ECKERT SEAMANS ATTORNEYS AT LAW

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Aviation Regulatory Alert

# REGULATORY UPDATE FOR THE WEEK OF APRIL 6, 2020

## DOT FINALIZES AIRLINE MINIMUM SERVICE ORDER

On April 7, 2020, the U.S. Department of Transportation (DOT) issued a final order, available here, establishing parameters for implementing the authority granted to the DOT by Sections 4005 and 4114(b) of the Coronavirus Aid, Recovery, and Economic Security (CARES) Act. The Order finalizes, with some modifications, the Department's tentative findings, and requires that air carriers receiving financial assistance maintain minimum air services on a nationwide basis. U.S. Air carriers offering scheduled passenger service and all-cargo carriers are covered by the Order; however, the Department is not requiring service obligations of all-cargo carriers at this time. Charter operations and air taxi operators are also not covered.

DOT established the following minimum service levels:

- For points that a covered carrier served with at least one flight at least five days per week, at least one flight per day, five days per week, is required.
- For a point that received service from fewer than five days per week, the carrier would only need to serve that point with at least one flight on one day per week.
- If a covered carrier served a point with any degree of scheduled service from more than one other point, it would only need to provide service from that point to one of the previously served points as long as it met the above frequency requirements.
- A covered carrier could also meet its minimum Service Obligation for a given point by dividing its flights across multiple cities, if it so chose.
- If multiple covered carriers served a point, each covered carrier would be required to serve the point in accordance with the above minimum service levels, regardless of the service decisions made by the other covered carriers serving that point.

With regard to requests for exemptions, which DOT intends to expedite: (1) Covered carriers must file exemption requests with the Department in advance and serve their filings on interested parties; (2) Interested parties will have a brief period of time to submit comments; (3) Until DOT issues a decision, any services covered by a carrier's Service Obligation must continue. DOT is also providing an industry-wide exemption for circumstances in which direct financial support arrangements between communities and airlines have ceased after the declaration of a public health emergency under section 319 of the Public Health Services Act in response to the COVID-19 epidemic.

The initial term for the service obligations extends through September 30, 2020, which may be extended by the Department. If carriers have any questions about their minimum service obligations, or need help filing exemptions, please contact us.

## CLASS ACTION LAWSUIT FILED AGAINST UNITED AIRLINES OVER REFUND POLICY

On April 6, 2020, a complaint was filed against United Airlines in federal court in the Northern District of Illinois. In the case, the plaintiffs are attempting to certify a class that includes all persons in the United States that purchased tickets for travel on United Airlines flights scheduled to operate to, from, or within the United States from March 1, 2020 to the present and who sought a refund and were refused or who seek a refund in the future. The plaintiff's complaint asserts: 1) claims regarding violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, as well as similar consumer fraud acts in all 50 states; 2) claims of unjust enrichment; 3) claims of conversion; and 4) claims of fraudulent misrepresentation, regarding United Airlines' refusal to provide refunds to passengers for flights that were cancelled during the COVID-19 epidemic.

## NEW TREASURY GUIDANCE AND APPLICATION AVAILABLE FOR AVIATION LOAN PROGRAM

On April 6, 2020, the U.S. Treasury Department issued further guidance on the application procedure for loans to air carriers under Section 4003 of the CARES Act, available here. The application document was only for informational purposes in an effort to provide potential applicants with an understanding of what information would be requested by the forthcoming online application form. On April 8, 2020, the Treasury Department released the online application form for the Section 4003 loan program, available here. To receive approval of their applications as soon as possible, carriers are instructed to submit their completed application materials **no later than 5:00 p.m. EDT on April 17, 2020**. The Treasury Department has indicated that applications received after 5:00 p.m. EDT on April 17 will be considered, but may not receive approval as quickly. Applications received after 11:59 p.m. EDT on April 30, 2020, may not be considered at all. However, Treasury, in their discretion and subject to the availability of funds, may consider such applications for approval.

Importantly, the application guidance states that it only applies to loans from DOT to (1) passenger air carriers; (2) cargo air carriers; (3) eligible businesses that are certified under 14 CFR part 145 and approved to perform inspection, repair, replacement, or overhaul services ("Part-145 certified repair station operators"); and (4) and ticket agents. However, the application guidance in its current form does not provide any further definition of "businesses critical to maintaining national security" which are also eligible for loans under Section 4003(b)(3) of the CARES Act.

