# January 2022 Aviation Regulatory Update

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## OSHA WITHDRAWS ITS COVID VACCINE MANDATE FOR LARGE EMPLOYERS

On January 25, 2022, the Occupational Safety and Health Administration ("OSHA") published a notice in the Federal Register announcing that it would withdraw its Emergency Temporary Standard ("ETS"), which mandated that all U.S. employers with 100 employees or more require that their employees be fully vaccinated against COVID-19 or wear facemasks and submit to weekly testing. OSHA's withdrawal of the ETS comes after months of ongoing litigation and the U.S. Supreme Court's ("SCOTUS") stay of the ETS.

On January 13, 2022, SCOTUS essentially blocked the vaccine mandate from going into effect when it issued its opinion staying the ETS. Specifically, SCOTUS found that the stay was appropriate because the Secretary of Labor did not have the authority to impose the mandate on U.S. employers. In its notice, OSHA cited SCOTUS's decision as the main reason for its official withdrawal of the ETS.

OSHA also indicated that although it was withdrawing the ETS as an enforceable emergency temporary standard, it was not withdrawing the ETS to the extent it serves as a proposed rule under section 6(c)(3) of the OSH Act, and that its withdrawal of the ETS does not change the status of the notice and comment rulemaking that it previously issued. OSHA also stated that the change does not currently affect state-run OSHA plans, which are not required to take any action in response to withdrawal of the ETS. This is because the occupational safety and health programs that are run by the 28 states and U.S. territories that have them are required to be OSHA approved and be at least as effective as Federal OSHA's program. This includes a requirement that when Federal OSHA makes a program change that renders its program more effective, a state plan must timely adopt a corresponding change in order to maintain a safety and health program that is at least as effective as Federal OSHA's. However, in this case, since the withdrawal of Federal OSHA's ETS does not impose any new requirements or otherwise render the Federal program more effective, state plans are not required to take any action. OSHA's withdrawal of the ETS became effective on January 26, 2022.

## UPDATES IN THE U.S. 5G C-BAND LAUNCH SAGA

On January 18, 2022, AT&T and Verizon agreed to temporarily defer turning on a limited number of towers around certain airport runways as they continue to work with the aviation industry and the Federal Aviation Administration ("FAA") to determine ways for airplane equipment and 5G signals to coexist safely. Pursuant to an agreement between the U.S. airline industry, the FAA, the U.S. Department of Transportation ("DOT"), and communications companies AT&T and Verizon Communications, the launch of 5G services in the U.S. around 50 designated airports has been restricted for a period of six months in order to address airline industry and DOT/FAA concerns that the 5G signals may interfere with certain safety equipment used to take off and land in inclement weather. Rollout of 5G technology in all areas outside of the 50 designated airports or "buffer zones" launched on January 19, 2022.

In preparation of the launch of 5G services, FAA prohibited certain instrument based flight operations at a number of affected US airports for certain aircraft types and issued aircraft specific guidance. For example, FAA announced that it would require operators of Boeing 787s to take additional precautions when landing on wet or snowy runways at airports where 5G C-band service is deployed, as safety experts determined that 5G interference with the aircraft's radio altimeter could prevent engine and braking systems from transitioning to landing mode. FAA also issued two new Airworthiness Directives ("ADs") revising the landing requirements for Bowing 737 MAX airplanes, and prohibiting Boeing 747-8, 747-8F and 777 airplanes from landing at airports where 5g interference could occur, links to both AD's can be found here. FAA also approved a number of airplane models to perform low-visibility landings at many of the airports where 5G C-band is now deployed, including some Boeing 717, 737, 747, 757, 767, 777, 787, MD-10/-11 and all Airbus A300, A310, A319, A320, A321, A330, A340, A350, and A380 models. FAA also issued 1,500 Notices to Air Missions (NOTAMs) at over 1,300 airports to warn that aircraft with untested altimeters or that need retrofitting or replacement will be unable to perform low-visibility landings where 5G is deployed. A link to FAA's website where all 5G related NOTAMs have been published can be found here.

