

Aviation Regulatory Update

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DOT ISSUES FINAL RULE ON ACCESSIBLE LAVATORIES ON SINGLE-AISLE AIRCRAFT

On July 26, 2023, the U.S. Department of Transportation (“DOT”) issued a [final rule](#) to require that aircraft lavatories be more accessible for wheelchair users. Specifically, the rulemaking, which is authorized under the Air Carrier Access Act and will amend certain parts of 14 CFR Part 382, will require U.S. and foreign airlines to ensure that lavatories on new single-aisle aircraft that are FAA-certified with a maximum seating capacity of 125 or more seats, are large enough to allow a passenger with a disability and an attendant to be able to approach, enter, and maneuver within the lavatory to allow for the passenger’s use of the aircraft lavatory. Importantly, the rulemaking does not require airlines to retrofit the cabin interiors of existing single-aisle aircraft, but rather, requires that any lavatories replaced on single-aisle aircraft three years after the effective date of the final rule, and any new aircraft originally ordered ten years after the effective date of the final rule or delivered twelve years after the effective date of the final rule be accessible in order to comply with the requirements of the rule. The rule will also require carriers to conduct annual “hands-on” training for employees regarding the use, stowage, and assistance of passengers to/from the lavatory using onboard wheelchairs and will require carriers to develop procedures for handling sharps and bio-waste and informing passengers of these procedures upon request. These requirements will become effective three years after the effective date of the final rule.

Some notable required specifications included in the rulemaking for single-aisle aircraft lavatories, include:

- Grab bars that must be provided and positioned to meet the needs of passengers with disabilities.
- Lavatory faucets with controls with tactile information concerning temperature, or alternatively, adjusted lavatory water temperature to eliminate the risk of scalding, and automated or hand-operated faucets able to dispense water for a minimum of five seconds.
- Attendant call buttons and door locks accessible to an individual seated within the lavatory.
- Lavatory controls and dispensers discernible through touch, and parts within the lavatory that are operable with one hand and that do not require tight grasping, pinching, or twisting of the wrist (to the extent that such accessible components are reasonably available and certificated for the applicable aircraft type).
- Lavatory doors that provide minimum obstruction to the passage of the onboard wheelchair across the sill while preventing the leakage of fluids from the lavatory floor and trip hazards during an emergency evacuation.
- A visual barrier to be provided upon the request of a passenger with a disability, that provides the passenger using the lavatory (with the lavatory door open) with a level of privacy substantially equivalent to the privacy provided to ambulatory users.

DOT noted that major reasons for the new rulemaking include the fact that for decades, accessible lavatories have been required on twin-aisle aircraft, but were not required for single-aisle aircraft, which are increasingly being used for long-haul flights, and to ensure that passengers with disabilities are able to safely access and use aircraft lavatories.

FAA ISSUES NPRM ON MODERNIZATION OF SPECIAL AIRWORTHINESS CERTIFICATION

On July 24, 2023, the Federal Aviation Administration (“FAA”) issued a [notice of proposed rulemaking](#) (“NPRM”) to amend the rules for the certification and operation of light-sport category aircraft. The FAA’s Modernization of Special Airworthiness Certification (“MOSAIC”) NPRM enables certification of light-sport category aircraft with simplified flight controls and electric propulsion systems. The proposed amendments would also remove the weight limit for light-sport category aircraft and increase the cruise and stall speed allowances for these aircraft. Under the proposed rule, aircraft seeking a special airworthiness certificate would be required to comply with aircraft design, production, and airworthiness requirements using industry consensus standards, instead of complying with the current definitional requirements codified in 14 CFR 1.1.

In addition, MOSAIC proposes to expand certain privileges for sport pilots. The proposed rule would allow sport pilots to operate airplanes with up to four seats, allow sport pilots to operate at night, and permit operations in aircraft equipped with retractable landing gear. The proposed rule also introduces a new rotorcraft-helicopter privilege for sport pilots and sport pilot instructors and would permit sport pilots to use aviation training devices (“ATD”) and flight simulation training devices (“FSTD”) to meet certain experience requirements for a sport pilot certificate. To benefit from this increase in privileges, sport pilots would be required to complete more robust training and receive additional endorsements.

The FAA is currently accepting comments on the NPRM until **October 23, 2023**, in the applicable docket [available here](#).

