air services agreements with countries "like the US", where air services arrangements are currently covered by the existing U.S.-EU Open Skies Agreement. As most of our readers know, the current U.S.-EU Open Skies Agreement is incredibly liberalized, and permits any airline in the EU to fly to any point in the U.S. and vice versa. The agreement was significant for the UK when signed in 2007 because it opened up competition and transatlantic opportunities to London Heathrow Airport, to which access had previously been restricted under the prior U.S.-UK bilateral (Bermuda II agreement).

The UK will begin the process of exiting the EU at the end of March 2017, when it plans to trigger Article 50 of the Treaty on European Union after a majority of votes on a June 2016 referendum were casted in favor of the UK leaving the EU.

A copy of the white paper is available at: http://www.politico.eu/wp-content/uploads/2017/02/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web-2.pdf

HOUSE HOMELAND SECURITY COMMITTEE RELEASES "AMERICA'S AIRPORTS: THE THREAT FROM WITHIN" REPORT

On February 6, 2017, the U.S. House of Representatives Homeland Security Committee released a report entitled "America's Airports: The Threat From Within."

The report makes nine recommendations to airports, airlines, DHS and their workers to mitigate against threats posed by terrorist and criminal elements seeking to infiltrate airport access points; most of which involved ways to further protect secured areas of airport facilities. According to the Committee's website, key findings of the report include:

- Inconsistencies across the aviation system as to how airport and air carrier security officials educate credentialed populations (i.e. personnel with access to secured areas) on responsibly using their access and reporting suspicious activities.
- Conflict between industry and government stakeholders makes it difficult to implement needed improvements to aviation security.

AVIATION REGULATORY UPDATE

- A majority of airports do not have full employee screening at secure access points and are unable to demonstrate the security effectiveness of existing employee screening efforts.
- Recent insider threat examples are legitimate, such as an attempt to detonate a bomb at an airport, gun and drug smuggling, an expressed willingness to smuggle explosives, as well as employees who became involved in terrorist activities overseas.

The report can be found at: https://homeland.house.gov/wp-content/uploads/2017/02/Americas-Airports-The-Threat-From-Within.pdf

TRANSPORTATION AND INFRASTRUCTURE COMMITTEE HOLDS FIRST HEARING OF THE 115TH CONGRESS

On February 1, 2017, the 115th Congress held its first full hearing of the House Transportation and Infrastructure Committee, titled "Building a 21st Century Infrastructure for America." The goal of the hearing was to receive testimony concerning the challenges facing our Nation's current transportation infrastructure and to provide a vision for a modern 21st century transportation infrastructure. Leaders from five transportation and infrastructure corporations, including FedEx Corporation, Cargill, and BMW North America, participated in the hearing. Aviation-related issues that were discussed included reforms to the existing air traffic control system (i.e. NextGen), U.S. Open Skies policy in the context of fair competition, the expansion of the application of Part 117 (Flight and Duty Time Limitations and Rest Requirements for Flightcrew) to the All-Cargo airline industry, and safety concerns.

President Trump has repeatedly stated that he plans to focus on infrastructure improvements so it will be interesting to see how the new Administration addresses these and other related issues. We will continue to keep our readers updated as to new developments in this area.

COURT RELIES ON MONTREAL CONVENTION'S "ACT OF PUBLIC AUTHORITY" LIABILITY EXCLUSION IN CARGO SPOILAGE CASE

In Best Value Kosher Foods, Inc. v. American Airlines, Inc. (E.D.N.Y. Dec. 12, 2016), plaintiff Best Value arranged for cheese it had purchased in France to be shipped by American Airlines from Paris to New York. Upon arrival the cargo was stored by American at its JFK cargo facility but, due to delays in the U.S. Food and Drug Administration (FDA) and U.S. Customs and Border Protection (CBP) FDA inspection and clearance processes, was not picked up by Best Value for six days. The product was rendered unusable by this delay.

Best Value sued American in state court, alleging that American had an affirmative duty to properly store (i.e. refrigerate) the cargo upon its arrival at JFK but had failed to do so. The case was removed to Federal Court and ultimately dismissed. In granting summary judgment for American, the Court relied primarily on the Montreal Convention, finding that American was exempt from liability under Article 18(2), which provides that a carrier is not liable for cargo destruction, loss or damage due to "an act of public authority carried out in connection with the entry, exit or transit of the cargo."?

ECKERT SEAMANS
ATTORNEYS AT LAW

FEBRUARY 2017

AVIATION REGULATORY UPDATE

This is significant because the court determined that FDA and CBP inspections constitute "acts of public authority carried out in connection with the entry, exit or transit of the cargo" within the meaning of Article 18(2) of the Convention and that damage to the cargo at issue fell within the "act of public authority" liability exclusion. Moreover, the Court also found that, even if American had "some duty" to keep the cargo refrigerated, it was only obligated to use "reasonable care" to perform that duty and that six days was "too long to have expected American to keep the cheese at a low temperature."

This finding is an issue of first impression and should serve as strong precedent for the industry in future cargo claims against shippers.

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

ECKERT SEAMANS
ATTORNEYS AT LAW

MARCH 2017

AVIATION REGULATORY UPDATE

TSA AND FAA ADDRESS CARRIAGE OF LITHIUM ION BATTERIES

The Transportation Safety Administration (TSA) issued a Bulletin on March 14, 2017 that requires all non-medical electronics larger than a cell phone to be checked in the cargo hold of the airplane. The restriction applies to direct flights from the following countries and airports to the United States: Queen Alia (Jordan), Cairo (Egypt), Ataturk (Turkey), King Abdulaziz (Saudi Arabia), King Khalid (Saudi Arabia), Kuwait (Kuwait), Mohammed V (Morocco), Hamad (Qatar), Dubai and Abu Dhabi (UAE).

Further, all checked passenger luggage on select flights arriving from the above airports will be screened by the TSA (via machine or canine) before being reunited with the passenger. Passengers with connecting flights will then reclaim their luggage for transfer to their connecting flights.

TSA's new policy runs contrary to existing FAA and ICAO requirements for the safe transportation of lithium ion batteries. Following TSA's Bulletin, the FAA's New York Field Office on March 27, 2017 issued additional guidance regarding the safe stowage of lithium batteries on the affected flights. At a minimum, the guidance states that devices should be completely powered down; devices should be protected from damage during transport, including placement in some protective packaging or casing to prevent accidental activation; devices should be dispersed within the cargo hold; spare batteries are prohibited from checked baggage; passengers should be informed verbally to remove all batteries from their carry-on baggage when the carry-ons are checked pursuant to the TSA Bulletin; during ticket purchase and check-in, passengers must be informed that spare lithium batteries are prohibited from checked baggage; and additional personnel training may be necessary.

US AIRWAYS AND SABRE: THE END IS IN SIGHT

Sabre Holdings Corp. and US Airways (now American Airlines Group) seem to be at the end of a long-running litigation over claims that Sabre violated Antitrust and Anticompetition rules. On March 21, 2017 a U.S. District Court Judge in Los Angeles denied Sabre's request to overturn a jury verdict that awarded $15 million to US Airways.

Sabre, the largest Global Distribution Systems (GDS) provider for air bookings in North America, was accused by US Airways of hindering trade via forced unfavorable contracts terms. The lawsuit focused on a 2011 contract between the airline and online booking provider that required US Airways to supply Sabre with access to all of its seats so that travel agents could sell US Airways' seats to corporate and leisure customers.

The original jury verdict, awarded to US Airways in 2016, found that Sabre unreasonably restrained trade but that it had not conspired with other firms to cause injury to US Airways. US Airways successfully argued that Sabre's immense market share in the GDS industry placed US Airways at a disadvantage in the negotiation of the 2011 contract as 38 percent of US Airways' revenue was generated through Sabre sales while only a small amount of Sabre revenue was generated from US Airways ticket sales.

AVIATION REGULATORY UPDATE

US Airways has requested $122 million in attorneys' fees for the six-year litigation. The Court has yet to rule on the motion.

TRUMP SEEKS TO SIGNIFICANTLY RESHAPE TSA 9/11 FEE

The Trump Administration is proposing to increase the September 11th airline security fee "to ensure that that cost of government services is not subsidized by taxpayers who do not directly benefit from these programs." While the Administration has not publicly stated the exact amount of the increase, it has noted that fees should be raised high enough to cover 75% of passenger security operations. Reports indicate that the current $5.60 fee for each leg of a flight could rise as much as $1.00. The higher fee is projected to generate $40 billion over its first decade and contribute $12.6 billion to deficit reduction. A4A has asked the D.C. Circuit Court of Appeals to review the fee hike and we expect to see significant opposition from airlines if the proposal moves forward.

In addition, the budget seeks to eliminate TSA grants to state and local jurisdictions to incentivize police patrols at airports because "[the patrols] should already be a high priority" and includes a reduction of the Visible Intermodal Prevention and Response team that patrols airports with bomb-sniffing dogs.

With respect to DOT, the budget is calling for a 13% ($2.4 billion) reduction in the Department of Transportation's (DOT) funding. This includes moving air traffic control from the Federal Aviation Administration to an independent, non-governmental organization and eliminating the Essential Air Service (EAS) program, which subsidizes air carriers to operate unprofitable passenger routes to rural communities in the United States.

DEPARTMENT OF TRANSPORTATION EXTENDS COMPLIANCE DATE FOR MISHANDLED BAGGAGE FINAL RULE

DOT has extended the compliance date for its final rule on reporting data for mishandled baggage and wheelchairs in aircraft cargo compartments from January 1, 2018 to January 1, 2019. This extension is in response to requests by Airlines for America (A4A) and Delta.

The final rule changes the mishandled-baggage data that U.S. air carriers are required to report, from the number of Mishandled Baggage Reports (MBR) and the number of domestic passenger enplanements to the number of mishandled bags and the number of enplaned bags. DOT believes this adjusted reporting methodology will better educate the general public as to the actual percentage of bags that are mishandled. The rule also requires separate statistics for mishandled wheelchairs and scooters used by passengers with disabilities and transported in cargo compartments. This rule does not apply to foreign air carriers.

ECKERT SEAMANS
ATTORNEYS AT LAW

MARCH 2017

AVIATION REGULATORY UPDATE

NORWEGIAN AIR CAN INTERVENE IN DC CIRCUIT AIR PERMIT ROW

On March 6, 2017 the D.C. Circuit held that Norwegian Air Shuttle ASA's Irish subsidiary, Norwegian Air International (NAI), can intervene in a suit brought by a coalition of pilots and flight attendant unions challenging DOT's decision to grant a foreign air carrier permit to Norwegian Air International to offer service to U.S. destinations.

The airline asked for permission to intervene in early February arguing that it has a fundamental and direct interest in the proceedings as its plans to operate as a foreign carrier to the U.S. would be upended if the order to grant the permit was reversed or vacated by the court.

Norwegian Air's bid to have its subsidiary serve U.S. markets has come under fire by numerous U.S. labor groups and others who claim the airline's questionable labor practices undercut employee's ability to unionize and bargain collectively. NAI filed its application for the permit in late 2013, but it was not granted until December 2016.

In its order, DOT stated that it had no choice but to issue the permit despite the controversy surrounding the application and the opposition from labor groups as well as foreign and domestic airlines. The decision came the same day that the European Union filed an arbitration claim against the U.S. for delaying its decision on NAI's application.

ADA PREEMPTS PASSENGER'S NEGLIGENCE CLAIMS ARISING FROM IMPACT WITH VIDEO MONITOR

A passenger is suing American Airlines after hitting her head on a video monitor on a flight from JFK to LAX. According to the complaint, the monitor "protruded from the wall in front of and above her seat" and "was painted to blend with the wall." The plaintiff claims to have sustained severe head and heart injuries due to the impact with the monitor and alleges entitlement to over $11 million in compensatory damages and punitive damages exceeding $21 million. The passenger also sought injunctive relief that American Airlines remove certain seats close to the monitors and paint the walls and monitors different colors.

American removed the case to federal court and asked for judgment on the grounds that the claims were preempted by 49 U.S.C. § 41713(b). In support of its motion, the airline submitted an affidavit from the engineering manager of its 767-200 interiors group stating that the installation of the video monitor complied with federal regulations and industry practices.

The court analyzed American's argument and applied a three factor test, ultimately finding that: the positioning of an in-flight monitor relates to an airline service; the plaintiff's claims concerning the placement of the monitors directly affects that service; and the placement of monitors near passenger seating was essential to the provision of safety-instruction videos and in-flight entertainment. Based on

these findings the court granted American's motion. On February 28, 2017 the plaintiff filed a notice of appeal. See Faewmino v. American Airlines, Inc. (S.D.N.Y. Jan. 30, 2017).

DELTA FILES TRADEMARK SUIT OVER FRAUDULENT WEBSITE

Delta Airlines Inc. has filed a complaint against the operators of a website at deltaairlinereservations.org where a handful of "John Does" are using Delta trademarks to defraud and confuse the public by impersonating the airline. The operators of the site even offer a call center through the website where they intentionally misrepresent to customers that they are doing business with Delta Airlines.

In its complaint, Delta notes that it has registered numerous block-letter and stylized marks with the U.S. Patent and Trademark Office, and the defendants have copied all of them for use on their website. The unauthorized use of Delta's marks has caused consumer confusion and the suit states it is deliberate, willful, and demonstrative of bad-faith intent to trade on the goodwill of Delta's marks. As a result of the alleged infringement, Delta states that it continues to suffer irreparable harm and damage to its reputation, according to the suit. The airline is seeking permanent injunctive relief, disgorgement of profits, actual or statutory damages, costs, and attorney fees. See Delta Airlines, Inc. v. John Does 1-5 (N.D.Ga. Nov. 22, 2013).

FAA MANDATES ADS-B OUT BY 2020

The FAA has mandated aircraft operated in controlled airspace be equipped with Automatic Dependent Surveillance-Broadcast (ADS-B) Out by January 1, 2020. To maintain access to the affected airspace, both domestic and foreign operators must comply with the requirements. The FAA has also stated that it will not extend the effective date of the rule as implementation is critical to the foundational element of the U.S. NextGen program.

ADS-B Out is a precise satellite-based surveillance system which uses GPS technology to determine an aircraft's location, airspeed, and additional relevant data to other properly equipped aircraft and ground stations as well as air traffic control.

The FAA has been working with the aviation industry to ensure awareness of the requirement. Notably, the U.S. government has presented a Working Paper to the ICAO 39th Assembly calling attention to the mandate and foreign regulatory authorities are being encouraged to require similar equipment modernization as soon as possible to avoid service disruption once the mandate becomes effective.

DELTA AIRLINES FINED $90,000 FOR FAILURE TO ADEQUATELY PROVIDE FOOD AND WATER DURING TARMAC DELAYS

The Department of Transportation fined Delta Airlines, Inc. $90,000 for failing to provide food and water to passengers on four flight delays at JFK and ATL in July 2016.

Pursuant to 14 CFR 259.4(b)(3) carriers are required to provide adequate food and water no later than two hours after the aircraft leaves the gate (in case of departure) or touches down (in case of arrival) if the aircraft remains on the tarmac. Section 259.4(b)(7) requires that carriers have sufficient resources to implement their contingency plan for lengthy tarmac delays.

Although water was served on each of these flights to all passengers, evidence indicated that there was limited or no food service provided. Delta acknowledged that the manner of distribution of snacks was not ideal and consented to a fine of $90,000 and to an order to cease and desist from further violations.

VIRGIN ATLANTIC FINED FOR FULL-FARE ADVERTISING VIOLATION

DOT has fined Virgin Atlantic Airways Ltd. (Virgin) $30,000 for violations of 14 C.F.R. Section 399.84(a), which requires that the first price quote for air transportation must state the entire price to be paid by the customer. Violating the regulation constitutes an unfair and deceptive practice in violation of 49 U.S.C. § 41712. The complaint, among other assertions, states that Virgin's description of "Taxes" on its "Rewards Flight" website did not make it sufficiently clear to consumers that the heading "Taxes" included taxes, fees and carrier-imposed surcharges. Virgin's response argued that the "Taxes" heading was a mistake and that it was corrected the same day as the complainant's purchase.

In issuing the penalty, DOT relied on guidance it published in February 2012 which explains that that it is an unfair and deceptive practice in violation of section 41712 to include carrier-imposed surcharges and other fees not imposed by a government under the label of "taxes," or under the label "taxes and fees". Virgin neither admitted nor denied the violations described above when it consented to a cease and desist order from DOT in addition to the $30,000 fine.

SPIRIT FINED FOR FAILING TO MAKE REQUIRED NOTIFICATIONS DURING LENGTHY TARMAC DELAY

Spirit Airlines, Inc. (Spirit) was recently fined $60,000 for failing to inform passengers on a flight delayed at the gate that they had the opportunity to deplane. Under 14 C.F.R. 259.4(b)(6), covered carriers must provide notifications beginning 30 minutes after the scheduled departure time and every 30 minutes thereafter that passengers have the opportunity to deplane from an aircraft that is at the gate or another disembarkation area with the door open if the opportunity to deplane actually exists.

On December 27, 2015, Spirit Airlines flight 713 departed from Orlando International Airport (MCO) and was scheduled to land at George Bush Intercontinental Airport (IAH). The aircraft was diverted to Louis Armstrong New Orleans International Airport (MSY) due to bad weather. According to the consent order, after landing at MSY and reaching the gate, the aircraft door was opened. The aircraft remained at the gate with the door open for more than 30 minutes and passengers had the opportunity to deplane during this time. However, Spirit Airlines failed to notify passengers of this opportunity which resulted in a violation of the tarmac delay rule.

ECKERT SEAMANS
ATTORNEYS AT LAW

MARCH 2017

AVIATION REGULATORY UPDATE

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

ECKERT SEAMANS
ATTORNEYS AT LAW

APRIL 2017

AVIATION REGULATORY UPDATE

CONGRESS TO INVESTIGATE AIRLINE CONSUMER ISSUES

The House Transportation and Infrastructure Committee announced on April 19, 2017 that it plans to hold a hearing on airline consumer issues in the wake of a United Airlines passenger incident that went viral earlier in the month. The incident resulted from the removal of a seated and ticketed passenger on United Flight 3411 by law enforcement officers. The passenger, Dr. David Dao, allegedly suffered physical injuries after attempts by police to remove him from the aircraft. The House Committee has not announced a date for a public hearing.

United has confirmed that it will meet with Committee members to share the results of an internal review of the incident. United missed an April 20, 2017 deadline to respond to Senate Commerce Committee questions on the same incident. The airline plans to submit a report on April 27, 2017. The airline has said that it plans to share the results of the investigation directly with the Senate Committee.

