

September 2020 Aviation Regulatory Update

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ECKERT SEAMANS WELCOMES RENEE MARTIN-NAGLE TO AVIATION AND ENVIRONMENTAL TEAMS

We wish to welcome former Airbus Americas Chief Legal Officer and noted sustainability scholar Renee Martin-Nagle to Eckert Seamans' Aviation and Environmental practices. Martin-Nagle served for more than 20 years at Airbus Americas, retiring in 2011 as Vice President, General Counsel, Chief Compliance Officer, Head of Environmental Affairs, Corporate Secretary, and a member of the Board of Directors. While at Airbus, she designed and implemented policies, programs, and training concerning corporate compliance, lobbying, document management, export-import regulations, business ethics, environmental issues, and social media. Among her many aviation sector activities, she served as Chair of the American Bar Association Forum on Air and Space Law. She was honored with the 2014 Aviation Industry Woman of Excellence Award by the International Aviation Women's Association.

She joins Eckert Seamans after serving as CEO and President of A Ripple Effect PLC, a consultancy focused on international water law and integrated water resources management services where she had many successes, including designing a sustainability program for a major U.S. airline and producing an analysis of sustainability initiatives at smaller U.S. airports for the U.S. airport cooperative research program.

OFAC UPDATES CUBAN ASSETS CONTROL REGULATIONS AND FREQUENTLY ASKED QUESTIONS

On September 24, 2020, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) issued a new rule, [available here](#), amending the Cuban Assets Control Regulations to further implement portions of President Trump's foreign policy toward Cuba to deny the Cuban regime sources of revenue. Specifically, the new rule:

- Adds a new prohibition regarding lodging and related transactions at certain properties in Cuba;
- Amends four general licenses to restrict the importation into the United States of Cuban-origin alcohol and tobacco products;
- Amends a general license to remove the authorization allowing persons jurisdiction to attend or organize professional meetings or conferences in Cuba; and
- removes a general license that authorizes persons to participate in or organize certain public performances, clinics, workshops, other athletic or non-athletic competitions, and exhibitions, and replaces it with a specific licensing policy.

Additionally, OFAC published a number of new and updated Frequently Asked Questions, [available here](#), regarding these changes.

DOT IG ISSUES REPORT ON FAA PROCESS FOR UPDATING AIRPLANE EVACUATION STANDARDS

On September 16, 2020, the DOT Office of the Inspector General (OIG) issued a report, [available here](#), based on an audit the OIG conducted to assess the FAA's process for developing and updating aircraft emergency evacuation standards. The OIG found that the FAA usually only updates evacuation standards after accidents have occurred, and the last such update occurred after an accident in 1991. The report further found that the FAA's process currently lacks data collection and analysis of current risks, such as how changes in passenger behavior, passenger demographics, and seating capacity since the 1991 update could affect those standards.

Specifically, the OIG found that the FAA has not adequately studied the effects of passengers' retrieval of carry-on baggage, passenger demographics, minimum seat dimensions, and emotional support animals during evacuations. The report also found that the FAA does not maintain evacuation certification data, allows manufacturers to use old data, and allows reliance on analyses instead of demonstrations even when the analysis data differs from later demonstration results. Finally, the FAA found that evacuation demonstrations and analyses do not adequately account for real world factors, including smoke created during cabin emergencies and passengers' behaviors such as use of personal devices. The OIG recommended that the FAA develop and implement a systematic process to regularly collect and analyze data on emergency evacuations and develop a policy or procedures to maintain and analyze aircraft manufacturers' evacuation demonstrations and analyses data.

CANADA ANNOUNCES PLANS TO UPDATE CONTACT TRACING REQUIREMENTS

On September 25, 2020 the Government of Canada announced its intention to require the digital submission of passenger contact tracing information via the government sponsored ArriveCAN App or website. Currently, passengers arriving to Canada are requested to provide information, including contact tracing data, via either the "ArriveCAN" app or website, or by filling out a physical form. Starting October 31 2020, Canada will require digital (ArriveCAN App or website) submission only, with limited exceptions and all paper forms will be eliminated.

Once passengers input the information into the app/website, they will receive an electronic receipt that they can also print. Exceptions for digital submission will include in transit passengers whose final destination is not Canada and an inability to submit due to ArriveCAN service disruptions. Carriers flying to Canada will be responsible for notifying passengers of the requirements, and verifying that passengers have submitted information digitally or are exempt.

If passengers either do not have the electronic receipt or refuse to provide the information, but have a "Right of Entry" (primarily Canadian citizens or permanent residents), airlines can board the passengers but must advise them that they will be subject to a fine upon arrival in Canada. Without a Right of Entry or electronic ArriveCan receipt, airlines are prohibited from boarding passengers. Finally, carriers will be subject to a fine if they fail to notify passengers of their obligations, if they do not verify receipts, or if they board travelers without Right of Entry that do not show a receipt.

