

March 2020 Aviation Regulatory Update

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UPDATE ON U.S. COVID-19 CONTROL MEASURES

Below are current requirements and restrictions divided by U.S. federal agency:

- **The White House / U.S. Department of Homeland Security (DHS):**
This month, the U.S. extended its foreign national entry bans to cover passengers who have been in **mainland China (excluding Hong Kong and Macau), The Islamic Republic of Iran, the European Schengen Area, The United Kingdom (excluding overseas territories outside of Europe) and The Republic of Ireland** in the last 14 days. Foreign carriers should continue to follow the directions given by their Transportation Security Administration International Industry Representative (TSA IIR), which were distributed via emergency directive, and must not board passengers on flights to the U.S. who are inadmissible under the presidential proclamations. Carriers are free to ask passengers to sign a declaration stating they have not been in a restricted country for the prior 14 days. We would recommend this practice if it is feasible, as it will provide affirmative documentation that the passenger confirmed they were permitted to travel to the U.S., and could assist the airline in avoiding a penalty if a prohibited passenger lied on the form but is inadvertently transported to the U.S. based on the assertions made to the airline.
- **U.S. Department of Transportation (DOT):**
Passengers who are denied boarding based on COVID-19 or their travel history must receive a DOT 10-Day Letter as is required under 14 C.F.R. Part 382.
- **U.S. Department of Health and Human Services (HHS) – Centers for Disease Control and Prevention (CDC):**

Health Declaration Forms

DHS, in collaboration with CDC, is requiring each traveler coming from a country for which the U.S. has applied entry restrictions due to COVID-19 to fill out a “United States Traveler Health Declaration” form (now available in [English](#), [Mandarin](#), [Farsi](#), [Spanish](#), and [Italian](#), and subject to update on CDC’s website as travel restrictions evolve). The form must be completed by each passenger and provided to CDC/DHS representatives upon arrival at an approved screening airport. Additionally, cabin crew should make an announcement to passengers before landing using the CDC’s suggested script ([available in English at this link](#)).

Passenger Health Data Reporting Requirements

As was the case before the COVID-19 crisis, CDC regulations under 42 C.F.R. Part 71 require the captain of any flight arriving in the U.S. to report the death or illness of any crewmember or passenger to the CDC quarantine station nearest the arrival airport. (A detailed description of the symptoms of illness triggering the

reporting requirement is available [at this webpage.](#)) In the event the CDC needed to track and follow up with a passenger who was ill, the agency could instruct an airline to provide “contact tracing” data (e.g., name, address, phone number, flight numbers, etc.) on that passenger according to 42 C.F.R. 71.4 sections (a) through (c). Both of these requirements remain in effect.

Last month, the CDC implemented new requirements relating to flights arriving in the U.S. from mainland China. The CDC published an Interim Final Rule (IFR) effective February 7, 2020, that added two more sections (d) and (e) to 42 C.F.R. 71.4 to give the CDC authority to demand air carriers produce five contact tracing data elements on passengers or crew in a format acceptable to the CDC Director within 24 hours of such a demand. The CDC followed this IFR with an implementing Data Collection Order on February 18, 2020, and a Frequency Asked Questions (FAQ) post on its website on February 27, 2020. These documents explained that carriers would need to input contact tracing data into their PNR systems for passengers (but not crew) who had been in or transited mainland China within the past 14 days before attempting to enter the U.S. These requirements remain in force for passengers arriving from China.

Carriers and industry groups have strongly advocated for data reporting methods which would be more technically feasible than copying data into a PNR. Perhaps in response to this feedback, the CDC has not yet issued a Data Collection Order extending the IFR’s requirements to passengers who have been present in Iran, the Schengen Area, the UK, and Ireland in the past 14 days. Therefore, carriers are not required to input contact tracing data into PNR systems for these travelers at this time. Instead, the U.S. government appears to be relying on health entry screening at airports, the “United States Traveler Health Declaration” form described above, and instructions to arriving passengers to self-quarantine for 14 days at home, to ensure that it captures tracing data and protects U.S. public health. We expect the CDC’s rules on passenger health data reporting to continue to evolve and will keep our readers apprised.

Other Relevant Guidance

The CDC maintains other best practice guidance resources on its website ([available at this link](#)) for U.S. and foreign air carriers. Except where the CDC refers explicitly to a legal requirement (e.g., sick passenger reporting under 42 C.F.R. 71.4), these best practices do not carry the force of law and can be implemented to the extent not inconsistent with instructions from a carrier’s civil aviation authority. The CDC guides provide helpful information for both foreign and domestic carriers regarding infection control ([available at this link](#)), and new this month, recommendations regarding crew protection and aircraft cleaning related to SARS-CoV-2 coronavirus ([available at this link](#)). Good practice described in this guidance includes:

- Emphasis on routine handwashing;
- Steps to take after identifying sick passengers;
- Procedures for cleaning up bodily fluids;
- Cleaning and disinfecting contaminated surfaces;
- Following routine operating procedures for cleaning aircraft, managing solid waste, and wearing personal protective equipment (PPE) if no symptomatic passengers were identified during or immediately after the flight; and
- “Enhanced Cleaning” procedures if symptomatic passengers were identified during or immediately after the flight.