TRUMP TAPS LYFT EXEC FOR NUMBER THREE SPOT AT DOT

President Trump has nominated Lyft general manager Derek Kan to serve as the Department of Transportation's under secretary of transportation for policy. While Kan appears to have limited prior experience in the aviation sector, he has been a member of Amtrak's board since 2015, previously served as a policy adviser to Senate Majority Leader Mitch McConnell (who is Secretary Chao's husband) and was the chief economist for the Senate Republican Policy Committee. If confirmed, Kan would be responsible for providing policy guidance for the Department, including how to deal with emerging technologies such as self-driving cars, UAS, and NextGen.

The Trump administration has also nominated Jeffrey A. Rosen to be the Deputy Secretary of Transportation. Mr. Rosen was formerly the General Counsel at DOT from 2003-2006. He also had responsibility for DOT's regulatory program, enforcement and litigation activities, legal issues relating to international activities involving transportation, legislative proposals, and he acted as counsel to then-Secretary Norman Mineta. Mr. Rosen will leave Kirkland & Ellis LLP in Washington to fulfill the role. Mr. Rosen has not yet been confirmed to the position.

PORT AUTHORITY OF NY AND NJ INTENDS TO IMPOSE AND USE PFCS AT EWR, JFK, LGA AND SWF

The Port Authority of New York and New Jersey plans to impose new Passenger Facility Charges (PFCs) at JFK, EWR, LGA and SWF airports. The new PFCs are proposed to take effect at staggered dates in 2017 and 2018 and will be used to pay for renovations of LGA Terminal B, EWR Terminal A as well as roadway improvements at both airports. Carriers have until May 25, 2017 to provide written certification of their agreement or disagreement with the proposed PFC projects.

If you would like more information on the fees or the certification process, please contact us.

ECKERT SEAMANS
ATTORNEYS AT LAW

APRIL 2017

AVIATION REGULATORY UPDATE

14 STATES ASK DC DISTRICT COURT TO UPHOLD TRUMP'S 2-FOR-1 ORDER

Public interest groups and other organizations have filed suit to stop a Trump Administration executive order which, starting in 2018, calls on the director of the White House Office of Management and Budget (OMB) to give each agency a budget for how much it can increase regulatory costs or cut regulatory costs. The President has advertised the "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs" as requiring agencies to abolish two existing rules for every new one that is imposed. Public interest groups argue that the order and guidance from OMB failed to take into account the benefits of any new rules. Additionally, their lawsuit states that the order would force agencies to arbitrarily scrap existing rules to meet the cost cap set by the OMB and that requiring executive agencies to consider the costs of rulemaking conflicts with the principle of separation of powers.

On April 17, 2017 Alabama, Arizona, Arkansas, Georgia, Kansas, Louisiana, Michigan, Nevada, Oklahoma, South Carolina, Texas, West Virginia, Wisconsin and Wyoming moved to support the executive order. These states support the measure because it is likely to lessen the regulatory burden on the states and their residents. According to their amicus brief on behalf of the White House, submitted to U.S. District Court for the District of Columbia, between 2010 and 2015 the federal government averaged 57 significant regulations per year. The states argue that in 2012 alone, regulations cost businesses and individuals an estimated $2.028 trillion in compliance costs.

These states disagree with the interest groups and note that other presidents have issued executive orders directing federal agencies to consider factors when exercising discretion in regards to regulation. The states believe that that there has been unnecessary growth in federal regulations and it has had a deleterious effect on the states and their citizens. The states argue that the one in, two out concept would help to solve this long term problem.

The case is Public Citizen Inc. et al. v. Donald Trump et al, case number 1:17-cv-00253, in the U.S. District Court for the District of Columbia.

INHOFE CALLS FOR IMPROVED PROTECTIONS FOR PILOTS

Sen. Jim Inhofe (R-OK) recently introduced S.755, the Fairness for Pilots Act. The proposed bill would improve due process protections that already exist in the Pilot's Bill of Rights for General Aviation pilots, which was signed into law in 2012. Existing protections include a pilot's right to appeal a Federal Aviation Administration (FAA) decision through a merit-based trial in federal court. The 2012 law also includes provisions to stop the NTSB from rubber stamping FAA penalties levied against pilots. According to Inhofe, only a small fraction of appeals brought to the NTSB result in the Board overturning the FAA's findings. The new bill seeks to increase transparency for pilots under FAA investigation or enforcement action by requiring the agency to inform the affected individuals of the specific event under investigation and to provide detailed documentation that is relevant to the investigation. The legislation is also intended to expedite updates to the Notice to Airmen (NOTAM) Improvement Program required in the current Pilot's Bill of Rights.

ECKERT SEAMANS
ATTORNEYS AT LAW

APRIL 2017

AVIATION REGULATORY UPDATE

FCC MOVES TO END PROPOSAL TO ALLOW CELLPHONE CALLS ON PLANES

On April 10, 2017, FCC Chairman Ajit Pai moved to close the three year old proposal that would have allowed cellphone calls on airplanes. Former FCC Chairman Tom Wheeler, a Democrat, first proposed the idea of in-flight calls in 2013. The plan would have relaxed the agency's rules on using certain frequencies on aircraft, allowing airlines to choose whether to enable mobile calls. The public was invited to comment on the proposal and there was overwhelming opposition to the divisive issue, particularly from airline pilots, flight attendants and passengers.

Separately, DOT proposed a rule in December 2016 that would require airlines to inform passengers prior to purchasing tickets whether their flight supported calling via wi-fi on board the aircraft. DOT also sought comment on whether it should ban all voice calls on all U.S. flights. Currently, FCC rules prohibit the use of mobile devices on certain radio frequencies onboard aircraft, including for voice calls. However, the existing FCC rules do not cover wi-fi and other means by which it may become possible to make voice calls. Several airlines have asked DOT to delay action on in-air mobile calling as it takes stock of the regulatory climate in the new administration.

AIRLINES CONTINUE TO CHALLENGE LOCAL TAXES IN CALIFORNIA

A California appellate court has held that numerous airlines, including Southwest, United, AirTran Airways, American Airlines, Envoy Air, JetBlue, and SkyWest Airlines, have not exhausted their administrative remedies when it comes to a dispute over claims by the carriers for tax refunds related to the storage of aircraft in the state.

The airlines are attempting to secure refunds for excess taxes allegedly paid on aircraft stored in 11 California counties, including Los Angeles, San Diego and Sacramento counties, and have filed 11 suits against the individual counties alleging that various local assessments on aircraft were void. The airlines unsuccessfully argued that the assessments are void because the local boards of each county do not possess the "special competence to decide" valuation and that the assessors did not have the proper figures to calculate economic obsolescence, or a form of depreciation. The appellate court ultimately ruled against the airlines, holding that they circumvented local tax equalization boards in their bid to avoid the taxes and must comply with the law like any other citizen.

The airlines will now have to plead their case directly to the local boards.

DOT FINES PARADIGM JET MANAGEMENT $30,000

On April 7, 2017, DOT fined Paradigm Jet Management, Inc. (Paradigm) $30,000 for engaging in unfair and deceptive trade practices in violation of 49 U.S.C. 41712. Paradigm entered into an arrangement with IBX Jets LLC (IBX) whereby Paradigm allowed its FAA safety authority to be used by IBX. IBX then used this

arrangement to engage in air transportation as an indirect air carrier without having economic authority of its own.

In order to engage directly or indirectly in air transportation, citizens of the United States must hold economic authority from the Department either in the form of a certificate of public convenience and necessity or through an exemption from the certificate requirement, such as those applicable to direct air carriers operating as air taxis or to indirect air carriers acting as public charter operators. This was not the case with IBX. In its Order, DOT reiterated that an entity that does not hold economic authority from DOT may not lawfully solicit and contract with a charter customer for air transportation and then separately contract with a direct air carrier to provide the air service it has promised to the charter customer. Notably, DOT emphasized that the "holding out" of air service as well as the operation of the air service in such a situation is an unfair and deceptive practice. According to DOT, "in isolation, IBX's behavior would have been extremely serious because it amounted to engaging in air transportation without a license. However, IBX's behavior was particularly pernicious, because it was done under the guise of lawful authority, a condition that would have been impossible without Paradigm's involvement."

DOT has initiated a separate investigation into IBX's activity.

PRIVATE BOMB-SNIFFING CANINES TO MEET NEW REQUIREMENTS

The Transportation Security Administration (TSA) is pushing to regulate the certification of Explosive Detection Canine (EDC) teams owned, operated and trained by private companies. A TSA-approved certification program would allow EDC teams to participate in cargo screening operations. The TSA currently operates the TSA Canine Training Center which "trains and deploys both TSA-led and state and local law enforcement-led canine teams in support of day-to-day activities that protect the transportation domain [,]" according to the TSA website. The certification program does not call for EDCs to screen passenger aircraft.

The 2017 Department of Homeland Security Appropriations Bills also call for the use of EDCs to augment TSA capabilities. This ultimately permits private industry to use third-party certified canines to meet TSA air cargo screening requirements in addition to the TSA Training Center. The bills were passed by both Houses of Congress. Most recently, TSA has conducted market surveys in order to assess the viability of EDCs working in conjunction with TSA canines. TSA has not announced a date for the certification program to go into effect. The use of specially trained dogs is one of several methods for screening air freight that are identified in the 9/11 Commission Recommendations Act that was passed by Congress in 2007.

If you would like information on private companies that provide this service, please contact us. Some have advised they will provide free demonstrations of the types of services they can offer.

ECKERT SEAMANS
ATTORNEYS AT LAW

APRIL 2017

AVIATION REGULATORY UPDATE

US AIRWAYS DEFENDS $122M ATTORNEY FEE BID IN SABRE ANTITRUST SUITE

US Airways is defending its request for $122 million in attorneys' fees for its $15 million victory against Sabre in an antitrust dispute. The airline argued on April 17 in New York federal court that its legal fees are reasonable and in line with Sabre's own legal costs. Sabre argued that the airline should only receive $13 million in legal fees since three of the four claims in the underlying suit were rejected and that a number of the specific decisions in the airline's legal strategy created unnecessary attorneys' fees. US Airways stated that the Clayton Act does not require a plaintiff to prevail on all motions and claims to be entitled to full recovery of fees. The court has not yet issued a ruling on the arguments.

TEN-YEAR PRICE-FIXING MDL SAGA CONTINUES

On April 14, 2017 the 9th Circuit Court of Appeals affirmed Judge Charles R. Breyer's (Northern District of California) grant of summary judgment to a group of plaintiffs in a suit against All Nippon Airways, EVA Airways and China Airlines, concerning allegations of price-fixing on trans-Pacific flights.

The airlines' defense was predicated on the filed rate doctrine, which is a judicially created rule that prevents collateral attacks on rates that are filed and/or regulated by the Department of Transportation (DOT) (or other state or federal agencies). In 2014, Judge Breyer held that fares actually filed with DOT were barred by the filed rate doctrine. However, for unfiled fares, fuel surcharges and discount fares, Judge Breyer's opinion ruled that airlines cannot avoid antitrust damages claims simply because DOT oversees the airlines' fares and surcharges. Rather, immunity would require that the airline actually file the fares and surcharges to DOT.

The 9th Circuit's recent opinion holds that if additional evidence is presented to show DOT did regulate the unfiled discount fares and surcharges then the district court would be required to rethink its finding. The litigation has been ongoing since 2007 and has involved several other airline defendants but many have since settled.

ALLIED AVIATION DOES NOT MEET DEFINITION OF "CARRIER"

On April 18, 2017, a D.C. Circuit panel rejected aviation fueling service Allied Aviation Service Company's (Allied) recent argument that it is a "carrier" subject to the National Mediation Board's (NMB) jurisdiction under the Railway Labor Act (RLA).

The issue stems from 2012 when a group of Allied supervisors at Newark Liberty International Airport tried to organize with the local International Brotherhood of Teamsters. The National Labor Relation Act in part bars supervisors from unionizing. However, the National Labor Relations Board (NLRB) previously found that most of the supervisors were supervisors in name only. The NLRB found that the employees did not perform any actual tasks that would demonstrate actual supervisory authority.

AVIATION REGULATORY UPDATE

In response to the NLRB decision, Allied argued that it was subject to the RLA due to its status as a "carrier". The RLA gives the NMB jurisdiction over rail and air companies that transport passengers or cargo. In ruling on this theory, the D.C. Circuit panel used a two part test in determining whether Allied is a carrier (or to be so controlled by a carrier as to be outside the NLRB's reach). First, the panel determined whether the company is "directly or indirectly owned or controlled by … a carrier or carriers." Second, the panel would have weighed whether the company performs work that is "traditionally performed by employees of rail or air carriers." However, the D.C. Circuit found Allied failed the control prong, without having to reach the function prong. The court held that "Allied presented no evidence that it was under contract with any common carrier, nor did it identify any case in which an employer without a carrier contract was subject to RLA jurisdiction."

Judge Nina Pillard wrote, "[t]he record in this case confirms that the [NLRB] board's factual findings regarding carrier control were supported by substantial evidence." Further, "[a]llied presented no evidence that it was under contract with any common carrier, nor did it identify any case in which an employer without a carrier contract was subject to RLA jurisdiction."

Allied will now have to negotiate with non-supervisory employees in further attempts to unionize. The D.C. Circuit ordered Allied to bargain with a unit certified by the National Labor Relations Board NLRB.

PHMSA INCREASES PENALTIES FOR HAZMAT VIOLATIONS

The Pipeline and Hazardous Materials Safety Administration (PHMSA), a Department under DOT, is increasing maximum fines for violations related to the transportation of hazardous materials that result in death, serious illness or injury, or severe destruction of property from $ 179,993 to $182,877 per violation. It can also fine a maximum of $78,376 for knowing violations of a less serious nature. This is an increase from $77,114. The fine increases are a result of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 which requires agencies to increase fines to account for inflation. PHMSA oversees all transporters of hazardous materials, including airlines.

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

ECKERT SEAMANS
ATTORNEYS AT LAW

MAY 2017

AVIATION REGULATORY UPDATE

AIRLINES AGREE TO SHORTEN CUSTOMER SERVICE CONTRACTS IN HOUSE HEARING

A U.S. House of Representatives hearing on May 2, 2017 resulted in an agreement whereby several of the nation's top airlines will shorten customer service contracts for the benefit of consumers. Members of the House Transportation and Infrastructure Committee chided executives from United, Alaska, American and Southwest Airlines about their respective lengthy conditions of carriage. This was the first Congressional hearing after the now-famous April 9, 2017 denied boarding incident on a United Airlines flight.

The hearing focused specifically on airline overbooking and bumping policies that led to the April 9, 2017 event. Legislators stated that passengers rarely know the terms of passenger agreements at the time of ticket purchase and that the average consumer needs a simpler, more understandable contract so that they can meet the airlines on an equal contractual footing. As an example, United's Contract of Carriage is 46 pages long and Alaska's is 67 pages. As of May 24, 2017, United's Contract of Carriage has not yet been revised.

NINTH CIRCUIT HOLDS AIRLINE DEREGULATION ACT DOES NOT PREEMPT STATE PUTATIVE CLASS ACTION CLAIMS TO RECOVER $15 BAGGAGE FEES

The Ninth Circuit Court of Appeals ruled on May 3, 2017 that the federal Airline Deregulation Act, which preempts state laws "related to a price, route, or service of an air carrier[,]" does not preempt certain putative state-law class action claims stemming from delayed baggage disputes. The named plaintiff sued US Airways in connection with its practice of retaining checked-baggage fees it collected from passengers whose bags had been delayed or lost while in the airline's care. The plaintiff alleged that the airline breached the terms of its contract by refusing to refund the $15 baggage fee. The Circuit Court held that the passenger's breach of contract claim was not preempted by the Airline Deregulation Act and remanded the case to federal district court in order to determine the case on the merits. Hon. Howard R. Lloyd, Magistrate Judge from the U.S. District Court of the Northern District of California, had previously granted the airline's motion to dismiss premised on the theory of federal preemption. The case is *Hickcox-Huffman v. US Airways*.

D.C. CIRCUIT VACATES ELEMENTS OF FAA DRONE RULE

The United States Court of Appeals for the District of Columbia Circuit recently vacated the Federal Aviation Administration's drone registration rule to the extent it applies to model aircraft. As background, in 2012, Congress passed a law prohibiting the FAA from promulgating "any rule or regulation regarding a model aircraft." In 2015, the FAA issued a rule requiring registration for drones, including model aircraft, in response to a 2012 Congressional mandate that the FAA establish a "comprehensive plan" to fully integrate commercial and recreational drones into the national airspace system.

AVIATION REGULATORY UPDATE

A 3-judge panel of the D.C. Circuit vacated this rule, concluding that "statutory interpretation does not get much simpler" in light of the express Congressional mandate, and held that the "registration rule is unlawful as applied to model aircraft. "The lawsuit was filed by John A. Taylor, an individual hobbyist acting in a pro se capacity. Taylor also challenged an advisory circular limiting model aircraft operations in the Washington, D.C. region. The D.C. Circuit denied Taylor's petition for review of the advisory circular because it was filed outside the 60-day judicial review timeline imposed by 49 U.S.C. § 46110. Taylor had admitted that he had not known about the advisory circular until the FAA began advertising it more than 60 days after it was issued. The D.C. Circuit noted that Taylor's position was "understandable" but concluded that precedent required "more than simply ignorance of the order" to qualify as reasonable grounds for a delay of complying with the 60-day requirement of § 46110.

SOUTHWEST TO END OVERBOOKING PASSENGERS

Southwest Airlines CEO Gary Kelly stated in a May 16, 2017 interview with the Wall Street Journal that the airline sought ways to mitigate the risk of repeating the April 9, 2017 incident on United Airlines where a passenger was taken off of a flight after refusing to surrender his seat. Mr. Kelly explained that overbooking is a tool that airlines use to keep fares low. The practice capitalizes on bookings where passengers pay for transport but otherwise fail to appear for the scheduled flight. The airline is then able to sell the unused seat to a second passenger and is able to keep the fare paid by the absentee passenger.

In the interview, Mr. Kelly explained that the number of no-show passengers has decreased over the years to such a degree as to make the overbooking practice less lucrative than it had been in the past. Also, the CEO believes that ending the overbooking business model is "the right thing to do."

Southwest joins other airlines, like JetBlue, that do not overbook flights.

