Aviation Regulatory Update

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ENSURING SAFE ACCOMMODATIONS FOR AIR TRAVELERS WITH DISABILITIES USING WHEELCHAIRS

On February 29, 2024, the U.S. Department of Transportation ("DOT or "the Department") announced an upcoming Notice of Proposed Rulemaking ("NPRM") expanding requirements airlines must meet for accommodating passengers with disabilities who require use of a wheelchair. The NPRM proposes to set new standards for airline employees and contractors who physically assist passenger with disabilities. The NPRM also outlines specific actions that airlines must take to protect passengers when a wheelchair is mishandled in transport. Moreover, causing damage to or delay in returning wheelchairs to passengers would become an automatic violation of the Air Carrier Access Act ("ACAA"), allowing DOT to have a greater ability to hold airlines accountable for violations. The Department seeks comments on the NPRM which must be received within sixty (60) days of the date the notice is published in the Federal Register. In addition to the wheelchair related issues noted above, DOT also seeks comments regarding: 1) The size standards for lavatories on twin-aisle aircraft with respect to sufficient room for both a passenger with a disability and an attendant to enter and maneuver within; and 2) reimbursement of airfare difference between the fare on a flight a wheelchair user took and the fare on a flight that the wheelchair user would have taken if their wheelchair had been able to fit in the aircraft.

Breaking things down further, the proposed rule would take major actions in three key areas:

1. Penalties and remedies for wheelchair mishandling

- (a) Mishandling wheelchairs as automatic violations of the ACAA which includes wheelchairs being lost, delayed, damaged, or stolen.
  - It also proposes to require airlines to immediately notify affected passengers of their right to file a claim with the airline, receive a loner wheelchair from the airline, choose a preferred vendor for repairs or replacements, and have a Complaints Resolution Officer available.
- (b) Prompt repair or replacement of damaged wheelchairs.
- (c) Loaner wheelchair accommodations when wheelchair is manhandled.

2. Safe, dignified, and prompt assistance

- (a) Enhanced airline employee training for assisting passengers with wheelchair.
- (b) Prompt return of delayed wheelchair within 24 hours of the passenger's arrival.
- (c) Safe and dignified assistance.
- (d) Prompt assistance when enplaning, deplaning, or moving through the airport terminal.

3. Improved standards on planes

- (a) Improved standards for on-board wheelchairs for smaller aircraft consistent with existing standards for single aisle aircraft with 125 or more seats.
- (b) Notifications of loading and unloading of cargo traveling wheelchairs.

Please let us know if you have any questions or would like to file a comment about the NPRM.

TSA ISSUES FINAL RULE TO REDUCE REGULATORY BURDEN FOR INDIRECT AIR CARRIERS

On February 8, 2024, the Transportation Security Administration ("TSA") issued a final rule to reduce the frequency of Indirect Air Carrier ("IAC") renewal applications for the IAC security program. The program ensures that "IACs are held accountable for securing the goods entrusted to them throughout those legs of the supply chain for which they are responsible." Specifically, the rulemaking requires renewal once every three years as opposed to the current requirements, which mandate that IACs submit a renewal application each year. By receiving and consolidating cargo from one or more shippers, IACs act as intermediaries between a shipper of air cargo and an air carrier. To secure the air cargo supply chain in the United States while also reducing regulatory costs, the final rule reduces the frequency that IACs must renew their security program certifications. When TSA first implemented the annual renewal requirement in 2006, it assumed that an annual cycle was the best way to confirm that each IAC complied with TSA security requirements. TSA now acknowledges that it can guarantee compliance through a nationwide schedule of regular annual inspection, reducing the need for annual renewals. TSA further noted that its ability to withdraw approval of any IAC security program provides an effective safeguard in the event that TSA identifies an ongoing security risk.

DOT OUTLINES ITS REGULATORY AND DEREGULATORY AGENDA

On February 9, 2024, DOT published the Unified Agenda of Federal Regulatory and Deregulatory Actions ("Regulatory Agenda"). In addition to providing information on upcoming regulatory activity, the Regulatory Agenda also invites comments on DOT's regulatory process to streamline regulatory language. For instance, in an upcoming rulemaking initiative, the Department's Office of the Secretary ("OST") is working to update the definition of "service animal" to ensure that DOT's definition is aligned with recent amendments made by the Department of Justice ("DOJ"). The Department's goal is to ensure consistent definitional regulations while also mitigating any confusion that may result from varying service animal standards across different modes of transportation.

