

Aviation Regulatory Update

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

FINAL REMINDER: DOT ANNUAL DISABILITY REPORTS DUE JANUARY 30, 2023

As a final reminder, annual reports including a categorized summary of all disability-related complaints received by airlines in 2022 must be submitted to the U.S. Department of Transportation's ("DOT") Aviation Consumer Protection Division by next Monday, **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. DOT has historically penalized carriers for failing to comply with this important reporting mandate.

DOT INCREASES MAXIMUM CIVIL PENALTY AMOUNT; ISSUES UPDATED CIVIL PENALTY GUIDELINES

On January 6, 2023, DOT issued a final rule to make new adjustments to its civil penalty amounts for 2023. Importantly, under the adjustment, the new maximum civil penalty for violations of the aviation economic regulations has increased from \$37,377 to \$40,272. The adjustment also includes new FAA civil penalty amounts. Some of the civil penalty adjustments for 2023 are included below, while a full listing is [available here](#).

Office of the Secretary (OST) 2023 Adjustments

Penalty	Citation	Existing penalty	New penalty (existing penalty × 1.07745)
General civil penalty for violations of certain aviation economic regulations and statutes	49 U.S.C. 46301(a)(1)	\$37,377	\$40,272

Federal Aviation Administration (FAA) 2023 Adjustments

Penalty	Citation	Existing penalty	New penalty (existing penalty × 1.07745)
Violation of hazardous materials transportation law	49 U.S.C. 5123(a)(1)	\$89,678	\$96,624

Penalty	Citation	Existing penalty	New penalty (existing penalty x 1.07745)
Violation of hazardous materials transportation law resulting in death, serious illness, severe injury, or substantial property destruction	49 U.S.C. 5123(a)(2)	209,249	225,455
Minimum penalty for violation of hazardous materials transportation law relating to training	49 U.S.C. 5123(a)(3)	540	582
Maximum penalty for violation of hazardous materials transportation law relating to training	49 U.S.C. 5123(a)(3)	89,678	96,624
Knowing presentation of a nonconforming aircraft for issuance of an initial airworthiness certificate by a production certificate holder	49 U.S.C. 44704(d)(3)(B)	1,062,220	1,144,489
Knowing failure by an applicant for or holder of a type certificate to submit safety critical information or include certain such information in an airplane flight manual or flight crew operating manual contrary to 49 U.S.C. 44704(e)(1)-(3)	49 U.S.C. 44704(e)(4)(A)	1,062,220	1,144,489
Physical or sexual assault or threat to physically or sexually assault crewmember or other individual on an aircraft, or action that poses an imminent threat to the safety of the aircraft or individuals on board	49 U.S.C. 46318	39,247	42,287

TSA ISSUES CIVIL MONETARY PENALTY ADJUSTMENTS FOR 2023

On January 12, 2023, the Department of Homeland Security (“DHS”) made its annual inflation adjustment for civil monetary penalties issued by several agencies, including Customs and Border Protection (“CBP”) and the Transportation Security Administration (“TSA”). Some of the notable civil penalty adjustments are included in the tables below. A full listing of all 2023 civil penalty adjustments is [available here](#).

CBP Civil Penalty Adjustments

Penalty	Citation	Penalty amount as adjusted in the 2022 FR	New penalty as adjusted by this final rule
Penalties for non-compliance with arrival and departure manifest requirements for passengers, crewmembers, or occupants transported on commercial vessels or aircraft arriving to or departing from the United States	8 U.S.C. 1221(g) ; 8 CFR 280.53(b)(1) (INA section 231(g))	\$1,525	\$1,643
Penalties for non-compliance with landing requirements at designated ports of entry for aircraft transporting aliens	8 U.S.C. 1224 ; 8 CFR 280.53(b)(2) (INA section 234)	\$4,144	\$4,465
Penalties for bringing to the United States aliens without required documentation	8 U.S.C. 1323(b) ; 8 CFR 280.53(b)(13) (INA section 273(b))	\$6,215	\$6,696

Penalty	Citation	Penalty amount as adjusted in the 2022 FR	New penalty as adjusted by this final rule
Penalties for improper entry	8 U.S.C. 1325(b) ; 8 CFR 280.53(b)(15) (INA section 275(b))	\$87-\$438	\$94-\$472