In regard to the 50 designated U.S. airports where buffer zones will be implemented, 5G equipment in the buffer zones will be operated at a lower power than usual for the next six months and 5G signals will be restricted around landing runways to protect the last 20 seconds of flight. The 50 designated airports are generally the bigger and busier U.S. airports and U.S. airports that are known for low visibility including JFK, DFW, EWR, ORD, IAH, LAS, LAX, LGA, MIA, SEA, etc.

The FAA has noted in a recent press release, available here, that many airports that are not listed as one of the 50 designated airports where 5G deployment will not take place for the next six months are not currently and will not be affected by 5G deployment. This is because these airports are not in the 46 markets where the new 5G service will be deployed and/or are airports that do not have the ability to allow low-visibility landings.

The FAA has also been made aware of the European Union Aviation Safety Agency (EASA) guidance published on 5G and has been in discussions with EASA on the 5G issue in general. According to FAA, because its ADs (2021-23-12 and 2021-23-13) apply only to N-registered aircraft operating in U.S. airspace; aircraft operating outside the U.S. or of foreign registry are not subject to its ADs. The FAA also notes that the State of Registry (SoR) authority for foreign registered aircraft may decide to adopt the FAA's ADs, or issue their own ADs, which could affect each specific aircraft in question, therefore, FAA recommends that foreign air carriers check with their SoR authority. Nonetheless, foreign registered aircraft flying into U.S. airspace are subject to the NOTAMs that FAA issues in support of its ADs. NOTAMs will be maintained to identify locations with 5G C-band base station deployments. FAA has also recommended that all operators and pilots take certain actions in preparation of the deployment of 5G C-Band service in its Special Airworthiness Information Bulletin (SAIB), and its December 23, 2021, Safety Alert for Operators (SAFO).

## DOT AMENDS PROCEDURES FOR NEW AVIATION CONSUMER RULEMAKING

On January 24, 2022, the U.S. Department of Transportation ("DOT") announced a change to its procedural rules governing new rulemaking for U.S. aviation consumer protections. By virtue of its rule, "Defining Unfair or Deceptive Practices", issued on December 7, 2020, DOT under the Trump administration created a procedure that would let the public ask DOT for an evidentiary hearing to explore complex issues at stake in any future rulemaking (e.g., extent of consumer harms, costs, and benefits, etc.) if the Department proposed a new aviation consumer protection standard. This month's amended procedures by the Biden administration's DOT preserves this process, but raises the requirement for stakeholders to successfully request a hearing. Accordingly, the Department will now have a greater ability to prevent aviation consumer rulemakings from being delayed by speeding up the hearing procedures it uses. The move comes as part of a broader push by the Biden administration's DOT to intensify enforcement of existing aviation consumer protection standards and to press for new protections for U.S. air consumers. For example, the forthcoming amendments to rules

governing ticket refunds in the case of public health measure-related flight delays and cancellations are expected to be published by DOT later in 2022.

## DOT ISSUES MODIFIED ORDER SUSPENDING 44 FLIGHTS FROM CHINA

On January 21, 2022, DOT issued an Order to further modify its decision in Order 2020-6-1, which suspended the scheduled passenger operations of all Chinese air carriers to and from the United States. In the original Order, DOT explained that it called for the suspension because China had impaired the operating rights of U.S. carriers by denying them the "fair and equal opportunity" to operate passenger flights to China in 2020.

Recently, China instituted a new "circuit-breaker" measure under which it automatically suspends the international flights of an air carrier for at least two weeks if passengers on any inbound flights test positive for COVID-19. The measure has affected U.S. airlines including United Airlines, Delta Airlines, and American Airlines, as 44 of their flights have been prohibited from operating to China. In response to this, DOT issued its new Order calling for the suspension of 44 flights planned for operation by several Chinese carriers to counter China's continued banning of inbound flights from the U.S. The U.S.'s suspension will affect 44 flights typically operated by Air China, Beijing Capital Airlines, China Eastern Airlines, China Southern Airlines, Xiamen Airlines, Hainan Airlines and Sichuan Airlines and will affect the airlines' operations for at least the next several weeks.

