

Aviation Regulatory Update

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2023 FAA REAUTHORIZATION BILL UPDATE

On June 9, 2023, the U.S. House of Representatives published the [bill text](#) for its version of the Federal Aviation Administration (“FAA”) Reauthorization Act of 2023. A few days later, the U.S. Senate also published its version of the [FAA Reauthorization Act of 2023](#). A brief overview of some of the important provisions applicable to U.S. and foreign air carriers included in the current versions of the bill is included below.

Advertisements and solicitations for passenger air transportation. (House Bill, Sec. 701, pg. 619).

This section would codify language on full fare advertising to provide that it is not considered an unfair and deceptive practice for a covered entity (i.e., a U.S. or foreign air carrier, etc.) to state the base airfare in an advertisement or solicitation for passenger air transportation if the covered entity also “clearly and separately discloses” all government-imposed taxes and fees associated with the air transportation, and the total cost of the air transportation, among other things.

Unrealistic or Deceptive Scheduling. (Senate Bill, Sec. 702, pg. 294).

This section would provide that if a carrier engages in unrealistic or deceptive scheduling of flights it would be considered an unfair or deceptive practice and an unfair method of competition. This section would also require the U.S. Department of Transportation (“DOT”) to task the Aviation Consumer Protection Advisory Committee (“ACPAC”) with creating recommendations on what would qualify as unrealistic or deceptive scheduling of flights that DOT could then address through a proposed rulemaking.

Refunds. (Senate Bill, Sec. 703, pg. 295).

This section includes a requirement for U.S. and foreign air carriers to provide prompt full refunds (i.e., including taxes, ancillary fees, etc.) to passengers holding nonrefundable tickets if their flight is significantly delayed or changed and the passenger has chosen not to fly on the significantly delayed or changed flight or accept a rebooking on an alternative flight, or has not chosen to accept a voucher, credit, or other form of compensation offered by the carrier. This section would also direct DOT to require that U.S. and foreign airlines display a link on the homepage of their websites to allow consumers to be able to request refunds.

More recently, the House and Senate have been marking up their respective bill drafts, which has resulted in several amendments on both sides. For example, the Senate Commerce Committee reached a “tentative deal” to add four long distance flights at Ronald Reagan Washington National Airport (DCA) in Washington D.C. despite calls by other lawmakers, local residents, and the Metropolitan Washington Airports Authority (“MWAA”) to keep the DCA

“Perimeter Rule”, which only allows a limited number of flights over 1,250 miles to operate to/from the airport. Nevertheless, the Senate Commerce Committee has postponed its hearing to discuss the DCA proposal, and other proposed amendments to the bill, after a dispute between Senators broke out over a proposal to raise the mandatory retirement age for commercial airline pilots from 65 to 67 during the Senate Committee’s most recent hearing. In contrast, the House Transportation Committee recently unanimously approved its version of the bill after two days of debates and consideration of over 100 amendments. The House version of the bill will now go to the floor to be considered by all House members. Based on previous reauthorizations and current reporting, we expect there to be a number of changes before a final bill is enacted later this year, and therefore, we will continue to provide updates on this bill’s progress as we receive them.

DOT ISSUES FINAL RULE CLARIFYING ITS FORMAL ENFORCEMENT PROCEDURES FOR UNFAIR AND DECEPTIVE PRACTICES

On June 16, 2023, DOT issued a [final rule](#) to amend its regulations on the formal enforcement procedures that it may use if it takes action against an airline or ticket agent for violations related to unfair and deceptive practices, and is unable to settle the matter through a consent order. More specifically, the amendment provides that in such cases, DOT may also bring a civil action against the airline or ticket agent in a U.S. District Court, in addition to the other methods of enforcement DOT may pursue. DOT noted that previous amendments and guidance provided that DOT has the authority to regulate, investigate, and issue orders to stop unfair and deceptive practices, or issue a notice to institute an enforcement proceeding before a DOT administrative law judge when a settlement cannot be reached, but that its December 2020 “Defining Unfair or Deceptive Practices” final rule failed to also provide that it may file a complaint in a U.S. District Court when a settlement cannot be reached.

