

Aviation Regulatory Update

By Evelyn D. Sahr, Drew M. Derco, and Alexis A. George

TSA MASK MANDATE FOR TRANSPORTATION HUBS AND AIRCRAFT TERMINATED – OR IS IT?

On April 13, 2022, the U.S. Centers for Disease Control and Prevention (“CDC”) announced its recommendation to extend the 14-month-old federal transportation mask mandate for another 15 days, to May 3, 2022, meaning that travelers aboard airplanes, trains, buses, public transportation and in transportation hubs in the U.S. would be required to wear masks until at least that date. However, in a surprise development, on April 18, 2022, a U.S. District Court Judge struck down the mask mandate in an Order holding that the CDC had exceeded its statutory authority, failed to solicit public comment, and did not adequately explain its decisions. In response, the CDC updated its website, stating that due to the court order, the CDC’s January 29, 2021, Order requiring masks on public transportation conveyances and at transportation hubs was no longer in effect and CDC would no longer enforce the Order. The Transportation Security Administration (“TSA”) made a similar announcement, stating that due to the court order it would no longer enforce its Security Directives and Emergency Amendment requiring mask use on public transportation and transportation hubs and planned on rescinding the new Security Directives that were scheduled to take effect on April 20, 2022. Following the ruling, virtually all major U.S. airlines and many U.S. airports updated their policies, making masks optional.

There is still much uncertainty regarding the future of the mask mandate, however. On April 19, 2022, the Biden administration announced that the Department of Justice (“DOJ”) would appeal the Order if CDC requested it do so by deeming the mandate necessary for public health. The next day, CDC requested that DOJ appeal the ruling, citing its desire to keep the mandate intact as well as to preserve its public health powers (i.e., preserve its powers to issue future guidance and mandates), prompting DOJ to file a notice of appeal to the Eleventh Circuit Court of Appeals.

Interestingly, DOJ’s appeal does not change the status of the mask mandate, meaning that the mask mandate is currently not in force and cannot be reinstated at this time unless DOJ requests and is granted a stay of the Court’s ruling, rendering the decision temporarily ineffective. As of publishing of this update, DOJ has not requested nor been granted a stay of the Court’s ruling. Further, there has been little indication that any airlines will move to reintroduce their own mask requirements.

The U.S. District Court’s ruling will not impact the current pre-departure testing requirement, meaning that all passengers aged two and older to the U.S. must still present a negative COVID-19 test taken within 24 hours of entry to the country. Additionally, international carriers that operate to and from the U.S. should also be aware that masks may still be required on certain international flights depending on the arrival country’s requirements. Therefore, international carriers should review any home country mask requirements and continue complying with them if applicable, regardless of the recent decision, unless and until further clarification is received.

We will continue to provide updates on any changes associated with the mask mandate as we receive them.

CDC ISSUES AMENDED ORDER IN RESPONSE TO UPDATED ISOLATION AND QUARANTINE GUIDANCE AND TO CLARIFY ATTESTATION REQUIREMENTS

On April 4, 2022, CDC issued an [amended Order](#) revising some parts of its October 30, 2021, Order on travel requirements and restrictions for non-U.S. citizens who are nonimmigrants seeking to enter the U.S. by air travel and who are not fully vaccinated against COVID-19.

The amended Order, which became effective on April 14, 2022, is meant to align with CDC's current "after international travel recommendations" regarding quarantine and self-isolation requirements if a person tests positive for or develops symptoms of COVID-19 and calls for updates to the required attestation. The new attestation includes a change that non-U.S. citizens and/or residents that qualify for one of the various exceptions to the vaccination requirement and later test positive for COVID-19 after arriving in the U.S. need only to quarantine for five days instead of seven days as previously stipulated and clarifies previous language to confirm that children under the age of two need not complete (or have a parent or guardian complete on their behalf) the attestation. The amended Order also reduces the number of days recommended for isolation for people who are diagnosed with COVID-19, or have symptoms of COVID-19, from 10 days to five days.

