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Aviation Regulatory Alert

February 2020 Aviation Regulatory Alert

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U.S. DEPARTMENT OF TRANSPORTATION PUBLISHES PROPOSED RULE ON DEFINING UNFAIR AND DECEPTIVE PRACTICES

The U.S. Department of Transportation on February 20, 2020 published a Notice of Proposed Rulemaking (NPRM) that would codify definitions for the terms "unfair" and "deceptive" in the Department's regulations implementing its aviation consumer protection statute, and will mirror the definitions used by the Federal Trade Commission. The proposed rule is intended to provide the aviation industry and other stakeholders with greater clarity about DOT's interpretation of what constitutes an unfair and deceptive practice. Public comments to the NPRM should be filed by April 20, 2020.

Most notably, the proposed rule would require DOT to articulate the basis for concluding that a practice is unfair or deceptive in situations where no existing regulation governs the practice in question in future enforcement orders, state the basis for its conclusion that a practice is unfair or deceptive when it issues discretionary aviation consumer protection regulations, and apply formal hearing procedures for discretionary aviation consumer protection rulemakings. This rule is intended to clarify and explain the policies and procedures for DOT enforcement actions.

CORONAVIRUS DEVELOPMENTS

US Travel Restrictions: On Friday, January 31, 2020, President Trump issued a Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus (COVID-2019). Effective at 5pm Eastern Standard Time on February 2, 2020, this order suspended the entry of certain classes of non-U.S. citizen (aliens) to the United States. An alien is inadmissible if the person has been present in mainland China (excluding Macau and Hong Kong) within the last 14 days preceding their attempted entry into the U.S. This includes persons who are transiting China en route to another destination. U.S. citizens, permanent residents, airline crewmembers, and certain other classes of alien are exempt from this suspension of entry. The full list of exempt classes of aliens is provided in the presidential proclamation.

Passengers who have been in China within the preceding 14 days but are in an exempt category and permitted to travel may only arrive in the U.S. at a designated airport that is implementing screening and, if necessary, quarantine procedures. Effective February 3, 2020, the list of designated arrival airports is:

- John F. Kennedy International Airport (JFK), New York;
- Chicago O'Hare International Airport (ORD), Illinois;
- San Francisco International Airport (SFO), California;
- Seattle-Tacoma International Airport (SEA), Washington;

- Daniel K. Inouye International Airport (HNL), Hawaii;
- Los Angeles International Airport, (LAX), California;
- Hartsfield-Jackson Atlanta International Airport (ATL), Georgia;
- Washington-Dulles International Airport (IAD), Virginia;
- Newark Liberty International Airport (EWR), New Jersey;
- Dallas/Fort Worth International Airport (DFW), Texas; and
- Detroit Metropolitan Airport (DTW), Michigan.

Emergency Interim Final Rule: On February 7, 2020, the U.S. Department of Health and Human Services (HHS) issued an Emergency Interim Final Rule (Emergency Rule) effective immediately requiring all airlines flying to the U.S. to collect and have available the information about each passenger and crew member. This information must be retained electronically and transmitted to the U.S. Centers for Disease Control and Prevention (CDC) within 24 hours of a request for it by the CDC for a given flight(s). The full Emergency Rule is available by clicking this link.

The required data points for each passenger and crew member (to the extent such information exists for the individual) are:

1) **Full name** (last, first, and, if available, middle or others);
2) **Address** while in the United States (number and street, city, State, and zip code), except that U.S. citizens and lawful permanent residents will provide address of permanent residence in the U.S. (number and street, city, State, and zip code);
3) **Primary contact phone number** to include country code;
4) **Secondary contact phone number** to include country code; and
5) **Email address**.

While the interim final rule became effective immediately upon publication, HHS is soliciting public comments on the Emergency Rule until March 13, 2020.

CDC Order: On February 18, 2020, the U.S. Centers for Disease Control and Prevention (CDC) published guidance (Data Collection Order) regarding the scope and implementation of the Emergency Rule of February 7, 2020. The Data Collection Order helps clarify the Emergency Rule and narrows the scope of data reporting required to a group of Designated Passengers deemed particularly at risk of exposure to COVID-2019. Designated Passengers are passengers who departed from or have been present in mainland China (excluding Hong Kong and Macau) in the past 14 days. Notably, this definition excludes airline employees aboard the flight as part of their duties, including deadheading crew. Airlines are directed to produce the required information (i.e., name, address, two phone numbers, and email address) on Designated Passengers through "existing data-sharing channels" within two (2) hours of the departure of any flight carrying a Designated Passenger. We understand by "existing data-sharing channels" that CDC is referring to entry of key data points into the passenger's Passenger Name Record (PNR) by carrier staff, although we understand that a number of carriers may have issues complying with this requirement. The CDC's order is available by clicking this link.

