

## October 2021 Aviation Regulatory Update

By Evelyn D. Sahr, Drew M. Derco and Andrew Orr

### U.S. TO LIFT AIR TRAVEL RESTRICTIONS FOR FULLY VACCINATED FOREIGN TRAVELERS

On Monday, October 25, 2021, the Biden administration along with the U.S. Centers for Disease Control (“CDC”) announced further details on [their collective plan](#) to ease air travel restrictions for fully vaccinated foreign nationals beginning November 8, 2021. In addition to details on the plan, the administration also released three implementation documents including a presidential proclamation on the safe resumption of international travel, three CDC Orders on vaccination, testing, and contact tracing, and technical instructions for airlines and travelers.

Notably, there will be no standardized or digital system for airlines to use to verify if international travelers coming to the U.S. are vaccinated. Instead, carriers will be tasked with determining if passenger vaccine credentials are authentic by making a determination that they were issued by a “credible source” and have matching name and date of birth information to the passengers’ other credentials. Other changes included in the new guidelines and CDC Orders include the following: (a) a new vaccination and testing requirement, which will require that all non-citizen, non-immigrant air travelers to the U.S. show proof of full vaccination against COVID-19 before boarding a U.S.-bound flight, with limited exceptions; (b) a new testing protocol, which will require unvaccinated U.S. citizens, lawful permanent residents and a small number of excepted unvaccinated foreign nationals to show proof of a negative COVID test within one day of departure to be able to travel to the U.S. (in which case both PCR tests and antigen tests are accepted); (c) newly designated exceptions to the vaccine requirement guidelines, which includes exemptions for children under 18, people who have experienced severe anaphylactic allergic reactions to a prior COVID vaccine, and people who are travelling from countries with low availability of COVID vaccines; and (d) new requirements for contact tracing, which now include requirements that all airlines flying into the U.S. be willing and able to provide the CDC with contact information for passengers, as needed, to allow public health officials to contact inbound air travelers in the event they are exposed or potentially exposed to a person who has tested positive for COVID. According to the CDC’s Orders, accepted vaccines will include all those that have been approved or authorized by the U.S. Food and Drug Administration (“FDA”) and those designated by the World Health Organization (“WHO”) for emergency use. Both digital and paper certificates of vaccination will be accepted. Travelers from countries with low vaccine rates (i.e. those with less than 10 percent of its population vaccinated) will still need to show a “compelling reason” to avoid compliance with the new vaccine requirements. Additionally, fully vaccinated passengers, regardless of citizenship, will still be required to show proof of a negative COVID test taken no more than three days before boarding their flight to the U.S.

The U.S. government announced earlier this month that it would lift the country-based travel bans by replacing the bans with vaccine requirements for incoming passengers.

**FAA PROPOSES \$1.38 MILLION CIVIL PENALTY AGAINST CAMPBELL OIL & ASSOCIATES**

On October 8, 2021, the U.S. Federal Aviation Administration (“FAA”) issued [a press release](#), detailing its decision to propose a \$1.38 million civil penalty against Campbell Oil and other associates for allegedly conducting illegal charter flights for nearly two years.

In the press release, the FAA alleged that Campbell Oil had conducted nearly 154 paid passenger-carrying flights between April 2017 and March 2019 using multiple aircraft including two Cessna Citations and a Beechcraft King Air. The FAA also accused Campbell Oil of operating the aircraft without required FAA operating certificates or air carrier certificates, and conducting flights without necessary FAA operations specifications outlining what operations the company was authorized to perform. The FAA also alleged that Campbell Oil had employed unqualified pilots to carry out the flights who had not completed FAA-required training, testing, and competency checks.

**CDC ISSUES ORDER REQUIRING ALL FOREIGN NATIONAL EMPLOYEES PROVIDE PROOF OF COVID-19 VACCINATION TO WORK FOR U.S. EMPLOYERS**

The U.S. Centers for Disease Control (“CDC”) recently issued an Order, which went into effect on October 1, 2021, that requires all foreign nationals entering the U.S. to work for American employers provide proof of vaccination against COVID-19. The Order also requires applicants for lawful permanent resident status (i.e. “LPR” or “green card” status) to be fully vaccinated for COVID-19 with limited exceptions. The United States Citizenship and Immigration Services (“USCIS”) and the U.S. Department of State are the two bodies that will be enforcing the Order.