TSA Civil Penalty Adjustments

Penalty	Citation	Penalty amount as adjusted in the 2022 FR	New penalty as adjusted by this final rule
Violation of 49 U.S.C. ch. 449 (except secs. 44902, 44903(d), 44907(a)-(d)(1)(A), 44907(d)(1)(C)-(f), 44908, and 44909), or 49 U.S.C. 46302 or 46303 , a regulation prescribed, or order issued thereunder by a person operating an aircraft for the transportation of passengers or property for compensation	49 U.S.C. 46301(a)(1) , (4), (5), (6); 49 U.S.C. 46301(d)(2) , (8); 49 CFR 1503.401(c)(3)	\$37,377 (up to a total of \$598,026 per civil penalty action)	\$40,272 (up to a total of \$644,343 per civil penalty action)
Violation of 49 U.S.C. ch. 449 (except secs. 44902, 44903(d), 44907(a)-(d)(1)(A), 44907(d)(1)(C)-(f), 44908, and 44909), or 49 U.S.C. 46302 or 46303 , a regulation prescribed, or order issued thereunder by an individual (except an airman serving as an airman), any person not operating an aircraft for the transportation of passengers or property for compensation, or a small business concern	49 U.S.C. 46301(a)(1) , (4), (5); 49 U.S.C. 46301(d)(8) ; 49 CFR 1503.401(c)	\$14,950 (up to a total of \$74,754 for individuals or small businesses, \$598,026 for others)	\$16,108 (up to a total of \$80,544 for individuals or small businesses, \$644,343 for others)
Violation of any other provision of title 49 U.S.C. or of 46 U.S.C. ch. 701, a regulation prescribed, or order issued thereunder	49 U.S.C. 114(u) ; 49 CFR 1503.401(b)	\$12,794 (up to a total of \$63,973 total for individuals or small businesses, \$511,780 for others)	\$13,785 (up to a total of \$68,928 total for individuals or small businesses, \$551,417 for others)

DOT ISSUES NEW NOTICE ON ITS INVESTIGATORY AND ENFORCEMENT POLICIES AND PROCEDURES

On January 3, 2023, DOT issued a [notice](#) explaining its investigatory and enforcement policies and practices to further its efforts related to protecting aviation consumers. The notice includes specific sections detailing how DOT’s enforcement office learns about potential issues (usually through consumer complaints), its investigative process, what results from investigations, the various types of enforcement actions (i.e., consent orders, warning letters, and enforcement proceedings), and other relevant topics such as how voluntary self-disclosure of violations by airlines can impact the enforcement process, and general information on sanctions (i.e., civil penalties). The notice also includes an attachment explaining the criteria DOT uses to determine whether to seek civil penalties or settle for a

certain penalty during enforcement proceedings, which includes several factors such as the number of violations committed, how long the violations continued after the violator became aware of them, and consideration of the harm caused by the violations.

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.

5G UPDATE: FAA OUTLINES NEW REQUIREMENTS AND DEADLINE FOR COMPLIANCE

The Federal Aviation Administration (“FAA”) recently announced plans for a new airworthiness directive that would include new requirements related to the ongoing implementation of 5G C-Band service across the U.S. Specifically, the directive would require passenger and cargo aircraft operating in the U.S. to have new or updated altimeters in place, or install FAA-approved filters, by 2024. The FAA’s proposal would make retrofitting of aircraft mandatory. The directive would also require operators to revise aircraft flight manuals to prohibit low-visibility landings after June 30, 2023, unless aircraft retrofitting has been completed by that time.

Telecom companies Verizon and AT&T voluntarily agreed to delay the implementation of some 5G C-Band 5G service until July 2023 so that carriers could work on retrofitting aircraft to ensure that expanded 5G service would not cause interference to aircraft operations. The new FAA directive is aimed at ensuring that aircraft safety is maintained once the telecom companies are allowed to fully roll out 5G service.

DHS ISSUES NOTICE TERMINATING UGANDA ARRIVAL RESTRICTIONS RELATED TO EBOLA

On January 17, 2023, DHS published a [notice](#) announcing the termination of arrival restrictions for flights to the U.S. carrying people who recently traveled from or were otherwise present in Uganda due to an outbreak of Ebola disease. The arrival restrictions were terminated as of 11:59 P.M. EST on January 11, 2023.

Under the restrictions, affected flights had to land at designated U.S. airports where the U.S. Government had public health resources on hand to implement enhanced public health measures. DHS noted that since no new cases of Ebola have been detected in Uganda since November 27, 2022, and since two 21-day incubation periods have passed with no new hospitalized patients or the designation of new contacts of confirmed cases, the Department determined that the situation had diminished enough to eliminate the arrival restrictions.