Finally, last month, the CDC and U.S. Federal Aviation Administration (FAA) also collaborated on best practice guidance for air crew safety during the pandemic ([available at this link](#)). Since air crew are exempt from entry restrictions in the U.S., the CDC encourages air crews to carefully observe their employer’s occupational health program to prevent the spread of COVID-19.

- **State/Local:**

A number of states have imposed restrictions on individuals within the state, requiring them to stay home unless they are deemed “essential” – typically, if they work in an exempted or critical sector. Many states, including New York, California, and Illinois have classified employees in the aviation sector as being exempt.

We are recommending that all businesses provide their employees “verification of critical employment” letters that each employee can carry to/from work. While these letters are not currently required under the existing state restrictions, if there is any enforcement action or an inquiry, the letters will provide your employees with a valid response to any questions. Also, the letters will give employees assurance that they are not doing anything unlawful by showing up for work. If you would like assistance in drafting such a letter for employees, please contact us, and we will be happy to assist.

Finally, in addition to the letters we recommend you instruct employees to carry at all times:

- Photo ID;
- Employee ID (if permitted to carry employee ID off premises); and
- Contact information for business/plant HR or management contacts.

TRAVEL RESTRICTIONS BETWEEN U.S. AND CANADA/MEXICO

Last week, the U.S. government reached agreements with the governments of Canada and Mexico to limit non-essential cross border travel between the U.S. and each respective country. On March 24, 2020, the U.S. Department of Homeland Security (DHS) published guidance on the temporary travel restrictions and what qualifies as essential travel, [available here](#). Under the guidance, DHS made clear that the travel restrictions do not apply to air, rail, or sea travel at this time. Additionally, the notification made clear that individuals engaged in lawful cross-border trade and traveling to work in the United States are considered essential and may continue to travel.

GOVERNOR DESANTIS ANNOUNCES TRAVEL RESTRICTIONS BETWEEN FLORIDA AND NEW YORK, NEW JERSEY, AND CONNECTICUT

On March 23, 2020, Florida Governor Ron Desantis issued Executive Order 20-80, which requires all passengers from New York, New Jersey, and Connecticut who enter the state of Florida through an airport to isolate or quarantine themselves for 14 days, or for the length of their stay, whichever is less. Furthermore, these isolated passengers are responsible for all costs associated with any such isolation and self-quarantine. The order does not apply to persons employed by airlines, or those persons providing military, emergency, or health services. Violators of the Executive Order are guilty of committing a second degree misdemeanor, which is punishable by imprisonment not to exceed 60 days, a fine not to exceed \$500, or both. The order took effect on March 24, 2020 at 12:01 a.m. EDT and will not expire until Governor Desantis rescinds his previous related order declaring a state of emergency in Florida.

NOTICE OF OPPORTUNITY TO SHOW CAUSE AND REQUEST FOR INFORMATION: EXTENSION OF A LIMITED WAIVER OF THE SLOT USAGE REQUIREMENT

On March 22, 2020, the FAA issued a Notice of Opportunity to Show Cause and Request for Information regarding an extension of the limited waiver of the minimum slot usage requirement that the FAA issued on March 11, 2020. This latest Notice and Request provides interested parties an opportunity to submit views and relevant information on the FAA's tentative determination to extend the waiver through October 24, 2020 on the same terms as the relief that the FAA already has announced through May 31, 2020.

In response to the COVID-19 epidemic, the original limited waiver announced certain relief of the minimum usage requirement as to any slot associated with a scheduled nonstop flight between John F. Kennedy International Airport (JFK), LaGuardia Airport (LGA), and Ronald Reagan Washington National Airport (DCA), respectively, and other points, that is canceled as a direct result of COVID-19. The waiver also announced that the FAA would prioritize flights canceled due to COVID-19 at designated IATA Level 2 airports (ORD, EWR, LAX, and SFO), for purposes of establishing a carrier's operational baseline in the next corresponding season.

Comments the extension must be submitted no later than March 30, 2020, by e-mail to the Slot Administration Office at 7-awa-slotadmin@faa.gov. After receiving and reviewing comments, the FAA anticipates subsequently providing notice of its final decision.