## UNITED FILES REPLY IN CASE AGAINST PANYNJ ALLEGING IMPROPER DIVERSION OF AIRPORT REVENUE

On January 14, 2022, United Airlines ("United") filed its reply to respondent, Port Authority of New York and New Jersey's ("PANYNJ") supplemental brief on remand.

United's reply is the latest action in a case that has continued for the last few years and was initiated when United filed suit against PANYNJ in January of 2015. United alleged that PANYNJ, the airport sponsor of Newark-Liberty International Airport (EWR), charged unreasonable rates in violation of 49 U.S.C. § 47107(a), generated excessive surplus revenues in order to subsidize non-aeronautical functions, and improperly diverted airport revenue in violation of 49 U.S.C. § 47107(b)(2). PANYNJ denied all of United's allegations and asserted that its flight fees are not unreasonable or unjustly discriminatory. PANYNJ also asserted that because it is a "grandfathered airport" (i.e. referring to several pre-1982 New York and New Jersey statutes that provide that Port Authority revenues, including revenues from air terminals, be pledged as security or applied to the repayment of debt without regard to the facility from which the revenues are derived, to fulfill any undertakings which the Port Authority may assume for the "benefit of its consolidated bondholders.") it was not engaging in unlawful diversion of airport revenue because it could use airport revenue for non-aeronautical purposes.

In 2018, after review of evidence presented by both parties, the Director of Airport Compliance and Management Analysis (the "Director") of the FAA determined that PANYNJ had not adequately demonstrated that it had complied with "grandfathering" exceptions and had used considerable amounts of airport revenue on non-aviation facilities that it owned, which could be considered an improper diversion of revenue. The Director therefore ordered PANYNJ to take corrective action by submitting a corrective action plan. Shortly thereafter, PANYNJ filed an order requesting an extension of time to file an appeal and suspension of the submission requirement to file its corrective action plan until after a Final Agency Decision or judicial opinion was issued, which FAA granted in December 2018. Since then, several additional replies and requests for an extension of time to file relevant documents have been made by both parties, as well as an Order issued by the Associate Administrator of the FAA, affirming the Director's Determination and remanding the grandfathering issue to the Director to make a determination and consider whether or not to issue a civil penalty against PANYNJ. The Director has yet to make a final determination in this case.

## FINAL RULE ON 2022 CIVIL MONETARY PENALTY ADJUSTMENTS FOR INFLATION ISSUED BY DHS

On January 11, 2022, the U.S. Department of Homeland Security ("DHS"), U.S. Customs and Border Protection ("CBP"), and the U.S. Transportation Security Administration ("TSA") published a Final Rule in the Federal Register encompassing civil monetary penalty adjustments for inflation for 2022. According to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the "Act") all U.S. federal agencies must adjust their civil monetary penalties annually based on inflation and publish the penalty adjustments in the Federal Register.

CBP often assesses civil monetary penalties under various titles of the United States Code (the "Code") and the Code of Federal Regulations ("CFR") including penalties for certain violations of Title 8 of the CFR as it relates to the Immigration and Nationality Act of 1952 ("INA") as well as non-INA penalties. The 2022 adjustment for aviation related penalties that CBP administers is as follows:

| Penalty Name | Citation | 2021 Penalty Amount | 2022 Adjusted Penalty |
|---|---|---|---|
| Penalties for non- compliance with arrival and departure manifest requirements for passengers, crewmembers, or occupants transported on commercial vessels or aircraft arriving to or departing from the United States | 8 U.S.C. 1221(g)<br>8 CFR 280.53(b)(1)<br>(INA section 231(g)) | $1,436 | $1,525 |
| Penalties for non- compliance with landing requirements at designated ports of entry for aircraft transporting aliens | 8 U.S.C. 1224<br>8 CFR 280.53(b)(2)<br>(INA section 234) | $3,901 | $4,144 |
| Penalties for failure to depart voluntarily | 8 U.S.C. 1229c(d)<br>8 CFR 280.53(b)(3)<br>(INA section 240B(d)) | $1,644-$8,224 | $1,746-$8,736 |
| Penalties for violations of removal orders relating to aliens transported on vessels or aircraft under section 241(d) of the INA, or for costs associated with removal under section 241(e) of the INA | 8 U.S.C. 1253(c)(1)(A)<br>8 CFR 280.53(b)(4)<br>(INA section 243(c)(1)(A)) | $3,289 | $3,494 |
| Penalties for failure to report an illegal landing or desertion of alien crewmen, and for each alien not reported on arrival or departure manifest or lists required in accordance with section 251 of the INA | 8 U.S.C. 1281(d)<br>8 CFR 280.53(b)(6)<br>(INA section 251(d)) | $390 for each alien | $414 for each alien |
| Penalties for failure to control, detain, or remove alien crewmen | 8 U.S.C. 1284(a)<br>8 CFR 280.53(b)(7)<br>(INA section 254(a)) | $975-$5,851 | $1,036-$6,215 |

| Penalty Name | Citation | 2021 Penalty Amount | 2022 Adjusted Penalty |
|---|---|---|---|
| Penalties for failure to prevent the unauthorized landing of aliens | 8 U.S.C. 1321(a)<br>8 CFR 280.53(b)(11)<br>(INA section 271(a)) | $5,851 | $6,215 |
| Penalties for bringing to the United States aliens subject to denial of admission on a health-related ground | 8 U.S.C. 1322(a)<br>8 CFR 280.53(b)(12)<br>(INA section 272(a)) | $5,851 | $6,215 |
| Penalties for bringing to the United States aliens without required documentation | 8 U.S.C. 1323(b)<br>8 CFR 280.53(b)(13)<br>(INA section 273(b)) | $5,851 | $6,215 |
| Penalties for failure to depart | 8 U.S.C. 1324d<br>8 CFR 280.53(b)(14)<br>(INA section 274D) | $823 | $874 |
| Penalties for improper entry | 8 U.S.C. 1325(b)<br>8 CFR 280.53(b)(15)<br>(INA section 275(b)) | $82-$412 | $87-$438 |

In regard to TSA, which issues civil penalties for various violations of implementing regulations and orders and a wide array of aviation and surface security requirements, the 2022 adjustment for penalties is as follows:

| Penalty Name | Citation | 2021 Penalty Amount | 2022 Adjusted Penalty |
|---|---|---|---|
| Violation of 49 U.S.C. ch. 449 (except secs. 44902, 44903(d), 44907(a)–(d)(1)(A), 44907(d)(1)(C)– (f), 44908, and 44909), or 49 U.S.C. 46302 or 46303, a regulation prescribed, or order issued thereunder by a person operating an aircraft for the transportation of passengers or property for compensation | 49 U.S.C. 46301(a)(1), (4), (5), (6); 49 U.S.C. 46301(d)(2), (8); 49 CFR 1503.401(c)(3) | $35,188 (up to a total of $562,996 per civil penalty action) | $37,377 (up to a total of $598,026 per civil penalty action) |
| Violation of 49 U.S.C. ch. 449 (except secs. 44902, 44903(d), 44907(a)–(d)(1)(A), 44907(d)(1)(C)–(f), 44908, and 44909), or 49 U.S.C. 46302 or 46303, a regulation prescribed, or order issued thereunder by an individual (except an airman serving as an airman), any person not operating an aircraft for the transportation of passengers or property for compensation, or a small business concern | 49 U.S.C. 46301(a)(1), (4), (5); 49 U.S.C. 46301(d)(8); 49 CFR 1503.401(c)(1) and (2) | $14,074 (up to a total of $70,375 for individuals or small businesses, $562,996 for others) | $14,950 (up to a total of $74,754 for individuals or small businesses, $598,026 for others) |

| Penalty Name | Citation | 2021 Penalty Amount | 2022 Adjusted Penalty |
|---|---|---|---|
| Violation of any other provision of title 49 U.S.C. or of 46 U.S.C. ch. 701, a regulation prescribed, or Order issued thereunder | 49 U.S.C. 114(u); 49 CFR 1503.401(b) | $12,045 (up to a total of $60,226 total for individuals or small businesses, $481,802 for others) | $12,794 (up to a total of $63,973 total for individuals or small businesses, $511,780 for others) |

