January 2021 Aviation Regulatory Update

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BIDEN SIGNS EXECUTIVE ORDER MANDATING MASKS AND NEGATIVE COVID-19 TESTS FOR TRAVEL

On January 21, 2021, President Biden issued the Promoting COVID-19 Safety in Domestic and International Travel executive order, available here, which sets forth a number of new safety mandates pertaining to COVID-19.

Mask Requirements for Domestic Travel

For domestic travel, applicable U.S. agencies must immediately take action to require that masks be worn in compliance with CDC guidelines in or on airports, commercial aircraft, trains, ferries, intercity buses and other modes of public transportation.

Negative Tests Now Required for All Passengers Flying to the U.S.

Effective January 26, 2021, the U.S. requires all passengers arriving on flights from abroad to test negative for SARS-CoV-2, or to present proof of recent recovery from COVID-19. On January 25, 2021, the U.S. Centers for Disease Control and Prevention (CDC) published an updated legal Order requiring pre-departure testing, available here. The CDC also continues to update its Frequently Asked Questions (FAQs) webpage (available here) to provide guidance about application of its Order. The principal changes in the January 25 Order from the CDC's first version published on January 12 are:

- to remove a requirement that no layover in an multi-segment itinerary to the U.S. can exceed 24 hours without requiring a passenger to re-test;
- to remove an option for carriers to petition the CDC to exempt certain countries from the testing requirement due to inadequate testing capacity; and
- to provide the possibility of exceptions for exigent humanitarian purposes.

We encourage our readers to review these updated documents carefully and let us know if you have any questions.

Under the Order, an air carrier is required to verify that each passenger traveling on a flight to the U.S. has either: obtained a qualifying viral test within three days before the day of the beginning of their journey to the U.S. (e.g., for a flight any time on Friday, the test specimen was collected on or after the preceding Tuesday); or that the passenger tested positive for SARS-CoV-2 within the past 90 days but has since recovered and has been cleared for travel by a medical professional. A negative test result is required even if a passenger has received a vaccine. If a passenger cannot demonstrate they received a negative test or clearance to travel as required by the CDC Order, an air carrier must deny the passenger boarding. Crew who are assigned to operate the aircraft, or who are positioning for another flight (deadheading), are exempt from the pre-departure testing requirement, but must follow the carrier's occupational safety

guidance in accordance with CDC and FAA guidance (SAFO 20009, available at this link) to prevent transmission of the virus.

Air carriers must present to each passenger an Attestation form approved by the CDC (available at this link) – which the passenger uses to certify their eligibility to travel and to accept their legal responsibility for a false report – and air carriers must retain a copy of each passenger's completed Attestation for two years. The language of the Attestation is exact and cannot be modified, though the whole Attestation can be translated into a language other than English and retained by the air carrier in another language. The Attestation can be presented to passengers and acknowledged electronically at the time of booking or on paper, e.g., as part of the check-in process. Along with the Attestation, an air carrier must verify that each passenger possesses paper or electronic documentation proving their negative test or recovery from COVID-19. Though an air carrier must review this documentation, carrier staff do no need to retain a copy of the testing/recovery documentation. Rather, a passenger is responsible for carrying their own testing/recovery documentation to present as needed; for example, U.S. state and city authorities might review it to determine if a passenger is required to quarantine on arrival in their jurisdiction. At this time, there is no enforceable U.S. federal quarantine requirement, though the Biden Administration is studying this topic and the CDC continues to recommend that all passengers self-isolate for several days upon arrival from travel and test negative before ending self-isolation.

FAA ADOPTS STRICTER UNRULY PASSENGER POLICY

On January 13, 2021, the FAA amended FAA Order 2150.3C, the FAA's internal Compliance and Enforcement Program Manual. The change provides for a special emphasis enforcement program applicable to passengers who assault, threaten, intimidate, or interfere with a crewmember in the performance of a crewmember's duties in violation of 14 C.F.R. §§ 91.11, 121.580, 125.328, or 135.120, or who engage in conduct proscribed under 49 U.S.C. § 46318. These passengers will be addressed with legal enforcement action in the form of a civil penalty including fines of up to $35,000 and imprisonment.

The FAA has recently observed a proliferation of such conduct, including incidents stemming from a passenger's refusal to wear a mask in response to the COVID-19 pandemic-related health measures in place on board aircraft . While a passenger's failure to wear a mask aboard an aircraft is not itself a violation of federal law, conduct related to such a failure that results in violations of the codes listed above will be subject to civil penalty in accordance to this policy.

This policy is effective immediately through March 30, 2021.

BOEING SETTLES DOJ CRIMINAL CHARGE OVER 737 MAX FOR $2.5 BILLION

On January 7, 2021, Boeing was charged with defrauding regulators at the FAA during the development of the company's 737 MAX, and has agreed to pay $2.5 billion to resolve the charges.

