Aviation Regulatory Update

By Evelyn Sahr, Drew Derco, and Jay Julien

U.S. SUPREME COURT SHIFTS POWER AWAY FROM REGULATORS

On June 28, 2024, the U.S. Supreme Court announced its decision to overturn the landmark 1984 decision, Chevron V. Natural Resources Defense Council. This previous case gave rise to the "Chevron Deference" doctrine which required courts to uphold a regulatory agency's interpretation of a statute as long as it was reasonable. The now overruled case came to be one of the most cited Supreme Court decisions and was a critical backstop that regulatory bodies relied on when promulgating new rules. As a consequence of this decision, U.S. courts will now have much more latitude to interpret statutes and overturn agency interpretations including recent Department of Transportation ("DOT" or "the Department") rules regarding consumer protections. One such controversial rule, DOT's "fare transparency rule" is particularly vulnerable as it has previously faced significant legal challenges in court. Some analysts predict that this ruling will discourage DOT from pursuing broader regulations for fear of being overturned, and instead will force DOT to focus on technical rulemaking. This decision will also likely create the opportunity for a greater number of DOT regulations to be successfully challenged.

FAA ISSUES NOTICE OF INTENT TO INITIATE RULEMAKING THAT COULD POTENTIALLY IMPACT CERTAIN PUBLIC CHARTER OPERATORS

On June 17, 2024, the Federal Aviation Administration ("FAA") announced its intention to publish a Notice of Proposed Rulemaking regarding its proposed changes to the regulations governing public charter flights. Under 14 CFR 110.2 of the FAA's safety regulations, public charters can be "on-demand operations" if using airplanes (including jet-powered airplanes) with no more than thirty passenger seats. Under the FAA's proposed changes, Part 110's definition of "scheduled," "on demand," and "supplemental" operations would be amended. This amendment would cause public charters to be subject to operating rules similar to the safety parameters regulating other non-charter operations. These revisions were triggered by certain charter operators who, despite operating what are basically scheduled flights, are allowed to follow less stringent regulations because they use smaller aircraft. These operators are not required to screen passengers through TSA checkpoints, for example. The FAA identified this incongruence as a notable safety risk. In a prior request for comment, the FAA received over 60,000 comments in less than a year from a wide range of stakeholders including airlines and passengers. The new rule would also focus on expanding air service to small and rural communities; specifically, the FAA will organize a Safety Risk Management Panel to assess the possibility of a new operating authority for smaller aircrafts (10-35 seats). The FAA encourages interested persons to provide comments, written data, views, or arguments relating to this notice.

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DOT FINES KLM, LUFTHANSA, AND SAA FOR DELAYED REFUNDS

On June 4, 2024, DOT announced that it will be fining South African Airways, KLM Royal Dutch Airways, and Lufthansa a total of $2.5 million dollars as a penalty for extreme delays in providing refunds owed to passengers during the Covid-19 pandemic. The fine comes in addition to the $900 million dollars in refunds that the three (3) airlines have already paid back to passengers. DOT analyzed the number of complaints that each carrier received, the number of refunds that took greater than 100 days to process, as well as whether the carrier had refunded consumers who had purchased non-refundable tickets. South African Airways received the fewest complaints of the three, with over 400. DOT found that "many" of the refunds South African Airways issued took longer than 100 days to process, although DOT did not specify an exact number. Ultimately, South African Airways was issued a $300,000 dollar penalty to be paid in six equal installments with no credit for refunding consumers who had purchased non-refundable tickets. KLM received 948 complaints and took more than 100 days to issue refunds to thousands of consumers. KLM was fined $1.1 million, half of which is to be paid in three installments and the other half credited for providing refunds to consumers with non-refundable tickets. Lastly, Lufthansa received tens of thousands of complaints directly from consumers, with over 2,500 complaints being made directly to DOT. Like South African and KLM, Lufthansa took more than 100 days to issue refunds to thousands of consumers. Lufthansa was fined $1.1 million, half of which was credited for providing refunds to consumers with non-refundable tickets. This announcement of these significant fines comes as part of a greater effort by DOT to ensure passengers are properly refunded for cancelled or significantly changed flights, which has seen nearly $4 billion dollars returned to consumers in the form of refunds and reimbursements.

