

January 2020 Aviation Regulatory Alert

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2019-NCOV “Wuhan” Coronavirus Impacting Global Travel

We continue to follow the rapidly-developing situation regarding a new airborne coronavirus that emerged in December 2019 in the Chinese province of Hubei. Major travel restrictions are in effect in a quarantine zone surrounding the city of Wuhan, including road checkpoints and closure of train stations and airports. Airlines are reporting significant numbers of cancellations of flights to China, leading to the suspension of many international routes. The Civil Aviation Administration of China (CAAC) has ordered all air carriers to waive restrictions on changes or refunds to cover travel to and from all of mainland China points. The CAAC is also temporarily waiving slot usage requirements for Chinese airports.

On January 30, 2020, the World Health Organization (WHO) announced the outbreak met its criteria for a Public Health Emergency of International Concern (PHEIC), but emphasized “that the declaration of a PHEIC should be seen in the spirit of support and appreciation for China, its people, and the actions China has taken on the frontlines of this outbreak, with transparency, and, it is to be hoped, with success.” According to the WHO, “Not enough is known about the epidemiology of 2019-nCoV to draw definitive conclusions about the full clinical features of disease, the intensity of the human-to-human transmission, and the original source of the outbreak,” and the organization recommends against restrictions on international trade and travel based on available information.

Many airports around the world have implemented entry screening and quarantine procedures and national health authorities such as the U.S. Centers for Disease Control and Prevention (CDC) are recommending avoiding all non-essential travel to China. U.S. officials also announced on January 31, 2020, that flights from China will be limited to arriving at New York-JFK, Chicago O'Hare, Los Angeles, San Francisco, Seattle, Atlanta and Honolulu airports starting on February 2, 2020, but that the U.S. government is not contemplating a total flight ban at this time. As this situation continues to develop we will keep you apprised of any changes.

Trump Administration Expands Travel Ban

On January 31, 2020, the U.S. Department of Homeland Security (DHS) announced that Burma, Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania have been added to the list of countries along with Iran, Libya, Somalia, Syria and Yemen whose nationals are subject to partial or total limitations on entry to the U.S. This follows remarks earlier in January by President Donald Trump at the World Economic Forum that the U.S. government was considering an expansion of countries covered by travel restrictions under Executive Order No. 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*. The specific suspensions vary by country:

- **Burma:** According to DHS, Burma has begun to engage with the U.S. on a variety of identity-management and information-sharing issues, but it does not comply with the established identity-management and information-sharing criteria assessed by the performance metrics. Accordingly, DHS suspends of entry for

Immigrants, except as Special Immigrants whose eligibility is based on having provided assistance to the U.S. Government.

- **Eritrea:** According to DHS, Eritrea does not comply with the established identity-management and information-sharing criteria assessed by the performance metrics. Accordingly, DHS suspends entry for Immigrants, except as Special Immigrants whose eligibility is based on having provided assistance to the U.S. Government.
- **Kyrgyzstan:** According to DHS, Kyrgyzstan does not comply with the established identity-management and information-sharing criteria assessed by the performance metrics. Accordingly, DHS suspends of entry for Immigrants, except as Special Immigrants whose eligibility is based on having provided assistance to the U.S. Government.
- **Nigeria:** According to DHS, Nigeria does not comply with the established identity-management and information-sharing criteria assessed by the performance metrics. Accordingly, DHS suspends entry for Immigrants, except as Special Immigrants whose eligibility is based on having provided assistance to the U.S. Government.
- **Sudan:** According to DHS, Sudan generally does not comply with U.S. identity management performance metrics and presents a high risk, relative to other countries in the world, of terrorist travel to the U.S. Accordingly, DHS suspends entry for Diversity Immigrants, as described in 8 U.S.C. 1153(c).
- **Tanzania:** According to DHS, Tanzania does not comply with the established identity-management and information-sharing criteria assessed by the performance metrics. Accordingly, DHS suspends entry for Diversity Immigrants, as described in 8 U.S.C. 1153(c).

DOT Proposes to Tighten Disability Nondiscrimination Rules for Service Animals Aboard Aircraft

On January 22, 2020, the U.S. Department of Transportation (DOT or Department) released a Notice of Proposed Rulemaking (NPRM), *Traveling by Air with Service Animals*, which proposes to amend the portions of DOT's Nondiscrimination on the Basis of Disability in Air Travel rules, 14 C.F.R. Part 382, that relate to service animals. The proposed rules would apply to U.S. and foreign air carrier operations on flights to, from, and within the U.S. in the same fashion as existing Part 382 requirements.

