Aviation Regulatory Update

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FAA REACHES AGREEMENT WITH TELECOM INDUSTRY REGARDING 5G: NEW COMPROMISES

On June 17, 2022, the Federal Aviation Administration ("FAA") announced an agreement with the telecom industry to permit AT&T and Verizon to boost their 5G signals around key airports, while keeping in place certain limitations for 5G deployment and setting a timeline for the upgrading of aircraft altimeters in order to avoid signal interference. Practically, this means that the telecom companies and FAA have reached a final agreement to delay rolling out some 5G signals for an additional year to allow more time for replacing and filtering radar altimeters and therefore prevent interference. The agreement also details several airports where 5G services can be enhanced without posing a significant risk of disruption to flight schedules. In recent months the FAA identified approximately 1,700 Airbus and Embraer aircraft that would need to be retrofit or upgrade their altimeters to avoid signal interference. FAA has also categorized aircraft depending on their vulnerability to 5G signal interference which is the determining factor in FAA's timeline. The agency also stated that it estimates that the work to retrofit or update affected aircraft should be completed by July 2023 as far as the mainline commercial fleet is concerned, which could mean that the telecom companies would be able to fully rollout 5G networks by that time.

Announcement of the agreement has not been well received by airlines or interest groups. Airlines for America ("A4A"), for example, in response to an FAA letter urging air carriers to expedite retrofitting of vulnerable aircraft where and if they could, argued that the request carried an undue burden in terms of air carrier operations and expressed that it felt the matter has still not yet been properly addressed. A4A also expressed serious concerns regarding the FAA's decision to place the burden for expedited updates and retrofits on the aviation industry, calling the decision "reckless" in terms of proposed design changes to safety-critical avionics.

FAA ISSUES NPRM ON AIRPLANE FUEL EFFICIENCY CERTIFICATION

On June 15, 2022, the FAA issued a new Notice of Proposed Rulemaking ("NPRM") that if adopted would create fuel efficiency requirements for the certification of certain aircraft. FAA's NPRM is a next step in the United States' ongoing Aviation Climate Action Plan, which includes a goal to achieve net-zero greenhouse gas emissions from the U.S. aviation sector by 2050. The proposed rule would apply to all large commercial aircraft that operate in U.S. airspace and would specifically require more fuel efficiency for new subsonic jet aircraft and large turboprop and propeller aircraft that are not yet certified and implement fuel efficiency requirements for all aircraft manufactured after January 1, 2028. Some commercial aircraft that will be required to meet the proposed standards include the upcoming Boeing 777-X, future versions of the 787 Dreamliner, the Airbus A330-neo, the ATR 72, and business jets such as the Cessna Citation and Viking Limited Q400. The proposed rule does not apply to aircraft that are already in service.

According to the FAA, civil aircraft such as the ones listed above were responsible for 10% of domestic transportation emissions and 3% of total U.S. greenhouse gas emissions prior to the COVID-19 pandemic. FAA

also stated that the fuel efficiency requirements would implement the emissions standards adopted by the Environmental Protection Agency ("EPA") in its January 11, 2021, Final Rule.

The FAA is accepting public comments on the NPRM until August 15, 2022.

D.C. COURT OF APPEALS RULES IN FAVOR OF DEPARTMENT OF AGRICULTURE IN APHIS FEE CASE

On June 21, 2022, the D.C. Circuit Court of Appeals issued a ruling in an action brought by A4A and IATA to contest an existing Department of Agriculture rulemaking called "User Fees for Agricultural Quarantine and Inspection Services." In Air Transp. Ass'n of Am. v. United States Dep't of Agric., the Appellants argued that the rule violated both the Food, Agriculture, Conservation, and Trade Act of 1990 (the "Act") and the Administrative Procedure Act ("APA"). Previously in the case, the district court ruled in favor of the Department of Agriculture on 3 of 4 counts, granting it summary judgment.

This ruling stems from a prior case, originally brought by the Appellants in 2016 following the adoption of a final rule by the Animal and Plant Health Inspection Service ("APHIS"), which increased the Commercial Aircraft User Fee to $225 for commercial flights and reduced the Commercial Air Passenger Fee from $5 to $3.96. The Appellants made four main claims against the Department of Agriculture and APHIS. First, they asserted that APHIS had exceeded its authority under the Act and the APA by charging both a per-passenger fee as well as a per-aircraft fee to fund inspections of a single aircraft. Second, the Appellants argued that APHIS' final rule violated the Act because it imposed excessively high fees and violated the APA due to its failure to explain how the $225 Commercial Aircraft User Fee was "commensurate" with inspection costs or even necessary at all given the imposition of the Commercial Air Passenger Fee. Next, the Appellants argued that the imposition of a reserve surcharge by the final rule exceeded the Department's authority because the Act only authorized a reserve charge until 2002. Lastly, the Appellants argued that the final rule violated the APA because APHIS withheld key information during the rulemaking process. The district court considered all the arguments and ultimately granted summary judgment in favor of APHIS on the first, second and fourth claims, while finding that due to the time limitation included in 21 U.S.C. § 136a(a)(1)(C), APHIS did not have authorization to collect fees to fund a reserve after fiscal year 2002 and therefore granted summary judgment in favor of the Appellants on the third claim. On appeal the Court found in favor of the Department and APHIS on all counts, affirming the district court's judgment in part, as it agreed with its rulings on claims 1, 2 and 4, and reversing and remanding the district court's decision on claim 3 after asserting that the challenged rule did authorize the collection of fees to fund a reserve after 2002.