The final rule will become effective on **July 17, 2023**.

FAA ISSUES FINAL RULE ON SECONDARY FLIGHT DECK BARRIERS

On June 26, 2023, the FAA issued a [final rule](#) to require that certain aircraft used to conduct passenger-carrying operations install physical secondary barriers (“IPSB”) to protect the flightdeck from unauthorized intrusion when the flightdeck door is opened. The final rule, which becomes effective on **August 25, 2023**, is intended to slow an attack attempted on the flightdeck long enough for an open flightdeck door to be closed and locked before an attacker can get through. The rule only applies to Part 121 operators conducting passenger-carrying operations in the U.S. using transport category airplanes. Under the rule, manufacturers will be required to begin installing IPSB on all new commercial transport category airplanes, and the requirements will be applicable to all transport category airplanes manufactured two years after the effective date of the final rule. The final rule comes in response to a mandate included in the FAA Reauthorization Act of 2018 and the FAA’s proposed rule on the matter, issued in August 2022.

FAA ISSUES NPRM ON THE DESIGNATION OF U.S. AGENTS FOR SERVICE FOR INDIVIDUALS WITH FOREIGN ADDRESSES

On June 12, 2023, the FAA issued a [notice of proposed rulemaking](#) (“NPRM”) to require that individuals with foreign addresses and no U.S. physical address of record on file with the FAA designate a U.S. agent for service of receipt of FAA documents. More specifically, the rule would apply to individuals with foreign addresses and no physical U.S. address of record who hold or wish to apply for certain certificates, ratings, or authorizations from the FAA. The designated U.S. agent for service would then receive service of official FAA documents on behalf of the certificate holder or applicant. The reason behind the NPRM is to ensure that FAA can provide “prompt and cost-effective service of process and service of other safety-critical or time-sensitive documents” to individuals with no physical

presence in the U.S. To clarify, the NPRM would only be applicable to individuals, not entities, as U.S. and foreign air carriers are already required to designate a U.S. agent for service of FAA documents in their operations specifications.

The FAA is currently accepting comments on the NPRM until **August 11, 2023**, in the applicable docket [available here](#). The FAA has also specifically requested comments on the following issues: (1) how many individuals impacted by this rule are likely to have contacts within the United States that they could designate as their U.S. agent for service at no cost; and (2) apart from publishing the rulemaking in the Federal Register for notice and comment, what other methods of outreach could the agency undertake to inform individuals impacted by this rule?

FAA ISSUES NPRM ON CERTIFYING AND TRAINING AAM PILOTS

On June 14, 2023, the FAA issued a [NPRM](#) to outline the training and certification requirements for Advanced Air Mobility (“AAM”) pilots as part of the FAA’s goal to provide additional guidance to the AAM industry, and the broader powered-lift industry, since FAA expects powered-lift aircraft to be used to support the deployment of AAM operations.

The NPRM would establish requirements for pilot certification and the operation of powered-lift aircraft, which are described as aircraft that are capable of vertical takeoff and landing (“VTOL”), similar to helicopters, but able to fly like airplanes during cruise flight. New training and certification rules are needed because currently there are no type certificates for powered-lift in civil operations, though there have been several applicants seeking such certificates, and the FAA is looking to prepare for the safe integration of powered-lift into the U.S. national airspace system. The FAA is proposing a Special Federal Aviation Regulation (“SFAR”) for alternate eligibility requirements so that an initial group of powered-lift pilots can be safely certificated, with the goal of having the initial certificated pilots serve as flight instructors who are able to train additional instructors at flight schools, and to establish temporary operating rules applicable to powered-lift operations, while FAA continues to gather additional information to determine the most appropriate permanent requirements for powered-lift aircraft. FAA also noted that powered-lift will be type certificated as a special class aircraft under existing FAA regulations given the fact that currently there is no established method for civilian pilots to be certificated with a powered-lift category rating.

Interested parties are encouraged to submit comments on the NPRM in the relevant docket, [available here](#), until **August 14, 2023**.

