September 2021 Aviation Regulatory Update

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DOT FINES UNITED AIRLINES FOR TARMAC DELAYS GOING BACK SIX YEARS

On Friday, September 24, 2021, the Department of Transportation ("DOT") announced via press release, available here, that it has decided to fine United Airlines ("United") for violations of the extended tarmac delay rule. The fine totals $1.9 million; the largest ever proposed by DOT for tarmac delay violations.

The penalty came after several years of extensive study of airline tarmac delays by DOT. According to DOT's Office of Aviation Consumer Protection, which studied airline tarmac delays from December 2015 through February 2021, United's delays affected more than 3,200 passengers on 20 domestic flights and 5 international flights. In the press release, DOT stated that it found that in each of the 25 cases in which a tarmac delay occurred, the delays exceeded the threshold allowed under current rules. Specifically, in the 20 cases involving domestic flights, the delays exceeded the 3-hour maximum limit by at least 12 minutes and the worst delay totaled nearly 4 hours and 30 minutes. Similarly, in the five cases involving international flights, delays exceeded the 4-hour maximum limit by at least 12 minutes with the worst delay totaling 5 hours and 21 minutes. The majority of cases involved delays due to weather-related diversions.

FAA EXTENDS COVID-19 SLOT RELIEF THROUGH MARCH

On September 16, 2021, the U.S. Federal Aviation Administration ("FAA") has determined that the ongoing COVID-19 crisis warrants an extension of the waiver of minimum slot usage requirements at Level 3 airports (i.e. JFK, LGA, DCA) as well as designated IATA Level 2 airports (i.e. ORD, LAX, EWR, SFO) in the United States.

The FAA's initial waiver order was issued in March 2020 and lasted through May 31, 2020; it was then extended to October 24, 2020, and ultimately further extended until October 30, 2021. The FAA now proposes to further extend the order through the end of the Winter 2021/2022 season, to March 26, 2022. After reviewing industry comments on the last extension, the FAA has determined it will maintain the current waiver structure instead of proceeding with the conditions proposed by the Worldwide Airport Slot Board.

Under the current structure, carriers may seek a waiver from the slot usage requirements simply by informing the FAA which slots will not be used due to COVID-19 related issues, subject to the following conditions: (1) Carriers must return the slots they do not intend to use to the FAA four weeks prior to start of the FAA approved operation; (2) the waiver does not apply to newly allocated slots; and (3) the waiver does not apply to slots that have been leased to another carrier.

Similarly, the FAA proposes that through March 26, 2022, its COVID-19-related policy for prioritizing flights cancelled at designated IATA Level 2 airports in the United States (i.e. ORD, LAX, EWR, SFO) will continue for purposes of establishing a carrier's operational baseline in the next corresponding season, subject to the follow

conditions: (1) Carriers must return the slots they do not intend to use to the FAA four weeks prior to start of the FAA approved operations; and (2) schedules approved for Winter 2021/2022 do not apply to net-newly approved operations for initial use during the Winter 2021/2022 season.

REASSIGNMENT OF SCHEDULES AT NEWARK-LIBERTY INTERNATIONAL AIRPORT

The FAA has issued a Notice of Proposed Reassignment of Schedules at Newark Liberty International Airport (EWR), available here, requesting comments on its intention to reassign 16 peak-hour runway timings at EWR to a single Low Cost Carrier (LCC) or Ultra Low Cost Carrier (ULCC). This Notice is being issued as a result of the decision reached by the U.S. Court of Appeals for the D.C. Circuit, in *Spirit Airlines Inc. v. DOT et. al*., finding that the FAA's initial decision to retire the 16 peak-hour runway timings lacked consideration of the competitive effects at EWR, and was therefore arbitrary and capricious.