BTC WRITES TO CONGRESS REGARDING AIRLINE PRICING

In a letter to Members of Congress, the Business Travel Coalition (BTC) called for a meaningful review of existing grants of Antitrust Immunity (ATI) and a reevaluation of general ATI policy with the U.S. Department of Justice.

BTC cites that industry consolidation and collusion amongst Delta Airlines, American Airlines, and United Airlines (Big 3) has significantly increased the risk of lower competition which equates to artificially high fare prices and fewer consumer benefits.

The letter goes on to state that the Big 3 have been a primary proponent of an anti-Open Skies campaign in protest of Emirates Airlines, Etihad Airways, and Qatar Airways (Gulf Carriers). The letter argues that Gulf Carriers charge market-based prices which are lower than the Big 3's artificially higher air fares. However, the Big 3 have not been able to provide an instance of Gulf Carriers providing below-cost pricing in relation to government subsidies. Proof of such an allegation would be a violation of Article 12 of the U.S.-United Arab Emirates and the U.S.-Qatar Open Skies agreements. BTC claims that the lower-priced fares by Gulf

AVIATION REGULATORY UPDATE

Carriers are a result of the fact they do not collude through ATI or charge oligopoly-immunized fares with foreign joint venture (JV) partners.

The Business Travel Coalition asks that Congress and the Trump Administration rectify the mistake of prior administrations and take a hard look at airline pricing to fix this issue as the market is considerably less competitive than when the JV's were first granted ATI. The Trump Administration had not responded to the letter as of the date of this publication.

AIRLINES' $40M ANTITRUST DEAL UNFAIR, NINTH CIRCUIT HEARS APPEAL

On April 21, 2017 Anna St. John of the Competitive Enterprise Institute objected to a $39.5 million settlement ending antitrust claims in multidistrict litigation against Société Air France, S.A. (Air France). The original suit was brought in 2007 against several airlines, among them Air New Zealand, Singapore Airlines, and Continental Airlines, alleging that they fixed the fares on long-haul trans-pacific flights to Australia, New Zealand, and the Pacific Islands.

St. John argued to a Ninth Circuit panel that the settlement unfairly lumped the claims of customers who bought the tickets through travel agents with those who purchased directly from the airlines. She stated that U.S. District Court Judge Charles Breyer made a legal error by failing to evaluate the strengths of the different claims as required by the Ninth Circuit's 2003 Churchill Village decision and that of the US Supreme Court's 1999 *Ortiz v. Fibreboard Corp*. ruling which supported the premise that limited fund class actions are not appropriate for to litigate many unliquidated tort claims. She asked that subclasses be created with separate representatives to independently advocate in the interests of the different groups. The appeal also requested the court to consider a separate class for Japan Airlines travelers whose city of origin was abroad rather than domestic, arguing they siphoned money from domestic travelers.

Class counsel Christopher L. Lesbock cited the Third Circuit's 2010 *Sullivan v. DB Investments* case and said that the Ninth Circuit found that such issues were left to the discretion of district court judges. The Court will consider Ms. St. John's argument and a ruling has not been made as of May 24, 2017.

BASICMED BEGINS

Effective May 1, general aviation pilots can now fly under BasicMed without holding a Federal Aviation Administration (FAA) medical certificate. BasicMed is an alternative to the FAA's medical qualification process for third class medical certificates. General aviation pilots can now choose to use BasicMed or continue to use their existing FAA medical certificates. A pilot who chooses BasicMed will be required to complete a medical education course every two years and undergo a medical examination every four years. Pilots will also have to comply with other aircraft and operating restrictions.

ECKERT SEAMANS
ATTORNEYS AT LAW

MAY 2017

AVIATION REGULATORY UPDATE

SUPREME COURT LIMITS "FORUM SHOPPING" IN PATENT-INFRINGEMENT LAWSUITS

The Supreme Court of the United States issued a decision in T*C Heartland LLC v. Kraft Food Group Brands, LLC* on May 22, 2017 that will limit "forum shopping" in patent-infringement lawsuits against a variety of corporations. Prior to the *Heartland* case, a corporation could be sued for patent infringement virtually anywhere in the United States where its product was sold, even if the company did not have an office or retail presence in that state. As a result, certain jurisdictions became popular for patent-infringement cases. The Supreme Court's *Heartland* ruling will end this practice. Corporations can now only be sued in patent-infringement cases (1) in the state in which it is incorporated or (2) in a state where it sells its products and maintains a regular and established place of business, such as an office or store. The mere sale of a product in a state, if a corporation has no presence there, will no longer make that company subject to a patent-infringement lawsuit in that state. The practical effect of the *Heartland* decision will be that certain "plaintiff haven" forums will see a decline in patent-infringement lawsuits while other forums where many corporations are incorporated, such as Delaware, will likely see an increase.

CONGRESSMEN ASK GAO TO STUDY CONSUMER PROTECTION RULES

Representatives Peter DeFazio (D-OR) and Rick Larsen (D-WA) sent a joint letter to the Comptroller General of the Government Accountability Office (GAO) on May 2, 2017 in order to request a review of the U.S. Department of Transportation's (DOT) consumer protection rules for airlines. The letter notes earlier efforts by DOT to enhance consumer protection but questions the agency's decision when it "tabled" a rulemaking that would provide additional passenger protections in connection with the Trump administration's freeze on regulations. As a result, the Representatives ask GAO to "review the efficacy of existing protections and DOT oversight."

FAA PROPOSED $63,000 CIVIL PENALTY AGAINST GLADWIN PAINT FOR ALLEGED HAZMAT VIOLATIONS

On May 23, 2017 The Federal Aviation Administration proposed a $63,000 penalty against Gladwin Paint Company of Arlington, Texas for alleged violations of the Hazardous Material Regulations.

The alleged action took place on May 11, 2016 when a box containing flammable paint was presented to FedEX to be shipped from Arlington, Texas to Abilene Texas. Gladwin's shipment did not have shipping papers describing the material, was not properly marked or labeled, was not packaged or in the proper condition for shipment, and did not include emergency response information. The FAA is also alleging that the company failed to provide required hazardous materials training to employees.

Gladwin has 30 days from receiving the FAA's letter to respond to the allegation.

ECKERT SEAMANS
ATTORNEYS AT LAW

MAY 2017

AVIATION REGULATORY UPDATE

The GAO has not released a comment as to whether the study will be initiated.

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

ECKERT SEAMANS
ATTORNEYS AT LAW

JUNE 2017

AVIATION REGULATORY UPDATE

DEPARTMENT OF HOMELAND SECURITY CHANGES COURSE ON "LAPTOP BAN"

On Wednesday, June 28, 2017 the Department of Homeland Security (DHS) announced that every commercial flight bound for the U.S. will be forced to tighten its security procedures or else risk a complete ban on large electronic devices (devices larger than a smart phone) from both the cabin and the luggage compartments of the airplane.

The new requirements will apply to approximately 180 airlines operating at more than 280 airports in 150 countries that are the last point of departure for direct flight to the U.S.

Airlines that operate to the U.S. from 10 airports in the Middle East and North Africa can "escape" the so-called "laptop ban" if they comply with the new security measures. The new measures have not been fully released yet but could include a larger number of K-9 units to detect bombs and other harmful devices, greater security presence around aircraft or the use of new electronic monitoring devices. Additional measures have the potential of creating longer wait times for passengers transiting security check points.

DHS officials have stated that the measures will differ by airport and that it is the responsibility of the airlines to inform passengers of new security procedures and how they might affect travel and wait times.

The situation remains fluid and more concrete details of the new security measures will likely become more available in the coming weeks.

HOUSE AND SENATE LEADERS PRESENT FAA REAUTHORIZATION ACT

On June 22, 2017, both the House of Representatives and the Senate introduced bills to reauthorize the Federal Aviation Administration (FAA). The agency's current authorization would otherwise expire this September without action by the federal government. The most prominent issue is the privatization of Air Traffic Control (ATC), which is supported by the President. Some of the highlights of each bill are as follows:

Senate:

- Consumer Protection and Air Travel Enhancements:
    - Elimination of Limitation on Compensation for Involuntary Denied Boarding: Requires that within a year of the passage of the bill, the Department of Transportation (DOT) will review applicable laws that limit compensation that may be provided to a passenger who is denied boarding involuntarily.
    - Protect Passengers from the Involuntary Denied Boarding Process: By prohibiting an air carrier (defined in the bill as a domestic or foreign air carrier) from denying boarding to a revenue passenger once he/she has been approved by the gate attendant to board unless the passenger poses a safety, security, or health risk to other passengers or engages in

abusive or unlawful behavior. It also eliminates the dollar amount limitation on involuntary denied boarding compensation and requires that passenger receive information on their overbooking rights.

- Advisory Committee for Aviation Consumer Protection (ACACP) is extended from September 30, 2017 to September 30, 2021. ACACP is an advisory body to the Department that is responsible for evaluating the Department's aviation consumer protection programs and recommending such new programs as may be needed. The ACACP was originally mandated by the FAA Modernization and Reform Act of 2012.
- Refunds for Fees Not Honored by a Covered Air Carrier: Within one year, requires the Secretary of DOT must promulgate regulations that require each covered air carrier to promptly provide an automated refund to a passenger of any ancillary fees paid for services related to air travel that the passenger does not receive, including on the passenger's scheduled flight, on a subsequent replacement itinerary if there has been a rescheduling, or for a flight not taken by the passenger.
- Disclosure of Fees to Passengers: Within one year, the Secretary of DOT must to promulgate regulations that require each covered air carrier to disclose to a consumer the baggage fee, cancellation fee, change fee, ticketing fee, and seat selection fee of that covered air carrier in a standardized format.
- Seat Assignments: Within 15 months of the passage of the bill, the Secretary of DOT must complete such actions as may be necessary to require each covered air carrier and ticket agent to disclose to a consumer that seat selection for which a fee is charged is an optional service, and that if a consumer does not pay for a seat assignment, a seat will be assigned to the consumer from available inventory.
- Consumer Complaint Process Improvement: DOT rules will requires each air carrier, foreign air carrier, and ticket agent to inform consumers of a carrier service, at the point of sale, that the consumer can file a complaint about that service with the carrier and with the Aviation Consumer Protection Division of DOT. Further, the same entities will be required to include on their website or other electronic service an active link and the email address, telephone number, and mailing address of the air carrier, foreign air carrier, or ticket agent, as applicable, for a consumer to submit a complaint to the carrier about the quality of service; notice that the consumer can file a com-plaint with the Aviation Consumer Protection Division; and an active link to the Internet Web site of the Aviation Consumer Protection Division.
- Online Access to Aviation Consumer Protection Information: No later than 180 days after the date of enactment, the Secretary of DOT will complete an evaluation of the aviation consumer protection portion of DOT's public Internet Web site to identify any changes to the user interface that will improve usability, accessibility, consumer satisfaction, and website performance.
- Enhance the Travel Experience of Passengers with Disabilities:

AVIATION REGULATORY UPDATE

- DOT will conduct and report on a study of in-cabin wheelchair restraint systems within two years of the date of passage of the bill.
- The Secretary will also establish an "Advisory Committee on the Air Travel Needs of Passengers with Disabilities."
- The bill includes a requirement for DOT to review airline policies for traveling during pregnancy and, if appropriate, require air carriers to offer advance boarding to such passengers requesting assistance.
- Implements new delayed and damaged baggage reporting requirements for wheelchairs and mobility devices like scooters.
- By requiring a review of training and best practices by airports.
- Check-in and Seat Fees: Requires airlines to provide notice, when passengers buy a ticket and at the time of check-in, that seating fees are optional and seats will be assigned free of charge prior to departure.
- Dimensions for Passenger Seats: Requires the Administrator of the FAA to initiate a proceeding to study the minimum seat pitch for passenger seats on aircraft operated by domestic air carriers.
- Delay and Cancellation Reporting: Directs DOT to review how airlines provide information on decisions to delay or cancel flights that may be fully or only partially due to weather-related causes.
- Ancillary Services Refunds: Requires airlines to promptly return fees for ancillary services purchased, but not received (such a seat assignments, early boarding and carry-on luggage).

- Air Traffic Control: The bill focuses on implementing recommendations made by independent government stakeholders to ensure a transition to a satellite-based next generation ATC system. It will require that all ATC candidates receive an in-person interview with the FAA before being approved for hire. It also follows up on recommendations made by the DOT Office of the Inspector General and GAO to improve NextGen transition management, mitigating risks to NextGen interoperability with foreign countries, and assess NextGen acquisition practices.
- General Aviation Safety: provides General Aviation airports more flexibility to facilitate infrastructure investment, applies the same medical certificate requirements to air balloon operators as other licensed pilots, and expands the rights of pilots in FAA enforcement proceedings.

- Lithium Ion Battery Transport: The bill includes new requirements on the bulk transfer of lithium batteries. Not later than 90 days after the date of enactment of passage of the bill, the DOT shall conform U.S. regulations on the air transport of lithium cells and batteries with the lithium cells in the 2015–2016 edition of the International Civil Aviation Organization's (ICAO) Technical Instructions (to include all addenda) including the revised standards adopted by ICAO which became effective on April 1, 2016.

ECKERT SEAMANS
ATTORNEYS AT LAW

JUNE 2017

AVIATION REGULATORY UPDATE

- Annual Report: Requires FAA to submit to Congress an annual report on its oversight of scheduled air carriers.

- Drone Safety: Addresses safety and privacy issues, criminalizes reckless drone behavior around manned aircraft and runways, authorizes FAA drone registration authority, and boosts enforcement while creating new opportunities for testing and promoting innovative uses.

- Aircraft Certifications and Reforms: Seeks to improve international competitiveness of U.S. aerospace manufacturing by improving the FAA's processes for certifying aircraft designs and modifications, as well as ensuring the benefits of such certification processes for manufacturers competing in global markets.

House of Representatives:

- Air Traffic Control: The highlight and major change introduced in the House bill is a push to move the Air Traffic Control (ATC) system away from the government and into a non-profit federally chartered corporation. Under this proposal the board of directors of the proposed ATC corporation would consist of 13 members represented by one member each from large, regional and cargo carriers; one member from business aircraft interests; one from general aviation interests; one from air traffic controllers; one from airline pilots; and airports, among others. There would be two "at-large" directors chosen by the 11 other members.

- Consumer Protection:

    - Repeal of Full-Fare Advertising Rule: The full-fare advertising rule implemented by DOT in 2012 which requires that airlines, packagers and travel agents to post total ticket prices, including taxes and fees, in print and online advertising, would be repealed. The bill includes a provision that allows airlines and ticket agents to post base fares on websites and in advertisements, so long as other costs are separately disclosed.
    - Prohibit Certain Cell Phone Voice Communications: The bill would prohibit a passenger from engaging in voice communications using a telephone or tablet during scheduled passenger operations.
    - Protect Passengers from the Involuntary Denied Boarding Process: Declare involuntary denied boarding to be an "unfair and deceptive practice" under DOT rules. Airlines cannot remove a passenger if he or she is traveling on a confirmed reservation and is checked in for the flight prior to any deadline. The bill also eliminates maximum levels of compensation for passengers who are involuntarily denied boarding while also establishing a minimum level of compensation for the same, as determined by DOT.
    - Consumer Complaints Hotline: Requires the Secretary to periodically assess whether other forms of communications (like mobile phone apps) are a viable new means for passengers to communicate complaints.

- Communicate Widespread Disruptions: Foreign and domestic air carriers must immediately publish a clear statement indicating the cause for a passenger's disrupted travel plans and that the air carrier will provide certain services and make arrangements to ensure the passenger can continue on his or her journey.
- Advisory Committee for Aviation Consumer Protection (ACACP) is extended from September 30, 2017 to September 30, 2023.
- Improved Notification of Insecticide Use: Requires domestic and foreign carriers to disclose on their own internet site or through another means that the destination country may require to treat the passenger cabin with insecticides prior to flight.
- Enhance the Travel Experience of Passengers with Disabilities:
  - The Secretary will establish a "Select Subcommittee for Aviation Consumers with Disabilities" to, among other things, identify the disability-related access barriers encountered by passengers with disabilities and recommend consumer protection improvements related to the air travel experience of passengers with disabilities.
  - DOT will conduct and report on a study of in-cabin wheelchair restraint systems within two years of the date of passage of the bill.

- Streamline FAA Certification Process: The bill would make the FAA certification process for aircraft and aviation products more efficient to help manufacturers bring products to market on time, and it would promote innovation and new aviation technologies that improve safety and efficiency.

- FAA Aviation Rulemaking Committee: Separately, the bill calls for the creation of an FAA Aviation Rulemaking Committee to revise flight duty and rest guidelines for Part 135 carriers based on scientific study and similar regulations for commercial airline pilots. The current duty and rest guidance for on-demand operators was last updated in the late 1950s.

SUPREME COURT TO HEAR APPEAL ON IMMIGRATION EXECUTIVE ORDER

On June 26, 2017, the U.S. Supreme Court decided to hear a seminal case involving President Trump's second executive order on immigration. The executive order, which bars entry of certain foreign nationals into the United States from six designated countries (Iran, Libya, Somalia, Sudan, Syria, and Yemen) for a period of 90 days, was challenged in court almost immediately after it was announced and two federal appeals courts blocked critical parts of the order. In deciding to review the case, a divided Supreme Court ultimately stayed portions of the lower court injunctions that prevented any elements of the ban from coming into effect. The Supreme Court's decision is narrow, and only allows the ban to remain in place for individuals who do not have "a credible claim of a bona fide relationship with a person or entity in the United States." How this standard will be interpreted or enforced remains to be seen.

AVIATION REGULATORY UPDATE

The President has argued that the restrictions are necessary for national security, and during oral argument, which is expected to take place in October 2017, the Court will consider the president's power to set national security priorities against the inherent need to protect individuals from discrimination based on their religion or national origin.

The Court's opinion can be found here: https://www.supremecourt.gov/opinions/16pdf/16-1436_l6hc.pdf

PRESIDENT TRUMP ANNOUNCES DEPARTURE FROM OBAMA CUBA POLICY

On June 16, 2017, President Trump announced a new initiative that would pare down former President Obama's business and travel policies with Cuba. The most significant change removes "individual people-to-people travel" between the U.S. and Cuba. The Office of Foreign Asset Control (OFAC), which enforces and administers economic and trade sanctions, announced that licenses instead will be issued for "group travel" "under the auspices of an organization… that sponsors such exchanges to promote people-to-people contact." There are not currently any other planned changes to the other 11 general licenses authorizing travel to Cuba.

