

## REGULATORY UPDATE FOR THE WEEK OF APRIL 13 and APRIL 20, 2020

### FAA ISSUES GUIDANCE FOR HAULING CARGO IN PASSENGER CABINS

On April 15, 2020, the Federal Aviation Administration (FAA) issued a Safety Alert for Operators (SAFO) on Transporting Cargo on Transport-Category Airplanes Configured to Carry Passengers, [available here](#).

The FAA acknowledged that Part 121 operators may seek to use aircraft configured with passenger cabins to carry cargo only, or to carry additional cargo without passengers onboard, due to the COVID-19 epidemic. While 14 C.F.R. § 121.285 allows cargo to be transported within the passenger cabin, the SAFO notes that it is an extraordinary situation for an entire passenger cabin to be loaded with cargo as passenger aircraft are not designed for an all-cargo configuration. The SAFO provides information and recommendations for certificate holders to better evaluate regulatory implications and safety risks when transporting only cargo inside the passenger cabin of an airplane operating under Part 121.

Specifically, the SAFO provides information and guidance for carrying cargo on airplanes configured with passenger cabins without passengers in the following four locations for

1. Lower deck cargo compartments;
2. Existing approved stowage locations in the passenger cabin;
3. Passenger seats located in the passenger cabin; and
4. Floor of the passenger cabin (passenger seats removed), using seat tracks to tie cargo down.

### NUMEROUS AIRLINES RECEIVE PAYROLL ASSISTANCE UNDER SECTION 4113 OF THE CARES ACT

On April 14, 2020, Secretary Mnuchin of the Treasury Department announced that Allegiant Air, American Airlines, Delta Air Lines, Southwest Airlines, Spirit Airlines, and United Airlines Alaska Airlines, Frontier Airlines, Hawaiian Airlines, JetBlue Airways, and SkyWest Airlines, had all agreed to participate in the Payroll Support Program under Section 4113 of the CARES Act. Together, these airlines represent nearly 95 percent of U.S. airline capacity. While Treasury has not yet provided specific details about any of the agreements, a number of airlines have confirmed the amount of aid they expect to receive in separate interviews, such as:

- Delta Air Lines - \$5.4 billion, which includes a \$1.6 billion loan;
- Southwest Airlines - \$3.2 billion, which includes a \$1 billion loan;
- American Airlines - \$5.8 billion, which includes a \$1.7 billion loan;
- JetBlue Airways - \$935.8 million, which includes a \$250.7 million loan; and
- United Airlines - \$5 billion, which includes a \$1.5 billion loan.

Many of these airlines may also be applying for, and receiving, direct loans under Section 4003 of the CARES Act. For instance, as part of its agreement with the Treasury Department, American indicated it received an initial loan of \$1.7 billion, but that it also intends to seek a separate loan of \$4.75 billion.

Importantly, Alaska, Hawaiian, JetBlue, American, Cape Air, Sun Country Airlines, SkyWest, Frontier, United, Delta, Allegiant, Silver Airways, Mokulele Airlines, and Spirit have all applied for waivers of the DOT minimum service requirements since the final rule was issued on April 7. These minimum service requirements are applicable to any passenger airlines seeking aid under the CARES Act aviation programs. In the final rule, DOT asserted that such exemptions would be processed on a priority basis.

DOT has already responded to the requests of JetBlue, Spirit, Hawaiian, Alaskan, and Delta. JetBlue's exemption was partially granted with regard to airports for which the Governor of Puerto Rico had requested flight restrictions, the other service exemption requests were denied. Regarding Spirit's request, DOT partially granted the exemption to address airports that Spirit had not previously serviced, and denied all other requests. DOT partially granted Hawaiian's request, in that instead of completely eliminating an obligation to one airport (what airport?), DOT is allowing Hawaiian to increase its service to another airport (what airport?) instead. DOT Partially granted Alaska's request with regard to certain flights to Hawaii due to the extreme distance involved and the 14-day quarantine currently in effect in Hawaii for all visitors. Finally, DOT partially granted Delta's request to begin its seasonal summer service in May or June 2020.

Based on the responses so far, it appears DOT will be taking a hard stance on exemption requests. We will continue to follow DOT's determinations on these exemptions and provide further updates as they become available.

## **CLASS ACTION LAWSUIT FILED AGAINST ADDITIONAL AIRLINES OVER PASSENGER REFUNDS**

The COVID-19 epidemic has led to an ongoing decrease in air transportation, and many airlines being forced to choose between giving full refunds or credit vouchers to the passengers whose flights have been canceled. This has resulted in a number of class action lawsuits being filed against airlines by passengers over these policies. So far, all of the cases have raised various claims, including claims that these action violate consumer fraud acts in all 50 states, and claims of unjust enrichment, unconscionability, conversion, and fraudulent misrepresentation. Below are the lawsuits filed so far:

- United Airlines – 3 Class Actions
  - Filed April 6, 2020 – Federal District Court – Northern District of Illinois
  - Filed April 6, 2020 – Federal District Court – Northern District of Illinois
  - Filed April 7, 2020 – Federal District Court – Northern District of Ohio
  