The proposed rules would generally tighten existing requirements for the carriage of service animals and align DOT's rules covering aircraft cabins with the U.S. Department of Justice's rules covering public spaces pursuant to the Americans With Disabilities Act. Among other changes, the proposed rules would define "service animal" as a dog performing tasks for the benefit of a person with a disability, either physical or psychiatric, and exclude "emotional support animals" from the definition. Carriers would be prohibited from restricting the breed of a service dog but would, however, be permitted to impose new requirements on passengers carrying service animals, such as:

- Showing documentation of the service animal's behavior, training, and health; in the proposed rule, DOT sets out proposed standard forms to fulfill this requirement;
- Checking in at the airport an hour in advance to permit observation of the animal;
- Requiring that a service animal fit in a passenger's foot space or lap; and
- Limiting the number of service animals that a passenger may bring onboard (though the number of passengers with service animals on a given flight would not be subject to limit).

We encourage our readers to review this important new proposed rule. Once the NPRM is officially published in the Federal Register, the public will have **60 days (i.e., until around March 22, 2020)** to submit comments. We are happy to answer questions or help prepare comments.

Reminder: New Montreal Convention Liability Limits

On January 17, 2020, DOT published a Notice in the Federal Register to officially inform U.S. and foreign air carriers of inflation adjustments to existing liability limits under the Montreal Convention. If not done already, airlines should review their claims and insurance documentation, along with their websites, Conditions of Carriage, Tariffs and notices to consumers during the purchase process, to ensure that references to the Montreal Convention limits are up-to-date. Failure to update these documents in a timely manner could subject an air carrier, foreign air carrier, indirect air carrier, or ticket agent to civil penalties.

As we previously reported, these limits went into effect on December 28, 2019. The table below shows the old and new limits, as expressed using the Convention’s international standard of Special Drawing Rights (SDR):

Provisions of the Montreal Convention	Old Limits (effective Dec. 30, 2009)	New Limits (effective Dec. 28, 2019)
Article 21 <i>Death or injury of passengers</i>	113,100 SDR	128,821 SDR
Article 22, paragraph 1 <i>Delay to passengers</i>	4,694 SDR	5,346 SDR
Article 22, paragraph 2 <i>Destruction, loss, damage or delay of baggage</i>	1,131 SDR	1,288 SDR
Article 22, paragraph 3 <i>Destruction, loss, damage or delay of cargo</i>	19 SDR per kilogram	22 SDR per kilogram

Reminder: Comment Period Open for DOT’s Proposed Accessible Lavatory Regulations for Single-Aisle Aircraft

Last month we reported that DOT had proposed an update to 14 C.F.R. Part 382 regarding accessible lavatories on single-aisle aircraft. Under the rule, starting three years after its effective date, new performance requirements would apply to accessible lavatory fixtures and onboard wheelchairs on newly-delivered single-aisle aircraft with 125 or more seats (or at least one lavatory on an existing aircraft of that size if lavatories are upgraded). The proposed rule would also require carriers to meet new annual training standards of flight attendant proficiency, publish information on their websites regarding lavatory accessibility, and provide information to passengers on procedures for safe disposal of sharps and bio-waste.

The Notice of Proposed Rulemaking (NPRM) was officially published in the Federal Register on January 2, 2020 (RIN No. 2105-AE88; Docket No. DOT-OST-2019-0180). **Comments on the proposed standards are due by March 2, 2020.** We encourage all carriers to familiarize themselves with these requirements and to let us know if we can assist with any questions or preparation of a public comment.

Relatedly, on January 7, 2020, the U.S. Government Accountability Office (GAO) published a report to Congress titled *Aviation Consumer Protection: Few U.S. Aircraft Have Lavatories Designed to Accommodate Passengers with Reduced Mobility*, GAO-20-258. The report was prepared pursuant to the 2018 FAA Reauthorization Act, which directed the GAO to study the availability and designs of lavatories on commercial aircraft and the ability of passengers with disabilities to access them. The report surveyed the fleets of large domestic air carriers and found, among other details,

that while very few single-aisle aircraft in service have accessible lavatories, DOT has received relatively few formal complaints about lack of access.

Reminder and Extension for Public Comments: Canadian Accessible Transportation Regulations (ATDPR) Phase II

Last month we reminded readers that the Canadian Transportation Agency (CTA) was in the process of developing new accessible transportation regulations, known as the Accessible Transportation for Persons with Disabilities Regulations (ATPDR). **CTA has extended its public comment period on its ATPDR Phase II consultation paper until February 28, 2020** (the previous deadline was February 7, 2020). Topics under study include the transportation of emotional support animals, planning and reporting obligations for carriers, and whether to apply CTA's One Person, One Fare requirement to international travel.