FAA MAKES ZERO-TOLERANCE POLICY ON UNRULY BEHAVIOR PERMANENT

On April 20, 2022, the U.S. Federal Aviation Administration ("FAA") issued a [press release](#) announcing that it would make its zero-tolerance policy aimed at deterring unruly behavior onboard airplanes permanent. According to FAA, the decision to make the policy permanent was made as the agency believes its strategy has made a difference by reducing the frequency of onboard incidents involving unruly behavior by more than 60%, while egregious, unruly, and sometimes violent behavior has continued to persist. For example, so far this year 1,233 incidents involving unruly passengers have been reported, 797 of which were related to the recently voided mask mandate. Of these cases, FAA has initiated investigations into 370 incidents and acted in 192 of the cases.

FAA made its statement on the policy even after announcements by CDC and TSA that the mask mandate would no longer be enforced, even though the FAA's zero-tolerance policy and the mask mandate have long been linked. FAA's decision to make the policy permanent effectively delinked the policy from the mask mandate, allowing it to continue even as the mask mandate likely will not. To further enforce the policy in the future, FAA also stated that it has been working with TSA to revoke TSA PreCheck privileges for unruly passengers who are ultimately fined by FAA.

BIDEN ADMINISTRATION TO ISSUE NEW RULES ON FOREIGN-MADE DRONES

Recently, the Biden administration announced plans to issue new guidance on how federal agencies should handle the use of Chinese-made drones. The administration said it was developing a broader list of recommendations regarding the federal use of drones made in other countries, with a specific focus on reducing U.S. dependence on drones made in countries like China and strengthening the U.S. drone manufacturing industry. An administration official also said that it plans to separately publish terms for drone purchasing recommendations for the federal government sometime in the future. Currently, there is no coordinated approach to limiting the use of foreign-made drones as many federal agencies utilize their own solutions to try to avoid using foreign-made drones, especially those manufactured in China. This has prompted the Biden administration to seek to implement across the board recommendations as many of the restrictions currently applied by various federal agencies still allow for exceptions, such as in the case of the Interior Department, which grants waiver authority for the use of foreign-made drones in emergency situations.

We will provide any further updates on the Biden administration's proposed rules regarding foreign-made drones as soon as we receive them.

COURT OF APPEALS UPHOLDS DECISION TO DISMISS NEGLIGENCE CASE AGAINST SOUTHWEST

On April 22, 2022, The Court of Appeal, Second Appellate District (the “Court”) affirmed a recent trial court ruling granting Southwest Airlines Co. (“Southwest”) summary judgment after finding that the airline was not negligent and owed no duty to protect the plaintiff-appellant from an unforeseeable assault committed by another passenger.

As background, the plaintiff-appellant was a passenger on a Southwest flight from Dallas, TX to Los Angeles, CA on which an incident between another passenger, crewmember and unruly passenger ensued. The plaintiff-appellant was seriously injured after being hit and toppled onto by another passenger following a confrontation between two passengers during an unplanned disembarkation of the flight. This prompted the plaintiff-appellant to file suit against the passenger who caused his injury, as well as Southwest, for personal injury damages. In addition, the plaintiff-appellant also asserted one cause of action for negligence against Southwest claiming that Southwest breached its duty of care as a common carrier by failing to control the circumstances of the plaintiff-appellant’s transportation while he was a passenger on the flight. In response, Southwest filed an answer denying liability and asserting various affirmative defenses, and ultimately made a motion for summary judgment to dismiss the claim, arguing that it had no duty to protect the plaintiff-appellant from unforeseeable assaults committed by another passenger. Following a hearing, the trial court granted Southwest’s summary judgment motion, finding that although common carriers like Southwest have a duty to protect passengers from assaults by fellow passengers, there were no triable issues of material fact indicating that (1) the assault was reasonably foreseeable to Southwest; and (2) Southwest would have been able to prevent the injury suffered by the plaintiff-appellant. This prompted the plaintiff-appellant to file an appeal. After considering the same fact pattern, evidence presented, and arguments raised by both parties, the Court also determined Southwest did not have a duty to protect the plaintiff-appellant from the unforeseeable injury caused by another passenger and found that Southwest’s summary judgment motion was properly granted, affirming the trial court’s decision.