The Department of Justice said Boeing admitted in court documents that two of its employees, 737 MAX technical pilots, deceived an FAA group tasked with evaluating the aircraft's designs about a flight control feature that has been implicated in two crashes, known as the Maneuvering Characteristics Augmentation System (MCAS). As a result, the Justice Department claims, "a key document published…lacked information about MCAS, and in turn, airplane manuals and pilot-training materials for U.S.-based airlines lacked information about MCAS."

The $2.5 billion settlement consists of a criminal monetary penalty of $243.6 million, $1.77 billion in compensation to Boeing's airline customers and a $500 million fund to compensate the heirs and relatives of the 346 victims of the two crashes. This is part of a deferred-prosecution agreement by which the charge will be dismissed after three years if Boeing meets several conditions, including agreeing to continue cooperating with the Justice Department in "ongoing or future investigations and prosecutions" and to strengthen its compliance program.

AMERICAN AND JETBLUE JOINT VENTURE CAUSES CONTROVERSY

On January 7, 2021, Spirit Airlines filed a complaint to request an on-the-record investigation under 49 U.S.C. § 41712(a) of the codeshare and related joint-venture (NEA) agreements between American Airlines and JetBlue Airways to determine if implementation of these agreements would constitute an anticompetitive unfair method of competition that must be prohibited. Spirit alleged that very little information has been released about the potential American and JetBlue alliance, and that so far, all of DOT's review has been conducted behind closed doors. Spirit therefore requested that DOT conduct a full investigation of the agreement under § 41712(a), which would include the opportunity for a hearing and submission of public comments. Soon after, DOT further received letters in support of Sprit's complaint from Southwest Airlines and the National Air Carrier Association.

On January 12, 2021, DOT signed an agreement with American and JetBlue terminating the Department's review of the joint venture agreements, and established certain commitments by American and JetBlue to address competition issues, Under the agreement, JetBlue and American agreed that: i) JetBlue would not exit any non-seasonal, non-stop routes it served as of February 2020 except JFK-LGB, JFK-OAK, and JFK-ORH for the term of the agreement; ii) the NEA agreements would be amended so there are mandatory limitations on what can be discussed during network planning sessions; iii) the NEA agreements would be amended to limit discretion to withdraw assets and assistance provided under the NEA; and iv) data and reports pertaining to NEA performance would be provided to DOT similar to those required for immunized alliances. JetBlue and American also agreed to the upfront divestiture of 7 slots at JFK and 6 slots at DCA, and the conditional divestiture of up to 10 slot pairs at JFK if they fail to meet certain capacity targets. However, DOT also noted that it retained its authority to investigate and bring enforcement action, and would continue to evaluate whether the public interest review requested by Spirit would be warranted.

DC CIRCUIT COURT REFUSES REQUEST TO REGROUND 737 MAX

On January 14, 2021, the U.S. Court of Appeals for the D.C. Circuit denied a request for an emergency order to re-ground the Boeing 737 MAX. The Flyer's Rights Education Foundation (Flyer's Rights) had filed the request on December 3, 2020, challenging the FAA's November 18, 2020 decision to return the 737 MAX to commercial service, claiming that the FAA's conclusions about the (MCAS) were inaccurate and that FAA failed to disclose facts about the testing FAA conducted on the MCAS system.

However, the D.C. Circuit determined that Flyer's Rights failed to meet the high standard necessary to warrant an emergency stay of the FAA's order. Courts have historically given agency decisions considerable deference under the Chevron doctrine, and this has been especially so in regard to FAA safety determinations. While the court failed to grant the request to request to reground the 737 MAX on an emergency basis, the court is still considering whether Flyer's Rights has standing to otherwise challenge the FAA's decision on a non-emergency basis.

FAA EXTENDS SLOT RELIEF THROUGH OCTOBER

On January 13, 2021, the FAA determined the ongoing COVID-19 crisis warrants an extension of the waiver of minimum slot usage requirements at Level 3 airports (JFK, LGA, DCA) as well as designated IATA Level 2 airports in the United States (ORD, LAX, EWR, SFO).

The FAA's initial waiver order was issued in March 2020 and lasted until May 31, 2020. It was then extended to October 24, 2020, and further extended until March 27, 2021. The FAA has now extended the Order to October 30, 2021. Additionally, after reviewing the industry comments on the last extension. the FAA has determined it will maintain the current waiver structure instead of proceeding with the conditions proposed by the Worldwide Airport Slot Board.

Under the current waiver structure, 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.

Similarly, the FAA extended through October 30, 2021 its COVID-19-related policy for prioritizing flights cancelled at designated IATA Level 2 airports in the United States (ORD, LAX, EWR, SFO), for purposes of establishing a carrier's operational baseline in the next corresponding season, subject to the follow 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 operations; and (2) Schedules approved for Summer 2021 does not apply to net-newly approved operations for initial use during the Summer 2021 season.

