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December 2020

Aviation Regulatory Update

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DOT REPORT OF DISABILITY-RELATED COMPLAINTS RECEIVED DURING CALENDAR YEAR 2020 DUE BY JANUARY 25, 2021

Each January carriers are required to submit an annual report to the U.S. Department of Transportation (DOT or the Department) 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 2020, is due no later than January 25, 2020. Carriers that did not receive any written disability-related complaints in calendar year 2020 are still required to file a zero report indicating that no complaints were received. Failure to comply with the reporting requirements can result in DOT taking enforcement action – DOT has penalized numerous carriers for failing to comply with this important reporting mandate.

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

U.S. DEPARTMENT OF TRANSPORTATION ANNOUNCES FINAL RULE ON SERVICE ANIMALS

As we reported earlier this month, on December 2, 2020, the U.S. Department of Transportation published its long awaited final rule on "Traveling by Air with Service Animals", available here, which now defines a service animal as a "dog", allows emotional service animals to be treated as pets, and regulates the documentation, number, placement in the cabin, and harnessing of service animals. DOT received more than 15,000 comments from interested parties including airlines, trade associations, consumer and disability advocacy groups, medical professionals, individual travelers, and others on its February 5, 2020 Notice of Proposed Rulemaking – a testament to the importance of the issue. The final rule revises the Air Carrier Access Act (ACAA) regulations on the transportation of service animals by air, with the intent to provide reasonable accommodations for individuals traveling with service animals while balancing those needs with the health and safety of other passengers and crew. It makes a number of key changes to the current regulatory framework, including but not limited to:

- The final rule defines a "service animal" as a dog, regardless of breed or type that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Airlines are not required to transport other species of animals, such as cats, miniature horses, and capuchin monkeys that assist individuals with disabilities in the cabin for free, although they are free to do so pursuant to an established airline policy.
- Under the final rule, "emotional support animals" are no longer required to be treated as service animals. Rather, airlines may treat emotional service animals as pets (and, importantly, charge corresponding pet fees or require their carriage in the cargo compartment).

- The final rule requires airlines to treat psychiatric service animals the same as other service animals, meaning psychiatric service animal users will no longer be required to provide a letter from a licensed mental health professional detailing the passenger's need for the animal, nor will they be required to check in one hour before the check-in time for other passengers.
- The final rule allows airlines to require passengers wanting to travel with a service animal to provide a new "Service Animal Air Transportation Form", (See Page 79759 of the Final Rule in the Federal Register) developed by DOT. And, for flight segments of eight hours or more, airlines may require a "Relief Form" (See Page 79761 of the Final Rule in the Federal Register) attesting that the service animal has the ability not to relieve itself on a long flight or to do so in a sanitary manner.
- The final Rule permits carriers to require individuals traveling with a service animal to provide the DOT service animal form(s) up to 48 hours in advance of the date of travel if the passenger's reservation was made prior to that time.
- The final rule allows airlines to limit the number of service animals traveling with a single passenger with a disability to two (2) service animals.
- Under the final rule, carriers may require a service animal to fit within its handler's foot space on the aircraft or be placed on the passenger's lap and allows carriers to require that service animals be harnessed, leashed, or tethered at all times in the airport and on the aircraft, even in instances where the device interferes with the service animal's work or the passenger's disability prevents use of these devices.
- Under the final rule, carriers may not refuse to transport a service animal solely based on breed.

The final rule will become effective on January 11, 2021.

DOT ISSUES NOTICE OF PROPOSED EXTENSION FOR MINIMUM SLOT USAGE REQUIREMENT WAIVER

On December 22, 2020, the FAA published a Notice in the Federal Register, available here, seeking comment on a proposed extension of its waiver of the slot usage requirements at slot controlled high density Level 3 airports (JFK, LGA, DCA) as well as designated IATA Level 2 airports in the United States (ORD, LAX, EWR, SFO).