FIRST PUBLIC ADMINISTRATIVE CHARGING LETTER ISSUED BY BIS AGAINST ABRAMOVICH

On June 6, 2022, an Administrative Charging letter was issued against Roman Abramovich by the U.S. Department of Commerce's Bureau of Industry and Security ("BIS"), alleging violations of the Export Administration Regulations ("EAR") which was followed by seizure warrants from the U.S. Department of Justice. The two actions come as the Commerce Department continues to enforce export controls in response to Russia's invasion of Ukraine. Notably, the decision to publish the charging letter is the first of its kind under the new regulations allowing for this type of action.

The alleged violations involve the operation of two U.S. origin aircraft to Russia without having previously acquired the required BIS export licenses. The aircraft in question, a Boeing 787-8 Dreamliner and a Gulfstream G650ER, currently located in Dubai and Russia, respectively, were subject to a license requirement while also being ineligible for any license exception. An FBI affidavit stated that Abramovich has "owned and/or controlled" the two aircraft

"through a series of shell companies." The public list of aircraft that have flown to Russia, in apparent violation of EAR, continues to be constantly updated by BIS.

If Abramovich is found to have committed the alleged violations, the Export Control Reform Act of 2018 (50 U.S.C. §§ 4801-4852) provides for administrative sanctions such as administrative monetary policies reaching up to $328,121 per violation or twice the value of the transaction, whichever is greater. The denial of export privileges remains another possible penalty for the alleged violations.

UPDATE ON CONSUMER PRIVACY LAW INITIATIVES

Since our last update, two more states have decided to enact comprehensive consumer privacy laws that will apply to any entities that collect or use the personal data of state residents. First, in March 2022, Utah adopted its comprehensive consumer privacy law known as the Utah Consumer Privacy Act ("UCPA") which is set to go into effect on December 31, 2023. Utah's law largely mirrors the GDPR, which is the European Union's ("EU") privacy law, and Virginia's 2021 Consumer Data Protection Act by incorporating the same distinctions for "controllers" and "processors" that both laws include.

Looking further west, California's new privacy regulator recently issued the first draft of the state's highly anticipated regulations for a revamped consumer privacy law, the California Privacy Rights Act ("CPRA"), that is set to take effect in January 2023. Notably, under California's current consumer privacy law and the CPRA, the penalty for violations is $2,500 per day for unintentional breaches to $7,500 per day for intentional breaches, and both the current law and the CPRA allow consumers a private right of action when there is a breach of their unencrypted and unredacted personal information, which allows for damages between $100 and $750 per incident or actual damages, whichever is greater.

Lastly and more recently, the Governor of Connecticut signed into law Connecticut's comprehensive consumer privacy act called the "Act Concerning Personal Data Privacy and Online Monitoring" (or "CTDPA") effectively making Connecticut the fifth and most recent state in the U.S. to enact a comprehensive consumer privacy law. The CTDPA goes into effect on July 1, 2023 and incorporates many of the same tenets regarding "controllers" and "processors" of personal data as found in the GDPR and previously enacted privacy laws in other states.

All of the laws define "personal data" as information that is linked to or reasonably linkable to an identified individual or identifiable individual and create a category of "sensitive data" that includes personal data that reveals an individual's racial or ethnic origin, citizenship or immigration status, sexual orientation, religious beliefs, and information regarding an individual's medical history including diagnoses, treatments, or mental and/or physical health conditions. The enactment of these most recent consumer privacy laws is a part of a continuing trend across the U.S. It is important to note that these laws are applicable to many airlines as they often apply to both organizations and entities that determine the means and purposes of processing personal data, known as "controllers," as well as other organizations and entities that process personal data on the controllers' behalf, known as "processors," and include requirements that such organizations and entities must follow. For example, if an airline currently uses or collects the personal data from residents of any of the five states enacting consumer privacy laws in 2023, then the air carrier would be obligated to comply with the relevant state's law and the duties that are imposed under the new laws which include for example, pre-collection disclosures about the use and sharing of data, opt-outs from sales of data, and responding to consumer information requests.

9TH CIRCUIT COURT OF APPEALS ISSUES DECISION IN NEGLIGENCE AND COMMON CARRIER LIABILITY CASE AGAINST UNITED

On June 15, 2022, the U.S. Court of Appeals for the Ninth Circuit (hereinafter the "Court") issued a ruling affirming the decision of the U.S. District Court for the Central District of California to grant summary judgment in favor of United Airlines ("United") in a negligence and state-law common carrier liability suit brought by a former passenger.

