

Aviation Regulatory Update

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

U.S. SENATORS INTRODUCE BILLS ON AIRLINE PASSENGER PROTECTIONS – FAIR FEES ACT AND AIRLINE PASSENGERS’ BILL OF RIGHTS

Several U.S. Senators recently reintroduced legislation aimed at strengthening airline passenger protections, including proposals to require that airlines issue passenger refunds more quickly after flight disruptions and to further regulate airline fees for ancillaries like seating assignments and baggage. One piece of legislation proposed, known as the “Forbidding Airlines from Imposing Ridiculous Fees Act” or “FAIR Fees Act”, would prohibit U.S. airlines from charging fees including cancellation, change, and bag and seat fees that are not “reasonable and proportional” to the costs of the services actually provided by the airline. If adopted as written, the bill would also direct the U.S. Department of Transportation (“DOT”) to review other fees imposed by U.S. airlines to determine whether the fees are reasonable and proportional to the costs incurred by the airline, and make sure that U.S. airlines allow children and their family members to sit together on flights at no additional cost.

Relatedly, the “Airline Passengers’ Bill of Rights”, which would apply to both U.S. and foreign airlines, would require airlines to offer at least \$1,350 to travelers bumped from oversold flights, effectively eliminating the current dollar limitations on compensation for passengers denied boarding due to overbookings. The bill would also require that airlines offer compensation to passengers for delayed or cancelled flights and provide notifications to passengers on their rights and eligibility to receive a refund, and require that airlines immediately refund bag fees for lost or damaged bags. The bill would also prohibit airlines from reducing the size of aircraft seats or legroom space until a minimum seat size requirement is implemented. If adopted as written, the bill would also create a private right of action for passengers allowing them to file suit against airlines in U.S. state and federal courts for unfair and deceptive practices, and would increase the amount of civil penalties that may be imposed on airlines for violations of passenger protections.

We will provide further updates on the progress of these new bills as we receive them.

5G UPDATE: IATA WARNS THAT AIRLINES ARE UNABLE TO MEET JULY DEADLINE, SUBMITS COMMENTS ON FAA NPRM

On February 2, 2023, the International Air Transport Association (“IATA”) sent a letter to DOT and the Federal Aviation Administration (“FAA”) warning that many airlines will be unable to meet and comply with FAA’s July 2023 deadline for the retrofitting of aircraft to meet safety standards prior to the expanded implementation of 5G C-Band service set to take place this summer. IATA noted that it and member airlines remain concerned that potential flight disruptions may occur because airlines “through no fault of their own” are largely unable to meet FAA’s retrofitting deadlines due to supply chain issues, certification delays, and logistical challenges. IATA also proposed a new plan for the retrofitting process, which would involve FAA requesting that aircraft and radio altimeter manufacturers provide a written report on the status of retrofits conducted by carriers, and then using this information to create

more realistic timelines for the completion of retrofits. IATA also suggested that FAA encourage all parties to work collaboratively and meet bimonthly to review progress and take any corrective actions needed to ensure the retrofitting process is completed efficiently.

More recently, IATA [submitted comments](#) on the FAA's proposed rulemaking on Airworthiness Directives related to 5G stating that: (1) the proposed rule offers carriers no assurances that all of the telecom companies will continue to abide by the voluntary agreements made with Verizon and AT&T regarding 5G C-Band implementation and that the voluntary agreements should be codified into U.S. law and hold carriers harmless if the telecom companies do not abide by the agreements, (2) carriers are shouldering all of the burden in terms of investing money into retrofitting aircraft to maintain safety, (3) the proposed rule does not adequately address how it would affect Part 129 operators, nor does it detail the FAA's plans for consulting with foreign regulators to ensure compliance and conformity, (4) FAA should publish radio altimeter anomalies that have occurred near areas where 5G is currently deployed so that carriers can better understand and address potential safety issues, (5) FAA should continue to allow the use of NOTAMs and AMOCs until all aircraft can be retrofitted, (6) FAA should provide updated lists of 5G tolerant radio altimeters, and (7) the proposed rulemaking significantly underestimates the total cost associated with retrofitting aircraft since it is likely to cost around \$52,000 per aircraft to upgrade altimeters, or around \$80,000 per aircraft for full replacements, while FAA previously estimated that it would only cost around \$26,000 per aircraft to complete the upgrades.

