Aviation Regulatory Update

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DOT ANNOUNCES NEW RULEMAKING ON AIRLINE TICKET REFUNDS

On August 22, 2022, the U.S. Department of Transportation ("DOT" or "the Department") published a new proposed rule relating to ticket refunds that would apply to both U.S. and foreign airlines operating to the U.S. This rule is being proposed in response to the pandemic and health-related issues of passengers, as well as to the numerous air travel-related complaints submitted to DOT since 2020 and ongoing cancellations and delays by carriers. A copy of the full text NPRM is available here.

DOT's proposed rulemaking on airline ticket refunds is not a final rule. Airlines and interested parties have the opportunity to attempt to influence the language to be included in any final rule by making a public comment during the notice-and comment period, which is currently ongoing. Comments on the proposed rule are due no later than **November 21, 2022**.

Highlights of the proposed rule include but are not limited to:

- A re-statement of the Department's longstanding interpretation that failure to provide timely refunds for cancelled or significantly delayed flights amounts to an unfair business practice and ensuring that air travelers receive timely refunds when airlines cancel or significantly change flights.
- A proposed requirement that airlines provide passengers with a notification that they are entitled to a refund if that is the case.
- A proposed requirement that airlines provide passengers who hold non-refundable tickets with non-expiring flight credits or vouchers if such passengers are unable to fly due to certain pandemic related reasons including government-mandated travel bans, closed borders, or if passengers are advised not to travel due to personal health risks or concerns, or the health risks or concerns of other passengers. And a requirement that airlines issue monetary refunds to passengers instead of non-expiring flight credits or vouchers if they receive "significant government assistance" related to a pandemic.
- New definitions for the terms, "cancellation" and "significant change".

We encourage you to review the rule in its entirety, as it raises a number of issues critical to U.S. and foreign air carriers, as well as to travel agents. DOT has also sought input from interested parties on more than 30 key topics. If you are interested in submitting a comment, please do not hesitate to reach out to us.

SUMMARY OF DOT'S MEETING ON AIRLINE TICKET REFUNDS AND CONSUMER PROTECTION MATTERS (AIRLINE TICKET REFFUNDS NPRM)

On August 22, 2022, DOT's Aviation Consumer Protection Advisory Committee held a meeting on airline ticket refunds and related consumer protection matters, with specific focus on the Department's recently published Notice of Proposed Rulemaking ("NPRM") on airline ticket refunds (more fully detailed above). The meeting included a DOT-led presentation on topics addressed in the NPRM including: (1) ticket refunds generally, including a discussion on the new definitions proposed for "cancellations" and "significant changes"; (2) when non-expiring travel credits and vouchers can be provided to passengers unable to fly due to pandemic-related reasons; and (3) the proposed requirement that airlines provide consumers with cash refunds instead of vouchers or flight credits for cancelled or significantly delayed flights if the airline receives significant government financial assistance related to a pandemic. Each presentation was also followed by question and comment periods for each topic. A brief summary of each presentation is as follows:

Part 1:

DOT began the meeting by emphasizing that a major reason for the NPRM is its desire to codify its longstanding interpretation that an airline's refusal to provide prompt refunds (whether monetary, or through vouchers, etc.) when it cancels or significantly changes a flight amounts to an unfair and deceptive business practice in violation of 49 U.S.C § 41712. DOT then explained the NPRM's proposed new definitions for the terms "cancellation" and "significant change" to clear up consumer confusion regarding those terms. DOT also indicated that the NPRM would allow airlines to choose to provide a refund in the original form of payment used by a consumer, or by providing consumers with a "cash-equivalent", which will be defined as a form of payment that can be used in the same ways as cash can (e.g., checks, gift cards that are widely accepted in commerce, and digital platform funds), but that regardless of the type of refund ultimately given out, airlines will be required to clearly communicate to consumers that they are entitled to a refund when this is the case, and must make consumers aware of their options for a refund (i.e., cash, cash equivalent, voucher, etc.). A few interesting points raised during the question and comment portion of the meeting for this part of the presentation were the fact that under the NPRM the refunding entity would be granted the authority to determine the form of the refund to be given to an affected passenger, and discussion of the many undefined terms included in the NPRM such as "comparable amenities" and "significant downgrade". There were also several scenario-specific questions raised including what airlines should do in terms of refunds as it relates to subscription plans, and whether a cancellation like a ground stop due to severe weather would still be considered to be a cancellation that the airline would be responsible for providing a refund for (to which DOT answered "yes"), DOT encouraged further comments on both of these and similar scenarios.