RECAP OF DOT ACPAC MEETING ON TICKET REFUNDS AND ANCILLARY FEES NPRMS

On January 12, 2023, DOT’s Aviation Consumer Protection Advisory Committee (“ACPAC”) held a final meeting to discuss the Department’s proposed rules (“NPRMs”) on “Transparency of Airline Ancillary Service Fees and Related

Consumer Protection Matters” and “Airline Ticket Refunds and Consumer Protections”, and to finalize its recommendations to DOT on the rules. Some of the notable ACPAC recommendations are detailed below:

- A unanimous vote that the ACPAC recommend that DOT codify its longstanding policy to require that airlines and ticket agents provide prompt refunds to consumers when airlines cancel or make a significant change to flight itineraries and consumers do not accept alternative transportation offered by airlines or ticket agents.
- A vote to support DOT’s proposed definition for “cancelled flight” as defined in the NPRM.
- A vote to recommend that DOT adopt its proposal to define a significant delay as a delay of 3 hours or more for domestic flights and 6 hours or more for international flights.
- A vote to support DOT’s proposal to require airlines and ticket agents to issue non-expiring travel credits or vouchers for three categories of consumers whose travel is impacted by a reason related to a serious communicable disease; and a vote to support DOT’s proposal to require that the travel credits or vouchers be transferable to other passengers.
- A vote to support DOT’s proposal to require that once it has made a final determination on which airlines or ticket agents are required to provide refunds in lieu of credits or vouchers because they have received significant government assistance, the relevant airlines and ticket agents provide notifications to eligible consumers to inform them that they may request a refund.

The meeting then turned to discussions on DOT’s NPRM on ancillary fees. The discussions were focused on five topics including proposed requirements related to: (1) disclosure of baggage fees, (2) disclosure of change and cancellation fees, (3) disclosure of transactability of family seating fees, (4) data sharing between airlines and ticket agents, and (5) the Department’s proposed changes to existing rule requirements, and the suggestion to change (i.e., extend) the compliance implementation period by various individuals and industry groups.

DOT ISSUES FINAL RULE ON LITHIUM BATTERY TRANSPORT

On December 21, 2022, DOT and the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) published a [final rule](#) on the safe transport of lithium batteries which will take effect on **January 20, 2023**. The final rule prohibits the transport of lithium-ion cells and batteries as cargo on passenger aircraft, requires that all lithium-ion cells and batteries be shipped at no more than 30% charge on cargo-only aircraft, and limits the use of alternative provisions for smaller lithium-ion cells or batteries to one package per consignment. The final rule also includes an amendment related to marking requirements for lithium cells and batteries, including a requirement that packages of smaller lithium-ion cells and batteries be marked with an indication that the package is forbidden for transport aboard passenger aircraft or labeled with the CAO label. The rule does include an exemption for the transport of lithium cells and batteries to be used in medical devices onboard passenger aircraft for destinations that are not well serviced by cargo aircraft. The rule also does not restrict passengers or crewmembers from bringing electronic devices onto aircraft nor does it restrict the transport of lithium-ion cells or batteries when packed with or contained in other equipment.

FAA PROPOSES \$1 MILLION PENALTY AGAINST AIRCRAFT RESOURCE MANAGEMENT FOR ILLEGAL CHARTER FLIGHTS

On January 18, 2023, the FAA issued a [press release](#) announcing a proposed a civil penalty of \$1,037,478 against Aircraft Resource Management, a Kansas company, for allegedly conducting 78 charter flights with unqualified pilots and without holding the proper FAA certifications for the operations.

DOT ISSUES CONSENT ORDER AGAINST VIRGIN ATLANTIC FOR OPERATING FLIGHTS IN PROHIBITED AIRSPACE

On January 17, 2023, DOT issued a Consent Order against Virgin Atlantic Airways Limited (“Virgin Atlantic”) for allegedly operating unauthorized foreign air transportation, assessing a civil penalty of \$1,050,000.

DOT alleged that between September 2020 and September 2021, Virgin Atlantic operated a significant number of flights carrying Delta’s DL* designator code between the U.K. and India through airspace in the Baghdad Flight Information Region (“FIR”) that FAA had prohibited U.S. operators and airmen from flying in or through due to increased militia activity and tensions in Iraq. DOT reasoned that because the flights carried the DL code, the FAA’s prohibitions were applicable, meaning Virgin Atlantic had operated the flights in violation of the conditions of its statement of authorization for the codeshare. In its response to the allegations, Virgin Atlantic stated that it takes seriously its responsibility to comply with DOT regulations, that it operated the prohibited overflights inadvertently due to operational disruptions and loss of personnel due to the COVID-19 pandemic, and that it immediately rerouted the flights once DOT notified it of the issue, but nevertheless, DOT concluded that enforcement action was warranted to deter future noncompliance.