PHMSA/DOT ISSUE PROPOSED RULEMAKING TO AMEND PROVISIONS OF U.S. HAZMAT REGULATIONS

On May 30, 2023, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) along with DOT issued a [NPRM](#) to propose amendments to PHMSA’s Hazardous Materials Regulations (“HMR”). Specifically, PHMSA seeks to amend certain sections of the HMR to maintain alignment with international regulations on hazmat standards by adopting several new changes, like changes to proper shipping names (“PSN”), hazard classes, packing groups (“PG”), special provisions (“SP”), packaging authorizations, air transport quantity limitations, and vessel stowage requirements. Some additional proposed amendments to the HMR include the incorporation by reference of certain updated versions of international hazmat regulations and standards into the HMR, amendments to PHMSA’s Hazardous Materials Table, and a proposal to remove the exceptions provided for small lithium cells and batteries for transport by aircraft consistent with the elimination of similar provisions in the ICAO Technical Instructions.

The NPRM also notes that PHMSA is seeking the changes since it believes harmonization of the HMR with international regulations and consensus standards could reduce delays and interruptions of hazardous materials during transportation, and lower greenhouse gas emissions and related safety risks to certain low-income, minority, and disadvantaged populations and communities that live near the storage sites and transportation hubs where hazmat is present. Interested parties are encouraged to submit comments on the NPRM [here](#), until **July 31, 2023**.

LAWSUIT FILED AGAINST DELTA AIRLINES OVER CARBON-NEUTRAL CLAIMS

In May 2023, Delta Air Lines (“Delta”) was sued by various plaintiffs who alleged that Delta falsely misrepresented the environmental impact of its business operations and thereby obtained undue profit and market share. As background, Delta claims to be the “first carbon-neutral airline in the world” in advertisements, social media posts, and even airplane napkins provided to customers, based on the airline’s buying of carbon credits to fund projects that positively impact the environment to offset CO₂ emissions from its normal operations. In the complaint, the plaintiffs argue that Delta’s carbon neutral label is misleading because the practice of carbon offsetting relies on imprecise overestimations of carbon emissions reductions and therefore, that Delta intentionally misled consumers and accused the company of “greenwashing” to increase profits. The complaint also cites several notable studies demonstrating that carbon offsets are unimpactful and even harmful because it overfunds environmental projects that would have occurred even without carbon credits and fails to motivate companies to further reduce the overall environmental impacts from their operations. Plaintiffs also claim that Delta knew or should have known that its carbon neutral labels were false and misleading and that by continuously representing itself as carbon neutral, Delta violated several California state laws, including its consumer protection laws. Similar claims could potentially be brought against other airlines under applicable state laws in other states. For example, there have been an increasing number of lawsuits brought challenging environmental and sustainability claims made by companies in their advertisements and marketing campaigns, and customers and regulators have put more pressure on companies to be sustainable and carbon neutral. As such, it is suggested that any sustainability claims be made carefully.

FEDERAL JUDGE RULES MA CANNOT IMPOSE SICK LEAVE LAW ON AIRLINES

On June 2, 2023, a U.S. federal judge issued a ruling to prohibit the Massachusetts State Attorney General from enforcing the Massachusetts, “Earned Sick Time Law” against airlines. As background, Airlines for America (“A4A”) filed suit against the Massachusetts State Attorney General in 2018, after the state instituted its sick leave law that effectively allowed airline employees to use sick leave time for additional reasons beyond what was allowed in their collective bargaining agreements, and prohibited airlines from using sick leave absences as a “negative factor” in employee discipline decisions, among other things. A4A alleged that the sick leave law was preempted by the Airline Deregulation Act (the “Act”) and unlawfully interfered with interstate commerce. During the trial on the matter, airline lobbying groups also presented “extensive, credible” testimony from managers at American Airlines, JetBlue Airways, and Southwest Airlines, some of the major airlines operating to/from airports in the state, noting the prevalence of sick leave abuse by airline industry personnel and specifically detailing instances of earned sick time abuse, especially during and around holidays, among Boston-based crews. The court noted that the state sick leave law did in fact run afoul of federal law by allowing for abuse of sick leave time by airline employees, resulting in unexplained absences, and therefore negatively disrupting airline operations overall. The court also agreed with A4A’s argument that the state law was preempted by the Act.