FAA ISSUES FINAL RULE ON AIRPORT SAFETY MANAGEMENT SYSTEMS

On February 16, 2023, the FAA issued a [press release](#) announcing its draft final rule aimed at helping airports mitigate safety issues before they occur by requiring certain airport certificate holders to develop, implement, maintain and adhere to an airport safety management system ("SMS"). According to the [final rule](#), which was officially published on February 23, an airport SMS must include at a minimum a safety policy, safety risk management component, safety assurance component, and a safety promotion component. The final rule will be applicable to certificated airports that fall into at least one of the following categories: (a) airports classified as large, medium, or small hubs based on passenger data extracted from the FAA Air Carrier Activity Information System, (b) airports that have a 3-year rolling average of 100,000 or more total annual operations, meaning the total number of all arrivals and departures, or (c) airports that serve any international operation other than general aviation. Based on these criteria, the final rule will be applicable to about 265 certificated U.S. airports. As a first step, certificate holders will be required to identify their plans for developing and implementing SMS through an FAA-approved Implementation Plan and must submit their SMS Implementation Plans based on their category. From that point, the affected certificated airports would work to fully implement SMS over the next several years.

The final rule becomes effective on **April 24, 2023**.

AVIATION ACCESSIBILITY BILL INTRODUCED IN THE U.S. SENATE

On February 14, 2023, the "Prioritizing Accountability and Accessibility for Aviation Consumers Act" was introduced in the U.S. Senate. If adopted, the bill would require DOT to publish an annual report on the disability-related complaints carriers receive including: (1) information on the number of disability related consumer complaints that have been filed within the last five years, (2) information on the nature of these complaints including specific details on the issues each complainant had with a carrier (e.g., mishandling an assistive device, difficulties in being moved or in communicating with a carrier's staff, etc.), and (3) an overview of carriers' review processes for resolving disability related complaints and information on how disability related complaints were ultimately resolved.

Congress has not yet acted on the bill, and we will continue to provide updates on the progress of the bill as we receive them.

FAMILY SEATING FEES UPDATES: DOT TO PROPOSE RULE REQUIRING U.S. AIRLINES TO SEAT FAMILIES TOGETHER FOR FREE; WHITE HOUSE PROPOSES DOT FAMILY SEATING FEES DASHBOARD; UNITED TO STOP CHARGING FAMILY SEATING FEES

On February 1, 2023, DOT announced that it plans to propose a new rule to require that airlines seat families together onboard at no additional cost. This comes in direct response to the Biden administration's [announcement](#) calling for the enactment of a "Junk Fee Prevention Act" to eliminate "unfair and costly" fees including aircraft seating fees for parents and young children, and the U.S. Senate's reintroduction of the "FAIR Fees Act", which also includes a proposed directive for DOT to ensure that U.S. airlines allow children and family members to be seated together on flights at no additional cost (as further detailed above). DOT previously published a [notice](#) in July 2022 urging U.S. airlines to work to ensure that children aged 13 or younger are allowed to sit next to an accompanying adult on flights for no additional charge. It is expected that DOT will develop a proposed rulemaking on family seating fees throughout the course of 2023, though DOT has not stated when it expects to formally issue a proposed rule. The Biden administration also recently proposed that until family seating fees can be prohibited either through a DOT rulemaking or federal law, DOT publish a family seating fee dashboard, similar to DOT's dashboard that consumers can use to compare airline services and amenities, where consumers could compare airline seating fees.

More recently, United Airlines announced that it will no longer charge families to be able to sit together onboard its flights as of March 2023. Under the new policy, adults and children aged 12 and younger will have the option to book adjacent seats on United flights in both the Basic Economy and Preferred Seat classes (if no options for adjacent seating are available in Basic Economy), and be given an option to switch flights if no adjacent seats are available at the time of booking, all for no additional cost.

DOT DENIES A4A'S IATFCPA COMPLAINT AGAINST THE BAHAMAS

On February 21, 2023, DOT issued an Order denying Airlines for America's ("A4A") International Air Transportation Fair Competitive Practices Act ("IATFCPA") complaint against the Commonwealth of the Bahamas for alleged unreasonable, discriminatory, and anticompetitive acts related to air navigation services charges imposed on foreign carriers.