U.S. Announces Record-Breaking \$3.9 Billion Anti-Corruption Settlement in Investigation of Airbus

On January 31, 2020, the U.S. Department of Justice (DOJ) announced a non-prosecution agreement in a criminal investigation of French corporation Airbus SE (Airbus) for a scheme to use third-party business partners to bribe government officials, as well as non-governmental airline executives, around the world. The investigation, conducted in cooperation with British and French law enforcement, revealed violations in the U.S. of the Foreign Corrupt Practices Act (FCPA), Arms Export Control Act (AECA), and International Traffic in Arms Regulations (ITAR). The \$3.9 billion settlement announced was the largest ever in a corporate foreign bribery investigation.

According to DOJ, "beginning in at least 2008 and continuing until at least 2015, Airbus engaged in and facilitated a scheme to offer and pay bribes to decision makers and other influencers, including to foreign officials, in order to obtain improper business advantages and to win business from both privately owned enterprises and entities that were state-owned and state-controlled." Additionally, between December 2011 and December 2016, Airbus failed to provide "accurate information related to commissions paid by Airbus to third-party brokers who were hired to solicit, promote or otherwise secure the sale of defense articles and defense services to foreign armed forces," resulting in technology export control violations.

U.S. to Halt Charter Flights to Nine Cuban Airports, Cap Number of Flights to Havana

On January 10, 2020, U.S. Secretary of State Mike Pompeo announced that the State Department was officially requesting that DOT suspend public charter flights from the U.S. to nine airports in Cuba, and that DOT restrict the total number of flights allowed to Havana's Jose Marti International Airport. Pompeo stated the ban would be part of an effort to "prevent the Cuban regime from gaining access to hard currency from U.S. travelers" and to "further restrict the Cuban regime's ability to obtain revenue, which it uses to finance its ongoing repression of the Cuban people and its unconscionable support for dictator Nicolás Maduro in Venezuela."

In tandem, DOT issued a Notice on January 10, 2020, **effective 60 days later (i.e., March 10, 2020)**, suspending the authority granted to all public charter operators for public charter flights between any point in the U.S. and any point in Cuba, except José Martí International Airport (HAV) in Havana. Then, on January 29, 2020, DOT issued an Order to Show Cause stating that it would cap the number of authorized public charter flights from the U.S. to HAV initially at the level of service in calendar year 2019, or approximately 3,600 round-trip flights. DOT tentatively set out allocation procedures for these flights, stating it would distribute up to 75% of available flights to incumbent operators Swift Air, LLC and Caribbean Sun Airlines, Inc. d/b/a World Atlantic Airlines and institute a first-come, first-served charter pool for the remainder of the available flights. Interested parties have 14 calendar days (i.e., through February 12, 2020) from the date of the Order to Show Cause to file any objections in Docket DOT-OST-2020-0011.

Immigration: Trump Administration Imposes Visa Restrictions to Block “Birth Tourism”

On January 24, 2020, the U.S. Department of State published a final regulation aiming to curtail the so-called practice of “birth tourism,” whereby a pregnant woman enters the U.S. to give birth to a child in order for her child to receive U.S. citizenship. Persons born in the U.S. are automatic recipients of citizenship under the U.S. Constitution. In its notice, the Trump Administration asserts that “birth tourism” presents law enforcement and national security challenges and should be curtailed. Accordingly, the notice amends the regulations for issuance of nonimmigrant “B” visas to state that traveling for the purpose of giving birth to a child in the U.S. is not a form of “pleasure” for which the visa can be granted, that B visa applicants traveling for specialized medical treatment must demonstrate an ability to pay for their treatment, and that consular officers may presume that pregnant B visa applicants intend to travel for birth tourism unless shown otherwise.

Antitrust: DOJ, FTC Propose New Vertical Merger Guidelines: DOJ Opposes Sabre Acquisition of Farelogix in Court

On January 10, 2020, DOJ’s Antitrust Division and the U.S. Federal Trade Commission (FTC) announced an update to a key element of U.S. competition law – draft Vertical Merger Guidelines. These guidelines set forth the standards for how DOJ and FTC administratively examine vertical mergers (i.e., those that combine two or more companies operating at different levels in the same supply chain) and whether to recommend against approving a given proposed deal. According to DOJ, “the draft guidelines:

- Describe potential anticompetitive effects resulting from vertical mergers, which may include both unilateral and coordinated effects;
- Identify foreclosure and raising rivals’ costs and access to competitively sensitive information as potential elements of antitrust harm under unilateral effects;
- Describe an analytic framework for analyzing potential anticompetitive effects of foreclosure and raising rivals’ costs;
- Discuss how the elimination of double marginalization may mitigate or completely neutralize the potential anticompetitive effects of vertical mergers;
- Discuss cognizable merger efficiencies that are specific to vertical mergers;
- Provide a number of examples to provide more clarity about the agencies’ analytical methods in evaluating vertical mergers.”

