Aviation Regulatory Update

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AIRLINES GRANTED TEMPORARY HOLD ON DOT'S ANCILLARY FEE RULE; POTENTIAL CHALLENGE TO AUTOMATIC REFUND RULE COMING NEXT

On July 29, 2024, Judge Duncan of the Fifth Circuit Court of Appeals granted a temporary hold on the Department of Transportation's ("the Department" or "DOT") "Enhancing Transparency of Airline Ancillary Service Fees" rule "ancillary fees rule"). DOT issued the Rule, which requires covered entities to disclose ancillary service fees and policies, in April. Various airlines and airline associations asked DOT to stay the ancillary fees rule while they sought review, but DOT declined to do so. The airlines and airline associations then challenged the ancillary fees rule in the Fifth Circuit Court of Appeals, arguing that it: "(1) exceeds DOT's authority; (2) is arbitrary and capricious; and (3) wrongly bypassed notice and comment." Judge Duncan granted the stay and ordered expedited review of the ancillary fees rule.

The Judge reasoned that the petitioners made a "strong showing that the Rule exceeds DOT's authority." The Judge agreed that the ancillary fees rule "prescribes" conduct, rather than prohibiting it, which he said goes beyond DOT's statutory authority. The Judge also found that petitioners submitted enough evidence showing that, absent a stay of the ancillary fees rule, they would suffer significant, irreparable harm because they would "have to expend significant resources reengineering their websites to comply with the Rule," among other things. Finally, the Judge stated that there was "no public interest in the perpetuation of unlawful agency action." The ancillary fees rule is on hold until the entire Fifth Circuit reviews it.

Similarly, airlines and airline associations asked DOT for more time to comply with the Automatic Refund Rule issued in April. DOT declined their request, setting the stage for potential legal challenges to the Automatic Refund Rule. Unknown at this time is the effect that the overturing of the *Chevron Deference* via the Supreme Court decision, Loper Bright Enterprises v. Raimondo may have on these challenges. For more information regarding Loper Bright and another significant Supreme Court decision limiting regulatory agency authority (SEC v. Jarkesy), please see articles further below.

NEW CDC RULES ON DOG IMPORTATION AND WAIVER OPPORTUNITY

The Centers for Disease Control and Prevention ("CDC") has published guidance regarding its final rule which will implement significant changes for the requirements placed on dogs entering or reentering the United States. The CDC's final rule, titled: *Control of Communicable Diseases; Foreign Quarantine: Importation of Dogs and Cats*, requires stricter entry rules for dogs while not substantially changing importation rules for cats.

Any dog which has not been to a "high-risk country" in the last six (6) months is not required to present documentation of rabies vaccination. High-risk countries include China, Egypt, India, and many others. Dogs without a vaccine certification who have been to a high-risk country in the last six (6) months will not be permitted to enter the United States.

Starting on August 1, 2024, **all dogs**, including service dogs, entering the United States must conform with the following requirements:

- Be at least six (6) months old.
- Have an implanted International Organization for Standardization compatible microchip.
    - This microchip must have been implanted prior to administration of the rabies vaccine.
    - The microchip number needs to be listed on all required forms.
- Provide a *CDC Dog Import Form* receipt.
    - The form may be completed online.
    - Ideally the form will be completed 2-10 days prior to arrival but may be completed as late as in line at border crossing.
    - Form requires a clear photograph of the dog including its face and body. Dogs less than one year old are required to produce a photograph taken within fifteen (15) days of arrival.

For any dog entering or returning to the U.S. that have been only in dog rabies-free or low-risk countries in the past six (6) months:

- Only subject to the requirements for **all dogs** listed above.

For dogs with rabies vaccination administered in the U.S. with contact with a high-risk country in the past six (6) months:

- Subject to the requirements for **all dogs** listed above plus;
- Must provide a USDA endorsed *Certification of U.S.-Issued Rabies Vaccine* form;
- Or a USDA endorsed export health certificate.

