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Aviation Regulatory Update

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DOT ANNUAL REPORT OF DISABILITY-RELATED COMPLAINTS RECEIVED IN 2022 DUE BY JANUARY 30, 2023

Each January carriers are required to submit an annual report to the U.S. Department of Transportation ("DOT" or the "Department") which includes a categorized summary of all disability-related complaints received by the airline during the prior calendar year. The summary is to be submitted to the Department's Aviation Consumer Protection Division ("DOT ACPD") on or before the last Monday in January. This year's report, covering calendar year 2022, is due no later than **January 30, 2023**. Carriers that did not receive any written disability-related complaints in calendar year 2022 are still required to file a zero-report indicating that no complaints were received.

Failure to comply with the reporting requirements can result in DOT taking enforcement action, and DOT has historically penalized numerous carriers for failing to comply with this important reporting mandate.

Please contact us if you have any questions on the submission process or require assistance in making your annual report.

UPDATE: DOT EXTENDS COMMENT PERIOD FOR AIRLINE ANCILLARY FEES NPRM TO JANUARY 23, 2023

On December 14, 2022, DOT issued a notice to announce that it has extended the comment period for its proposed rulemaking on "Enhancing Transparency of Airline Ancillary Service Fees" to **January 23, 2023**. This decision was made based on requests DOT received from various airline industry groups including IATA and Airlines for America. DOT also noted that it plans to issue formal responses to the questions raised by the airline groups in the rulemaking docket, available here, in the coming weeks.

A4A MEMBERS FILE IATFCPA COMPLAINT AGAINST THE BAHAMAS

On December 19, 2022, members of Airlines for America ("A4A") filed a joint complaint with DOT against the Government of the Bahamas for alleged "unjustifiable, unreasonably discriminatory, anticompetitive and unreasonable charges levied against" A4A members by the Bahamian government in violation of the U.S.-Bahamas Air Transport Agreement (the "Agreement"). A4A alleged that the Bahamas imposed "astronomical charges" for air navigation services that far exceeded the costs it incurred to provide the services to A4A members, which violates the country's obligations under Article 10 of the Agreement to ensure "fundamental fairness" of the user charges imposed on carriers. In the complaint A4A notes that its members are subject to the highest charges for flying certain aircraft through Bahamas airspace or operating to/from the Bahamas as they must pay approximately $51.60 per nautical mile when transiting through Bahamas airspace, or $61.00 per flight when they land in or depart from the Bahamas. A4A also notes that its members alone have allegedly paid over $20 million to the Bahamas since

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the charges were instituted (or nearly $11 million per year), while the estimated annual total cost for the Bahamas to provide air navigation services to A4A members is only about $2 million (which includes FAA fees and other charges). Based on this, A4A requested that DOT take action based on its authority under the International Air Transportation Fair Competitive Practices Act ("IATFCPA"), and specifically issue a show cause order to curtail or suspend the authority held by air carriers of the Bahamas to provide international air transportation to the U.S. until the Bahamas ends the collection of the "unjust" charges.

A4A has requested that DOT provide answers to its complaint within 2 weeks, though under U.S. law DOT has up to 180 days (or until June 17, 2023) to take action against the Bahamas or otherwise resolve the issues raised in A4A's complaint.

RECAP: DOT ACPAC MEETING ON TRANSPARENCY OF AIRLINE ANCILLARY FEES AND AIRLINE TICKET REFUNDS NPRMs

On December 8th and 9th, DOT's Aviation Consumer Protection Advisory Committee ("ACPAC") held public meetings to discuss DOT's proposed rulemakings on "Enhancing Transparency of Airline Ancillary Service Fees" and "Airline Ticket Refunds and Consumer Protections", as well as other related topics. The comment period on the transparency of ancillary fees rulemaking has been extended to **January 23, 2023** (as detailed above). The comment period for the refunds rulemaking closed on **December 16, 2022**.