To comply with the new Order, foreign national employees must now provide written, documentary proof of full COVID-19 vaccination in order to obtain green cards. This means that foreign nationals applying for an adjustment of status and who are completing the required 1-693 medical screening on or after October 1, 2021, must be vaccinated or risk being denied LPR status, and that foreign nationals that are applying for an immigrant visa at a U.S. consulate abroad and who undergo a physical examination with a designated equivalent to a USCIS civil surgeon on or after October 1, 2021, must be vaccinated as well. For foreign nationals who completed a medical screening before October 1, 2021, and who have exam results that are within the validity period (i.e. typically two years with some limited exceptions), COVID-19 vaccination is not required. The Order also states that all available COVID-19 vaccinations can be administered without regard to the timing of other vaccinations required for adjustment of status and that all applicants will be required to be vaccinated regardless of evidence of prior immunity or past COVID-19 infection.

There are some blanket waivers that are permitted for certain applicants which would allow these applicants to obtain LPR status despite not being vaccinated, which include (a) a blanket waiver based on age appropriateness; (b) a blanket waiver for applicants who have a valid contraindication or precaution to the COVID-19 vaccine formulation available to them. This would require documentation of the “contraindicated” reason and would apply to applicants who suffer a severe reaction to the first dose of the vaccine that can be considered to be a contraindication to receiving a second dose; and (c) a blanket waiver for applicants who are unable to get vaccinated because no COVID-19 vaccine option is routinely available to them. This would also apply in cases where a vaccine is available to an applicant, but due to limited supply, it would cause significant delay for the applicant to receive their vaccination. Applicants may also request waivers due to religious or moral convictions. Nevertheless, if an applicant refuses the COVID-19 vaccination in part or in its entirety where they do not qualify for a waiver and where medically appropriate, the applicant’s refusal and a mark designating vaccine requirements as incomplete will be recorded.

**U.S. HOUSE APPROVES TSA ONE-STOP PILOT PROGRAM BILL**

On September 30, 2021, the U.S. House of Representatives unanimously approved the One-Stop Pilot Program Act (H.R. 4094). The Act will allow the Transportation Security Administration (“TSA”) in coordination with U.S. Customs and Border Protection to operate a pilot program in which international passengers and their baggage from up to six locations would not need to be re-screened upon arrival into the United States prior to a domestic connecting flight if the passenger’s last point of departure airport has a proportionate level of screening to the United States. Specifically, the Act will allow passengers to continue on domestic flight segments without going through additional security screenings in three circumstances:

- If an initial screening was conducted in accordance with an aviation security screening agreement;
- For passengers arriving from participating foreign airports who are unable to access their checked baggage until their arrival at their final destination; and
- Upon arrival in the U.S., for passengers arriving from participating foreign airports who do not come into contact with other arriving international passengers or those passengers’ property or other persons who have not been screened or subjected to other appropriate security controls required for entry into the airport’s sterile area.

To ensure that adequate security measures are still maintained under the pilot program, the Act will give the Administrator of the TSA the authority to determine whether checked baggage arriving from participating foreign airports must be re-screened. The Act would also give the Administrator of the TSA the authority to require that passengers and their baggage be re-screened if the Administrator determines that the foreign country from which they have departed from has not maintained and implemented adequate security standards and protocols comparable to the U.S.

The One-Stop Pilot Program Act (H.R. 4094) is now under consideration by the U.S. Senate.

**U.S. DISTRICT COURT ISSUES MOTION FOR PRELIMINARY INJUNCTION IN LAWSUIT BETWEEN SOUTHWEST AIRLINES AND KIWI.COM**

The United States District Court for the Northern District of Texas recently issued a Motion for a Preliminary Injunction in the case between Southwest Airlines Co. (“Southwest”) and Kiwi.com, Inc. (“Kiwi”) on September 30, 2021.