On February 27, 2020, the CDC released additional guidance for carriers subject to its Data Collection Order of February 18, 2020 via a series of Questions and Answers, available by clicking this link. The latest guidance is subject to change as CDC receives further questions from industry. We will continue to keep our readers updated as this situation continues to develop.

ADDITIONAL NY SHIELD ACT PROVISIONS BECOME EFFECTIVE IN MARCH 2020

On July 25, 2019, New York Governor Andrew Cuomo signed the Stop Hacks and Improve Electronic Data Security Act (SHIELD Act), expanding the scope of New York's prior data breach notification law. As we have previously reported the SHIELD Act: (1) enhances breach notification requirements, and (2) introduces new proactive data security requirements. While the breach notification procedures took effect in October 2019, the new proactive data security requirements will take effect on March 21, 2020.

The SHIELD Act applies to any person or business that owns or licenses computerized data that includes the private information of a New York resident. This applies regardless of whether the person or business has a physical presence in New York State or does business there, which includes any foreign airlines who maintain computerized data for New York residents. These new data security protections will require companies to take proactive measures by implementing "reasonable safeguards to protect the security, confidentiality and integrity of [New York residents'] private information." Among other things, each company subject to the SHIELD Act must implement a written data security program containing specific elements designed to protect residents' private information. These elements include:

- Designating an employee or employees to coordinate and oversee a data security program;
- Training employees on data security practices and procedures;
- Assessing internal and external risks;
- Vetting service providers and instituting contractual requirements that safeguard the private information of New York residents; and
- Securely destroying private information that is no longer needed.

The Act extends the period of time in which the New York Attorney General may bring an action from two years to three. In addition, the SHIELD Act: (a) doubles the penalty recoverable by the New York Attorney General for failing to make the proper notifications, from $10 to $20 per instance; (b) increases the cap on notification violations from $100,000 to $250,000; and (c) imposes a new civil penalty of up to $5,000 per violation of the new security program standards.

FAA ANNOUNCES FINAL RULE ON PILOT PROFESSIONAL DEVELOPMENT

On February 25, 2020, the Federal Aviation Administration (FAA) published a Final Rule on Pilot Professional Development that will enhance the professional development of pilots in commercial operations, by amending pilot development and training requirements primarily applicable to air carriers conducting domestic, flag, and supplemental operations.

The rule requires covered entities to provide newly hired pilots with an opportunity to observe flight operations and become familiar with procedures before serving as a flight crew member during operations, to revise the upgrade curriculum, and to provide leadership and command and mentoring training for all pilots in command.

While the Final Rule becomes effective on April 27, 2020, certain compliance requirements will be extended beyond the effective date. The compliance date for the new requirements pertaining to operations familiarization, leadership and command training, mentoring training, and the revised upgrade curriculum shall be 24 months after the effective date, or April 27, 2022. The compliance date for carriers to develop the training, have the training approved by the FAA, train the instructors, and then complete training of all the current PICs (14 C.F.R. § 121.429) shall be 36 months after the effective date, or April 27, 2023.

BOEING DISCLOSES SEC PROBE

According to a federal disclosure filed on January 31, 2020, Boeing announced to investors that it is under investigation by the Security and Exchange Commission (SEC) regarding the 737 MAX aircraft. Included in the disclosure section regarding investor risk factors, Boeing acknowledged that it was cooperating with the U.S. government on multiple investigations, including those by the Department of Justice and SEC. Boeing further admitted that potential litigation and investigations could materially affect the company's financial position.

GOVERNMENT ACCOUNTABILITY OFFICE - AVIATION REPORTS

The Government Accountability Office (GAO) recently published two reports addressing insider threats at airports and aviation maintenance.