As you may recall from a prior update, A4A filed the complaint in December 2022 alleging that the Bahamian government violated the U.S.-Bahamas Air Transport Agreement (the "Agreement") by imposing "astronomical" charges on A4A members for air navigation services that exceeded the costs the government incurred to provide the services to the carriers. A4A alleged its members have been required to pay the highest charges for flying certain aircraft through Bahamian airspace or operating to/from the Bahamas. In explaining its decision, DOT decided to deny A4A's complaint because it did not believe the complaint successfully alleged a claim under IATFCPA, but noted that it did have "serious concerns" that the overflight charges imposed by the Bahamas Air Navigation Services Authority may not fall within a reasonable level given the costs cited for providing the air navigation services. DOT also said it plans to initiate formal consultations under Article 13 of the Agreement to further address the issue.

CBP ISSUES PROPOSED RULE ON APIS REQUIREMENTS

On February 2, 2023, U.S. Customs and Border Protection (“CBP”) issued a [notice of proposed rulemaking](#) (“NPRM”) to amend its regulations requiring carriers to electronically transmit passenger information to its Advance Passenger Information System (“APIS”).

CBP currently uses APIS to compare passenger information submitted by carriers to the information included in law enforcement databases and the terrorist watch list to enhance national security and safety. The proposed new requirements are intended to further strengthen CBP’s vetting processes, enhance communication with carriers, incorporate additional commercial carrier requirements to confirm that all passengers seeking to travel to or from the U.S. are traveling with authentic travel documents prior to boarding an aircraft, and to require that carriers ensure that their systems are capable of accepting document validation instructions from CBP’s system and take action, if necessary, to resolve the travel document status of every passenger intending to board flights departing from or arriving to the U.S. There is also a proposed requirement that all carriers participate in CBP’s Document Validation Program to receive document validation messages from CBP and contact CBP in situations where a passenger’s travel documents cannot be validated. CBP is also proposing a requirement that commercial air carriers transmit additional data elements, including contact data like phone numbers and email addresses, through APIS for all commercial air passengers arriving, or intending to arrive, in the U.S. The NPRM also includes proposals to change existing CBP regulations to better conform with current practices for close out messages, to eliminate requirements that are outdated such as references to U.S. EDIFACT formatting for the transmission of manifests, and to allow commercial carriers to transmit an aircraft’s registration number to CBP using APIS.

Comments on the NPRM are due by **April 3, 2023**. If you would like assistance with submitting a comment on the proposed rule, please let us know.

FAA ISSUES NEW POLICY ON AIR CARRIER INCENTIVE PROGRAMS

On February 3, 2023, FAA announced a [proposed policy statement](#) related to the incentives offered by airport sponsors to air carriers under Air Carrier Incentive Programs (“ACIP”). The policy includes revised general guiding principles aimed at giving airport sponsors more flexibility to design incentive programs while remaining in compliance with federal obligations on economic discrimination, reasonable fees, and the use of airport revenue. If adopted, the policy would also supersede FAA’s “*Air Carrier Incentive Program Guidebook*” that was issued in 2010. The proposed policy includes the following proposals:

- (1) A new definition for “new service.”
- (2) A definition for “seasonal service,” which would be a service offered for less than 6 months, and a proposal to permit incentives for seasonal service for three seasons, up to three years from the start of service.
- (3) Continuation of the policy prohibiting an incentive based on the type or size of an aircraft.
- (4) Clarification that an ACIP may be offered for new cargo service, separate from any ACIP offered for new passenger service.
- (5) Authorization for airport sponsors to offer per passenger and per seat-mile incentives to reward the success of new service and longer routes as long as the incentives comply with certain requirements.

- (6) A disclosure requirement for proposed ACIPs and incentives to promote transparency among all carriers and airport users.
- (7) Authorization for airport sponsors to participate in the use of non-airport funds for an ACIP with certain limitations.
- (8) A clarification that payments to a carrier will be considered a prohibited diversion of airport revenue, and that payments of airport revenue for marketing must be provided to only the marketing services.
- (9) Elimination of the distinction between airports based on size in relation to budgets for ACIPs.
- (10) Grant of discretion to airport sponsors on the use of incentives to restart service previously subject to an incentive but canceled in response to a service cancellation, such as because of the COVID-19 pandemic.

The policy would allow FAA-compliant carrier incentives initiated prior to the issue date of a new final FAA policy to continue as implemented until they expire, but incentives initiated on or immediately after the issuance date of a final policy must comply with the guidance included in FAA's policy statement for compliance with sponsor Grant Assurances.