A second proposed change is that persons subject to U.S. jurisdiction who travel to Cuba will be prohibited from engaging in transactions with "certain identified Cuban military, intelligence, or security services." To assist in implementing this requirement, the State Department will issue a list of military affiliated entities, such those owned by the Grupo de Administración Empresarial S.A. (GAESA), with which direct transactions are generally prohibited; this is expected to include many of the military owned-hotels and other tourism-related businesses in Cuba. It is being reported that airlines will be exempt from this restriction.

It should be noted that none of the above restrictions will take effect until the new OFAC regulations are issued, which are not expected before September. Additionally, according to the FAQ's issued by OFAC on the issue, any travel-related transaction including direct transactions with entities related to the "Cuban military, intelligence, or security services" that may be implicated by the new Cuba policy will be permitted, provided that the transaction was initiated prior to the issuance of the forthcoming regulations although it remains to be seen how OFAC will address airlines' ability to enter into future contracts with military entities.

SECRETARY KELLY TESTIFIES ON DHS BUDGET REQUEST

On May 25, 2017 DHS Secretary John F. Kelly provided testimony to the Senate Committee on Appropriations, Subcommittee on Homeland Security hearing titled "Review of the FY2018 Budget Request for the U.S. Department of Homeland Security".

Secretary Kelly stated that Biometrics are critical to an ongoing DHS identification and verification initiative. The Budget requests $354 million to support biometric initiatives to assist with entry and exit at ports with the goal of making air travel more secure, convenient, and easier by improving technology and decreasing the possibility of human error when scanning baggage, passengers and cargo for threats.

AVIATION REGULATORY UPDATE

The Secretary also outlined that the Budget will include $277.2 million for checked baggage screening and explosives detection equipment and $77 million for research in explosives screening, threat assessments and detection capabilities.

Finally, the Secretary announced that TSA will cease staffing airport exit lanes, "which will enable placement of an additional 629 TSA Officers at the checkpoints. This solution reflects risk-based analysis; TSA Officers are specially trained to ensure no metallic or non-metallic threat items make it onboard planes. Their security screening skills and expertise are not being put to good use while staffing airport exit lanes, and this is a waste of taxpayer dollars." The Secretary did not elaborate as to who would staff the exit lanes in the future.

The Secretary's testimony outlines the spending initiatives that DHS will implement according to the President's proposed budget which may change after Congress votes on a budget; likely later this summer.

USTOA COMMENTS ON TRANSPARENCY OF AIRLINE ANCILLARY FEES AND OTHER CONSUMER PROTECTION ISSUES

On May 31, 2017, the United States Tour Operators Association (USTOA) wrote to Secretary of Transportation Elaine Chao in regards to the imposition of additional customer service standards on air transportation ticket agents via the Department's Air Transportation Consumer Protect Requirements for Ticket Agents (Consumer Rule IV) rulemaking.

This rule, if promulgated, would require large ticket agents to adopt and adhere to intrusive minimum customer service standards governing the timing of ticket refunds; the holding/cancellation of reservation within 24 hours of booking; the disclosure of carrier cancellation policies, aircraft seating configurations and lavatory availability; the timing for communicating carrier-initiated itinerary changes; and the handling of customer complaints.

In its letter, USTOA argues that Consumer Rule IV would, among other things, impose "complex and, ultimately, unnecessary, customer service standards on 'large ticket agents' selling air transportation, notwithstanding the fact that ticket agents consistently have accounted for an exceedingly small fraction of consumer complaints to the Department." The letter also notes that Consumer Rule IV is based on an outdated regulatory analysis which uses data that is between six and ten years old. USTOA also notes that even though ticket agents sell almost half of all airline tickets, they account for a small share of the written complaints received by DOT. For example, the letter notes that in 2016, DOT received 17,904 consumer complaints, of which only 362 (2.0%) involved ticket agents. And the average for 2014 and 2015 was 1.8%.

USTOA argues that the record for Consumer Rule IV does not indicate a deficiency among ticket agents that would warrant such "extraordinarily intrusive regulatory expansion" which could stifle newer approaches developed by retail seller of air transportation for the handling of customer service issues. The letter urges the Department not to impose standards for dictating ticket agent customer service levels. Specifically, that that mandatory ticket agent customer service standards are unwarranted and that any required

standards would require large ticket agents to "adhere to intrusive minimum customer service standards". However, USTOA writes that if DOT decides to proceed with Consumer Rule IV then the DOT ought to conduct a Regulatory Impact Analysis and re-open the public comment period to take a "fresh look" at the need for regulation of ticket agents.

SENATOR CORNYN PUSHES FOR SECURITY MEASURES AT AIRPORTS SERVED BY IRANIAN CARRIER

Senator John Cornyn (R-TX) on June 12, 2017 stated on the Senate floor that he plans to push for the DHS to increase security at airports served by Mahan Air—an Iranian air carrier. Cornyn said that he will offer a bipartisan amendment to an Iran sanctions bill that would require DHS to compile a list of airports where Mahan operates and make recommendations for increasing security at those facilities.

Although Mahan Air does not fly to any U.S. destinations, Cornyn believes that the airline's operation to European destinations is a security threat to Americans traveling abroad.

DENIED BOARDING COMPLAINT: JACKSON AND JACKSON V. AMERICAN AIRLINES

Renee and Bryan Jackson have filed a complaint against American Airlines for the airline's alleged refusal to transport the couple at Dallas Fort Worth Airport (DFW).

According to the complaint, dated June 18, 2017, American Airlines' refused to transport Bryan and Renee Jackson on their connecting flight AA2497 at DFW airport the evening of April 9, 2015. The couple alleges that after disembarking from their first flight, the couple immediately proceeded to the gate for the connecting flight and stopped briefly to confirm the departing gate number from a screen. Ms. Jackson made multiple attempts to engage a gate agent about the connecting flight but was rebuffed. The agent purportedly refused to speak with the Jacksons or accept their boarding passes. For nearly thirty minutes, the Jacksons were ignored and/or shunned until departure time.

The complaint alleges that "after being involuntarily denied boarding, every gate agent the Jacksons encountered that evening was either cavalier or perfunctory in providing assistance."

The complaint requests, among other things, a denied boarding compensation payment to each passenger and that appropriate civil penalties be imposed.

DOT REQUESTS INPUT ON UNNECESSARY RULES THAT IMPEDE TRANSPORTATION INFRASTRUCTURE PROJECTS

On June 9, 2017, DOT announced a review of "its existing policy statements, guidance documents, and regulations to identify unnecessary obstacles to transportation infrastructure projects." In order to remove

a rule, agencies are required to go through the same Public Notice, Comment Period, and Public Hearing rules under 15 CFR Section 930.128 as are required to promulgate a new rule.

The comment period is open until July 24, 2017.

DOT is particularly interested in comments on any DOT requirement that unjustifiably delays or prevents surface, maritime, and aviation transportation infrastructure projects. This would include, but not be limited to, interpretations found in policy statements or guidance documents issued from the Office of the Secretary of Transportation (OST) and the following Operating Administrations: FAA; the Federal Highway Administration (FHWA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); the Maritime Administration (MARAD); and the Pipeline and Hazardous Materials Safety Administration (PHMSA).

PETITION FOR RULEMAKING: PASSENGER RIGHT TO RECORD

On June 19, 2017, two individuals filed a Petition for a Rulemaking under 14 CFR 302.16 "to request that the Department reject airlines' improper attempts to prohibit recordings by passengers of events onboard common carriage aircraft and their interactions with staff."

The Petition requests, among other things, that DOT issue rules indicating that:

1. Passenger recordings, subject to reasonable conditions, are in the public interest;
2. Recordings made to resolve bona fide disputes are presumptively in the public interest;
3. Recordings made from a place where a passenger has a right to be, without interfering with airline personnel, are presumptively in the public interest; and
4. The mere fact that a recording preserves statements of airline personnel, or shows airline or airport equipment, does not render the recording improper or impermissible.

Interested parties now have the opportunity to comment on the Petition.

AIRPORTS URGE TRUMP ADMINISTRATION TO INCREASE CAP ON PFC FEES

Two major industry trade groups representing U.S. airports sent a letter to President Trump, requesting that the current $4.50 cap on passenger facility charges (PFC) be increased. PFC charges are added to every ticket in order to fund airport improvement projects. However, the American Association of Airport Executives and Airports Council International described the federal cap as "outdated" and "unnecessary" and argued that removing the cap could be a way for airports to raise money for infrastructure improvements. The two groups have proposed raising the PFC fee, which has not been raised in over 15 years, to $8.50 per ticket to allow airports to focus on capital intensive projects and reduce reliance on the federal government for infrastructure projects.

ECKERT SEAMANS
ATTORNEYS AT LAW

JUNE 2017

AVIATION REGULATORY UPDATE

DELTA ORDERED TO PAY $120,000 FOR INACCURACIES IN ANNUAL ANIMAL REPORT

Delta Airlines has been issued a consent order by the Department of Transportation to pay $120,000 as a result of inaccurate reporting in its annual animal report provided to the Aviation Consumer Protections Division (ACPD) in January 2016. Delta submitted its animal report for the 2015 year in January 2016 reporting it had transported a total of 98,779 animals. In February 2016 Delta contacted the Department and noted concern in the methodology used by carriers when reporting, and stated the annual animal report was flawed. Delta reviewed its records and concluded that it's previously reported number of animals transported for 2015 was wrong, and the correct number was 159,747. The Department's Office of Aviation Enforcement Proceeding performed an investigation into the drastic change in the numbers reported. The carrier reviewed its calculations and changed the number of animals reported for a third time. The total this time was only 96,630.

As a result of Delta's inaccurate reporting and concern from the Department and several carriers about the accuracy of the data, the publication of the Air Traffic Consumer Report was delayed. This deprived the traveling public of data to be used when determining which carrier to choose when transporting an animal. Delta regrets the misstep and notes that this was the first year in which these reports were required, and actions were not performed in bad faith. The airline has indicated corrective actions and intends to improve its reporting process moving forward.

UNITED FACES $435,000 PENALTY FOR AIRWORTHINESS VIOLATION

The FAA proposed a $435,000 penalty on June 9, 2017 alleging that United Airlines operated an aircraft that was not in an airworthy condition. The incident relates to a replaced fuel pump pressure switch on a Boeing 787 that failed to undergo FAA-required safety inspections prior to the aircraft's return to service.

United operated 23 domestic flights using the aircraft in question; including two flights even after the FAA notified the airline that the aircraft was out of compliance. United has asked to meet with the FAA to discuss the allegations.

REMINDER ABOUT ADDING AIRCRAFT TO PART 129 OPERATIONS SPECIFICATIONS

Just a reminder that when fleet changes are made, new aircraft are acquired, or new U.S. destinations are added, carriers must notify and/or submit documentation to the FAA. Absent emergency circumstances, this information should be submitted at least 30 days in advance to give FAA sufficient time to update the operations specification.

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

ECKERT SEAMANS
ATTORNEYS AT LAW

JULY 2017

AVIATION REGULATORY UPDATE

DOT ISSUES CONSUMER PROTECTION PENALTIES AGAINST DELTA, FRONTIER, AND AMERICAN

Delta Air Lines

On July 21, 2017, the United States Department of Transportation (DOT) fined Delta Air Lines $200,000 and, after reviewing the airline's Standard Operating Procedures (SOP) for Damage and Liability for Baggage Recovery, directed it to cease and desist from misclassifying and misreporting mishandled baggage claims filed by passengers.

As background, 9 U.S.C. § 41708 authorizes the Secretary of Transportation to require air carriers to submit reports to the Department and 14 C.F.R. Part 234 requires each reporting carrier to file with the Department, on a monthly basis, information about the number of mishandled baggage reports (MBRs) it receives from passengers. This information is then compiled and published in the Department's monthly Air Travel Consumer Report, which ranks the reporting carriers based on various performance criteria, including the rate of MBR per 1,000 enplaned passengers.

Delta's SOP stated that if an agent was unable to settle a mishandled baggage claim with a customer they were to create an entry in Delta's "WorldTracer" for the claim. Delta uses World Tracer to calculate its mishandled baggage reports as required by Part 234. A DOT investigation determined that certain reports were not properly entered into WorldTracer. This affected the accuracy of Delta's data on mishandled baggage and, by extension, the Department's Air Travel Consumer Report that is available to the public. DOT stated that Delta's actions in this regard contradict DOT's mandatory reporting requirements, and is an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712.

Frontier Airlines

DOT fined Frontier Airlines $400,000 on July 21, 2017, for violations of the Department's oversales and denied boarding rules (14 C.F.R. Part 250), as well as a rule that requires air carriers to provide passengers with disabilities assistance in enplaning and deplaning, preboarding and moving within the terminal (14 C.F.R. Part 382).

As background, Part 250 permits airlines to sell more tickets for a flight than there are seats available on the aircraft to be used for that flight. This allows carriers to fill seats that would otherwise have remained empty due to "no shows," thereby achieving operational efficiencies including revenue enhancement for carriers, and resulting in benefits for passengers as a whole by enabling carriers to offer them lower fares. However, in the event a flight is oversold and passengers are unable to fly, DOT regulations mandate compensation and other protections for passengers who are involuntarily denied boarding.

Here, in the course of an investigation, DOT staff reviewed approximately 200 complaints received by the carrier in calendar years 2014 and 2015. Among these files, it identified a significant number of instances in which the complaint file indicated that Frontier involuntarily denied boarding to eligible passengers but

failed to do the following: advise them of their rights to cash or check DBC payments, furnish a written notice to these passengers as required by §250.9, provide proper DBC in a timely manner, or solicit volunteers before denying boarding of passengers involuntarily. Additionally, during on-site airport inspections conducted in September 2016 by DOT Enforcement Office staff, some Frontier agents, when asked about the handling of oversale situations, informed Enforcement Office staff that only vouchers, rather than cash or a check, are offered as involuntary denied boarding compensation.

For Frontier's Part 382 violations, DOT staff reviewed approximately 375 disability-related complaints from calendar years 2014 and 2015, including complaints received by the carrier and directly by the Department. Its investigation revealed that a disproportionate amount of complaints involving Part 382-required wheelchair assistance showed that Frontier admitted a violation to the passenger's allegations in the carrier's written response to that passenger. This resulted in an "exorbitantly high rate of violations". Specifically, the Enforcement Office found a high percentage of instances in which Frontier acknowledged that the carrier failed to provide adequate and timely wheelchair assistance to passengers with disabilities in moving within the terminal, in preboarding the aircraft, and in enplaning and deplaning the aircraft. DOT determined that Frontier's actions violated Part 382's requirements that passengers with disabilities receive "prompt" enplaning and deplaning assistance, which inherently includes assistance in moving within the terminal and connecting assistance, if requested.

DOT ultimately determined that the array of violations warranted a $400,000 fine and ordered Frontier to cease-and-desist from future violations.

American Airlines

Also on July 21, 2017, DOT fined American Airlines $250,000 for allegedly failing to process a "significant" number of refund requests in a timely manner, in violation of the Truth in Lending Act's Regulation Z (12 C.F.R. Part 226). Regulation Z, and DOT's implementing rule, 14 C.F.R. Part 374, require that airlines transmit a credit statement for a passenger refund to the credit card issuer within seven business days of receipt of full documentation for the refund requested.

Furthermore, American adopted a customer commitment regarding refunds, which was made available on its website. In its customer commitment, American stated that refunds would be provided within seven business days of receipt of the required refund information for credit card transactions, and within 20 business days of receipt of the required information for cash purchases.

A DOT investigation determined that American failed to adhere to this commitment on numerous occasions (i.e. it failed to process refunds in a timely manner). While American asserted that the delays resulted from integration issues with the American Airlines and US Airways Refunds and Customer Relations, the Department nevertheless determined that American's failure to timely process refunds constituted an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712.

ECKERT SEAMANS
ATTORNEYS AT LAW

JULY 2017

AVIATION REGULATORY UPDATE

TRUMP ADMINISTRATION ISSUES DOT REGULATORY AGENDA FOR 2017

On July 20, 2017, the Trump Administration issued its first unified regulatory agenda for departments and agencies throughout the federal government, including DOT. The DOT agenda provides guidance on which regulations the Department will work on during the current year. As with any regulatory initiative, Congressional action may impact the Administration's agenda as some regulations are required by Congressional mandates.

The following rules are expected to be addressed in 2017

- Accessible In-Flight Entertainment and Accessible Lavatories on Single-Aisle Aircraft

Both of these issues have been discussed at length in past versions of this update, and are the result of last year's RegNeg proceeding, which brought together stakeholders from the industry, manufacturers, advocacy groups, and DOT to discuss these and other disability-related issues.

The new rulemaking would address whether carriers should be required to ensure that the same in-flight entertainment available to all passengers is accessible to passengers with disabilities. Under a new regulation certain content displayed on aircraft IFE systems would be captioned to provide access to deaf and hard of hearing passengers.

Second, the rulemaking would consider whether carriers should be required to provide accessible lavatories on certain new single aisle aircraft. This would likely involve a requirement that airlines take a number of steps to improve the accessibility of these lavatories within three years after the effective date of the rule but will not be required to increase their size.

- Modernizing Payment of Denied Boarding Compensation

If implemented, this rulemaking would increase flexibility for airlines by amending 14 C.F.R. Part 250 to allow airlines to use prepaid or stored value cards, or other equivalent electronic payment media, in lieu of check or cash payment to compensate passengers who are denied boarding involuntarily due to oversales.

- Improving Accuracy of Flight Cancellation Reporting

This rule would revise the process through which flight cancellations are reported to DOT, so as to eliminate from reports all technical cancellations (the cause of the cancellation or delay was due to circumstances within the airline's control, like maintenance or crew problems, aircraft cleaning, baggage loading, fueling, etc.) of code-share flights as reported by a marketing carrier when a flight was scheduled to be operated by one code-share partner of the reporting carrier but was actually operated by another codeshare partner. This change would ensure that a marketing (i.e. non-metal) carrier does not have to report a cancelled flight to the Department in situations when a flight number, operating carrier, or aircraft changes, but the flight still operates according to its published schedule.

ECKERT SEAMANS
ATTORNEYS AT LAW

JULY 2017

AVIATION REGULATORY UPDATE

- Revisions to Denied Boarding Compensation, Domestic Baggage Liability Limits

This rule would implement inflation adjustments to the maximum Denied Boarding Compensation and Domestic Baggage Liability Limits as required by the respective rules. Specifically, this final rule would raise the maximum denied boarding compensation amounts that have been in effect since August 2015. In accordance with 14 C.F.R. § 254.6, this final rule would also raise the minimum liability limit air carriers may impose for mishandled baggage in domestic air transportation. The new figures have not yet been released by DOT. Currently, the maximum denied boarding compensation is $1,350. The limit on mishandled baggage in domestic air transportation is currently $2,750 per occurrence.