FAA ISSUES FINAL RULE ADDING POWERED-LIFT TO REGULATORY DEFINITIONS

On July 26, 2023, the FAA issued a [final rule](#) enabling air carrier operations with powered-lift. Under 14 CFR 1.1, powered-lift are defined as heavier-than-air aircraft capable of vertical takeoff and landing (“VTOL”) and low-speed flight, using engine-driven or engine-thrust lift during takeoff and landing, and nonrotating airfoils for horizontal flight. The final rule incorporates powered-lift into the definitions of five air carrier operations: commuter, domestic, flag, on-demand, and supplemental. In addition, the rule amends the experience requirements for air carrier management personnel to ensure proper experience in powered-lift operations and extends certain commercial air tour and noncommon carriage operating rules to powered-lift. The rulemaking comes as part of the FAA’s multi-faceted rulemaking approach to integrate powered-lift into the regulatory paradigm. The final rule becomes effective on **September 25, 2023**.

PHMSA ISSUES ANPRM ON MODERNIZING HAZMAT REGULATIONS

On July 5, 2023, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issued an [Advance Notice of Proposed Rulemaking](#) (“ANPRM”) to obtain feedback on proposed initiatives to modernize the Hazardous Materials Regulations (“HMR”), improve efficiencies, and maintain or improve safety. PHMSA noted that it has received regulatory modernization topics through petitions and internal review efforts based on changing technologies, transportation trends, and economic conditions warranting the collection of additional information from commenters to help it develop specific changes to the HMR. The ANPRM will allow PHMSA to gather comments

on the safety, environmental, and economic impacts of regulatory modernization initiatives suggested by the regulated community and stakeholders. More specifically, PHMSA has requested public comments on questions related to 46 different topics, including:

- Evaluation of Carrier Maintenance of Emergency Response Information
- Non-Bulk Packaging, Intermediate Bulk Container, and Large Packaging Periodic Retest Extension
- Use of Non-Bulk Package Test Samples for Multiple Tests
- Requirements for Damaged, Defective, or Recalled Lithium Cells and Batteries
- Sampling and Testing Program for Unrefined Petroleum-Based Products
- Recycling Safety Devices
- Creation of Basic Description and Shipping Description Definitions
- Removal of the 60-Day Renewal Requirement for Approvals and Special Permits
- Emerging Technologies

A full list of the topics under consideration and the applicable questions on which public comment has been sought can be found in the published ANPRM, [available here](#). Interested parties may submit comments until **October 3, 2023**.

DHS ANNOUNCES NEW ALTERNATIVE PROCEDURE FOR EMPLOYMENT ELIGIBILITY VERIFICATION

On July 21, 2023, the U.S. Department of Homeland Security (“DHS”) [announced](#) a [rule](#) to authorize an optional alternative procedure to allow certain participating employers that use E-Verify to examine an employee’s identity and employment authorization documents remotely. Specifically, employers participating in E-Verify and who are in good standing will have the option to conduct verification of required Form I-9 documentation electronically and with a live video call interaction. DHS noted that the update is intended to advance its mission of safeguarding the integrity of the employment eligibility verification process while recognizing that even post-pandemic, many employees continue to work remotely. The new alternative procedure will become available for use on **August 1, 2023**. DHS also [published](#) a new version of the Form I-9 employment eligibility verification form, that also becomes available for use starting August 1st.

TSA ISSUES NOTICE OF INTENT TO REQUEST EXTENSION FOR PUBLIC COLLECTION OF INFORMATION ON AIR CARGO SECURITY REQUIREMENTS

On July 3, 2023, the Transportation Security Administration (“TSA”) issued a [60-day Notice](#) to request public comments on a currently approved Information Collection Request (“ICR”) that TSA now wishes to submit to the DOT’s Office of Management and Budget (“OMB”) for an extension.

As background, the ICR involves affected populations operating under a security program including aircraft operators, foreign air carriers, and indirect air carriers, and requires the collection of information related to security programs, security threat assessments on certain individuals, known shipper data via the Known Shipper Management System and the Indirect Air Carrier Management System, and evidence of compliance recordkeeping. TSA noted that extension of the ICR is necessary to ensure compliance with TSA regulations on the acceptance, handling, and screening of cargo transported by air, and because uninterrupted collection of this information will

allow TSA to continue to ensure implementation of “vital security measures” for the protection of the traveling public. To prepare for OMB review and approval of the ICR, TSA is now also requesting comments to (1) evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility, (2) evaluate the accuracy of the agency’s estimate of the burden, (3) enhance the quality, utility, and clarity of the information to be collected, and (4) to minimize the burden of the collection of information on those who will respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments on the Notice may be sent by email to TSAPRA@tsa.dhs.gov, or by mail, until **September 1, 2023**.