## IRS ISSUES NEW TAX REGULATIONS RELATED TO AIRCRAFT MANAGEMENT COMPANY EXCISE TAX

The U.S. Internal Revenue Service ("IRS") recently issued final regulations under Internal Revenue Code § 4261(e)(5) which provide guidance to aircraft management companies and aircraft owners in relation to their federal excise tax obligations. Specifically, the final regulations implement a provision included in the 2017 Tax Cuts and Jobs Act that provides an exception to the 7.5% federal excise tax for commercial air transportation operators when an aircraft owner pays for management services to support flights on their aircraft. Under the new regulations, the 7.5% tax is not due when an aircraft owner pays for management services for their flights because such flights are already subject to the non-commercial fuel tax and exempt from the percentage tax.

## AIRBNB FINED BY OFAC FOR VIOLATIONS OF U.S. EMBARGO ON CUBA; PARTIES AGREE TO $91,179.29 SETTLEMENT

On Monday, January 3, 2022, vacation Rental Company, Airbnb, and the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") came to a settlement after OFAC fined Airbnb for alleged violations of U.S. sanctions on Cuba.

The alleged violations were brought to the attention of OFAC after a forensic review conducted by Airbnb Payments determined that Airbnb Payments had processed payments related to 3,464 "Stays" transactions in Cuba that were made by guests traveling to Cuba for purposes outside the 12 authorized categories during the period between September 28, 2015 and March 1, 2020, and also processed payments related to 3,076 "Experiences" transactions for which Airbnb had failed to keep required records in accordance with OFAC regulations. Given the results of the review, OFAC accused Airbnb of allegedly accepting reservations from guests planning to travel to Cuba for purposes outside of the 12 authorized categories set forth under § 15.560(a) including travel for family visits, official business of the U.S. government or other foreign governments, journalistic activity, professional research, educational activity, humanitarian projects, etc., and failing to keep certain required records associated with "Cuba-related transactions."

Originally, Airbnb faced a potential maximum civil penalty of just over $600 million, but because the company disclosed the potential violations, cooperated with the OFAC, and had an excellent prior compliance record, the agency agreed to mitigation of the penalty and lowered the fine. Therefore, OFAC and Airbnb agreed that the company would pay $91,172.29 to settle the case against it.

## UNRULY PASSENGERS TO LOSE TSA PRECHECK ELIGIBILITY

On December 21, 2021, the Federal Aviation Administration ("FAA") and the Transportation Security Administration ("TSA") each issued identical press releases announcing a new partnership under which the FAA will begin sharing the information of passengers who face civil penalties for unruly behavior with TSA.

According to the agreement, once the information is given to TSA, it is allowed to remove the unruly passenger from TSA PreCheck screening eligibility. TSA has said that it has "zero tolerance" for unruly behavior, especially behavior that

involves physical assault that occurs onboard aircraft, and that TSA PreCheck is a "privilege" reserved for low-risk travelers. Under the agreement, TSA will also begin providing the FAA with information so that it can identify and locate unruly passengers to be able to more efficiently serve them with civil penalty notices. According to TSA, this is being done to help ensure the safety and security of all passengers and hold unruly passengers more accountable for their actions, especially given that unruly behavior involving physical assault is strictly prohibited under federal regulations. Both entities have maintained that the information sharing processes that will be used by FAA and TSA include robust provisions to protect passenger privacy and data.

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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 Alexis George at 804-788-7772 or ageorge@eckertsemans.com or any other attorney at Eckert Seamans with whom you have been working.