In a high-profile example of an opposition to a vertical merger involving the travel technology space, DOJ Antitrust Division attorneys were in the U.S. District Court for the District of Delaware this month opposing the acquisition of airline booking company Farelogix by Sabre Corp. (Sabre) for \$360 million. Sabre is one of the world’s three largest global distribution systems (GDS) alongside Amadeus and Travelport. Farelogix is a software company whose Airline Commerce Gateway, among other services, provides data-driven retailing to airline clients. Despite the pending merger Farelogix has historically complained to U.S. antitrust regulators that Sabre has tried to hinder its growth as a competitor. DOJ argued that Sabre is a dominant legacy competitor in its market who could stifle competition in travel technology by acquiring an innovative competitor in Farelogix.

FAA Proposes \$5.4 Million Penalty Against the Boeing Co.

On January 10, 2020, the FAA proposed a \$5.4 million civil penalty against The Boeing Co.—in addition to a previously proposed civil penalty of more than \$3.9 million—for installing nonconforming slat tracks on approximately 178 Boeing 737 MAX aircraft, which Boeing ultimately presented as ready for airworthiness certification. Boeing had already been under scrutiny for installing the same nonconforming slat tracks on approximately 133 Boeing 737 NG aircraft. The FAA

alleged that Boeing not only failed to adequately oversee its suppliers to ensure they complied with the company's quality assurance system, but that it knowingly submitted aircraft for final FAA airworthiness certification after being informed that the slat tracks could not be used due to a failed strength test. The FAA issued an Airworthiness Directive (AD) on Aug. 15, 2019, mandating inspections of the affected aircraft.

FAA Proposes \$3.92 Million Penalty Against Southwest Airlines

On January 10, 2020, the FAA proposed a \$3.92 million civil penalty against Southwest Airlines for allegedly operating multiple aircraft on commercial flights with incorrect calculations of weight and balance data—contrary to the airline's approved weight-and-balance program and FAA-issued operations specifications. More specifically, between May 1, 2018 and August 9, 2018, Southwest operated 44 aircraft on a total of 21,505 flights with incorrect operational empty weights, and center of gravity or moment data.

FAA Proposes \$120,000 Civil Penalty Against UPS, Inc. for Improper Shipment of Lithium Batteries by Air

On January 24, 2020, the FAA proposed a \$120,000 civil penalty against UPS, Inc. for allegedly violating the Hazardous Materials regulations by knowingly shipping multiple loosely packed and damaged lithium batteries by air. Lithium ion batteries that are damaged, defective and likely to generate dangerous levels of heat are forbidden for air transportation on cargo and passenger carrying aircraft. Additionally, according to the FAA, these packages were not accompanied by a Shipper's Declaration for Dangerous goods, properly described, marked nor labeled to indicate the hazardous nature of its contents.

FAA Proposes to Revoke Air Carrier Certificate of Nantucket Express, LLC of Nantucket, Mass.

On January 3, 2020, the FAA proposed to revoke the air carrier certificate of Nantucket Express, LLC (Nantucket Express) for conducting passenger-carrying flights using unqualified pilots and operating unauthorized aircraft. The FAA alleged that between March 2015 and September 2017, Nantucket Express conducted 76 passenger-carrying flights using three aircraft not listed on its air carrier certificate, flown by pilots who were unqualified either by not being listed on Nantucket Express's air carrier certificate or by failing to pass a required knowledge test and competency and flight checks. Furthermore, the FAA's investigation concluded that Nantucket Express operated 39 passenger flights with aircraft that had not undergone required safety inspections.

FAA Proposes \$57,400 Civil Penalty Against Alaska Air Group, Inc.

On January 24, 2020, the FAA proposed a \$57,400 civil penalty against Alaska Air Group, Inc. (Alaska Airlines) for alleged drug and alcohol testing violations. According to the FAA, Alaska Airlines transferred four employees into safety-sensitive functions (i.e., ground security coordinator), but failed to initially include them in the company's random drug and alcohol testing pool.