DOT & FAA ISSUE NOTICE AND REQUEST FOR COMMENTS ON INFORMATION COLLECTION FOR DOMESTIC AND INTERNATIONAL FLIGHT PLANS

On July 5, 2023, the DOT and FAA issued a joint [Notice and request for comments](#) to obtain public comments on the agencies’ intention to request OMB’s approval to renew an information collection related to extracting flight data, like aircraft, routing speed, and other data, from domestic and international flights. DOT and FAA have asked the public to comment generally on the information collection and on specific issues including (1) whether the proposed collection of information is necessary for FAA’s performance, (2) the accuracy of the estimated burden, (3) ways for FAA to enhance quality, utility, and clarity of the information collection, and (4) ways that the burden could be minimized without reducing the quality of the collected information. Interested parties may submit comments on the Notice until **September 5, 2023**.

CBP ISSUES VISA WAIVER PROGRAM ESTA UPDATES FOR BRUNEI AND CUBA

On July 6, 2023, U.S. Customs and Border Protection (“CBP”) announced that as of July 6, 2023, DHS updated the Electronic System for Travel Authorization (“ESTA”) application form and ESTA Mobile App to institute changes that effectively makes nationals of Visa Waiver Program (“VWP”) countries who have been present in Cuba on or after January 12, 2021, as well as dual nationals of a VWP country and Cuba, ineligible for travel to the U.S. under the VWP. As background, a law known as the “Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015,” makes nationals of VWP countries who have been in a country designated as a State Sponsor of Terrorism (“SST”) and dual nationals of both a VWP country and an SST country ineligible for travel to the U.S. under the VWP. Therefore, since Cuba was designated as an SST by the U.S. Secretary of State on January 12, 2021, any nationals present in Cuba on or after that date, or who are dual nationals of a VWP country and Cuba, are no longer eligible to travel to the U.S. under the VWP. CBP also noted that if an individual has an approved ESTA but is later found to have been present in Cuba on or after January 12, 2021, or holds dual nationality with a VWP country and Cuba, then their ESTA will be revoked based on the new changes.

One week later, on July 13, 2023, CBP issued a notice announcing that DHS, in consultation with the U.S. Department of State (“DOS”), reduced the ESTA validity period for travel by citizens and nationals of Brunei Darussalam (“Brunei”) under the VWP to the U.S. Accordingly, effective July 6, 2023, the ESTA validity period for Bruneian citizens and nationals was shortened from two years from the date of issuance to one year. The reduction of ESTA validity only affects new ESTA applications received after July 6th and does not apply to Bruneian citizens and nationals who received approved ESTA prior to the July 6th effective date.

PANYNJ ANNOUNCES AIR CARRIER CONSULTATION MEETING

On July 13, 2023, the Port Authority of New York and New Jersey (“PANYNJ”) announced its intention to hold an Air Carrier Consultation Meeting in relation to its plan to apply to the FAA to impose and use Passenger Facility Charges (“PFCs”) at Newark Liberty International Airport (EWR), LaGuardia Airport (LGA), John F. Kennedy

International Airport (JFK), and New York Stewart International Airport (SWF) for three new projects. The projects include (1) a EWR Terminal A – Airside Pavement & Infrastructure Construction Project, (2) a LGA Terminal B – Airside Pavement Reconfiguration Project, and (3) reimbursement of Consulting Fees incurred in relation to the preparation of PANYNJ’s PFC application.

The meeting will be held on **August 16, 2023**, from **2:30-3:15 PM EST** remotely via Microsoft Teams and in person at the following address: Port Authority of NY and NJ, 4 World Trade Center, 150 Greenwich Street, 18th Floor - Conference room 18A, New York, NY 10007. Carriers who received the official notice from PANYNJ (i.e., those who have significant business at EWR, LGA, JFK and/or SWF) are asked to acknowledge receipt of the notice within 30 days by signing and returning the notice via email to Passenger_Facility_Charge@panynj.gov.

CBP ISSUES GENERAL NOTICE ON UPDATE TO INTEREST RATES FOR OVERDUE ACCOUNTS AND REFUNDS OF CUSTOMS DUTIES

On July 5, 2023, CBP issued a [General Notice](#) to advise the public that the quarterly Internal Revenue Service (“IRS”) interest rates that are used to calculate interest on overdue accounts (i.e., underpayments) and refunds (i.e., overpayments) of customs duties will remain unchanged from the previous quarter. This means the interest rates for overpayments will remain at 6% for corporations and 7% for non-corporations, while the interest rates for underpayments will remain at 7% for both corporations and non-corporations.