Part 2:

During the second part of the presentation, DOT began the discussion by noting the three categories of consumers that may receive non-expiring travel credits for voluntary cancellations, including (1) consumers who are physically or legally restricted from traveling or those whose travel would be pointless due to government-imposed measures (i.e., lockdowns); (2) those consumers who are at heightened risk of complications if they were to contract a serious communicable disease, regardless of whether or not a public health emergency is currently in effect; and (3) those consumers who have a serious communicable disease that could potentially be spread to others, regardless of whether or not a public health emergency is currently in effect. On this point, DOT reiterated that the NPRM includes a requirement that airlines provide non-expiring vouchers of equal to greater fare, applicable taxes, fees, and ancillaries to such passengers. In response, there were a few questions on some of the terms used in the NPRM regarding the non-expiring travel credit/voucher requirements, including what the definition of a "medical professional" would be and what the definition of a "serious communicable disease" would be.

Part 3:

Lastly, DOT focused on the requirement currently included in the NPRM that airlines only provide cash refunds for cancellations and significant changes caused by them if they receive "significant government assistance" related to a pandemic. DOT discussed the requirement generally and made a few clarifications such as (1) the fact that as written, the rule would require airlines to pay out cash refunds when passengers are unable to fly due to pandemic related reasons and the airline receives a significant amount of money, even if the money is restricted in its uses (i.e., significant money is granted but a large part of it must be used to pay out employee salaries), and (2) that in the NPRM "financial support" as defined would include cash contributions and stock purchases that airlines receive from the government. DOT also noted that passengers entitled to non-expiring credits or vouchers (as discussed in the second presentation) would also be able to receive cash refunds instead of credits or vouchers if the airline receives significant government financial assistance.

FAA SEEKS PUBLIC COMMENTS ON AIRPLANE SEAT SIZES TO DETERMINE FUTURE RULEMAKINGS

The Federal Aviation Administration ("FAA") recently announced via press release that it is currently seeking public comments on the minimum seat dimensions for seats onboard commercial aircraft to determine if they are too small. Specifically, FAA is seeking comments on the minimum seat dimensions necessary for passenger safety as it relates to airplane evacuations. This is part of FAA's ongoing efforts to determine whether to issue new regulatory standards to ensure safety and comply with its duties under Section 577 of the FAA Reauthorization Act of 2018. So far, over 11,000 comments have been submitted on this issue.

As some readers may recall, in 2018 Congress instructed the FAA to issue rules regarding the minimum dimensions (i.e., seat pitch, width, and length) for passenger seats on aircraft that are operated by airlines in interstate and intrastate transportation and are necessary to passenger safety. To gather data to comply with the directive, FAA conducted a number of simulated emergency evacuations at the Civil Aerospace Medical Institute ("CAMI") and published a report, available here, which included several recommendations on how the safety of such evacuations could be improved. According to the report, seat size and spacing did not adversely affect the success of emergency evacuations, but CAMI still recommended that FAA continue to monitor size issues related to passenger seats. Written comments related to the size of commercial aircraft seats are due by **November 1, 2022**. Interested parties can submit comments on this issue in FAA's nonrulemaking docket on the matter, available here.

FAA ISSUES NPRM ON INSTALLATION AND OPERATION OF FLIGHTDECK PHYSICAL SECONDARY BARRIERS FOR PART 121 SERVICE

On August 1, 2022, FAA issued a notice of proposed rulemaking ("NPRM") regarding the implementation of a mandate based on the FAA Reauthorization Act of 2018, which would require the installation and use of an installed physical secondary barrier ("IPSB") on certain aircraft operated by air carriers operating under 14 C.F.R. Part 121. If adopted, the rule would only apply to operators conducting passenger-carrying operations in the U.S. with transport category airplanes and would require these carriers to use the IPSB as part of their procedures for opening the flightdeck door.

