November 2020 Aviation Regulatory Update

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DOT ISSUES FINAL RULE DEFINING UNFAIR OR DECEPTIVE PRACTICES

On November 27, 2020, the U.S. Department of Transportation ("DOT" or "Department") issued a final rule, available here, codifying the longstanding definitions of "unfair" and "deceptive" practices, and making other substantive changes, with regard to the Department's aviation consumer protection regulations. The rule is intended to "provide regulated entities and other stakeholders with greater clarity and certainty about the Department's interpretation of unfair or deceptive practices and the Department's process for making such determinations in the context of aviation consumer protection rulemaking and enforcement actions." Under the final rule:

- A practice is "unfair" to consumers if it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition;
- A practice is "deceptive" to consumers if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer's conduct or decision with respect to a product or service;
- Proof of intent is not necessary to establish unfairness or deception;
- For future discretionary rulemakings, if the Department proposes that a practice is unfair or deceptive, and the rulemaking raises scientific, technical, economic, or other factual issues that are genuinely in dispute, then interested parties may request an evidentiary hearing to gather evidence on those disputed issues of fact;
- Before DOT determines how to resolve a matter involving a potential unfair or deceptive practice, DOT must provide an informal opportunity for the alleged violator to be heard and to present relevant evidence in its defense; and
- When DOT issues a consent order declaring that a practice is unfair or deceptive, and no specific regulation specifically applies to the conduct at issue, DOT must explain the basis for finding that the conduct was unfair or deceptive, using the definitions set forth in the rule;

The rule will become effective on December 27, 2020.

DELTA AND WESTJET FILE OBJECTION TO DOT SHOW CAUSE ORDER AND WITHDRAW APPLICATION FOR ANTITRUST IMMUNITY

On November 20, 2020, Delta Air Lines and WestJet jointly filed an objection to DOT's Show Cause order regarding the tentative grant of approval, subject to certain conditions, of antitrust immunity for the proposed alliance between the two airlines. Delta and WestJet claimed that the conditions DOT placed on the tentative grant of approval were arbitrary and capricious, unreasonable, and unacceptable, and therefore Delta and WestJet withdrew their application and asked the

Department to dismiss the proceeding and close out the docket. Specifically, Delta and WestJet took issue with: i) requiring that WestJet divest 100% of its slot portfolio at LaGuardia Airport ("LGA"), or else requiring Delta to divest an equivalent set of eight slot pairs from its own LGA slot portfolio; ii) requiring that WestJet's Swoop affiliate and parent company be carved out from the joint venture; and iii) requiring that WestJet interline upon request with all other U.S. airlines besides United.

PANYNJ FILES COMMENT ON ANTI-TRUST IMMUNITY APPROVAL FOR DELTA AND WESTJET ALLIANCE

While the Port Authority of New York and New Jersey's (PANYNJ) comments are moot because Delta and WestJet have withdrawn their application, we have included a summary of the comment because it is significant that PANYNJ filed a comment on the application. On November 20, 2020, PANYNJ filed a comment regarding the Department's tentative grant of approval, subject to certain conditions, of antitrust immunity for the proposed alliance between Delta Air Lines and WestJet. As part of DOT's tentative approval, DOT "identified likely competitive harm that stems from the proposed transaction's impacts at LGA and believes a divestiture of [16] LGA slots equivalent to WestJet's current holdings is required to address the harm." As the operator of LGA, PANYNJ's comments generally supported: i) the requirement that WestJet divest 16 slots at LGA; ii) the new entrant eligibility threshold of no greater than 10 percent of LGA slots; and iii) DOT's plan to review this decision in five years. PANYNJ also recommended that: i) the single 16-slot bundle divested by WestJet be divided into two 8-slot bundles; ii) that DOT provides a reasonable window of time between the transfer of awarded slots and expected commencement of air carrier operations; and iii) that DOT limit eligibility of the divested slots to low cost and ultra-low cost carriers.

