ECKERT SEAMANS
ATTORNEYS AT LAW

January 2018

AVIATION REGULATORY UPDATE

DELTA PREVAILS OVER DOT ENFORCEMENT OFFICE IN DISPUTED CONSENT ORDER CASE

A DOT Administrative Law Judge recently issued an order in favor of Delta's challenge of a DOT Notice of Enforcement Proceeding and Proposed Assessment of Civil Penalties for the carrier's alleged violation of DOT's codeshare disclosure rule (14 C.F.R. 257.5(b)), the prohibition against unfair and deceptive trade practices (49 U.S.C. § 41712(c)), and the violation of a prior cease and desist order that prohibited Delta from failing to comply with the Department's codeshare disclosure requirements. The proposed civil penalty was for $660,000. Delta refused to pay the penalty, and DOT filed a formal enforcement complaint under 14 C.F.R. Part 302. This is quite unusual as most carriers choose to follow the consent order process rather than risk formal litigation with DOT.

The penalty resulted from a lengthy investigation by DOT's enforcement office, during which DOT analysts called the Delta reservations line, pretending to be passengers interested in booking one-way flights on a codeshare partner. If the DL reservation agent failed to disclose that the flight was operated by a codeshare partner, DOT noted a violation even though no tickets were purchased. Delta argued, and the ALJ agreed, that the applicable statute and regulation specify ticket purchase or booking as the triggering event for codeshare disclosure.

Because there were no tickets purchased during DOT's investigation, the ALJ determined that Delta's actions could not have violated the codeshare disclosure rule and thus the penalty was improper. Barring a change in the statute and regulation, future investigations of alleged violations of codeshare disclosure requirements for oral communications would require DOT to purchase actual tickets to prove that a violation of 49 U.S.C. § 41712(c) and 14 C.F.R. 257.5(b) occurred. It is notable that the ALJ did comment on the concept that a specific regulatory or statutory provision governs over the general statutory prohibition on "unfair and deceptive practices". This could be read as a mild rebuke of the enforcement office that it should not overly apply the broad unfair and deceptive trade practice statute, particularly if it is inconsistent with a specific regulation.

NEW TAX BILL AFFECTS BUSINESS AVIATION

On December 22, 2017, President Trump signed the Tax Cuts and Jobs Act which will have short and long-term effects on individuals and businesses. The Act also directly impacts the Business Aviation industry as follows:

- 100-Percent Expensing (Bonus Depreciation)

Allows for "100 percent expensing", which will allow taxpayers to immediately write off the cost of aircraft acquired and placed in service between September 27, 2017 and January 1, 2023. For tax years after 2022,

the law provides for a phase-out of bonus depreciation in increments of 20 percent each year for aircraft acquired and placed in service before January 1, 2027.

- Prohibition on Deduction of Employees' Commuting Expenses

Prohibits employers from deducting the cost of providing transportation to employees to commute between the employee's residence and place of employment, unless provided for the safety of the employee. It is unclear whether this new provision would allow the deduction of commuting expenses and, if so, whether such deductions will be limited. Further guidance from the IRS is expected and will be needed to determine the implications upon implementation.

- Transportation Excise Tax Does Not Apply to Owner Flights on Managed Aircraft

Amends Internal Revenue Code (IRC) § 4261 by adding a new subsection to clarify that owner flights on managed aircraft are not subject to the Federal Transportation Excise Tax (FET) ticket tax ($3.00 for domestic segments during 2002 or thereafter), but rather are subject to the non-commercial fuel tax. The FET exception applies to payments by the aircraft owner (or lessee) for aircraft management services related to maintenance, support or flights on the aircraft. The exception does not actually require that the owner be on the flight or that the flight be on the business of the owner, but only that the owner (or lessee) pay for the aircraft management services. The National Business Aviation Association (NBAA) notes that "the issue has been the subject of controversy for more than 60 years, and this amendment clarifies the law consistent with the understanding of most people in the industry."

SOUTHWEST SETTLES PRICE FIXING LAWSUIT FOR $15 MILLION

Beginning in July 2015, numerous antitrust lawsuits were filed by passengers against legacy carriers American Airlines, Delta Air Lines, Southwest Airlines, and United Airlines. The cases alleged that the airlines "participated in an unlawful conspiracy" to artificially limit capacity in order to increase fares in violation of Section 1 of the Sherman Act. The cases were consolidated into a class. Earlier this month, a D.C. federal court judge approved a $15 million settlement between Southwest Airlines and members of the class. The preliminary settlement, which must still be approved by the Court, notes that Southwest denies colluding but will provide "a full account of facts" regarding the nature of the meetings that took place between the airlines to commit the alleged conspiracy. The other co-defendants, American Airlines, Delta Air Lines, and United Airlines, have similarly denied any wrongdoing but continue to fight the allegations. Southwest's cooperation will include: a full account of facts related to the alleged conduct, payment for meetings between plaintiff's counsel and an industry expert, and interviews, affidavits, depositions and testimony of current Southwest employees to assist the class plaintiffs at trial.

ECKERT SEAMANS
ATTORNEYS AT LAW

January 2018

AVIATION REGULATORY UPDATE

SOUTHWEST SUES STARTUP COMPANY THAT MONITORED AND DISTRIBUTED AIRFARE CHANGES

In early January, Southwest sued startup company SWMonkey.com and its founders, Pavel Yurevich and Chase Roberts, in U.S. District Court in Dallas. The airline alleges the company and its founders violated the terms and conditions of Southwest's website by improperly taking fare data off the site. The suit also alleges that Mr. Yurevich and Mr. Roberts violated trademark laws as well as the Computer Fraud and Abuse Act by accessing Southwest's "computers without authorization or in excess of authorized access."

SWMonkey.com was launched in November 2017. The startup's business model involved charging a $3 fee for an automated email notifying passengers when Southwest fares or mileage requirements dropped on the airline's website. With this knowledge, passengers could rebook at the lower fare, as Southwest allows travelers to rebook at lower prices and holds the difference for future travel. Following cease-and-desist letters from the airline, Yurevich and Roberts ended their service in late November.

At issue in the suit is whether airlines' fares are public information. Though airfares are easily obtained, prices for certain schedules and city pairs are not generally published. Southwest sells its tickets on its own website and, like other major airlines, restricts the use of automated scraping tools on its website.

Southwest alleges in the suit that it has lost at least $5,000 and will seek damages, including legal fees.

COURT GRANTS AMERICAN AIRLINES' MOTION TO DISMISS CUSTOMER BOARDING DISCRIMINATION CLAIMS

In Shin v. American Airlines Group, Inc. (E.D.N.Y. Aug. 3, 2017), a customer/plaintiff alleged that American "dramatically" refused to allow him to board a flight from DFW to Corpus Christi, Texas, "[f]or the mere fact that the Plaintiff was Korean-American," while allowing Caucasian customers to board the flight.

In his complaint, the plaintiff alleged claims under Title VI of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York Civil Rights Law. The plaintiff also alleged claims of misrepresentation, breach of the implied covenant of good faith and fair dealing, and breach of contract. For each claim, the plaintiff sought $1 million in compensatory damages and $5 million in punitive damages.

The court found that the complaint was "completely devoid of details suggesting intentional discrimination," such as a "derogatory remark" by an airline employee. The court ruled against the claims based on New York statutes because they do not provide a cause of action for alleged discrimination by a foreign corporation, such as American, that occurs outside New York. The discrimination was alleged to have occurred in Texas. On August 31, 2017, the plaintiff appealed the court's judgment to the Second Circuit.

ECKERT SEAMANS
ATTORNEYS AT LAW

January 2018

AVIATION REGULATORY UPDATE

CHINA AIRLINES, PHILIPPINE AIRLINES AND AIR NEW ZEALAND TO PAY $29.4M TO SETTLE PRICE-FIXING CLASS ACTION

After being accused of price fixing on long-haul trans-Pacific flights, China Airlines, Philippine Airlines and Air New Zealand have agreed to pay a total of $29.4 million to settle a proposed class action in the U.S. District Court for the Northern District of California.

The plaintiffs recently moved for preliminary approval of the settlement agreements. According to the plaintiffs' motion, China Airlines agreed to the largest settlement of $19.5 million in cash plus $250,000 for notice costs. Philippine Airlines agreed to pay $9 million, and Air New Zealand agreed to pay $400,000 plus $250,000 toward notice costs. The deals leave only two carriers left in the lawsuit, All Nippon Airways Co. Ltd. and EVA Airways Corp. Both have asked the U.S. Supreme Court to review whether the filed-rate doctrine should prevent the lawsuit from going forward.

The litigation dates back to 2007, when passengers accused a group of airlines of conspiring to fix prices on long-haul trans-Pacific flights to Australia, New Zealand and the Pacific Islands. Most carriers initially involved have already settled the case, including Air France, Japan Airlines International Co., Vietnam Airlines Co., Thai Airways International Public Co. Ltd., Malaysian Airline System Bhd., and Cathay Pacific Airways Ltd. These airlines agreed to settlements totaling $29.6 million in 2014. Singapore Airlines Ltd. and Qantas Airways later reached settlements totaling $9.2 million and $550,000, respectively.

DELTA FLIGHT ATTENDANTS ACCUSE AIRLINE OF ANTI-SEMITISM

On January 2, 2018, four flight attendants filed a lawsuit in the U.S. District Court for the Eastern District of New York, Fukelman et al. v. Delta Airlines Inc., accusing Delta Air Lines of discriminating against Jewish and Israeli employees, non-Jewish employees who associate with them, and passengers traveling to Israel.

The plaintiffs, two of whom are of Jewish and Israeli ethnicity, are current and former Delta flight attendants with at least 10 years of experience who regularly worked on the airline's flights between New York and Israel. They allege they were discriminated against, passed over for promotion, subjected to unwarranted discipline, and restricted from sharing their flight benefits with people who were Jewish or from Israel.

The suit states that Delta has encouraged and maintained an attitude among management that ethnic Jews and Israelis "cannot be trusted, are aggressive and inappropriate, and engage in what are deemed to be 'strange' behaviors by conducting prayers on the flight and requiring special dietary accommodations (kosher meals)." The plaintiffs allege the conduct is in violation of the Federal Civil Rights Act.

In response to the lawsuit, Delta issued a corporate statement denouncing the claims.

ECKERT SEAMANS
ATTORNEYS AT LAW

January 2018

AVIATION REGULATORY UPDATE

IRS ANNOUNCES 2018 ANNUAL INFLATION ADJUSTMENTS

The Internal Revenue Service (IRS) has released the inflation-adjusted Federal Excise Tax rates for 2018. The IRS announces the inflation-adjusted rates annually.

The International Head Tax (also known as the International Arrival/Departure Tax) increased from $18.00 to $18.30 per passenger. The Domestic Segment Tax also rose, from $4.10 in 2017 to $4.20 in 2018 per passenger. However, the Ticket Tax for each ticket sold remained the same, at 7.5% of the amount of the ticket sold. The tax for the transportation of property also remains unchanged, at 6.5% of the cost of the transportation,

FAA PROPOSES $1.76 MILLION CIVIL PENALTY AGAINST COMMERCIAL AIRCRAFT EQUIPMENT MANUFACTURER

On December 22, 2017, the FAA proposed a $1.76 million civil penalty against Commercial Aircraft Equipment of Dallas, Texas, for allegedly producing aircraft galley carts without the required FAA approval. CAE is a subsidiary of Biskay Holdings LLC.

The FAA alleges that in August 2016, CAE produced and sold 160 modified airline galley carts for Atlas Air without first holding an FAA Parts Manufacturer Approval (PMA) to produce them. The FAA further alleges that despite not holding this approval, CAE attached metal "FAA-PMA" tags to each of the carts before they were delivered.

CAE was given 30 days from the receipt of the FAA's enforcement letter to respond to the agency.

U.S. CARRIERS BAN "SMART LUGGAGE"

Throughout January 2018, U.S. air carriers unilaterally (without the FAA requiring them to do so) implemented policies which ban passengers from traveling with smart luggage. "Smart luggage is any piece of travel-worthy baggage imbued with electronics, charging ports, and Bluetooth." It now appears that all major U.S. carriers have implemented similar restrictions on smart luggage.

The ban is a result of safety concerns related to the lithium ion batteries that are housed in smart luggage and are used to charge or operate compatible devices. As the airlines' restrictions currently stand, passengers are not able to check smart luggage unless the lithium ion battery can be removed from the luggage prior to travel. The batteries, which are the same type of battery that also powers laptops and cellular devices, are allowed in the main cabin of the aircraft. There is no indication that the airlines will rescind the ban as its primary purpose is to preserve the safety of the passengers and the airlines' crews.

ECKERT SEAMANS
ATTORNEYS AT LAW

January 2018

AVIATION REGULATORY UPDATE

AMENDMENT TO EU/U.S. BILATERAL AGREEMENT SIGNALS INTERAGENCY COOPERATION ON PILOT LICENSING AND PRODUCT CERTIFICATION

The FAA recently announced the signing of an amendment to the Bilateral Aviation Safety Agreement (BASA) between the FAA and the European Aviation Safety Agency (EASA) of the European Union related to consistent acceptance of flight simulator training devices and pilot licensing. The amendment could prove effective in addressing duplicative certification standards for manufacturers. Interagency cooperation on flight simulator training device standards and pilot licensing may also result in a more timely and thorough exchange of pilot certifications between the FAA and EASA.

The BASA between the FAA and EASA was originally implemented in 2008. In addition to the European Union, the U.S. has similar BASAs with other countries, including Brazil, Canada, China, Japan, and Mexico.

SUMMARY OF 2017 DOT CONSENT ORDERS

In 2017, DOT issued a total of 19 consent orders and ordered fines for an aggregate amount of $3,185,000. Violations addressed by DOT in 2017 include: the tarmac delay rule, rules on Passenger Facility Charges, the domestic baggage liability rule, animal report filing requirements, refund rules, rules on misreporting of baggage claims, the oversales rule, and violation of disability-related regulations.

Violations of the tarmac delay rule and disability-related violations of the Air Carrier Access Act and 14 C.F.R. Part 382 were the most heavily fined by the Department in 2017. This level of enforcement marks a continued pattern of increased enforcement in these areas in recent years.

The largest fine ordered by the Department was $1,500,000 against Frontier Airlines for violations of the tarmac delay rule (14 C.F.R. 259.4), the prohibition against unfair and deceptive practices (49 U.S.C. § 41712), and the requirement to adhere to a carrier's tarmac delay contingency plan (49 U.S.C. § 42301).

SEAPORT AIRLINES' JOINT CONSENT ORDER

On December 21, 2017, the Department of Transportation fined Seaport Airlines (Seaport) for violating several consumer protection-related regulations. Specifically, DOT alleged that Seaport collected PFCs from consumers, but failed to remit those funds to airports as required. In February 2016, Seaport filed for bankruptcy under Chapter 11 of the Bankruptcy Code in the District of Oregon. On September 21, 2016, the case was converted to a Chapter 7 proceeding and the FAA and DOT cancelled the company's authorities. When Seaport filed for bankruptcy, it did not immediately create and fund a separate PFC fund that complied with the provisions of 14 C.F.R. 158.49(c). These acts and omissions constitute violations of 49 U.S.C. § 40117 and 14 C.F.R. Part 158.

AVIATION REGULATORY UPDATE

Moreover, Seaport informed consumers on its website that PFCs are a component of the price to be paid for air transportation on certain itineraries. However, in late 2015 and early 2016, Seaport failed to remit some of those PFC payments to several airports. In doing so, Seaport engaged in a false or misleading display of air transportation price components in violation of 14 C.F.R. 399.84. By violating section 399.84, Seaport also engaged in an unfair or deceptive practice in violation of 49 U.S.C. § 41712.

DOT determined that the above actions constituted violations of U.S.C. § 41712 and were also unfair and deceptive practices under 14 C.F.R. Part 399.84. As a result, the Department fined Seaport Airlines, Inc. $40,000.

ALLEGIANT AIR FINED $35,000

On January 9, 2018, DOT fined Allegiant Air for violating several consumer protection-related regulations. Specifically, DOT alleged that during compliance inspections at various U.S. airports, Allegiant agents produced ticket notices or displayed signage at two airport ticket counters and/or boarding gates which purported to limit the carrier's domestic baggage liability limit to an amount less than $3500. In some cases, the displayed liability amounts were more than seven years outdated and posted on multiple signs at certain airports.

DOT determined that the above actions constituted violations of U.S.C. § 41712 and were also unfair and deceptive practices under 14 C.F.R. Part 254. As a result, the Department fined Allegiant $35,000.

SOUTHWEST AIRLINES FINED $50,000

On January 9, 2018, DOT fined Southwest Airlines for violating several consumer protection-related regulations. Specifically, DOT alleged that during compliance inspections at various U.S. airports, Southwest agents produced ticket notices or the carrier displayed signage at three airport ticket counters and/or boarding gates which purported to limit the carrier's domestic baggage liability limit to an amount less than $3,500. In some cases, the displayed liability amounts were more than seven years outdated and posted on multiple signs at certain airports.

DOT determined that the above actions constituted violations of U.S.C. § 41712 and were also unfair and deceptive practices under 14 C.F.R. Part 254. As a result, the Department fined Southwest $50,000.

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 2018

AVIATION REGULATORY UPDATE

ANOTHER U.S. CARRIER TIGHTENS POLICIES FOR ONBOARD CARRIAGE OF EMOTIONAL SUPPORT ANIMALS

Pursuant to 14 C.F.R. Part 382, DOT's regulation on the non-discriminatory treatment of passengers with disabilities, airlines operating to, from or within the United States generally must allow passengers with disabilities to travel with emotional support animals in the aircraft cabin (foreign airlines are, however, only required to transport emotional support dogs). In such circumstances carriers may, as a condition of providing transportation, require advance notice and certain limited documentation justifying the passenger's need to travel with the emotional support animal. Emotional support animals are transported free of charge. Airlines have traditionally been hesitant to scrutinize passengers traveling with emotional support animals, preferring instead to accommodate passengers' needs wherever possible. However, the relatively lax standards under which a passenger may qualify as one who needs to travel with an emotional support animal, coupled with online companies that will issue the required documentation for a fee (and in some cases without a patient consultation) has resulted in systematic abuses by passengers and the unveiling of tighter restrictions by airlines.

Following a previous similar pronouncement by Delta, United has announced a new emotional support animal policy which becomes effective March 1, 2018. Per United's new policy, passengers traveling with emotional support animals will be required to give 48 hours' advance notice to the airline's Accessibility Desk and provide a signed letter from a mental health professional that confirms the passenger's need to travel with an emotional support animal. Additionally, UA will require passengers to provide a written confirmation that the emotional support animal has been trained to behave properly in a public setting and acknowledge responsibility for the animal. Finally, the passenger will need to produce a health and vaccination form signed by the animal's veterinarian, affirming that there is no reason to believe the animal will pose a direct threat to the health and safety of others on the aircraft or cause a significant disruption in service. United advised that its tougher policies for emotional support animals were put forth following a significant increase in the number of passengers traveling with an emotional support animal – United reported that there was a 75 percent increase the carriage of emotional support animals between 2016 and 2017.

Following the announcements by Delta and United, several disability rights organizations, including the American Association of People with Disabilities, the National Association of the Deaf and the Paralyzed Veterans of America, wrote to Transportation Secretary Chao, arguing that the policies are inconsistent with applicable DOT regulations and the Department's "Guidance Concerning Service Animals in Air Transportation." The disability groups have called on DOT to confirm that the revised policies violate the Air Carrier Access Act (ACAA) and "advise Delta and United accordingly." DOT has taken no action to date, but we will keep our readers updated on any new developments relating to this issue.