Use of the IPSB is intended to protect the flightdeck from unauthorized intrusion when the flightdeck door is opened. For example, the IPSB would be required to be capable of resisting intrusion and meeting certain physical standards while still allowing line-of-sight visibility between the flightdeck door and the cabin. The proposed rule

would also require that the IPSB be deployed (i.e., closed and locked) whenever the flightdeck door is opened while the airplane is in flight. Notably, the rule would not be applicable to Part 129 operations of foreign carriers that operate within the U.S. or solely outside of the U.S. using U.S. registered airplanes. Lastly, the proposed rule would apply to transport category airplanes manufactured two years after the effective date of a final rule. The FAA has defined the date of manufacture as the date on which an inspection record shows that an aircraft is in a condition for safe flight. Comments on the NPRM are due by **September 30, 2022**.

ATPCO SUBMITS COMMENT ON AIRLINE DISTRIBUTION AND DISPLAY OF ANCILLARY CONTENT EFFORTS

On August 10, 2022, the Airline Tariff Publishing Company ("ATPCO") submitted a comment, available here, to DOT's nonrulemaking docket for the Advisory Committee for Aviation Consumer Protection ("ACACP") regarding the Department's consideration of rules that would establish new requirements for airlines on the distribution and display of ancillary content.

As background, DOT has for more than a decade focused on and issued numerous rules related to ancillary service fee transparency and the distribution and transmission of information on ancillary airline products and services. More recently, DOT has signaled a renewed focus on the implementation of new rules in this area, such as the proposed rule on "Enhancing Transparency of Airline Ancillary Fees" (RIN 2105-AF10), scheduled for publication in October 2022**. If promulgated, this rule would amend DOT's aviation consumer protection regulations to ensure that consumers have ancillary fee information including baggage fees, change fees, and cancellation fees at the time they purchase a ticket, and determine whether fees for certain ancillary services should be disclosed at the beginning of the search process for a ticket, when the fare is listed.**

In response, ATPCO submitted a letter stating that DOT has missed much of its work, as well as the work of airlines and other third parties, to make "significant progress to facilitate the transparency that the Department intends to foster" with new rules, and that the Department's issuance of new rules on ancillary content may end up causing complex issues that could delay the industry's ongoing efforts. For example, ATPCO detailed how it already has been working to develop new standards and data to ensure that flight fares and related policy content, including information on ancillary service and baggage fees, are clearly available to consumers at all points of sale. Comments related to the display and distribution of ancillary content and DOT's proposed rules on this subject can be made in DOT's ACACP nonrulemaking docket, available here. Comments on ancillary content can be submitted indefinitely for the time-being since DOT has yet to issue a proposed rulemaking subject to a notice and comment period.

U.S. DISTRCT COURT DENIES HAWAIIAN'S MOTION FOR SUMMARY JUDGMENT IN TURBULANCE-RELATED NEGLIGENCE CASE

On August 24, 2022, the U.S. District Court for the District of Hawaii (the "Court") denied Hawaiian Airlines' ("Hawaiian") motion for summary judgment involving damages due to a turbulent flight. During the flight, the fasten seatbelts sign was turned on and an announcement was made while the Plaintiff was on his way back to his seat from the restroom. The Plaintiff claimed it took him several minutes to return to his seat due to the airplane wobbling, and that when he returned, he attempted to fasten his seatbelt, but did not succeed. Consequently, when the flight encountered more turbulence, the Plaintiff was allegedly ejected from his seat and injured. The Plaintiff also alleged that multiple other passengers were similarly injured due to the turbulence and that a flight attendant near the Plaintiff during the incident also allegedly hit the ceiling during the turbulence.