FMCSA BROKER AND FREIGHT FORWARDER PROPOSED RULEMAKING

On January 5, 2023, DOT’s Federal Motor Carrier Safety Administration (“FMCSA”) issued a [proposed rulemaking](#) seeking to address the issue of brokers and sureties who fail to timely pay claims brought by motor carriers and freight forwarders. FMCSA is proposing regulations in five areas including (1) assets readily available, meaning brokers/freight forwarders would be required to maintain trusts with at least \$75,000 in assets; (2) immediate suspension of broker/freight forwarder’s operating authority, meaning whenever the assets in a trust fall below \$75,000, FMCSA would issue a notice to the trust/surety to replenish funds in the account within seven days or face possible suspension; (3) surety/trust responsibility for financial failure or insolvency, under which the insolvency would be published and the surety/trust named on behalf of the broker/forwarder would be notified to initiate an immediate cancelation of financial responsibility; (4) enforcement authorization, under which FMCSA would provide notice of a suspension and provide 30 days for the broker/forwarder to respond, after which a final agency decision would be issued; and (5) entities available to provide trust funds, under which loan and finance companies would no longer be permitted to act as sureties or trustees.

FMCSA is seeking comment on the proposed rulemaking until [March 6, 2023](#).

DISTRICT COURT SENTENCES UNRULY PASSENGER TO PROBATION AND PAYMENT OF \$9,123 RESTITUTION TO AMERICAN

On January 3, 2023, the U.S. District Court for Arizona sentenced an unruly passenger to 24 months of probation and ordered the passenger to pay \$9,123 in restitution charges to American Airlines for interference with crewmembers onboard an American flight from Dallas, TX to Los Angeles, CA in 2021. The Court also noted that as part of the passenger’s probation, she must participate in a substance abuse treatment program and agree to regular substance abuse testing. The passenger and a co-defendant, who was sentenced to four months in prison followed by 36 months of supervised release in September 2022, were removed from the American flight in question after physically assaulting a crewmember during the flight.

MAGISTRATE JUDGE ISSUES DECISION IN FAVOR OF AMERICAN IN FACEMASK-RELATED DISABILITY DISCRIMINATION SUIT

On December 1, 2022, a Magistrate Judge for the U.S. District Court for the Northern District of Texas decided in favor of American, dismissing a passenger's claims of discrimination and retaliation by American related to its face mask policy. Like many airlines, American had a policy requiring passengers to wear a mask onboard flights in response to the COVID-19 pandemic. The passenger in this case alleged that he contacted American a month before his flight to document a disability that prevented him from being able to wear a mask, and to request an accommodation, but American did not grant this request. The passenger then alleged that upon boarding his flight, American personnel required him to wear a mask, which he argued showed that American perceived him to be disabled with a contagious disease and should have entitled him to decline wearing a mask as an accommodation under the Americans with Disabilities Act ("ADA"). After consideration of the issues raised, the Court found that the passenger did not show that American had committed a discriminatory or retaliatory act because the passenger acknowledged that he did not have a disability, at no point alleged what his disability was, and did not indicate how any alleged disability would have prevented him from wearing a mask as required by American's policy. As a result, the case was dismissed.

DOT ISSUES CONSENT ORDER AGAINST AERONEXUS CORPORATE LTD FOR UNLAWFUL CHARTER OPERATIONS

On December 27, 2022, DOT issued a Consent Order against Aeronexus Corporate (PTY) LTD ("Aeronexus") for conducting alleged unauthorized foreign air transportation, ordering the carrier to pay a civil penalty of \$205,000.

DOT noted that Aeronexus received economic authority to engage in charter operations between South Africa and the U.S. in 2013, but that its authority had expired on August 21, 2018. DOT also noted that upon an investigation, it found that between August 21, 2018, and July 18, 2021, Aeronexus had operated multiple charter flights for compensation between the U.S. and various foreign points outside of South Africa, which it did not have permission to conduct even when it did hold valid DOT authority. In response, Aeronexus stated that it seeks to comply with U.S. federal law and regulations, and that it did not intend to violate DOT rules as it believed that it had the required DOT authority to operate the flights. DOT disagreed with these arguments and ultimately decided to issue Aeronexus a cease and desist from future violations and the compromise civil penalty noted above.