

## November 2021 Aviation Regulatory Update

By Evelyn D. Sahr, Drew M. Derco and Alexis George

### U.S. ANNOUNCES TRAVEL BAN FOR EIGHT AFRICAN COUNTRIES IN RESPONSE TO THE DISCOVERY OF NEW OMICRON COVID-19 VARIANT

On Friday, November 26, 2021, the Biden administration announced its plan to re-institute a travel ban for foreign travelers to the United States coming from eight African countries, which include South Africa, Botswana, Zimbabwe, Namibia, Lesotho, Eswatini, Mozambique, and Malawi.

The U.S. decided to institute the new travel ban in response to the discovery of the new coronavirus variant, Omicron, in South Africa, which has been deemed a highly transmissible virus of concern by the World Health Organization (“WHO”). Under the new travel ban, all non-U.S. citizens who have been in any of the eight African countries listed above within the past 14 days will be banned from travel to the U.S. and all U.S. citizens, lawful permanent residents and noncitizens who are the spouses of citizens or permanent residents returning to the U.S. from these countries will have to present a negative COVID-19 test within 24 hours of departure to the U.S.

The new travel ban went into effect at 12:01 A.M. (EDT) on Monday, November 29, 2021. If you have any questions regarding the implementation of the new travel ban, please do not hesitate to contact us.

### CDC ISSUES CHECKLIST TO HELP AIRLINES DETERMINE THE VACCINE AND TESTING STATUS OF FOREIGN TRAVELERS SEEKING ENTRY INTO THE U.S.

On November 8, 2021, the U.S. Centers for Disease Control and Prevention’s (“CDC”) order requiring that all foreign travelers planning to travel to the U.S. by air provide proof of vaccination for COVID-19 and proof of a negative COVID-19 test or recovery from COVID-19, in order to gain entry into the U.S., went into effect. The CDC also issued a checklist, [available here](#), to help airline personnel in confirming proof of COVID-19 vaccination and negative qualifying test results or documentation of recovery from COVID-19 for such passengers. The checklist includes 11 steps broken down into three parts, which are summarized as follows:

#### **PART ONE:**

1. **Determine if the passenger is a Covered Individual** (i.e. any non-U.S. citizen seeking to enter the United States by air with a nonimmigrant visa; any non-U.S. citizen seeking to enter the United States by air who has been granted an Electronic System for Travel Authorization (ESTA) as part of the Visa Waiver Program; etc.).
2. **Determine if the passenger could be considered a Non-Covered Individual** (i.e. U.S. citizens; U.S. nationals; U.S. lawful permanent residents (Green Card holders); Non-U.S. citizens seeking to enter the U.S. as immigrants; Non-U.S. citizens seeking to enter the U.S. by land or sea travel, etc.).

3. **Determine if the passenger has proof of being fully vaccinated against COVID-19** (NOTE: If the passenger does not have proof of being fully vaccinated, the passenger must meet criteria for an exception to this requirement, and show appropriate documentation, in order to board a flight to the U.S).
4. **Confirm that the passenger's proof of vaccination includes all of the following information:**
  - a) The personal identifiers (full name plus at least one other identifier such as date of birth or passport number) on the proof of vaccination match the personal identifiers on the passenger's passport or other travel identification document;
  - b) The name of official source issuing the record (e.g., public health agency, government agency, or other authorized vaccine provider) is provided;
  - c) Vaccine manufacturer and date(s) of vaccination; and
  - d) The passenger meets CDC's definition of Fully Vaccinated against COVID-19.
5. **Confirm that the passenger has received an accepted type of COVID-19 vaccine.**
6. **Confirm that the passenger meets the CDC's definition of "fully vaccinated" against COVID-19** (i.e. two weeks (14 days) or more since a person received one dose of an accepted single-dose-series COVID-19 vaccine, two weeks (14 days) or more since a person's second dose in a 2-dose series of an accepted COVID-19 vaccine, etc.).