CANADIAN CTA TO ISSUE DRAFT GUIDANCE ON ATPDR COMPLIANCE

We have previously informed our readers about the Canadian Transportation Agency's (CTA) forthcoming *Accessible Transportation for Persons with Disabilities Regulations* (ATPDR). This regulation will impose new responsibilities on air carriers with respect to the carriage of passengers with disabilities. The regulation was published in two phases beginning last year, and most of its provisions affecting flights to, from, and within Canada will enter into force on June 25, 2020.

The CTA this month has published advisory guidance on implementation of the ATPDR on its website for public review. The final guidance will not change the legal obligations imposed by the ATPDR text but will explain the text's practical application. Topics of the guidance include:

- When passengers must provide advance notice and/or documentation to carriers;
- Rights and responsibilities of travelers with service dogs;
- Rules regarding curbside assistance;
- Carrier obligations regarding accessibility of onboard entertainment;
- Rules regarding passengers with severe allergies; and
- Accessibility rules for communication with passengers with disabilities in-person and via phone, website, kiosk, and public announcement touchpoints.

Interested carriers and members of the public are invited to review the documents posted on CTA's website and to submit comments and questions through April 2020.

FAA PROPOSES \$19.68 MILLION CIVIL PENALTY AGAINST THE BOEING CO.

On March 6, 2020, the FAA proposed a \$19.68 million civil penalty against The Boeing Co. for allegedly installing equipment on hundreds of the company's 737 aircraft containing sensors that were not approved for that equipment. The FAA alleges that between June 2015 and April 2019, Boeing installed Rockwell Collins Head-up Guidance Systems on 791 jetliners, including 618 Boeing 737 NGs and 173 Boeing 737 MAX aircraft. The FAA alleges that the guidance systems in these aircraft were equipped with sensors that had not been tested or approved as being compatible with those guidance systems. Boeing allegedly violated FAA regulations when it certified these aircraft as airworthy when they were not in conformance with their type certificate. FAA further alleges that Boeing failed to follow its own Business Process Instructions, which are in place to help prevent such situations from occurring.

ACLU SUES FOR FACIAL RECOGNITION RECORDS AT U.S. AIRPORTS

On March 12, 2020, the American Civil Liberties Union (ACLU) filed a case against U.S. Customs and Border Protection (CBP), the TSA, and U.S. Immigration and Customs Enforcement (ICE), in New York federal court in an effort to force the agencies to turn over records on their use of facial recognition technology at airports and other U.S. points of entry.

The case is in response to the U.S. government's refusal to turn over records that the ACLU had requested under the Freedom of Information Act. Specifically, the ACLU asked that the U.S. government be required to turn over records about its plans to further roll out facial surveillance at airports, about specifics of its government contracts dealing with the technology, and about its policies for how it acquires, processes and retains traveler data. The ACLU also wants records on how the U.S. government is analyzing the effectiveness of its facial recognition technology, which some academic studies have found to be less accurate in recognizing black or brown faces.

This issue has become important to privacy advocates as the U.S. government has been rapidly expanding its use of facial recognition technology at border crossings in recent years. Starting in January 2019, CBP began a program known

as "biometric exit" that compares travelers' face scans taken at the airport with photos already on file in federal databases. This program was operational in some form at 17 U.S. airports, including in Chicago, Boston and New York City's John F. Kennedy International Airport.

DELTA WINS TICKET BUYERS' SUIT OVER TRIP INSURANCE

On March 6, 2020, Delta Air Lines successfully had dismissed an attempted class action lawsuit brought by group of ticket buying customers on a federal Racketeer Influenced and Corrupt Organizations (RICO) Act claim and a Florida Deceptive and Unfair Trade Practices Act claim. The litigation began in September 2018, when plaintiffs accused Delta of accepting kickbacks in return for selling travel insurance to customers. The plaintiffs alleged that Delta received substantial percentage-based commission profits from AllianzGlobal Assistance when customers bought trip insurance through Delta's website, even though the airline's website makes it seem as though the charge is a pass-through fee for Delta.

The Court dismissed the plaintiffs' RICO claims in July 2019, but allowed the case to proceed on the state claim. In the March 6, 2020 order, the Court found that the plaintiffs' insurance-related consumer protection claims fall under the Florida Department of Financial Services and the Office of Insurance Regulation and are not covered under the Florida Deceptive and Unfair Trade Practices Act. The Court further found that the remedy sought by the plaintiffs are barred because the "filed rate doctrine" prohibits court challenges to rates approved by regulators, and that unjust enrichment claims are unavailable when the service paid was in fact received by the plaintiffs.