For dogs with a rabies vaccination administered outside of the U.S. with contact with a high-risk country in the past six (6) months:

Subject to the requirements for **all dogs** listed above plus;

- Must provide a *Certification of Foreign Rabies Vaccination and Microchip* form endorsed by an official government veterinarian.
- Must provide a rabies serology titer.
- Must have a reservation at a CDC-registered animal care facility. Absent a rabies serology titer, this requires a twenty-eight (28) day quarantine reservation.
- Dog must arrive at U.S. airport where there is a CDC-registered animal care facility. Please note that there are CDC-registered animal care facilities at most major U.S. airports.

Airlines must comply with numerous obligations and include on their website an explanation and links to these rules, the required documentation, and institute a policy for accepting and verifying compliance with these rules.

WAIVER

One important airline obligation is the requirement that airlines generate a bill of lading including an air waybill ("AWB") for any dog (including service dogs) carried in transportation as cargo, checked baggage, hand-carried, or otherwise accompanying a traveler arriving in the U.S. Airlines may request a waiver to this specific requirement which is good for a period of 90 days. Within these 90 days, airlines may submit an application for a longer, 9-month waiver. Pursuant to the final rule, "airlines that lack the technical ability to generate an AWB to transport dogs may apply for the waiver." The CDC also indicated that it may grant an annual waiver, subject to additional conditions. These waivers allow airlines to temporarily operate without needing to generate a bill of lading including AWBs for each dog they transport to the U.S. If you believe that generating a bill of lading and AWBs for dogs will be technically difficult for your airline, please let us know and we can assist you with applying for a waiver. The process is relatively simple. While there is no deadline by which waivers must be filed, the sooner a waiver is granted, the sooner an airline can be relieved of the requirement that it generate a bill of lading and AWB for each dog. **Please note that the grant of such waiver does not release an airline from the other obligations under the rule listed in the attached summary.**

For a complete list of requirements please visit the CDC website. If you have further questions regarding compliance with this final rule or need help applying for a waiver, please reach out to us and we would be happy to assist you.

STATUTE OF LIMITATIONS EXTENDED FOR VIOLATIONS OF TRADING WITH THE ENEMY ACT

On July 22. 2024, the U.S. Department of the Treasury ("Treasury") Office of Foreign Assets Control ("OFAC") released guidance regarding a change to the statute of limitations related to violations of the *International Emergency Economic Powers Act* ("IEEPA") and the *Trading with the Enemy Act* ("TWEA"). Section 3111 of the *21st Century Peace through Strength Act* extends the statute of limitations for civil or criminal violations of the IEEPA and TWEA from five (5) years to ten (10) years effective as of April 24, 2024. Critically, this extension allows OFAC to commence a civil enforcement action for a violation of the IEEPA and TWEA that occurred any time on or since April 24, 2019. The IEEPA and TWEA grant broad authority to the President to restrict trade between the U.S. and foreign powers during times of war and national emergency. OFAC plans to publish an interim final rule, with an opportunity for public comment, that will codify the extension of the statute of limitations pursuant to recordkeeping requirements. "OFAC anticipates that a ten-year (10) recordkeeping requirement would become effective six (6) months after publication of the interim final rule."

OFAC REACHES $7.4 MILLION DOLLAR SETTLEMENT WITH STATE STREET BANK AND TRUST COMPANY FOR VIOLATIONS OF UKRAINE/RUSSIA SANCTIONS

On July 26, 2024, OFAC announced that it had reached a $7,452,501 settlement with State Street Bank and Trust Company for apparent violations of OFAC's Ukraine-/Russia-Related Sanctions Regulations ("Sanctions".) The Massachusetts based company agreed to the settlement on behalf of itself and its subsidiary Charles River Systems, Inc. ("Charles River") because of alleged misconduct related to invoices that were erroneously redated or reissued. The thirty-eight (38) violations occurred between 2016 and 2020 and totaled $1,270,456. Notably, Charles River had maintained relationships with subsidiaries owned by Russian financial institutions identified by OFAC to be subject to it's Directive 1 which prohibits holding certain debts beyond a certain period. Charles River is alleged to have been aware that it had invoices from Directive 1 identified entities that had exceeded the maximum holding period. In order to mask this, Charles River is alleged to have changed and reissued invoices to make them appear more recent. OFAC found that Charles River's violations were egregious which it noted that the institution had failed to self-disclose.

