Aviation Regulatory Update

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

DOT ANNOUNCES PASSENGER BILL OF RIGHTS FOR DISABLED PASSENGERS AND FAMILIES

On July 8, 2022, the U.S. Department of Transportation ("DOT") announced the publication of its Disabled Passenger Bill of Rights, which is applicable to U.S. and foreign carriers, as well as a notice to all U.S. airlines to take action to ensure that young children are seated with a parent for no additional cost. The "Airline Passengers with Disabilities Bill of Rights" ("Bill of Rights") includes a summary of certain "fundamental rights" that passengers with disabilities are entitled to under the Air Carrier Access Act and its implementing regulation, 14 C.F.R. Part 382. These rights include:

1) The right to be treated with dignity and respect.
2) The right to receive information about services and aircraft capabilities and limitations.
3) The right to receive information in an accessible format.
4) The right to accessible airport facilities.
5) The right to assistance at airports.
6) The right to assistance on the aircraft.
7) The right to travel with an assistive device or service animal.
8) The right to receive seating accommodations.
9) The right to accessible aircraft features; and
10) The right to resolution of a disability-related issue.

DOT's Bill of Rights does not constitute a rulemaking, but importantly, pursuant to § 434 of the FAA Reauthorization Act of 2018, U.S. and foreign air carriers must include the Bill of Rights on publicly available internet websites and in any pre-flight notifications or communications provided to passengers who inform the carrier in advance of their need for accommodations relating to a disability. DOT is also requiring that airlines ensure that their employees and contractors receive training on the responsibilities described in the Bill of Rights. It is also important to note that there is no specific timeframe in which airlines must complete these actions. Nevertheless, while there is no specific timeframe for airlines to display the Bill of Rights on their websites and in pre-flight notifications or communications, DOT has indicated that it expects airlines to implement this requirement in a "reasonable time." Further, to determine whether an airline is implementing the requirements without unreasonable delay, the Department's Office of Aviation Consumer Protection has been tasked with looking at the totality of the circumstances to determine if an airline is making a good faith effort to promptly post the Bill of Rights on its website and include it in pre-flight notifications or communications. Additionally, regarding submission of training plans to DOT, the Department has said that it will soon begin the process of seeking Paperwork Reduction Act ("PRA") authorization to collect the plans. The PRA authorization process typically takes approximately nine months and

includes publication of a 60-day notice followed by a 30-day notice in the Federal Register and subsequent review by the Office of Management and Budget ("OMB"). After OMB approves the information collection, DOT will then issue a notice that provides information on how to submit the plans. This means that submission of the training plans will likely not be required until after DOT's notice on submission.

According to DOT, the Bill of Rights is not meant to expand or restrict the rights of passengers with disabilities, but rather provide a more succinct explanation of existing law so that air travelers with disabilities can be aware of and understand their rights, and so that U.S. and foreign air carriers and their affiliates and contractors understand their responsibilities regarding disabled air travelers.

DOT also announced a new notice, solely applicable to U.S. carriers, encouraging all U.S. airlines to "do everything in their power" to make sure that children aged 13 and under are seated next to an accompanying parent on flights at no additional cost. DOT stated that it continues to receive complaints involving instances in which children as young as 11 months old are not seated next to an accompanying adult, which prompted the agency to act by issuing the notice for U.S. airlines. While the notice does not constitute a rulemaking with immediate specific requirements for U.S. carriers, DOT said that it "expects" U.S. carriers to review their seating policies and revise them as necessary to align with the goals articulated in the notice. DOT also stated that it will review airline policies and practices in November 2022 to assess whether they meet the expectations of the notice, and that if it determines that air carriers' seating policies and practices would unnecessarily prohibit children from being able to sit next to a parent or adult family member, it could take additional action such as instituting a rulemaking to prohibit U.S. carriers from charging fees for seating young children next to an accompanying adult.

DOT ISSUES REMINDER FOR U.S. AND FOREIGN CARRIERS ON TARMAC DELAY REPORTING REQUIREMENTS

On July 15, 2022, DOT sent an email to all U.S. and foreign carriers' representatives to remind and instruct airlines on the reporting requirements under the Tarmac Delay Rule.

According to 14 C.F.R. 259.3, the amended Tarmac Delay Rule, published in May 2021, a tarmac delay is defined as a period during which an aircraft is on the tarmac with passengers onboard and those passengers have no opportunity to deplane. In its reminder, DOT specifically focused on international flights, noting that for international flights all U.S. and foreign carriers are required to submit to DOT's Office of Aviation Consumer Protection ("OACP") a written description of each of the flights it operates that experience a tarmac delay of more than four hours at any U.S. airport no later than 30 days after the tarmac delay occurs. DOT's reminder also points out that, at a minimum, the required written description must include the carrier's name, flight number, the origin and destination airports for the flight, the date on which the delay occurred and the airport at which the delay occurred, the duration of the delay, an explanation of the incident specifically detailing the cause of the delay, any actions that were taken to minimize hardships for passengers (e.g., the distribution of food and water, maintenance and servicing of lavatories, medical assistance provided, etc.), and a description of how the incident causing the delay was resolved. DOT also points out that non-compliance with the reporting requirements of 14 C.F.R. 259.4(g) can subject a carrier to a civil penalty of up to $37,377 per day, per violation, so it is very important to report tarmac delays timely and sufficiently. OACP has created a website, available here, where carriers are encouraged to file written tarmac delay reports online.