CONSUMER REPORTS SUBMITS PETITION U.S. SECRETARY OF TRANSPORTATION FOR STRONGER AIRLINE INDUSTRY OVERSIGHT AND A PASSENGER BILL OF RIGHTS

On April 18, 2022, Consumer Reports (“CR”), an American nonprofit consumer organization, submitted a petition to Transportation Secretary Pete Buttigieg signed by nearly 30,000 consumers asking that the U.S. Department of Transportation (“DOT”) take more aggressive action to ensure airline passengers are treated fairly by instituting a Passenger Bill of Rights. Specifically, the petition includes four requests, (1) to bring order, fairness and accountability to the airline industry by investigating airlines in order to hold them accountable and minimize flight cancellations, delays, and the withholding of refunds, (2) that DOT create one set of clear, consistent rules for all airlines that operate to and from U.S. points in regard to airlines’ Contracts of Carriage so that passengers understand their rights in the case of delays, cancellations, mishandled baggage and involuntary bumping, (3) that DOT adopt a new rule to allow passengers to cancel their own flights and still receive full refunds during “force majeure” events such as global pandemics, and (4) that DOT prohibit airlines from charging families extra fees for sitting with their young children on flights to better enforce the legislation passed by Congress in 2016 that sought to end the practice of charging fees for children under the age of 13 whose parents or guardians request to sit with them on flights.

JFK ANNUAL REPORT ON 2021 FLIGHT FEE FORMULA COST COMPUTATION

On April 18, 2022, the Port Authority of New York and New Jersey (“PANYNJ”) issued the annual report for the 2021 Flight Fee Formula Cost Computation Annual Statement (hereinafter the “Report”) for John F. Kennedy International Airport (“JFK”). In a letter to all Freedom Agreement holders detailing the Report, PANYNJ announced that application of the final 2021 Flight Fee Rate resulted in an overbilling of \$94.3 million, which PANYNJ says will be credited to the airlines affected as part of the 2022 flight fee formula cost computation. PANYNJ also reported that the 2021 final Flight Fee Rate totaled \$9.7498 per thousand pounds of maximum take-off weight of all signatory aircraft. Additionally, PANYNJ also stated that during 2021, \$39.2 million was applied against 2020 under billings of \$126.3 million, leaving an

outstanding balance of \$87.1 million, which is planned to be recovered from signatory airlines over the two-year period between 2022-2023.

If any signatory airlines have any questions or concerns regarding JFK's billing rates, they are encouraged to contact the Manager of JFK Financial Services using the following information: Mr. Max Dela Cruz, Manager, JFK Financial Services, (718) 244-3658.

UPDATES ON BIS AND OFAC SANCTIONS AND SDN LIST OF SANCTIONED INDIVIDUALS AND ENTITIES

In recent weeks, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") issued several updates to its "Specially Designated Nationals and Blocked Persons List" ("SDN List") and Frequently Asked Questions ("FAQs") regarding U.S. sanctions and enforcement of Transnational Criminal Organizations and certain sanctioned countries including Russia, Belarus, Libya and North Korea. A summary of each new development is provided as follows:

- On April 20, 2022, OFAC issued [notice](#) of a new FAQ on the obligations of operators of credit card systems according to the Russian Harmful Foreign Activities Sanctions Regulations, 31 C.F.R. part 587 (RuHSR), and the Belarus Sanctions Regulations, 31 C.F.R. part 548 ("BSR"). According to OFAC's new FAQ, U.S. operators of credit card systems and U.S. acquirers, are prohibited from processing transactions involving certain sanctioned foreign financial institutions, unless exempt or authorized by OFAC. Non-U.S. operators of credit card systems whose payment cards are issued by sanctioned foreign financial institutions may also be in violation of OFAC-administered sanctions regulations if they allow those cards to be used in the U.S.
- Also on April 20, 2022, OFAC issued a [press release](#) announcing the addition of several entities and individuals to the SDN List for attempting to evade sanctions imposed by the U.S. and its international partners on Russia. Specifically, OFAC designated Russian commercial bank, Transkapitalbank and a global network of more than 40 individuals and entities led by U.S.-designated Russian oligarch Konstantin Malofeyev, including organizations whose primary mission is to facilitate sanctions evasion for Russian entities. Other companies recently designated by OFAC operate in Russia's virtual currency mining industry, which is reportedly the third largest in the world, marking the first time the U.S. Treasury has designated a virtual currency mining company and put it on the SDN List.
- Earlier in the month OFAC also issued three other press releases noting other updates to its SDN List. The [first press release](#) included the names and identifying information of seven individuals and an entity known as the Kinahan Organized Crime Group, that were placed on the SDN List in connection with U.S. sanctions on Libya, and the second being a [press release](#) including the names and information of seven persons and an entity across four countries in the Western Balkans that were added to the SDN List in response to U.S. sanctions on actors involved in destabilizing and corruption activities in the Western Balkans region. Lastly, as part of OFAC's [North Korea update](#), OFAC issued notice of its intent to update the identifying information of an entity known as "LAZARUS GROUP", which is currently included in its SDN List in connection with U.S. sanctions currently imposed on North Korea and affiliated persons and entities.
- On April 14, 2022, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") issued an update announcing that it would implement a new rule to expand sanctions against Russia and Belarus according to U.S. Export Administration Regulations in response to the invasion of and ongoing aggression in Ukraine. The updated BIS Rule expands licensing requirements for Russia and Belarus under the Export Administration Regulations to all items classified under any Export Control Classification Number in Categories 0 through 2 on the Commerce Control List ("CCL") and removes license exception eligibility for aircraft registered in, owned or controlled by, or under charter or lease by Belarus or a national of Belarus. A copy of the BIS Final Rule can be found [here](#).

BIS TAKES ENFORCEMENT ACTION AGAINST RUSSIAN AIRLINES FOR OPERATING IN VIOLATION OF U.S. EXPORT CONTROLS

On April 7, 2022, BIS's Assistant Secretary for Export Enforcement issued a [press release](#) announcing the implementation of several orders denying export privileges of Russian airlines, Aeroflot, Azur Air, and UTair in response to alleged ongoing export violations by the airlines related to the export controls on Russia that were imposed by the Commerce Department.

Specifically, BIS issued three 180-day “Temporary Denial Orders” (“TDOs”) which effectively terminated the rights of the three airlines to participate in transactions subject to the Export Administration Regulations, which includes exports and re-exports from the U.S.

As background, because of U.S. involvement with and connection to most aircraft, and U.S. sanctions and export controls placed on certain countries such as Russia, some airlines, including foreign and domestic airlines, must obtain a BIS license or a license exception to operate anywhere outside of the U.S. This means that in theory, the TDOs issued by BIS and its revocation of export privileges has effectively grounded the three Russian airlines while current U.S. export controls bans companies around the world from providing refueling, maintenance, repair, other services or spare parts to the identified aircraft. Issuance of the TDOs comes in direct response to the U.S. identification of more than 170 Boeing aircraft that Russian airlines had continued to operate in violation of U.S. sanctions, which included about 40 Aeroflot Boeing 737 and 777 aircraft, 21 Azur Boeing aircraft, and 17 UTair Boeing aircraft.

While the TDOs represent the first enforcement actions taken by BIS in response to the Russian invasion of Ukraine, it is important to note that it is unclear how BIS would be able to enforce the TDOs. For instance, it is likely that any penalties that are issued for violations of the TDOs will be difficult to enforce. It is possible that future monetary payment could be used to enforce these and future TDOs if any of the airlines penalized seek to operate to the U.S. in the future, however this guidance has not been put forth by nor confirmed by BIS.