The Plaintiff alleged two claims for negligence and strict liability under the Montreal Convention (specifically Article 17(1), which provides that "an air carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking"). Hawaiian argued that it was entitled to summary judgment because the incident could not be considered an "accident" under the Montreal Convention and therefore did not fall within the scope of Article 17. Specifically, Hawaiian asserted that the Plaintiff did not have a right to recover damages because (1) turbulence preceded by a warning to passengers to fasten seatbelts is not "unusual or unexpected"; (2) the Plaintiff's injuries could only be attributed to his own failure to fasten his seatbelt rather than an external event; and (3) even if the accident occurred, it did not cause the Plaintiff's injuries. The Court summarily denied these arguments, instead finding that there were several factual disputes between the parties such as to whether the Plaintiff was negligent and if he was, whether his own negligence caused his injuries, requiring that the case be considered further. Accordingly, the Court denied Hawaiian's motion for summary judgment.

U.S. TENTH CIRCUIT COURT OF APPEALS RULES AGAINST SKYWEST IN PERSONAL INJURY CASE

On August 22, 2022, the U.S. Court of Appeals for the Tenth Circuit announced its decision to reverse and remand a district court ruling that dismissed a passenger's personal injury claim against SkyWest Airlines ("SkyWest") for its alleged failure to exercise due care.

The Plaintiff originally brought suit following a 2019 incident during which a SkyWest flight attendant allegedly "carelessly" struck her with a beverage cart. The Plaintiff further alleged that during the flight's beverage service the flight attendant "caused the beverage cart to forcefully strike" her shoulder resulting in a significant injury. The complaint included claims of negligence and breach of contract by the airline under Utah state law. The Plaintiff alleged that her injuries were caused by SkyWest's breach of its contractual obligations to provide "safe carriage and transport from her origination to her destination" and to "exercise professional, careful, and safe conduct and judgment." In response, SkyWest made a motion to dismiss the negligence claim based on the Airline Deregulation Act ("ADA") which generally preempts state laws related to "a price, route, or service of an air carrier", and to dismiss the contract claim due to redundance and a failure by the Plaintiff to identify a specific contract or contractual provision that was breached. The district court agreed with SkyWest finding that the negligence and contract claims were both preempted by the ADA and subsequently dismissed the whole complaint on that basis.

On Appeal, the Court found that when applying the Supreme Court's "connection with or reference to" test, which is applicable in ADA preemption cases, the Plaintiff's negligence and contract claims were not preempted under the "reference to" part of the test because the state laws invoked by the Plaintiff did not refer to airline prices, routes, or services, but rather to Utah's common-law negligence and contract causes of action, which can be considered laws of general applicability that apply to any individuals or corporations whose actions may foreseeably injure others or those who enter into contractual arrangements. The Appeals Court also found that the Plaintiff's claims were not based on state laws that were impermissibly "connected with" airline prices, routes, or services. Given this, the Appeals Court determined that a finding in favor of the Plaintiff would not affect SkyWest's services, and would only require SkyWest to "honor its contractual obligations and to comply with the general duty of care toward those who might be foreseeably injured by its affirmative acts" as it believed any other business would be required to do, and that SkyWest had failed to show how a ruling in the Plaintiff's favor would limit its choices regarding prices, routes, and services. As a result, the case was reversed and sent back to the district court for reconsideration.

U.S. DISTRICT COURT GRANTS PARTIAL MOTION TO DISMISS ACAA CLAIM ASSERTED AGAINST SOUTHWEST

On August 16, 2022, the U.S. District Court for the Eastern District of Louisiana granted Defendant Southwest Airlines' ("Southwest") motion to dismiss an Air Carrier Access Act ("ACAA") claim brought by a passenger seeking to recover damages for injuries sustained due to Southwest's alleged failure to provide proper wheelchair assistance at Louis Armstrong International Airport (MSY).