FAA is accepting comments on the proposed policy until **April 4, 2023**, in the relevant docket, [available here](#). If you are interested in filing a comment and need assistance, please feel free to contact us and we would be happy to assist you.

IATA ISSUES NEW GUIDANCE ON THE TRANSPORT OF MOBILITY AIDS

IATA recently published [new guidance](#) to assist airlines and handling agents in the transport of mobility aids to improve air travel for passengers with disabilities. Key elements of the new guidance include:

- Guidance on creating better processes for booking and information exchange, including the use of Special Service Request (SSR) and Passenger Name Requirement (PNR) codes to give advance information on the specifications of mobility aids.
- A recommendation to create an electronic mobility aid tag that contains technical information to help airlines and ground handlers transport the mobility aid safely.
- Advice to airlines on developing a communications toolkit for engaging with passengers with disabilities including the creation of a dedicated area on the airline's website for accessibility information.
- Suggested best practices for loading, collection and return of mobility aids.
- A recommendation for airlines to designate specialized ramp personnel to be trained and deployed to handle mobility aids.
- Guidance on how to properly resolve instances where mobility aids are damaged.
- Guidance on revised and enhanced training of ground handlers and airline staff.

IATA noted that the guidance reflects and builds on industry best practices and will continually be updated to reflect new guidance as necessary. The guidance also comes in response to a Resolution approved during IATA's 2019 Annual General Meeting where it identified the safe and efficient transport of mobility aids as a key area for improvement by airlines.

U.S. HOUSE PASSES BILL TO CREATE NOTAM SYSTEM TASK FORCE

On January 25, 2023, the U.S. House of Representatives passed a bill known as the “NOTAM Improvement Act” aimed at identifying improvements to FAA’s Notice to Air Missions (“NOTAM”) pilot alert system. If enacted the Act would require the creation of a FAA task force including pilots, airline representatives, airport industry executives, union officials, air traffic control personnel, and other aviation industry and computer system experts that would review issues and propose solutions to improve the NOTAM system’s stability and prevent future cyberattacks. The task force would also be responsible for reviewing existing NOTAM regulations, reviewing the current methods for delivering NOTAMs and flight operations information, and making formal recommendations for improvements through a report to be submitted to Congress within one year of the task force’s establishment.

Passage of the Act by the U.S. House comes in direct response to an incident in January that forced the FAA to ground all U.S. flights for several hours because of a NOTAM system outage caused by the unintentional deletion of files by government contractors who were working to improve the NOTAM system’s database. We will continue to provide updates on the bill’s progress as we receive them.

NEW STATE CONSUMER PRIVACY LEGISLATION FOR 2023

As noted in a previous update, five states including California, Colorado, Connecticut, Utah and Virginia previously enacted comprehensive consumer privacy laws that become effective this year. In addition to the new broad consumer privacy laws enacted in these states, eight additional state legislatures have already introduced comprehensive consumer privacy bills in 2023, including New York, Oregon, Indiana, Iowa, Kentucky, Oklahoma, Tennessee and Mississippi. New Jersey also introduced privacy legislation in 2022 which now carries over into the second year of that state’s legislative session. While several of these bills are reintroductions of legislation that failed to become law previously, the continued push to implement state privacy laws shows a continued interest among state legislators to enact laws that give consumers rights and options regarding the collection, use, sharing and protection of personal information. Nevertheless, there is no clear indication that a comprehensive federal privacy bill will become law in the near future.

Importantly, as more states enact consumer privacy laws, it could also present a problem for companies that do business in the U.S. in terms of compliance with conflicting obligations and requirements under the different state laws. This increasingly complicated patchwork of laws may also expose non-compliant businesses to more liability and litigation, depending on how any new legislation ultimately is enforced. For example, some of the new privacy bills that have been proposed, including the current Oregon bill, give consumers a private right of action on both an individual and class basis, as currently drafted. On a similar note, Maryland, New York and Mississippi also have introduced legislation this year in relation to the collection and use of biometric identifiers such as fingerprints or facial scans. If these new biometric privacy bills become law and they include a private right of action for consumers, they could also lead to significant litigation, and large settlements and verdicts for violations that are similar to those that have occurred under the Biometric Information Privacy Act in Illinois.