FAA: FEDERAL GUIDANCE TO FLY HEALTHY THIS HOLIDAY SEASON

On November 12, 2020 the Federal Aviation Administration, Centers for Disease Control and Prevention, Transportation Security Administration, and U.S. Customs and Border Protection collaborated on guidance supporting recommendations for passengers on how to Fly Healthy this holiday season. The portal itself provides advice on: plan your travel; at the airport; aboard the aircraft; arrival at your destination, and returning home.

Likewise, additional information can be retrieved to protect airline passengers, crew, and other airport works through the Runway to Recovery publication – a joint guidance initiative from the Departments of Homeland Security, Transportation, and Health and Human Services.

HOUSE ADVANCES FAA REFORM BILL AFTER 737 MAX CRASHES

On November 17, 2020, House lawmakers approved bipartisan legislation, H.R. 8408 (Aircraft Certification Reform and Accountability Act), mandating tighter controls on the FAA's aircraft certification process after two deadly Boeing 737 Max crashes exposed gaps in the government's oversight and jet makers' outsized role in vetting their own aircraft safety.

This bill would:

1. Require FAA to revise and improve how it issues amended type certificates of older airplane designs, and it would introduce another layer of oversight for the FAA's Organization Designation Authorization program, which delegates certain segments of the aircraft certification process to the plane makers themselves;
2. Require FAA to approve any new employees who are selected by the manufacturers to perform delegated tasks under the ODA program;
3. Establish an expert review panel to evaluate Boeing's safety culture and to make recommendations for improvements;

4. Demand more transparency from transport-category aircraft manufacturers, like Boeing
5. Incorporate recommendations from the National Transportation Safety Board requiring FAA to:
    a. Rework its existing assumptions to more sufficiently account for a variety of in-flight emergency situations;
    b. The different levels of pilot training; and,
    c. How pilots are expected to interact with highly automated and complex aircraft-handling systems that have become more common in newer jets like the 737 Max.

In addition to the bill being passed in the House, the FAA also published a notice of proposed rulemaking in August for an airworthiness directive that will mandate a number of design changes to the Boeing 737 Max before it returns to passenger service.

FAA WARNS ON AIRCRAFT DISINFECTION RISKS

On November 5, 2020, the FAA called to attention risks that disinfection products can have on aircraft interiors urging operators and maintainers to heed manufacturers' guidance and take extra steps to protect sensitive equipment, wiring, and other high-risk components. According to the FAA, they acknowledge the Environmental Protection Agency's publication regarding a list of disinfectants effective at inactivating COVID-19, but also note that they may not be suitable for aircraft, except in very limited and localized application.

Specifically, the agency's area of concern: fogging and misting allows disinfectant to penetrate areas where it could create problems, such as underlying structure or fan-cooled electronics. The FAA recommends electrostatic spraying over fogging, because sprayers offer more directional control.

The FAA also advised increased inspections for corrosion in any areas where disinfectants are used. It notes that any procedure that creates pools of liquid should be avoided, as the "liquids can intrude into flight deck switches and seals…excessive liquid intrusion can lead to electrical shorts in the near term and unexpected corrosion in the long term."

FEDERAL COURT GRANTS SNAP REMOVAL OF SOUTHWEST AIRLINES CASE

On November 8, 2020, the United States District Court for the Northern District of Texas approved the "snap removal" of a Texas state court case filed against Southwest Airlines. The case relates to allegations that Southwest negligently breached several duties during Southwest Airlines Flight 1380's engine-failure incident in April 2018. The plaintiff originally filed the suit in Texas state court, but the next day before service had been effected, Southwest, despite being the sole defendant and a citizen of the forum, removed the case to federal court on the basis of diversity jurisdiction. Typically, 28 U.S.C. 1441(b)(2), the forum defendant rule, prohibits removal solely based on diversity jurisdiction "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought", which Southwest was in this case. For this reason, the plaintiff filed a motion to remand the case to state court, claiming the removal was improper under 28 U.S.C. 1441(b)(2). However, the district court found that "snap removal", which essentially allows a state-court defendant to circumvent the forum-defendant rule by removing cases to federal court on diversity grounds almost immediately after a plaintiff files in state court but before the plaintiff formally serves the defendant is unambiguously allowed by the plain language of the statute.