As background, in 2019, Southwest decided to end its operations at EWR, in favor of LaGuardia (LGA), making 36 runway timings available for reallocation at EWR. While the FAA reallocated 20 of those times, it decided to retire the remaining 16 peak-hour times. The FAA found that retiring the 16 times would improve on-time performance at the airport, and allow for more efficient scheduling. In the D.C. Circuit's decision, however, the Court recognized that Southwest was given the 36 runway times to ensure competition at EWR following the United/Continental merger. The Court found that the FAA's decision to retire the 16 peak-hour times failed to properly consider the impact on competition EWR and likelihood that fares would increase without a strong competitor filling those peak-hour times. The Court remanded the case back to the FAA to fully assess the competitive effects of retiring the peak-hour times.

Following the FAA's reevaluation of its initial decision, it reversed course, finding that the "benefits of lower fares significantly outweigh the impacts of additional delays" and that an LCC or ULCC would provide the greatest level of price discipline EWR. The FAA therefore intends to award the 16 peak-hour times to a LCC or ULCC, after evaluating the eligible carriers' business model, record of providing effective competition, staying power in competitive markets, and their ability to provide competitive schedules.

In the last few days, DOT has received 26 public comments on the Notice from major carriers such as United, JetBlue, and Spirit, as well as groups like the New Jersey Chamber of Commerce, the City of Newark, and the Port Authority of New York and New Jersey. While some of these entities, including the Port Authority and JetBlue, issued comments in support of the Proposed Reassignment of Schedules, others chose to focus on related issues, such how the FAA should work to prevent congestion and delays at EWR before it take up the reassignment issue. A formal request for proposals will be issued following FAA's review of the comments submitted on its Notice.

NEW PROPOSED RULE ON AIR AMBULANCE SERVICES, AGENT AND BROKER DISCLOSURES AND PROVIDER ENFORCEMENT ANNOUNCED BY SEVERAL AGENCIES

On September 10, 2021 the Department of Health and Human Services ("HHS"), Department of Labor ("DOL"), and Department of the Treasury, along with the Office of Personnel Management ("OPM") announced their intentions to issue a notice of proposed rulemaking, available here, to implement additional components of the No Surprises Act and the Consolidated Appropriations Act of 2021.

The proposed rule focuses on three main issues (1) the reporting/submission of information about air ambulance services by air ambulance providers, insurers, group health plans, and Federal Employee Health Benefits carriers; (2) the process HHS should take to investigate and enforce violations of federal insurance law; and (3) the implementation of a provision of the Consolidated Appropriations Act that requires insurers to disclose the amount

they pay in direct and indirect compensation to agents and brokers for enrollment in individual market coverage and short-term, limited duration insurance.

The proposed rule would require plans, issuers, and providers of air ambulance services to submit detailed data in regard to air ambulance services specified in the reporting requirements of the No Surprises Act, and would give authority to the Centers for Medicare & Medicaid Services to fully enforce Title I of the Act and Title II of Division BB of the Consolidated Appropriations Act. The proposed rule would also provide a process that HHS would use to investigate complaints and potential violations of Public Service Health Act provisions and if necessary, would also allow the agency to take enforcement action, which includes the imposition of civil penalties, against facilities and providers of air ambulance services for failure to submit some or all of the required air ambulance claims data to HHS. The proposed rule would also require all entities, including air ambulance providers, group health plans, insurers, and Federal Employee Health Benefits carriers would be required to submit reports on air ambulance services by March 31, 2023 and March 30, 2024. In addition to this, the proposed rule also provides a more detailed description of the process that the Centers for Medicare & Medicaid Services would be able to use to determine if states are adequately enforcing the new surprise billing protections and taking action against providers that continue to issue surprise bills to patients.

The new rule is being proposed as President Biden's administration is looking to do more to protect patients from high costs and make health care more affordable. The agencies are seeking comments on the proposed rule until October 13, 2021.

TSA DOUBLES FINES FOR REFUSAL TO WEAR MASKS DURING TRAVEL

On September 9, 2021, the Transportation Security Administration ("TSA") issued a press release announcing its plans to increase the range of civil penalties that may be imposed for violations of the federal mask mandate, which applied to certain modes of transportation. The decision was announced around the same time a new federal vaccine mandate was publicized by the White House, and nearly two weeks after news that the federal mask mandate will continue through January 18, 2022.