We will continue to provide updates on the new consumer privacy laws and initiatives as we receive them.

DOJ ANNOUNCES UPDATES TO ITS CORPORATE CRIMINAL ENFORCEMENT POLICIES

On January 17, 2023, the Assistant Attorney General for the U.S. Department of Justice (“DOJ”) announced the Department’s plans to issue a new round of updates to its corporate criminal enforcement policy aimed at encouraging companies to self-report misconduct. Specifically, under the new updates, companies may benefit from greater potential reductions in fines for self-reporting serious misconduct and based on the degree of cooperation shown during DOJ investigations. The policy would also give companies an opportunity to potentially avoid prosecution for serious misconduct involving “aggravating circumstances” such as C-suite involvement in the misconduct, recidivism, and other egregious or pervasive crimes. To receive these benefits companies must have an effective compliance program and accounting controls in place that helped identify the potential wrongdoing, must immediately self-disclose the potential wrongdoing as soon as they become aware of it, and then engage in extensive cooperation and remediation to correct bad actions.

More recently, on February 23, DOJ announced a new [voluntary self-disclosure policy](#) for corporate criminal enforcement for U.S. Attorney’s Offices aimed at further incentivizing companies to make voluntary self-disclosures of misconduct. The policy includes a new standard definition for voluntary self-disclosure and guidance on how U.S. Attorney’s Offices will determine whether a company has made a voluntary self-disclosure. For example, a U.S. Attorney’s Office may deem that a company made a timely voluntary self-disclosure if the company self-disclosed prior to (a) an imminent threat of misconduct being revealed, (b) the initiation of a government investigation, (c) the government learning of the misconduct, and/or (d) the misconduct becoming publicly known or uncovered. For companies that timely disclose misconduct and fully cooperate with an investigation, including implementing appropriate remediation, U.S. Attorney’s Offices will not seek guilty pleas, though if certain aggravating factors occur (e.g., if the misconduct poses a grave threat to national security, public health or the environment) a U.S. Attorney’s Office may still seek a guilty plea. The policy also notes that some cases of voluntary self-disclosure may also result in no monetary penalties assessed or a fine no greater than 50% below the lower range of the U.S. sentencing guidelines. The policy also allows for reduced penalties for the voluntary self-disclosure of serious misconduct requiring a guilty plea, allowing companies to still be eligible to receive benefits like a 50%-75% reduction in fines off the lower range of the sentencing guidelines.

FAA SUSPENDS AERO MICRONESIA’S OPERATING AUTHORITY

On February 7, 2023, the FAA [announced](#) that it has issued an Emergency Order of Suspension to suspend the operating authority of Aero Micronesia Inc. d/b/a Asia Pacific (“Aero Micronesia”) for alleged non-compliance with FAA regulations. FAA alleged that Aero Micronesia had failed to prove that its pilots were properly trained after FAA requested that the company provide documents showing that two individuals who provide proficiency checks for its pilots were properly trained and qualified. FAA argued that because the two individuals could not be proven to be trained and qualified, any flight check they conducted could be considered invalid, meaning none of Aero Micronesia’s pilots could be considered qualified to fly. FAA also noted that in December 2022 it notified Aero Micronesia that it appeared to be noncompliant with the regulations and should therefore cease all operations until the issue was resolved, but that Aero Micronesia continued to operate despite the FAA’s warning. Under the terms of the Emergency Order, Aero Micronesia must surrender its air carrier certificate to FAA and cease operations until complete records can be provided. The Emergency Order also notes that the penalty for failure to surrender the certificate could be a fine of up to \$16,108 per day.

FAA PROPOSES \$1 MILLION FINE AGAINST UNITED FOR MISSED FIRE SYSTEM MAINTENANCE CHECKS

On February 6, 2023, the FAA issued a [press release](#) announcing that it has proposed a \$1.15 million civil penalty against United Airlines for allegedly operating over 100,000 flights between June 2018 and April 2021 without performing a fire system warning check during pre-flight maintenance inspections. FAA alleged that United removed the fire system warning check from its Boeing 777 preflight checklist in 2018, despite the fact that the inspection task is still required under the carrier's Maintenance Specifications manual. FAA alleged that United's failure to perform the required checks resulted in the operation of aircraft that did not meet airworthiness requirements.

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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@eckertseamans.com or any other attorney at Eckert Seamans with whom you have been working.