The Department also plans to finalize its Refunding Airline Tickets Ancillary Service Fees rulemaking within the near future. 49 U.S.C. 41712 prohibits U.S. and foreign air carriers, as well as ticket agents, from engaging in unfair sale practices and requires the issuance of refunds when a carrier cancels or significantly changes a flight. This rulemaking seeks to clarify that carriers and ticket agents must promptly refund tickets and would also define "cancellation" and "significant change" while also resolving whether "new itineraries involving delays of a certain length or additional stops constitute a significant change requiring a refund." Other purposes of the rulemaking include addressing protections for consumers who are unable to travel due to government restrictions, requiring airlines to refund checked baggage fees when bags are not delivered in a timely manner, and requiring the prompt refund of ancillary fees for services not received. In addition to several meetings of the Aviation Consumer Protection Advisory Committee, this rulemaking also prompted one public hearing last year at the request of airline industry groups.

USCIS ISSUES FINAL RULE ON H-1B REGISTRATION SELECTION PROCESS

On February 2, 2024, U.S. Citizenship and Immigration Services ("USCIS") issued a final rule implementing the proposed beneficiary-centric selection process for H-1B registrations. The H-1B non-immigrant visa program allows U.S. employers to hire professional foreign workers on a temporary basis. Such visas are limited, and USCIS manages the 65,000 annual cap for the H-1B visa category through a random selection process in high demand years. To further strengthen the process and reduce the potential for fraud, USCIS published the final rule to safeguard the integrity of the registration selection process. Specifically, the changes will impact the Fiscal Year 2025 H-1B lottery process for professional foreign workers by creating a beneficiary-centric selection process for H-1B registration. In other words, the final rule seeks to level the playing field for all beneficiaries and prevent unfair advantages given to beneficiaries of multiple registrations.

By implementing a beneficiary-centric selection process for H-1B registrations, USCIS and the U.S. Department of Homeland Security ("DHS") anticipate that each beneficiary will have the same chance of being selected, regardless of how many registrations are submitted on their behalf. To implement greater integrity measures related to the H-1B registration process, USCIS and DHS are requiring registrations to include the beneficiary's valid passport information or valid travel document information. The rulemaking also prohibits a beneficiary from being registered under more than one passport or travel document.

The initial registration period for the Fiscal Year 2025 H-1B lottery opens on March 6, 2024, and concludes on March 22, 2024. After the registration window closes, USCIS conducts a random H-1B lottery among submitted registrations with selections being made by March 31, 2024. The final rule becomes effective on March 4, 2024.

NTSB SUBMITS COMMENT ON FAA'S PROPOSED 25-HOUR COCKPIT VOICE RECORDER REQUIREMENT

The National Transportation Safety Board ("NTSB") recently submitted a comment to the FAA's NPRM requiring the installation of 25-hour duration cockpit voice recorders ("CVRs") on all newly manufactured aircraft operating under 14 CFR Parts 91, 121, 125, and 135. While the NPRM would increase the CVRs recording time from the currently mandated two hours, the NTSB noted that it cannot fully support the proposed rule given that it does not propose a similar requirement to retrofit existing aircraft which are required to carry a CVR. Citing safety concerns and the investigative value of CVR data in accident investigations, the NTSB expressed disappointment that the NPRM did not propose a requirement to retrofit existing aircraft. Since the service life of airplanes can exceed 40 years, the NTSB comment cautioned that critical CVR data will be lost if existing airplanes are not equipped with a CVR that records the last 25 hours of aircraft operation.

The NTSB further objected to the NPRM's excessive costs justification for excluding existing aircraft in the proposed regulations. For instance, the Federal Aviation Administration ("FAA") overestimated the cost of retrofitting existing aircraft because the retrofit requirement would apply to less than half the number of airplanes the FAA estimates, according to the NTSB. After urging FAA to reconsider its cost/benefit analysis, the NTSB comment further reasons that the 5-year retrofit period provides operators sufficient time to update the CVRs during regular maintenance. When issuing a final rule, NTSB urged the FAA to require a CVR that records the last 25 hours of operations for both newly manufactured aircraft as well as existing airplanes.

FAA HEIGHTENS OVERSIGHT UP AND DOWN SUPPLY CHAIN AFTER BOEING INCIDENT

Following last month's fallout surrounding missing Boeing 737 MAX 9 door plug bolts, the FAA announced heightened oversight of Boeing's 737 program including an investigation of its compliance with manufacturing requirements and

an increased presence of FAA inspectors at all Boeing facilities. Of note, the FAA plans to dispatch twenty-four (24) inspectors to Boeing's 737 manufacturing facility in Renton, Washington, as well as Spirit AeroSystems' fuselage supply line in Wichita, Kansas. While the FAA's attention is currently focused on Boeing's manufacturing process, FAA officials stressed that increased oversight would apply to all aviation manufacturers throughout the supply chain. This comes after Boeing confirmed that approximately 50 of the 737 fuselages made by Spirit AeroSystems had misdrilled holes, prompting the FAA to expand the scope of its oversight to manufacturers up and down the supply chain. These actions will likely delay near-term 737 deliveries because FAA, pursuant to its regulatory authority, plans to limit Boeing 737 deliveries to no more than 38 airworthiness certificates per month.