By way of background, before an air carrier can operate scheduled service to a Level 3 slot controlled airport, it must first obtain specific time slots from the FAA for its schedule. Slot times are reissued with priority by the FAA each season (the FAA divides each year into a Summer and Winter season) to carriers that have operated them during the previous season. However, if a carrier does not use their slot times at a rate of at least 80%, the carrier will lose their right to use the slots in the future, and the FAA will not reissue the slots to the carrier the following season. Minimum slot usage requirements do not apply at Level 2 airports, and while voluntary, carriers are expected to seek and obtain schedule approval in the Level 2 process. Additionally, instead of submitting historic slot data like Level 3 airports, carriers submit a proposed schedule which is analyzed with all submissions for any potential delays.

Since the COVID-19 pandemic has dramatically disrupted the schedules of foreign and domestic carriers, the FAA created a path for carriers to seek a waiver of the usage requirements for their slot times at Level 3 airports Carriers are able to notify the FAA that due to issues related to the COVID-19 pandemic, they will not be able operate their slots, and the FAA will allow the carrier to maintain their right to the slot times for use in future seasons. In addition, at designated IATA Level 2 airports, the FAA determined that it would prioritize flights canceled due to COVID-19 for purposes of establishing a carrier's operational baseline in the next corresponding season.

The initial waiver order was issued in March 2020 and lasted until May 31, 2020. It was then extended to October 24, 2020, and then further extended until March 27, 2021. The FAA is now considering extending the Order to October 30,

2021 and is seeking comments on whether to extend the waiver through the full duration of the Summer 2021 scheduling season, as well as on two separate proposals for the waiver structure.

The first option would be to maintain the status quo, through which a carrier may seek a waiver from the slot usage requirements simply by informing the FAA which slots it will not use due to COVID-19 related issues, subject to the following conditions: (1) Carriers must return the slots they do not intend to use to the FAA four weeks prior to start of the FAA approved operation; (2) The waiver does not apply to newly allocated slots; and (3) The waiver does not apply to slots that have been leased to another carrier.

The second option is a set of conditions proposed by the Worldwide Airport Slot Board (WASB) including (1) Carriers holding slots may return those they will not use to the FAA on or before February 8, 2021 (approximately 7 weeks before the start of the season) and will be able to retain them for future use. Similar to the current rules, newly allocated slots are not eligible for the waiver, nor are slots leased to another carrier; (2) For slots that are not returned before February 8, 2021, the usage threshold will be reduced from 80% to 50%; and (3) There will also be an exception to the 50% usage requirement for circumstances that may prevent airlines from operating scheduled flights for reasons other than commercial cancellations.

The comment period closed on December 29, 2020 and a number of entities commented, including the Star Alliance, which believes that FAA should extend the exemption in its current form, as a "continuation would avoid drastic schedule adjustments that would have ramifications throughout the system and disruptions to air connectivity." While the Star Alliance prefers an extension of the current requirements, they recognized the WASB proposal as "an important industry compromise and [give their] support as a fall-back option."

CDC ISSUES ORDER REQUIRING UK PASSENGERS TO TEST NEGATIVE FOR COVID-19 PRIOR TO TRAVEL TO US

On December 25, 2020, the CDC issued an Order, available here, requiring proof of a negative COVID-19 test for all passengers arriving by air from the United Kingdom (UK). Under this order Passengers are required to get a viral test (i.e., a test for current infection) within three days prior to departing the UK and provide written documentation of their laboratory test result (in hard copy or electronic) to the airline operating the flight. Airlines are required to confirm that all passengers have attested to the negative test result and have provided negative test result documentation before boarding. If a passenger chooses not to take a test, the airline must deny boarding to the passenger. This Order went into effect at 7:01pm EST on December 27, 2020.

FAA ISSUES FINAL RULE ON UAS OPERATIONS OVER PEOPLE AND REMOTE IDENTIFICATION

On December 28, 2020, the FAA issued two UAS related final rules.

"Operation of Small Unmanned Aircraft Systems Over People", available here, allows expanded routine operations of small UAS over people without a waiver or exemption, provided that the operation meets the requirements of one of four operational categories. The first three categories of operations over people are based on the risk of injury they present to people on the ground, while the fourth category is based on the small UAS having an airworthiness certificate.