- GAO-20-275 studied "insider threats" at airports, which involves aviation workers exploiting their access privileges to potentially cause harm at the nation's airports. GAO reviewed efforts taken by aviation stakeholders to address and mitigate insider threats at airports, and evaluated the strategic planning and performance goals of the Transportation Security Administration's (TSA) Insider Threat program. The GAO found that TSA, airport operators, and air carriers help to mitigate insider threats through a variety of efforts. TSA's Insider Threat Program comprises multiple TSA offices with ongoing insider threat mitigation activities, including long-standing requirements addressing access controls and background checks, and compliance inspections. GAO recommended that TSA develop and implement a strategic plan for continuing to address insider threats and to identify objective performance goals to achieve that plan.
- GAO-20-206 studied the potential adverse effects that retirements and attrition could have on the aviation maintenance workforce as required by the FAA Reauthorization Act of 2018. The study reviewed: federal data about the aviation maintenance workforce; how the government, educational institutions, and businesses develop the aviation maintenance workforce; and how the FAA has updated training curriculums and testing standards for aviation mechanics. The report found that a sufficient supply of certificated workers is critical for safety and to meet the growing demand for air travel. However, GAO also found that supply and demand data for certificated workers are limited. FAA maintains data on the number of newly certificated individuals, but less is known about how many certificated individuals exit the aviation industry each year and the extent of growing demand. GAO's analysis of FAA data found that over half of the roughly 330,000 mechanics and repairmen FAA had certificated as of December 2018 were between 50 and 70 years old, and that 97 percent were men. The GAO ultimately recommended that the FAA gather information and target resources towards promoting a robust and qualified aviation maintenance workforce.

U.S. HIKES TARIFFS ON EU PLANES IN AIRBUS DISPUTE

On February 14, 2020, the Trump administration announced that it would increase its retaliatory tariff on European Union (EU) aircraft from 10% to 15% in the long-running World Trade Organization (WTO) battle over illegal subsidies granted to Airbus. The original 10% tariffs on aircraft from Europe were approved after a 15-year legal fight at the WTO ultimately found that the EU illegally supplied subsidies to Airbus. Under U.S. law, tariffs issued pursuant to a WTO proceeding may be adjusted 120 days after a ruling, and then every 180 days after that. Based on industry comments received, the U.S. decided to raise the tariff on European aircraft by 5%. The EU is currently seeking permission from the WTO to enact its own tariffs on aircraft based on U.S. subsidies to Boeing, which the U.S. Trade Representative has acknowledged would be taken into account in determining any future tariff increases by the U.S.

ADA PREEMPTS FATHER'S CLAIMS AGAINST AIRLINE

The father of a 14-year old boy sued Southwest Airlines in an Ohio state court, alleging that the airline had a duty to require parental permission for his son to travel. The father also asserted claims based on negligence and intentional infliction of emotional distress, and further alleged intentional interference with a parent-child relationship. The case arose because the 14-year old boy, who lived in Ohio with his father, boarded a Southwest flight out of Ohio without telling his father, using a ticket purchased for him by his mother who was living in New Orleans.

Southwest sought to dismiss the father's claims as being preempted under the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), on the grounds that the claims were related to its ticketing, check-in and boarding services. The court agreed with Southwest's arguments, noting that the "ticketing and boarding offered by Defendant falls under the definition of 'services' for the purposes of ADA preemption." The court also found that the father's arguments were "predicated on the allegation that Defendant allowed Plaintiff's son to board a flight with no parental supervision" and thus "arise from Defendant's services." The court did note that its decision did not leave the father without any recourse, as he could petition DOT to investigate his claims. Edwards v. Southwest Airlines Co. 2020 U.S. Dist. LEXIS 14155 (S.D. Ohio Jan. 28, 2020).

DOT ANNOUNCES FINAL RULE REPEALING CERTAIN CRAF REGULATIONS

On February 25, 2020, the DOT issued an immediately effective Final Rule that rescinded 49 C.F.R. Part 93, which contains procedures for the allocation of aircraft to the Civil Reserve Air Fleet (CRAF). According to DOT, these regulations have become obsolete because they are inconsistent with the contractual nature of the current CRAF program. Originally, aircraft were made available for CRAF through allocation by the DOT or by contract with the Department of Defense (DOD). However, under current practice, all aircraft in the CRAF fleet are made available by contract through DOD, and DOT now has the further ability to allocate civil transportation resources through 49 C.F.R. Part 33, the Transportation Priorities and Allocation System (TPAS). As Part 93 is no longer necessary to support CRAF, and has become inconsistent with TPAS regulations, DOT has rescinded and reserved Part 93.

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