- JetBlue – 1 Class Action
  - Filed April 16, 2020 – Federal District Court – Eastern District of New York
  
- Southwest Airlines – 1 Class Action
  - Filed April 13, 2020 – Federal District Court – Eastern District of Pennsylvania
  
- Volaris – 1 Class Action
  - Filed April 8, 2020 – Federal District Court – Northern District of Illinois

- Delta Airlines – 2 Class Actions
  - Filed April 17, 2020 – Federal District Court – Northern District of Georgia
  - Filed April 22, 2020 – Federal District Court – Northern District of Georgia
  
- Spirit Airlines – 2 Class Actions
  - Filed April 10, 2020 – Federal District Court – Southern District of Florida
  - Filed April 21, 2020 – Federal District Court – District of Massachusetts
  
- Aeromexico – 1 Class Action
  - Filed April 20, 2020 – Federal District Court – Central District of California
  
- Hawaiian Airlines – 1 Class Actions
  - Filed April 20, 2020 – Federal District Court – District of Hawaii
  
- American Airlines – 1 Class Action
  - Filed April 22, 2020 – Federal District Court – Northern District of Texas
  
- Air Canada – 1 Class Action
  - Filed April 23, 2020 – Federal District Court – Middle District of Florida

## **FAA ISSUES NOTICE OF PROPOSED RULEMAKING ON SUPERSONIC AIRCRAFT NOISE STANDARDS**

On April 13, 2020, the FAA issued a Notice of Proposed Rulemaking (NPRM) to add new supersonic airplanes to the applicability of noise certification regulations, and proposes landing and takeoff noise standards for a certain class of new supersonic airplanes. The agency is proposing to amend the noise certification regulations in Parts 21 and 36 to provide for new supersonic airplanes, and to add subsonic landing and takeoff (LTO) cycle standards for supersonic airplanes that have a maximum takeoff weight no greater than 150,000 pounds and a maximum operating cruise speed up to Mach 1.8.

The proposed standards include noise limits that are quieter than the Stage 4 limits at which most of the current subsonic jet fleet operates, though louder than the current certification level of Stage 5 for the same aircraft weights. The proposed standards would allow Variable Noise Reduction Systems (VNRS) to be used for noise certification testing, and if used for certification, would require the system to be activated during normal operations.

Interested parties will have until July 13, 2020 to comment on the proposed rule.

## **DOT RECEIVES NUMEROUS COMMENTS ON UNFAIR AND DECEPTIVE PRACTICE NPRM**

On February 28, 2020, DOT published a Notice of Proposed Rulemaking (NPRM) seeking to codify definitions for the terms “unfair” and “deceptive” in the Department’s regulations implementing its aviation consumer protection statute. DOT asked interested parties to comment on the proposed regulation by April 28, 2020. So far, approximately 175 comments have been filed. It appears that the vast majority of comments have been submitted by individuals opposed to the changes, who cite concerns that DOT’s proposed changes will not be beneficial to aviation consumers. A

collection of consumer rights groups, National Consumers League et. al., have requested that DOT extend the comment deadline until sixty days following the termination of President's COVID-19 national emergency declaration in order to give all stakeholders additional time to gather information and documentation and produce comments that will substantially add to the record. Interestingly, no airline has yet submitted a comment either for or against the DOT's proposed rule.

## **CBP ANNOUNCES TEMPORARY POSTPONEMENT OF TIME TO DEPOSIT CERTAIN ESTIMATED DUTIES, TAXES AND FEES**

On April 20, 2020, the Secretary of the Treasury and U.S. Customs and Border Patrol (CBP) announced in two messages through their Cargo Systems Messaging Service, available [here](#) and [here](#), that for 90 calendar days will be postponing the deadline for payment for the deposit of certain estimated duties, taxes, and fees for importers experiencing a significant financial hardship due to the COVID-19 epidemic. The temporary postponement applies to formal entries of merchandise entered, or withdrawn from warehouse, for consumption (including entries for consumption from a Foreign Trade Zone) in March or April 2020. This temporary postponement of payment of estimated duties, taxes, and fees does not apply to any entry, or withdrawal from warehouse, for consumption, where the entry summary includes merchandise subject to antidumping duties, countervailing duties and/or Section 232 of the Trade Expansion Act of 1964, and Section 201 or 301 of the Trade Act of 1974.

An importer will be considered to have a significant financial hardship if the operation of such importer is fully or partially suspended during March 2020 or April 2020 due to orders from a competent governmental authority limiting commerce, travel, or group meetings due to COVID-19, and as a result of such suspension, the gross receipts of such importer for March 13-31, 2020 or April 2020 are less than 60 percent of the gross receipts for the comparable period in 2019. Importers do not need to file documentation with CBP to be eligible for this relief but must maintain documentation as part of its books and records establishing that it meets the requirements for relief. CBP may also conduct a review of the documentation at a future date to ensure compliance with the requirements