## **PART TWO**

1. **Check if the passenger intends to show a negative COVID-19 test result (option A) or documentation of recovery (option B).**
2. **To prove a negative test result under Option A:**
  - a) The test taken by the passenger must have been a viral test.
  - b) The test must include where the test was performed.
  - c) The test must show a specimen collection date one day or three days (depending on vaccination status) or less before flight departure.
  - d) The test must include information that identifies the person.
  - e) The test result must be negative.
3. **To show documentation of recovery from COVID-19 under Option B:**
  - a) The test taken by the passenger must have been a viral test.
  - b) The test must include where the test was performed.
  - c) The test must show a specimen collection date within the last 90 days.
  - d) The test must include information that identifies the person.
  - e) The test result must be positive.
  - f) The passenger must also have a signed letter stating that the passenger is cleared for travel (i.e. from a licensed healthcare provider/public health official, signed on letterhead, etc. This can also be a letter that shows that the person is cleared to end isolation).

**PART THREE**

1. **Ensure that all Covered Individuals (i.e., noncitizen, nonimmigrant) have completed and signed Section 1 AND Section 2 of the Combined Passenger Disclosure and Attestation.**
2. **Ensure that all Non-Covered Individuals (i.e., U.S. Citizens, U.S. Nationals, Lawful Permanent Residents, Immigrants, etc.) two years of age or older have completed and signed Section 1 of the Combined Passenger Disclosure and Attestation.**

In addition to the checklist summarized above, the CDC has also issued scripts in 11 languages including Amharic, Bengali, English, French, German, Hindi, Japanese, Portuguese (Brazilian), Russian, Simplified Chinese, and Spanish. The CDC recommends that airline personnel use these scripts with passengers during boarding and upon arrival to ensure that passengers are reminded of the combined vaccine and testing order compliance checks.

**OSHA ISSUES ETS ON VACCINE & TESTING REQUIREMENTS FOR EMPLOYERS WITH MORE THAN 100 U.S. BASED EMPLOYEES**

On November 4, 2021, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") released an Emergency Temporary Standard (the "ETS") requiring that employers with 100 or more employees implement vaccination and testing protocols by January 4, 2022. The rule was originally announced in early September by the Biden administration and calls for all private employers with 100 or more employees to implement procedures that would require their employees be fully vaccinated against COVID-19 or submit to weekly testing and wear a face covering at all times while at work if they choose to remain unvaccinated. Employers would also be required to determine the vaccination status of all employees and require employees to show acceptable proof of vaccination status. The rule also includes a proposed penalty of up to \$14,000 per violation in instances in which a business is found to be noncompliant.

The rule, as written, is unclear regarding the ETS' applicability to airline personnel in the scenario where a foreign air carrier has more than 100 employees globally, but fewer than 100 employees in the United States. It is also unclear whether the ETS could potentially apply to crewmembers who are operating aircraft to/from the United States, although we believe it unlikely the ETS would apply to such employees. We are actively working to clarify these issues with OSHA and via the International Air Transport Association and will keep our readers updated as to any new developments.

In the meantime, however, it is important to note that on November 6, 2021, the Fifth Circuit Court of Appeals issued an order blocking enforcement of the ETS due to legal challenges brought by various companies, individuals, and officials in several states against the Biden administration. Critics of the rule question its constitutionality, specifically, whether the rule exceeds the federal government's authority under the Commerce Clause and whether it impedes upon U.S. citizens' civil liberties. Critics have also noted that enforcement of the rule may cause workforce related issues such as strikes and labor shortages due to employees potentially choosing to leave their jobs as opposed to adhering to the vaccination requirement. The effect of the Court's ruling is that the ETS is not currently in effect and as of now will not be enforced after the January 4, 2022 compliance deadline.

In the last few weeks, various entities also filed petitions for review of the ETS in 11 of the 12 U.S. Circuit Courts of Appeal. As a result, on November 16, 2021, the Judicial Panel of Multidistrict Litigation consolidated all petitions for review of the ETS, which includes the Fifth Circuit's ruling, before the U.S. Court of Appeals for the Sixth Circuit, which will now determine whether to continue the Fifth Circuit's order. The Sixth Circuit has yet to consider the issue.