Southwest filed a lawsuit against Kiwi in January 2021 claiming that Kiwi was operating an online travel agency (“OTA”) that was engaged in repeated, unlawful activity on Southwest’s website including unauthorized page scraping of flight and pricing data, which is expressly prohibited under Southwest’s Terms & Conditions, as well as the unauthorized sale of Southwest tickets. Specifically, Southwest asserted the following causes of action in its complaint: (1) breach of contract and breach of Southwest’s Terms & Conditions; (2) trademark infringement under 15 U.S.C. § 1114; (3) false designation of origin and unfair competition under 15 U.S.C. § 1125(a); (4) dilution under 15 U.S.C. § 1125(c); (5) violation of the Computer Fraud and Abuse Act (CFAA) 18 U.S.C. § 1030; (6) violation of the Texas Harmful Access by Computer Act; and (7) unjust enrichment.

Southwest requested a Motion for Preliminary Injunction to prohibit Kiwi from continuing to undertake unauthorized sales of its flights while also arguing that Southwest was likely to succeed on the merits of its breach of contract claim and establish the remaining requirements for injunctive relief. The Court agreed and granted the Motion finding that Southwest had adequately established the existence of a valid contract between it and Kiwi, and proved other elements of a breach of contract. In its reasoning, the Court said that Kiwi had breached Southwest’s Terms & Conditions by scraping Southwest flight and fare data from its website, presenting Southwest flight data on kiwi.com, and selling Southwest flights without obtaining authorization from Southwest to do so. This caused Southwest to suffer damages including “damage to its reputation and loss of goodwill from customer complaints and increased customer service burdens and disruption to operations.”

Under the Court's order granting Southwest's Motion, Kiwi has been preliminarily enjoined from (1) harvesting, extracting or scraping information from Southwest's website; (2) publishing Southwest flight or fare information on kiwi.com or through Kiwi's mobile applications or elsewhere; (3) otherwise accessing and using Southwest's website and data for any other commercial purpose; (4) selling tickets for Southwest flights; and (5) committing any other acts in violation of Southwest's Terms & Conditions for the pendency of the lawsuit.

## **FAA FILES COMPLAINT AGAINST COMPANY FOR LITHIUM BATTERY RELATED VIOLATIONS**

The U.S. Federal Aviation Administration ("FAA") recently filed a Complaint against Behind the Scenes Worldwide Logistics ("Behind the Scenes") for alleged shipping violations. The violations stemmed from a single occurrence on or about February 25, 2017, during which Behind the Scenes allegedly knowingly offered a shipment containing thirty (30) Lithium batteries, twelve (12) Lithium ion batteries packed with equipment, Batteries, five (5) Nickel-Metal Hydride and one (1) container of 1,1-Difluoroethane to Southwest Airlines Cargo for transportation by air from Austin, Texas to Sherman Oaks, California. All of these items were contained inside of an overpack.

According to the FAA, Behind the Scenes knew or should have known, in the exercise of reasonable care, that the shipment in question contained Lithium ion batteries, Lithium ion batteries packed with equipment, Batteries, nickel-metal hydride, and 1,1-Difluoroethane. FAA also alleged that Behind the Scenes did not include any hazardous material markings or labels on the overpack and that the overpack was undeclared. Examples of other violation accusations the FAA made against Behind the Scenes in its Complaint include:

- 1) An allegation that Behind the Scenes offered "hazardous material contained in an overpack for transportation by air in commerce and failed to properly class, describe, package, mark label, and otherwise ensure the overpack was in a condition for shipment as required or authorized by applicable requirements of the hazardous materials regulations";
- 2) An allegation that Behind the Scenes offered hazardous material for transportation by cargo aircraft only and failed to label the overpack with a CARGO AIRCRAFT ONLY label specified in §172.488;
- 3) An allegation that Behind the Scenes offered hazardous material for transportation by air without making emergency response information, including the emergency response telephone number immediately available for use at all times the hazardous material was present;
- 4) An allegation that Behind the Scenes failed to ensure that its hazmat employees received training in accordance with the requirements prescribed in Subpart H of Part 172; and
- 5) An allegation that Behind the Scenes offered lithium ion batteries for transportation by air and failed to mark the outer packaging with a handling marking, which is durable, legible and displayed on a background of contrasting colors as presented in §173.185(c)(3)(ii).

The FAA issued a Final Notice of Proposed Civil Penalty on June 29, 2021 advising Behind the Scenes that it was proposing the assessment of a civil penalty of \$88,500 against Behind the Scenes for the violations. The appointed Administrative Law Judge has yet to issue an Initial or Final Decision in this case.