If you have any questions or require assistance in reporting a delay, please contact us.

DOT CONDITIONALLY APPROVES UNITED AND AIR CANADA'S TRANSBORDER JOINT BUSINESS AGREEMENT

On July 19, 2022, DOT published a letter conditionally approving United Airlines' request for prior approval of a Transborder Joint Business Agreement (the "Agreement") between it and Air Canada (the "Parties"). DOT's approval means that antitrust immunity from an existing antitrust immunized alliance previously approved by DOT will now be extended to the Agreement.

DOT originally granted antitrust immunity to the Parties in 1997 and took subsequent actions in 2007 and 2009 to extend antitrust immunity to the carriers as the A++ alliance expanded to include additional airlines and geographic regions such as key U.S.-European markets. However, since all material implementing agreements between the Parties must be submitted to the Department's Director of the Office of Aviation Analysis for review, the Parties submitted a request to DOT on February 10, 2022, to have antitrust immunity extended to the new Agreement. In their request, the Parties noted prolonged market recovery challenges and argued that a new cooperative structure is necessary and will incentivize more coordinated network planning, enhance optimization, and reduce inefficiencies, thus benefiting consumers. DOT seemingly agreed with this argument and in adjudicating the Parties' request recognized that distressed conditions regarding the transborder market continue to persist.

DOT stated however that permanent approval of the Agreement would not be in the public interest and elected to extend the grant of antitrust immunity for a temporary period of five (5) years subject to certain conditions. DOT also stipulated that the Parties must submit annual reports detailing their alliance as well as inquiries made by third-party carriers to access either carrier's network within the geographic scope of the joint ventures and an explanation on how those inquiries were resolved, remove exclusivity clauses involving transborder origin and destination travel, and provide interline access and enter into interline agreements with Canadian and U.S. carriers respectively when specific conditions are met.

BIDEN ADMINISTRATION ANNOUNCES $1 BILLION IN FUNDING TO IMPROVE AIRPORT TERMINALS ACROSS THE U.S.

On July 7, 2022, the Federal Aviation Administration ("FAA") announced that under President Biden's Bipartisan Infrastructure Law ("BIL") nearly $1 billion will be allocated through grants to 85 airports across the U.S. with the aim of expanding the capacity of terminals, promoting competition, increasing energy efficiency, and providing greater accessibility for individuals with disabilities. Airports will receive the funding through grants that have been allocated for nearly 100 approved projects.

The grants announced will be funded under the Airport Terminal Program which lasts for five years and provides for grants amounting to $1 billion annually. This Program, together with the Air Traffic Facilities and Airport Infrastructure Programs, form FAA's modernization plans to invest the $25 billion granted by the BIL to address aging infrastructure. According to the White House, the BIL is a "once-in-a-generation investment in infrastructure and competitiveness" with one of its driving factors being to upgrade U.S. airports and ports to strengthen supply chains and prevent the type of disruptions that have caused inflation.

U.S. HOUSE PASSES FY 2023 TRANSPORTATION APPROPRIATIONS BILL INCLUDING PROBLEMATIC "FLAGS OF CONVENIENCE" AMENDMENT

On July 20, 2022, the U.S. House of Representatives passed its version of the Transportation – HUD spending bill for fiscal year 2023. If adopted in its current form, the bill would provide $3.35 billion for the Airport Improvement Program and appropriate an extra $273 million in general-fund revenue for discretionary grants available to all U.S. airports.

Notably, the House version of the bill includes language that some aviation groups have deemed "problematic" in terms of existing Open Skies aviation agreements.

Section 419, also known as the "Flags of Convenience" amendment, potentially puts a prohibition on certain foreign air carrier permit and exemption applications submitted by carriers governed by the U.S.-E.U.-Iceland-Norway Air Transport Agreement. The subsection specifically provides that none of the funds provided for in the bill can be used to "approve a new foreign air carrier permit" or for an exemption application for a foreign carrier that already holds an air operators certificate issued by a country that is a party to the U.S.-E.U.-Iceland-Norway Air Transport Agreement if such an approval would "contravene United States law or Article 17 bis of the U.S.-E.U.-Iceland-Norway Air Transport Agreement."

ACI-NA and other aviation industry groups have stated that they are continually working to ensure that the Flags of Convenience amendment is not adopted by the Senate nor included in the final bill to be adopted later this year. The bill will now be considered by the U.S. Senate.