- Category 1: UAS that weigh 0.55 pounds or less, including everything that is on board and does not contain any exposed rotating parts that would lacerate human skin on impact with a human being;
- Category 2: UAS that weigh more than 0.55 pounds but do not have an airworthiness certificate under 14 CFR Part 21, meet a specific human impact injury limit, do not contain rotating parts that would lacerate human skin, do not have safety defects; Category 2 UAS must also (1) display a label on the aircraft indicating eligibility to conduct Category 2 operations; (2) have current remote pilot operating instructions that apply to the operation of

the small unmanned aircraft; and (3) be subject to a product support and notification process; Category 2 also has specific UAS pilot requirements;

- Category 3: Operations are subject to a higher injury severity limit than Category 2, and the risk of injury to an individual is mitigated by applying additional operating limitations. Like Category 2, UAS must not contain rotating parts that would lacerate human skin, and must not have safety defects; Category 3 UAS must also meet the same labeling, operating instructions, and notification requirements as Category 2; Category 3 also has specific UAS pilot operational requirements;
- Category 4: Allows UAS issued an airworthiness certificate under 14 CFR Part 21 to operate over people in accordance with part 107, so long as the operating limitations specified in the approved Flight Manual or as otherwise specified by the Administrator, do not prohibit operations over human beings; Operators must also meet numerous maintenance, reporting, and record requirements;

This rule also allows routine operations of small UAS at night under two conditions: (1) the UAS pilot must complete a current initial knowledge test and recurrent training to ensure familiarity with the risks and appropriate mitigations for nighttime operations; (2) the small unmanned aircraft must have lighted anti-collision lighting visible or at least 3 statute miles that has a flash rate sufficient to avoid a collision.

This rule will become effective 60 days after publication in the federal register, except for the amendments to §§ 107.61 (Eligibility for a remote pilot certificate), 107.63 (Issuance of UAS pilot certificate), 107.65 (Aeronautical knowledge recency), 107.73 (Initial and recurrent knowledge tests), and 107.74 (Initial and recurrent training courses) which will become effective 45 days after publication.

"Remote Identification of Unmanned Aircraft", available here, sets forth new final rules on remote identification operational requirements. Operators can comply by any of the following methods: (1) by operating a standard remote identification UAS that broadcasts identification, location, and performance information of the unmanned aircraft and control station; (2) by operating a UAS with a remote identification broadcast module, where the broadcast module broadcasts identification, location, and take-off information, and may be a separate device that is attached to a UAS, or a built in feature; and (3) by operating UAS without any remote identification equipment, when the UAS is operated at specific FAA-recognized identification areas.

The effective date of the Remote ID requirements for UAS produced for operation in the airspace of the US is 60 days 18 months after publication in the federal register. The effective date of the Remote ID requirements for UAS operated in the airspace of the US is 60 days and 30 months after publication of the final rule in the federal register. This rule also prohibits use of ADS-B Out and transponders for UAS operations under Part 107 unless otherwise authorized by the FAA, and defines when ADS-B Out is appropriate for UAS operating under part 91. This part of the rule becomes effective 60 days after publication in the federal register.

EPA ISSUES FINAL AVIATION EMISSIONS

On December 23, 2020, the Environmental Protection Agency (EPA) issued a final rule on "Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures", available here. Under the rule, EPA is adopting greenhouse gas (GHG) emission standards, equivalent to the airplane carbon dioxide (CO2) standards that were adopted by the International Civil Aviation Organization (ICAO) in 2017, applicable to certain classes of engines used by certain civil subsonic jet airplanes with a maximum takeoff mass greater than 5,700 kilograms and by certain civil larger subsonic propeller-driven airplanes with turboprop engines having a maximum takeoff mass greater than 8,618 kilograms. The timing and stringencies of the standards differ depending on whether the covered airplane is a new type design (i.e., a design that has not previously been type certificated under 14 CFR) or an in production model (i.e., an existing design that had been type certificated under 14 CFR prior to the effective date of the GHG standards). The standards for new type designs apply to covered airplanes for which an application for certification is submitted to the

FAA on or after publication of the final rule in the federal register, while the in-production standards apply to covered airplanes beginning January 1, 2028. The rule will become immediately effective upon being published in the federal register.