**DOT PUBLISHES UPDATE REGARDING NPRM ON ACCESSIBLE LAVATORIES ON SINGLE-AISLE AIRCRAFT**

On Friday, November 19, 2021, the U.S. Department of Transportation (“DOT”) published a notice in the Federal Register announcing that it will reopen the comment period and request public comments, and hold a virtual public meeting on its notice of proposed rulemaking (“NPRM”) related to accessible lavatories on single-aisle aircraft.

DOT initially issued the NPRM on January 2, 2020 following the Architectural and Transportation Barriers Compliance Board’s (the “Access Board”) publishing of its proposed advisory guidelines for aircraft onboard wheelchairs on August 20, 2019. The NPRM proposed specific measures to improve accessibility of lavatories on single-aisle aircraft for passengers with disabilities while the Access Board’s advisory guidelines provided technical specifications for onboard wheelchairs that would serve as one means of complying with DOT’s proposed performance standards for onboard wheelchairs. More recently, DOT and the Access Board decided to re-open the public comment period and hold a joint public meeting so that both bodies can gather more information on their respective onboard wheelchair advisory guidelines and proposed onboard wheelchair performance standards.

The public comment period on the Access Board’s draft advisory guidelines for onboard wheelchairs as well as DOT’s NPRM will be re-opened on December 16, 2021 (i.e. the day of the joint public meeting) and remain open until January 17, 2022. As previously stated, the joint public meeting will take place on December 16, 2021 from 9:30 a.m. to 11:30 a.m. and 1:00 p.m. to 3:00 p.m.

**FAA PROPOSES \$120,000 CIVIL PENALTY AGAINST COMPANY FOR ALLEGED HAZARDOUS MATERIALS VIOLATIONS**

On November 19, 2021, the U.S. Federal Aviation Administration (“FAA”) announced via [press release](#) that it has proposed a \$120,000 civil penalty against Braille Battery, Inc. (“Braille Battery”) for alleged violations related to the transport of hazardous materials.

The FAA alleges that in October and November 2019, Braille Battery offered two shipments of lithium-ion batteries to FedEx to transport by air that did not meet relevant safety standards for transportation, and were therefore prohibited from being shipped by air. The FAA also alleged that it had previously informed Braille Battery of the prohibition in September 2019.

Braille Battery was previously accused of committing the same violations, and faced similar penalties, in 2016 and 2018. In the 2016 instance, the FAA issued Braille Battery an Emergency Restriction/Prohibition Order, which barred Braille Battery from shipping prohibited batteries by air that did not meet required safety criteria. Following this, in 2018 the FAA ordered Braille Battery to pay a \$235,000 civil penalty. In the current case, Braille Battery has yet to respond.

**FAA PROPOSES A \$341,893 FINE AGAINST 93 AIR FOR ALLEGED ILLEGAL CHARTER OPERATIONS**

On November 19, 2021, the U.S. Federal Aviation Administration (“FAA”) issued a [press release](#) announcing that it has proposed a \$341,893 civil penalty against 93 Air, a Nebraska-based company, for allegedly conducting 32 illegal charter flights in 2018 and 2019.

Specifically, the FAA alleges that 93 Air conducted the paid passenger-carrying flights between October 2018 and September 2019 in a single-engine Pilatus PC-12/45 despite not having a required air carrier certificate or

operations specifications to carry out the flights. The FAA also alleges that 93 Air employed unqualified pilots to operate the flights who had not completed FAA-required training, testing and competency checks. 93 Air has not yet responded to the proposed civil penalty.

## **FAA REFERS 37 UNRULY PASSENGER CASES TO DOJ FOR POTENTIAL CRIMINAL PROSECUTION**

On Thursday, November 4, 2021, the U.S. Federal Aviation Administration (“FAA”) announced that it has referred 37 cases involving egregiously unruly behavior by airline passengers to the U.S. Department of Justice (“DOJ”) as it believes the cases meet the standard for potential criminal prosecution.

In determining whether to criminally prosecute unruly passengers, DOJ considers a number of factors including, but not limited to, the egregiousness of the offense, the victim impact, if lives were in danger, and mental health. Additionally, before prosecuting unruly passengers, DOJ has said it also considers factors including whether the aircraft had to make an unscheduled landing, if the offense committed is a repeat offense, and if there are any other mitigating factors.