EXTENSION OF FAA ORDER LIMITING OPERATIONS AT JFK

The FAA has extended the Order limiting operations to New York's John F. Kennedy International Airport (JFK), maintaining the current slot administration rules. In January 2008, the FAA issued its first Order establishing the current slot administration rules at JFK. This Order was subsequently extended on October 7, 2009, April 4, 2011, May 14, 2013, March 26, 2014, May 24, 2016, as corrected June 21, 2016, and on September 17, 2018. The current order took effect on September 18, 2020, and will extend the rules until October 29, 2022.

The Order maintains the rules that are currently in effect:

1. The current hourly limits of 81 scheduled operations at JFK during the peak period (6:00am to 10:59pm);
2. The 80 percent minimum usage requirement for carriers holding slot times;
3. The rules for withdrawing slots for FAA operational reasons;
4. Procedures to allocate withdrawn, surrendered, or unallocated slots; and
5. Rules for the trade and lease of slots for consideration.

Also, while the Order establishes the FAA's rules governing the slot administration at JFK, the FAA still uses the International Air Transport Association Worldwide Slot Guidelines (IATA WSG) to inform its decisions, such as new entrant priority. However, while IATA recently instituted its newly created Worldwide Airport Slot Guidelines (WASG), the FAA continues to apply version 9 of the IATA WSG (Jan. 1, 2019), until it has completed its review of the WASG.

Additionally, on September 11, 2020, in an Order [available here](#), the FAA proposed to extend the COVID-19 related limited waiver of the minimum slot usage requirement at JFK, and other slot controlled airports, through March 27, 2021, with additional conditions. The FAA had already made this waiver available through October 24, 2020. The FAA also proposed to extend, through December 31, 2020, its COVID-19-related policy for prioritizing flights canceled at designated International Air Transport Association Level 2 airports in the United States, for purposes of establishing a carrier's operational baseline in the initial months of the next corresponding season. The FAA will provide notice of its final decision in the near future.

EPA ISSUES RULE ON AIRCRAFT EMISSIONS

On August 20, 2020, the United States Environmental Protection Agency (EPA) issued a proposed rule that for the first time would impose a standard for limiting emissions from nearly all commercial aircraft. If enacted, the rule would apply to civil subsonic jet airplanes with a maximum takeoff mass greater than 5,700 kilograms and to larger civil subsonic propeller-driven airplanes with turboprop engines having a maximum takeoff mass greater than 8,618 kilograms. Military aircraft are excluded from the rule. EPA's proposed standard closely follows the standard adopted by the International Civil Aviation Organization (ICAO) in 2017. Both the 2005 Kyoto Protocol and the 2016 Paris Climate Accord ceded authority over civil aviation's role in greenhouse gas (GHG) mitigation to ICAO. Like the ICAO standard, the EPA standard would apply to all covered aircraft for which a new design type certificate is requested on or after January 1, 2020, and would apply to in-production aircraft beginning January 1, 2028. However, modifications to in-production aircraft that would result in an increase in GHG emissions would advance applicability of the rule to January 1, 2023, for those aircraft.

U.S. PRECLEARANCE FACILITY TO OPEN AT BRUSSELS AIRPORT

On September 28, 2020, the U.S. and the Kingdom of Belgium concluded an agreement today to implement U.S. Customs and Border Protection (CBP) Preclearance operations at Brussels Airport (BRU). Under the terms of the Preclearance agreement, CBP personnel will be stationed at Brussels Airport to complete customs, immigration, and agriculture inspections before travelers board direct flights to the United States. These precleared travelers will then bypass CBP and Transportation Security Administration (TSA) security inspections upon arrival in the U.S. Before preclearance operations begin, the Belgian parliament must ratify preclearance agreement, and the U.S. and Belgian governments must complete all necessary internal procedures in partnership with the Brussels Airport Company.

SWITZERLAND FDPIC CONCLUDES SWISS-US PRIVACY SHIELD FAILS TO OFFER ADEQUATE PROTECTION OF PERSONAL DATA

On September 8, 2020, the Swiss Federal Data Protection and Information Commissioner (the FDPIC) issued a policy paper concluding that the Swiss-US Privacy Shield does not provide an adequate level of protection for personal data transferred from Switzerland to the United States. The FDPIC relied upon the July 16, 2020 decision of the Court of Justice of the European Union's (CJEU) which ruled that the EU-US Privacy Shield was invalid. Following its annual assessment of the Swiss-U.S. Privacy Shield regime, the FDPIC concluded that while the arrangement guarantees special data protection rights for individuals in the country, it fails to provide an adequate level of protection for data transferred out of the country to the U.S. Unlike the CJEU, the FDPIC lacks the authority to completely invalidate the Swiss-US Privacy Shield. However, unless Swiss courts rule to the contrary, affected companies will no longer be allowed to rely upon the Swiss-US Privacy Shield framework to transfer data between the two countries.

