

May 2020 Aviation Regulatory Update

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U.S. DEPARTMENT OF TRANSPORTATION ISSUES NEW FAQ REGARDING AIRLINE REFUNDS

On May 12, 2020, DOT issued a Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel, [available here](#). The document provides answers to some of the most common questions about the Department's April 3, 2020 enforcement notice to help consumers understand their rights and to ensure airlines and ticket agents understand their obligations with respect to COVID-19 related cancellations and refunds. Of particular interest:

- DOT confirmed that the FAQs do not have the force and effect of law and are not meant to bind carriers or ticket agents in any way. DOT did however note that such entities can rely on the FAQs as a safeguard from Departmental enforcement.
- DOT confirmed that neither the term "significant change" nor the term "cancellation" is defined in regulation or statute, and that these terms are defined (if at all) differently by carriers when fulfilling their obligation to provide refunds. DOT further stated that carriers are free to develop reasonable interpretations of what those terms mean (although carriers are expected to honor those interpretations when implementing refund obligations).
- DOT confirmed that, with respect to a voluntary change or cancellation where a flight is still operating, passengers are "generally not entitled to a refund or a travel voucher for future use on the airline" even if the passenger's decision to change or cancel is made due to concerns related to the COVID-19 public health emergency
- The FAQs note that carriers and ticket agents can offer consumers alternatives to a refund, such as credits or vouchers, so long as the option of a refund is also offered and clearly disclosed if the passenger is entitled to a refund.
- DOT reiterated that it recognizes the unprecedented impact of COVID-19 on the industry, and stated that it will exercise enforcement discretion, and will first provide carriers and ticket agents an opportunity to become compliant.

FAA DEFENDS GROUNDING OF ABANDONED NEWARK FLIGHT SLOTS

On May 15, 2020, the FAA filed its first brief in a case initiated by Spirit Airlines in the U.S. Court of Appeals for the D.C. Circuit in December 2019 in an attempt to force the FAA to grant Spirit grandfathered Newark Airport slots that Southwest Airlines relinquished in 2019. Once Southwest decided to relinquish its grandfathered slots at the Newark, the FAA announced it would not recommend new flights in those Southwest slots at this time. Through this lawsuit, Spirit is attempting to force the FAA to grant those slots previously held by Southwest to Spirit.

At Newark, the FAA reviews airline flight proposals for a six-month period, then provide slot recommendations based on those airline proposals in an effort to reduce congestion. However, the FAA does not technically “approve” the airline proposals, airlines are not required to follow the FAA’s recommendations, and airlines are legally free to operate unapproved flights. In defense against the lawsuit, the FAA argues that there is not a true controversy to support the lawsuit as Spirit can operate flights that replace Southwest’s grandfathered operations even without the FAA’s approval or granting of Southwest’s slots to Spirit.

Furthermore, the FAA argues that Spirit’s lawsuit should not have been filed yet because the FAA’s refusal to recommend another airline taking over Southwest’s slots was not a final agency action. The FAA contends that Spirit is required to await the results of FAA’s Summer 2020 recommendation process, which has not yet been completed, and then seek review of that FAA decision.

This litigation is still ongoing, and we will provide updates as they become available.

FAA PLANS TO ISSUE NEW RULE REQUIRING SAFETY MANAGEMENT SYSTEMS FOR AVIATION MANUFACTURERS

On May 19, 2020, the FAA announced that it will issue a rule to require safety management systems for aviation manufacturers, following recommendations handed out by a special committee that examined two Boeing 737 MAX crashes. The FAA aims to release the new rule by the end of 2021.

This action is in response to recommendations contained in a January 2020 report, [available here](#), released by an expert panel named by Transportation Secretary Elaine Chao. The expert panel, referred to as the “special committee”, recommended that the FAA require manufacturers to have “safety management systems” in place, which is something already required of airlines and is intended as a systematic way to help mitigate risk. The special committee also recommended that the FAA “acknowledge the international profile of operators” of U.S. aircraft and make changes to its certification process to account for “differences in operations, training, and oversight.”

The FAA noted that it will be involved in an International Civil Aviation Organization panel on pilot training standards. The FAA will also work with other countries and international organizations to review current regulations and standards related to the “human-machine interface,” such as pilot interaction with automated systems. New guidance will deal with assumptions about how pilots respond to multiple problems in flight, as the pilots did in the Ethiopian Airlines and Lion Air 737 MAX incidents.

The FAA also wants to re-charter a team of U.S., EU, Canadian and Brazilian experts to recommend ways to address any “regulatory and/or policy gaps” around products like the 737 MAX that are considered updated versions of previous models. Finally, FAA noted that it has created an office to oversee its Organization Designation Authorization program, as mandated by the most recent FAA reauthorization. One of the office’s goals is to “address concerns regarding the potential for undue pressure on ODA units” — which has been a key concern among lawmakers.