NTSB CLOSES IN ON REVISED GUIDANCE FOR PASSENGER LIST/MANIFEST DISTRIBUTION & CONTROL

On July 7, 2024, the National Transportation Safety Board ("NTSB") announced that it will be revising its previously issued Guidance for Passenger List/Manifest Distribution and Control. The revisions come as a result of the May 2024 FAA Reauthorization Act of 2024 which made changes to family assistance legislation for carriers and the emergency response community related to the distribution of the passenger list/manifest following an accident involving an air carrier or foreign air carrier.

The NTSB will include the following changes to previously released guidance in order to conform with the FAA Reauthorization Act of 2024:

- When NTSB, but not the American Red Cross, receives a passenger list from a carrier involved in an accident, NTSB may now share that information with a "local, Tribal, State, or Federal agency responsible for determining the whereabouts or welfare of a passenger." However, these collaborating agencies may not release this information without the express permission of NTSB.
- Carriers are already free to independently share passenger list information with response agencies when requested, but revised guidance clarifies that carriers should notify NTSB when they deny such requests.

The NTSB is currently reviewing feedback regarding this revised guidance and expects to release a final version by the end of August 2024.

U.S. SUPREME COURT OVERTURNS LANDMARK CHEVRON CASE: SETTING THE STAGE FOR CHALLENGES TO DOT REGULATIONS

On June 28, 2024, the United State Supreme Court decided 6-3 to overturn its landmark 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*. ("Chevron"), which famously established the so-called *Chevron Deference* for judicial review of certain administrative law actions. Loper Bright Enterprises v. Raimondo and its companion case Relentless, Inc. v. Department of Commerce together reset judicial standards and will empower courts to take a more active role in determining whether the regulations created and interpreted by federal agencies exceed Congressional authority. In doing so, the Supreme Court has set the stage for future challenges to agency regulations and enforcement actions, including those of the Department's which has recently promulgated several new consumer protection rules and stepped-up enforcement activities against airlines.

It is difficult to overstate the importance of the original Chevron decision within the world of administrative law. In the last forty (40) years, Chevron has become one of the most cited administrative law cases of all time. The Court in Chevron analyzed whether the Environmental Protection Agency ("EPA") was permitted by the Clean Air Act of 1963 to define a "source" of air pollution to cover an entire industrial plant or factory. Central to this question was the fact that the term "source" was not well defined by the applicable statute. The Court held that the EPA's definition was permissible, based on a doctrine it dubbed *Chevron Deference*. Moving forward, courts were to apply *Chevron Deference* when analyzing legal challenges to agency interpretations of ambiguous statutes. Under this two-part test, a reviewing court asks whether: (1) Congress has spoken directly to the issue at hand; and (2) is the agency's interpretation of the statute reasonable? When Congress has not spoken directly to the issue, and the reviewing court finds the agency interpretation to be reasonable, the court must hold in favor of the administrative agency. Under this framework, Congress could generally direct federal agencies to execute on legislative intent while at the same time federal agencies could remain flexible in their rulemaking efforts without significant fear of judicial review. It is no surprise that following the Chevron decision, there was a boon in the number, size, and scope of agency regulations.