According to the FAA, there have been 5,033 reported unruly passenger incidents this year, 3,642 of which were related to mask compliance. FAA has also initiated 950 investigations for unruly passenger incidents, and to date, has initiated enforcement action in 227 cases year to date. Comparatively, the DOJ has criminally charged 25 defendants for interfering with flight crewmembers over the last year.

This all comes months after the FAA’s implementation of its “zero tolerance” policy aimed at deterring bad behavior by passengers aboard airplanes and repeated requests for the DOJ to be more involved in unruly passenger cases by taking more aggressive actions, including criminally prosecuting unruly passengers.

## **FAA IMPOSES OVER \$225K IN FINES AGAINST PASSENGERS FOR ALLEGED UNRULY BEHAVIOR INVOLVING PHYSICAL ASSAULT**

The FAA recently announced via [press release](#) that it has proposed \$225,287 in civil penalties against ten airline passengers for alleged unruly behavior that involved physical assault of other passengers or crewmembers. The FAA also reported that since January 1, 2021, it has received more than 100 reports of unruly behavior that involved physical assault, which is strictly prohibited under federal law. The breakdown of cases and fines are as follows:

- \$32,000 against a passenger who allegedly failed to follow crew instructions to fasten her seatbelt, and punched and screamed at her husband and son, repeatedly, causing a diversion of flight attendants from their duties. The passenger also allegedly threw trash at a flight attendant, and snatched cookies from a nearby passenger.
- \$20,000 against a passenger who allegedly yelled orders at multiple flight attendants while the plane taxied from the gate. According to the FAA, the passenger also removed his seatbelt, left his seat while the fastened seatbelt sign was on, and refused to return to his seat after a flight attendant instructed him to do so. He also threatened a flight attendant and while moving up and down the aisle during taxiing, he made physical contact with a flight attendant, and continued yelling profanities. The flight returned to the gate and law enforcement officers were forced to board the flight to remove the passenger.

- \$26,787 against a passenger who allegedly, during final descent and despite crew instruction to remain seated, left his seat and attempted to enter the cockpit. Additionally, while the aircraft braked during touch down and flight attendants attempted to hold him down to keep the passenger from injuring himself; the passenger began punching one of the flight attendants, which resulted in the flight attendant needing medical attention.
- \$25,000 against a passenger who allegedly refused crew instruction to stow her carry-on luggage in the overhead bin. According to reports, the crew instructed her to exit the aircraft and speak with ground station personnel, and ground station personnel informed her that she could not continue with the flight. Upon re-boarding the aircraft to collect her carry-on luggage, the passenger sat in a seat, held onto the armrest, shouted loudly and aggressively, and used derogatory language and obscene gestures towards a crewmember. Additionally, as she disembarked, the passenger broke loose from a travel companion's grip and spat on a crewmember.
- \$24,000 against a passenger who allegedly failed to follow crew instruction to wear her facemask during boarding. According to reports, the passenger and her travel companions were also disruptive while the aircraft stayed at the gate due to a minor mechanical issue, causing several passengers to request a seat reassignment to avoid the group. Additionally, after the captain requested to remove the passenger from the aircraft, the passenger physically assaulted a flight attendant by shoving her in the chest.
- \$24,000 against a passenger for failing to comply with the facemask policy and intentionally elbowing a flight attendant and later kicking him.
- \$24,000 against a passenger who refused to follow crew instruction to wear a mask, threatening crewmembers, cursing at crewmembers, and shoving a crewmember.
- \$23,000 against a passenger who verbally abused flight attendants after she realized her assigned seat would not recline. Even after agreeing to switch seats with another passenger, the passenger continued to verbally abuse flight attendants and then struck a flight attendant on the right forearm and continued to try to strike the flight attendant several times thereafter.
- \$17,500 against a passenger who used profane language and physically assaulted a flight crewmember.
- \$9,000 against a passenger who stomped and/or kicked the feet of the passenger seated behind him.