EASA AND ECDC PUBLISH COVID-19 HEALTH SAFETY PROTOCOL

On May 21, 2020, the European Union Aviation Safety Agency (EASA) and the European Centre for Disease Prevention and Control (ECDC) published a new COVID-19 Aviation Health Safety Protocol, a set of technical health and safety guidelines for the aviation sector during the pandemic, [available here](#). These guidelines had previously been announced as forthcoming by the European Commission in its *Guidelines on the Progressive Restoration of Transport Services and Connectivity* of May 13, 2020.

EASA and ECDC emphasize that basic public health precautions remain the principal line of defense against COVID-19 transmission in air transportation. For travelers, social distancing of 1.5. meters or greater is recommended

wherever possible, along with hand hygiene, avoiding unnecessary contact with surfaces, respiratory etiquette (e.g., covering coughs and sneezes), and mandatory wearing of masks from the moment travelers enter the terminal building, through flight, and until the time they leave at their destination. Airport authorities are encouraged to intensify cleaning of high touch surfaces, optimize ventilation, discourage congregation by travelers, use non-contact check-in methods, require protective equipment wearing by employees, and provide barriers between staff and the public. Aboard aircraft, air crews are encouraged to minimize contact with passengers through reduced food and beverage service, ensure maximum ventilation, conduct intensified cleaning according to best practices, and isolate passengers who exhibit COVID-19 symptoms during flight. In addition, use of passenger locator cards to collect contact tracing information is encouraged, though EASA/ECDC note that, “States will need to assess whether the transfer of passenger location data from airlines to public health authorities complies with the requirements under the General Data Protection Legislation (GDPR), taking into account the legal requirements under their national law.”

The guidelines take a cautious approach to novel technological health interventions as scientific knowledge continues to evolve. For example, “immunity passports” based on immunological testing are discouraged based on their current rates of reliability. On the issue of temperature screening, EASA/ECDC discourage the unnecessary use of public health resources on screening, noting the possibility of false positive and negative screens as well as the possibility for transmission of COVID-19 by asymptomatic travelers. Nevertheless, the guidance acknowledges that European national authorities may implement temperature screening measures in their local law, and accordingly provides recommendations such as screening travelers immediately upon entering a terminal, and not repatriating passengers on commercial flights who are stopped by entry screens.

TREASURY ISSUES GUIDANCE ON PPP LOAN FORGIVENESS

On May 16, 2020, the U.S. Department of the Treasury issued new guidance and an application form, [available here](#), regarding loan forgiveness for the Paycheck Protection Program (PPP) under the CARES Act. Borrowers who were approved for a loan under PPP can now begin applying for loan forgiveness. There are step-by-step worksheets attached to the application to calculate the various PPP loan forgiveness reductions, which will vary depending on whether the borrower met the 75% payroll spending requirement, reduced its workforce, or reduced employee salaries over the spend period.

If you have any questions about the PPP loan forgiveness program, or need assistance applying for loan forgiveness, please let us know.

TRUMP ISSUES EXECUTIVE ORDER TO PUSH FOR MORE DEREGULATION

On May 19, 2020, President Trump signed an executive order, [available here](#), calling on federal agencies to increase their deregulatory efforts and ease enforcement of existing rules to help the economy recover from the steep downturn caused by the coronavirus pandemic. The Executive Order states that “agencies should address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery.

The Executive Order further directs agencies to identify rules that could “inhibit” economic recovery and do whatever possible to repeal, waive or ease the rules for regulated businesses. Additionally, the Executive Order allows agencies to decline to pursue enforcement against any entities that tried to comply with rules but were unable because of the coronavirus. Finally, the Executive Order directs agencies to consider whether any temporary regulatory actions taken during the COVID-19 epidemic should be made permanent. The Office of Management and Budget is expected to issue a more detailed memo on how to implement the order in the coming weeks.

FAA ANNOUNCES SAFETY RATING FOR EASTERN CARIBBEAN AVIATION SYSTEM

On May 8, 2020, the FAA announced that the Organization of Eastern Caribbean States (OECS) has been assigned a Category 2 rating because it does not comply with International Civil Aviation Organization (ICAO) safety standards under the FAA's International Aviation Safety Assessment (IASA) program. The Eastern Caribbean Civil Aviation Authority (ECCAA) provides aviation safety oversight for OECS members Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, as well as St. Vincent and the Grenadines. With the Category 2 IASA rating, the OECS's carriers will be allowed to continue existing service to the U.S. but will not be allowed to establish any new service.