TSA ISSUES NOTICE OF MEETING FOR INTERNATIONAL ALL-CARGO CARRIERS

On December 23, 2020, the TSA issued a notice of meeting, available here, for commercial air carriers that carry international cargo. Under ICAO standards, becoming effective June 30, 2021, all international air-cargo transported on commercial aircraft must be screened by the aircraft operator or received from another regulated entity that has applied security controls that satisfy international standards. To meet this new standard, TSA intends to implement a new program that meets ICAO's standards for an alternative to screening, and TSA is holding a closed meeting with representatives of e-commerce fulfillment centers, manufacturers, shippers, suppliers, warehouses, and third-party logistics providers who ship international air cargo to discuss this alternative framework. As this meeting will be closed to the public, all participants must be validated by TSA as a representative of one of the industries identified above and obtain clearance from TSA for access to Sensitive Security Information (SSI). Additionally, in light of the COVID-19 pandemic, the meeting will be virtual. The meeting will occur on Wednesday, January 13, 2021, beginning at 9:00 am EST. Requests to attend the meeting must be received by the below contact on or before January 6, 2021: Thomas Friedman, Transportation Security Administration, 6595 Springfield Center Drive Springfield, VA 20598-6028; telephone (571) 227-3555 OR (202) 236-3786; email Thomas.Friedman@tsa.dhs.gov OR Air Cargo Branch, TSA at the above address.

EU CONTINGENCY MEASURES IN THE ABSENCE OF AN AGREEMENT ON A FUTURE PARTNERSHIP WITH THE UK

On December 12, 2020 the European Commission (EC) issued legislative proposals for contingency measures in the absence of an agreement on a future partnership with the United Kingdom. Without an agreement in place by January 1, 2021, most relations between the UK and EU, such as trade in goods and services, would be governed by other multilateral international frameworks that both the UK and the EU are parties to. However, for the aviation sector, there is no such international agreement for the UK and EU to rely upon. For this reason, the EC has recommended the certain contingency measures regarding basic connectivity and aviation safety.

To ensure basic air connectivity, the EC adopted a proposal for a Regulation to ensure the provision of certain air services between the United Kingdom and the EU for a limited period of time, which would allow, for a maximum duration of up to six months, air carriers from the UK to fly across the territory of the EU without landing, make stops in the territory of the EU for non-traffic purposes, and perform scheduled and non-scheduled international passenger and cargo services between points in the United Kingdom and points in the EU (third and fourth 'Freedoms of the Air'). The draft regulation also covers cooperative marketing arrangements and conditions for UK carriers to be able to use wet and dry lease capacity to operate the services allowed under regulation which are similar to the current arrangements. However, the regulation makes no mention of any contingency arrangements for UK carriers' ability to wet or dry lease capacity to EU operators implying normal 3rd country rules apply.

Regarding aviation safety, the Commission has adopted a proposal for a Regulation ensuring that the affected aviation products or designs, (and annex) which were certified by EASA or by a design organization certified by EASA before the end of the transition period, can continue to be used in EU aircraft without disruption. The measure would only apply with respect to aircraft registered in the EU.

If an agreement on a future EU-UK partnership should be submitted by January 1, 2021, then these contingency measures would not enter into application. The UK Department for Transport (DfT) has indicated that they will be publishing the UK's reciprocal policy statement at the direction of the UK Secretary of State (Transport Minister) very shortly.

FAA ISSUES SAFETY ALERT REGARDING TRANSPORTATION OF COVID-19 VACCINES REQUIRING LARGE QUANTITIES OF DRY ICE

On December 10, 2020, the FAA released a Safety Alert for Operators, available here, providing information and recommendations to foreign and domestic carriers that will be transporting COVID-19 vaccines by air, which will require carriers to also carry large amounts of dry ice. The FAA notes that the volume of dry ice needed to be carried to maintain the COVID-19 vaccine may present risks that existing mitigations do not adequately address. To this end, the FAA recommends that carriers with an approved Safety Management System (SMS) conduct safety risk assessments in accordance with their approved Safety Management System. Operators without an accepted SMS should conduct a safety analysis and apply appropriate risk mitigations.