The incident occurred in the Spring of 2021. According to the Plaintiff, he repeatedly requested wheelchair assistance at MSY due to pre-existing physical injuries that rendered him disabled, but upon arriving at the airport for a flight to Houston, TX, Southwest did not provide him with a wheelchair. As a result, Plaintiff asserted that he fell causing injuries to his head, shoulders and neck when he attempted to board the aircraft without a wheelchair. The Plaintiff raised five causes of action, including claims under the Americans with Disabilities Act ("ADA") and the ACAA to recover damages for his injuries. Southwest filed a motion to dismiss, arguing that the Plaintiff's claim under the ACAA should be dismissed because the statute does not provide passengers with an individual private right of action. The U.S. District Court agreed with Southwest's argument, stating that while the ACAA prohibits airlines from discriminating against consumers on the basis of disability, the Act does not expressly provide individual consumers with a right to sue a carrier based on it, as the Act's remedial process is specifically limited to allowing an aggrieved passenger to notify DOT of an alleged violation. DOT can then decide whether to investigate the alleged violation and issue a fine for non-compliance based on the Department's civil penalty guidelines, or issue an order of compliance and enforce its order by filing a civil action in district court, but only it is given this authority under the ACAA. The Court also pointed out that in a recent decision the U.S. Fifth Circuit Court also held that "no private right of action exists to enforce the ACAA in district court", and that every federal court that has considered the issue has held that "the ACAA's text and structure preclude a private right of action." No further action has been taken yet on the Plaintiff's remaining ADA-related claim.

OFAC ISSUES NEW GENERAL LICENSE RELATED TO CIVIL AVIATION SAFETY

On August 3, 2022, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") issued a new General License related to its Russian Harmful Activities Sanctions Regulations. Specifically, General License No. 40B, concerning civil aviation safety, provides that all transactions ordinarily incident and necessary to the provision, exportation, or re-exportation of goods, technology, or services to ensure the safety of civil aviation involving one or more previously blocked entities are now authorized, provided that they meet the following conditions. First, the aircraft involved must be registered in a jurisdiction outside of the Russian Federation; and second, the goods, technology, or services provided, exported, or reexported must be for use on aircraft operated solely for civil aviation purposes.

It is important to note that the new General License does not authorize the following transactions: (1) any transactions prohibited by Directive 2 under E.O. 14024 ("Prohibition Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions"); (2) any transactions prohibited by Directive 4 under E.O. 14024 ("Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation"); or (3) any transactions otherwise prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR Part 587 (RuHSR), including transactions involving any person blocked pursuant to the RuHSR other than the blocked entities listed in the Annex to General License 40B, unless separately authorized.

DOJ REQUESTS SEIZURE OF BOEING 747 CARGO PLANE CURRENTLY GROUNDED IN ARGENTINA

On August 2, 2022, the U.S. Department of Justice ("DOJ") issued notice that it has transmitted a request to Argentinian authorities to seize a Boeing 747-300M cargo airplane following the U.S. District Court for the District of Columbia's decision to unseal a seizure warrant for the aircraft. The warrant was originally issued on July 19, 2022 after a finding that the U.S.-made aircraft was subject to forfeiture due to violations of U.S. export control laws including the unauthorized transfer of the aircraft from Mahan Air, an Iranian airline that has been linked with a previously sanctioned and designated terrorist organization known as the Islamic Revolutionary Guard Corp-Qods Force ("IRGC-QF"), to Empresa de Transporte Aéreocargo del Sur, S.A. (also known as EMTRASUR), a Venezuelan cargo airline. This was preceded by a June 2022 seizure warrant prompted following Argentinian authorities' reports of the detainment of the flight crew of the Boeing aircraft, including five Iranians and the captain of the aircraft, who was later identified as an ex-commander for the IRGC-QF and a shareholder and member of the board of Iranian airline Qeshm Fars Air. Argentinian authorities also conducted a search of the aircraft and found a Mahan Air flight log documenting various flights conducted after the unauthorized transfer of the aircraft to EMTRASUR.

As further background, in 2008, a Temporary Denial Order was issued against Mahan Air prohibiting it from engaging in any transaction involving any commodity exported from the U.S. that is subject to U.S. export regulations, among other things. Then, in 2011 Mahan Air was designated by OFAC for providing material support to the IRGC-QF. In October 2021, Mahan Air violated the Temporary Denial Order and U.S. export control laws by transferring control and custody of the Boeing aircraft to EMTRASUR without obtaining authorization from the U.S. government. EMTRASUR then allegedly committed additional violations of U.S. export control laws between February and May 2022 when it reexported the Boeing aircraft between Caracas, Venezuela; Tehran, Iran; and Moscow, Russia, again without obtaining authorization from the U.S. government.

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