OFAC SETTLES WITH TOLL HOLDINGS FOR \$6,131,855 FOR APPARENT SANCTIONS VIOLATIONS

On April 25, 2022, OFAC issued an [Enforcement Release](#) announcing its settlement with Toll Holdings Limited (“Toll”), an international freight forwarding and logistics company headquartered in Australia, for alleged violations of multiple OFAC sanctions programs. Toll allegedly originated or caused to be received 2,958 payments in connection with sea, air, and rail shipments conducted by Toll, its affiliates, or providers and suppliers to, from, or through North Korea, Iran, or Syria, and/or involving the property or interests in property of an entity on OFAC’s SDN List between approximately January 2013 and February 2019. Further, according to OFAC, the value of the payments related to a designated person or made in connection with a sanctioned country totaled about \$48,409,909 and were processed through at least four financial institutions in the U.S. or foreign branches of financial institutions incorporated in the U.S., which is in violation of OFAC sanctions. Of the payments, 424 involved Mahan Airlines, which was designated pursuant to Executive Order (“E.O.”) 132241, and Hafiz Darya Shipping Lines Company, which was designated pursuant to E.O. 138822, with the remainder of the transactions, including 2,534 funds transfers, comprising payments made for shipments to, from, or transshipping through North Korea, Iran, or Syria. According to OFAC, the statutory maximum civil monetary penalty applicable in this matter was \$826,431,378, but since OFAC determined that Toll’s apparent violations were non-egregious and since Toll voluntarily self-disclosed the alleged violations, OFAC agreed to settle Toll’s potential civil liability to \$6,131,855.

DOJ UPDATES ITS ANTITRUST LENIENCY POLICY

On April 4, 2022, the Antitrust Division of DOJ issued a [press release](#) announcing changes to its Leniency Policy for the reporting of criminal violations and involvement with antitrust cartels and issued a revised set of frequently asked questions (FAQs), [available here](#).

As background, the Antitrust Division Leniency Policy allows a company or corporate officer to avoid criminal prosecution if the company is the first to self-report its involvement in an antitrust cartel, does so promptly after discovery of the misconduct, and cooperates with the government in its investigation and prosecution of the offenses. The updated leniency policy adds the element of “promptness” to its list of established requirements including restitution to victims, and the remediation of the harm caused to persons and property. Promptness is not defined in the policy but is assessed by DOJ by weighing the circumstances of the offenses with the size and scope of the company. Specifically, the determination of whether a company has acted promptly is left entirely to the discretion of DOJ’s Antitrust Division. A

company is also required to strengthen its compliance program to significantly reduce or eliminate future involvement in criminal antitrust activity. It is also important to note that any company applying for leniency is tacitly admitting that it believes it has committed a crime or been involved in a criminal enterprise.

As part of the update, DOJ has established a dedicated email address for companies seeking leniency under this program. (antitrust.leniency@usdoj.gov).

FAA ISSUES LARGEST FINES EVER IMPOSED AGAINST TWO UNRULY PASSENGERS

On April 8, 2022, FAA issued a [press release](#) announcing that it proposed the largest-ever fines against two unruly passengers for \$81,950 and \$77,272 respectively.

In the first instance, the passenger was fined \$81,950 for allegedly threatening and physically assaulting several flight attendants, crewmembers, and passengers. The passenger first threatened to hurt the flight attendant that offered to help her after she fell in the aisle of the aircraft, pushed the flight attendant aside, and tried to open the cabin door. Then the passenger repeatedly hit another flight attendant in the head when multiple flight attendants attempted to restrain her and spit at, headbutted, bit and tried to kick other crew members and passengers while being restrained. In the second instance, the passenger was fined \$77,272 for attempting to hug and kiss the passenger seated next to her, walking to the front of the aircraft and trying to exit the aircraft during flight, refusing to return to her seat at the direction of crewmembers, and biting another passenger multiple times.

The fines come as FAA continues to try to crack down on unruly passenger behavior on airplanes. In fact, the two fines detailed above are part of the approximately \$2 million DOT has proposed against unruly passengers since January 1, 2022.