Under the IASA program, the FAA determines whether foreign civil aviation authorities comply with ICAO safety standards, rather than FAA regulations. A Category 1 rating means the country's civil aviation authority complies with ICAO standards and allows air carriers from that country to establish service to the United States and carry the code of U.S. carriers. A Category 2 rating means that laws or regulations lack the necessary requirements to oversee air carriers in accordance with minimum international standards, or that civil aviation authorities are deficient in one or more areas, including technical expertise, trained personnel, record-keeping, inspection procedures or resolution of safety concerns.

REMINDER: NY SHIELD ACT BECAME FULLY EFFECTIVE ON MARCH 21

Below are the important provisions of this expensive state privacy law:

- **Notification Requirements:** When a private entity suffers a data breach, it must notify the following groups: 1) The affected NY residents; 2) The NY Attorney General; 3) The NY Division of State Police; and 4) The Department of State's Division of Consumer Protection.
 - "Private Information" includes biometric information, e-mail addresses and corresponding passwords or security questions and answers, and financial account numbers and security codes;
 - "Breach" now includes any unauthorized "access" to personal information; and
 - The Act applies to any "person or business," whether conducting business in New York or not, that owns or licenses private information of a New York resident.

- **Proactive Measures:** Any person or business in possession of New York residents' private information must take *proactive measures* to protect such information by developing and implementing "...reasonable safeguards to protect the security, confidentiality and integrity of the private information." This includes:
 - Designating an employee or employees to coordinate a data security program;
 - Training employees on data security practices and procedures;
 - 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.

- **Shield Act Penalties:**
 - The Act doubles the penalty recoverable by the Attorney General for failing to make the proper notifications, from \$10 to \$20 per instance, while increasing the cap from \$100,000 to \$250,000.
 - Imposes a new civil penalty of up to \$5,000 per violation of the new security program standards.

SETTLEMENT AGREEMENT BETWEEN THE U.S. DEPARTMENT OF THE TREASURY'S OFFICE OF FOREIGN ASSETS CONTROL AND BIOMIN AMERICA, INC.

On May 6, 2020 U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) announced that BIOMIN America, Inc. ("BIOMIN America"), an animal nutrition company based in Overland Park, Kansas, has paid \$257,862 to settle its potential civil liability for apparent violations of the Cuban Assets Control Regulations, 31 C.F.R. part 515 (CACR).

Specifically, OFAC alleged that between July 2012 and September 2017, BIOMIN America and its owned or controlled foreign entities engaged in sales of agricultural commodities produced outside the United States to Alfarma S.A. in Cuba without authorization from OFAC, which resulted in 44 apparent violations of § 515.201 of the CACR.

BIOMIN America could potentially have received authorization for the transactions but failed to take the steps necessary to do so. Instead, BIOMIN America developed a transaction structure that it incorrectly determined would be consistent with U.S. sanctions requirements. However, because BIOMIN America voluntarily disclosed the potential violations, OFAC determined that this constituted a non-egregious case.

ICE TO ALLOW MODIFIED COMPLETION OF I-9 FORM DUE TO THE COVID-19 EPIDEMIC

Immigration and Customs Enforcement ("ICE") recently issued guidance, [available here](#), regarding the completion of the Form I-9 in the context of COVID-19. In the guidance, ICE announced that it is suspending the requirement that certain employers physically inspect the documents that employees provide them to verify their identity and work authorization until June 19, 2020. Once employers resume normal operations, they must ask all employees who provided the documents remotely to bring them to the worksite for an in-person verification within 3 business days. United States Citizenship and Immigration Services also recently issued guidance, [available here](#), regarding List B documents which were set to expire on or after March 1, 2020, and were not otherwise extended by the issuing authority, which may be treated as if an employee presented an acceptable document under certain conditions. If you have any further questions about handling your Form I-9 during the COVID-19 epidemic, please let us know.

COURT ORDERS FAA TO MOVE ON REGULATING AIR TOURS OVER NATIONAL PARKS

On May 1, 2020, the U.S. Court of Appeals for the D.C. Circuit ordered the FAA and the National Park Service (NPS) to comply with a law passed in 2000 that seeks to strengthen oversight of air tours at national parks. The court said NPS and FAA have two years to require parks with commercial sightseeing flights to have management plans or voluntary agreements establishing rules with all of their operators. The lawsuit, brought by the groups Public Employees for Environmental Responsibility (PEER) and Hawaii Island Coalition Malama Pono, asked the court to order mandatory deadlines for adoption of air tour limits covering seven national parks as the FAA and NPS have allegedly failed to do so since the law was passed.