We will continue to provide updates on the CARES Act and potential relief for air carriers as it becomes available. If you have any questions about, or intend to apply for loans under Section 4003 of the CARES Act, please contact us for assistance.

## TSA ISSUES REQUEST FOR INFORMATION REGARDING AIR CARGO SECURITY COST MITIGATION

On April 10, 2020, the Transportation Security Administration (TSA) issued a request for information, available here, from the air cargo industry, which includes manufacturers, shippers, suppliers, warehouses, e-commerce fulfillment centers, third-party logistics providers, and air carriers, relating to compliance with international security standards for the transport of air cargo by commercial aircraft operators.

Effective June 30, 2021, international standards require that all international air cargo carried by commercial aircraft operators (passenger and all-cargo) be either screened or be received from another TSA-regulated entity that has applied security controls and/or screened the cargo. TSA is seeking information regarding options to reduce the burden on U.S. and foreign all-cargo aircraft operators in complying with the international standard, such as security controls

implemented throughout the supply chain that provide a level of security commensurate with the screening of cargo before transport. Because TSA does not expect these standards to require changes to current procedures for cargo transported on passenger aircraft, the TSA request for information is focused only on all-cargo operations.

Commenters will have 90 days, or until July 9, 2020, to submit comments.

## TRANSPORT OF CARGO IN PASSENGER CABINS

On April 2, 2020, the International Air Transport Association (IATA) issued "Guidance for Safe Transport of Cargo in Passenger Cabin", available here. The guidance was issued in response to the COVID-19 epidemic as passenger aircraft are being utilized to transport goods, including medical supplies, and this includes carrying cargo in the passenger cabins to complement the capacity of aircraft cargo compartments.

IATA reminded carriers of the need to conduct a safety risk assessment when repurposing passenger aircraft for cargo transport in this manner. IATA further recommended that carriers ensure that all safety regulations, including those associated with a change in aircraft utilization, are complied with prior to using passenger aircraft for the carriage of cargo.

If you are interested in conducting this service to U.S. points, please contact us for further guidance from the FAA.

## SABRE WINS DOJ ANTITRUST CASE

In August 2019, the U.S. Department of Justice (DOJ) sought to block the merger of Sabre and Farelogix on anti-competition grounds. On April 7, 2020, a Delaware federal court ruled that the DOJ failed to prove that Sabre's $360 million purchase of Farelogix would substantially lessen competition for booking services for airline tickets sold through traditional travel agencies in the U.S.

Sabre is the United States' largest global distribution system, connecting more than 400 airlines and thousands of hotels and car rental companies to both online and in-person travel agents. Farelogix, on the other hand, had developed Farelogix Open Connect, or FLX OC, which is software that airlines use to power their websites and mobile apps.

The court dismissed the DOJ's arguments on "nascent competition", finding that Sabre was not necessarily acquiring Farelogix to remove them as a competitor. Furthermore, the court found that DOJ's defined market of "booking services" was not a term the industry used and accounted for only a portion of Sabre's business. The court also relied on the U.S. Supreme Court's 2018 American Express case (*Ohio v. American Express Co.,* 138 S. Ct. 2274 (2018)) on two-sided markets, finding that because Sabre was a two-sided market, connecting with both airlines and travel agents, and Farelogix was a one-sided market, only connecting with airlines, the two companies could not truly be in competition.

DOJ now has the option to appeal the court's decision, though DOJ usually will not appeal such a decision as it is difficult to win appeals in antitrust cases. The matter is also not fully settled for Sabre and Farelogix, as the U.K.'s Competition and Markets Authority also attempted to block the merger, and issued a provisional finding that the merger should be blocked. The U.K. Authority is expected to release its final decision later this week.

## FAA PROPOSES ANOTHER PENALTY FOR ILLEGAL CHARTERS

On April 3, 2020, the FAA took enforcement action against another business for allegedly operating illegal charter operations. The $1,504,800 civil penalty was proposed against B E L Aviation of Odessa, TX. The FAA alleges that between September 2016 and July 2018, B E L conducted 114 unauthorized for-hire flights transporting passengers throughout the United States and that the flights were unauthorized because B E L Aviation did not have an air carrier or air operator certificate. FAA further alleged that the operations were careless or reckless because the pilots who conducted the flights did not meet applicable training requirements for those types of operations.

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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.