FAA’S INTERNATIONAL FLIGHT TEST DEMONSTRATION SUCCESSFUL

On June 30, 2023, FAA [announced](#) that its international flight test demonstration was successful. The test involved a joint effort between the FAA and air traffic experts in Japan, Singapore, and Thailand to determine the possibility of being able to predict where an aircraft will be and at what time using Trajectory Based Operations (“TBO”). This involves countries sharing precise data on an aircraft’s trajectory, including latitude, longitude, altitude, and time information, and then sequencing the aircraft’s flight routes to achieve the optimal flight path across multiple regions while also factoring in conditions like weather, air traffic, and airspace closures. In the announcement on the test, FAA noted that the goal is to have air traffic controllers shift from sharing flight information using voice-based exchanges to sharing the information more broadly, primarily using data, which will allow each country to be immediately aware of how changes in other countries will affect a flight and be able to better plan for when an aircraft enters its area of responsibility. FAA also noted that the successful test showed that sharing and coordinating on trajectory information between countries can improve safety and efficiency, and could ultimately minimize flight disruptions, reduce travel costs and times, and reduce carbon emissions by about 10%.

U.S. SUPREME COURT RULES U.S. TRADEMARK LAW DOES NOT APPLY EXTRATERRITORIALLY

On June 29, 2023, the U.S. Supreme Court ruled that the U.S. law against trademark infringement, known as the Lanham Act, does not apply extraterritorially, meaning the law is only applicable to infringements that occur within the U.S. Specifically, a majority of the Court found that Congress did not provide an “express statement” in the Lanham Act to note that the law would apply extraterritorially, meaning Congress did not intend for the law to govern actions that occur outside of the U.S. The Court based its decision on the legal principle known as the “presumption against extraterritoriality,” which is the presumption that laws created in a country should not be deemed to apply to conduct in the territory of another country while specifically noting the longstanding U.S. legal principle that any laws enacted by Congress are meant to only apply within the U.S. unless contrary intent is specified in the law.

CLASS ACTION LAWSUIT FILED AGAINST FRONTIER FOR ALLEGED HIDDEN BAG FEES

On June 29, 2023, a class action lawsuit was filed in the U.S. District Court in Middle Florida against Frontier Airlines (“Frontier”) for alleged hidden baggage fees. Specifically, the Plaintiff alleged that Frontier falsely misled her and “numerous other consumers” into believing that the airline has the lowest fares and bag fees when in fact the airline requires payment for “fraudulent and unwarranted charges.” As examples, the Plaintiff noted that Frontier allegedly allows one personal item per passenger but that the advertised dimensions for personal items are larger than the dimensions of the bag sizer that Frontier actually uses to measure bags at the gate, and that Frontier allegedly does not disclose that it charges fees for oversized bags, and therefore, also does not disclose the amount of oversized bag fees. Based on this, the Plaintiff filed suit alleging that Frontier violated Florida’s Deceptive and Unfair Trade Practices Act, and asserting claims for breach of contract, fraudulent misrepresentations, and misleading advertising under Florida law. The Plaintiff is seeking (1) a refund for all bag fees, attorneys fees, and other costs she incurred, and an additional \$100 million in punitive damages for herself and all similarly situated consumers, (2) a judgment from the Court to require Frontier to “clearly and conspicuously” disclose its bag fees and the dimensions of its bag sizer online, in the airport, and at gates, and (3) a judgment to require Frontier to inform consumers that it does not offer the lowest fares and that personal items are not included in its fares. Frontier has not yet responded to the complaint.

U.S. FEDERAL COURT DISMISSES DELAYED BAG-RELATED LAWSUIT AGAINST UNITED

On July 7, 2023, the U.S. District Court for the Northern District of Ohio issued a decision dismissing a lawsuit against United Airlines (“United”) in which the Plaintiff alleged that United violated U.S. federal law by failing to deliver lost bags in a timely manner and refusing his requests for reimbursement. The Plaintiff alleged he and his wife’s bags, which included necessary prescription medications, were lost following a United flight to India. The Plaintiff also noted that United made assurances that the bags would arrive the day after the flight, but that the bags did not arrive until five days later, causing the Plaintiff and his wife to suffer medical complications and incur additional expenses based on the bags’ delayed arrival. The Plaintiff also alleged that despite contacting United several times to seek reimbursement, his requests were ignored and then refused. United filed a motion to dismiss the Plaintiff’s complaint based on the argument that he failed to state a claim for which relief could be granted by the Court. The Court agreed with United, finding that based on the Montreal Convention (the “Convention”), the Plaintiff did not assert a plausible claim for relief since the Convention does not provide a right of recovery for bag delays that are less than 21 days in duration. The Court also noted that while Article 17 of the Convention also permits passengers to obtain compensation for damaged bags if the carrier admits loss of checked baggage, United never admitted that it lost the bags. The Plaintiff also asked that the Court deny United’s motion to dismiss because United had engaged in deceptive behavior and did not show that its employees made a good faith effort to locate the bags in a timely fashion, but while the Court noted that a remedy may be available for this sort of claim under Article 19 of the Convention, it pointed out that passengers must first obtain a claim for damage to baggage under Article 17 before Article 19 would apply, and since the Plaintiff did not have a plausible claim under Article 17, Article 19 also did not apply.