FAA CIVIL PENALTIES AND CERTIFICATE ACTIONS

Below is a short summary of recent certificate actions taken by the FAA:

- On May 8, 2020 the FAA announced that it issued an emergency order revoking the repair station certificate of Ecolift Corporation of San Juan, Puerto Rico. The FAA alleges that Ecolift repeatedly performed aircraft maintenance work that it was not authorized to perform. The FAA also alleges that Ecolift failed to properly document maintenance, allowed an unauthorized person to sign off on approving aircraft for return to service following maintenance work, and failed to provide sufficient workspace and areas to properly segregate, identify, store and protect articles that were undergoing maintenance. Prior to discovering the above-referenced alleged violations, the FAA had identified earlier instances where Ecolift performed unauthorized maintenance work and had worked with the company to develop a corrective action plan to address this issue. However, during investigations in 2018 and 2019, the FAA notified Ecolift that it was still violating federal aviation regulations by continuing to perform unauthorized work. Ecolift has surrendered its certificate.

- On May 8, 2020, the FAA announced that it issued an emergency order revoking the aviation maintenance technical school certificate of Florida-based Boynton Beach Community High School. The FAA alleges the school, which taught airframe maintenance: i) failed to include the required 750 hours of instruction; ii) failed to maintain a list of the names and qualifications of its specialized instructors; iii) failed to maintain documentation showing it gave appropriate tests to students, and failed to maintain attendance, transcript and progress records; iv) had unusable and unsafe classrooms; and v) continued to provide instruction to students despite the failure to comply with regulatory requirements. The school has surrendered its certificate.
- On May 8, 2020, the FAA announced that it has issued an emergency order revoking the repair station certificate of Elite Aviation Services of Springdale, Arkansas. The FAA alleges Elite Aviation Services improperly installed instrument lighting, navigation, autopilot and flight control systems on a Cessna 182 airplane during maintenance work. FAA also alleged that Elite falsified maintenance records by stating it had performed this work according to specified data and required standards when it knew that was not the case. Elite is also alleged to have improperly installed cockpit lighting, luminescent light strips, a pitch trim switch and propeller and carburetor heat-control cables, and performed unauthorized modifications to the pilot subpanel structure. The improper maintenance performed by Elite rendered the aircraft un-airworthy under FAA regulations. Elite Aviation Services surrendered its certificate.
- On May 7, 2020, the FAA proposed a \$1,291,621 civil penalty against the City of Chicago Department of Aviation for alleged violations of aircraft rescue and firefighting regulations. The FAA alleges that between April and August 2019, three firefighters at O'Hare were assigned to a High Reach Extendable Turret vehicle but had not completed required training on operating the turret. The FAA also alleges that one of the firefighters falsified 13 training log entries to make it appear he had completed the training. Additionally, it is alleged that a captain was assigned to a vehicle for two shifts when she had not completed required recurrent training, and that the firefighter also accessed the airfield during nine shifts when she was not properly badged or under proper escort. Finally, the FAA alleges that the Chicago Department of Aviation failed to properly maintain the required training records.
- On May 22, 2020, the FAA proposed a \$67,050 civil penalty against Wing Over L.A., of Van Nuys, Calif., for allegedly violating drug and alcohol testing regulations. The FAA alleges the commercial air tour company failed to administer pre-employment drug tests and receive verified negative results for six employees between May 1, 2018 and Sept. 13, 2019. Additionally, the FAA alleges that the safety-sensitive employees performed maintenance and preventive maintenance on aircraft used for the commercial air tour operations when they were not subject to random drug and alcohol testing. Wings Over L.A. has 30 days after receiving the FAA's enforcement letter to respond to the agency.
- On May 20, 2020, the FAA proposed a \$5.89 million civil penalty against Humes McCoy Aviation of Atlanta, Ga., for conducting hundreds of allegedly illegal charter flights. The FAA alleges Humes McCoy operated a total of 270 illegal cargo flights in 2017, 2018 and 2019. The flights were illegal because the company did not have a commercial operating certificate, advertised and offered to perform operations that required such a certificate, received compensation for the flights, and used pilots who had not passed required tests and flight-competency checks, the FAA alleges. Additionally, the FAA alleges that the Humes McCoy did not have an approved pilot training program and hazardous materials training program and failed to provide initial and recurrent hazardous materials training to all its crew members, which are required for those types of operations. Finally, the FAA alleges that the 270 flights were careless or reckless so as to endanger lives or property. Humes McCoy has 30 days after receiving the FAA's enforcement letter to respond to the agency.

This Aviation Regulatory Alert 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 Evelyn Sahr at esahr@eckertseamans.com or 202.659.6622, Drew Derco at dderco@eckertseamans.com or 202.659.6665, or Andy Orr at aorr@eckertseamans.com or 202.659.6625.