LAWSUIT FILED AGAINST UNITED FOR ALLEGED WEBSITE ACCESSIBILITY, ADA VIOLATIONS

On June 1, 2023, United Airlines (“United”) was named in a proposed class action suit by a consumer claiming that United had “unlawfully failed” to create and operate an accessible website for legally blind consumers. More specifically, the plaintiff in the case, who is legally blind, alleged that United failed to make its website compatible with screen-reading or other access programs, which prevents the website from being fully accessible in violation of the Americans with Disabilities Act (“ADA”). The plaintiff is calling for United to update its website so that it is accessible for consumers with visual impairments, and has asked the court to declare that United’s website is in violation of the ADA and issue preliminary and permanent injunctions to stop United from continuing to use the current website. The plaintiff is also seeking proposed class damages, with interest, and attorney’s fees and court costs. United has not yet responded to the plaintiff’s claims, and to date no further action on the matter has been taken.

FEDERAL JUDGE DISMISSES LAWSUIT AGAINST JETBLUE ALLEGING ILLEGAL TRACKING OF WEBSITE USERS

On June 12, 2023, a U.S. federal judge dismissed a proposed class action lawsuit brought against JetBlue Airways (“JetBlue”) in which the plaintiff alleged that the airline had illegally tracked users on its website. The plaintiff in the case, a customer of JetBlue, alleged that the airline tracked her keystrokes and mouse movements while she browsed the JetBlue website to search for prices for airfare, in violation of the California Invasion of Privacy Act and her Constitutional right to privacy. In response, JetBlue filed a motion to dismiss the case, alleging that the customer lacked standing based on the U.S. Constitution, and specifically because the customer could not show that that JetBlue had collected or recorded any personal information through her use of the website to search fares. Ultimately the judge ruled in favor of JetBlue, finding that the customer lacked standing based on a failure to show that she had actually shared sensitive information with JetBlue that caused her to suffer harm.

DOT ISSUES ENFORCEMENT ORDER AGAINST BRITISH AIRWAYS FOR FAILURE TO PROVIDE TIMELY REFUNDS

On June 1, 2023, DOT issued a [Consent Order](#) against British Airways for violations related to the airline’s alleged failure to provide timely refunds to passengers for flights to/from the U.S. that were cancelled or significantly changed.

DOT found that between March and November of 2020, British Airways’ website instructed consumers to contact the carrier via phone “to discuss refund options” in instances where flights were cancelled or significantly delayed, but that consumers were largely unable to get through to speak with customer service agents during this time period because British Airways “failed to maintain adequate functionality of its customer service phone lines.” DOT also noted that aside from calling to speak to a customer service agent, British Airways provided no alternate means for consumers to submit refund requests online through its website, and that British Airways had allegedly misled consumers by including information on its website causing them to inadvertently request travel vouchers instead of refunds. In total, DOT estimated that it and British Airways had each received “thousands” of complaints related to the carrier’s alleged failure to provide timely refunds. In response, British Airways asserted that the complaints it received should be considered in the context of the “unprecedented global health pandemic and the resulting astronomical number of flight cancellations” that it faced, and that despite high consumer demand and it being forced to close two of its five call centers due to the pandemic, it still worked to try to refund passengers as quickly

as possible. Nevertheless, DOT decided that enforcement action was warranted, and issued a civil penalty of \$1,100,000 against the airline along with an order to cease and desist from future violations.

CONGRESS' DEBT LIMIT BILL TO RESCIND UNUSED COVID-19 RELATED FUNDING FOR AIRPORTS

The U.S. debt limit bill known as the "[Fiscal Responsibility Act of 2023](#)" was recently passed to suspend the U.S. debt limit and allow the U.S. to continue to borrow funds to pay for debts and impose new spending caps through January 2025. The bill includes a number funding cuts, including rescissions to "unobligated balances of amounts available" to DOT and the FAA for funding for grants for U.S. airports. This means the rescissions will allow the U.S. government to take back approximately \$200 million in unused funds that were previously allocated under the U.S. COVID-19 relief legislation known as the "CARES Act" and the "American Rescue Plan Act of 2021", to assist U.S. airports. Notably, however, the bill exempts the U.S. infrastructure law passed in 2021 that included funding for transportation programs, meaning funds allocated through that law have not been rescinded.