ECKERT SEAMANS
ATTORNEYS AT LAW

February 2018

AVIATION REGULATORY UPDATE

AIRLINE UNIONS CONTEST NORWEGIAN AIR INTERNATIONAL PERMIT IN D.C. CIRCUIT

On February 23, 2018, oral argument was held in the D.C. Circuit for *Air Line Pilots Association International et al. v. Elaine L. Chao*, a case concerning DOT's 2016 grant of a foreign air carrier permit to Norwegian Air Shuttle ASA's Irish subsidiary, Norwegian Air International Limited (NAI). Attorneys for the group of airline unions filing suit, the Air Line Pilots Association, the Association of Flight Attendants-CWA, the Allied Pilots Association and the Southwest Airlines Pilots' Association, urged the D.C. Circuit panel to reverse DOT's grant of a permit to NAI and argued that the only requirement for standing in the suit is market entry by a competitor that allegedly will undercut labor standards.

At issue is DOT's December 2016 decision to award a foreign air carrier permit to NAI after a lengthy three-year review that was characterized by strong resistance from labor groups, politicians and others who argued the airline's cost-cutting employment practices give it an unfair competitive edge in the industry.

An attorney for the unions pushed back in oral argument against the D.C. Circuit panel's assertions that the unions lack standing because they are not in "direct competition" with NAI. The unions' attorney instead argued that NAI's trans-Atlantic service threatens the labor provision of the U.S.-European Union Air Transport Agreement (including Iceland and Norway). In particular, the unions' opposition to the permit stems from concerns over which nation's laws govern the employment contracts of NAI employees, specifically contracts governed by the laws of Singapore and Thailand versus U.S. or EU law.

An attorney with the U.S. Department of Justice, which is representing DOT in the case, argued that D.C. Circuit precedent for standing requires a showing of a "virtual certainty" of economic harm. DOT further argued that NAI has had another affiliate operating in the U.S. since 2014 under the allegedly harmful labor practices, yet there has been "no actual evidence" of harm from the labor agreements.

Judge David Tatel told DOT's attorney that he was initially skeptical of the unions' standing, but had found a case that held standing based on increased competition and downward pay pressure from Mexican truck drivers allowed to work in the United States under a pilot program, with standing based on "the laws of economics." DOT's attorney argued in response that the Mexican drivers would not have been able to work in the U.S. absent the pilot program, while there is no reason to believe the NAI crews would not have the same employment opportunities as U.S. union crews absent NAI's permit.

Judge Tatel also challenged the unions' public interest argument against DOT's grant of the permit, noting the two different avenues DOT is granted under statute to approve permits: 1) via designation by an applicant's government through an international agreement, as occurred with NAI, or 2) if a permit is in the public interest. According to Judge Tatel, if there has been a designation by an applicant's government through an international agreement, the matter does not continue to the public interest analysis the unions argue that DOT should've weighed when granting the permit.

ECKERT SEAMANS
ATTORNEYS AT LAW

February 2018

AVIATION REGULATORY UPDATE

AIRLINES SUE WASHINGTON STATE OVER PAID SICK LEAVE LAW

On behalf of its member airlines, Airlines for America is suing Washington State in federal court to avoid complying with a mandatory paid sick leave law that took effect January 1, 2018. As background, in 2016, Washington voters passed Initiative 1433 which, in addition to increasing the statewide minimum wage, requires all Washington employers to provide employees at least one hour of paid sick leave for every 40 hours worked. It allows employees to take leave for illness and healthcare needs—both their own and those of their family members, including siblings—and to seek treatment or services related to domestic violence.

Airlines for America argued that the paid sick leave mandate, when applied to Washington-based pilots and flight attendants who spend most of their working hours outside of Washington, is unconstitutional and contravenes the federal Airline Deregulation Act. It also claims airlines already provide paid sick leave benefits, negotiated through collective bargaining agreements, which can be more generous than what Washington now requires.

According to a spokesperson for the Washington Department of Labor and Industries, the lawsuit is under review by the Washington Attorney General's Office, which will determine the state's course of action. Airlines for America argued that "[u]niformity in regulation of air carriers from one end of a route to another is a national necessity" and that such a uniform standard was called for in the Airline Deregulation Act.

GEORGIA REPUBLICANS VOW TO KILL AIRLINE TAX CUT BILL AFTER DELTA ENDS N.R.A. DISCOUNT

On Monday, February 26, 2018, Georgia's Lieutenant Governor, Casey Cagle, threatened to kill a proposed lucrative tax cut for Delta Air Lines after the company eliminated a discounted fare program for the National Rifle Association (N.R.A.) over the weekend. Mr. Cagle emphasized this proposed action on Twitter the same day at 2:02 PM: "I will kill any tax legislation that benefits @Delta unless the company changes its position and fully reinstates its relationship with @NRA. Corporations cannot attack conservatives and expect us not to fight back." The showdown between one of Georgia's most powerful politicians and one of the state's largest employers was the latest conflict in a national debate around guns after the deadly school shooting at Marjory Stoneman Douglass High School in Parkland, Florida earlier this month.

Following Mr. Cagle's tweet, other Republicans in the State Legislature pulled back their support for the bill, which would grant a $50 million sales tax exemption on jet fuel, primarily benefiting Delta. In response, the airline, which had come under growing pressure from its customers and others to cut ties with the gun group, said its decision "reflects the airline's neutral status in the current national debate over gun control amid recent school shootings."

AVIATION REGULATORY UPDATE

This is not the first time Delta has attempted to remove itself from involvement in political issues. The airline noted that it withdrew financial support of a New York production of "Julius Caesar" last summer because it depicted the assassination of a Trump-like Roman ruler.

In the days after the shooting massacre in Parkland, Florida, more than a dozen companies, including MetLife Insurance, Symantec and Enterprise, cut ties with the N.R.A. The companies had been threatened with boycotts over deals and discounts they had offered to the gun group's members.

REMINDER: USDA REGISTRATION REQUIREMENTS

The U.S. Department of Agriculture's (USDA) Animal Welfare Act (AWA) requires carriers that transport animals to register with the USDA. If your company is not currently registered pursuant to the AWA, this may result in administrative action from USDA's Animal and Plant Health Inspection Service (APHIS), the agency that enforces the AWA. Below is a summary of the AWA and its registration requirements.

The AWA was signed into law in 1966. It is the only Federal law in the United States that regulates the treatment of animals in research, exhibition, transport, and by dealers. The AWA requires that minimum standards of care and treatment be provided for certain animals bred for commercial sale, used in research, transported commercially, or exhibited to the public. Other laws, policies, and guidelines may include additional species coverage or specifications for animal care and use, but all refer to the Animal Welfare Act as the minimum acceptable standard.

APHIS ensures that all regulated commercial animal breeders, dealers, brokers, transportation companies, exhibitors, and research facilities are licensed or registered. APHIS also regularly searches for unlicensed or unregistered parties. Before APHIS will issue a license, the applicant must be in compliance with all standards and regulations under the AWA. To ensure that all licensed and registered facilities continue to comply with the Act, APHIS inspectors regularly make unannounced inspections. If an inspection reveals deficiencies in meeting the AWA standards and regulations, the inspector will document the deficiencies and instruct the operation to correct the problems within a given timeframe. If deficiencies remain uncorrected at subsequent inspections, APHIS will consider legal action.

9 C.F.R 2.25(a) requires that each carrier and intermediate handler shall register with the USDA by completing and filing a properly executed form which will be furnished, upon request, by the AWA Regional Director. Intermediate handlers include airlines, railroads, motor carriers, shipping lines, and other enterprises. We note that "regulated animal" is generally any warm blooded animal which is being used, or is intended for use for research, teaching, testing, experimentation, exhibition purposes, or as a pet. Additionally, registrations are generally valid for three years and a failure to become a registered carrier is a punishable violation of the AWA, which is enforced by the USDA. Violations of the AWA can result in criminal penalties, civil penalties (up to $5,000 per incident) and the revocation of a carrier's AWA permit. If you are currently transporting animals, and do not have a registration, please contact us for assistance.

ECKERT SEAMANS
ATTORNEYS AT LAW

February 2018

AVIATION REGULATORY UPDATE

OFAC MAKES CHANGES TO SDN LIST AND RELEASES ADVISORY ON NORTH KOREA

On February 9, 2018, the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) made several additions 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.

The newest additions to the SDN list include:

Individuals

1. ABUBAKAR, Abdulpatta Escalon (Linked To: ISLAMIC STATE OF IRAQ AND THE LEVANT).
2. SAKARYA, Yunus Emre (Linked To: ISLAMIC STATE OF IRAQ AND THE LEVANT).
3. YUSUF, Mohamed Mire Ali (Linked To: ISLAMIC STATE OF IRAQ AND THE LEVANT).

Entities

1. AL-MUTAFAQ COMMERCIAL COMPANY (Linked To: YUSUF, Mohamed Mire Ali).
2. LIIBAAN TRADING (Linked To: YUSUF, Mohamed Mire Ali).
3. PROFESYONELLER ELEKTRONIK (Linked To: ISLAMIC STATE OF IRAQ AND THE LEVANT; Linked To: SAKARYA, Yunus Emre).

North Korea Sanctions Advisory

On February 23, 2018, OFAC released a North Korea Sanctions Advisory, which stated that U.S. statutory law requires the U.S. government to impose sanctions on any person determined to knowingly, directly or indirectly facilitate a significant transaction or transactions to operate or maintain an aircraft that is designated under a North Korea-related Executive Order (E.O.) or U.N. Security Council Resolution (UNSCR), or that is owned or controlled by a person designated under a North Korea-related E.O. or UNSCR.

Additionally, the U.S. government is also aggressively targeting for designation on the SDN list any person, among others, that either facilitates a significant export to or import from North Korea or engages in the transportation industry of the North Korea economy.

ECKERT SEAMANS
ATTORNEYS AT LAW

February 2018

AVIATION REGULATORY UPDATE

DHS ANNOUNCES NEW SECURITY MEASURES FOR REFUGEES FROM 11 NATIONS

On January 29, 2018, DHS announced that it will impose new security measures on refugee applicants from 11 "high-risk" countries. The decision followed a 90-day review period during which DHS weighed whether additional safeguards were needed.

The Trump administration resumed refugee admissions in October 2017 after the expiration of an executive order that blocked resettlement for 120 days. 11 countries were singled out for additional review. The administration has not identified the 11 countries, but several reports indicate that they are: Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria and Yemen.

According to the Trump administration, the current list of countries requiring additional screening has not been updated since 2015 and does not reflect the comprehensive assessment of public safety and national security risks associated with applicants from those countries.

Homeland Security Secretary Kirstjen Nielsen has also recommended that a joint DHS and State Department working group convene to further review the list and propose an updated one in six months.

DHS BUDGET REQUEST WOULD ENABLE HISTORIC TSA STAFFING INCREASE

DHS has announced that the White House fiscal 2019 budget request released on February 12, 2018 would allow TSA to make a historic hiring increase. The budget request includes $3.2 billion to help TSA hire an additional 687 transportation security agents, which would be the largest staffing boost in the agency's history.

The Trump administration, however, has announced in a supplemental budget document that it still seeks to eliminate a reimbursement grant program for airports that hire state and local law enforcement—a plan that has been widely rebuked by airport groups and certain lawmakers in the past year.

The Trump administration's fiscal 2019 budget also prioritizes the adoption of new aviation security technology. TSA is asking for $74 million to purchase 145 new 3-D computed tomography scanners. This figure is slightly higher than the $71 million the White House included for aviation security technology in a fiscal 2019 budget request document released earlier this month.

Lawmakers have been pressuring TSA to expedite its deployment of CT technology to U.S. airports. However, TSA Administrator David Pekoske's fiscal 2019 CT scanner deployment plan called for 300 machines. DHS has not commented on why the CT deployment plan was slashed.

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.

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March 2018

AVIATION REGULATORY UPDATE

EU GENERAL DATA PROTECTION REGULATION (GDPR) COMING ON MAY 25TH

The EU's General Data Protection Regulation (GDPR), to be implemented on May 25th, 2018, will have a significant impact on the aviation industry. The regulation institutes a broad range of recordkeeping, reporting, consent and related data privacy requirements as well as various legal mechanisms for noncompliance, including penalties.

GDPR not only will apply to companies located or conducting business within the EU, but also to organizations located outside of the EU if they offer goods or services to EU citizens. Further, GDPR will apply to all companies processing and/or holding the personal data of "Data Subjects" residing in the European Union, regardless of the company's location. Any information related to a Data Subject which can be used to directly or indirectly identify that person constitutes personal data under GDPR. Examples of personal data for purposes of GDPR include: a name, a photo, an email address, bank details, social media content, a computer IP address, and website tracking cookies, among others.

GDPR's penalties are far more significant than current data protection regimes. Under the new regulation, companies can be fined up to 4% of their annual turnover or €20 million for violations, whichever is greater. GDPR has several requirements which could expose companies to the above fines for noncompliance, including a 72-hour deadline to report data breaches, a right of EU citizens to request data deletion, various data recordkeeping requirements, and appointment of company data protection officers in certain cases, among others.

There are several steps that companies in the aviation sector must already have taken to prepare for GDPR's arrival, including beginning to establish the necessary recordkeeping regimes, data consent processes, and reporting protocols, among others. Below are steps that should be taken before May 25:

- Update your public-facing privacy policy to reflect GDPR's requirements;
- Identify the personal data of EU citizens in your possession, where you have it, how it is protected, and how to access it. If you use a customer relationship management application (CRM), determine if it contains hidden personal data through data analytics;
- Establish data privacy protection policies and document how you follow them;
- If you have a website that collects data analytics, sells to EU citizens or EU companies or collects demographic data on EU citizens for any purpose, hire a data protection officer (DPO), as mandated by GDPR;
- Convert your data collection processes to require explicit opting-in by individuals. For example, a customer's consent by clicking to accept a lengthy, unrelated Terms of Service document is not sufficient under GDPR;
- Delete personal data of EU citizens which you do not need. EU citizens have a legal right under GDPR to ask you to produce any data you have on the individual and for you to delete such data at their request. If you do have data on an EU citizen, it is possible you will be required to request permission from the individual for you to keep the data.

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March 2018

AVIATION REGULATORY UPDATE

In order to ensure compliance as of GDPR's effective date of May 25, 2018, companies must be able to demonstrate the steps they have already taken to meet the regulation's compliance objectives. If you have any questions regarding GDPR compliance, please contact us

AIRLINES FOR AMERICA SUPPLEMENTS ITS REGULATORY REVIEW FILING; TAKES AIM AT FULL FARE ADVERTISING RULE

On March 15, A4A supplemented its filing in before the U.S. Department of Transportation (DOT or the Department) in the Regulatory Review docket (Docket DOT-OST-2017-0069) in order to specifically target DOT's Full Fare Advertising rule, and to provide additional justifications as to why that rule is unnecessary to protect consumers, harms competition, and should be repealed. A4A argues that the rule, which prohibits airlines from advertising airfares without including all government-imposed fees and taxes in the advertised fare, is not needed, improper, and a departure from established Federal Trade Commission policy and practice, on which DOT's consumer protection regime is based. The 211-page supplemental filing also calls into question DOT's penchant for regulating through guidance documents and "Frequently Asked Questions," which are not adopted via a statutorily authorized notice-and-comment rulemaking process or by any other mechanism whereby the public is notified and allowed to provide input. A4A calls for DOT to rescind the "overreaching regulation and related guidance documents" and revert to its long-standing prior policy, which was in place for decades, and allow airlines to separately advertise the base fare and government-imposed fees and taxes. A4A argues:

- The Full Fare Advertising rule subjects airlines to different advertising requirements than nearly all other businesses and industries in America, including competing modes of transportation;
- DOT adopted the Full Fare Advertising rule without any meaningful evidence of consumer confusion under prior DOT policy and premised the rule on a deeply flawed cost-benefit analysis;
- DOT's intrusive regulation of price advertising is very different from the FTC's policy, which allows sellers to advertise base prices without including taxes; and
- The Full Fare Advertising rule's overly prescriptive advertising requirements inhibit airlines from clearly informing the public of the true burden of government taxation on air transportation.

TSA WITHDRAWS LARGE AIRCRAFT SECURITY PROGRAM NPRM

Earlier this month, the Transportation Security Administration (TSA) announced its intention to withdraw a significant rulemaking concerning the possible establishment of a large aircraft security program (LASP). TSA originally proposed this requirement in 2008. At that time it sought comments on potentially requiring certain private and corporate aircraft operations to adopt security standards similar to those of commercial aircraft operations, including the use of security programs, crew vetting, and passenger watchlist matching. The 2008 Notice also proposed new requirements for airports that serve private and corporate operations. Following the NPRM's announcement in 2008, TSA held a series of public meetings and reviewed more than 7,000 public comments from pilots, aircraft operators, airports, aviation workers, individuals,

members of congress, aviation associations, and civic organizations. While many commenters supported parts of the NPRM, LASP was met by overwhelming criticism, with the vast majority of commenters noting that it increased costs unnecessarily, created burdensome new processes, and would lead small airport and aircraft operators to go out of business causing widespread loss of employment.

Based on all of the information received and a re-evaluation of the proposal in light of risk-based principles, TSA has decided not to pursue this rulemaking at this time. The decision corresponds with TSA 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 last year. TSA did note that it has several regulatory initiatives underway that are required by statute, and we expect to see additional regulations from this agency in the near term.

COMPANION LAWSUITS ARE FILED TO CONTEST USDA APHIS FEES

The U.S. Court of Federal Claims has agreed to stay a lawsuit brought by a host of international airlines against the government's Animal Plant Health Inspection Service (APHIS) pending the outcome of a similar case currently before the U.S. District Court for the District of Columbia. The first lawsuit was filed by Airlines for America (A4A) and IATA against the U.S. Department of Agriculture (USDA) and its associated department, APHIS, regarding the collection of Agricultural Quarantine and Inspection (AQI) fees. The case was initially filed in the U.S. District Court for the District of Columbia in May 2016. The lawsuit focuses on the significant increase of AQI aircraft inspection fees in December 2015, from $70.75 per arriving international flight to $225.

The plaintiffs, which include A4A and IATA, seek injunctive relief to prohibit USDA APHIS from collecting the new, higher AQI Fee. They allege that the USDA raised the AQI fee without considering associated costs which is a requirement under U.S. law. Further, the plaintiffs allege that the combination of USDA inspection fees that are (1) assessed on a per-passenger ticket basis and (2) assessed on arriving international aircraft amount to an illegal "double charge" under U.S. law.

Now, plaintiffs' counsel has assembled a group of over 40 carriers and has filed a companion case invoking a federal law called the Tucker Act in the U.S. Court for Federal Claims. The Tucker Act allows for the recovery of any federal tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the federal tax laws. Because IATA and A4A do not have standing to file a Tucker Act claim, plaintiffs' counsel coordinated a group of affected airlines to file the companion suit in an effort to have the $225 aircraft inspection fee declared invalid and to permanently enjoin the USDA from collecting the fee. It is also possible that a prevailing action would entitle participating airlines to a full or partial refund of the AQI fees paid to date. The plaintiffs currently claim that airlines are owed more than $50,000,000 in fees from 2012 to the present.

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March 2018

AVIATION REGULATORY UPDATE

SUPREME COURT TO DETERMINE WHETHER REMOTE SELLERS ARE REQUIRED TO COLLECT AND REMIT USE TAXES

In *South Dakota v. Wayfair Inc*. et al, the U.S. Solicitor General filed an amicus brief on March 6, 2018 outlining the U.S. Government's position that states have the authority to compel remote sellers to collect and remit a use tax. Such remote sellers would include travel agents and other sellers of travel tickets.