The Trump Administration Regulatory plan for 2017 has suspended or deferred action indefinitely on the following DOT-related issues:

- Carrier-Supplied Medical Oxygen, Service Request Reporting, and Seating Accommodations with Extra Legroom
- Use of Mobile Wireless Devices for Voice Calls on Aircraft
- Reporting Ancillary Airline Passenger Revenues
- Refunding Baggage Fees for Delayed Checked Bags
- Transparency of Airline Ancillary Service Fees
- Air Transportation Consumer Protection Requirements for Ticket Agents
- Traveling by Air with Service Animals

U.S. ENDS "LAPTOP BAN" FOR MIDDLE EASTERN AIRLINES

The Transportation Security Administration (TSA) announced on July 17, 2017 that all 10 nations that were originally subject to a ban on laptops for direct flights to the United States now comply with heightened Department of Homeland Security (DHS) security standards. As a result, passengers are able to travel with personal electronic devices (PEDs), like laptops, in the main cabin from those countries (see below). Further, on July 21, 2017, the Department of Homeland Security (DHS) posted to its website that "[t]here are currently no airlines under restrictions for large personal electronic devices. The [TSA] has lifted the restrictions on large personal electronic devices for the ten airports/nine airlines in the Middle East and North Africa, which were announced in March. These airports and airlines have also successfully implemented the first phase of enhanced security measures."

The original restriction was imposed by the DHS on flights to the U.S. originating from ten Middle Eastern and North African airports: Dubai International Airport and Abu Dhabi International Airport in the UAE, Hamad International Airport in Doha, Queen Alia International Airport in Amman, Cairo International Airport, Ataturk International Airport in Istanbul, King Abdulaziz International Airport in Jeddah, Kuwait International Airport, and Mohammed V International Airport in Casablanca.
DHS also confirmed that all ten airports have implemented "enhanced security measures". The new requirements include enhanced passenger screening at foreign airports, increased security protocols around aircraft and in passenger areas and expanded canine screening. They affect 325,000 airline

passengers on about 2,000 commercial flights arriving daily in the United States, on 180 airlines from 280 airports in 105 countries. DHS had also announced that international airports have 120 days to comply with other security measures, including enhanced screening of airline passengers.

TREASURY DEPARTMENT ISSUES NEW FAQ'S REGARDING CUBA

On July 25, 2017, the Department of Treasury's Office of Foreign Assets Control (OFAC) issued new and updated frequently asked questions (FAQs) in furtherance of President Trump's June 16, 2017 announcement that his administration would undertake a different diplomatic approach to Cuba than the previous administration. Most importantly, OFAC, which enforces and administers economic and trade sanctions, states in the FAQs that any changes mentioned in President Trump's June speech "do not take effect until the new regulations are issued…in the coming months".

As we reported in our June 2017 Newsletter, the most significant change removes "individual people-to-people travel" between the U.S. and Cuba. OFAC announced that licenses instead will be issued for "group travel" "under the auspices of an organization… that sponsors such exchanges to promote people-to-people contact." There are not currently any other planned changes to the other 11 general licenses authorizing travel to Cuba. The FAQs state that U.S. airline travel to Cuba will not change because the new policy will not affect the means by which persons subject to U.S. jurisdiction may purchase airline tickets for travel to Cuba.

Further, the State Department will publish a list of entities with which direct transactions "generally will not be permitted". More guidance on conducting business in Cuba will accompany the new regulations which will be released on a yet-to-be determined date.

The full and updated July 25, 2017 FAQs are:

1. How will OFAC implement the changes to the Cuba sanctions program announced by the President on June 16, 2017? Are the changes effective immediately?

OFAC will implement the Treasury-specific changes via amendments to its Cuban Assets Control Regulations. The Department of Commerce will implement any necessary changes via amendments to its Export Administration Regulations. OFAC expects to issue its regulatory amendments in the coming months. The announced changes do not take effect until the new regulations are issued.

2. What is individual people-to-people travel, and how does the President's announcement impact this travel authorization?

Individual people-to-people travel is educational travel that: (i) does not involve academic study pursuant to a degree program; and (ii) does not take place under the auspices of an organization that is subject to U.S. jurisdiction that sponsors such exchanges to promote people-to-people contact. The President

instructed Treasury to issue regulations that will end individual people-to-people travel. The announced changes do not take effect until the new regulations are issued.

3. Will group people-to-people travel still be authorized?

Yes. Group people-to-people travel is educational travel not involving academic study pursuant to a degree program that takes place under the auspices of an organization that is subject to U.S. jurisdiction that sponsors such exchanges to promote people-to-people contact. Travelers utilizing this travel authorization must: (i) maintain a full-time schedule of educational exchange activities that are intended to enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities, and that will result in meaningful interaction between the traveler and individuals in Cuba; and (ii) be accompanied by an employee, consultant, or agent of the sponsoring organization, who will ensure that each traveler maintains a full-time schedule of educational exchange activities. In addition, the predominant portion of the activities engaged in by individual travelers must not be with prohibited officials of the Government of Cuba or prohibited members of the Cuban Communist Party (as defined in the regulations). Once OFAC issues the new regulations, new individual people-to-people travel will not be authorized.

4. Will organizations subject to U.S. jurisdiction that sponsor exchanges to promote people-to-people contact be required to apply to OFAC for a specific license?

No. To the extent that proposed travel falls within the scope of an existing general license, including group people-to-people educational travel, persons subject to U.S. jurisdiction may proceed with sponsoring such travel without applying to OFAC for a specific license. It is OFAC's policy not to grant applications for a specific license authorizing transactions where a general license is applicable.

Once the State Department publishes its list of entities and subentities with which direct transactions will not be authorized and OFAC issues its regulations, no new transactions, including travel-related transactions, may be initiated with these identified entities and subentities. Prior travel arrangements that may involve these entities or subentities will still be authorized. See FAQ 8.

5. How do the changes announced by the President on June 16, 2017 affect individual people-to-people travelers who have already begun making their travel arrangements (such as purchasing flights, hotels, or rental cars)?

The announced changes do not take effect until OFAC issues new regulations. Provided that the traveler has already completed at least one travel-related transaction (such as purchasing a flight or reserving accommodation) prior to the President's announcement on June 16, 2017, all additional travel-related transactions for that trip would also be authorized, including if the trip occurs after OFAC issues new regulations, provided the travel-related transactions are consistent with OFAC's regulations as of June 16, 2017. Once the State Department publishes its list of entities and subentities with which direct transactions will not be authorized and OFAC issues its regulations, no new transactions may be initiated with these

identified entities and subentities. Prior travel arrangements that may involve these entities or subentities will still be authorized. See FAQ 8.

6. How does the new policy impact other authorized travel to Cuba by persons subject to U.S. jurisdiction?

The new policy will also impact certain categories of educational travel as well as travel under support for the Cuban people, as set forth in the National Security Presidential Memorandum signed by the President on June 16, 2017. In addition, following the issuance of OFAC's regulatory changes, travel-related transactions with prohibited entities identified by the State Department will not be permitted, unless otherwise authorized by OFAC. Guidance will accompany the issuance of the new regulations.

7. Will persons subject to U.S. jurisdiction be required to apply to OFAC for a specific license to engage in Cuba-related travel and transactions consistent with the other authorized categories of travel?

To the extent that proposed travel falls within the scope of an existing general license, persons subject to U.S. jurisdiction may proceed with such travel without applying to OFAC for a specific license. It is OFAC's policy not to grant applications for a specific license authorizing transactions where a general license is applicable. Once the State Department publishes its list of entities and subentities with which direct transactions will not be authorized and OFAC issues its regulations, no new transactions may be initiated with these identified entities and subentities. Prior travel arrangements that may involve these entities or subentities will still be authorized. See FAQ 8.

8. How do the changes announced by the President on June 16, 2017 affect authorized travelers to Cuba whose travel arrangements may include direct transactions with entities related to the Cuban military, intelligence, or security services that may be implicated by the new Cuba policy?

The announced changes do not take effect until OFAC issues new regulations. Consistent with the Administration's interest to avoid negatively impacting Americans for arranging lawful travel to Cuba, any travel-related arrangements that include direct transactions with entities related to the Cuban military, intelligence, or security services that may be implicated by the new Cuba policy will be permitted provided that those travel arrangements were initiated prior to the State Department listing of the entity or subentity. Once the State Department adds an entity or subentity to the list, new direct financial transactions with the entity or subentity will not be permitted, unless authorized by OFAC.

9. How do the changes announced by the President on June 16, 2017 affect companies subject to U.S. jurisdiction that are already engaged in the Cuban market and that may undertake direct transactions with entities related to the Cuban military, intelligence, or security services that may be implicated by the new Cuba policy?

The announced changes do not take effect until OFAC issues new regulations. Consistent with the Administration's interest in not negatively impacting American businesses for engaging in lawful commercial opportunities, Cuba-related commercial engagement that includes direct transactions with

entities and subentities related to the Cuban military, intelligence, or security services that may be implicated by the new Cuba policy will be permitted after the issuance of new regulations by OFAC, provided that those commercial engagements were in place prior to the issuance of the forthcoming regulations. For example, businesses will be permitted to continue with transactions outlined in contingent or other types of contractual arrangements agreed to prior to the issuance of the new regulations, consistent with other CACR authorizations.

10. Does the new policy affect the means by which persons subject to U.S. jurisdiction may purchase airline tickets for authorized travel to Cuba?

No. The new policy will not change the means by which persons subject to U.S. jurisdiction traveling to Cuba pursuant to the 12 categories of authorized travel may purchase their airline tickets.

11. Can I continue to send authorized remittances to Cuba?

Yes. The announced policy changes will not change the authorizations for sending remittances to Cuba. Additionally, the announced changes include an exception that will allow for transactions incidental to the sending, processing, and receipt of authorized remittances to the extent they would otherwise be restricted by the new policy limiting transactions with certain identified Cuban military, intelligence, or security services. However, consistent with the President's policy announcement, changes will be made to the definition of prohibited members of Government of Cuba that may exclude certain persons from receipt of such remittances.

12. How will the new policy impact existing OFAC specific licenses?

The forthcoming regulations will be prospective and thus will not affect authorized transactions under existing specific licenses, unless explicitly noted.

13. How will U.S. companies know if a Cuban counterpart is affiliated with a prohibited entity or subentity in Cuba?

The State Department will be publishing a list of entities and subentities with which direct transactions generally will not be permitted. Guidance will accompany the issuance of the new regulations. The announced changes do not take effect until the new regulations are issued.

14. Is authorized travel by cruise ship or passenger vessel to Cuba impacted by the new Cuba policy?

Persons subject to U.S. jurisdiction will still be able to engage in authorized travel to Cuba by cruise ship or passenger vessel.
Following the issuance of OFAC's regulatory changes, travel-related transactions with prohibited entities and subentities identified by the State Department generally will not be permitted. Guidance will accompany the issuance of the new regulations.

ECKERT SEAMANS
ATTORNEYS AT LAW

JULY 2017

AVIATION REGULATORY UPDATE

U.S. IMPOSES NEW SANCTIONS ON IRAN

On July 18, 2017, President Trump issued new sanctions against 18 Iranian entities and individuals for supporting the Islamic republic's "ballistic missile program, military procurement and outside armed groups[.]" The sanctions freeze any assets the targets may have in the U.S. and prevents Americans from doing business with them.

The Treasury Department placed sanctions on seven entities and five individuals for their support of the Iranian military and the Islamic Revolutionary Guard Corps, as well as two Iranian companies allegedly engaged in international hacking efforts and two men connected to the company. The individuals, Mohammed Saeed Ajily and Mohammed Reza Rezakhah, are alleged by the Treasury and in federal court documents to have stolen defense software from a U.S. company for sale in Iran by Ajily's company, Ajily Software Procurement Group. A related company is also a target of sanctions.

The full list of entities on the sanctions list, as published by OFAC, includes:

- ABASCIENCE TECH CO. LTD.;
- ANDISHEH VESAL MIDDLE EAST COMPANY;
- ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION (a.k.a. ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE RESEARCH AND SELF SUFFICIENCY JEHAD ORGANIZATION;
- ISLAMIC REVOLUTIONARY GUARD CORPS RESEARCH AND SELF-SUFFICIENCY JEHAD ORGANIZATION (a.k.a. ISLAMIC REVOLUTIONARY GUARD CORPS RESEARCH AND SELF-SUFFICIENCY JIHAD ORGANIZATION; a.k.a. ISLAMIC REVOLUTIONARY GUARD CORPS SELF-SUFFICIENCY JEHAD ORGANIZATION);
- QESHM MADKANDALOO SHIPBUILDING COOPERATIVE CO (a.k.a. MAD KANDALU COMPANY; a.k.a. MAD KANDALU SHIPBUILDING COOPERATIVE; a.k.a. MAD KANDALU SHIPBUILDING COOPERATIVE QESHM; a.k.a. MADKANDALOU COMPANY);
- RAMOR GROUP (a.k.a. RAMOR DIS TICARET VE INSAAT YATIRIM ANONIM SIRKETI);
- RAYAN ROSHD AFZAR COMPANY (a.k.a. RAYAN ROSHD COMPANY; a.k.a. "RAYAN ROSHD");
- RAYBEAM OPTRONICS CO. LTD.;
- RAYTRONIC CORPORATION, LIMITED; and
- SUNWAY TECH CO., LTD.

DOT FINES TAP AIR PORTUGAL $100,000 FOR TARMAC DELAY

On July 6, 2017 DOT and TAP Air Portugal agreed to a consent order involving a significant tarmac delay violation. Specifically, DOT found that TAP failed to adhere to the assurances in its contingency plan for lengthy tarmac delays regarding deplaning of passengers, provision of adequate food, and access to operable lavatories during a lengthy delay at Boston's Logan International Airport (BOS). DOT fined TAP $100,000 and ordered the carrier to cease and desist from future similar violations.

ECKERT SEAMANS
ATTORNEYS AT LAW

JULY 2017

AVIATION REGULATORY UPDATE

The 4-hour and 26-minute tarmac delay occurred on July 25, 2016, after TAP Flight 213 was diverted to BOS due to thunderstorms in the New York City-area. Flight 213, which was originally bound for Newark Liberty International Airport (EWR) was one of 19 flights diverted to Boston that evening, but it and one other were the only flights to experience an extended tarmac delay. DOT determined that TAP chose not to cancel the flight, which would have allowed them to use a gate at BOS, "despite its awareness of both the congestion at BOS and significant passenger discomfort onboard the aircraft due to the failure of the aircraft's auxiliary power unit (APU), which resulted in a lack of air conditioning for nearly two hours during the delay. During that period, law enforcement boarded the aircraft at TAP's request due to multiple agitated passengers." TAP blamed the delay on "perfect storm" events outside its control, which resulted in the shutdown of all three major New York City-area airports and resulted in TAP 213 being one of the last to divert to Boston, which resulted in strained facilities at Logan.

FAA PROPOSES $63,000 CIVIL PENALTY AGAINST TERRAZZO USA FOR ALLEGED HAZARDOUS MATERIALS VIOLATIONS

On June 28, 2017, the FAA proposed a $63,000 civil penalty against Terrazzo USA (Terrazzo) and Associated, Inc. for allegedly violating the Hazardous Materials Regulations. The allegation holds that on June 23, 2016 Terrazzo tendered to UPS a box holding corrosive liquid for shipment by air. Workers at the UPS sort facility in Austin, Texas, later discovered the shipment was leaking. The package was not accompanied by shipping papers providing a proper description of the material or emergency response information. It was also not properly marked, labeled, packaged, described or in the proper condition for shipping to prevent the release of hazardous material. The FAA also states that Terrazzo failed to train its employees regarding hazardous materials. Terrazzo has 30 days from receipt of the FAA's enforcement letter to respond to the agency.

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

ECKERT SEAMANS
ATTORNEYS AT LAW

August 2017

AVIATION REGULATORY UPDATE

UNITED STATES COURT OF APPEALS ORDERS FAA TO ADDRESS PASSENGER SAFETY CONCERNS REGARDING DECREASED SEAT DIMENSIONS

On July 28, 2017, the U.S. Court of Appeals for the District of Columbia Circuit, in a case it called "the Case of the Incredible Shrinking Airline Seat" ruled, in part, in favor of the passenger rights organization, FlyersRights, holding that the Federal Aviation Administration (FAA) failed to cite any studies or tests to corroborate its conclusions that seat size did not present a safety or security concern.

FlyersRights had petitioned the FAA to issue rules governing the minimum requirements for seat sizes and spacing on commercial passenger aircraft and to create an advisory committee to assist and advise the FAA on this issue. The organization provided evidence that airline seat and spacing dimensions have steadily decreased in size in the last several decades, particularly in economy-class, where some seat pitches are as small as 28 inches with widths at 17 inches. FlyersRights expressed concern that the decrease in seat size, coupled with the increase in passenger size since the 1960's, imperiled passengers' health and safety by impeding emergency egress. The FAA denied the request but failed to cite any studies or tests to corroborate its representations to the contrary.

The Court found that when the FAA responds to a petition exposing a life-and-death safety concern, it must adequately explain the facts and policy concerns and those facts must have some basis in the record. While the FAA cited certain studies to the Court, it did not address how increased passenger size interacts with the current seat dimensions to affect emergency egress. The Court further held that "[as] a matter of basic physics, at some point seat and passenger dimensions would become so squeezed as to impede the ability of passengers to extricate themselves from their seats and get over to an aisle. The question is not whether seat dimensions matter, but when." Finally, the Court was concerned because the FAA claimed that emergency evacuation tests were successfully run with seat dimensions as small as those being used by commercial airlines today but the tests were not provided to the Court.

The matter was sent back to the FAA for a "properly reasoned disposition" of the organization's safety concerns.

TRUMP ADMINISTRATION IMPOSES NEW SANCTIONS ON VENEZUELA

In clear opposition to the regime of Venezuelan President Nicholas Maduro, the Trump Administration on July 31, 2017 hit Maduro with sanctions just one day after he declared a victory that would reportedly allow him to consolidate his power.