U.S. LABOR DEPARTMENT "JOINT EMPLOYER" RULE STRUCK DOWN

On September 8, 2020, the U.S. District Court for the Southern District of New York invalidated most of a U.S. Department of Labor (DOL) rule which sought to restrict when multiple linked businesses are held liable to the same worker under federal wage law. The court found that the rule conflicted with the broad definitions of the Fair Labor Standards Act, and furthermore, that the DOL failed to adequately justify its departure from the prior administration's interpretations and to account for some of the final rule's important costs. The rule, issued in January 2020, was a key plank of the Trump administration's workplace policy platform. The Court vacated the portion of the rule applying to "vertical" employment relationships, in which workers for a staffing company are contracted to another company. However, the court stood by the portion applying to "horizontal" relationships, in which a worker is employed by two "sufficiently associated" businesses.

FAA ANNOUNCES PLANS TO TEST AND EVALUATE UNMANNED AIRCRAFT DETECTION & MITIGATION EQUIPMENT AT AIRPORTS

On August 21, 2020, the FAA announced its plans to evaluate technologies and systems that could detect and mitigate potential safety risks posed by Unmanned Aircraft Systems (UAS) at U.S. airports. The testing is part of the agency's Airport Unmanned Aircraft Systems Detection and Mitigation Research Program. The FAA plans to initially test and evaluate at least 10 technologies or systems at the FAA's William J. Hughes Technical Center, located adjacent to the Atlantic City International Airport in New Jersey. After the initial testing and evaluation the agency expects to expand the effort to four additional U.S. airports. Interested manufacturers, vendors, and integrators of drone detection and/or mitigation technologies/systems have until October 5, 2020 to respond to the FAA's announcement, [available here](#). Airport operators interested in hosting this test and evaluation effort have until October 22, 2020 to respond to the FAA's solicitation, [available here](#).

OFAC DESIGNATES ADDITIONAL MAHAN AIR RELATED BUSINESSES

On August 19, 2020, OFAC designated two UAE-based companies, Parthia Cargo and Delta Parts Supply FZC, for their material support of Iranian airline Mahan Air. OFAC is also designating UAE-based Iranian national Amin Mahdavi for owning or controlling Parthia Cargo. OFAC alleges that Parthia Cargo served as a freight forwarding agent of Mahan Air and regularly forwarded consignments of aircraft parts, including U.S.-origin parts, from UAE directly to Mahan Air in Tehran, as well as to Mahan Air front companies in Istanbul. Furthermore, Delta Parts Supply FZC is alleged to have sold key aviation goods, including U.S.-origin parts, directly to Mahan Air or its front companies.

FAA PROPOSES \$247,000 CIVIL PENALTY AGAINST THE COLLINGS FOUNDATION

On September 4, 2020, the FAA proposed a \$247,000 civil penalty against the Collings Foundation of Stow, Mass., for allegedly conducting unauthorized flights in a P-51D Mustang airplane. The FAA alleges that between January 17, 2020 and January 30, 2020, the Foundation improperly operated the Mustang on 26 flights carrying people it had charged for flight training. The FAA further alleges that before the operations occurred, FAA inspectors advised the Foundation that such flights would violate FAA regulations.

Previously, the Collings Foundation legally offered revenue rides in their aircraft under the FAA's Living History Flight Exemptions program, an approval operators can renew every two years. However, following the FAA's investigation into the crash of the foundation's B-17G Nine-O-Nine at Windsor Locks, Connecticut, on October 2, 2019, the FAA declined to approve the Collings Foundation's latest request for a renewal. The FAA found that the Foundation failed to follow agreed-upon training and maintenance requirements of the program.

The Collings Foundation has 30 days after receiving the FAA's enforcement letter to respond to the agency.

FAA PROPOSES \$95,000 CIVIL PENALTY AGAINST WESTERN GLOBAL AIRLINES

On September 18, 2020, the FAA proposed a \$95,000 civil penalty against Western Global Airlines of Estero, FL, for alleged drug and alcohol testing violations. The FAA alleges that after a Western Global employee refused to undergo a random drug test, the employee was properly removed from his safety-sensitive duties, was evaluated by a substance abuse professional, and was returned duty. The FAA further alleges that Western Global then failed to follow the directive from the substance abuse professional, which required them to conduct monthly follow-up tests on the employee for drug and alcohol use, by only conducting three drug tests and three alcohol tests during the eleven months after the employee returned to work performing safety-sensitive work.