AMERICAN ACCUSES ASTA OF SELF-SERVING INTERESTS IN TECHNOLOGICAL DISPUTE

On February 5, 2024, American Airlines ("American") filed its Surreply and Motion for Leave to File with DOT in an ongoing dispute with The American Society of Travel Advisors ("ASTA"). As American and other major airlines transition to the New Distribution Capability ("NDC") model from the traditional EDIFACT model, several travel management companies ("TMCs") urged ASTA to request that DOT block American's implementation of its NDC program. If ASTA prevails, American claims that DOT will undercut technological competition to insulate outdated corporate travel agencies from the modern demands of an e-commerce economy.

More specifically, American notes that EDIFACT's limited text-only capabilities do not allow for airlines to provide individualized products and passenger-specific information. Citing evidence that most online travel agencies are or soon will be NDC-enabled, American argues that ASTA's advocacy for a subset of agencies is for the sole purpose of hindering technological competition in the marketplace. By blocking technological innovation for airline ticketing, American contends that ASTA will relegate consumers to a stagnant and outdated EDIFACT-based booking flow. American alleges that this will precludes consumers from NDC-enabled benefits such as market-driven pricing, real-time inventory, and a wider variety of price points. If DOT wants to foster competition in the airline industry while simultaneously improving the travel experience for consumers, American urges DOT to dismiss ASTA's Complaint.

DELTA ALLEGES RETALIATORY MEASURES IN ONGOING QUEST FOR JOINT VENTURE ANTITRUST IMMUNITY

On February 9, 2024, after the DOT declined to renew antitrust immunity for a joint venture between Delta Air Lines ("Delta") and Aeromexico, Delta responded by characterizing DOT's termination as "premature, punitive, misdirected, and ineffectual." More specifically, Delta alleges that the tentative termination of its Aeromexico joint venture is a retaliatory measure in an ongoing intergovernmental dispute between the United States and Mexico and is not based on any concerns regarding the competitive effects if the joint venture. Delta's response comes as DOT continues to express concerns about Mexico's compliance with the air transport agreement between the two countries as well as the capacity restrictions imposed by the Mexican government at specific airports. According to Delta, rather than terminating the joint venture, DOT should consult with the Mexican government, consider Part 213 schedule-filing sanctions, or possibly arbitration.

DOT PARTIALLY DENIES REQUEST FOR CONFIDENTIAL TREATMENT

On February 16, 2024, DOT partially denied a request for confidential treatment concerning a company's assets and financial wherewithal. The partial denial comes after 7 Air, LLC ("7 Air") filed a Motion earlier this month asking that aircraft lease documents and financial information about Haines Capital Group ("HCG"), 7 Air's primary source of financing, be afforded confidential treatment under 14 CFR § 302.12 ("Rule 12"). Citing Exemption 4 to the Freedom of Information Act ("FOIA"), 7 Air argued that both the aircraft lease documents and financial information about HCG were commercial in nature and involved sensitive financial information thus warranting confidential protection. While

DOT granted confidential treatment for 7 Air's aircraft lease documents related to two aircraft, it declined to grant confidential treatment to a letter from HCG responding to several DOT questions about the ownership and financial stability of the company.

The Department's response hints at the limits of confidential treatment protection. DOT clarified that information is only "confidential" where the information is treated as private by its owner and provided to the government under an assurance of privacy. Since HCG is the primary financing source for 7 Air's operations and previously received confidential treatment for the terms of its promissory note with 7 Air, DOT reasoned that any "financial information related to HCG is necessary for determining the financial fitness of 7 Air." In other words, DOT declined to provide duplicative confidential treatment protection to 7 Air when the information at issue involved standard financial terms. DOT's confidential treatment protection is more applicable when dealing with proprietary information like trade secrets. As such, DOT partially denied 7 Air's requested Rule 12 motion and required the prompt filing of HCG's financial information in the public docket.

ECKERT SEAMANS ATTORNEYS AT LAW

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 Evelyn Sahr at 202.659.6622 or esahr@eckertseamans.com; Drew Derco at 202.659.6665 or dderco@eckertseamans.com; Jay Julien at 202.659.6648 or jjulien@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.