Effective July 31, 2017, the U.S. Treasury Department put a freeze on all of President Maduro's assets that are subject to U.S. jurisdiction. The new sanctions also bar U.S. citizens from dealing with President Maduro. Interestingly, Maduro joins a small fraternity of just a few heads of state to be sanctioned by the U.S. government. Others include Syrian President Bashar al-Assad, North Korea's Supreme Leader Kim Jong

AVIATION REGULATORY UPDATE

Un, Zimbabwe's President Robert Mugabe, former Yugoslav President Slobodan Milosevic, and Manuel Noriega, the former military dictator of Panama.

Then, on August 25, 2017, the White House imposed a new round of economic sanctions on Venezuela. These newest prohibitions restrict trading of Venezuelan bonds, which are sold in American financial markets by the Maduro government in order to raise money outside of Venezuela's depressed economy. While President Trump ultimately decided not to prohibit imports of Venezuelan oil to American refineries (which likely would have crippled the Venezuelan government), the policies with respect to bond trading could increase the likelihood of a default by the Venezuelan government on its debts in late 2017. It is reported that Venezuela's cash reserves have depleted to just $10 billion, the lowest in more than 70 years.

According to the White House, the measures are "carefully calibrated to deny the Maduro dictatorship a critical source of financing to maintain its illegitimate rule, protect the United States financial system from complicity in Venezuela's corruption and in the impoverishment of the Venezuelan people, and allow for humanitarian assistance."

PEKOSKE BEGINS TENURE AS TSA ADMINISTRATOR

On August 3, 2017, the Senate confirmed by voice vote David Pekoske to be the next administrator of the Transportation Security Administration (TSA). Pekoske is a former vice commandant for the Coast Guard, and his nomination was previously approved by both Senate Commerce, Science and Transportation Committee and the Senate Homeland Security Committee.

Pekoske was officially sworn in on August 10, 2017, becoming the 13th TSA administrator in the agency's 16-year history. He will lead a workforce of approximately 60,000 employees, charged with maintaining the security operations at nearly 450 airports throughout the United States. He will also manage the Federal Air Marshal Service and work on initiatives for shared security for highways, railroads, ports, mass transit systems and pipelines. With respect to airlines, Pekoske will most likely assist Acting Secretary Elaine Duke to oversee implementation of a June 2017 DHS directive, ordering 180 airlines to work with partner airports around the glove to update security for flights to the United States, among other transportation security issues.

TRUMP ADMINISTRATION AND RIGHTS GROUPS SETTLE TRAVEL BAN SUIT

The ACLU lawsuit against the Trump administration's travel ban has settled. In a recent announcement, attorneys for both the ACLU and the Justice Department reportedly reached an agreement late on August 29, 2017, although the terms of the deal will not be announced until later this week. As our readers may recall, the ACLU and other groups filed suit earlier this year on behalf of two Iraqis held at JFK International Airport and other individuals similarly situated in similar cases across the U.S. following President Trump's controversial travel ban. The ban, which has since been blocked, attempted to bar immigrants from seven predominantly Muslim countries and suspend the U.S. refugee program.

ECKERT SEAMANS
ATTORNEYS AT LAW

August 2017

AVIATION REGULATORY UPDATE

After the blocking of the first ban by other courts, the Trump administration introduced a revised version via a second executive order, which sought to block nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen for 90 days. Iraq was dropped from the list of affected countries. The Supreme Court will hear oral arguments in the fall on this revised ban. However, both executive orders are deemed illegal and unconstitutional by many rights groups.

A conference is scheduled for Thursday afternoon, at which time the terms of the settlement deal will be made public.

OFAC MAKES CHANGES TO SDN LIST

On August 22, 2017, the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) made significant changes to its Specially Designated Nationals (SDN) List. As you may recall from prior updates, OFAC maintains a list of individuals and companies whose assets are blocked and with whom U.S. persons are generally prohibited from dealing. In most cases, entities listed are owned or controlled by, or acting for or on behalf of, targeted countries. The SDN list also includes individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific.

Notably, OFAC has (1) removed approximately 4,900 Cuba-focused Internet domain names from its SDN and Blocked Persons List, all of which are primarily associated with travel related websites; and (2) added numerous individuals and entities from countries such as North Korea, China, Namibia, and Russia.

The newest additions to the SDN list include:

Individuals

- CHI, Yupeng (Linked To: DANDONG ZHICHENG METALLIC MATERIAL CO., LTD.).
- HUISH, Irina Igorevna (Linked To: VELMUR MANAGEMENT PTE LTD).
- KIM, Tong-chol (Linked To: MANSUDAE OVERSEAS PROJECT GROUP OF COMPANIES; Linked To: MANSUDAE OVERSEAS PROJECTS ARCHITECTURAL AND TECHNICAL SERVICES (PTY) LIMITED; Linked To: QINGDAO CONSTRUCTION (NAMIBIA) CC).
- KIRAKOSYAN, Ruben Ruslanovic (Linked To: GEFEST-M LLC; Linked To: KOREA TANGUN TRADING CORPORATION).
- PISKLIN, Mikhail Yur'evich
- SERBIN, Andrey

Entities

- DANDONG RICH EARTH TRADING CO., LTD. (Linked To: KOREA KUMSAN TRADING CORPORATION).
- DANDONG TIANFU TRADE CO., LTD.

ECKERT SEAMANS
ATTORNEYS AT LAW

August 2017

AVIATION REGULATORY UPDATE

- DANDONG ZHICHENG METALLIC MATERIAL CO., LTD.
- GEFEST-M LLC (Linked To: KOREA TANGUN TRADING CORPORATION).
- JINHOU INTERNATIONAL HOLDINGS CO., LTD.
- MANSUDAE OVERSEAS PROJECTS ARCHITECTURAL AND TECHNICAL SERVICES (PTY) LIMITED (Linked To: MANSUDAE OVERSEAS PROJECT GROUP OF COMPANIES).
- MINGZHENG INTERNATIONAL TRADING LIMITED (Linked To: FOREIGN TRADE BANK OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA; Linked To: SUN, Wei).
- QINGDAO CONSTRUCTION (NAMIBIA) (Linked To: MANSUDAE OVERSEAS PROJECTS ARCHITECTURAL AND TECHNICAL SERVICES (PTY) LIMITED; Linked To: MANSUDAE OVERSEAS PROJECT GROUP OF COMPANIES).
- TRANSATLANTIC PARTNERS PTE. LTD.
- VELMUR MANAGEMENT PTE LTD (Linked To: TRANSATLANTIC PARTNERS PTE. LTD.).

D.C. CIRCUIT REJECTS FAA FLIGHT PLAN FOR PHOENIX

In a 2-1 decision, the D.C. Circuit Court of Appeals on August 29, 2017 rejected flight path changes at Phoenix Sky Harbor proposed by the FAA under the agency's NextGen program. In making this determination, the court questioned how regulators can appropriately evaluate the potential noise impacts of more-direct flight trajectories, and cited concerns with several aspects of FAA's consultation process with the city, including a failure by FAA to formally notify relevant stakeholders in Phoenix of the proposed route changes and a propensity by FAA to engage only with low-level Aviation Department employees. The Court also found that the FAA's decision to avoid an in-depth analysis of the flight plan changes (which would have boosted new traffic over certain parts of Phoenix by 300 percent) was "arbitrary" because the public was not afforded an opportunity to get involved in the analysis. FAA has noted that it "will carefully review the decision before deciding on [its] next steps."

FRONTIER AIRLINES FINED FOR VIOLATING DOT REGULATIONS

On August 30, 2017, DOT fined Frontier Airlines for violating several consumer protection-related regulations. Specifically, DOT reported that during compliance inspections at various U.S. airports, Frontier agents routinely failed to produce proper copies of the airline's written denied boarding statement when asked for it by Enforcement Office staff. In other cases, when the statement was produced, it contained inaccurate information, with compensation amounts below that which is required in 14 C.F.R. Part 250. Frontier also failed to display the required public disclosure of deliberate overbooking and boarding procedures at certain airport boarding gates locations and ticket counters being used by the carrier. Finally, DOT noted that Frontier displayed signage at certain airport ticket counters and/or boarding gates which appeared to limit Frontier's domestic baggage liability limit to amounts less than $3,500. And in some cases, the displayed liability amounts were more than eight years outdated.

AVIATION REGULATORY UPDATE

DOT determined that the above actions constituted violations of 14 C.F.R. Parts 250, 254, and 259, and were also unfair and deceptive practices under 49 U.S.C. 41712. As a result the Department fined Frontier $40,000.

FAA PENALIZES GLOBAL MANUFACTURER FOR HAZMAT VIOLATIONS

On July 28, 2017, the FAA proposed a $54,000 civil penalty against Carboline Company for allegedly violating the Hazardous Materials Regulations. According to its website, Carboline supplies high performance coatings, linings and fireproofing products to customers around the world. It is a subsidiary of RPM International Inc. (NYSE: RPM), which is a multinational holding company with subsidiaries that manufacture and market high-performance coatings, sealants and specialty chemicals, primarily for maintenance, repair and improvement applications.

According to the FAA, Carboline offered a shipment to FedEx for overnight delivery on September 15, 2016 containing two pails of flammable paint. The package was transported on a FedEx flight from Memphis to San Antonio the following day. When the package arrived in San Antonio, workers at the FedEx sorting facility there discovered the shipment was leaking, as Carboline allegedly failed to secure the lids of the cans with clips. In addition to an alleged failure to properly package the shipment to prevent a release of hazardous materials under normal transportation conditions, the FAA also determined that Carboline failed to provide emergency response information with the shipment, and failed to properly classify, mark, or label the shipment, or send it with a shipper's declaration of dangerous goods form.

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

ECKERT SEAMANS
ATTORNEYS AT LAW

September 2017

AVIATION REGULATORY UPDATE

"TRAVEL BAN" TAKES ON NEW FORM AND IS EXPANDED TO RESTRICT VISITORS FROM EIGHT COUNTRIES

On Sunday, September 24, 2017, the White House announced a new Executive Order ("Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists and other Public Safety Threats") on Extreme Vetting of citizens seeking visas from select countries. The Order impacts citizens from Iran, Libya, Somalia, Syria, Chad, North Korea and Venezuela but the required restrictions will not affect anyone who already holds a U.S. visa. The Order becomes effective on October 18, 2017.

U.S. Customs and Border Protection (CBP) has stated that it does not anticipate the new Executive Order to affect the operations of air carriers serving the U.S. market. Rather, official guidance suggests that "[p]assengers are still required to present a valid visa or other entry document to travel to the Unites States. Passengers who present a valid visa or other entry document are presumed to be either outside the scope of the Presidential Proclamation, to have received a waiver from the travel restrictions, or to be covered by court injunctions."

Passengers are still required to present a valid visa or other entry document to travel to the United States. Passengers who present a valid visa or other entry document are presumed to be either outside the scope of the Presidential Proclamation, to have received a waiver from the travel restrictions, or to be covered by court injunctions. Dual citizens will be processed according to the document they present.

U.S. TO REQUIRE ENHANCED SCREENING OF CARGO ORIGINATING IN TURKEY

On September 7, 2017, the Transportation Security Administration (TSA) announced that it is issuing a new security directive, which will require enhanced screening of cargo originating from Turkey. Prior to the new directive, screenings for cargo from Turkey had been voluntary.

The new mandate follows a foiled terror plot in Australia, which revealed that a senior ISIS commander had shipped partially assembled components of a bomb on a commercial cargo plane from Turkey to Australia. According to TSA spokesman James Gregory, the directive is designed "[t]o adequately address emerging threats to cargo and raise the baseline for global aviation security, TSA has issued a security directive and an emergency amendment for enhanced security screening of cargo…."

To date, TSA has not publically disclosed which screening procedures will be utilized for the cargo.

ANTITRUST GROUP PETITIONS 11TH CIRCUIT TO OVERTURN ALLEGED AIRLINE COLLUSION OVER BAGGAGE FEES

The American Antitrust Institute filed an amicus brief supporting airline passengers seeking to reverse a District Court judge's summary judgment ruling in March that allowed Delta and AirTran (acquired by

Southwest Airlines in 2014) to escape a lawsuit alleging the airlines colluded to institute a first-checked baggage fee. The American Antitrust Institute argued that a public statement by the chief executive officer of AirTran in December 2008 indicated that the company would implement a baggage fee if Delta did so first, and should be viewed by the court as an unlawful invitation to collude.

The passenger suit stems from decisions made days apart in 2008 by Delta and AirTran to implement $15 fees for the first bag checked by each passenger. According to the suit, the companies were among the only major carriers that had not implemented first-bag checked fees by 2008 and were "holding off" because of concerns about competition from each other. The passengers alleged that once it was clear that both companies were considering the fees, Delta implemented them and that AirTran followed.

The certified class of plaintiffs includes roughly 28 million passengers and the 11th Circuit has yet to release a decision on the case. The case is Avery Insurance Group Inc. et al. v. Delta Air Lines Inc. et al., case number 17-11733.

NEW AIRWORTHINESS STANDARDS FOR SMALL AIRPLANES BECOME EFFECTIVE

On August 30, 2017, a final rule intended to overhaul airworthiness standards for general aviation (GA) aircraft took effect. Officially titled "Revision of Airworthiness Standards for Normal, Utility, Acrobatic, and Commuter Category Airplanes", the rule responds to Congressional mandates directing the FAA to streamline the approval of safety advancements for small GA airplanes. It also addresses recommendations from the FAA's 2013 Part 23 Reorganization Aviation Rulemaking Committee, which suggested a more streamlined approval process for safety equipment on those airplanes.

Under the final rule's provisions, categories such as commuter, utility, aerobatic or normal will be eliminated for future Part 23 airplane certifications. Instead, all newly certificated airplanes under Part 23 would be certified in the normal category. Airplanes already certified in the commuter, utility, acrobatic, or normal categories will continue to fall in those categories. Under the proposed rulemaking, all normal category airplanes would have a maximum seating capacity of 19 passengers or less, and a maximum takeoff weight of 19,000 pounds or less.

Airplane performance levels will be designated as low speed (a maximum design cruising speed or maximum operating limit speed of less than or equal to 250 KTAS) or high speed (airplanes with a maximum design cruising speed or maximum operating limit speed greater than 250 KTAS).

Under a change to the proposed Part 23, an applicant may use consensus standards acceptable to the FAA to demonstrate how compliance with Part 23 will be achieved. The change creates flexibility for applicants in developing means of compliance. The rule also adds new certifications standards to address GA loss of control accidents and in-flight icing conditions.

ECKERT SEAMANS
ATTORNEYS AT LAW

September 2017

AVIATION REGULATORY UPDATE

DOJ CHALLENGES CLOSED $4.3B PARKER HANNIFIN DEAL

The Department of Justice has filed suit against Parker Hannifin's $4.3 billion acquisition of Clarcor on the grounds that the consummated merger combines the only two domestic companies providing aviation fuel filtration systems for the military and airlines. The merging of the two companies eliminates head to head competition for systems and parts and would lead to higher prices. DOT states that this deal created an illegal monopoly and would yield higher prices, less innovation, and less favorable terms for companies and the U.S. military. The suit asks for temporary relief to keep Clarcor's aviation fuel filtration business from disappearing while the case proceeds.

While suits seeking to undo a consummated merger are rare, DOJ notes that Hannifin failed to produce documents and data after requests were sent by the agency. Parker Hannifin stated that DOJ did not issue a second request for information after the waiting period for the transaction ended in January.

UNITED FINED $80,000 FOR ANIMAL REPORTING INACCURACIES

United Airlines has been fined $80,000 for reporting inaccuracies in its certified annual animal report for calendar year 2015. On January 15, 2016, the airline submitted a report to ACPD, stating it had transported a total of 196,920 animals under applicable definitions in part 235. On December 20, 2016 United disclosed to the Office of Aviation Enforcement and Proceedings that the total number of animals transported in 2015 was inaccurate as originally reported, and that the correct number was 97,156. The error in reporting was discovered in a self-audit performed by the airline. As a result of the misreport, United's "incident per 10,000 animals transported rating" increased from 1.17 to 2.37. United's regional carriers were also forced to amend their reports, as they relied on the accuracy of United's submission for the year 2015 in making their own submissions.

FRONTIER AIRLINES FINED $1.5 MILLION FINE FOR VIOLATING TARMAC DELAY RULE

On September 15, 2017, the Department of Transportation (DOT or the Department) fined Frontier Airlines (Frontier) $1.5 million for violating 14 CFR 259.4 (the Department's tarmac delay rule), 49 U.S.C. § 41712 (prohibition against unfair and deceptive practices), and 49 U.S.C. § 42301 (requirement to adhere to a carrier's tarmac delay contingency plan).

The consent order states that Frontier failed to adhere to the assurances in its contingency plan for lengthy tarmac delays for twelve domestic flights at Denver International Airport (DEN) on December 16, 17, and 18, in 2016. The delays occurred during an extreme winter weather event. Specifically, the carrier violated the Department's tarmac delay rule because it allowed an aircraft to remain on the tarmac for more than three hours for domestic flights before providing passengers an opportunity to deplane, and also lacked sufficient resources to implement its plan. The longest delay — 4 hours, 25 minutes — was Flight 418 from

AVIATION REGULATORY UPDATE

DEN to Atlanta Hartsfield-Jackson International Airport (ATL). At the other end of the spectrum, Flight 509 to DEN from New York's LaGuardia International Airport (LGA) was two minutes over the limit.

Airline officials explained that 40 percent of the airline's network goes through Denver. When flights to Denver were canceled, crew and aircraft were not in their assigned locations, creating a domino effect for later flights from other cities. Compounding the problem, Frontier workers were unable to get to the airport during the storm. Frontier officials also conceded that they should have pre-canceled more flights in anticipation of the weather event. This would have allowed passengers to rebook on other flights as they did in January prior to a subsequent storm.

The penalty was the third DOT fine that Frontier has faced in as many months. In July, the department ordered the airline to pay $400,000 for violating procedures for bumping passengers from oversold flights and for failing to properly accommodate passengers with disabilities. In August, Frontier was fined $40,000 for failing to provide customers with required information about compensation for being bumped and for lost or damaged luggage.

FAA PROPOSES $50,000 CIVIL PENALTY AGAINST DEBMED USA

FAA has proposed a $50,000 civil penalty against DebMed USA LLC for an alleged violation of the Hazardous Materials Regulations. The alleged incident took place on June 22, 2016 when the company offered 142 lithium metal batteries to American Airlines for air transportation from Dallas Fort Worth International Airport to San Francisco in a checked bag of a DebMed employee. Lithium metal batteries are prohibited as air cargo on passenger aircrafts and checked bags. Additionally, airline baggage is not an authorized method of moving hazardous materials such as lithium batteries.