DOT ISSUES $1.8 MILLION DOLLAR PENALTY AGAINST EMIRATES

On June 13, 2024, DOT announced that it will be fining Emirates $1.8 million dollars for violating its operational authority by carrying the B6* designator code of JetBlue airways on flights operated by Emirates between the United Arab Emirates and the U.S. Specifically, Emirates allegedly conducted a "significant number" of flights carrying the code of a U.S. carrier within airspace prohibited by the FAA. This airspace in particular (the Baghdad flight information region) is prohibited because the FAA has determined that there is a risk "posed by weapons capable of targeting, or otherwise negatively affecting, U.S. civil aviation, as well as other hazards to U.S. civil aviation associated with fighting, extremist or militant activity, or heightened tensions." The terms of Emirates' foreign air carrier permit and the statement of authorization permitting the codeshare arrangement with JetBlue prohibit Emirates from circumventing FAA restrictions of this nature.

This is not the first time Emirates has been penalized for carrying the code of a U.S. partner in prohibited airspace. In 2020, the Department issued a cease-and-desist order (Order 2020-9-29) against Emirates for operating flights within prohibited airspace while carrying a U.S. code. In its defense, Emirates stated that it was required to use the prohibited airspace as it was only following the directions of local air traffic control. The Department was not persuaded, and determined that a fine was appropriate, in part because of the violation of the previously issued cease and desist.

BIS SUSPENDS FREIGHT FORWARDER AFTER NONCOMPLIANCE

The U.S. Department of Commerce Bureau of Industry and Security ("BIS") issued an order against U.S. freight forwarder USGoBuy, LLC ("USGoBuy") for repeated violations of the Export Administration Regulations. Part of USGoBuy's business was generated by allowing "foreign customers to purchase commodities from domestic retailers and have them shipped to its facilities for export to their final destinations abroad." In June of 2021, USGoBuy, entered into a settlement agreement with BIS in which it admitted fault for exporting riflescopes to the People's Republic of China and the United Arab Emirates without the proper licensing. Under the settlement

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agreement, USGoBuy was ordered to pay $20,000 in penalties, with $15,000 suspended for three years if it rectified regulatory deficiencies and submitted to external audits. A subsequent audit conducted after the initial order found 176 instances of USGoBuy failing to submit required Electronic Export Information reports. As a result of its continued noncompliance, BIS has issued this order, suspending the "export privileges of USGoBuy, its successors and assigns, for a period of three (3) years."

UNITED KINGDOM ENACTS 2024 GENERAL AVIATION REGULATIONS

The United Kingdom ("UK") has implemented new entry requirements, effective April 6, 2024. The captain of an international flight to or from the UK must now submit all crew and passenger information for both departures and arrivals. This information can be submitted through the General Aviation Regulation website or approved third-party applications such as Rocket Route. All submitted details must match the information on each passenger's passport to be approved. Additionally, the Electronic Travel Authorization program has been expanded to include all nationalities that do not require visas for stays of six months or less. The Director of Flight Operations and Regulations has advised all international flight operations to closely adhere to these updates due to the associated fines for noncompliance. Any airline operating to or from the UK which includes England, Scotland, Wales, and Northern Ireland, should take note of this additional requirement.

UPDATED MENTAL HEALTH EVALUATION CRITERIA UNDER FEDERAL AVIATION ADMINISTRATION

The FAA has updated its guidelines regarding agency participation in mental health evaluations, providing Aviation Medical Examiners ("AMEs") with more discretion when determining a pilot's fitness to fly. Specifically, after the AMEs issue a questionnaire to pilots facing "uncomplicated anxiety, depression and related conditions," the FAA will not get involved in the process if the following criteria are met:

1. The pilot has not been prescribed medication for two years,
2. The questionnaire raises no concerns, and
3. The AME has no concerns.

Notwithstanding, if any item of the questionnaire that addresses suicidal thoughts and self-harm ideations is selected as "YES," then the FAA requires further evaluation, and the AME must defer to the FAA. Absent a concerning questionnaire, this update could enable pilots who were grounded due to minor medical issues to obtain their medical certificates with no objection from the FAA.

PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS: TECHNICAL AMENDMENTS, PROGRAMS, AND TESTING PROGRAMS

The Department made amendments to the current drug testing procedures rule, which went into effect in June 2023. The majority of these amendments are technical in nature and are intended to correct textual errors in the statute. DOT reiterated that these amendments are corrective of the current rule that went through a formal notice and comment process. The amendments do not make any substantive changes to 49 C.F.R. Part 40; the goal is to clarify the rule for laboratories, employers, employees' subjects to testing, and other stakeholders. The amendments went into effect June 21, 2024.