The FAA also recommends that operators consider the following information:

- Aircraft manufacturers provide information on maximum recommended dry ice quantities that the aircraft ventilation can accommodate, depending on the sublimation rate (transitions directly from a solid to a gas).
  - Note that dry ice continually sublimates at temperatures higher than -78°C (-108.4°F) under normal atmospheric pressure. At reduced pressures, the sublimation rate of dry ice will increase, all other factors being equal.
- An accurate determination of the dry ice sublimation rate is necessary to determine the correct quantity of dry ice that may be safely transported aboard an aircraft.
- As the dry ice sublimates, a loss of weight occurs, affecting the aircraft center of gravity.
- Dispatch with fully operational Environmental Control Systems, including all air conditioning packs and auxiliary power unit (APU), to enable effective ventilation for ground operations and inflight contingencies.
- CO2 sensors installed or carried in the aircraft or worn by the pilots and other crewmembers will assist the operator and crew in recognizing hazardous concentrations of CO2 and implementing effective risk controls.
- Pilot training on specific conditions and procedures can improve pilot decision-making in the event of a CO2 detector alert or other system abnormalities.
- Maximum ventilation, including during the ground de-icing and anti-icing process, will mitigate CO2 accumulation in the aircraft.

Please let us know if you have any further questions, and we will be happy to assist you.

FCC SAYS PASSENGERS STILL CANNOT MAKE CALLS ABOARD FLIGHTS

On November 27, 2020, the Federal Communications Commission (FCC) released an order, available here, terminating the rulemaking proceeding which would have expanded access to mobile wireless services onboard aircraft. In 2013, the FCC said it would consider expanding consumer access to in-flight calls, arguing that technology and engineering had evolved over the prior two decades and interference could be prevented by specialized onboard systems. However, after strong resistance from airline industry labor interests, who said the agency had failed to address a number of safety and national security concerns, the FCC determined, “it would not serve the public interest or be a wise use of the agency’s limited resources to continue to pursue this rulemaking proceeding.” The terminating order took effect immediately upon release of this order on November 27, 2020.

MUSLIM PLAINTIFFS PLACED ON THE NO-FLY LIST MAY SEEK MONETARY DAMAGES UNDER RFRA

On December 10, 2020, the U.S. Supreme Court unanimously ruled that a group of Muslim plaintiffs could seek monetary damages under the Religious Freedom Restoration Act ("RFRA") from FBI agents who allegedly placed them on the no-fly list after the plaintiffs refused to become informants. Tanzin et al. v. Tanvir et al., No. 19-71 (Sup. Ct. October term 2020).

The RFRA allows plaintiffs to seek "appropriate relief" against officials in their personal capacity for substantial burdens on the plaintiffs' religious exercise. The Court rejected the government's position that "appropriate relief" did not include monetary damages. Justice Clarence Thomas wrote the Court's majority opinion, stating that had Congress wished to limit the remedy, it would have done so in the language of the statute. Justice Thomas also rejected the government's concerns that allowing plaintiffs to seek payouts would raise separation-of-powers concerns. He said that there was no constitutional reason for the Supreme Court to shield government employees from personal liabilities. Congress was free to consider these public policy concerns when they wrote and passed the RFRA.

The Supreme Court only ruled on the interpretation of "appropriate relief" in the RFRA; it did not express an opinion on the merits of the case.