BIDEN SIGNS EXECUTIVE ORDER STRENGTHENING BUY AMERICA PROGRAM

Following up on a campaign promise to "Buy American," on January 25, 2021, President Biden signed an Executive Order on Ensuring the Future Is Made in All of America by All of America's Workers, available here. The Buy American EO directs federal agencies to study how they can "maximize the use of goods, products, and materials produced in, and services offered in, the United States," in support of the goal that, "The United States Government should, whenever possible, procure goods, products, materials, and services from sources that will help American businesses compete in strategic industries and help America's workers thrive."

The EO establishes a "Made in America Office" within the Office of Management and Budget (OMB). This office will be responsible for reviewing requests by U.S. government agencies to waive the requirements of "Made in America" laws and regulations – those being defined as requirements relating to federal financial assistance awards or federal procurement that require, or provide a preference for, acquisition of goods, products, or materials produced in the U.S., and including the domestic preference for maritime transport provided by the Merchant Marine Act of 1920 (the Jones Act). The Made in America Office will approve waiver requests by agencies and seek to ensure that waivers are granted judiciously and supported by "detailed justifications." To promote transparency in procurement, the Made in America office will publish information about waiver requests. In addition, each federal agency is tasked by the EO with reporting to the Made in America Office within 180 days (i.e., by July 24, 2021), and bi-annually thereafter, on how the agency is currently implementing "Made in America" laws and waivers.

The EO also contains instructions to Federal Acquisition Regulatory Council (FAR Council) to consider certain amendments to its acquisition regulations; revocations of certain existing EOs and disclaimer of certain others to the extent they are inconsistent with the new policy; a direction to government agencies to consider improper cost advantages of certain foreign goods due to dumping or subsidies when assessing a waiver request.

DOT ISSUES OVERSALES AND DOMESTIC BAGGAGE RULE

On January 15, 2021, the DOT issued a final rule, Implementing Certain Provisions of the TICKETS Act and Revisions to Denied Boarding Compensation and Domestic Baggage Liability Limits, available here. This final rule amends the DOT's oversales regulation, 14 CFR Part 250, by clarifying that the maximum amount of Denied Boarding Compensation (DBC) that a carrier may provide to a passenger denied boarding involuntarily is not limited, and by prohibiting airlines from involuntarily denying boarding to a passenger after the passenger's boarding pass has been collected or scanned and the passenger has boarded, subject to safety and security exceptions.

Further, pursuant to existing regulation, this final rule raises the liability limits for Denied Boarding Compensation that U.S. and foreign air carriers may impose from the current figures of $675 and $1,350 to $775 and $1,550.

Lastly, this final rule revises 14 CFR Part 254 to raise the liability limit U.S. air carriers may impose for mishandled baggage in domestic air transportation by adjusting the limit of liability from the current amount of $3,500 to $3,800.

This final rule is effective on April 13, 2021.

JOEL SZABAT RETURNS TO AVIATION AND INTERNATIONAL AFFAIRS OFFICE

On January 8, 2021, Joel Szabat announced he was departing from his No. 3 post at DOT and will return to a career civil service job he had held previously at the Department. Szabat will return to his posting of deputy assistant secretary for aviation and international affairs, a non-political job directly under the one for which he was previously confirmed.

FAA ANNOUNCES FINAL RULE TO FACILITATE THE REINTRODUCTION OF CIVIL SUPERSONIC FLIGHT

On January 6, 2021, the FAA issued a final rule, available here, to facilitate the safe development of civil supersonic aircraft. The rule streamlines and clarifies procedures to obtain FAA approval for supersonic flight testing in the United States. The rule does not change the general prohibition against overland supersonic flight in the U.S.; rather it revises the language in part 91, appendix B, which more clearly describes the process and criteria for requesting a special flight authorization. The new rule also includes noise testing as another reason for which an authorization may be issued. It should be further noted that these procedures only cover flights intended to be conducted at supersonic speeds, and the rule does not address noise limits for supersonic aircraft during takeoff and landing, as that was addressed in a separate rulemaking in April 2020. The FAA expects this rule would eventually be used by supersonic aircraft developers to test aircraft under development at supersonic speeds. The Department and the FAA anticipate taking additional regulatory actions to enable the development of supersonic aircraft.

FAA PROPOSES CIVIL PENALTY AGAINST SKY LEASE I, INC.

On January 8, 2021 the FAA proposed a $422,500 civil penalty against Sky Lease I, Inc., for allegedly operating two Boeing 747 airplanes on dozens of flights without required avionics equipment.

Between June 21, 2020 and July 12, 2020, the company operated the aircraft on 56 flights within the U.S. and to and from countries including Bolivia, China, Canada, Colombia, and Peru when they lacked the required version of Automatic Dependent Surveillance-Broadcast (ADS-B) Out system. Sky Lease I has 30 days to respond.

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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.