On the first day, ACPAC reviewed the various components of the ancillary service fees NPRM through DOT led presentations on the rule. This included an overview of proposed rule provisions on the disclosure of baggage fees (including specifically online disclosures versus offline disclosures of baggage fees), the disclosure of change and cancellation fees, and the disclosure and transactability of family seating fees. The ACPAC then generally discussed a number of issues including whether the rulemaking will address challenges that consumers may face regarding finding and understanding ancillary fees when searching for flights and services through newer technologies like mobile applications, and the proposed rulemaking's requirements regarding the display of certain content such as change fees, seating guardians next to children, etc. Members of the ACPAC and the general public were also given an opportunity to make further comments on the rulemaking and ask questions. Some comments included a statement that the rulemaking is a "step in the right direction", and a reiteration that the proposed implementation deadline for compliance (i.e., 6 months from the enactment of a final rule) may not be adequate to give airlines and tickets enough time to come into full compliance. There were also several comments given on behalf of airline groups, including (1) an indication that the cost and time to implement the requirements of the proposed rule that would require airlines and related ticket-selling websites to provide specific information to consumers on an itinerary or carrier specific basis, and based on a consumer's frequent flyer status if they provide identifying information, would outweigh the potential time saved for the consumer (i.e., the cost and time to implement the changes aren't worth the small amount of time savings the consumer will reap), and (2) that the rulemaking could present an added burden and cause more confusion for consumers since it would require more, highly-detailed information to be added and broken down on the first search page for flight fares.

On the second day, ACPAC discussed the proposed rulemaking on ticket refunds, beginning again with an overview of the NPRM and issues/comments raised during the previous August 2022 ACPAC meeting on the rulemaking. After general discussion, the ACPAC deliberated and made several committee recommendations to eventually be voted on and submitted to DOT as ACPAC's official recommendations. Some of the recommendations included (1) that the ACPAC support DOT's proposed definitions for "Cancelled flight" and "Significant change", and that significant changes be defined as 3 hours for domestic flights and 4 hours for international flights, (2) that DOT clarify its proposal on "Medical Professionals" by changing this term to have the same definition as "Treating Physician" as defined under Michigan state law, (3) that the ACPAC support DOT's proposal regarding non-expiring

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travel credits and vouchers that are provided in situations where people are not able to travel due to a communicable disease, (4) that DOT look into the possibility of providing passenger education to better explain the true cause of delays and cancellations (e.g., weather disturbances when there do not appear to be weather issues at a passenger's arrival or departure airport location), and (5) that DOT look into issuing regulations to require airlines to notify affected consumers of services and amenities that are available in the event of a controllable delay or cancellation.

FAA ISSUES PROPOSED RULEMAKING TO UPDATE AIR CARRIER DEFINITIONS

On December 7, 2022, the Federal Aviation Administration ("FAA") issued a notice of proposed rulemaking to amend the regulatory definitions of certain air carrier and commercial operations and add "powered-lift" to its definitions to ensure that the appropriate rules apply to air carriers' and certain commercial operators' powered-lift operations. FAA is also proposing to update requirements related to carrier oversight including guidance on the contents of operations specifications and the qualifications applicable to certain management personnel for powered-lift operations.

Comments on the proposed rule are due by **February 6, 2023**. This is a follow-up to the item included in our November update on the FAA's announcement regarding its plans to issue new rules to expand commercial air taxi, or "powered-lift" operations.

DECISION ON PROPOSED EU-U.S. TRANSATLANTIC DATA TRANSFERS CHANGES ISSUED

On December 13, 2022, the European Commission published a preliminary decision supporting the proposed data protection changes related to transatlantic data transfers outlined by the Biden administration's October 2022 Executive Order on "Enhancing Safeguards for United States Signals Intelligence Activities." As a reminder, the data protection changes proposed are aimed at reducing widespread access to the data of European citizens by American national security agencies and instituting an independent process to approve how such agencies can use the personal data of citizens in the European Union. This came in response to a 2020 European Union Court of Justice decision finding that the U.S. did not provide sufficient protections regarding the transfer of personal data across the Atlantic, effectively invalidating the previous EU-U.S. Data Privacy Framework.