The Solicitor General stated that "'[i]n light of internet retailers' pervasive and continuous virtual presence in the states where their websites are accessible, the states have ample authority to require those retailers to collect state sales taxes owed by their customers[.]'" The case was appealed to the Supreme Court due to a South Dakota law which requires businesses to collect state sales taxes if they sell more than $100,000 of goods inside South Dakota annually, even if they have no physical presence in the state. Opponents of the South Dakota tax argued that the Supreme Court's 1992 decision in *Quill Corp. v. North Dakota* holds that a state can collect sales tax only from a retailer that has a physical presence in the state. The Solicitor General argued that the Quill decision did not contemplate the modern pervasiveness of e-commerce and its effects on traditional sales tax obligations and, as a result, the Supreme Court should depart from its previous holding.

The Supreme Court has not yet scheduled oral argument for the case, but it will likely be heard during the 2018 Summer Term.

FEDERAL APPEALS COURT RULES ON THE MEANING OF "NONREFUNDABLE", DISMISSES CLAIM AGAINST UNITED

Two customers filed a class action complaint in an Oklahoma state court against United after buying several nonrefundable tickets through the airline's website and being told by United they were unable to make new reservations after the one-year deadline set forth in United's Contract of Carriage (CoC). The case was ultimately dismissed by the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) on February 21, 2018 (*Martin v. United Airlines, Inc.*).

In their original filings in Oklahoma state court, the customers conceded that, in buying the tickets, they had agreed to United's 48-page CoC. The CoC provided that United will not refund any portion of a ticket that is purchased with a nonrefundable fare and that a nonrefundable ticket has no value after its ticketed departure time. However, if the customer canceled the reservations before the ticketed departure time, United's CoC allowed a customer to use, within a one-year period from the issuance of the ticket, the value of that ticket toward another ticket, subject to the applicable change fee.

United removed the case to federal court, then moved to dismiss the complaint. The federal district court granted United's motion to dismiss, holding that the customers' claims were either preempted by the

AVIATION REGULATORY UPDATE

Airline Deregulation Act, or, to the extent they were not preempted, were not actionable because the relevant CoC terms were in fact enforceable.

On appeal to the Tenth Circuit, the Court affirmed the federal district court's ruling, noting that United did nothing more than enforce an enforceable contract. The Court rejected the customers' argument that the CoC was ambiguous, ruling that they had failed to identify the specific text that they alleged was ambiguous. Further, the Court rejected the customers' argument that the restrictions on nonrefundable tickets were unconscionable, explaining that travelers have a choice between purchasing a refundable ticket or a significantly cheaper nonrefundable ticket from a variety of airlines and that airlines are not coercive in offering travelers the choice of cheaper nonrefundable tickets.

NTSB OFFERS FAMILY ASSISTANCE TRAINING COURSE

The National Transportation Safety Board's (NTSB) Transportation Disaster Assistance Division will offer a course called "Transportation Disaster Response – Family Assistance" from April 3-5 2018. The NTSB writes that the "course is a unique opportunity for anyone with an interest in gaining an understanding of family assistance operations in the aftermath of a major transportation accident." Although the course is relevant to all modes of transportation, aviation will be a major component of the discussion.

More information and registration for the course can be found at:
https://www.ntsb.gov/Training_Center/Pages/TDA301_2017.aspx

QANTAS AIRWAYS – CABOTAGE CONSENT ORDER

On March 28, 2018, Qantas Airways Ltd (Qantas) entered into a Consent Order Agreement with DOT. Although Qantas admitted to no wrongdoing, the underlying action focused on DOT's position that Qantas had engaged in cabotage (the carriage by air of local traffic for compensation or hire by foreign air carriers between two points in the United States) between 2015 and 2016. It is DOT's position that cabotage is a violation of 49 U.S.C. §§ 41301 and 40109 and also constitutes unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712.

In the Consent Order, DOT stated that Qantas conducted unauthorized cabotage operations after it held out and enplaned revenue passengers on flights that it operated between two points within the United States. These passengers were then transported on connecting Qantas codeshare flights operated by a U.S. or another foreign air carrier to points outside the United States. "Specifically, Qantas' U.S.-facing website held out, and accepted reservations and payments from passengers for, flights from John F. Kennedy International Airport (JFK) to Fa'a'ā International Airport (PPT) in Tahiti, French Polynesia, with a connection at Los Angeles International Airport (LAX)." Under the codeshare arrangement, the first leg from JFK to LAX was operated by Qantas on Qantas' aircraft. However, in order to continue on to PPT, passengers deplaned at LAX and continued as Qantas codeshare passengers on board aircraft operated by other carriers. "Additionally", according to DOT, "Qantas' U.S.-facing website also held out, and accepted

reservations and payments from passengers for, flights from JFK to Auckland International Airport (AKL) in New Zealand, with a connection at LAX." The first leg of the flights from JFK to LAX was operated by Qantas on Qantas' aircraft. However, in order to continue on to AKL, passengers deplaned at LAX and continued as Qantas codeshare passengers on board aircraft operated by other carriers.

According to DOT, the sum of these actions resulted in unauthorized cabotage and unfair and deceptive business practices. The Consent Order assessed a civil penalty of $125,000 against the airlines.

COPA AIRLINES – TARMAC DELAY CONSENT ORDER

On December 23, 2018, the Department of Transportation fined Compañía Panameña de Aviación, S.A. (Copa) for violating 14 C.F.R. Part 259 and 49 U.S.C. § 41712. Specifically, Copa allegedly failed to adhere to the assurances in its contingency plan for lengthy tarmac delays to provide adequate food within two hours after arrival and to provide operable lavatories during a tarmac delay.

On December 21, 2016, Copa Flight CM302 flew from Tocumen International Airport (PTY) to Los Angeles International Airport (LAX) and experienced a tarmac delay after it was forced to divert to Ontario California International Airport (ONT) due to heavy rains and congestion at LAX. Flight CM302 decided to land at ONT, an airport that is not one of Copa's regular diversion airports, because of low fuel. Upon landing at ONT, flight CM302 experienced a tarmac delay of two hours and 39 minutes. While Copa confirmed that the passengers on flight CM302 were provided beverages within two hours after the aircraft arrived at ONT, Copa admitted that passengers were not provided with food during this time. The Enforcement Office's investigation also revealed that lavatories onboard flight CM302 were inoperable during the delay.

In order to avoid litigation, Copa agreed to settle the matter with DOT's Enforcement Office and enter into a consent order which directed the carrier to cease and desist from future similar violations of 14 C.F.R. Part 259 and 49 U.S.C. § 41712, as well as a $25,000 compromise in civil penalties.

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April 2018

AVIATION REGULATORY UPDATE

EU GENERAL DATA PROTECTION REGULATION (GDPR) COMING ON MAY 25TH

As we noted in our March 2018 update, the EU's General Data Protection Regulation (GDPR), will be implemented on May 25, 2018. GDPR will have a significant impact on the aviation industry. The regulation institutes a broad range of recordkeeping, reporting, consent and related data privacy requirements as well as various legal mechanisms for noncompliance, including penalties.

GDPR not only will apply to companies located or conducting business within the EU, but also to organizations located outside of the EU if they offer goods or services to EU citizens. Further, GDPR will apply to all companies processing and/or holding the personal data of "Data Subjects" that reside in the European Union, regardless of the company's location. Any information related to a Data Subject which can be used to directly or indirectly identify that person constitutes personal data under GDPR. Examples of personal data for purposes of GDPR include: a name, a photo, an email address, bank details, social media content, a computer IP address, and website tracking cookies, among others.

GDPR's penalties are far more significant than current data protection regimes. Under the new regulation, companies can be fined up to 4% of their annual turnover or €20 million for violations, whichever is greater. GDPR has several requirements which could expose companies to the above fines for noncompliance, including but not limited to a 72-hour deadline to report data breaches, a right of EU citizens to request data deletion, various data recordkeeping requirements, and the appointment of company data protection officers in certain cases.

There are several steps that companies in the aviation sector should already have taken to prepare for GDPR's arrival, including beginning to establish the necessary recordkeeping regimes, data consent processes, and reporting protocols, among others. Below are steps that should be taken before May 25:

- Update your public-facing privacy policy to reflect GDPR's requirements;
- Identify the personal data of EU citizens in your possession, where you have it, how it is protected, and how to access it. If you use a customer relationship management application (CRM), determine if it contains hidden personal data through data analytics;
- Establish data privacy protection policies and document how you follow them;
- If you have a website that collects data analytics, sells to EU citizens or EU companies or collects demographic data on EU citizens for any purpose, hire a data protection officer (DPO), as mandated by GDPR;
- Convert your data collection processes to require explicit opting-in by individuals. For example, a customer's consent by clicking to accept a lengthy, unrelated Terms of Service document is not sufficient under GDPR; and

AVIATION REGULATORY UPDATE

- Delete personal data of EU citizens which you do not need. EU citizens have a legal right under GDPR to ask you to produce any data you have on the individual and for you to delete such data at their request. If you do have data on an EU citizen, it is possible you will be required to request permission from the individual for you to keep the data.

In order to ensure compliance as of GDPR's effective date of May 25, 2018, companies must be able to demonstrate the steps they have already taken to meet the regulation's compliance objectives. If you have any questions regarding GDPR compliance, please contact us.

IATA LAUNCHES NEW GLOBAL CERTIFICATION PROGRAM TO IMPROVE SAFETY AND WELFARE OF ANIMALS IN AIR TRAVEL

The International Air Transport Association (IATA) recently launched a new standardized global certification program to improve the safety and welfare of animals travelling by air. The Center of Excellence for Independent Validators for Live Animals Logistics (CEIV Live Animals) certification process will provide stakeholders across the air cargo supply chain with the assurance that CEIV Live Animals certified companies are operating to the highest standards in the transport of live animals.

The standards and training involved the CEIV Live Animals certification program are based on the IATA Live Animals Regulations (LAR), the worldwide standard for transporting animals by air. As background., the IATA LAR were developed from professional and operational input from industry experts, including veterinarians, animal welfare experts as well as government agencies involved in the regulation of animal transportation and non-governmental organizations with an interest in animal transportation.

The CEIV Live Animals program is intended to increase the level of competency, operations, quality management and professionalism in the handling and transportation of live animals in the air freight industry while reinforcing training and compliance across the supply chain. Independent validators will conduct training and onsite audits to ensure animals' safety and welfare when they are travelling by air across the world.

The CEIV Live Animals program also incorporates compliance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) requirements. CITES is the legally-binding agreement with 183 Parties (182 States and the EU), regulating international trade in more than 36,000 species of animals and plants.

EUROPEAN UNION AGREES TO NEW SECURITY SYSTEM MODELED AFTER US ESTA

On April 25, 2018, the EU Council and EU Parliament agreed to terms for a "European travel information and authorization system,", or ETIAS, which the EU notes was an "important step" in protecting the EU's

external borders and will ensure member states have advance knowledge of travelers to the EU before they arrive.

Discussion around the ETIAS scheme has been ongoing since November 2016 following the adoption of the European Agenda on Security in April 2015, which was designed to combat terrorism and security threats facing the union. A "general approach" to the concept was agreed by the council in June 2017.
ETIAS authorization will cost a traveler €7 and will be valid for a period of three years. Travelers will be able to apply online ahead of travel, much like the US ESTA system and the charge will apply to "visa-exempt third country nationals." Authorization, like the US ESTA system, does not provide automatic right of entry or stay, with any final decisions to be made at the border by border guards.

The regulation will now be submitted to the European Parliament for a vote at first reading, and then to the Council for adoption. If it is adopted, it is understood the EU would seek to implement the system as soon as possible, potentially by 2020.

SUPREME COURT REJECTS LONGSTANDING "NARROW CONSTRUCTION" RULE FOR FLSA EXEMPTIONS

The U.S. Supreme Court has, since 1945, narrowly construed exemptions to the Fair Labor Standards Act (FLSA), which in turn created a strong presumption that an employee was non-exempt unless an employer could demonstrate that an exemption "plainly and unmistakably" applied. The Court's longstanding "narrow construction" rule was overturned this month, in *Encino Motorcars, LLC v. Navarro*, when the high court held in a 5-4 decision that the specific employees at issue—service advisors at an automobile dealership—are exempt from the FLSA's overtime requirement. In *Encino Motorcars*, the Court considered the question of whether current and former service advisors in a California car dealership were non-exempt under the FLSA and therefore entitled to overtime. The most significant aspect of the ruling is not whether the service advisors were in fact exempt or non-exempt under the FLSA, but that the Court rejected the Ninth Circuit's reliance of the longstanding "narrow construction" principle for FLSA exemptions, stating "the Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. We reject this principle as a useful guidepost for interpreting the FLSA."

The Court's holding in *Encino Motorcars* will affect many industries. As noted above under the now defunct narrow construction rule, there was a strong presumption of non-exempt status, absent a showing by the employer that an exemption "plainly and unmistakably" applies. The practical effect of the Court's ruling is that employers should have an easier time persuading courts that employees fall within overtime exemptions. Now, employers must merely show that their reading of the exemption is more consistent with the statutory and regulatory text, rather than showing that there is little or no doubt about the matter.

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April 2018

AVIATION REGULATORY UPDATE

HAWAIIAN AIRLINES, INC. – CONSENT ORDER

On April 13, 2018, Hawaiian Airlines (Hawaiian) entered into a Consent Order Agreement with DOT concerning alleged violations by Hawaiian of the Department's disability rule in 14 CFR Part 382 and the Department's oversales rule in 14 CFR Part 250. It is DOT's position that violations of Part 382 and section 14 CFR 250.5 constitute a failure to adhere to the carrier's Customer Service Plan in violation of 14 CFR 259.5, the Air Carrier Access Act (49 USC § 41705), 49 USC § 41702 to the extent the violations occurred in interstate air transportation, and 49 USC § 41310 to the extent the violations occurred in foreign air transportation. The violations also constituted unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712.

In the Order, DOT stated that Hawaiian failed to provide dispositive responses to individuals with disabilities as required by 14 CFR 382.155(d) and failed to properly categorize and report disability-related complaints as is required by 14 CFR 382.157. Additionally, Hawaiian did not pay adequate denied boarding compensation (DBC) to passengers who were involuntarily denied boarding in violation of 14 CFR 250.5, a provision in the Department's oversales rules.

DOT's Enforcement Office and Hawaiian have reached a settlement of this matter in order to avoid litigation. Hawaiian consented to the issuance of the Order, to cease and desist from future similar violations, and to the assessment of $125,000 in penalties.

ALLEGIANT AIR, LLC – CONSENT ORDER

On April, 13, 2018, Allegiant Air, LLC (Allegiant) entered into a Consent Order Agreement with DOT. The Order concerned alleged violations by Allegiant of the Department's disability rule in 14 CFR Part 382. The Order also concerned violations by Allegiant of the Department's regulations regarding consumer complaints, 14 CFR 259.7 and 14 CFR Part 374.

In the Order, DOT stated that Allegiant failed to provide adequate assistance to passengers with disabilities while moving within the terminal and failed to provide timely dispositive written responses to written disability-related air travel complaints. The Order also detailed Allegiant's failure to comply with the Department's regulations regarding timely responses to consumer complaints as well as its failure to provide prompt refunds to passengers. These violations also constitute unfair and deceptive practices in violation of 49 U.S.C. § 41712.

DOT's Enforcement Office and Allegiant have reached a settlement of this matter in order to avoid litigation. Allegiant consented to the issuance of the Order, to cease and desist from future similar violations, and to the assessment of $250,000 in penalties.

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April 2018

AVIATION REGULATORY UPDATE

FLUGLEIDIR, H.F., D/B/A/ ICELANDAIR – CONSENT ORDER

On April 16, 2018, Flugleidir, h.f., d/b/a/ Icelandair (Icelandair) entered into a Consent Order Agreement with DOT. The Order concerned alleged violations by Icelandair of 14 CFR Part 259, and the statutory prohibition against unfair and deceptive practices and unfair methods of competition, 49 U.S.C. § 41712. Specifically, the Order addressed violations of the Department's rules requiring carriers to respond to consumer complaints in a timely manner, as well as the Department's rules requiring that carriers adhere to the standards set forth in their customer service plans.

According to the DOT's Enforcement Office, it was revealed that Icelandair failed to provide substantive responses within 31 days of receipt to over 20% of the consumer complaints reviewed by the Enforcement Office, in violation of Icelandair's customer service plan. Additionally, Icelandair failed to provide a substantive response within 60 days of receipt, as required by DOT regulations, to over 40% of these complaints.

The Enforcement Office and Icelandair have reached a settlement of this matter in order to avoid litigation. Icelandair consented to the issuance of the Order, to cease and desist from future similar violations, and to the assessment of $100,000 in penalties.

OFFICER WHO DETAINED DR. DAVID DAO SUES UNITED AIRLINES

An aviation security officer who was fired after "forcibly dragging" passenger Dr. David Dao from a United Airlines (United) aircraft last year has sued the airline and the city of Chicago. The security officer has claimed that he was not "properly trained to deal with such a situation" and that he was defamed after the incident became a national news sensation.

The lawsuit, filed on April 10, 2018, seeks more than $150,000 in damages. The Complaint states that "[b]ut for the [Chicago Department of Aviation's] negligence and failure to train [the plaintiff] how to respond to an escalating situation with an airline passenger, [he] would not have acted in the manner he did, which resulted in his termination…." The plaintiff also alleges that he was defamed on social media and in the press because those stories often omitted important facts about the plaintiff's actions which were "intentionally misleading" and had "the direct intention to harm" the plaintiff.

The City of Chicago and United have not yet made official comments about the lawsuit. Dr. Dao also previously sued the airline, but the lawsuit was settled out of court and the terms of that settlement are confidential.

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April 2018

AVIATION REGULATORY UPDATE

UNITED AIRLINES SUED IN CLASS ACTION OVER CANCELLED FLIGHT

On April 10, 2018, United Airlines (United) was sued in a class action lawsuit over the September 10, 2017 cancellation of United Airlines flight 1270 (UA1270) from Tampa Bay to Chicago. The plaintiff-passengers brought a breach of contract action against the airline after United allegedly refused to compensate the passengers for "their actual, general and special damages for cancellation of flight from Tampa to Chicago; as well as under other legal theories incorporated herein under the doctrine of pendent jurisdiction...."

The total value of the alleged pecuniary losses sustained by the passengers exceeds $219,929.60. The lawsuit, *Dmytro Shalahin et al v. United Airlines*, was filed in the U.S. District Court for the District of Northern Illinois.

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May 2018

AVIATION REGULATORY UPDATE

FAA REAUTHORIZATION ACT UP FOR APPROVAL BY U.S. SENATE

On April 13, 2018, the FAA Reauthorization Act of 2018 (the Act, or H.R. 4), was introduced in Congress. The Act is sponsored by Pennsylvania's Bill Shuster and if passed, will have far-reaching impacts across numerous sectors of the aviation industry. Of particular note to our readers are proposed "Air Service Improvements" which address a number of consumer related issues. Specifically, the Act would:

- Roll back the U.S. Department of Transportation's (DOT or the Department) "Full Fare Advertising Rule" to allow carriers to advertise base prices separately from government taxes and fees;
- Prohibit involuntary bumping of passengers once they have already boarded the plane and require DOT to clarify current regulations regarding compensation offered in instances of involuntary denied boarding. The Act would also remove maximum amounts of Denied Boarding Compensation (DBC) payable, and require carriers to proactively pay DBC instead of waiting for the passenger to request it;
- Direct DOT to conduct a rulemaking proceeding to develop minimum standards for the carriage of emotional support and service animals;
- Prohibit the use of cells phones and mobile devices for voice communications while an aircraft is in-flight;
- Require review of best practices and studies on how to improve overall travel experience (including the establishment of a Select Subcommittee for Aviation Consumers with Disabilities);
- Establish an advisory committee to make recommendations on consumer protections and improve the process of filing complaints;
- Require DOT to develop an "Airline Passengers with Disabilities Bill of Rights" that describes rights and obligations of passengers and airlines in carriage of passengers with disabilities. This Bill of Rights would have to be displayed on carrier websites and mentioned in notifications to passengers;
- Require carriers to submit plans to DOT to ensure applicable training is being conducted regarding Airline Passengers with Disabilities Bill of Rights;
- Increase maximum penalty (three times the current minimum amount, to $96,420) for injury to passengers with disabilities or damage to passenger wheelchairs/mobility aids;
- Require DOT to examine and possibly amend regulations related to airline training programs for addressing needs of passenger with disabilities;
- Amend the existing non-smoking law to apply to e-cigarettes;
- Require large ticket agents to adopt minimum customer service standards; and

- Require DOT to issue regulations establishing minimum seat dimension standards on passenger aircraft.