U.S. DISTRICT COURT ISSUES RULING IN AMERICAN'S MISAPPROPRIATION OF DATA CASE

On July 15, 2022, the U.S. District Court for the Northern District of Texas (hereinafter the "Court") issued a ruling granting in part and denying in part a Motion filed by Red Ventures, LLC and The Points Guy, LLC (the "Defendants") to have four claims brought by American Airlines ("American") alleging the misappropriation of data from its servers dismissed. American claimed that the Defendants had misappropriated customer data from its servers by integrating data into the Defendants' "The Points Guy App" ("TPG App") without permission. American alleged that the misappropriation occurred after discussions between the parties on a proposed deal that would have involved placing American's AAdvantage member loyalty program customer data in the TPG App. American claims that it declined to move forward with the deal after citing data security concerns, but that the Defendants still went on to incorporate its AAdvantage program data, as well as its intellectual property, into the TPG App.

The Court considered a number of claims, ultimately deciding in favor of American on two: its Computer Fraud and Abuse Act ("CFAA") and Texas Harmful Access by Computer Act ("THACA") claims after finding that American had stated plausible CFAA violation and THACA violation claims in its complaint for relief. Accordingly, American's CFAA and THACA claims will be considered at a later date but its remaining claims were dismissed with prejeduce.

D.C. CIRCUIT COURT REJECTS FEDEX'S EXPORT REGULATION APPEAL

On July 8, 2022, the D.C. Circuit Court of Appeals issued a ruling affirming a District Court decision from 2020 that dismissed Federal Express Corporation's ("FedEx") claims against the U.S. Department of Commerce, arguing that the Department's Export Administration Regulations ("EARs") overstepped the agency's authority and violated FedEx's right to due process. In its Complaint, FedEx asserted that the Department's EARs offer no "safe harbor provision" to except common carriers from liability for the contents of packages and communications they transmit on behalf of others, and that the EARs in fact hold common carriers liable as "aiders and abettors" of any EAR violations committed by customers, which can result in high monetary penalties. FedEx also contended that it is impossible for common carriers to inspect every shipment they handle. Therefore, FedEx made a due process claim as it asserted that without a safe harbor, the EARs only gave it two options; to continue to operate under the threat of enforcement action resulting from violations committed by its customers or cease operations to avoid the risk of U.S. enforcement action even though this course of action could result in legal consequences from customers and foreign governments. FedEx also requested declaratory and injunctive relief and asked the Court to review the Department's EARs, declare them unlawful, and enjoin the Department's actions (i.e., implementation of the EAR's).

The D.C. Circuit Court of Appeals found that "the statutory text, circuit precedent, and deference to the executive branch in matters of national security and foreign affairs" all supported the Department's actions. Further, the Court also noted that the EARs' strict liability standard was consistent with the statute it implemented, and that FedEx had previously received ample notice of the Department's strict interpretation of the law when the Department previously brought charges against FedEx for unlicensed shipments in both 2011 and 2017. The Court also reasoned that the Department's efforts to protect national security interests and prevent bad actors from acquiring restricted items outweighed the burden of strict liability, meaning that "substantial deference" must be given to the judgment of the Department, which was tasked with enforcing the statute's export control program.

FAA ISSUES OVER $3 MILLION FINE AGAINST MOSER AVIATION, LLC FOR CONDUCTING FLIGHTS WITHOUT A CHIEF PILOT

On July 19, 2022, the FAA issued a press release announcing that it has proposed a $3,009,500 civil penalty against Moser Aviation, LLC of Englewood, CO, for alleged violations involving Moser Aviation's operation of 1,018 flights without qualified management personnel onboard.

Specifically, FAA alleged that Moser Aviation conducted the illegal flights between January 2020 and May 2021 using multiple aircraft that did not have a qualified chief pilot onboard to oversee operation of the flights. FAA also alleged that Moser Aviation failed to notify it of a personnel change, which occurred during the same period, within the 10 days required in the company's operations specifications for notifications of a vacant position. In June 2020, Moser Aviation also allegedly made a false report to the agency's Denver Flight Standards District Office that its previous chief pilot was still working in their position even after they had ceased working as chief pilot, prompting FAA to investigate and ultimately issue the civil penalty.

FAA FINES ROSADO AVIATION OVER $1.1 MILLION FOR ILLEGAL CHARTER OPERATIONS

On July 18, 2022, the FAA issued a press release announcing that it has proposed a civil penalty of $1,125,640 against Rosado Aviation of Brodheadsville, PA for allegedly carrying out 52 illegal charter flights. Specifically, the FAA alleged that Rosado Aviation conducted the illegal, paid passenger-carrying charter flights between May 2019 and February of 2021 while using multiple aircraft without the required operating certificate or operations specifications. FAA has also accused Rosado Aviation of using unqualified operations, maintenance, and pilot personnel for the 52 alleged illegal charter flights. Rosado Aviation now has 30 days to respond to the FAA's enforcement letter.

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 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.

*Editor's Note: We would like to give special thanks to Summer Intern, **Thiseas Efthymiou** for his contributions to this month's issue.