In terms of next steps, members of the European Parliament are expected to weigh in on the Commission's decision soon, even though it does not have an official role in the process to institute a new transatlantic data deal. Any deal will also have to be approved by each national EU government before it can be finalized.

DHS DELAYS DEADLINE FOR REAL ID COMPLIANCE TO 2025

On December 5, 2022, the U.S. Department of Homeland Security ("DHS") issued a press release announcing that it has decided to once again extend the deadline for compliance with the REAL ID Act to **May 7, 2025**.

The extension will now give states an additional two years to ensure that residents have an opportunity to get the new driver's licenses and identification cards required to meet the security standards established by the REAL ID Act. DHS noted that the extension was warranted due to "lingering impacts of the COVID-19 pandemic on the ability to obtain a REAL ID driver's license or identification card" including extensive backlogs that agencies are continually trying to work through. Under the law, once the new deadline passes, federal agencies like the Transportation Security Administration ("TSA") will be prohibited from accepting driver's licenses and identification cards that do not meet the established requirements. Most notably, the REAL ID-compliant licenses will be required

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for air travelers 18 and older who want to board flights in the U.S., meaning those who do not present a REAL ID-compliant driver's license or identification card, state-issued enhanced driver's license, or another TSA-acceptable form of identification at airport security checkpoints for domestic air travel will not be allowed to board and fly on domestic flights after the May 7th deadline.

PANYNJ ISSUES NOTICE ON PASSENGER FACILITY CHARGES

On December 9, 2022, the Port Authority New York and New Jersey ("PANYNJ") issued a notice to carriers operating to EWR, LGA, JFK, and SWF airports requesting comment on submission of the Passenger Facility Charges ("PFC") Use Application to the FAA. This will include a request to use PFCs for various projects. In this regard, PANYNJ notes that two projects received extension approval from FAA for impose authority under applications 17- 12-C-00-EWR, 17-12-C-00-JFK, 17-12-C-00-LGA and 17-08-C-00-SWF, which are the Terminal Construction Project and the Airport Roads Construction Project, for EWR Terminal A.

Interested parties are encouraged to submit comments on this matter to PANYNJ here by **January 11, 2023**. PANYNJ is planning to submit the Use Application to FAA by **January 21, 2023**.

U.S. SENATE APPROVES BILL ON PREVENTING PFAS RUNOFF AT U.S. AIRPORTS

On December 2, 2022, the U.S. Senate passed a bill known as the "Preventing PFAS Runoff at Airports Act", which if enacted would temporarily allow the FAA to cover 100% of the costs for airports to purchase and deploy equipment (i.e., firefighting foam testing carts) to test fire suppression systems that contain perfluoroalkyl and polyfluoroalkyl substances ("PFAS") without actually discharging the substances, which are manmade, do not break down, and have been found to cause adverse human health effects. The bill would also direct the FAA to find options to reimburse airports that have already purchased firefighting foam testing carts without full federal assistance. The goal of the new legislation is to reduce the spread of toxic PFAS at commercial airports by incentivizing the airports to purchase low-cost input-based testing systems to reduce or prevent human exposure to PFAS.

U.S. SUPREME COURT TO CONSIDER CASE ON CHOICE-OF-LAW PROVISIONS FOLLOWING AIRLINE COMPANY DISPUTE

The U.S. Supreme Court will consider a case on how to interpret general choice of law provisions in contracts under the Federal Arbitration Act following a decision by the Eleventh Circuit refusing to vacate a $1 million award to Gulfstream Aerospace Corporation ("Gulfstream") over business jet payments stipulated in a contract between it and Oceltip Aviation 1 Pty. Ltd. ("Oceltip"). This comes in response to Oceltip's November 16 petition requesting the Court to determine whether courts can replace state law with FAA standards based on the federal common law rule requiring "clear intent" to opt out of FAA default standards in favor of state arbitration rules when they consider contracts that include both arbitration and choice of law provisions.