The previous range of civil penalties for noncompliance was $250 for first time offenders and went up to $1,500 for repeat offenders. The updated range of civil penalties for noncompliance is now $500-$1,000 for first-time offenders and $1,000-$3,000 for travelers who have previously violated the rule. The updated penalty regime became effective on Friday, September 10, 2021 and will apply not only to air travel, but also to travel via bus and rail. The TSA penalties are also separate from those that the FAA has imposed on travelers known as "unruly passengers" who have disrupted flights or assaulted airline personnel. The FAA can fine an unruly passenger up to $37,000 per violation for unlawful or disruptive behavior, which can include the failure to follow a crewmember's directive to wear a face mask.

TWO SENATORS RE-INTRODUCE BILL TO END DIVERSION OF TSA FEES

On September 9, 2021, Senators Edward Markey and Richard Blumenthal announced their intention to re-introduce a bill known as the "Funding for Aviation Screeners and Threat Elimination Restoration" (FASTER) Act, to end federal diversion of Transportation Security Administration, or "TSA", fees also known as 9/11 Passenger Security user fees to other federal purposes.

TSA fees are charges collected every time a passenger buys a plane ticket and were originally intended to help finance the costs associated with funding TSA. However, since 2013, Congress has diverted one-third of the revenue generated by TSA fees to pay for other largely unrelated federal programs. Under the FASTER Act, the requirement that a portion of TSA fees be deposited in the general fund of the U.S. Treasury to be used for unrelated

federal programs would be repealed, and instead, the fees would be deposited into a separate account of the U.S. Treasury and specifically used to cover the costs and services of the TSA, which would allow TSA to invest in its workforce, new equipment, and new technology.

Several aviation groups such as the Airports Council International – North America ("ACI-NA"), Airlines for America, and the American Association of Airport Executives have indicated their support of the new bill.

VARIOUS ENTITIES SUBMIT COMMENTS ON DOT'S PROPOSED REFUNDS RULE

On September 20, 2021, DOT received a final round of comments from several entities on its Notice of Proposed Rulemaking on "Refunding Fees for Delayed Checked Bags and Ancillary Services that Are Not Provided". The entities, which now includes several airlines, have submitted comments on the proposed rule noting various concerns.

In the final days leading up to and including the September 20th deadline, 23 entities including but not limited to United, Spirit, Virgin Atlantic, and IATA, submitted comments to DOT noting the parts of the proposed rule and considerations that they agree with, as well as issues they have with the proposed rule that they would like to see changed before the rule is finalized. For example, IATA issued comments on five main components of the proposed rule, which included:

1) Concerns regarding the length of delay triggering the refund requirement (12 hours for domestic flights, and 25 hours for international flight) given the innumerable amount of factors that can occur and are outside of an airline's control;

2) Support for not requiring carriers to refund checked baggage fees in instances where a passenger fails to a pick up their bag when available at the first point of entry into the U.S. when the bag needed to be picked up by the passenger for rechecking at a subsequent domestic flight segment;

3) Disagreement with DOT's proposal to start the clock on a potential bag delay when the passenger reaches their destination and is given the opportunity to deplane from the last flight segment, as opposed to when a mishandled baggage report is filed;

4) Disagreement with DOT's proposal to require that fees for oversized and overweight bags be refunded in the same way as for standard bags in the event of delay; and

5) A recommendation that the final rule become effective no sooner than one-year after publication in the Federal Register so that carriers would have time to implement the rule and account for its complexities.

With the notice and comment process now completed, the fate of the final rule rests in the hands of DOT.