H.R. 4 also addresses numerous issues including but not limited to the funding of FAA programs, Passenger Facility Charge modernization, Airport Improvement Program modifications, Airport Noise and Environmental streamlining, reforms to aircraft certification procedures and flight standards, Safety and Unmanned Aircraft Systems, and disaster relief. To address some of these issues, the Act would:

- Remove certain restrictions on PFCs, thereby allowing airports to more effectively finance infrastructure projects;
- Establish processes for the acceleration of implementing a low-altitude unmanned aircraft system traffic management system, and the streamlined deployment of commercial UAS via a risk-based permitting process;
- Improve aircraft certification process through the establishment of a Safety Oversight and Certification Advisory Committee to provide advice on safety certification issues, as well as oversight programs and activities; and
- Promote the establishment of a Lithium Ion Battery Safety Advisory Committee.

DOT sent a letter to the Ranking Member of the Senate Committee on Commerce, Science, and Transportation outlining several of the Department's concerns regarding various consumer protection requirements in the legislation. "As the Senate moves forward with consideration of aviation reauthorization, we strongly encourage that it be mindful of the Administration's commitment to reduce and streamline the regulatory burden, and minimize the administrative burden on the Department that otherwise diverts resources away from important aviation programs such as aviation safety," wrote DOT Deputy General Counsel James Owens in the letter.

The Act passed in the U.S. House of Representatives on April 27, 2018, and will go to the Senate next for consideration. Assuming it passes in the Senate, it will move on to President Trump for signature.

AIRLINES FOR AMERICA COMMENTS ON BTS INFORMATION COLLECTION PROCEDURES

Beginning in late 2014, and continuing to the present, the Department's Bureau of Transportation Statistics (BTS) has been pursuing an initiative to evaluate the continuing need for and usefulness of BTS collecting certain financial data from large certificated U.S. air carriers. On May 9, 2018, Airlines for America filed a comment targeting DOT's Form 41 "Report of Financial and Operating Statistics for Large Certificated Air Carriers" requirement. A4A urged the Department to "repeal all airline reporting requirements not specifically required by statute, especially for extensive and burdensome Form 41 reporting requirements"

and cited the Trump Administration's Executive Orders 13771 and 13777 (which call for reductions in regulations and the control of regulatory costs).

- A4A recommended that – at a minimum – DOT:
- Streamline employment reporting (P10 - Annual Employee Statistics by Labor Category);
- Do away with the BTS requirement that large certificated U.S. air carriers submit monthly income statement and balance sheet data to DOT (A4A instead notes that quarterly reporting should be sufficient to meet the Department's need for information); and
- Eliminate the requirement to submit Form 41, Schedule B-43, Inventory of Airframes and Aircraft Engines.

DC CIRCUIT DENIES ALPA'S SUIT AGAINST DOT REGARDING NORWEGIAN AIR PERMIT

On May 11, 2018, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) denied challenges put forth by several airline unions in their suit against DOT, *Air Line Pilots Association International et al. v. Elaine L. Chao*, ruling that the agency had no reason to deny a foreign air carrier permit to Norwegian Air Shuttle's Irish subsidiary, Norwegian Air International (NAI). The Air Line Pilots Association International, the Association of Flight Attendants-CWA, the Allied Pilots Association and the Southwest Airlines Pilots' Association had argued that DOT should have denied NAI's application for a foreign air carrier permit to operate flights in the United States. The court held that U.S. law and the Air Transport Agreement between the U.S. and the European Union provided no basis to deny the application simply because it may or may not be in the public interest (or against the interests of certain labor organizations).

DC Circuit Judge David S. Tatel wrote that "neither federal law nor international agreement requires the Secretary to deny a permit on freestanding public-interest grounds where, as here, an applicant satisfies the requirements for obtaining a permit."

At issue in the case was DOT's December 2016 decision to award a foreign air carrier permit to NAI after a three-year review which was characterized by strong resistance from labor groups, politicians and other parties who argued that NAI's employment practices give it an unfair competitive advantage.

The unions' challenge focused on DOT's alleged failure to uphold labor provisions in the U.S.-European Union (Iceland, Norway) Air Transport Agreement. The groups collectively argued that NAI's application and business model—under which the company's pilots and cabin crew are hired through a third-party company in Singapore—"run counter" to that agreement and that the airline should not have been granted a foreign air carrier permit to serve the U.S.

Judge Tatel sided with the Department of Transportation and the airline, however, finding that DOT was obligated to issue a permit to a qualified applicant, approved by its home jurisdiction, which Norwegian

was. The panel did rule in the unions' favor on the issue of standing. The court wrote that the unions had been able to demonstrate real harm that could come from the decision and that DOT's arguments to the contrary were not persuasive.

The two other judges on the panel wrote separate, concurring opinions. Judge Judith W. Rogers wrote that although the unions had not convinced the panel that the Department of Transportation violated the law, they still could petition for conditions to be imposed on Norwegian's approval through the Joint Committee responsible for the Air Transport Agreement.

U.S. FINES PANASONIC'S IN-FLIGHT ENTERTAINMENT ARM $280M FOR FOREIGN CORRUPT PRACTICES ACT VIOLATIONS

On April 30, 2018, Panasonic Avionics entered into a deferred prosecution agreement with the Department of Justice (DOJ) for violating the Foreign Corrupt Practices Act. The in-flight media system manufacturer agreed to pay $280 million and to accept future monitoring in order to resolve charges brought by the Department of Justice and Securities and Exchange Commission (SEC) related to making improper payments to consultants in Asia.

According to the DOJ, in 2007, Panasonic Avionics hired a foreign official as a consultant for contract negotiations with an unnamed, government-owned Middle Eastern airline. The official was paid $875,000 over the course of six years despite no record of work completed to warrant such payments. The payments were then recorded as legitimate consulting expenses in Panasonic's accounting records.

Additionally, the DOJ found that, from 2007 and 2016, employees at the subsidiary concealed Panasonic Avionics' use of sales agents in Asia who had not met internal due diligence requirements. Though the company formally terminated the agents, certain company employees rehired them as sub-agents after the fact. These employees concealed in excess of $7 million in payments to at least 13 agents. Panasonic employees continued to make secret payments to other agents despite receiving warnings.

The DOJ stated that Panasonic Avionics was required to pay 20% less than commensurate fines based on current U.S. sentencing guidelines. Panasonic Avionics will be required to retain an independent compliance monitor for two years as part of the agreement with DOJ.

Panasonic also entered into an agreement with the SEC over anti-bribery, anti-fraud, and internal accounting controls violations. The company has agreed to disgorge $143 million as part of the agreement, including $126.9 million in profits and $16.3 million in prejudgment interest.

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ATTORNEYS AT LAW

May 2018

AVIATION REGULATORY UPDATE

EU AND U.S. MOVE CLOSER TO AGREEMENT TO REMOVE WET-LEASE LIMITS

The European Union (EU) and the U.S. are making progress on an agreement to remove mandatory time limits for wet-leasing contracts after the European Council granted the European Commission permission to negotiate with its U.S. counterpart on this issue.

As background, the EU and the U.S. have disagreed over long term wet-leasing since 2008, when the EU imposed a once-renewable period of seven months for how long EU carriers could wet-lease aircraft from non-EU carriers. This action caused the U.S. to follow suit and impose similar limits on long-term wet-lease applications that were submitted to DOT. These limits were arguably contrary to a provision in the 2007 EU-U.S. Open Skies agreement which calls for an open wet-lease regime. The current negotiations are focused on restoring that provision.

In a statement approving the negotiations, the European Council stated: "Leasing an aircraft with its crew, known as 'wet leasing,' makes it easier for airlines to open new routes and to respond to, for example, seasonal demand for tourist destinations. Increased flexibility for aircraft operators brings wider choice and lower prices for customers."

U.S. TREASURY SET TO TERMINATE IRAN AIRCRAFT LICENSES

The U.S. Treasury Department is set to terminate civil aviation companies' export licenses for Iran following President Trump's decision to withdraw from the Iran nuclear deal. On May 8, 2018 President Trump released a memorandum on the withdrawal from the Joint Comprehensive Plan of Action (JCPOA), entitled "Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon."

According to a senior State Department official, speaking on condition of anonymity, "[w]ithin the first 90 days the Treasury Department is going to work to terminate the specific licenses that were issued pursuant to the statement of licensing policy on civil aviation…Treasury will be reaching out to private-sector companies and work to terminate those licenses in an orderly way."

This action by the U.S. Treasury Department effectively terminates Boeing's prospective delivery of roughly $9.5 billion worth of aircraft to Iran and halts any further delivery of Airbus aircraft under the company's previously completed $8.4 billion transaction.

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May 2018

AVIATION REGULATORY UPDATE

FAA PROPOSES $232,000 CIVIL PENALTY AGAINST AVIATION TECHNICAL SERVICES INC.

On May 18, 2018, the U.S. Department of Transportation's Federal Aviation Administration (FAA) proposed a $232,000 civil penalty against Aviation Technical Services Inc. (ATS) of Everett, Wash., for allegedly violating drug and alcohol screening regulations.

The FAA alleges that in 2016 and 2017, the aviation repair station failed to include in its random drug and alcohol testing pool 18 employees who performed safety-sensitive work. As a result, the employees performed safety-sensitive work for weeks or months without being subject to random drug and alcohol testing. The employees included quality control inspectors, mechanics, and avionics technicians.

The FAA further alleges the company allowed one new employee to perform safety-sensitive aircraft painting work before it received a verified negative pre-employment drug test for that employee. ATS has asked to meet with the FAA to discuss the case.

AIR CANADA – CONSENT ORDER (CUSTOMER SERVICE PLAN)

On May 22, 2018, the Department of Transportation fined Air Canada for violating 49 U.S.C. § 41712 and 14 CFR Parts 250 and 259. Specifically Air Canada failed to adhere to their Customer Service Plan.

During compliance inspections by the Department's Office of Aviation Enforcement and Proceedings (Enforcement Office) at various airports across the country in 2016, Air Canada agents failed to produce copies of Air Canada's written denied boarding statement at boarding gate locations and ticket counters being used by the carrier in response to specific requests by Enforcement Office staff.

In order to avoid litigation, Air Canada agreed to settle the matter with DOT's Enforcement Office and enter into a consent order which directed the carrier to cease and desist from future similar violations of 49 U.S.C. § 41712 and 14 CFR Parts 250 and 259, as well as a $35,000 compromise in civil penalties.

BRITISH AIRWAYS PLC – CONSENT ORDER (LENGTHY TARMAC DELAY)

On May 22, 2018, the Department of Transportation fined British Airways PLC (British Airways) for violating of 14 CFR Part 259 and 49 U.S.C. § 41712 with respect to two different flights. Specifically, for these flights, the carrier failed to adhere to the assurance in its contingency plan for lengthy tarmac delays that the carrier would not permit an international flight to remain on the tarmac for more than four hours without providing passengers an opportunity to deplane.

An investigation by the Office of Aviation Enforcement and Proceedings (Enforcement Office) revealed that on February 9, 2015, flight BA 202, traveling from BOS to Heathrow Airport (LHR), and was delayed on the

tarmac at BOS for four hours and fifty-one minutes. Due to wintry weather and difficult taxi conditions, the carrier determined that a second round of deicing would be needed prior to takeoff, which contributed to the lengthy delay.

The second investigation by the Enforcement Office revealed that on May 9, 2015, British Airways flight BA 218, traveling from DEN to LHR, was delayed on the tarmac for four hours and fifty-six minutes. After an initial round of deicing, the aircraft taxied to the runway, where the carrier determined that additional deicing would be necessary.

In order to avoid litigation, British Airways agreed to settle the matter with DOT's Enforcement Office and enter into a consent order which directed the carrier to cease and desist from future violations of 14 CFR Part 259 and 49 U.S.C. § 41712, as well as a $225,000 compromise in civil penalties.

TAME LINEA AEREA DEL ECUADOR – CONSENT ORDER (FULL FARE ADVERTISING)

On May 22, 2018, the Department of Transportation fined TAME Linea Aerea del Ecuador (TAME) for violating of 14 CFR Part 399 and 49 U.S.C. § 41712. Specifically, TAME violated the full fare advertising rule.

During an investigation by the Office of Aviation Enforcement and Proceedings (Enforcement Office), staff members created multiple sample itineraries to determine whether TAME routinely charged consumers a total price that was higher than the first quoted price displayed to consumers. TAME's practice of charging consumers a higher total price than the first price quoted to consumers during the booking process constitutes a violation of 14 CFR 399.84(a), thus exercising unfair and deceptive practices and unfair methods of compensation.

In order to avoid litigation, TAME agreed to settle the matter with DOT's Enforcement Office and enter into a consent order which directed the carrier to cease and desist from future similar violations of 14 CFR Part 399 and 49 U.S.C. § 41712, as well as a $130,000 compromise in civil penalties.

VIETNAM AIRLINES JSC – CONSENT ORDER (FULL FARE ADVERTISING)

On May 22, 2018, the Department of Transportation fined Vietnam Airlines JSC (Vietnam Airlines) for violating 14 CFR Part 399 and 49 U.S.C. § 41712. Specifically, Vietnam allegedly violated DOT's consumer protection regulations regarding full fare advertising.

For several months in 2017, Vietnam Airlines' U.S.-facing website, on its homepage and a subsequent page linked from the homepage, displayed fare advertisements which included base fares but did not include taxes and fees. Whereas the advertisements on the home page only listed base fares, the subsequent page displayed the following disclaimer below each list of advertised fares: "Airfare + Fuel Surcharge + taxes and the public utilities' charge." However, the webpage did not list specific figures for taxes or fees. Thus, the web advertisements displayed only partial fares, in violation of 14 CFR 399.84(a).

AVIATION REGULATORY UPDATE

Additionally, in its booking process, Vietnam Airlines' website displayed a carrier-imposed "Passenger Surcharge" in a breakdown menu under the labels "Taxes." Including carrier-imposed surcharges and other carrier fees not imposed by a government under the label of "taxes," or under the label "taxes and fees," is misleading a violated 14 CFR 399.84(a).

In order to avoid litigation, Vietnam Airlines agreed to settle the matter with DOT's Enforcement Office and enter into a consent order which directed the carrier to cease and desist from future similar violations of 14 CFR Part 399 and 49 U.S.C. § 41712, as well as a $65,000 compromise in civil penalties.

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 (esahr@eckertseamans.com or 202-659-6622); Drew Derco (dderco@eckertseamans.com or 202-659-6665), or Alexander Matthews (amatthews@eckertseamans.com or 202-659-6633).

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ATTORNEYS AT LAW

June 2018

AVIATION REGULATORY UPDATE

COMMENTS ON DOT'S CHANGES TO SERVICE ANIMAL REGULATIONS DUE JULY 9TH

The U.S. Department of Transportation recently published an Advance Notice of Proposed Rulemaking (ANPRM) regarding potential changes to its Air Carrier Access Act (ACAA) regulation, 14 C.F.R. Part 382, on the transportation of service animals.

In the ANPRM DOT notes that the current ACAA regulation (i.e., Part 382) "could be improved to ensure nondiscriminatory access for individuals with disabilities, while simultaneously preventing instances of fraud and ensuring consistency with other Federal regulations." Airlines have become increasingly concerned that untrained service animals pose a risk to the health and safety of its crewmembers and passengers. While the Department recognizes the legitimate and inherent need of certain individuals with disabilities to travel with a service animal, it also acknowledges the proliferation of fraud and abuse that airlines have faced in recent years.

DOT is considering the following questions: (1) whether psychiatric service animals should be treated similar to other service animals; (2) whether there should be a distinction between emotional support animals and other service animals; (3) whether emotional support animals should be required to travel in pet carriers for the duration of the flight; (4) whether the species of service animals and emotional support animals that airlines are required to transport should be limited; (5) whether the number of service animals/emotional support animals should be limited per passenger; (6) whether an attestation should be required from all service animal and emotional support animal users that their animal has been trained to behave in a public setting; (7) whether service animals and emotional support animals should be harnessed, leashed, or otherwise tethered; (8) whether there are safety concerns with transporting large service animals and if so, how to address them; (9) whether airlines should be prohibited from requiring a veterinary health form or immunization record from service animal users without an individualized assessment that the animal would pose a direct threat to the health or safety of others or would cause a significant disruption in the aircraft cabin; and (10) whether U.S. airlines should continue to be held responsible if a passenger traveling under the U.S. carrier's code is only allowed to travel with a service dog on a flight operated by its foreign code share partner.

Comments on the ANPRM are due by July 9, 2018. Please contact us if you would like to submit comments. The full text of the ANPRM is available at: https://www.gpo.gov/fdsys/pkg/FR-2018-05-23/pdf/2018-10815.pdf

DOT PUBLISHES INTERIM STATEMENT OF ENFORCEMENT PRIORITIES

On May 16, 2018, DOT published an *Interim Statement of Enforcement Priorities* in order to update industry and the public of its intended enforcement focus with respect to service animals. This document was prepared to inform interested parties about DOT's plans for enforcing current rules while the rulemaking process occurs and was, at least in part, likely prompted by numerous U.S. carriers, including Delta and United, unilaterally tightening their policies with respect to the carriage of service and emotional support animals.

DOT will focus its enforcement on "clear violations" of the applicable regulation:

- **Species and Number** – U.S. carriers must continue to accept the most commonly used service animals (i.e., dogs, cats, and miniature horses) for travel. DOT does not intend to take action if an airline limits passengers to transporting one emotional support animal or a total of three service animals.

AVIATION REGULATORY UPDATE

- **Advance Notice** – Current regulations prohibit carriers from requiring advance notice for passengers with disabilities, unless the rule specifically permits advance notice. DOT intends to pursue enforcement action against carriers that impose advance notice requirements on passengers with disabilities that exceed that which is allowed under Part 382.
- **Proof** – While airlines are required to accept items such as vests and harnesses as evidence of a service animal's status, DOT has advised that it would be reasonable to also request the passenger's credible verbal assurance to ensure the passenger is an individual with a disability who has a need for the service animal.
- **Check-in Requirements** – DOT will take action against an airline that requires a passenger with a service animal to check-in at the ticket counter, instead of giving them the option to use an automated kiosk.
- **Documentation** – DOT does not intend to pursue enforcement action against carriers that require proof of a service animal's vaccination, training, or behavior so long as the documentation is not required for passengers seeking to travel with a service animal that is not an emotional or psychiatric service animal.
- **Containing Emotional Support Animals in the Cabin** – DOT does not intend to pursue enforcement action against carriers that restrict the movement of emotional support animals in the cabin, provided the restriction is tied to a concern for the safety of other passengers and crew.

Several entities filed comments in response to the Interim Statement of Enforcement Priorities, including Delta, United, Airlines for America, and the International Air Transport Association. Comments were predominately supportive of the Department's efforts in tailoring its enforcement activities to certain portions of the service animal requirements, and acknowledging industry concerns on numerous issues.