Notwithstanding, Loper Bright has done away with the *Chevron Deference* and stands to return power to the courts. The Supreme Court in Loper Bright was asked to review Chevron via a dispute initiated by Atlantic herring fisheries against the Secretary of Commerce and National Marine Fisheries Service ("NMFS"). NMFS was alleged to have exceeded its authority under the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") by requiring fisheries to fund its inspection services. The Court limited its decision to whether Chevron should be overturned or refined. The Court chose the former, stating that Chevron had become "unworkable," reasoning that Chevron had always directly conflicted with the Administrative Procedures Act ("APA") which requires the reviewing court, not the agency, to "decide all relevant questions of law" and "interpret ... statutory provisions." Moreover, the Court held that it is courts that are the most well equipped to resolve statutory ambiguity, not agencies. Lastly, the Court wished to restore the judiciary to its Constitutional role as a check to executive action. In place of *Chevron Deference* the Court announced a return to *Skidmore Deference*, which has remained good law since 1944 but had been markedly overshadowed by Chevron. Although not all encompassing, *Skidmore Deference* permits a reviewing court to consider aspects of agency findings and rulings when reviewing agency actions. The Court was specific to not disturb the progeny of cases decided under Chevron, holding that cases settled using Chevron would not be overturned for that fact standing alone. Taken together, Loper Bright put the nail in the coffin for automatic judicial deference in favor of federal agencies and marks a monumental turning point in American regulatory jurisprudence.

Although the ultimate results of Loper Bright will take some time to be fully understood, the decision sets of the stage for increased legal scrutiny of administrative agency actions DOT will certainly be high on the list of targeted agencies. The Department was among those asked by the U.S. House Transportation and Infrastructure Committee to send information related to any proposed or promulgated rules, adjudications, enforcement actions, or interpretive rules that it has proffered since the beginning of the current presidential administration.

DOT's recent Final Rule on Enhancing Transparency of Airline Ancillary Service Fees rule ("ancillary fee rule") will likely face increased legal pressure from opponents under Looper Bright because of DOT's interpretation of the term "prompt." Congress directed DOT to promulgate a rule that "require an air carrier or foreign air carrier to promptly provide to a passenger an automated refund for any ancillary fees paid." Nonetheless, Congress failed to define the meaning of "prompt." Instead, DOT provided its own definition of "prompt ticket refund." Under Chevron, such ambiguity would likely be resolved in favor of the Department, assuming that a Court would find DOT's definition to be reasonable. Under Loper Bright, this ambiguity would technically afford room to challenge DOT's interpretation of legislative intent.

Importantly, Loper Bright also stands to prevent significant reversals in regulatory policy whenever a new executive administration changes. Chevron Deference required agencies to meet only a permissible standard when carrying out executive directives. Post Loper Bright, agencies will be held within a narrower zone of regulatory action. In theory, this should lead to less dramatic shifts in regulatory policy each time a new executive administration takes over, since there will be more decisions from courts regarding the outer limits of agency authority.

Those involved in the airline industry should also reevaluate other recent and potentially onerous DOT rulemakings including the Final Rule on Ticket Refunds and Consumer Protections to gauge whether these regulations exceed DOT's authority. Although it remains to be seen how potential challenges to DOT regulations will play out in the judicial system, the Loper Bright decision will invariably cause the Department and other agencies to give real consideration before promulgating any new regulation not based on clear statutory authority.

U.S. SUPREME COURT LIMITS ENFORCEMENT ACTIONS IN SEC V. JARKESY

The Supreme Court also took action to limit the enforcement capabilities of the Securities and Exchange Commission ("SEC") in in its recent decision in SEC v. Jarkesy, No. 22-859 (S. Ct. June 27, 2024) (6-3 decision). While the decision

only addresses the SEC's authority to seek civil penalties for securities fraud violations, now requiring SEC to file suit in federal Article III courts and providing parties an opportunity to have their case decided by a jury, the reasoning behind the majority decision could potentially be used to restrict other enforcement capabilities at agencies such as the DOT or Federal Aviation Administration ("FAA").