9TH CIRCUIT SKEPTICAL OF AIRLINES FOR AMERICA PREEMPTION ARGUMENT

On November 17, 2020, a federal judge for the U.S. Court of Appeals for the 9th Circuit questioned Airlines for America's argument that Washington state law regarding paid sick leave is preempted by federal law, asking the lobbying group to

explain why a 2014 9th Circuit ruling on preemption does not preclude their argument. In the 2014 *Dilts v. Penske Logistics LLC* decision, the 9th Circuit held that the California meal and rest break laws were not preempted by the FAA Authorization Act because the state laws did not directly or indirectly address or mandate airline prices or routes. In the current Airlines for America case, the judge asserted that Washington's Paid Sick Leave Act, enacted in 2016 and which established a uniform minimum wage across the state and also required that employers give out dedicated paid sick leave, also does not involve airline prices, routes, or services. Airlines for America is arguing that the Washington law is preempted by the Airline Deregulation Act and the U.S. Constitution because the law affects interstate commerce in the sense that airline workers taking this additional sick leave can have substantial effects on flight delays and cancellations. The current arguments were part of Airlines for America's appeal of a district court decision upholding the Washington law. The 9th Circuit has not yet issued a ruling in this appeal.

DOT GRANTS BLANKET EXEMPTION RENEWAL FOR FOREIGN AIR CARRIERS IN THE STATE OF ALASKA

On November 10, 2020, DOT issued a Notice of Action Taken, available here, regarding the State of Alaska's request for renewal and amendment of certain blanket exemption authority to foreign air carriers, for a two-year term, to conduct certain cargo/passenger transfer and other services at Ted Stevens Anchorage International Airport and Fairbanks International Airport. Alaska also requested that DOT renew the exemption authority to allow all foreign air carriers to serve any point or points in Alaska, and to coterminalize points in Alaska with other U.S. points for which they hold Department authority. DOT granted Alaska's request with the condition that DOT will not permit: (1) the carriage of traffic by a foreign air carrier, in its own name and under its code, from any point in the carrier's homeland to a point in the United States not otherwise authorized by the Department from that homeland point; (2) the carriage of traffic by a foreign air carrier, in its own name and under its code, from any third country point to a point in the United States except as otherwise authorized by the Department; (3) code-share operations to U.S. points unless both carriers otherwise hold Department authority between the points involved and the requisite Statement of Authorization; and (4) cabotage operations.

CRUISE INDUSTRY VOLUNTARILY EXTENDS NO-SAIL BEYOND CDC'S RESTART TIMELINE

The U.S. cruise industry has decided to voluntarily extend the timeline for restarting operations beyond the date set by the CDC. After push back from the Trump administration, the CDC set the date for resuming cruise operations as of October 31, 2020 instead of their initially recommended date of February 15, 2021. After the CDC announcement, the Cruise Lines International Association, a cruise industry trade group, stated that the October 31, 2020 restart date was too soon, and would not give cruise lines enough time to prepare for the planned changes to testing, sanitation and health care protocols. For this reason, according to the group's November 3, 2020 statement, available here, the industry has decided not to resume operations until December 31, 2020. However, it is still unclear whether the incoming Biden administration will resume a ban on cruise operations in response to the ongoing COVID-19 pandemic.