Interest groups have also weighed in. The Asthma and Allergy Foundation of America (AAFA) filed comments on June 20th advising that more than 25 million Americans have asthma and 50 million have allergies. AAFA advocates a balanced policy where airline passengers at risk of severe allergic reactions be considered equally to those who rely on comfort animals. AAFA also argues that DOT's Air Carrier Access Act definition of service animal is broader than that under the Americans With Disabilities Act (ADA) and that DOT's definition should be limited to the ADA definition (only dogs and in some cases miniature horses).
DOT's Interim Statement of Enforcement Policies is available at: https://www.gpo.gov/fdsys/pkg/FR-2018-05-23/pdf/2018-10814.pdf

AIR CARGO ADVANCE SCREENING – FROM VOLUNTARY PILOT PROGRAM TO MANDATORY REQUIREMENT

In 2010, U.S. Customs and Border Protection (CBP), in conjunction with other Department of Homeland Security interests and the air cargo industry, launched a voluntary Air Cargo Advance Screening (ACAS) pilot program to collect certain advance air cargo data earlier in the supply chain.

The pilot was a success and, on June 12, 2018, CBP published an interim final rule making compliance with ACAS requirements mandatory beginning on that date. The new ACAS program requires cargo carriers to report six pieces of information to CBP earlier in the shipping process than was formerly required. Below is a summary chart comparing the prior requirements to the new ACAS program. As you will note, the most significant change is six of the 11 pieces of mandatory information required to be reported to the CBP, must now be reported *prior to the loading of the cargo on the aircraft*. The rest of the mandatory information can continue to be reported according to the same timeline.

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June 2018

AVIATION REGULATORY UPDATE

The CBP is allowing for a 12-month grace period for carriers to become fully compliant with the program. However, while CBP will show restraint if the program's regulations are inadvertently violated, CBP will take enforcement action if it is clear that carriers are "willful and egregious violators" of the new rules. See 83 Fed. Reg. 27380 at 27382 (June 12, 2018).

Summary Chart for the New ACAS Program:

	Current Requirement	**New ACAS Requirement**
Timing of Data Submission	Time of departure or 4 hours prior to arrival depend on port of departure	As early as possible, but prior to loading of the cargo on the aircraft***
	Mandatory: 1) Air waybill number(s) - master and house, as applicable 2) Shipper name and address 3) Consignee name and address 4) Cargo description 5) Total quantity based on the smallest external packing unit 6) Total weight of cargo 7) Trip/flight number 8) Carrier/ICAO code 9) Airport of arrival 10) Airport of origin 11) Scheduled date of arrival Conditional: 1) Consolidation identifier 2) Split shipment indicator 3) Permit to proceed information 4) Identifier of other party which is to submit additional air waybill information 5) In-bond information 6) Local transfer facility	Mandatory: 1) Air waybill number 2) Shipper name and address 3) Consignee name and address 4) Cargo description 5) Total quantity based on the smallest external packing unit 6) Total weight of cargo Conditional: 1) Master air waybill number Optional: 1) Second notify party NOTE: The above listed information needs to be reported according to the new ACAS timing, however, the carrier must also report the rest of the 11 items (and six Conditional Items) by the former deadline.
Eligible Filers	Inbound air carriers, and other filers eligible under 19 CFR 122.48a	Inbound air carriers, other filers eligible under 19 CFR 122.48a, and freight forwarders
Bond Requirements	All 19 CFR 122.48a filers are required to have an appropriate bond	All ACAS filers, including freight forwarders

*** If an aircraft en route to the United States stops at one or more foreign airports and cargo is loaded, an ACAS filing would be required for the cargo loaded on each leg of the flight prior to loading of that cargo.

A copy of the full interim rule is available at: https://www.gpo.gov/fdsys/pkg/FR-2018-06-12/pdf/2018-12315.pdf

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June 2018

AVIATION REGULATORY UPDATE

SUPREME COURT RULES IN FAVOR OF COLLECTION OF STATE SALES TAX FOR INTERNET SALES

On June 21, 2018, the U.S. Supreme Court ruled in favor of allowing states to collect sales taxes from online retailers that do not have a physical presence in their borders.

As noted by Justice Kennedy, who wrote the opinion, the case has broad implications for commerce in the digital age: "Each year the physical presence test becomes further removed from economic reality and results in significant revenue losses to the States…These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the commerce clause." Kennedy stated that the test was "estimated to cost the states between $8 billion and $33 billion annually."

Internet retailers would have to comply with sales tax requirements in more than 12,000 jurisdictions nationwide as well as burdensome rules concerning retroactive tax obligations.

During oral argument in April, some justices noted that computer software could ease the process of paying out-of-state sales taxes, and that Amazon and other retailers are already collecting sales taxes from some or all states.

CREDIT CARD COMPANIES SET TO REACH SETTLEMENT IN LONGSTANDING SUIT OVER SWIPE FEES

Visa Inc. and Mastercard Inc., as well as several issuers including JPMorgan Chase & Co., Citigroup Inc. and Bank of America, are nearing a settlement in a 13-year-old lawsuit over the fees the companies charged when merchants accepted credit card payments. The lawsuit, filed on behalf of roughly 12 million merchants, has been pending for over a decade.

The terms of the settlement have not been made public, but sources have reported that the credit card companies and issuers would pay merchants roughly $6.5 billion dollars. One June 27, 2018, attorneys involved in the case notified the Magistrate Judge that they would provide a status report on July 10, 2018 with a deadline of July 17, 2018 to finalize the settlement. The case is *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 05-md-01720* in the U.S. District Court for the Eastern District of New York.

TREASURY LEVELS SANCTIONS ON RUSSIAN COMPANIES

As part of the Countering America's Adversaries Through Sanctions Act, the Treasury Department's Office of Foreign Assets Control has imposed new economic sanctions on five businesses and individuals found to have aided Russia's Federal Security Service ("FSB") increase their offensive cyber capabilities. These businesses and individuals assisted the FSB's cyber and underwater capabilities - the FSB has been activity engaged in tracking undersea communications.

The sanctions will bar Americans from doing business with the subject entities and individuals, as well as freeze their assets. The sanctions are a response to the June 2017 cyber-attack known as NotPetya, which disabled part of Ukraine's infrastructure and damaged computers worldwide, and other attacks on the U.S. energy grid. The sanctions

are also intended to scuttle Russian efforts to track underwater communications cables that transmit much of the world's data.

The sanctioned entities include:

- Digital Security, a Moscow based cybersecurity firm, and its two U.S. subsidiaries;
- Kvant Scientific Research Institute; and
- Divetechnoservices, a St. Petersburg based firm, along with three of its top executives.

U.S. SUPREME COURT HOLDS THAT FOREIGN GOVERNMENT SUBMISSIONS ARE NOT BINDING

In Animal Science Products Inc. et al. v. HeBei Welcome Pharmaceutical Co. Ltd. et al., the U.S. Supreme Court set forth important precedent for how U.S. courts will address the legal interpretations of foreign governments (in this case, China) in the future. The case focused on the Chinese government's interpretation that Chinese law compelled two companies to fix prices for their products. As a result, the decision has implications for foreign carriers in the broader context of U.S. antitrust law, DOT oversight of competition issues, and U.S. courts' deference to a foreign government's legal authority.

The Supreme Court rejected a lower court's decision that it was "bound to defer" to the Chinese ministry's legal interpretation of Chinese laws and approval of the price fixing at issue. Before the case was appealed to the Supreme Court, the trial court had expressed concern that the litigation had harmed U.S.-China relations and that the Chinese government had repeatedly expressed that it considered the case offensive and attached great importance to it. The Supreme Court ignored these concerns of the trial court and set precedent that other U.S. courts will not automatically be bound to defer to a foreign government's legal interpretation in this context.

The decision could affect future aviation antitrust cases which involve legal interpretations by a foreign government. Foreign entities will now have to present, in addition to a foreign government submission itself, evidence of a number a factors in order to rely on either a foreign compulsion defense or international comity defense in antitrust litigation. As noted in the Court's majority opinion, these factors include: "the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions."

EUROPEAN COURT OF JUSTICE RULING: DELAYS ON SINGLE TICKET JOURNEYS WITH NON-EU STOPOVERS COVERED BY REGULATION 261

On May 31, 2018 the European Court of Justice (ECJ) ruled that multiple flights booked under a single ticket must be considered a single journey under Regulation (EC) No 261/2004. Practically, this means that a passenger delayed on the non-EU leg of their journey can still claim compensation under the regulation.

The ruling came in response to a question originating in a regional court in Berlin, which heard a passenger's appeal against Royal Air Maroc's decision to deny the passenger compensation for delays in their journey from Berlin, Germany to Agadir, Morocco, via Casablanca, Morocco.

AVIATION REGULATORY UPDATE

The ECJ noted that article 3 of Regulation 261 only applies to flights departing from EU member states or from a third country to a member state. If the passenger's second flight had been considered a "separate transport operation", it would not have been deemed to be under the scope of the regulation.

The court noted that a connecting flight must be understood as two or more flights constituting a "whole" (i.e. booked as a single unit) for the right to compensation under the regulation to be upheld. As this was the case with the passenger in question, the court ruled that the passenger's trip should be considered as a single connecting flight, bringing it under the scope of article 3 of Regulation 261 and providing the passenger with a mechanism to seek compensation for the delay.

DC CIRCUIT DISMISSES PRIVACY GROUP'S CHALLENGE OF DRONE RULES

This month, the United States Court of Appeals for the DC Circuit issued a unanimous decision to dismiss a petition by the Electronic Privacy Information Center (EPIC), which sought a review of the FAA's small drone regulations by arguing that the regulations failed to include privacy safeguards. EPIC's petition was rejected by the Court due to its lack of standing to bring such a challenge.

As part of the FAA Modernization and Reform Act of 2012, Congress required the FAA to develop a regulatory framework for "small" drones. In 2015, the FAA created regulations for drones weighing less than 55 pounds. The FAA focused its attention on safety issues and declined to address privacy concerns, believing they were outside of its purview.

EPIC attempted to justify its standing by submitting affidavits from members of its advisory boards in Florida and Massachusetts. They argued that the increase of drone use would harm their privacy rights as drones would be equipped with cameras and sensors that would record private citizens in a way that would constitute an injury under Article III of the Constitution, a requirement for standing. The Court found their argument to be too speculative to support standing, and also noted that EPIC failed to submit any evidence that would justify organization standing.

Because the petition was dismissed on standing, the Court did not address the substance of EPIC's arguments.

RENEE JACKSON AND BRYAN JACKSON (THIRD-PARTY COMPLAINANTS) V. AMERICAN AIRLINES, INC. – SETTLEMENT

On June 18, 2017, Bryan and Renee Jackson filed a complaint against American Airlines (American) contesting that American involuntarily denied them boarding on April 9, 2015. The Jacksons claimed that they arrived 20-25 minutes prior to departure, made multiple attempts to engage the lone gate agent, and that the gate agent failed to make a last boarding call, nor did she board any passengers.

American argued that the issue of whether or not the Jacksons were present at the departure gate on time was "immaterial" to the Jacksons' claim. American argued that the complainants are not entitled to denied boarding compensation under Part 250 of the Department's Regulations (14 C.F.R. Part 250) because the flight at issue was not oversold, given that the flight had 22 empty seats.

Ultimately, on June 6, 2018, each of the third party complainants entered into settlement agreements with American Airlines and withdrew their respective complaints.

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June 2018

AVIATION REGULATORY UPDATE

ICELANDAIR GROUP, A/K/A FLUGLEIDIR, H.F., D/B/A ICELANDAIR – CONSENT ORDER (TARMAC DELAY)

On June 1, 2018, the Department of Transportation fined Icelandair Group, a/k/a Flugleidir, h.f., d/b/a Icelandair (Icelandair) for violating 14 CFR Part 259 and 49 U.S.C. § 41712. Specifically, the carrier failed to adhere to the assurance in its contingency plan for lengthy tarmac delays to provide adequate food on a departing flight no later than two hours after the aircraft leaves the gate.

An investigation by the Office of Aviation Enforcement and Proceedings (Enforcement Officed) revealed that on May 20, 2017, Icelandair Flight 646, from IAD to Keflavik International Airport, experienced a tarmac delay of three hours and 26 minutes at IAD to address maintenance issues.

In order to avoid litigation, Icelandair agreed to settle the matter with DOT's Enforcement Office and enter into a consent order which directed the carrier to cease and desist from future violations of 14 CFR Part 259 and 49 U.S.C § 4172, as well as a $40,000 compromise in civil penalties.

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ECKERT SEAMANS
ATTORNEYS AT LAW

July 2018

AVIATION REGULATORY UPDATE

U.S. HOUSE OF REPRESENTATIVES FAA REAUTHORIZATION BILL WOULD REQUIRE MINIMUM SIZE STANDARD FOR AIRLINE SEATS

The U.S. House of Representatives' version of the FAA reauthorization bill, H.R. 4, would require the Federal Aviation Administration (FAA) to establish minimum dimensions for passenger seats on aircraft operating in U.S. airspace. Minimum dimensions would be established for seat pitch, width and length. While the FAA reported in early July that there was no evidence that higher-capacity seat arrangements prevent safety evacuations within required minimum times, lawmakers are justifying the minimum seat requirements by citing safety and health concerns.

In a July 2, 2018 letter from the FAA to FlyersRights.org, the FAA denied the group's petition seeking a rulemaking on airline seat dimensions, stating that seat width and pitch, in conjunction with increased passenger numbers, do not hamper the speed, timing or sequence of a safety evacuations.

Alison McAfee, a spokeswoman for Airlines for America, issued a statement that "[A4A] believe[s] market forces should ultimately determine whether the industry is meeting customers' expectations, rather than government regulation." Similarly, Richard Aboulafia, a Teal Group analyst, said such a rule could potentially lead low cost carriers to raise fares if their costs increased.

Against this backdrop, the DOT Inspector General is currently conducting a probe into the FAA's oversight of safety evacuations to determine whether evacuations can be performed in 90 seconds in light of industry shifts to increase seat capacity on flights.

Despite the FAA's July 2nd letter, it may be forced to institute seat dimension requirements if the House's FAA reauthorization bill passes, or the DOT IG's findings differ from those of the FAA.

D.C. CIRCUIT UPHOLDS FAA SYSTEM FOR REGISTERING UNMANNED AIRCRAFT SYSTEMS

On July 6, 2018, the U.S. Court of Appeals for the D.C. Circuit rejected the arguments of hobbyist John Taylor, who had successfully overturned the FAA's system for registering unmanned aircraft systems (UAS) in 2017 (*Taylor v. Huerta, No. 15-1495 (D.C. Cir. May 19, 2017)*).

The original suit arose out of the FAA Modernization Act of 2012, which gave the FAA authority to regulate UAS. The law specified that certain UAS models flown by hobbyists and which followed specific safety rules were exempt from FAA oversight. Subsequently, in December 2015, the FAA issued the Registration and Marking Requirements for Small Unmanned Aircraft rule (Registration Rule). The Registration Rule targeted "model aircraft," which are unmanned aircraft capable of sustained flight in the atmosphere, flown within visual line of sight of the operator, that are flown for hobby or recreational purposes. Mr. Taylor alleged the Registration Rule violated a provision in the FAA Modernization Act of 2012 and that all UAS hobbyists, not only those specified by Congress, should be exempt from FAA's jurisdiction.

Despite acknowledging that Congress intended to grant limited exemptions to certain hobbyists, the D.C. Circuit upheld the FAA's authority over UAS flown by hobbyists, stating that "because the rule is within the agency's statutory authority and is neither arbitrary nor capricious, the petition for review is denied."

The ruling sets precedent and paves the way for further federal regulation of UAS, including the FAA's expected release of new regulations later this year that will permit UAS flights over crowds and will require most or all UAS to employ radio beacon identification systems.

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ATTORNEYS AT LAW

July 2018

AVIATION REGULATORY UPDATE

NEW YORK APPEALS COURT UPHOLDS LIABILITY LIMIT OF AIR WAYBILL AFTER INJURY TO EXOTIC CAT

The Plaintiff in *Lentini v. Delta Air Lines, Inc.* purchased an exotic cat from a breeder in Florida for $2,300, and hired Delta Air Lines (Delta) to transport the cat to LaGuardia Airport (LGA) where the Plaintiff would receive it. According to the Plaintiff, when she arrived at LGA to receive the cat, it was wet and suffered from a broken hip, which led to veterinary bills in excess of $7,000. Plaintiff brought an action against Delta for the cat's injuries, which were allegedly suffered during transport.

Relying on the air waybill's conditions of contract, Delta moved for summary judgment to limit its potential damages to $50. The trial court rejected Delta's argument and refused to enforce the liability limit, finding that the limit was not enforceable because the cargo was not "an inanimate object" and thus should be treated differently from "ordinary bulk objects," concluding that Delta had a "heightened duty of care."

On appeal, the Supreme Court of the State of New York reversed the lower court's decision and enforced the $50 limit, finding the limit was enforceable because reasonable notice of the limit had been provided via the air waybill, and the plaintiff was given a fair opportunity to purchase additional coverage. The trial court's distinction between live animals and inanimate objects was not addressed.

FLIGHT ATTENDANTS PUSH FOR RULEMAKING TO REGULATE AIRCRAFT TEMPERATURE

On July 6, 2018, the Association of Flight Attendants-CWA, AFL-CIO (AFA) formally petitioned DOT Secretary Elaine Chao to conduct a rulemaking to establish operational temperature standards on commercial aircraft. In its petition, the AFA noted the virtual lack of regulation in this area, and highlighted several incidents of high in-cabin temperatures that received national media attention. To address the current lack of temperature requirements, the AFA suggests that DOT could potentially revise the tarmac delay rule to regulate cabin temperatures for aircraft while on the ground, presumably by adding such a requirement to the "assurances" covered carriers provide in their Contingency Plans for Lengthy Tarmac Delays. The AFA also advises that "the best approach will be to promulgate a rule to limit on board temperature extremes during all phases of flight."

Notwithstanding the form that any suggested rulemaking may take, the AFA strongly recommends that the Department adopt the reasonable cabin temperature limits established by Standard Project Committee 161 of the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE). According to the Petition this standard, otherwise known as ASHRAE 161 (Air Quality within Commercial Aircraft), was developed by a committee that included a cross-section of members from the aviation community, including aircraft and component manufacturers, airlines, as well as crewmember and passenger groups. The current ASHRAE standard calls for the following temperature ranges:

- Target range inflight and on the ground: 65 — 75°F.
- Maximum allowed temperature on the ground: 65 to 80°F. (with an allowance for a maximum temperature 85°F. if all in-flight entertainment are operating on).
- Maximum allowed temp. inflight: 80°F.

The AFA's petition for rulemaking calls on DOT to take the following three actions:

1. Exercise its rulemaking authority under 49 U.S.C. Subtitle VII, including, but not limited to, 49 U.S.C. 41712 and 42301, to propose and promulgate regulations that adopt the cabin temperature standards published in

ASHRAE 161. These standards should include, but not be limited to, the provisions in ASHRAE 161 Section 5 General Requirements and Section 5.2 Temperature, and apply to all commercial passenger flights operated by U.S. commercial airlines, as well as by foreign airlines operating to and from U.S. states and territories.
2. Issue guidance encouraging airlines to adopt the cabin temperatures standards published in ASHRAE 161 until a final rule is issued.
3. Establish an advisory committee to conduct ongoing reviews of airplane cabin environmental data and conditions and assist and advise the DOT in proposing rules and standards to ensure the highest levels of safety, health, and comfort for airline passengers and crewmembers.

We will continue to keep our readers updated on any new regulatory developments in this area.

FAA PROPOSES $160,500 CIVIL PENALTY AGAINST WOODIOSO TECHNOLOGY FOR ALLEGED HAZMAT VIOLATIONS

On July 18, 2018, the FAA proposed a $160,500 civil penalty against Woodioso Technology Limited of Hong Kong (Woodioso) for allegedly violating the Hazardous Materials Regulations.