EU COMMISSION – EUROPEAN SUSTAINABLE AND SMART MOBILITY STRATEGY

On December 9, 2020, the European Commission (EC) presented its 'Sustainable and Smart Mobility Strategy' together with an Action Plan of initiatives that will guide the EC's work for the next four years. This strategy outlines how the EU transport system can achieve the green transformation as outlined in the European Green Deal. The key elements in the strategy include: i) Boosting update of zero-emission vehicles, sustainable fuels & related infrastructure; ii) Creating zero-emission airports and ports; iii) Greening freight transport; iv) Pricing carbon and providing better incentives for users; v) Making Connected and automated multimodal mobility a reality; vi) Innovation, data and AI for smart mobility; vii) Reinforcing the single market; and viii) Making mobility fair and just for all. More detailed information can be found in the Staff Working Document.

BRITISH AIRWAYS PREVAILS IN EU 261 CALIFORNIA LAWSUIT BROUGHT BY CLICK 2 REFUND, INC.

EU 261 protects passengers departing from a European airport (and those flying into Europe under certain circumstances) who have suffered a flight delay, cancellation or been denied boarding due to overbooking. This regulation's compensation provisions have spawned an industry of web-based "claims management companies" that offer to assist airline customers in obtaining compensation for delays or cancellations on a "no win, no fee" basis.

Click 2 Refund filed suit in California state court against British Airways after the airline refused to pay Click's demand based on its customer's EU 261 claim. The complaint alleged that British Airways cancelled a flight from Berlin to London, causing customers to miss their connecting flight and arrive in Boston more than four hours late. Click claimed damages of over $2,600.00. British Airways removed the case to federal court (Case 2:19-cv-05399-CAS-SK) and filed a motion for summary judgment. It argued that (1) Click was not the real party in interest, (2) claims under EU 261 cannot be brought in U.S. courts, and (3) the delay claim fails because there was no allegation that Click's customers had sustained any compensable damages. The U.S. District Court of Central California agreed and granted the motion.

First, the Court found that the "power of attorney" signed by customers did not assign any of their claims to Click. Thus, Click lacked authority to sue in its own name and was not a real party in interest. Second, the Court found that EU 261 claims are not enforceable in U.S. courts as previously decided in Volodarskiy v. Delta Airlines, Inc., 784 F.3d 349 (7th

Cir. 2015). Third, the Court found that the complaint only alleged unrecoverable EU 261 damages while asserting no out-of-pocket losses under Article 19 of the Montreal Convention.

The Court permitted Click to amend its complaint to add real parties in interest and to state an actionable Article 19 delay claim "if possible," but Click failed to file an amended complaint by the applicable deadline. Accordingly, on March 11, 2020, the Court dismissed the case with prejudice.

DOT DISMISSES DELTA AND WESTJET APPLICATION FOR ANTITRUST IMMUNITY

On December 17, 2020, DOT issued an order, available here, dismissing Delta and WestJet's application for antitrust immunity. After Delta Air Lines and WestJet jointly filed an objection to DOT's Show Cause order on November 20, 2020, objecting to the conditions DOT placed on the tentative grant of approval on the grounds that the conditions were arbitrary and capricious, unreasonable, and unacceptable, Delta and WestJet requested that the application be withdrawn and asked DOT to dismiss the proceeding and close out the docket. Based on Delta and WestJet's request, DOT dismissed the proceeding.

DOT FINES AEROLINEAS ARGENTINAS $300,000 FOR VIOLATING TARMAC DELAY RULE

On December 4, 2020, the DOT issued a consent order, available here, fining Aerolineas Argentinas $300,000 for violating rules prohibiting long tarmac delays. An investigation by DOT's Office of Aviation Consumer Protection found that Aerolineas Argentinas allowed two flights from Buenos Aires to New York – one on February 9, 2017 and another on January 4, 2018 – to remain on the tarmac for a lengthy period of time without providing passengers an opportunity to deplane. The 2017 tarmac delay lasted 4 hours and 46 minutes, and the 2018 tarmac delay lasted 4 hours and 35 minutes. Aerolineas Argentinas was ordered to cease and desist from future similar violations.

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This Aviation Regulatory Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact author Evelyn Sahr at 202.659.6622 or esahr@eckertseamans.com; Drew Derco at 202-659-6665 or dderco@eckertseamans.com; or Andy Orr at 202-659-6625 or aorr@eckertsemans.com or any other attorney at Eckert Seamans with whom you have been working.