FAA FOCUSED ON CURTAILING ILLEGAL CHARTER OPERATIONS

The FAA recently released a new Advisory Circular, AC 61-142, addressing the limits of private pilots' ability to be compensated by their passengers. The AC address certain issues around illegal charter operations; and it comes after Congress directed the FAA to publish easy-to-read guidance with demonstrative examples on the existing law of how a pilot may share expenses with passengers. In general, reimbursement is limited to qualified types of expenses, the pilot paying no less than their pro rata share of expenses, and the pilot not collecting reimbursement on a flight for which the private pilot does not have a common purpose with passengers. Noncompliance with any of those rules may constitute impermissible compensation for a private pilot. Additionally, a private pilot also must not "hold out" to the public their availability to provide transportation to anyone who wants it. The AC strongly suggests that this rule generally precludes private pilots from participating in websites or mobile apps by which pilots and passengers can be paired up to share costs of planned itineraries.

FAA PROPOSES \$79,500 CIVIL PENALTY AGAINST THE KING SALMON AIRPORT IN ALASKA

On March 13, 2020, the FAA proposed a \$79,500 civil penalty against the King Salmon Airport in King Salmon, Alaska, for allegedly violating federal aircraft rescue and firefighting regulations.

Between Aug. 27 and Aug. 29, 2019, FAA inspectors performed a periodic inspection of the state-operated airport to determine its compliance with federal regulations. During that inspection, the inspectors found that one of the airport's employees had not participated in a live fire-training course for more than a year. That employee was on firefighting standby for three flights in April 2019 when his training was not current, the FAA alleges.

Federal regulations require that airports such as King Salmon ensure all of their rescue and firefighting personnel participate in at least one live-fire drill before performing initial rescue and firefighting duties and one drill annually thereafter.

FAA REVOKES OPERATING CERTIFICATE OF PARADIGM AIR OPERATORS FOR ALLEGED ILLEGAL CHARTER FLIGHTS

On March 11, 2020, the FAA issued an emergency order revoking the operating certificate of Paradigm Air Operators, Inc. of Dallas, Texas, for allegedly conducting dozens of unauthorized charter flights using unqualified pilots and lacking required air carrier management and safety personnel. Paradigm is allowed to conduct non-common carriage and private

carriage operations, but is not allowed to advertise for-hire charter flights to the public, or to solicit or conduct common carriage flights. The FAA alleged that Paradigm conducted 34 flights using pilots who had not completed training and flight proficiency checks, to have conducted these flights when it lacked required personnel. Additionally, the FAA alleged that Paradigm, through a consultant, solicited and obtained long-term contracts. Under this emergency revocation order, Paradigm must immediately surrender its operating certificate and faces a civil penalty of \$13,669 for each day it fails to surrender the certificate.

DOT FINALIZES DENIAL OF ANTITRUST IMMUNITY IN HAWAIIAN AIRLINES-JAPAN AIRLINES COMMERCIAL ARRANGEMENT

On March 13, 2020, the DOT issued a final order in the Hawaiian Airlines, Inc. (Hawaiian) and Japan Airlines Co., Ltd. (JAL) antitrust immunity proceeding, Docket DOT-OST-2018-0084. The DOT's Final Order approves the commercial agreements to the extent that they comply with U.S. antitrust law but denies a grant of antitrust immunity at this time. DOT did note that the approval of the agreements means that Hawaiian and JAL can continue to coordinate and further explore how best to structure an arms-length partnership or, alternatively, revise other documents to reflect important changes they propose to implement to their commercial agreements.

FEDEX SEEKS DISMISSAL FROM SHAREHOLDER DERIVATIVE SUIT OVER RANSOMWARE ATTACK

On March 13, 2020, FedEx, its executives and board of directors filed a brief in support of a motion to dismiss a shareholder derivative suit filed over a 2017 cyberattack, arguing the investors never raised concerns to the board that the company was downplaying the impact of the hack.

The consolidated suit, first filed in September 2019, accused FedEx of making "materially false and misleading statements" about the company's response after European subsidiary TNT Express BV was among a number of companies targeted in the "NotPetya" cyberattack, which wreaked havoc on computer systems worldwide and caused as much as \$10 billion in damage. The plaintiffs raised claims of federal securities violations, breach of fiduciary duty, waste of corporate assets, and unjust enrichment. These allegations are similar to those filed in a July 2019 proposed securities class action in New York federal court.

In the recently filed brief, the FedEx defendants rebutted allegations that the board minimized the severity of the "NotPetya" cyberattack. FedEx claims that the plaintiffs have failed to link the executives and directors to the alleged misstatements about the "NotPetya" attack and have not put forth sufficient support to show that they knew the statements were false or misleading at the time they were made. The FedEx defendants also claim that the complaint fails to adequately plead facts that show a substantial likelihood of liability for the board of directors. The court has yet to rule on the defendant's motion to dismiss.