According to the FAA, Woodioso knowingly offered a shipment of 30 lithium ion batteries to United Parcel Service (UPS) for shipment by air from Hong Kong to the company's service facility in Louisville, Kentucky. When the shipment arrived, a UPS employee discovered the batteries and, upon inspection, the FAA alleges Woodioso did not keep the batteries separated to prevent them from contacting each other during shipment, which could have potentially created sparks or generated a dangerous evolution of heat. Improperly packaged lithium ion batteries are considered "forbidden materials" for air transportation.

The FAA further alleges that the shipment was not accompanied by a shipper's declaration of dangerous goods and was not properly classed, described, packaged, marked, labeled or in the proper condition for shipment.

Lastly, the FAA alleges Woodioso failed to ensure that each of its employees received required hazardous materials training, and failed to provide emergency response information with the shipment.

FAA PROPOSES $3.3 MILLION CIVIL PENALTY AGAINST THE HINMAN CO.

On June 29, 2018, the U.S. Department of Transportation's Federal Aviation Administration (FAA) proposed a $3.3 million civil penalty against The Hinman Co. (Hinman) for conducting hundreds of commercial aircraft operations in violation of the Federal Aviation Regulations, including a failure by Hinman to hold the required operator certificate for the flights being performed.

The FAA alleges that Hinman, through subsidiary Hincojet LLC, operated a Beechcraft Beechjet 400A and a Hawker 900XP aircraft. Hinman entered into multiple aircraft timeshare agreements for use of these aircraft. Under Part 91 of the Federal Aviation Regulations, Hinman was allowed to charge certain expenses for each flight under the timeshare agreements, including fuel, oil, lubricants and other additives, and an additional charge equal to 100 percent of the listed amount for each flight. Hinman, however, charged expenses exceeding these allowances for 850 flights and, as such, was required to conduct the flights in accordance with regulations applicable to commercial operations, the FAA alleges.

The FAA further alleges that on multiple occasions, Hinman double-billed timeshare clients for various legs of trips. In multiple examples, the FAA states that the aircraft in these situations were incapable of conducting all of those flights in a single day.

AVIATION REGULATORY UPDATE

As noted above, because it was charging more than the expenses allowed under Part 91, Hinman should have been operating these flights under Part 135, which applies to commercial operations. As a result, FAA alleges that Hinman failed to meet the FAA's Part 135 requirements for record keeping, including pilot records and load manifests, for each flight. The company also had no Part 135 training program in place and the pilots operating the flights were not authorized to conduct the flights under Part 135, the FAA alleges.

FAA PROPOSES $1.4 MILLION CIVIL PENALTY AGAINST VIRGIN ISLANDS PORT AUTHORITY

On June 29, 2018, the FAA proposed a $1,466,775 civil penalty against the Virgin Islands Port Authority (VIPA) for alleged violations of airport safety regulations at Henry E. Rohlsen Airport in St. Croix and Cyril E. King Airport in St. Thomas.

The FAA inspected both airports in early 2018 and identified numerous safety violations at both airports, including findings that VIPA did not have qualified personnel to oversee airport operations, to conduct required daily inspections or to conduct Airport Rescue and Firefighting (ARFF) operations. Additionally, the agency also alleges that the airports failed to maintain and make available to the FAA required records including Airport Certification Manuals, airport emergency plans, and training records for operations supervisors and ARFF employees.

The FAA also alleges that VIPA did not meet the ARFF requirements for air carrier flights at Henry E. Rohlsen Airport (STX) after an ARFF unit could not apply a fire-extinguishing agent within the required time and was incapable of performing its required functions.

Structurally, FAA inspectors noted that VIPA failed to properly upgrade the safety area for runways at both airports to eliminate hazardous ruts, humps, depressions and other surface variations. Moreover, the runways and taxiways were not properly lighted, marked or signed and VIPA failed to issue Notices to Airman (NOTAMs) informing air carriers of the runway and taxiway issues at the airports.

Finally, VIPA also failed to confirm that each fueling agent at STX had trained fueling personnel, and failed to take immediate action to alleviate wildlife hazards detected at the landfill near the airport.

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ECKERT SEAMANS
ATTORNEYS AT LAW

August 2018

AVIATION REGULATORY UPDATE

NY BUDGET BILL IMPOSES NEW HARASSMENT TRAINING OBLIGATIONS ON ALL EMPLOYERS

Earlier this year, New York State passed its 2018-19 budget bill, which included stringent new requirements on all New York employers to provide mandatory annual sexual harassment training to their employees. New York Governor Andrew Cuomo called this the "strongest, most comprehensive anti-sexual harassment protection in the nation". The new law requires that employers provide interactive annualized training to all employees, and the deadline for compliance is October 9, 2018. The New York State Division of Human Rights will develop a training program and draft a model sexual harassment policy for employers to use. Alternatively, however, employers can create their own policy or training program, as long as they equal or exceed the standards in the state's model.

The law also imposes responsibility on the employer for harassment that occurs in the workplace, even if it is done by a non-employee (i.e. third party contractors, etc.), with the obligation to undertake corrective action. There is also language in the legislation that prohibits mandatory arbitration clauses and non-disclosure or confidentiality language in any settlement agreements, except under certain circumstances. Finally, while many companies previously provided their employees with training as a matter of course, the new law imposes a more structured interactive training that must be verified by the employee. Failure to comply with the law will result in the imposition of penalties that are yet to be determined but will also expose the employer to liability in the event it is sued for sexual harassment.

Regarding the required training, we would recommend that it be:

1. Conducted by counsel rather than non-legal personnel; and
2. Divided between non-managerial and managerial employees.

We are happy to provide additional information on the new training requirements, or arrange to assist your organization with a mandatory training session.

TRUMP ADMINISTRATION RE-IMPOSES IRAN SANCTIONS

On May 8, 2018, President Trump announced that the United States would withdraw from the Iran Nuclear Deal, and re-impose certain sanctions through Executive Order 13846 – which took effect after a wind-down period on August 6, 2018.

The re-imposed sanctions include, notably, blocking financial transactions and the imports of raw materials, as well as severe restrictions on commercial aircraft purchases by Iranian entities. Years of U.S. sanctions have prevented Iran from investing in new jets or purchasing aircraft parts, which has contributed to the country's poor aviation record. The U.S. Office of Foreign Asset Control (OFAC) will still consider related license applications for the export, re-export, sale, lease, or transfer of commercial passenger aircraft and related parts under much more limited "aircraft safety" licensing policy:

> "Specific licenses may be issued on a case-by-case basis for the exportation or re- exportation of goods, services, and technology to insure the safety of civil aviation and safe operation of U.S.-origin commercial passenger aircraft."

In addition, General License "J" authorizes non-U.S. airlines to fly U.S. origin aircraft into Iran for stays of up to 72 hours, commonly known as the sojourner exception. Despite the revocation of certain general licenses following the U.S.'s withdrawal from the Iran Nuclear Deal, it does not currently appear that OFAC intends to revoke General

AVIATION REGULATORY UPDATE

License J. Thus, carriers can still operate scheduled service under the "sojourner exception", but cannot wetlease to an Iranian entity or wetlease to another non-Iranian airline operating to Iran.

LEGISLATION REFORMS COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS)

On August 13, 2018, President Trump signed into law the National Defense Authorization Act of 2019 and the Foreign Investment Risk Review Modernization Act (FIRRMA). FIRRMA contains a series of reforms to the Committee on Foreign Investment in the United States (CFIUS).

Before FIRRMA, CFIUS reviewed only transactions that would give foreign entities control over or access to a sensitive U.S. asset. With FIRRMA now signed into law, the definition of control now includes the concept of influence. CFIUS will now have the ability to review non-control investments in the critical infrastructure or technology sectors as well as those that give a foreign person influence over a U.S. entity or access to nonpublic information. Examples include the right to be on the board of a company, nominate a board member or even just observe the board.

Ultimately, however, FIRRMA's reforms to CFIUS will not change the process for how the interagency committee assesses national security risks or the process for assessing individual transactions. While CFIUS will now focus on a broader range of transactions after FIRRMA, the reforms do not necessarily guarantee that fewer transactions will be approved. Since FIRRMA was signed into law, several leading CFIUS experts have stated publicly that the legislation will not fundamentally change how CFIUS assesses transactions.

DELTA PILOT'S PENSION SUIT DISMISSED

On August 21, 2018, the D.C. Circuit dismissed a lawsuit against Pension Benefit Guaranty Corp. (PBGC) by approximately 1,700 Delta Air Lines pilots. The Circuit Court's ruling reversed the lower court's decision to deny PBGC's Motion to Dismiss, effectively ending the pilot's suit. The pilots brought suit against PBGC in 2014, arguing that the company violated its fiduciary duty by incorrectly allocating the Delta Pilots Retirement Plan's assets, depriving the retired pilots of $544 million.

PBGC assumed responsibility of the plan's assets in 2006, a year after Delta's bankruptcy. Under the Employee Retirement Income Security Act, fiduciaries must allocate assets according to a formula that places participants into six categories and assigns each category a priority level. The pilots argued that they were misclassified by being placed in a lower priority category, resulting in them receiving less money.

The Circuit Court found that PBGC met its obligations by paying out $800 million worth of retirement benefits. Further, the Court ruled that any investment earnings the plan brought in after PBGC took it over in 2006 belonged to the company, not the plan participants.

FAA PROPOSES $126,000 CIVIL PENALTY AGAINST RAE-I.T. ASSET MANAGEMENT FOR ALLEGED HAZARDOUS MATERIALS VIOLATIONS

The FAA proposed a $126,000 civil penalty against RAE-I.T. Asset Management, LLC, of Ocala, Fla., for allegedly violating the Hazardous Materials Regulations.

The FAA alleged that on May 24, 2017, the company offered a shipment containing 220 lithium ion cell phone batteries weighing approximately 36 pounds to UPS for shipment by air. The shipment was forbidden because it was not packaged in a manner to prevent sparks or a dangerous evolution of heat.

ECKERT SEAMANS
ATTORNEYS AT LAW

August 2018

AVIATION REGULATORY UPDATE

When the shipment arrived at Louisville International Airport in Kentucky, a UPS worker discovered the shipment and, upon inspection, the FAA alleged the package was not accompanied by a shipper's declaration of dangerous goods and was not properly classed, described, packaged, marked, labeled or in the proper condition for shipment. The agency also alleged that RAE-I.T. Asset Management, LLC, failed to ensure that each of its employees received required hazardous materials training, and failed to provide emergency response information with the shipment.

FAA REVOKES REPAIR STATION CERTIFICATE OF SENSENICH PROPELLER SERVICE'S CONNECTICUT MAINTENANCE FACILITY

The FAA issued an Emergency Order of Revocation of the repair station certificate that authorizes Sensenich Propeller Service, Inc., to operate in North Windham, Connecticut.

The FAA alleged Sensenich and the company's accountable managers falsified maintenance records and approved for return to service parts that had been improperly serviced. Specifically, the FAA alleged that not only did Sensenich and the accountable managers knowingly perform maintenance on 47 propellers for 45 separate aircraft—contrary to instructions in the manufacturers overhaul manuals—they also certified and approved the propellers for return to service, despite the propellers not being properly overhauled.

Due to the seriousness of the alleged violations, the FAA determined that emergency action was required to immediately revoke the certificates of the company and the accountable manager. Both surrendered their certificates to the FAA, and neither appealed the FAA's emergency revocation order.

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ECKERT SEAMANS
ATTORNEYS AT LAW

September 2018

AVIATION REGULATORY UPDATE

FAA REAUTHORIZATION ACT – CONSUMER PROTECTION PROVISIONS

Since 2015, the FAA has been funded by short-term extensions of authority, with the current short-term extension ending on September 30, 2018. The U.S. House of Representatives and Senate have been negotiating a final version of the FAA Reauthorization Act with the goal of passing the bill before the September 30th deadline. On September 22, 2018, House and Senate negotiators reached a deal on a five-year FAA reauthorization, which is anticipated to easily pass both chambers of Congress. The House and Senate plan to pass a one-week extension to enact the full bill (H.R. 302). The current draft contains several developments with regard to consumer protection, including, but not limited to:

Denied Boarding Rules:

- **Tightening of Denied Boarding rules** to prevent involuntarily deplaning revenue passengers if the passenger (1) is traveling on a confirmed reservation; (2) checked in prior to the check-in deadline for the flight; and (3) had their ticket or boarding pass collected/scanned by the gate agent.

- **Changes to Denied Boarding Compensation (DBC) limits** to clarify that there is no maximum to the amount of DBC that can be paid; and would require that carriers proactively offer DBC rather than wait for passengers to ask.

Passenger Rights:

- **Passenger Rights Overview** would require carriers to submit to DOT, for approval by the Secretary of Transportation, a 1-page document outlining passenger rights for compensation for delays, diversions, cancellations, damage to baggage, overbooking, and involuntary denied boardings, which carriers would be required to publish on their website.

- Would **require large ticket agents to adopt minimum customer service standards** for providing prompt refunds, holding reservations for 24 hours, disclosing cancellation policies, notifying of itinerary changes, and responding to complaints.

- Carriers must promptly provide **refunds to passengers of any ancillary fees** paid for services related to air travel that they did not receive, including on a scheduled flight, on a subsequent replacement itinerary if there has been a rescheduling, or for a flight not taken by the passenger.

- FAA shall issue regulations that **establish minimum dimensions for passenger seats** on aircraft operated by air carriers in interstate air transportation or intrastate air transportation, including minimums for seat pitch, width, and length, and other factors that are necessary for the safety of passengers.

- Establishes the position of **Aviation Consumer Advocate** at DOT to help consumers resolve their air travel complaints.

ECKERT SEAMANS
ATTORNEYS AT LAW

September 2018

AVIATION REGULATORY UPDATE

- DOT shall consider requiring carriers to **disclose to consumers the projected period of time between actual wheels-off and wheels-on times** for a flight upon reasonable request from a passenger; and require carriers to post on their website the actual wheels-off and wheels-on times during the most recent calendar month for a reportable flight.

Disabled Passenger Protections:

- Would have DOT develop an **"Airline Passengers with Disabilities Bill of Rights"** to be displayed on carrier websites and in any pre-flight notifications.

- Would **increase the maximum penalty to $96,420** (from the current amount of $32,140) for civil penalties involving passengers with disabilities, including damage to a passenger's wheelchair or other mobility aid or injury to a disabled passenger.

- Would have DOT conduct a rulemaking proceeding to **define the term "service animal"** for purposes of air transportation, develop minimum standards for the in-cabin carriage of service animals and emotional support animals (ESAs), and consider if the definition of service animal should be aligned with that of the ADA.

Prohibited Actions on Aircrafts:

- **Prohibition from engaging in voice communications using a mobile communications device** during scheduled passenger interstate or intrastate air transportation.

- **Prohibit individuals from using electronic cigarettes** while on an aircraft.

Passenger Complaints to DOT:

- DOT shall consider the benefits of **using mobile phone applications, or other technologies, to communicate complaints.**

- DOT will conduct an evaluation of the **aviation consumer protection portion of its website to identify any changes to the user interface**, including the interface presented to individuals accessing the website from a mobile device, that will improve usability, accessibility, consumer satisfaction, and website performance.

Required Studies and Recommendations:

- The Comptroller General of the U.S. will issue a report to Congress and DOT on the best practices to **improve air carrier employee training on polices for nondiscrimination** of racial, ethnic, and religious differences. After receiving this report, DOT will develop their own report to distribute to air carriers.

ECKERT SEAMANS
ATTORNEYS AT LAW

September 2018

AVIATION REGULATORY UPDATE

- The Secretary of Transportation shall **review the rate at which air carriers change passenger itineraries more than 24 hours before departure**, where the new itineraries involve additional stops or depart 3 hours earlier or later than originally scheduled and compensation or other suitable air transportation is not offered.

- DOT will develop specific **recommendations regarding improvements to wheelchair assistance** provided by air carriers, and recommendations on training programs for employees assisting disabled passengers.

- Requires DOT to review airline policies for traveling during pregnancy and considerations for such passengers requesting advance boarding.

- DOT's Advisory Committee will conduct a review and issue recommendations on modifying the regulations governing practices for ticketing, pre-flight seat assignments, and stowing of assistive devices for passengers with disabilities.

PETITION TO CONDUCT RULEMAKING TO PREVENT EXTREME ONBOARD TEMPERATURES

- On July 2, 2018, the Association of Flight Attendants (AFA) petitioned the Secretary of Transportation to conduct a rulemaking to establish operational temperature standards on commercial airplanes. The rule would establish limits for a comfortable cabin temperature for passenger planes operated by both U.S. and foreign carriers. The petition calls for adoption of the temperature limitations specified in Standard 161 of the American Society of Heating, Refrigerating and Air Conditioning Engineers.

- AFA argues that the rule would be in the public interest to prevent illnesses or injury caused by extreme temperatures. AFA stated that there have been numerous incidents of extreme temperature conditions, caused by in-flight crowding, that drew national attention. As an example, in June 2017 in Denver, Colorado, an infant was rushed by ambulance to a hospital after it was forced to endure an "oven with wings" aboard an aircraft. This incident was covered by the Associated Press and ABC News.

- The petition has broad support from various labor groups and other allies, including: the Transportation Workers Union of America, AFL-CIO; FlyersRights.org; Air Lines Pilots Association; and the Transportation Trades Department, AFL-CIO.

ECKERT SEAMANS
ATTORNEYS AT LAW

September 2018

AVIATION REGULATORY UPDATE

FAA ISSUES NEW ADVISORY TO AIRLINES CONCERNING IRANIAN AIRSPACE

On September 9, 2018, the FAA issued a new advisory to U.S. operators to exercise caution when operating in Iranian airspace. This advisory comes at the expiration of the prior year's advisory and is a result of the FAA's stated concerns over military activity in Iran, including reference to an unnamed U.S. civil operator which was intercepted by Iranian combat jets in December 2017. The advisory also cited military activities associated with the conflict in Syria, including combat aircraft which originate from or transit through Iranian airspace.

The U.S. Department of State (State Department) has advised U.S. citizens not to travel to Iran due to the risk of unwarranted arrest and detention. The State Department's advisory highlights the risks for operators with U.S. citizens as passengers when flying over Iranian airspace if an unplanned landing is required due to medical or technical reasons.

U.S. TREASURY SANCTIONS THAI FIRM WITH LINKS TO IRAN'S MAHAN AIR

On September 14, 2018, the U.S. Treasury Department's Office of Foreign Assets Control announced new sanctions targeting Bangkok-based firm, My Aviation Company Ltd. The aviation firm is accused of acting as General Services Agent (GSA) in Thailand for Mahan Air.

GSAs, by definition, are third-party entities that "provide services to an airline under the airline's own brand, including sales and marketing, freight handling and airport warehouse and ramp supervision." In this case, not only did this Bangkok-based company provide cargo services to Mahan Air, but it is also alleged to have worked with local freight forwarding entities to ship cargo aboard regularly scheduled Mahan Air flights to Tehran, Iran. By imposing sanctions on GSA entities such as My Aviation Company Ltd., service providers will "finally have to decide whether the profits generated by transacting with Mahan are worth the risk of American sanctions."

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October 2018

AVIATION REGULATORY UPDATE

FAA REAUTHORIZATION ACT OF 2018 SIGNED INTO LAW; OVERVIEW OF UPCOMING CONSUMER PROTECTION DEADLINES/ISSUES

The FAA Reauthorization Act of 2018 was recently signed into law by President Trump on October 5, 2018. The Act covers a cross-section of issues that address numerous industry concerns. These include **the modernization of airport infrastructure** (e.g., stable funding for AIP, removal of Passenger Facility Charge (PFC) restrictions, creation of a remote air traffic control tower pilot program), **the streamlining of FAA certification and regulatory processes** (e.g., improved FAA workforce training, aircraft certification reform, flight standards reform, creation of Safety Oversight and Certification Advisory Committee), **enhancements to aviation safety** (e.g., enhanced safety training for FAA workforce, strengthened voluntary safety reporting programs for pilots, alternative methods for tracking aircraft over oceans, focus on cybersecurity, improved rest and duty rules for Part 135 flight attendants and pilots), and **the safe and efficient use of drones** (e.g., development of sense-and-avoid technologies, greater flexibility for FAA to approve advanced UAS operations, privacy protections for unmanned aircraft, advances low-altitude UAS traffic management systems and services).