As background, in 2016, a tribunal of the International Centre for Dispute Resolution found that Oceltip breached a sales agreement with Gulfstream by failing to pay for a private jet it purchased through an agreement with Gulfstream. The contract between Gulfstream and Oceltip included a choice of law clause that indicated Georgia state law would govern the contract, which the entities' arbitration proceedings followed, but a dispute later arose over whether a state or federal court should enforce the award after Gulfstream attempted to confirm its $1 million award in federal court. In response, Oceltip argued that the choice of law clause in the agreement should have been construed as meaning that Gulfstream could not seek to enforce any award in federal court. Oceltip also argued that not confirming the award according to the Georgia arbitration code amounted to a "manifest disregard for the law." Both a Georgia federal court and the Eleventh Circuit found that the FAA's standards should be applied,

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however, as unless a clear preference for a state's arbitration standards is explicitly detailed in the contract, the Federal Arbitration Act would apply.

PASSENGERS SUE AMERICAN AIRLINES FOR INJURIES RELATED TO "ROCKY" LANDING

On December 2, 2022, the U.S. District Court for the Southern District of Florida issued a decision in a case filed by several passengers against American Airlines ("American") for damages for injuries suffered during a rocky airplane landing in the Bahamas. Specifically, the passengers alleged that in October 2020, they suffered various injuries during the landing of a flight from Miami FL to the Bahamas during which the airplane "experienced sudden braking with rapid deceleration and skidding" that resulted in the airplane "veering off the centerline before exiting the runway on the right runway shoulder." The passengers then filed suit in October 2022 based on the Montreal Convention treaty. American argued that the passengers' complaint failed to state a claim for which relief could be provided, and that the Montreal Convention does not govern actions involving international flights between the U.S. and the Bahamas because while the Bahamas is a signatory to the treaty, it never actually ratified or approved the Montreal Convention. The Court found in favor of American deciding that the Montreal Convention never defines the term "State Party" and that a country cannot be considered a "State Party" until it ratifies or otherwise approves the treaty. The Court also said that the Montreal Convention only applies when "the place of departure and the place of destination" are both "State Parties" to the Convention, and in this case, since the arrival place was the Bahamas (a signatory to the treaty that has not been listed by the ICAO as one of the states that has approved the treaty), the Montreal Convention did not apply to the instant action, meaning the complaint should be dismissed. In response to the Court's decision, the passengers requested leave to amend their claim, which was granted by the Court. No further action has been taken in the case to date.

LAWSUIT BROUGHT AGAINST UNITED FOR ALLEGED VIOLATIONS OF STATE PRIVACY LAWS

On November 23, 2022, a class action lawsuit was filed in Illinois state court against United Airlines ("United") alleging that United violated passengers' privacy rights by collecting facial geometry for identity verification purposes using gate photo kiosks before the passengers boarded United flights. The plaintiff claimed that this process was in violation of Illinois' state biometric privacy law, which requires that entities adhere to certain practices and provide disclosures before they can capture, use, or store the biometric information of individuals, such as facial geometry or fingerprints. The plaintiff also alleged that United continues to use traditional methods of verifying passenger identities (i.e., checking passengers' photo ID's), but does not disclose to passengers that the traditional method is an option instead of being scanned and identified by the gate photo kiosks.

The plaintiff in this case is seeking to represent a class of passengers to include anyone who has had their faces scanned at the gate photo kiosks before boarding United flights. The relief requested includes $5,000 in damages for each finding of a willful or reckless violation of the Illinois privacy law and $1,000 for each finding of a negligent violation of the law on the part of United. The court has yet to make a determination in this case.

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FAA ISSUES $134,475 PENALTY AGAINST VIEQUES AIR LINK FOR CONDUCTING FLIGHTS WITH UNQUALIFIED PILOTS

On December 15, 2022, the FAA issued a press release announcing that it has fined Vieques Air Link, a Puerto Rican airline, $134,475 for allegedly conducting commercial passenger flights using unqualified pilots. Specifically, Vieques is alleged to have conducted 11 flights in July and August 2022 using pilots who did not hold the appropriate certificates to operate the flights.

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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 Alexis George at 804-788-7772 or ageorge@eckertsemans.com or any other attorney at Eckert Seamans with whom you have been working.

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