DOT CONTINUES WORK TO IMPROVE SERVICE FOR PASSENGERS WITH DISABILITIES

On September 2, 2021, the U.S. Department of Transportation's ("DOT") publicly released materials and presentation slides ahead of the second public meeting of the Air Carrier Access Act Advisory Committee, which was held on September 2, 8 and 9, 2021. The meeting, which was a continuation of talks held on March 10-11, 2020, focused on many of the most pressing topics and issues associated with air travel as it relates to passengers with disabilities. DOT has been continuing its efforts to improve travel and services for passengers with disabilities as under the Air Carrier Access Act and its implementing regulation, 14 C.F.R. Part 382, disabled passengers are entitled to certain protections and accommodations, and discrimination based on disability is strictly prohibited. To ensure continued compliance with this rule, DOT's Office of Aviation Consumer Protection and the Air Carrier Access Act Advisory Committee has continued to meet to discuss current regulations, and consider new regulations and practices to implement. The various issues presented and discussed at these DOT meetings have included:

- DOT regulations related to bulkhead seating for passengers with disabilities;
- DOT regulations related to dignity of assistance, so that personnel are more aware, respectful and understand how to handle situations involving passengers with disabilities;
- A new Bill of Rights for passengers with disabilities;
- Creating universal accessibility within the air travel industry by 2031;
- Recommendations on timeliness of assistance, including what the definition of "prompt" means or should mean;
- Discussions on safety considerations that should be contemplated while assisting disabled passengers; and
- The use of SSR codes in ticketing practices.

This is all being done as DOT works to make air travel more accessible and easier for disabled passengers, which has long been a goal of the Department.

FAA RELEASES DATA SHOWING TRENDS IN DANGEROUS LASER STRIKES

On September 1, 2021, the FAA released the Tableau software program in order to draw attention to the dangerously high rate of laser strikes on airplanes. Specifically, the tool analyzed laser strike data from 2010 to 2020 by

In 2020, pilots reported 6,852 laser strikes to the FAA compared to 6,136 in 2019. Those who shine lasers at aircraft face FAA fines of up to $11,000 per violation and up to $30,800 for multiple offenses in addition to criminal penalties from federal, state, and local law enforcement agencies.

ONGOING LAWSUIT AGAINST GOVERNMENT AND SEVEN AIRLINES RELATED TO MASK REQUIREMENT

The Department of Justice recently submitted an answer arguing that the federal mask mandate related to various modes of transportation is not unconstitutional in response to a lawsuit filed in a District Court in Florida by several individuals from various states within the U.S. and Israel. The Complaint alleged that the federal mask mandate requiring that passengers wear masks while using public transportation violates the civil rights of passengers. One of the individual plaintiffs, Lucas Wall, initiated the lawsuit and has written and distributed several articles regarding it since June 2021. In the Complaint, seven airlines were named as defendants including, Southwest Airlines, Alaska Airlines, Allegiant Air, Delta Air Lines, Frontier Airlines, JetBlue Airways, and Spirit Airlines. The plaintiffs also named the Transportation Security Administration, the Centers for Disease Control, and President Joe Biden in the Complaint. Wall originally filed suit because earlier this year, he was turned away from a Southwest Airlines flight for failing to wear a mask or request a medical exemption at least seven days prior to his flight, as required by the airline's policies.

Since the initial suit was filed, some of the airlines named as defendants have released statements dispelling claims made in the Complaint. The case is still ongoing and has yet to be considered or ruled upon, but will be considered by a judge in Florida.

CBP FINES SEAFOOD GIANT FOR JONES ACT VIOLATIONS

On September 2, 2021, U.S. Customs and Border Protection ("CBP") announced its decision to impose a massive $300 million fine on U.S. seafood giant, American Seafoods, for violating the Merchant Marine Act of 1920, also known as the Jones Act, which generally requires that shipping between U.S. ports be conducted by U.S. flagged ships. The fine is one of the largest ever imposed by CBP for such a violation.