Most importantly for foreign carriers operating to, from and within the United States, the Act includes a number of new "Customer Service Improvements" that will be imposed on the industry in the coming months/years across a broad number of topics. Below is a summary of the Act's most significant Customer Service provisions which we have separated by topic. Where timing was indicated in, or mandated by, Congress, we have included that in **red text** below. Keep in mind, however, that some of these deadlines are more concrete than others.

Denied Boarding Rules:

- **Tightening of Denied Boarding rules** to prevent involuntarily deplaning of revenue passengers if the passenger (1) is traveling on a confirmed reservation; (2) checked in prior to the check-in deadline for the flight; and (3) had their ticket or boarding pass collected/scanned by the gate agent. **This requirement became effective on October 5, 2018.**

Passenger Rights:

- Covered air carriers will be required to submit to DOT, for approval by the Secretary of Transportation, a 1-page document outlining passenger rights for compensation for delays, diversions, cancellations, damage to baggage, overbooking, and involuntary denied boardings, which carriers would be required to publish on their website.

- **Within 180 days** DOT will issue a Final Rule that **requires large ticket agents to adopt certain minimum customer service standards**. To the extent feasible, new rules will require large ticket

agents (those with at least $100 million in annual revenue) to comply with customer service and disclosure requirements consistent with responsibilities placed upon covered air carriers.

- **Within one-year**, DOT will promulgate regulations that **require covered air carriers to promptly provide refunds to passengers of any ancillary fees** paid for services related to air travel that they did not receive, including on a scheduled flight, on a subsequent replacement itinerary if there has been a rescheduling, or for a flight not taken by the passenger.

- **Within one year**, and after notice and opportunity for public comment, the FAA shall issue regulations that **establish minimum dimensions for passenger seats** on aircraft operated by U.S. air carriers in interstate air transportation or intrastate air transportation, including minimums for seat pitch, width, and length, and other factors that are necessary for the safety of passengers.

- Establishes the position of **Aviation Consumer Advocate** at DOT to help consumers resolve their air travel complaints.

- **Within one year** DOT shall conduct a study and issue a report to Congress, considering if DOT should require U.S. carriers **to disclose to consumers the projected period of time between actual wheels-off and wheels-on times** for a flight upon reasonable request from a passenger; and require U.S. carriers to post on their website the actual wheels-off and wheels-on times during the most recent calendar month for a reportable flight.

- Requires U.S. and foreign airlines and ticket agents to disclose on their own website whether or not a destination country requires the aircraft cabin or passengers to be treated with insecticides prior to the flight.

Disabled Passenger Protections:

- DOT shall develop an **"Airline Passengers with Disabilities Bill of Rights"**, describe the basic protections and responsibilities of air carriers, to be displayed on air carrier websites and in any pre-flight notifications.

- **Effective October 5, 2018**, the **maximum penalty is increased to $96,420** (from the current amount of $32,140) for civil penalties involving passengers with disabilities, including damage to a passenger's wheelchair or other mobility aid or injury to a disabled passenger.

- DOT shall conduct a rulemaking proceeding to **define the term "service animal"** for purposes of air transportation and to develop minimum standards for the in-cabin carriage of service animals and emotional support animals (ESAs). In so doing, DOT will consider if the definition of service animal should be aligned with that of the ADA, evaluate reasonable measures to ensure pets are not claimed as service animals, consider reasonable measures to ensure the safety of all passengers,

and discuss the impact additional requirements on service animals could have on access to air transportation for passengers with disabilities (if impacts are found, DOT will find ways to eliminate or mitigate the impact). DOT will issue a final rule on these topics **within 18 months. A notice of proposed rulemaking is expected to be issued by March, 2019.**

Prohibited Actions on Aircrafts:

- **DOT shall issue regulations on the prohibition from engaging in voice communications using a mobile communications device** during scheduled passenger interstate or intrastate air transportation.

- **Prohibit individuals from using electronic cigarettes while on an aircraft**.

Passenger Complaints to DOT:

- **Within 180 days,** DOT will conduct an evaluation of the **aviation consumer protection portion of its website to identify any changes to the user interface**, including the interface presented to individuals accessing the website from a mobile device that will improve usability, accessibility, consumer satisfaction, and website performance.

Required Studies and Recommendations:

- **Within 180 days,** the Comptroller General of the U.S. will issue a report to Congress and DOT on the best practices to improve air carrier employee training on polices for **nondiscrimination** of racial, ethnic, and religious differences. After receiving this report, DOT will develop its own report to distribute to air carriers.

- **Within one year,** the Secretary of Transportation shall **review the rate at which air carriers change passenger itineraries more than 24 hours before departure,** where the new itineraries involve additional stops or depart 3 hours earlier or later than originally scheduled and compensation or other suitable air transportation is not offered. Within 90 days after the review, the Secretary shall issue a report to Congress on the findings.

- DOT will develop specific **recommendations regarding improvements to wheelchair assistance** provided by all air carriers, and recommendations on training programs for employees assisting disabled passengers.

- **Within 180 days** DOT shall review airline policies for traveling during pregnancy and considerations for such passengers requesting advance boarding, and if necessary, revise regulations.

ECKERT SEAMANS
ATTORNEYS AT LAW

October 2018

AVIATION REGULATORY UPDATE

- **No later than 30 days after the first meeting of DOT's Advisory Committee** on the travel needs of passengers with disabilities, the Committee will conduct a review and issue recommendations on modifying the regulations governing practices for ticketing, pre-flight seat assignments, and stowing of assistive devices for passengers with disabilities.

NEW YORK ANTI-HARASSMENT UPDATE

As we reported in our August 2018 Aviation/Regulatory Update, New York State recently passed one of the most aggressive anti-sexual harassment rules in the country. This legislation requires that every employer in the State provide to all employees annual interactive training on anti-sexual harassment. In addition, all employers (no matter the size) must adopt and distribute an anti-sexual harassment written policy that includes what sexual harassment is, the available means to report such conduct and time limits for such reports. In addition there must be a complaint form available and a poster placed outlining the policy provisions. **The anti-sexual harassment policy and issuance of a complaint form was required to be adopted and distributed by October 9, 2018.** The training deadline is now October 9, 2019.

The law also imposes responsibility on the employer for harassment that occurs in the workplace, even if it is done by a non-employee (i.e. third party contractors, delivery personnel etc.), with the obligation on the employer to undertake corrective action. There is also language in the legislation that prohibits mandatory arbitration clauses and non-disclosure or confidentiality language in any settlement agreements, except under certain circumstances. Finally, while many companies previously provided their employees with training as a matter of course, the new law imposes a more structured interactive training that must be verified by the employee. Failure to comply with the law will result in the imposition of penalties that are yet to be determined but will also expose the employer to liability in the event it is sued for sexual harassment.

FOREIGN INVESTMENT REQUIREMENTS - CFIUS PILOT PROGRAM

As required by the August 2018 Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), the Treasury Department has formed a Critical Technology Pilot Program (Pilot Program), going into effect November 10, 2018, which will institute a new review process for foreign investments with the ultimate goal of formulating permanent updated regulations for the CFIUS process.

Under the Pilot Program, CFIUS will review any purchase, lease, or concession to a foreign person of real estate located in proximity to sensitive U.S. government facilities. The Pilot Program regulations focus on whether or not the investment affords "access to any material nonpublic technical information in the possession of the pilot program U.S. business," among other considerations. Material information means that which is necessary to design, fabricate, develop, test, produce, or manufacture critical technologies.

AVIATION REGULATORY UPDATE

Critical technologies include existing export-controlled and military technologies but also an as-of-yet undetermined list of "emerging and foundational technologies" that will be filled out through federal interagency coordination. There are 27 advanced manufacturing industries covered by the Pilot Program, including "Aircraft Manufacturing" and "Aircraft Engine and Engine Parts." Companies looking to invest in sensitive U.S. industries should pay particular attention to these new rules, as they make the review process obligatory and penalize noncompliance. Companies conducting transactions covered by the Pilot Program rules must submit mandatory notices or simplified declarations to CFIUS, which then has up to 45 days to investigate. Companies who fail to submit the required filings are subject to fines.

U.S. TREASURY ISSUES NEW ADVISORY REGARDING IRAN FINANCIAL TRANSACTIONS

On October 11, 2018, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued FIN-2018-A006, "Advisory on the Iranian Regime's Illicit and Malign
Activities and Attempts to Exploit the Financial System." The alert reminds relevant institutions to be vigilant and maintain adequate risk-based compliance programs to ensure that they do not conduct funds or material transfers in contravention of various laws such as the International Emergency Economic Powers Act (IEEPA), the USA PATRIOT Act, and the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA).

The alert details a number of known methods by which Iranian individuals historically have sought to evade U.S. currency controls imposed by the Office of Foreign Assets Control (OFAC). These include the use of forged documents at exchange houses outside of Iran to convert Iranian currency into U.S. dollars, the use of shell companies to obtain advanced printing equipment for counterfeiting currency, and various forms of shipping and maritime document fraud to facilitate illegal cargo transfers. Red flags of possible illegal activity include commercially illogical funds transfers, use of multiple exchange houses, unusual structuring of transactions, or dealings in precious metals or jewels in that can serve as a substitute for currency. FinCEN also encourages vigilance with regard to rapidly-evolving blockchain-based virtual currencies, which are equally subject to anti-money-laundering compliance requirements as value denominated in other currencies.

With regard to civil aviation, FinCEN notes that many Iranian airlines are sanctioned entities due to their material support for other sanctioned organizations, such as the Iran Revolutionary Guards Corps. Front companies have been used to surreptitiously obtain export-controlled engines, parts, and whole aircraft for Iranian aviation, including through leases or purchases from other airlines. A red flag might be the ordering of aircraft parts for delivery to a destination that often serves as a transshipment point to Iran, when the beneficial ownership of the counterparty is unknown. FinCEN notes that companies maintaining commercial connections with sanctioned entities may be subject to sanction themselves by OFAC. If you have any questions regarding the advisory, please contact us.

ECKERT SEAMANS
ATTORNEYS AT LAW

October 2018

AVIATION REGULATORY UPDATE

IRS ISSUES INTERIM GUIDANCE ON DEDUCTIBILITY OF BUSINESS MEALS

On October 3, 2018, the IRS issued interim guidance entitled, "Expenses for Business Meals Under § 274 of the Internal Revenue Code." According to the notice, "[t]he Treasury Department and the IRS intend to publish proposed regulations under § 274 clarifying when business meal expenses are nondeductible entertainment expenses." Until then, the interim guidance applies, and public comments on the notice are open through December 2, 2018.

One question that arises for the aviation sector is whether transportation to a business-related meal might constitute entertainment and thus no longer be deductible as an ordinary business expense. The 2017 Tax Cuts and Jobs Act amended section 274 of the Internal Revenue Code to disallow entertainment, amusement, and recreation deductions as ordinary business expenses, but continued to provide a limited exception for non-lavish food and beverages served when the taxpayer or their employee was present and if the meal was directly related to the business. Taxpayers can deduct up to 50% of the purchase value for expenses under this exception. The interim guidance makes clear that such expenses continue to be deductible, but must be clearly separated from nondeductible entertainment expenses. The interim guidance, however, does not address, for example, how to classify a flight to a meeting. It remains to be seen how deductions related to air transportation are affected by the interim guidance.

FAA LIFTS SOME RESTRICTIONS ON FLIGHTS TO UKRAINIAN AIRPORTS

On October 19, 2018, the FAA issued a rule easing some restrictions on U.S. civil flight operations in the Dnipropetrovsk Flight Information Region (FIR) (UKDV) and over international waters in the Black Sea as the security situation in Eastern Ukraine continues to evolve. The FAA had prohibited air traffic in UKDV, as well as over Crimea's Simferopol FIR (UKFV), after competing claims by Ukrainian and Russian air traffic control authorities, and after the shoot-down of Malaysia Airlines flight MH17 in July 2014. The FAA is allowing U.S. flights to resume to Kharkiv International Airport (UKHH), Dnipropetrovsk International Airport (UKDD), and Zaporizhzhia International Airport (UKDE). While the eastern UKDV remains prohibited until at least October 2020, a limited exception is allowed for takeoff and landing operations with Ukrainian ATC to reach these three airports. Over the Black Sea, the FAA is reopening certain flight routes that have proven safe for civil aviation, though the prohibition on UKFV remains in effect.

FAA PROPOSES $474,000 CIVIL PENALTY AGAINST FRONTIER AIRLINES

On September 28, 2018, the U.S. Department of Transportation's Federal Aviation Administration (FAA) proposed a $474,000 civil penalty against Frontier Airlines, Inc. for operating aircraft that lacked required medical supplies on hundreds of flights.

ECKERT SEAMANS
ATTORNEYS AT LAW

October 2018

AVIATION REGULATORY UPDATE

The FAA alleges than in June and July 2017, Frontier personnel installed emergency medical kits into 11 aircrafts that lacked injectable epinephrine, atropine or both. On July 10, 2017, Frontier was made aware that the company was operating aircraft with defective medical kits. As a result, Frontier filed for an exemption allowing it to continue flying with those medical kits the following day. However, it was not until September 16, 2017 that the FAA granted this exemption. Meanwhile, the FAA alleges Frontier operated the 11 aircraft between July 11 and July 27, 2017—after it had become aware of the problem and before the FAA issued the exemption. Frontier has requested a meeting with the FAA to discuss the case.

ALLEGIANT AIR, LLC FINED $225,000 CIVIL PENALTY DUE TO AIRCRAFT CABIN TEMPERATURES DURING TARMAC DELAYS

On October 5, 2018, the U.S. Department of Transportation's Enforcement Office (DOT) issued a consent order against Allegiant Air, LLC (Allegiant) due to violations of requirements relating to aircraft cabin temperatures and other assurances contained in its tarmac delay contingency plan.

According to the DOT, Allegiant did not provide passengers a comfortable cabin temperature on several delayed flights at Las Vegas McCarran International Airport (LAS) and certain other U.S. airports between June and September of 2016 and 2017. In one of these instances, Allegiant did not provide food and water to passengers in a timely manner or make certain announcements as required.

In order to avoid litigation, Allegiant consented to the issuance of the order to cease and desist from future similar violations and the assessment of $225,000 in civil penalties.

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 2018

AVIATION REGULATORY UPDATE

REQUIRED UPDATES TO FAMILY ASSISTANCE PLANS AND POST-ACCIDENT NOTICES

The recently passed FAA Reauthorization Act of 2018 contained several changes to the scope of assistance plans for families of air crash victims (i.e. Family Assistance Plans), which each airline operating flights to, from, or within the United States must have in place and on file with the U.S. Department of Transportation and National Transportation Safety Board. Specifically, Congress struck the words "major" or "significant" loss of life and replaced them with the word "any". The effect of this modification is to lower the threshold at which Family Assistance Plan obligations are triggered – namely, Plan activation is required upon "any" loss of life. Additionally, airlines are also now required to assist the families of people on the ground who are seriously or fatally injured, as opposed to just those that were on the aircraft.

Congress also tightened the requirement for airlines to inform property owners on the ground of damage caused by an accident, making a similar substitution of "any" for "significant". In the case of an accident that results in any damage to a man-made structure or other property on the ground, the carrier should promptly provide notice to the affected property owner.

As a result of the above, carriers must review their plans and adjust as needed to comply with these new requirements. Please contact us for further details on compliance with the new requirements.

DOT INCREASES MINIMUM CIVIL PENALTY AMOUNTS

The Department of Transportation (DOT) recently announced changes to the amounts it can penalize airlines and travel agents for regulatory violations. Effective November 27, 2018, the maximum general civil penalty that can be imposed for violations of DOT's aviation economic regulations and statutes was increased from $32,140 to $33,333.

Adjustments to FAA penalty amounts included, among others:

- Violation of hazardous materials transportation law – increased from $78,376 to $79,976;
- Violation of hazardous materials transportation law resulting in death, serious illness, severe injury, or substantial property destruction – increased from $182,877 to $186,610; and
- Violation by a person other than an individual or small business concern under 49 U.S.C. 46301 – increased from $32,666 to $33,333.

DOT NOTICE OF PROPOSED RULEMAKING REGARDING THE DEFINITION OF "UNFAIR OR DECEPTIVE PRACTICES"

On March 11, 2019, DOT will publish a Notice of Proposed Rulemaking regarding the definition of the phrase "unfair or deceptive practice" in the Department's aviation consumer protection statute. The public comment period will close on May 10, 2019.

AVIATION REGULATORY UPDATE

The Department noted that its aviation consumer protection statute is modeled after a similar statute granting the U.S. Federal Trade Commission (FTC) the authority to regulate unfair or deceptive practices. Based on the FTC's policy statements, DOT currently finds a practice to be "unfair" if it "causes or is likely to cause substantial harm, the harm cannot reasonably be avoided, and the harm is not outweighed by any countervailing benefits to consumers or to competition." To date, DOT has also deemed a practice "deceptive" if it "misleads or is likely to mislead a consumer acting reasonably under the circumstances with respect to a material issue (one that is likely to affect the consumer's decision with regard to a product or service)"

This rulemaking would codify DOT's current interpretation of the phrase "unfair or deceptive practice" and solicit public comment on whether any changes are needed. The Department noted that the rulemaking is not expected to impose monetary costs, and will benefit regulated entities by providing a clearer understanding of DOT's interpretation of the statute.

Please contact us if you would like assistance with submitting comments when the public comment period opens on March 11, 2019.

DOT ISSUES NEW POLICIES ON REPORTING DATA FOR MISHANDLED BAGGAGE AND WHEELCHAIRS

DOT issued in November a Technical Directive and an Enforcement Policy related to reporting requirements for mishandled baggage and wheelchair data that will go into effect on January 1, 2019 for U.S. carriers. At this time, the Technical Directive and Enforcement policy will not be applicable to foreign airlines operating to or from the United States.

In general, those air carriers captured by the Technical Directive must report to DOT all bags (including wheelchairs and scooters) reported by or on behalf of passengers as lost, damaged, delayed, or pilfered, that occurred in the custody of the air carrier or the custody of its code-share partner for domestic flights to or from any U.S. large, medium, small or non-hub airport. Under the revised rules, instead of being required to submit a monthly tally of mishandled bag reports by passengers, reporting carriers will be required to report the actual number of mishandled bags. Reporting carriers also will be required to separately report the number of wheelchairs and scooters that were enplaned and the number of these items that were mishandled.

In its Enforcement Notice, the Department noted that carriers have cited the practical obstacles to reporting the number of actual mishandled bags when the bags pass through the custody of more than one carrier on a single itinerary. DOT plans to address these complexities in a future rulemaking, *Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters in Aircraft Cargo Compartments I*I. In the interim, for domestic itineraries that span multiple carriers on a single ticket, reporting carriers will be deemed compliant if they either identify which carrier mishandled a bag, and that carrier reports it, or if the carrier operating the last flight segment reports the mishandling.