DOJ, DOS, AND OFAC ISSUE GUIDANCE TO INDUSTRY ON IRAN'S UAV-RELATED ACTIVITIES

On June 9, 2023, the U.S. Departments of Justice and State, as well as the and U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") published "[Guidance to Industry on Iran's UAV-Related Activities](#)" to highlight threats associated with Iran's unmanned aerial vehicles ("UAVs") related activities and programs.

More specifically, the guidance notes that Iran's development, procurement, and proliferation of UAVs is seen as a threat because it destabilizes the Middle East and other regions as Iran has been able to increase its inventory of armed and unarmed UAVs, and then transfer the UAVs to "entities and countries of concern" like Russia and a group in Yemen that has used UAVs and other weapons obtained from Iran to conduct strikes in Yemen and neighboring countries, Saudi Arabia and the United Arab Emirates. The guidance also notes that Iran has largely been able to obtain the UAVs, and specifically the components of UAVs, through foreign suppliers, including U.S. industry suppliers. To prevent this, the guidance includes information on "key commodities" like electronics and guidance, navigation, and control equipment that Iran often obtains through foreign suppliers, so that industries are aware of the commodities and can exercise vigilance and due diligence in terms of supplying these commodities. The guidance also notes that in response to the rise in Iranian UAVs and UAV-related activities, the Department of Commerce's Bureau of Industry and Security ("BIS") has issued more stringent export controls like additional licensing requirements on certain commodities believed to be destined for Iran, in addition to noting the various existing U.S. sanctions and export controls related to UAVs. The guidance also includes a list of "red flag" indicators that companies and industries should use to try to determine if a party to a transaction may be engaged in efforts to evade or otherwise violate U.S. sanctions or export controls and includes information on the various penalties each department may impose for violations of U.S. sanctions and export controls.

OFAC ANNOUNCES RETIREMENT OF ITS FTP SERVER

On June 9, 2023, OFAC announced that it will retire its public facing file transfer protocol ("FTP") server on or around June 10, 2024, to comply with the Treasury Department's updated security policies. As background, the FTP server is the repository through which OFAC maintains critical files and its sanctions list and allows users to automate their sanctions list data downloads. Users of the FTP server are encouraged to develop automation using the list content available on OFAC's website throughout the next year to prepare for the FTP server's retirement. OFAC also included a list of URLs that may be used to access all of OFAC's sanctions list and other sanctions-related information in the announcement, [available here](#).

U.S. FEDERAL JUDGE RULES IN FAVOR OF MESA, AMERICAN IN NEGLIGENCE CASE

On June 2, 2023, a U.S. federal judge ruled in favor of Mesa Airlines, Inc. (“Mesa”) and American’s motion for summary judgement in a negligence case brought by former passengers in response to an in-flight aircraft emergency. The claim came in response to a June 7, 2020, flight that Mesa operated on behalf of American during which the aircraft’s anti-ice and leak controller malfunctioned, causing the bleed valves to close automatically, resulting in a loss of cabin pressure that necessitated an emergency descent. The plaintiffs alleged that Mesa was negligent by failing to communicate to passengers about the status of the emergency and that American was negligent by not providing medical personnel at the airport after having learned of the emergency. The airlines responded by arguing that they acted properly during the emergency and did not breach the standard of care dictated by U.S. federal aviation regulations since Mesa had followed the processes provided in its Emergency Procedures Checklist and Quick Reference Handbook, and since American, which did not operate the flight, was not required or recommended to provide medical personnel under applicable U.S. regulations or procedures since no injuries were reported and the plaintiffs did not request medical attention. The Court agreed with the airlines’ arguments, noting that “there is no evidence in the record that suggests [Mesa and American] violated any relevant aviation safety regulation” and that it was prudent for the pilot to inform the passengers about the status of the emergency only after handling the emergency descent procedure.