The Jones Act forbids foreign-flagged vessels from shipping between U.S. destinations unless an exception applies, such as in the case of shipments that "travel partially over certain Canadian rail lines and their own or other connecting water facilities." In the case of American Seafoods, Pollock destined for the U.S. market was allegedly shipped from Alaska to New Brunswick, Canada, via the Panama Canal, onboard foreign-flagged ships. Additionally, while in Canada, the Pollock was loaded onto refrigerated trucks, then moved to flatbed rail cars, and then finally moved a short distance along a rail line all before being loaded back onto trucks at its original location before continuing its journey on to the U.S. Given this progression of events, CBP accused American Seafoods of attempting to "workaround" requirements imposed by the Act by travelling through Canada in order to gain the benefit of this particular exception.

As previously mentioned, the $300 million fine imposed by CBP is the largest on record, the largest fine previously imposed by CBP for a Jones Act violation before this was for $10 million in 2017.

DOT IMPOSES $40,000 FINE ON PARADIGM AIR OPERATORS, INC.

On September 20, 2021, the U.S. Department of Transportation ("DOT") issued a consent order in response to alleged violations of 49 U.S.C. § 41712 by Paradigm Air Operators, Inc. ("Paradigm") for allegedly engaging in air transportation without holding the required economic authority from DOT. The order also indicates that DOT has imposed a civil penalty of $40,000 on Paradigm for the violations.

Paradigm, a corporation that operates several Boeing 757 and 737 aircrafts, was found to be in violation of 49 U.S.C. §§ 41101 and 41712, which require that a citizen of the United States, which includes corporations organized in the U.S., to hold economic authority granted by the Department in order to engage directly or indirectly in air transportation. In Paradigm's case, DOT accused the company of directly engaging in air transportation despite the fact that the company has never held economic authority from DOT. Through its investigation, DOT's Office of Aviation Consumer Protection found that on several occasions, Paradigm engaged in direct holding out of air transportation by conducting revenue demonstration flights, which allowed it to obtain new business by providing potential customers with a first-hand experience of Paradigm's service. Further, OACP also found that on several occasions, Paradigm had also engaged in indirect holding out of air transportation by soliciting charter business through air charter brokers.

FAA PROPOSES OVER $300,000 IN CIVIL PENALTIES AGAINST UNIVERSAL FLIGHT TRAINING

On September 22, 2021, the Federal Aviation Administration ("FAA") issued a press release, available here, indicating that it has proposed a civil penalty of $382,000 against Universal Flight Training ("Universal") of Sarasota, FL for allegedly conducting illegal passenger carrying flights.

According to the FAA, Universal and its affiliate, Universal Flight Services, conducted at least 26 paid-passenger flights between October 2015 and February 2019 in multiple aircraft that it was not authorized to operate. Specifically, FAA has alleged that the companies did not have the required FAA-issued Air Carrier and Operator Certificate to conduct the flights, and that the companies had used unqualified pilots who did not complete FAA required training, testing, and competency checks.

FAA PROPOSES $339,716 CIVIL PENALTY AGAINST TWO COMPANIES FOR CONDUCTING ILLEGAL CHARTER FLIGHTS

On September 3, 2021, the Federal Aviation Administration ("FAA") announced via press release that it is proposing a civil penalty of $339,716 against two companies, Slice of the 406, LLC and 82 and Sunny, LLC, as well as associated parties, for allegedly conducting illegal charter flights for over a year.

Specifically, FAA has accused the entities of conducting 26 paid passenger-carrying illegal flights, which all took place between July 2017 and November 2018. During these flights, the entities allegedly failed to obtain required FAA and DOT Air Carrier and Operating Certificates, as required to perform commercial operations. FAA also accused the entities of conducting flights without appropriate operations specifications and employing unqualified pilots who had not completed FAA-required training, testing and competency checks.

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This Aviation Regulatory Update 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 author Evelyn Sahr at 202.659.6622 or esahr@eckertseamans.com; Drew Derco at 202-659-6665 or dderco@eckertseamans.com; or Andy Orr at 202-659-6625 or aorr@eckertsemans.com or any other attorney at Eckert Seamans with whom you have been working.