## **FAA PROPOSES RULE THAT WOULD REQUIRE COMMERCIAL HOT-AIR BALLOON PILOTS TO GET MEDICAL CERTIFICATES**

On Tuesday, November 2, 2021, the FAA issued a notice confirming that it plans to propose a new rule requiring commercial hot-air balloon pilots to hold medical certifications when operating hot-air balloons for hire. Specifically, under the proposed rule, there would be a mandate that pilots hold a second-class medical certificate, which is the same standard currently in place and required for commercial pilots.

Hot-air balloon pilots are currently exempt from the medical requirements imposed on other commercial aircraft pilots. However, under the 2018 FAA Reauthorization Act, Congress directed the FAA to revise the medical certification standards for commercial balloon pilots. In response, in recent years the FAA has taken steps to increase the safety of hot-air balloon tourism by working with the Balloon Federation of America ("BFA"), which is why the FAA is considering certain new safety-focused rules as it relates to hot-air balloon travel. According to the FAA, the reasoning behind the new proposed rule is that hot-air balloon pilots are responsible for the safety of their passengers just as commercial pilots are, and therefore, the proposed rule would ensure that hot-air balloon pilots meet the same standard of medical requirements as pilots of other commercial aircraft.

The FAA plans to publish a draft of the proposed rule in the Federal Register sometime this month.

**21 AIR LLC FILES ANSWER TO ALPA PETITION IN HOPES OF OBTAINING A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

On Monday, November 1, 2021, 21 Air, LLC's ("21 Air") published its answer to the Air Line Pilots Association, International's ("ALPA") petition, in which ALPA requested that DOT review its decision to approve 21 Air's certificate of public necessity for foreign charter cargo air transportation because it believed that 21 Air's proposed operations would constitute illegal cabotage. In its answer, 21 Air requested immediate dismissal of the petition.

In late September, 21 Air filed an application for a certificate of public necessity for foreign charter cargo air transportation with DOT so that it could expand its fleet authorization from 5 aircraft to 10 aircraft, and so that it could expand its services and partners, which would include a more extensive relationship with Cargojet, a Canadian cargo carrier. In response, ALPA filed a petition with DOT on October 22, 2021, requesting reconsideration or review of its approval of 21 Air's request in a public, docketed proceeding because the matter raised "novel and unprecedented public interest issues involving potential prohibited cabotage and violation of US ownership and control rules." ALPA also alleged that in its view, DOT should question 21 Air to ensure that U.S. aviation regulations are upheld, as it believed 21 Air was attempting to violate rules requiring the prohibition of actual control of a U.S. carrier by a foreign entity and/or nationals and the rules prohibiting cabotage. ALPA followed this with a Supplement to its Petition on October 28, 2021, in which it submitted a letter from ALPA's president to the Secretary of Transportation requesting that the Department review 21 Air's petition again as it believed there is a potential "loophole" in DOT regulations that could allow cabotage by a foreign operator that has financial and operational control of a U.S. carrier.

In its answer, 21 Air put forth several arguments as to why the Department's approval of its application was well founded, including:

- a) The fact that 21 Air is a U.S. company that is 75% owned by a U.S. citizen;
- b) The Department's Fitness Office had already reviewed 21 Air and its transactions and found no issues warranting the denial of its application;
- c) ALPA was engaging in a "transparent and pernicious attempt to reduce American cargo capacity and jobs for U.S. pilots" even as the U.S. is currently facing supply chain issues and is about to enter the holiday season; and
- d) By expanding its fleet as it requested in its application, 21 Air was providing "important union jobs for American pilots."

Following 21 Air's answer, ALPA submitted a response on November 9, 2021, in which it requested that DOT require 21 Air to file additional documents and information to prove that 21 Air's proposed operations would not involve prohibited cabotage or operations that would otherwise violate U.S. ownership and control rules. In response, 21 Air filed a reply on November 19, 2021, again alleging that its application had already been thoroughly reviewed by DOT and that ALPA's claims were warrantless. DOT has yet to issue a decision concerning whether or not it will dismiss ALPA's petition as requested by 21 Air.