ECKERT SEAMANS
ATTORNEYS AT LAW

November 2018

AVIATION REGULATORY UPDATE

GAO EXAMINES DOT'S SUPERVISION OF AIRLINE CONSUMER PROTECTION

The Government Accountability Office (GAO) this month issued a report, *Airline Consumer Protections: Additional Actions Could Enhance DOT's Compliance and Education Efforts*, on customer service quality in the domestic airline industry. GAO examined government data on the twelve largest domestic airlines for the period 2008 to 2017 to identify trends in airline service, the effectiveness of the Department of Transportation (DOT's) compliance efforts, and how DOT's passenger education efforts aligned with industry best practices. In general, GAO observed that airline customer service quality was mixed: while late flights, denied boardings, and mishandled baggage have decreased, the rate of passenger complaints increased from 1.1 to 1.2 complaints per 100,000 in the period studied. Third-party studies of consumer perceptions indicated travelers were generally more satisfied with airline service in 2017 compared to 2013, though that trend might have plateaued in 2018.

The report recommended the following actions for DOT:

- improve the rigor of its analysts' training and coding of complaints;
- improve its complaints case management system;
- establish internal performance measures for its key compliance activities (consulting on compliance with airlines, processing complaints from passengers, conducting inspections, and enforcement); and
- reach out directly to consumers to understand what they do or don't know about their rights even as the Department regularly consults with stakeholder groups

In a letter dated November 6, 2018, DOT concurred with GAO's recommendations, and pledged to improve while also recognizing the significant work the Department has done over the past decade to ensure airline customer service quality. From 2008 to 2017, DOT's Enforcement Office processed over 142,000 consumer complaints, conducted approximately 2,500 investigations, issued approximately 400 consent orders, and developed 25 guidance documents for airlines.

CALIFORNIA ADJUSTS ITS FORMAT FOR PROPOSITION 65 WARNINGS

California's Proposition 65 has long required public warnings for applicable toxic substances, including a posted statement that "This Product Contains Chemicals Known to the State of California…" This year, that familiar statement is getting a make-over, and the changes affect the aviation industry directly among many others in California. In 2016, the California Office of Environmental Health Hazard Assessment (OEHHA) updated its regulations that implement the chemical warning program, and these regulations became mandatory on August 30, 2018. Companies who already post the required signage on jetways (or any other applicable public area) should update their signage accordingly. These changes are particularly relevant to all carriers operating at LAX.

ECKERT SEAMANS
ATTORNEYS AT LAW

November 2018

AVIATION REGULATORY UPDATE

Safe-harbor compliant signs must now: (1) use at least 72-point type, (2) clearly identify one or more sources of exposure and state at least one chemical by name, (3) be in English and in any other language used on other signage in the affected area, (4) display the new standard warning symbol – a black exclamation point in a yellow equilateral triangle with a bold black outline – to the left of the word "WARNING:" in all capital letters and bold print, and (5) use precise wording depending on the number of chemicals involved and the categories of harm (cancer, reproductive) they relate to. As a practical matter, signs must be updated to include the exclamation point graphic, the name of at least one suspect chemical and where it comes from, and the relevant specific language in order to remain presumptively compliant with the law's reasonable notice standard. Non-compliant signs create risk that a business may be sued under Proposition 65's private attorney general provision.

NEW DOT AVIATION CONSUMER PROTECTION ADVISORY COMMITTEE WILL ESTABLISH SEXUAL MISCONDUCT TASK FORCE

The first public meeting of DOT's recently reconstituted Aviation Consumer Protection Advisory Committee (ACPAC) will take place on January 16, 2019, and will focus on several consumer-related issues, including the establishment of a National In-Flight Sexual Misconduct Task Force (Task Force) as an ACPAC Subcommittee.

The subcommittee Task Force is called for by the FAA Reauthorization Act and will include representatives from the DOT, DOJ, HHS, national organizations which specialize in providing services to sexual assault victims, national consumer protection organizations, national travel organizations, labor organizations representing flight attendants and pilots, State and local law enforcement agencies, airports, and air carriers. Its mandate is to review current practices of U.S. airlines in responding to allegations of sexual misconduct by passengers on board aircraft, and to develop recommendations for best practices for handling misconduct.

FAA SEEKS COMMENT ON AIRMAN CERTIFICATION STANDARDS (ACS) FOR AIRLINE TRANSPORT PILOT (ATP) AND TYPE RATING FOR AIRPLANE

The FAA is requesting public comment on new draft standards for obtaining an Airline Transport Pilot (ATP) certificate in the airplane category, or for obtaining an airplane type rating. The notice and updated draft Airman Certification Standards (ACS) serve as additional measures being implemented by the FAA to move toward a systematic and cohesive process for pilot certification and airplane type ratings. By way of history, in June 2016, the FAA replaced the prior Practical Test Standards for the private pilot (airplane) certificate and the instrument (airplane) rating with the new corresponding ACS with a goal of ensuring that testing and training standards are commensurate with current operations.

The proposed draft ACS contain information on pilot requirements when preparing for the FAA ATP knowledge and practical tests. If the applicable standards are met, a pilot should ultimately receive an ATP

certificate or appropriate airline type rating. The new draft standards focus on the areas of preflight preparation, takeoffs and landings, inflight maneuvers, stall prevention, instrument procedures, emergency operations and postflight procedures.

TREASURY DEPARTMENT CONTINUES TO IMPLEMENT IRAN SANCTIONS

The U.S. Treasury Department stepped up its enforcement of Iranian sanctions violations as the Trump administration focuses on curtailing flows of sanctioned currency and technology to Iran. This month marked the expiration of a six-month transition period following the U.S. withdrawal from the Iran Nuclear Deal. On November 5, the Treasury Department's Office of Foreign Assets Control (OFAC) imposed sanctions on more than 700 individuals, entities, aircraft, and vessels as part of its return to a policy of maximum pressure against elements of the Iranian government. In the aviation sector, OFAC listed Iran Air and 67 of its aircraft as specially designated nationals (SDNs). OFAC also cautioned that "persons that engage in certain transactions with the entities designated and identified [pursuant to Executive Orders] may themselves be exposed to enforcement action, designation, or blocking sanctions."

OFAC and the Department of Justice continue to vigorously pursue Iran-related sanctions and export control violations. For instance, on November 8, an Iranian citizen named Arash Sepehri pled guilty in federal court in Washington, D.C. for conspiracy to unlawfully export goods to Iran, to defraud the U.S., and money laundering. Sepehri and his co-conspirators used fake names and companies to ship Department of Commerce-controlled items, and as well as items controlled by the U.S. Munitions List, to Iran via intermediary countries. He will be sentenced early next year.

RECENT OFAC CIVIL COMPLAINT SETTLEMENTS FOR SANCTIONS VIOLATIONS

Société Générale, S.A. - $54 Million

On November 19, 2018, OFAC announced a nearly $54 million global settlement between the French bank Société Générale, S.A. (SG) and the Board of Governors of the Federal Reserve System, the U.S. Department of Justice, the New York County District Attorney's Office, the U.S. Attorney for the Southern District of New York, and the New York State Department of Financial Services.

SG voluntarily disclosed violative transactions totaling around $5.5 billion over the course of an investigation that involved multiple regulators and ran from 2012 to 2017. The investigation scope covered transactions in retail, corporate, correspondent, and investment divisions from January 1, 2003 to December 31, 2013, as well as policies and procedures during that time. According to the settlement, "SG's review revealed that the bank processed certain transactions in a non-transparent manner that removed, omitted, obscured, or otherwise failed to include references to OFAC-sanctioned parties." At one point in the early 2000s, some individuals in the bank had circulated guidance how to process transactions without alerting U.S. authorities. Later, the bank improved its compliance programs, but some business units continued to improperly process transactions or delete required documentary information.

ECKERT SEAMANS
ATTORNEYS AT LAW

November 2018

AVIATION REGULATORY UPDATE

Cobham Holdings, Inc. - $87,000

On November 27, OFAC announced an $87,507 civil settlement with Cobham Holdings, Inc. of Arlington, Virginia on behalf of its former subsidiary Aeroflex/Metelics, Inc. Aeroflex/Metelics was involved in indirectly exporting components of a commercial air traffic control radar to a specially designated national in violation of the Ukraine Related Sanctions Regulations, 31 C.F.R. Part 589. Cobham self-disclosed the violations and OFAC concluded they constituted a non-egregious case.

SCANDINAVIAN AIRLINE SYSTEM FINED $200,000 BY DOT

On November 16, 2018, DOT's Enforcement Office fined Scandinavian Airline System (SAS) $200,000 for allegedly failing to comply with various requirements relating to DOT's website accessibility rule for individuals with disabilities.

In this case, SAS violated DOT's website accessibility requirements when it created a separate website for individuals with disabilities instead of ensuring that its primary website met the Web Content Accessibility Guidelines (WCAG) under Part 382. In order to avoid litigation, SAS consented to the issuance of the order to cease and desist from future similar violations and the assessment of $200,000 in civil penalties.

This Aviation Regulatory Update is intended to keep readers current on matters affecting the industry, and is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at esahr@eckertseamans.com or 202-659-6622; Drew Derco at dderco@eckertseamans.com or 202-659-6665; Alexander Matthews at amatthews@eckertseamans.com or 202.659.6633.

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December 2018

AVIATION REGULATORY UPDATE

UPDATE ON U.S. GOVERNMENT SHUTDOWN

If congressional leaders and President Trump are unable to reach a compromise on funding for the President's proposed border wall, the U.S. federal government will partially shut down at midnight on Friday, December 21, 2018. Congress has already passed appropriations (funding) legislation for 75 percent of the government; however, funding for the remaining 25 percent will expire at midnight on Friday absent a compromise on the proposed border wall. The remaining 25 percent includes several high-profile agencies such as the Department of Homeland Security, the Department of Transportation (DOT), the Department of Commerce, the Department of Justice and the Department of State.

Law enforcement agency employees, including Transportation Security Administration (TSA) officers and Customs and Border Protection (CBP) agents, would be deemed "essential personnel" and would be required to work through a government shutdown. However, "non-essential personnel," such as thirty percent of DOT staff, would be furloughed and would not be permitted to work during a government shutdown.

If you have any questions regarding how this may impact your operations, please contact us.

SUMMARY REPORT OF DISABILITY-RELATED COMPLAINTS RECEIVED DURING CALENDAR YEAR 2018 DUE TO DOT BY JANUARY 28, 2019

Each January carriers are required to submit an annual report to DOT which includes a categorized summary of all disability-related complaints received by the airline during the prior calendar year. The summary is to be submitted to the Department's Aviation Consumer Protection Division (DOT ACPD) on or before the last Monday in January. This year's report, covering calendar year 2018, is due on January 28, 2019. We note that carriers that did not receive any written disability-related complaints in calendar year 2018 are still required to file a report showing no complaints.

Failure to comply with the reporting requirements for disability-related complaints likely will subject a carrier to a civil penalty of up to $33,333 per violation. The Enforcement Office has taken action against a number of carriers in the past for failing to comply with these requirements. To date, twenty consent orders assessing civil penalties have been issued.

Please contact us if you have any questions on the submission process or require assistance in making your annual report.

ECKERT SEAMANS
ATTORNEYS AT LAW

December 2018

AVIATION REGULATORY UPDATE

CUSTOMS AND BORDER PROTECTION EXPECTS BROAD EXPANSION OF BIOMETRIC TECHNOLOGY PROGRAM IN 2019

CBP is planning to accelerate the introduction of its biometric technology program, the United States Visitor and Immigrant Status Indicator Technology (US-VISIT), next year. Under the program, biometric facial recognition technology is used to identify travelers using a complex algorithm that recognizes each person's unique facial characteristics. CBP has stated that the technology is 98% effective and is more secure than traditional ID/passport verification protocols. Digital fingerprint technology is also utilized in some cases.

In support of the rollout, CBP has coordinated with a number airports (DFW, LAX, MSP, MCO, IAD and ATL) and airlines (Southwest, United, American, Delta and JetBlue). The agency currently has pilot programs already underway at JFK, IAH, ORD, IAD, ATL and BOS. In partnership with CBP, airlines have made a commitment to purchase the technology which both CBP and the airlines can then use for ID verification purposes.

At ATL, Delta has partnered with the airport and CBP to implement a curb-to-gate biometric screening process through which passengers can check in, check luggage and have their ID verified by TSA–all by using facial recognition technology. Delta has stated that the technology can save nine minutes during the boarding process.

Outside the U.S., airports in Singapore, Amsterdam, Aruba, China and Japan have also implemented facial recognition technology. CBP has stated that it hopes to have facial recognition boarding at all U.S. airports serving international flights within three to four years. If you are interested in obtaining more information on how you or a foreign airport can be included in this program, please contact us.

DELTA AIR LINES PLACES MORE RESTRICTIONS ON SERVICE AND EMOTIONAL SUPPORT ANIMALS

Effective December 18, 2018, Delta is prohibiting service and emotional support animals (ESAs) under four months of age on any flight due to rabies vaccination requirements. Additionally, the airline is banning ESAs on flights longer than eight hours. If a passenger purchased their ticket prior to December 18, 2018 and requested to travel with an ESA, the passenger will be permitted to travel as originally ticketed. However, if a passenger's originating travel is on or after February 1, 2019, emotional support animals will not be accepted on flights longer than eight hours regardless of the booking date.

Delta has one of the most restrictive service and emotional support animal policies in the U.S. These recent changes appear to be partly intended to address the issue of animal waste during long flights. According to the airline, incidents involving service and support animals—included urination, defecation, and biting—increased 84% from 2016 to 2017.

According to DOT rules, carriers must generally transport ESAs on flights longer than eight hours but "may, as a condition of permitting a service animal to travel in the cabin, require the passenger using the service animal to provide documentation that the animal will not need to relieve itself on the flight or that the animal can relieve itself in a way that does not create a health or sanitation issue on the flight." (14 C.F.R. 382.117)

As a reminder, on May 23, 2018, DOT published an Interim Statement of Enforcement Priorities Regarding Service Animals, which detailed the agency's current standards for how carriers can address ESAs:

- If passengers are traveling with an ESA, carriers may require proof of vaccination, training and/or behavior, in addition to a letter from a licensed medical/mental health professional.
- Carriers may require electronic submission of the ESA documentation through the carrier's website (or email) 48 hours in advance of their trip, so the carrier may review the documentation before the flight. In the event the documentation is not satisfactory, the carrier may require that the passenger pay a pet fee to transport the animal.
- Carriers may impose restrictions on movement of ESAs in cabin area.
- Carriers may exclude animals that are too large or heavy to be accommodated in the cabin, pose a direct threat to the health or safety of others, or may cause a significant disruption of cabin service.
- Carriers may limit passengers to one ESA.

U.S. WANTS GLOBAL STANDARD FOR PASSENGER DATA SHARING

Last month at the International Civil Aviation Organization's (ICAO) high-level aviation security conference, U.S. representatives pressed for a global unified standard for the collection of passenger information. Currently, ICAO recommends that its members collect passenger record data, but the U.S. is pressing for the recommendation to become a standard by the end of the year.

The passenger data includes personal identifiable information, credit card information, and passenger itineraries. U.S. representatives argued that this information is highly valuable in the prevention of terrorism and the identification of patterns of suspicious travel. The proposal was supported by Canada, the Netherlands, Switzerland, New Zealand, the U.K., South Africa, Saudi Arabia and Nigeria.

Several other countries, including members of the EU, cautioned that more work should be done before the proposal is taken up by the full ICAO assembly, citing concerns about the protection of passenger privacy and the protection of fundamental rights, particularly when this information is shared with other countries. The EU instituted comprehensive data privacy regulations earlier this year, the General Data Protection Regulation (GDPR), which went into effect on May 25, 2018.

The collection of passenger data was a major issue at the two-day ICAO conference, where the U.N. and ICAO finalized an arrangement to cooperate on passenger information gathering. The agreement is

expected to be signed on December 20, 2018 at a U.N. Security Council Counter-Terrorism Committee briefing on aviation security.

EUROPEAN UNION IMPOSES OPERATING RESTRICTIONS AND BANS ON ADDITIONAL CARRIERS

More than a decade ago the European Union adopted Regulation (EC) No 2111/2005, which was enacted to fulfill two goals. First, it sought to establish a "Community List" of carriers that fail to meet relevant safety requirements. These airlines are then subjected either to operational restrictions throughout the EU, or to specific and complete operating bans. Second, it was to ensure that carriers bring the list of banned airlines to the attention of passengers, and inform the traveling public of the identity of those carriers on which restrictions/bans have been imposed. This is because passengers have a right of reimbursement/rerouting if their flight is cancelled as a result of the operating carrier being placed on the Community List.

Last month, the European Commission updated the list of carriers that are subject either to an operating ban or operational restrictions on flights within the European Union. The latest update, which took effect on November 28, 2018, listed the banned or restricted carriers in Annexes A and B. Annex A includes those carriers whose entire operations are subject to a ban and Annex B lists the carriers that are subject to operational restrictions.

Annex A includes all carriers certified by the authorities of the following countries: Afghanistan, Angola (except TAAG put in annex B), Republic of Congo, Democratic Republic of Congo (DRC) Djibouti, Equatorial Guinea, Eritrea, Gabon (except Afrijet and SN2AG put in Annex B), Kyrgyz Republic, Liberia, Libya, Nepal, Sao Tome and Principe, Sierra Leone, and Sudan.

In addition, the following six airlines are also listed in Annex A, meaning they cannot operate to the EU: Avior Airlines (Venezuela), Blue Wing Airlines (Suriname), Iran Aseman Airlines (Iran), Iraqi Airways (Iraq), Med-View (Nigeria), and Air Zimbabwe (Zimbabwe).

Annex B lists those carriers that are subject to operational restrictions, and includes: Afrijet and Nouvelle Air Affaires SN2AG (Gabon), Air Koryo (Democratic People's Republic of Korea), Air Service Comores (the Comoros), Iran Air (Iran) and TAAG Angola Airlines (Angola). These airlines may only operate to the EU with specific, pre-authorized aircraft types.

The full November 28, 2018 update is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.304.01.0010.01.ENG&toc=OJ:L:2018:304:TOC

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December 2018

AVIATION REGULATORY UPDATE

RECENT OFAC CIVIL COMPLAINT SETTLEMENT FOR SANCTION VIOLATIONS

On December 12, 2018, the U.S. Office of Foreign Assets Control (OFAC) announced a $2,774,972 million settlement between Yantai Jereh Oilfield Services Group Co. Ltd. (Jereh Group), its affiliated companies and subsidiaries worldwide, and the U.S. Department of Commerce's Bureau of Industry and Security.

Specifically, from on or about October 2, 2014 to on or about March 4, 2016, the Jereh Group violated provisions of the Iranian Transaction and Sanctions Regulations (ITSR) on at least 11 occasions when it exported or re-exported, or attempted to export or re-export, U.S.-origin goods ultimately intended for end-users in Iran by way of China. The goods in question include oilfield equipment such as spare parts, coiled tubing strings, and pump sets. Consequently, OFAC determined that the violations constituted an egregious case warranting the nearly $3 million dollar settlement.

FAA PROPOSES $624,000 CIVIL PENALTY AGAINST STEELE AVIATION OF BEVERLY HILLS, CALIFORNIA

On December 4, 2018, the U.S. Department of Transportation's Federal Aviation Administration (FAA) proposed a $624,000 civil penalty against Steele Aviation of Beverly Hills, California, for allegedly conducting illegal passenger-carrying flights.

In the latest case, the FAA alleged that between October 2016 and February 2018, Steele Aviation conducted 16 for-hire flights when the company did not have the air carrier certificate required for these operations.

Steele Aviation had previously been issued a civil penalty for the same violation when it operated a Gulfstream IV and a British Aerospace 125 on at least 78 for-hire passenger-carrying flights between September 17, 2015 and June 13, 2016. Additionally, the FAA further alleged the pilots who conducted the majority of these flights did not meet applicable training requirements for that type of operation.

This Aviation Regulatory Update is intended to keep readers current on matters affecting the industry, and is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at esahr@eckertseamans.com or 202-659-6622; Drew Derco at dderco@eckertseamans.com or 202-659-6665; Alexander Matthews at amatthews@eckertseamans.com or 202.659.6633.