SERVICE ANIMAL RULES GOES TO OMB FOR REVIEW

On November 4, 2020, the DOT sent the final rule regarding "Traveling by Air With Service Animals" to OMB for review. While it is not yet clear what provisions will be included in the final rule, the proposed rule, issued in February 2020, contained the following provisions:

- Defined "Service Animal" as a "dog that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability; Psychiatric service animals treated the same as other service animals

- Carriers would not be required to recognize “emotional support animals” as “service animals” and may limit service animals to dogs.
- Passengers could be required to complete an Animal Air Transportation Health Form, or an Animal Relief Attestation on flights eight hours or longer, as a condition of transportation.
- Carriers would be permitted to limit the number of service animals traveling with a single passenger to two service animals, and require that both fit on their handler's lap and/or within their handler's foot space on the aircraft
- Carriers would be permitted to require that a service animal be harnessed, leashed, tethered, or otherwise under the control of its handler
- Carriers would be prohibited from refusing to transport a service animal based solely on breed or generalized physical type, as distinct from an individualized assessment of the animal's behavior and health.
- Carriers that require a passenger with a disability to check-in at the airport prior to the travel time required for the general public would be required to make an employee available promptly to assist the passenger with the check-in process

OMB has up to 90 days to review the rule.

UPDATE TO CBP CTPAT’S VALIDATION PROGRAM

On November 6, 2020, the director of CBP’s Customs-Trade Partnership Against Terrorism (CTPAT), Manuel A. Garza, Jr. circulated a letter to its members, available here, regarding updates to their virtual validation test, annual requirements, and virtual training and outreach materials.

Until further notice, all on-site validations will be deferred and will resume normal operating procedures once conditions permit. In the meantime, the program intends to move forward using a virtual validation platform to be able to validate CTPAT partners.

With regards to CTPAT’s long-standing program policy, partners have been notified of the annual requirement to update their security profiles 90 days prior to the CTPAT account’s anniversary day. For inquiries regarding extensions granted, CTPAT encourages its members to answer the security profile to the best of their ability and submitting it. Supply Chain Security Specialists (SCSS) will review and assist any partners to the best of their ability as well.

Lastly, training and outreach materials can be located in the Public Documents/Public Library section of the CTPAT Portal. These materials include, but are not limited to, CTPAT Alerts on topics related to cyber security and on the need for companies to have a Code of Conduct in place, as well as several CTPAT videos uploaded to the CBP YouTube channel as additional training support resources.

CUSTOMS AND BORDER PROTECTION SET TO REQUIRE NONCITIZENS TO SUBMIT TO FACE SCANS AT PORTS OF ENTRY

On November 19, 2020, U.S. Customs and Border Protection (CBP) issued a Notice of Proposed Rulemaking, “Collection of Biometric Data from Aliens Upon Entry to and Departure from the United States,” available here. DHS is required by statute to develop and implement an integrated, automated entry and exit data system to match records, including biographic data and biometrics, of aliens entering and departing the U.S. However, under current regulations, CBP may only conduct pilot programs to collect biometrics at exit at a limited number of air and seaports and may only collect biometrics from a limited population. The proposed rule would amend the DHS entry/exit regulations to eliminate references to pilot programs and the port limitation to permit the collection of photographs or other biometrics from non-U.S. travelers departing from airports, land ports, seaports, or any other authorized point of departure. The proposed rule

would also amend the DHS entry/exit regulations requiring foreign travelers to provide photographs upon entry to and/or departure from the United States. In the initial stage of implementation, CBP plans to expand its facial recognition system to commercial airports, but will eventually establish a biometric entry-exit system at all air, sea, and land ports of entry. Finally, U.S. citizens may voluntarily opt out of participating in CBP's biometric verification program.

COMPANIES COULD FACE HEFTY FINES UNDER NEW CANADIAN PRIVACY LAW

On November 17, 2020, Innovation Minister Navdeep Bains introduced the Digital Charter Implementation Act as an "Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts." If the bill passes in Canada, companies could face fines of up to five per cent of global revenue or $25 million – whichever is greater for the most serious offenses.

This legislation would:

1. Give the federal privacy commissioner order-making powers, including the ability to force an organization to comply and to order a company to stop collecting data or using personal information;
2. Provide the commissioner with the ability to recommend fines to a new Personal Information and Data Protection Tribunal; and,
3. Give Canadians the option of demanding that their personal online information be "destroyed."

If the draft legislation passes, companies would have to obtain consent from customers through plain language and "not a long, jargon-filled legal document" before using their personal data.

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