FAA PROPOSES $54,000 PENALTY AGAINST INTERSCIENCE

Following an alleged violation of the Hazardous Materials Regulations, FAA has proposed a $54,000 penalty against Interscience of Saint-Nom-la-Breteche, France. It is alleged that Interscience offered six plastic bottles of flammable liquid disinfectant spray to American Airlines for air transport from Blagnac, France to Nuevo Leon, Mexico. The shipment was not accompanied by a shipper's declaration nor was it properly classed, described, packaged, marked, or labeled. Additionally, Interscience failed to ensure its employees received required training on hazardous materials.

FAA PROPOSES $231,350 PENALTY AGAINST BURGESS AIRCRAFT MANAGEMENT

The FAA has proposed a $231,350 civil penalty against charter operator, Burgess Aircraft Management. The company allegedly conducted more than 200 revenue flights with pilots who had not completed instrument proficiency checks. The company's airman training program requires pilots to undergo recurrent checks to demonstrate their proficiency at flying in instrument conditions. Burgess did not

administer proficiency checks to five pilots. The company also conducted 251 flights between November 2, 2014 and August 5, 2015 using pilots who had received incomplete proficiency checks.

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

ECKERT SEAMANS
ATTORNEYS AT LAW

October 2017

AVIATION REGULATORY UPDATE

COMMENT DEADLINE ON REGULATORY REVIEW INITIATIVE EXTENDED TO DECEMBER 1, 2017

On October 2, 2017, the Department of Transportation (DOT or the Department) DOT issued a Notification of Regulatory Review seeking comment from the public on existing rules and other agency actions that are good candidates for repeal, replacement, suspension, or modification. DOT provided a 30 day comment period for responses to that notice, which were originally due November 1, 2017. After receiving numerous requests, DOT has decided to extend the **comment period by 30 days, and comments are now due December 1, 2017.**

Please contact us if you have any questions or would like to consider submitting a comment.

In line with President Trump's wider initiative to remove onerous regulations, DOT's Regulatory Reform Task Force has, to date, reviewed over 130 previously planned regulatory actions to determine if the burden of the actions could be reduced or eliminated without compromising the mission of DOT. Following the Task Force's extensive review, the Department has withdrawn seven rules and revised six. Five additional rules are in the process of being withdrawn, with three more in the process of being revised. As of now, it is unknown which specific rules are affected or if they apply to the aviation industry.

DOT ENTERS INTO AGREEMENTS WITH ALASKA/VIRGIN AMERICA, SPIRIT, AND ALL NIPPON AIRWAYS

On October 25, 2017, DOT entered into an agreement with Alaska Airlines/Virgin America and Spirit Airlines to expand the availability of airport kiosks accessible to individuals with disabilities. DOT also agreed with All Nippon Airways (ANA) to make the airline's mobile website accessible for persons with disabilities. Under DOT rules, airlines are required to ensure that all automated kiosks installed after December 12, 2016 at U.S. airports that process 10,000 annual enplanements or more are accessible. This requirement applies to U.S. and foreign carriers operating to, from, or within the United States until at least 25 percent of the kiosks under their control are accessible in each of the airports where service is conducted. Further, DOT mandated that 25 percent of kiosks must be accessible by December 12, 2023. Airlines are also required to ensure that their websites are accessible, but there is no current requirement for airlines to ensure that their mobile websites are accessible.

Alaska Airlines/Virgin America, Spirit Airlines, and ANA self-reported to the Department. In lieu of penalties and other enforcement action, each airline offered to adopt measures providing accessibility beyond DOT requirements. Spirit agreed to make 50 percent of its kiosks accessible by December 31, 2017. Alaska Airlines/Virgin America agreed to do the same by December 31, 2019. Both airlines will install accessible kiosk models in the future until 100 percent of their kiosks are accessible.

ANA's agreement with the Department stems from ANA's previous non-compliance with DOT website accessibility rules. The agreement specifies that ANA will update its current platform as well as conform its

mobile site to accessibility rules. Despite no current DOT rule, ANA has agreed to conform to the World Wide Web Consortium (WC3) Mobile Web Best Practices (MWBP) and the airline will consult with individuals with disabilities regarding the mobile site's accessibility and usability no later than November 2018.

CNN GRANTED FIRST FAA FLYOVER RIGHTS FOR DRONES

On October 18, 2017, the Federal Aviation Administration (FAA) for the first time granted a waiver to Part 107 to CNN. As background, 14 CFR Part 107 (Part 107), also known as the "Small Unmanned Aircraft Regulations", governs the commercial use of drones weighing less than 55 pounds. Absent a waiver, Part 107 generally prohibits the operation of drones over open-air crowds like those found at concerts, festivals or other outdoor events for commercial purposes.

The waiver will allow CNN to operate its drones over open-air crowds at altitudes of up to 150 feet and represents a change in FAA policy, which previously viewed all requests for exceptions from a "worst-case scenario" point of view regarding possible damage that could occur should a drone suffer a malfunction or crash. The fact that the waiver was granted indicates that the FAA may have accepted a new "reasonableness approach", presented by CNN in its waiver request, which takes into account not just the potential impact of a crash, but also the safe operating history of the drone operator, technology, and built-in safety procedures.

The waiver may indicate a change in how the FAA addresses the commercial use of drones. CNN"s waiver is also likely to give cause for other commercial operators to request similar waivers of Part 107 requirements.

EU AGREES TO BREXIT-PROOF EMISSIONS SCHEME

On October 18, 2017, European Union (EU) lawmakers agreed on an amendment of the EU Emissions Trading System (EU ETS), also known as the European Union Emissions Trading Scheme, which was launched in 2005 and is the first and largest greenhouse gas emissions trading scheme in the world. While the amendment negotiation process primarily focused on Great Britain's possible exit from the EU and the effect it may have on EU ETS, the amendment exempts intercontinental flights from EU ETS until December 31, 2023. At that time, the first phase of the International Civil Aviation Organisation (ICAO)'s Carbon Reduction and Offsetting Scheme for International Aviation (CORSIA) scheme will begin. The amendment will prevent legal and time gaps between the two systems as the EU ETS exemption was originally due to expire at the end of this year.

CONGRESS URGED TO PASS TSA MODERNIZATION BILL

On Wednesday, October 4, 2017, the Senate Commerce Committee approved the Transportation Safety Administration (TSA) Modernization Act, which would reform the TSA and authorize three years of funding

for the agency. If passed in its current form, the legislation would establish performance objectives and metrics for testing and verification of security technology; include institutions of higher education in third party canine activities; require TSA to conduct a pilot program to test screening equipment using CT technology; require TSA to conduct an assessment of the effects on privacy of expanding the use of biometric data; and make improvements for the screening of disabled passengers.

Several groups have urged Congress to pass the legislation. For instance, Global Business Travel Association (GBTA), U.S. Travel Association and Travelers United, among others travel groups, sent a letter to Senate leaders urging the chamber to consider a reauthorization bill for TSA that would speed up deployment of new screening technologies at checkpoints and increase safety in airports, reducing travel delays. The groups noted that earlier this month, additional resources were allocated to increase the Pre-Check enrollment and to expedite screening.

HOT-AIR BALLOON ACCIDENT RESULTS IN NEW SAFETY PROGRAM

Following a July 30, 2016 accident that resulted in the deaths of 16 people, the FAA, the Balloon Federation of America (BFA), state licensing authorities and other industry stakeholders collaborated on issuing a new commercial hot-air balloon safety program. The program, called the "Envelope of Safety", establishes an accreditation program for balloon ride operations.

In order to meet the BFA's program requirements, commercial pilots of balloons that are capable of carrying more than 4-6 passengers must: be commercially certificated for 18 months; have a 150 hours of flight experience; and hold an FAA second-class medical certificate. Pilots also must pass a drug and alcohol background check, have attended a BFA-sanctioned safety seminar within the last 12 months, and be enrolled in the FAA WINGS (pilot proficiency) program. The BFA will verify information annually, and will check the safety background of pilot applicants by researching FAA accident and incident data.

$869,125 CIVIL PENALTY AGAINST COMPASS AIRLINES, LLC (D/B/A/ DELTA CONNECTION)

On October 27, 2017, the FAA proposed an $869,125 civil penalty against Compass Airlines, doing business as Delta Connection, for allegedly failing to provide flight crews with complete weather information. 14 CFR Parts 91, 121, and 135 require certificate holders to use weather reports and forecasts from specified sources. Those regulations require pilots and other persons responsible for operational control to have "enough weather information to determine whether a flight can be [safely] accomplished". Compass Airlines operated 47 flights between May 18, 2017 and June 19, 2015 while failing to employ an approved system to obtain weather forecasts and reports of adverse weather. On the flights at issue, Compass flew to and from Monterrey, Mexico and did not have the required Significant Meteorological Information (SIGMET) during the aircraft's operation. The FAA asserts that it is important that all operators have complete and accurate weather information to ensure the safety of their flight. The airline also failed to

notify its operations personnel about potentially hazardous meteorological conditions. Compass has 30 days from receiving the FAA's civil penalty letter to respond to the agency.

PROPOSED PENALTY OF NEARLY $3.7 MILLION AGAINST ADS-B NAVIGATION UNIT MANUFACTURER

On October 27, 2017, the FAA proposed a penalty of $3,685,000 against NavWorx Inc. According to the FAA, the manufacturer allegedly produced and sold navigation units that did not meet FAA requirements and misled consumers about the capabilities of those products. In an investigation, the FAA found that NavWorx produced some ADS-B navigation units containing GPS chips that did not meet the administration's System Integrity Level (SIL) standards.

In March 2015, FAA notified the aviation industry that it had tightened its SIL standards for GPS chips. The increased standards require operators to equip their aircraft with the appropriate ADS-B transmitters by January 1, 2020. Such units, when properly manufactured and operated, broadcast an aircraft's precise position. The FAA alleges that rather than replace the chips in their units, NavWorx altered their units to transmit a code indicating compliance with the new SIL standard even though they did not meet actual standards. The FAA also alleges that the company refused to comply with its directions to modify the software to transmit an accurate code. NavWorx also advertised on its site that the units met the FAA's tighter standards for the 2020 deadline even though the units used a GPS chip incapable of meeting the established standards.

After issuing an emergency order suspending NavWorx's authorization, the FAA inspected the supplier's quality systems, facilities, technical data, and products. Following the emergency inspection, NavWorx's manufacturing authorization was reinstated. As of June 2017, the FAA published an ADS-Airworthiness Directive requiring owners to remove or disable the substandard NaxWorx ADS-B units and to modify their units by linking them with a certified chip which meets FAA standards.

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

ECKERT SEAMANS
ATTORNEYS AT LAW

November 2017

AVIATION REGULATORY UPDATE

SENATE TAX BILL COULD IMPACT INTERNATIONAL AIRLINES

On November 14, 2017, the U.S. Senate Committee on Finance convened a markup of the "Tax Cuts and Jobs Act" which is the Senate's version of tax reform legislation. Included in the Senate's tax reform legislation is a provision that would eliminate an income tax exemption derived by certain foreign corporations engaged in the international operation of aircraft by adding additional requirements for the tax exemption to apply. Specifically, the proposal calls for airlines headquartered in foreign countries to pay U.S. corporate income taxes if: (i) the carrier's home country does not have an income tax treaty with the United States; and (ii) the carrier's country of origin has fewer than two arrivals and departures, per week, operated by major U.S. airlines. Jurisdictions impacted include: the British Virgin Islands, Cabo Verde, Ethiopia, Fiji, French Polynesia, Jordan, Kuwait, Malaysia, Qatar, Samoa, Saudi Arabia, Serbia, Suriname and the United Arab Emirates.

REMINDER: DEADLINE TO RESPOND TO DOT REGULATORY REVIEW IS DECEMBER 1

The deadline for submitting comments to DOT in response to its October 2, 2017 "Notification of Regulatory Review" proceeding is December 1, 2017. This is an important initiative as it affords U.S. and international airlines the opportunity to address some of the rules and regulations that have been enacted in the last ten or so years by DOT. The Trump Administration is dedicated to reducing unnecessary rules and regulations and is looking for information from the industry on the cost and burdensomeness of its rules so that it can properly assess the impact and efficiency of the rules. We have prepared a template comment which we are happy to adapt and submit on your behalf if you are interested.

OFAC IMPLEMENTS NEW RESTRICTIONS ON CUBA TRAVEL AND BUSINESS

On November 9, 2017, the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) amended the Cuban Asset Control Regulations (CACR). The focus of the amendments is on restricting individual travel to Cuba and prohibiting transactions with certain Cuban military, intelligence, or security services.

Under the new regulations, travel to Cuba for "People to People Travel" and "Educational Travel" must be conducted under the auspices of a sponsoring organization and travelers must be accompanied by a representative of that sponsoring organization. Additionally, travelers to Cuba for "Support of the Cuban People" must now engage in a full-time schedule of activities "that result in meaningful interaction with individuals in Cuba and that enhance contact with the Cuban people, support civil society in Cuba, or promote the Cuban people's independence from Cuban authorities."

Also effective November 9, 2017, persons subject to U.S. jurisdiction will prohibited from engaging in transactions with certain Cuban military, intelligence, or security services identified on the State Department's List of Restricted Entities and Sub-entities Associated with Cuba ("Restricted List"). This list can be found at: https://www.state.gov/e/eb/tfs/spi/cuba/cubarestrictedlist/275331.htm. Notably, it appears that this restriction will not apply to "transactions concerning air and sea operations" that "support permissible travel." Additionally, these restrictions will not apply to any transactions related to

commercial engagements that involve direct financial transactions with an entity on the Restricted List, provided those commercial engagements were in place prior to the date that the entity was added to the Restricted List.

ALL NIPPON AND EVA FILE PETITION TO U.S. SUPREME COURT

On October 17, 2017, All Nippon Airways and EVA Airways filed a petition for a writ of certiorari to the U.S. Supreme Court related to the filed-rate doctrine. As background, the filed-rate doctrine is a common law rule which provides that any entity that is required to file tariffs governing the rates, terms, and conditions of service must adhere strictly to those terms. The principle forbids a regulated entity from charging a rate other than the one on file with the appropriate federal regulatory authority. All Nippon is attempting to defend against "a class comprised of all 'persons and entities that purchased passenger air transportation' for travel" between the United States and Asia between January 1, 2000 and the present. The plaintiffs are seeking treble damages for an alleged conspiracy among the defendant airlines to fix the price of international passenger fares and fuel surcharges on transpacific flights in violation of Section l of the Sherman Act.

The petition addresses two issues. First, whether the filed-rate doctrine still applies where rates are filed with a federal agency pursuant to a statutory regulatory scheme or whether it no longer applies to such rates if a court finds the agency lacks sufficient "practical ability" to regulate those rates. The petition notes that there is a Circuit split on this issue. And second, whether, and to what extent, the filed-rate doctrine applies where a federal agency retains regulatory authority over rates but chooses to exercise that authority by establishing a regulatory system, which it periodically revisits and revises, that does not require each rate to be literally filed with the agency.

The U.S. Supreme Court will review the petition. However, the Court generally grants only 3-5% of petitions for a writ of certiorari during any given Term so it is uncertain whether this case will ultimately be decided.

DOT DROPS PROHIBITION ON U.S.-SUDAN CARGO SERVICE

Going back as far as 1998, cargo service between the United States and Sudan has been banned. DOT, through Order 98-2-5, specifically prohibited any air carrier or foreign air carrier from engaging in air transportation between the United States and Sudan using aircraft of Sudanese registry; prohibited the issuance in the United States of any air waybill that includes a stop in Sudan, regardless of whether the flight in question serves the United States; and forbid U.S. air carriers from selling any transportation of cargo to or from Sudan anywhere in the world. Sudan, has taken recent and positive action to address many of the U.S. government's concerns that have persisted since the late 1990s.

As a result, DOT, on November 20, 2017, issued Order 2017-11-15 "Order Revoking Order 98-2-5." The effect of DOT's action is to immediately allow a broad range of cargo operations between the United States and Sudan including foreign air transportation by Sudanese carriers, the issuance of air waybills in the

AVIATION REGULATORY UPDATE

United States that include a stop in Sudan, and the sale by U.S. carriers of cargo transportation between Sudan to points in third countries. We note that DOT's Order does not affect any regulatory restrictions or requirements that may be maintained by other agencies, including the Departments of State, Treasury, Commerce, and Homeland Security.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY TO CHARGE ADDITIONAL SECURITY FEE AT JFK

All companies performing security guard services at John F. Kennedy International Airport (JFK) will be required to enter into a new Security Guard Privilege Permit with the Port Authority that will require the company to obtain a license under New York State General Business Law (GBL) and its security guards will have to obtain a license under New York State GBL. The Security Guard Privilege Permit will also require the payment of a five percent fee on gross receipts to the Port Authority. Finally, all security guards will be required to attend and successfully complete a 4-hour training program provided by the Port Authority. The new Security Guard Privilege Permit is expected to become effective on January 1, 2018.

NEW YORK ATTORNEY GENERAL PROPOSES LAW TO PROTECT CUSTOMER DATA

New York Attorney General Eric Schneiderman has proposed new legislation, called the SHIELD Act, which would require companies to protect the "sensitive data" of New Yorkers in their possession regardless of whether that company does business within the state. The SHIELD Act would also "expand the types of data that trigger reporting requirements to include username and password combinations, biometric data, and HIPAA covered health data." Mr. Schneiderman stated that the proposed legislation is in response to several recent data breaches that have affected the security of millions of Americans. "In 2016 alone", according to a press release from the state, "the [New York] Attorney General's office received a record 1,300 data breach notifications, representing a 60 percent increase over the previous year." The SHIELD Act has not yet been voted on by either house of New York's legislature. It is anticipated that other states will follow suit with their own versions of New York's proposed law in the near future.

DYNAMIC INTERNATIONAL AIRWAYS, LLC FINED BY DOT FOR TARMAC DELAY VIOLATION

DOT's enforcement office recently fined Dynamic International Airways, LLC for allegedly violating 14 CFR Part 259 and 49 USC §§ 41712 and 42301. Specifically, DOT alleged that Dynamic failed to adhere to the assurance in its contingency plan for lengthy tarmac delays to provide adequate food and water no later than two hours after the aircraft touches down if the aircraft remains on the tarmac. DOT's November 2017 consent order directed Dynamic to cease and desist from future similar violations of 14 CFR Part 259 and 49 USC §§ 41712 and 42301, and assessed a $15,000 civil penalty against the airline.