This issue arose after the SEC initiated an enforcement action for civil penalties against an investment firm, Patriot28, LLC ("Patriot28"), and its owner George Jarkesy, Jr. ("Jarkesy"), for alleged violations of federal securities laws. Prior to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the SEC could only pursue civil penalties against an unregistered investment in federal court, but following the passage of Dodd-Frank, the SEC could adjudicate these types of enforcement actions through in-house administrative proceedings. Pursuant to a final agency order issued by the SEC, Jarkesy and Patriot28 were found liable for securities violations and were fined $300,000. Jarkesy and Patriot28 then petitioned for judicial review at the Fifth Circuit Court of Appeals, which vacated the SEC's order and civil penalty on the grounds that the SEC's administrative adjudication process violated the defendants' Seventh Amendment right to a jury trial. The Supreme Court has now affirmed the Fifth Circuit's decision, at least with respect to the requirement for Article III courts and jury trials for SEC civil penalties proceedings involving securities fraud. The 5th Circuit's decision also identified two additional constitutional problems: i) that Congress had violated the nondelegation doctrine by authorizing the SEC, to choose between Article III courts or in-house adjudication; and ii) that SEC ALJs having two layers of for-cause removal protections violated the separation of powers. However, because the Supreme Court resolved the issue based on the need for jury trials, they did not address the additional issues raised by the 5th Circuit in their decision.

The majority decision relies upon the Seventh Amendment requirement that civil litigants generally have a right to a jury trial "in suits at common law." The "common law" broadly refers to judge-made law developed in English courts prior to start of the United States, which was then imported into American jurisprudence and still provides a basis for how courts handle many matters, such as those involving torts and contracts where a judgement could be assessed against one party. While the Seventh Amendment has a general requirement for jury trials, for nearly two-hundred years courts have recognized a "public rights exception" to that necessity. The public rights doctrine was originally created by *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856), and has been refined since then, most notably in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U. S. 442 (1977). In *Atlas Roofing*, the Supreme Court found that in "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact, . . . the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." Generally, this public rights exception to the Seventh Amendment only applies to cases brought by the federal government to enforce a federal statute which involves a specific right that did not already exist under the common law. In those circumstances, the case may be heard before an agency Administrative Law Judge ("ALJ") in an administrative hearing without a jury.

In *Jarkesy*, the SEC was seeking to adjudicate claims under the anti-fraud provisions of federal securities laws for alleged fraudulent conduct. The Court determined that, while Congress had specifically created a new statutory scheme for civil penalties assigning the SEC enforcement and adjudication responsibilities, general fraud claims have a basis in the common law and traditional civil suits. In many cases, an SEC fraud claim looks very similar to a fraud claim that could be asserted in a suit between private individuals. For that reason, the Court held that the SEC's anti-fraud adjudications did not fall under the public rights exception and all such cased, therefore, must be tried in federal court before a jury.

Unfortunately, *Jarkesy* does not provide much guidance on what types of enforcement actions, or what other agencies, might be similarly affected, nor does it provide clear guidance on how to easily distinguish between private and public rights. The only areas the majority notes that have historically been covered under the public rights exception are: i)

relations with Indian tribes; ii) the administration of public lands, and iii) the granting of public benefits such as payments to veterans, pensions, and patent rights. The majority opinion acknowledges that the Supreme Court "has not always spoken in precise terms" with regard to the public rights exception and that this is an "area of frequently arcane distinctions and confusing precedents." Justice Roberts, who authored the majority decision, recognized that the Supreme Court had not previously "definitively explained the distinction between public and private rights" and wrote that the Court would not be doing so with the *Jarkesy* decision either, ultimately leaving the full reach of this decision and its application to other agency adjudication schemes open to later court challenges.

While the *Jarkesy* decision will not have any immediate effect on DOT or FAA's ability to pursue enforcement actions as a whole, similar challenges could be brought involving specific issues that these agencies adjudicate through administrative proceedings. Courts have considered the public rights exception in the context of FAA licensing enforcement in the past, finding in *Hill v. National Transp. Safety Bd.*, 886 F.2d 1275, 1282 (10th Cir. 1989) that administrative proceedings regarding suspension of pilot certificates involve the special expertise of FAA and are not akin to suits at common law for which a jury trial is required. However, there are likely DOT or FAA agency adjudications that are beyond the public rights exception. Most notably, DOT's ability to enforce the unfair and deceptive practices rules through agency adjudicated civil penalties, could potentially be at risk in the same way as SEC's anti-fraud enforcement.