As background, the plaintiff-appellant claimed that United was negligent for failing to "properly warn" her and other passengers onboard a United flight of "known, expected dangerous conditions" and failing to keep passengers safe when the aircraft experienced turbulence. The plaintiff-appellant also argued that United owed a duty to its passengers to keep them in the "highest possible degree of safety." The Appellate Court found that the District Court did apply the correct careless or reckless standard in considering the plaintiff's negligence claim. The Appellate Court also found that the plaintiff had failed to raise a genuine issue of material fact regarding any alleged violation of a Federal Aviation Regulation ("FAR"), and that the plaintiff-appellant's state law claim regarding common carrier liability was preempted by the FAA's regulations. The Court held that the Federal Aviation Act and FARs, set the standard of care for negligence claims asserted against air carriers by prescribing that they cannot operate an aircraft in a careless or reckless manner that would endanger life or property, but that neither the Act nor the FARs require airlines to provide service to the public at the "highest possible degree of safety."

NEW DEVELOPMENTS IN UNITED, SPIRIT AND JETBLUE'S ONGOING EWR SLOTS BATTLE

On May 31, 2022, United issued a reply to Spirit Airlines, Inc. ("Spirit") and JetBlue Airways ("JetBlue") to respond to the challenge initiated by the latter to the FAA's decision not to backfill 16 peak-hour operations slots at Newark-Liberty International Airport ("EWR or Newark"). Spirit and JetBlue had previously criticized United for dominating operations at EWR and being anticompetitive. The discord revolves around 16 of the 36 slots transferred from United to Southwest Airlines, Inc. ("Southwest") in 2010 while EWR was a Level 3 airport. These slots reverted to the FAA after Southwest ceased operations at EWR in 2019, which in the meantime had been re-designated as a Level 2 airport (meaning that Southwest could not sell the slots). The transfer was originally carried out in response to concerns expressed by the Department of Justice (DOJ) of the potential anticompetitive effects of the then announced merger between United and Continental Airlines.

In its reply, United states it has not increased the number of peak-hour flights at EWR over the past five years and accuses Spirit and JetBlue of scheduling new and unapproved flights during the afternoon peak, thus disregarding the "voluntary cooperation" that is expected from carriers operating to Level 2 airports and further burdening one of the most delayed airports in the country. Furthermore, United argues that both Spirit and JetBlue have built a narrative allowing them to disregard FAA policies on the grounds that the benefits from the competition inherent to their low-cost nature outweigh the potential reality of further congestion at EWR. Finally, United counters the accusations of anticompetitive behavior by stating that it rejects "the notion that there is something sinister about having a large number of flights" at EWR while also renewing its request for FAA to publish all "Reference IDs issued at EWR by carrier by hour".

Following this, on June 15, 2022, Spirit published a comment to United's reply asserting that in its May 31, 2022, letter, United "continues its effort to block competition at Newark Liberty International Airport under the banner of relieving congestion" by arguing that Spirit had made incorrect assertions. Spirit also alleges that the arguments United puts forth in its reply are done to protect its "virtual monopoly" at EWR and proposes that it, FAA, United, and other airlines that wish to obtain the slots, should participate in a scheduling conference where all carriers could agree to equitable reductions in operations at EWR and work out the conflict. To date, United has not yet submitted a further comment and there have been no further developments in regard to the issue.

SOUTHWEST AIRLINES FILES LAWSUITS IN RESPONSE TO $1.3M COLORADO FINE

After a lengthy investigation, the Department of Labor & Employment of Colorado ("CDLE") found Southwest Airlines to be in violation of multiple labor laws and imposed a fine of $1.3 million on the airline. This amount consists of $887,600 in fines for Southwest's refusal to give sick leave as provided for by the Colorado Healthy Families and Workplaces Act ("HFWA") and $443,800 for retaining provisions dictating the possibility of forfeiting earned vacation pay and failing to give notice of wage and hour rights.

Southwest's response to the fine came in the form of two lawsuits, one aiming to stay the enforcement of the actions and fines imposed by CDLE and another aiming to stop the state from enforcing the HFWA. The first suit ended with the refusal of an administrative judge to stay the order. The second lawsuit, if successful, could impact the enforcement of HFWA in general. Southwest's arguments revolve around what it sees as a violation of the Commerce Clause of the U.S. Constitution by the HFWA which it argues conflicts with the Railway Labor Act "RLA" and the Airline Deregulation Act. More specifically, the alleged clash regards collective bargaining agreements ("CBAs") with Southwest arguing they fall under a statutory exemption under which the RLA obliges the company to maintain CBAs agreed to under the Act even if they violate the requirements posed by the HFWA. The CDLE counters that CBAs can be exempt from the HFWA provided they grant more benefits than what the state law dictates. Moreover, it accuses Southwest of basing its arguments on a "willful misreading – or misinterpretation – of "HFWA". Southwest objected to this argument by claiming that if other states were allowed to proceed and follow Colorado's example to impose individual rules impacting interstate commerce, there would be a cacophony of laws allowing for employee leaves that would destabilize air carriers by leaving them exposed to federal laws requiring a certain number of personnel for each flight.

ECKERT SEAMANS ATTORNEYS AT LAW

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