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DOT also published a direct final rule revising the current DOT drug testing procedures which went into effect in May 2023. These changes provide temporary requirements for mock oral fluid monitors, provide for uniform privacy requirements by deciding which individuals can be present during oral fluid collection, and clarify how collectors are to distinguish when an adequate volume of oral fluid is retrieved. The final rule becomes effective on August 5, 2024 without further notice unless DOT receives comments suggesting a different date by July 22, 2024. DOT is issuing this direct final rule because it believes that this rule is noncontroversial and does not expect adverse comments on any provisions.

FAA REMOVES CHECK PILOT MEDICAL REQUIREMENT

On June 18, 2024, the FAA published a final rule removing certain requirements for check pilots to maintain medical certification. Check pilots and other check personnel are used to conduct flight checks and essential reviewing functions. This rule finalized relief initially proposed five years ago and "removes a requirement for check pilots, check flight engineers, and flight instructors to Part 135 and 121 operations to hold an FAA medical certificate when performing in-flight duties". The FAA is making this change to expand the pool of available and otherwise qualified check pilots while also eliminating inconsistencies regarding the qualification requirements between "domestic, flag, and supplemental operations and flight instructors in commuter and on- demand operations."

FAA STATEMENT ON EVOTL AIRCRAFT CERTIFICATION

On June 10, 2024, the FAA announced that the FAA and the European Union Aviation Safety Agency ("EASA") have reached an important milestone towards the goal of certifying electric vertical take-off and landing (eVTOL) aircraft for commercial use. eVTOLs are small electric powered aircraft capable of seating 4-6 passengers. These vehicles do not need a runway for takeoff or landing and are designed for short distance trips. Since their creation, regulatory bodies such as the FAA and EASA have been scrambling to define and appropriately regulate eVTOL usage. The Advisory Circular published by the FAA provides guidance in obtaining airworthiness certification for these types of aircraft. This collaboration between the United States and European Union lays the groundwork for a future with widespread adoption of this new form of transportation.

MUDDUSETTI V. PAX ASSIST, INC.

On May 29, 2024, the District Court for the Southern District of Texas, Houston Division granted defendant Pax Assist's motion to dismiss. This dispute stems from an incident that took place at John F. Kennedy International Airport. After arriving on a United Airlines flight, a passenger fell and sustained injuries while being transferred via a wheelchair operated by an alleged agent company of United Airlines. As a result, the passenger sued both United Airlines and Pax Assist in the state of Texas. Pax Assist, the wheelchair service company who allegedly harmed the customer, filed a motion to dismiss, arguing that the Court did not have personal jurisdiction. The Court agreed, explaining that the venue is improper because Pax Assist is incorporated in New York, had no contacts with Texas, and did not consent to being sued in Texas. The Court also clarified that although an agent company's actions usually impute to the principal company, the principal company's minimum contacts cannot establish jurisdiction over the agent company. However, instead of dismissing the passenger's claim for lack of jurisdiction and improper venue, the Court recommended that the case be transferred to the proper venue, the Eastern District of New York, which was accepted by the Federal Judge and transferred on June 26, 2024.

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CF DOMINICANA CIGARS, INC. V. AMERICAN AIRLINES, INC.

On May 29th, 2024, the Fourth District Court of Appeal of Florida affirmed the trial court's decision to dismiss a complaint made against American Airlines. CF Dominicana Cigars Inc. ("CF") filed the complaint after a subcontractor, traveling on an American Airlines flight, experienced a three-day delay in the delivery of luggage containing tools required for a cigar rolling event that CF was contracted to staff. CF alleged that American Airlines caused CF to breach their contractual obligations with the event planners due to the luggage delay. In response, American Airlines filed a motion to dismiss, arguing that CF had waived all rights to consequential damages through the Condition of Carriage ("COC") that all passengers agree to when purchasing an airline ticket. The trial court agreed, and CF appealed. This Court affirmed the lower court decision, holding that American Airlines effectively limited its liability in the COC, and as a result, CF waived any right to seek losses.

ECKERT SEAMANS ATTORNEYS AT LAW

This Aviation Regulatory Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact Evelyn Sahr at 202.659.6622 or esahr@eckertseamans.com; Drew Derco at 202.659.6665 or dderco@eckertseamans.com; Jay Julien at 202.659.6648 or jjulien@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.

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