Specifically, an investigation by DOT's Office of Aviation Enforcement and Proceedings revealed that on December 21, 2016, an XTRA Airways aircraft flying from Simón Bolívar International Airport to JFK

experienced a lengthy tarmac delay during a technical stop at MIA. Dynamic originally marketed the flight as a direct sales public charter and planned to operate it as Dynamic flight 2D 412 on December 19, 2016. However, when Dynamic was unable to operate the flight due to mechanical difficulty, it turned to XTRA to operate the flight on its behalf pursuant to an ACMI (i.e. wetlease) agreement.

Due to U.S. Customs and Border Protection restrictions at MIA, passengers were unable to deplane for the duration of the delay, which lasted over three hours, while the aircraft remained parked at the gate. Both Dynamic and XTRA confirmed that the passengers on the XTRA aircraft were not provided food or water before the tarmac delay exceeded two hours. XTRA stated that it requested food and water from Dynamic personnel at MIA, but that these requests were unsuccessful. DOT determined that although XTRA aircraft and crew operated the flight, Dynamic, as the charterer and marketing carrier, remained obligated to adhere to the terms of its tarmac delay contingency plan and ensure that passengers received adequate food and water during the tarmac delay. Dynamic's failure to do so violated 14 CFR 259.4(b)(3), 14 CFR 259.4(b)(7), and was deemed to be an unfair and deceptive trade practice.

GEM AIR RECEIVES $72,400 PROPOSED FAA FINE

On November 17, 2017, the Federal Aviation Administration (FAA) proposed a $72,400 civil penalty against Gem Air for allegedly operating three aircraft when required inspections were overdue. Gem Air is a Part 135 operator from Salmon, Idaho.

The inspections in question are mandated by FAA airworthiness directives. The FAA alleges that Gem Air:

- Operated a Cessna T206H for 8.7 hours in August 2016 when a periodic inspection of a fuel-injector line was overdue.
- Operated a Quest Kodiak 100 for 24.2 hours in January and February 2017 when a periodic inspection of an elevator control mechanism was overdue.
- Operated a Piper PA-31-350 for 246.1 hours between December 2015 and March 2017 when a periodic inspection of certain engine cowling components was overdue for one engine; and operated the aircraft for 198.8 hours between January 2016 and March 2017 when the inspection was overdue for the other engine.
- Operated the Piper PA-31-350 for 246.1 hours between December 2015 and March 2017 when periodic inspections of the engine exhaust systems were overdue.

The FAA also alleges Gem Air failed to keep a record of the current status of applicable airworthiness directives for the Piper PA-31-350 in question. Gem Air has asked to meet with the FAA to discuss the case and no final determination on the fine has been made.

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

ECKERT SEAMANS
ATTORNEYS AT LAW

December 2017

AVIATION REGULATORY UPDATE

DOT WITHDRAWS TWO MAJOR PROPOSED RULEMAKINGS

On Thursday, December 7, 2017, the U.S. Department of Transportation withdrew two significant notices of proposed rulemaking (NPRM) that would have resulted in costly implementation and compliance obligations on the airline industry. The decision corresponds with DOT and Trump Administration priorities of reducing unnecessary regulation on industry, and is consistent with Executive Order 13771, entitled "Reducing Regulation and Controlling Regulatory Costs" that was issued earlier this year. The proposed rulemakings being withdrawn are:

- Transparency of Airline Ancillary Service Fees Supplemental NPRM

This supplemental notice of proposed rulemaking was issued on January 9, 2017 and proposed to require air carriers, foreign air carriers and ticket agents to clearly disclose to consumers at all points of sale customer-specific fee information, or itinerary-specific information if a customer elects not to provide customer-specific information, for a first checked bag, a second checked bag, and one carry-on bag wherever fare and schedule information is provided to consumers. The SNPRM also proposed to require airlines to provide useable, current, and accurate baggage fee information to ticket agents, including Global Distribution Systems (GDSs) and metasearch entities, and proposed to allow both airlines and ticket agents to permit customers to opt-out of receiving baggage fee information when using their websites. In making its decision to withdraw the SNPRM, DOT noted that its "existing regulations already provide consumers some information regarding fees for ancillary services" thus making additional rulemaking unnecessary.

- Ancillary Airline Passenger Revenues NPRM

This notice of proposed rulemaking was issued on July 7, 2011, and proposed to collect detailed revenue information on airline-imposed fees from large domestic certificated air carriers. Specifically, the NPRM proposed to create two stand-alone reporting forms to capture ancillary revenues. It also proposed to define ancillary revenues as those charges paid by airline passengers that are not included in the standard ticket fare. The Department also solicited comments on which items should be identified as ancillary revenues, and proposed to collect data on nearly 20 separate charges for optional services, including baggage fees and on-board food and services. DOT received approximately 280 comments. Consumer rights groups were in favor of the NPRM but most airlines and industry organizations commented that the rule, as proposed, would not increase public benefit or transparency of pricing.

16 STATE ATTORNEYS GENERAL WRITE TO DOT REGARDING ABANDONMENT OF TRANSPARENCY OF AIRLINE ANCILLARY SERVICE FEES RULEMAKING

On December 19, 2017, Attorneys General from 16 states and the District of Columbia wrote to DOT Secretary Elaine Chao to voice their "serious concern" regarding the Department's decision to withdraw a

rule which would have required airlines and third-party booking services to disclose baggage and other fees prominently at all points of sale.

As reported above, the rule, called "Transparency of Airline Ancillary Service Fees," was initially proposed by DOT in January of 2017. The letter submitted by the Attorneys General notes that the rule "would have made it far easier for consumers to understand the true cost of their airline tickets[]" and that "[i]t is critical that consumers are able to quickly and easily determine and understand the full costs of their travel to make informed choices[]". The Attorneys Generals' letter states that they believe that the Secretary's decision will frustrate efforts to protect consumers moving forward.

The letter submitted by the Attorneys General does not have a procedural or substantive effect on DOT's decision to eliminate the rulemaking.

TRUMP ADMINISTRATION RELEASES NEW REQUIREMENTS FOR THE U.S. VISA WAIVER PROGRAM

On December 15, 2017, The Trump Administration established new requirements for the 38 countries participating in the U.S. Visa Waiver Program.

The Visa Waiver program allows citizens to travel to the United States for up to 90 days without a visa by way of obtaining a "travel authorization" to enter the United States. Among other requirements, the U.S. will now require countries participating in the program to use U.S. counterterrorism information to screen travelers, including those crossing their borders from third countries. According to the Trump Administration, many countries in the program already take these actions. The updated requirements will apply to all countries in the Visa Waiver program.

The new measures will also include a requirement that visa waiver countries systematically collect passenger travel data, including passenger name records, as well as enter into agreements that would permit U.S. federal air marshals to travel on flights from last point of departure airports. Countries that exceed a two percent threshold for citizens staying longer than authorized during visits to the United States—currently Hungary, Greece, Portugal and San Marino—will be required to conduct public awareness campaigns on the consequences of overstays. Penalties include barring individuals who overstay a visit from travelling visa-free to the United States in the future.

PRESIDENT TRUMP'S THIRD "TRAVEL BAN" TAKES EFFECT

In September, the White House announced a new Executive Order ("Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists and other Public Safety Threats") on Extreme Vetting of citizens seeking visas from select countries. The Order affects citizens of Iran, Libya, Somalia, Syria, Chad, North Korea and Venezuela and was originally scheduled to go into effect

on October 18, 2017. The Order was then blocked by two federal district courts. However, on December 4, 2017, the U.S. Supreme Court issued an order allowing the travel restrictions to go into effect while the legal challenges against it continue. The order by the Supreme Court will have no practical effect on airline operations to the United States as foreign nationals will still need to ensure that they have a valid visa before travelling. The new restrictions will not affect anyone who already holds a U.S. visa.

SUMMARY OF COMMENTS SUBMITTED TO DOT REGULATORY REFORM DOCKET

On October 2, 2017, DOT published a request for comments requesting "input on existing rules and other agency actions that are good candidates for repeal, replacement, suspension or modification." In total, over 2800 formal and informal comments were submitted to the docket (Docket DOT-OST-2017-0069) from all facets of the international aviation community, as well as individuals, and interested parties who deal with other modes of transportation such as busing, shipping and rail. Some of the aviation-related entities that commented include the International Air Transport Association, Airlines for America, the Regional Airlines Association, the Cargo Airline Association, the American Association of Airport Executives, the Air Line Pilots Association, and the Association of Asia Pacific Airlines; U.S. airlines including Delta Air Lines, United Airlines, American Airlines, Southwest Airlines, Sky West Airlines, Alaska Air, Atlas Air, Cape Air, and JetBlue Airways; foreign carriers such as Kuwait Airways, the Lufthansa Group, Air France/KLM, Qantas Airways, El Al, Avianca, Westjet, Singapore Airlines, and Etihad Airways; and others such as Airports Council International-North American, Embraer, Bar Harbor Airport, the Memphis-Shelby County Airport Authority, Florida Airports Council, and the Society of Travel Agents.

Comments addressed a broad range of topics, including the extraterritorial application of DOT regulations and their impact on foreign carriers operating to the United States, current regulations concerning passengers with disabilities (i.e. Part 382) and issues relating to the carriage of service animals and the provision of wheelchair assistance, code-share performance data reporting, antitrust immunity, the mishandled baggage statistics rule, the tarmac delay rule, DOT regulation of airline customer service plans, DOT rules governing mistake fares, pilot training and qualification requirements, FAA operations specifications, and many others.

It will take the Department some time to review and evaluate comments filed to date before making any decision as to what changes, if any, should be made to existing regulations. We will continue to monitor this matter and keep our readers appraised of any new developments.

U.S. SUPREME COURT DENIES REVIEW OF $39.5 MILLION ANTITRUST SUIT

On April 21, 2017, the Competitive Enterprise Institute (CEI) appealed a case to the U.S. Ninth Circuit Court of Appeals (the Ninth Circuit) regarding a $39.5 million settlement between Air France, Air New Zealand, Singapore Airlines, etc. and a class of plaintiffs claiming the carriers fixed prices on long-haul transpacific flights to Australia, New Zealand, and the Pacific Islands. CEI claimed the settlement unfairly lumped the claims of customers who bought tickets through travel agents with those who purchased directly from the

airlines. CEI asked that subclasses be created with separate representatives to independently advocate in the interests of the different groups. The appeal also asked the Court to consider a separate class for Japan Airlines' travelers whose city of origin was abroad rather than domestic. The Ninth Circuit, which heard argument in April, upheld the terms of the settlement 2-1 and reasoned that the district court properly certified the settlement class and was not obligated to create subclasses for purchasers of U.S.-originating travel and direct purchasers of airfare.

CEI petitioned the U.S. Supreme Court to overturn the Ninth Circuit's decision but on December 4, 2017, the Supreme Court denied the petition. As a result, the Ninth Circuit's decision will stand and the settlement agreement will go into effect.

NOTICE OF SETTLEMENT IN UNITED AIRLINES PERSONAL INJURY CASE BEFORE U.S. DISTRICT COURT

On July 14, 2016, plaintiff Thelma Kiger filed a complaint concerning a personal injury claim against United Airlines, Inc. (United) in the civil docket for the U.S. District Court for the Southern District of Texas.

On February 18, 2016, the plaintiff, an 89-year old woman, traveled from Los Angeles to Houston on United Airlines flight 1817. The complaint alleged that the plaintiff was given a wheelchair voucher by United for her arrival in Houston and was told prior to departure that a wheelchair would be waiting for her upon arrival at George Bush Intercontinental Airport. After waiting several minutes for her wheelchair upon arrival, a man operating an electric cart stopped near the plaintiff, escorted her onto the cart by foot, and later dropped her off near the escalator down to baggage claim without providing a wheelchair. The plaintiff subsequently fell on the escalator and sustained several injuries, including four fractured ribs, a fractured pelvis, and injuries to her left shoulder, left arm, back and legs.

The complaint alleged negligence in United's acts and omissions, as well as negligence per se and negligent training based on United's alleged failure to comply with DOT's disability regulations (Part 382). While the regulation does not allow for a private right of action for individuals to sue carriers for violations of Part 382, the plaintiff nonetheless attempted to incorporate the standards of Part 382 in her complaint. The Court did not reach the legality of this claim because the matter was ultimately settled.

CBP UPDATES DOCUMENTATION AND CLEARANCE REQUIREMENTS AT PORT OF ATLANTA

U.S. Customs and Border Protection (CBP) at the Port of Atlanta recently announced two new policies impacting passengers and crew arriving into Hartsfield-Jackson Atlanta International Airport (ATL) on an international flight. The new policies are as follows:

ECKERT SEAMANS
ATTORNEYS AT LAW

December 2017

AVIATION REGULATORY UPDATE

Effective December 11, 2017 passengers arriving into ATL on an international flight will no longer be required to submit a Customs Declarations Form 6059B upon arrival for primary inspection. (See Port of Atlanta Pipeline, Message 2018-002)

CBP also announced that effective January 1, 2018, foreign crew members arriving into Hartsfield-Jackson Atlanta International Airport on an international flight, when Atlanta is the initial U.S. Port of Entry, will need to be transported to the International Terminal / CBP Entrance and Clearance Office at Concourse F for CBP processing within one hour of arriving at ATL. This new procedure applies to crewmembers arriving on both passenger and cargo aircraft. (See Port of Atlanta Pipeline, Message 2018-001)

ICAO REQUESTS COMMENTS REGARDING CORSIA

On December 5, 2017, the International Civil Aviation Organization (ICAO) released a State Letter seeking comments from States on the ICAO's Proposal for standards and recommended practices for the "Carbon Offsetting and Reduction Scheme for International Aviation" (CORSIA). By way of background, on October 6, 2016, the 39th session of the ICAO Assembly concluded with the adoption of a global, market-based measure scheme to address CO2 emissions from international aviation. "Under the scheme," according to ICAO, "aircraft operators will be required to purchase 'emissions units' to offset the growth in CO2 emissions covered by the agreement."

CORSIA will be implemented in phases. From 2021 until 2026, only flights between States that volunteer to participate in the pilot and/or first phase will be subject to offsetting requirements. In the second phase, all international flights will be subject to offsetting requirements, except flights to and from Least Developed Countries (LDCs), Small Island Developing States (SIDs), Landlocked Developing Countries (LLDCs) and States which represent less than 0.5% of international RTK, unless they volunteer to participate. The standards will ultimately apply to all airlines operating international flights from January 1, 2019, and airlines must be prepared to comply with them by that date.

THE UNITED STATES AND THE EUROPEAN UNION AGREE TO EXPAND COOPERATION IN THE AREAS OF AVIATION SAFETY AND AIR TRAFFIC MANAGEMENT MODERNIZATION

On December 13, 2017, FAA Administrator Michael Huerta, Ambassador Kaja Tael, Permanent Representative of Estonia to the European Union, and the European Commission Directorate General for Mobility and Transport (DG MOVE) Director General Henrik Hololei signed Amendments to two U.S.-EU agreements that will expand areas for joint efforts on aviation safety and air traffic management harmonization.

The first amendment enables the FAA and the EU to finalize arrangements for reciprocal acceptance of approvals associated with Flight Simulator Training Devices and Pilot Licensing. Additionally, the

amendment permits future collaboration in aircraft operations and air traffic safety oversight. This is important, because by reducing duplication and leveraging resources, the FAA and EU can better allocate resources to areas with higher risks to aviation safety.

The second amendment expands collaboration in the area of air traffic management modernization. The FAA and EU will now share a stronger commitment to harmonizing air traffic technologies, standards and procedures under their modernization programs, NextGen (in the U.S.) and SESAR (in the EU).

LEGISLATION REINSTATES RULE FOR MANDATORY REGISTRATION OF RECREATIONAL DRONES

On December 12, 2017, President Trump signed the $700 billion 2018 National Defense Authorization Act (NDAA), a defense reauthorization bill which also contains a requirement that all owners of recreational unmanned aerial vehicles (UAVs), or drones, register their aircraft with the Federal Aviation Administration (FAA). The enacted law resolves uncertainty over the issue of registration stemming from a May 2017 decision by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit), which overturned a prior registration requirement set forth in the FAA Modernization and Reform Act of 2012.

In December 2015, the FAA issued an interim rule requiring personal drone hobbyists to register their recreational aircraft with the agency. The rule, which has not been finalized, requires that owners of drones and model aircraft (aircraft weighing between 0.55 and 55 pounds) pay a $5 registration fee and provide their name, email address, and physical address. In addition, these registered UAVs must display an assigned unique ID number at all times. Failing to register a drone or properly display the ID number could cause owners to incur civil and/or criminal penalties.

Over 800,000 people registered drones during the previous registration process that commenced in December 2015. The FAA has forecasted that 2.3 million consumer drones would be sold in 2017 in the U.S. alone. Drones can be registered at https://registermyuas.faa.gov/.

FAA PROPOSES $1.1 MILLION CIVIL PENALTY AGAINST BRAILLE BATTERY INC. FOR ALLEGED HAZMAT VIOLATIONS

On December 8, 2017, the FAA proposed the largest civil penalty ever for alleged violations of the requirements for offering an air shipment of lithium batteries. The $1.1 million proposed penalty is against Braille Battery Inc. for a hazardous material violation. The FAA alleges that on June 1, 2016, Braille offered four shipments, each containing a 24-volt lithium ion battery, to FedEx for transportation by air. One of the batteries apparently caught fire while it was being transported on a FedEx truck, after it had been transported on an aircraft, resulting in the destruction of the vehicle. The FAA alleges the lithium batteries in these shipments did not meet testing standards contained in the UN Manual of Tests and Criteria or the U.S. Hazardous Material Regulations, were not equipped with a means of preventing dangerous reverse

current flow, and were not in a proper condition for shipment. Additionally, the FAA alleges Braille failed to provide its employees with required hazardous materials training.

As a result, on June 8, 2016, the FAA informed Braille about concerns in their training program. Additionally, on June 14 and 15, 2016, the FAA informed Braille that the Hazardous Materials Regulations and the ICAO technical Instructions prohibit the shipment of lithium ion batteries that are not proven to meet the UN testing standards. However, Braille continued to offer shipments of these lithium ion batteries for air transportation on 14 separate occasions between July 14, 2016 and August 3, 2016, the FAA alleges. The shipments included a total of 77 batteries. Each shipment contained between one and 27 batteries. Also worth noting is the fact that the FAA previously assessed an $8,000 civil penalty against Braille in 2013 for shipping undeclared lithium ion batteries.

Braille has 30 days to respond to the FAA's enforcement letter.

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