DOT's rules on unfair and deceptive rules were most recently updated in December 2020. Under 49 U.S.C. § 41712, DOT has the authority to investigate and decide whether an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice in air transportation or the sale of air transportation. Section 41712 also provides air carriers with notice and an opportunity for an agency hearing, and DOT has the authority to issue orders to stop an unfair or deceptive practice. Under 49 U.S.C. § 46301, DOT has the authority to issue civil penalties for violations of Section 41712 or for any regulation issued under the authority of Section 41712. Until the Defining Unfair and Deceptive Practices final rule was issued in 2020, DOT did not have any official definition of "unfair" or "deceptive" practices. DOT's treatment of these terms was based loosely on the Federal Trade Commission's ("FTC") own policy and definitions of these terms, though their meaning had been determined through DOT's adjudication process and agency guidance. However, the 2020 final rule removed any doubts and specifically defined these terms based on FTC's own definitions and the FTC's 1980 Policy Statement on Unfairness.

Now the question is, do unfair and deceptive practices have a basis in the common law which would prohibit the application of the public right exceptions? The majority opinion discusses two cases concerning the application of the public rights to unfair methods of competition and interstate commerce. The Court cites *Ex Parte Bakelite Corp*., 279 U. S. 438, 446 (1929), which upheld a law authorizing tariffs on goods imported through unfair methods of competition, stating that Congress and the Executive branch had traditionally held exclusive power in this area of foreign commerce, and therefore Article III courts were not required. But the majority opinion declined to apply the precedent of *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320 (1909), which upheld an immigration law that allowed administrative civil penalties without a jury for aliens with "loathsome or dangerous contagious diseases." The majority opinion asserted *Oceanic Steam* was solely limited to administrative authority over *foreign* commerce, and explicitly states in a footnote that "Nowhere does Oceanic Steam Navigation say that the public rights exception applies to cases concerning the securities markets or interstate commerce more broadly." (*Jarkesy* at FN 1). However, the Supreme Court precedent does not otherwise clearly indicate whether the public rights exception would apply to unfair and deceptive practice adjudications before agency ALJs.

However, the FTC's 1980 Policy on Unfairness cites to an earlier 1964 FTC statement on determining what constituted consumer unfairness. The 1964 FTC statement provides:

> Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, **the common law**, or otherwise-whether, in other words, it is within at least the penumbra of some **common-law**, statutory, or other established concept of unfairness. (emphasis added).

Based on this language, it appears that a reasonable argument could be made that the adjudication of unfair and deceptive practices has at least some basis in the common law. As *Jarkesy* notes, the creation of a novel statutory scheme by Congress (such as protecting consumers from unfair and deceptive practices) is not enough alone to supplant the requirements of the Seventh Amendment, especially when the statutory schemes are related to common law claims.

While it is not certain that DOT enforcement of unfair and deceptive practice law claims through agency adjudication would fall to a court challenge similar to *Jarkesy*, it is reasonable to question whether this, or other similar agency adjudicatory practices, are in danger of suffering a similar fate. Ultimately, it will require an air carrier that is subject to an unfair and deceptive practice civil penalty to challenge in a federal appeals court the scope of DOT's authority under the public rights doctrine. If DOT's enforcement of 49 U.S.C. § 41712 was found to be beyond the public rights exception, DOT would likely face an uphill battle in effectively enforcing its rule.

First and foremost, a requirement to bring any civil penalty action for unfair and deceptive practices in a federal court would likely limit the number of actions that DOT could bring. Pursuing an action in federal court would certainly be more costly than in-house adjudications in front of an ALJ, and agencies do not have an infinite source of funding to support these actions. Additionally, while ALJs are supposed to be independent fact finders, it is very likely that a federal jury of normal citizens would give much less deference to an agency's explanation of the facts and relevant law than an ALJ who technically works for that same agency. As noted in *Jarkesy*, the SEC won about 90% of agency proceedings compared to 69% of its jury trials in federal court. If DOT were similarly required to adjudicate all unfair and deceptive practice actions in federal courts, it would likely be a boon for air carriers who certainly want to limit DOT's ability to pursue these actions.

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