

Aviation Regulatory Update

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DOT HOLDS PUBLIC HEARINGS ON TICKET REFUNDS AND ANCILLARY SERVICE FEES NPRMS

The U.S. Department of Transportation (“DOT”) recently held two public hearings on its “Airline Ticket Refunds and Consumer Protection” and “Enhancing Transparency of Airline Ancillary Service Fees” proposed rulemakings (“NPRMs”) at the request of airline industry groups, Airlines for America (“A4A”) and IATA, Travel Tech, and others. General summaries of the comments made at both hearings are included below.

[“Airline Ticket Refunds and Consumer Protection” Public Hearing:](#)

On March 21st, DOT held a hearing on the airline ticket refunds NPRM. Presenters commented on three topics: (1) whether consumers can make reasonable self-determinations regarding contracting a serious communicable disease; (2) whether a documentation requirement (medical attestation and/or public health guidance) is sufficient to prevent fraud; and (3) how to determine whether a downgrade of amenities or travel experiences qualifies as a “significant change of flight itinerary” that would entitle an individual to a ticket refund.

On the first topic, most presenters were opposed to DOT’s proposal to allow consumers to make their own self-determinations on contracting a serious communicable disease. Commenters noted that consumers are generally unqualified to make self-diagnoses, that diagnoses of communicable diseases are best left to trained medical professionals, and that the language and standards currently included in the proposed rule should be better defined, and aligned with terminology included in existing regulations (i.e., 14 CFR Part 382). On the second topic, a slight majority of commenters also opposed DOT’s proposal on requiring consumers to provide certain medical documentation, and its suggestion that this documentation would be sufficient to prevent fraud. Several commenters noted that the medical attestations could be considered analogous to the documentation requirements included in the emotional support animal (“ESA”) rules, and that based on the high level of consumer fraud observed under those rules, DOT should reject its proposal as it would be unlikely to prevent and may encourage fraud. On the third topic, comments were generally mixed on DOT’s proposal on determining when a downgrade of amenities would entitle a consumer to a refund. Some commenters supported DOT’s proposal because of the belief that some changes, such as the loss of accessible lavatories or decreased storage space for wheelchairs based on aircraft changes, are extremely impactful to disabled passengers and should always entitle such passengers to a refund, however, other commenters noted the vagueness of the term would likely cause confusion, and highlighted that DOT has not proposed any standards or guidance on what should be considered a significant change.

[“Enhancing Transparency of Airline Ancillary Service Fees” Public Hearing:](#)

On March 30th, DOT held a hearing on the ancillary service fees NPRM. Presenters commented on three topics: (1) whether consumers are or are likely to be substantially injured or misled by airlines’ current disclosures of

ancillary service fees; (2) whether disclosures of itinerary-specific ancillary fees at the time of first search would result in the display of incomplete or inapplicable ancillary fee information, cause consumer confusion, and distort the marketplace; and (3) whether requiring fee disclosures on the first page of the itinerary search selection process would be technically infeasible.

On the first topic, comments were mixed on whether consumers are currently or are likely to be injured or misled by airlines' current disclosures of ancillary fees. Some commenters generally argued that there is greater need for transparency of ancillary fee information so that consumers are aware of the total cost of flying before completing their bookings, while other commenters argued that airline displays are already transparent and that DOT's proposed requirements, such as displaying all ancillary fee information on the first page of a search, would substantially injure and mislead consumers far more than what is alleged under current practices. Commenters also argued that evidence suggests most consumers are aware that ancillary services are optional, and that DOT already requires airlines to display fees using a conspicuous link on their websites to further inform consumers of optional fees. Other commenters expressed support of certain proposals included in the NPRM, such as DOT's proposal to require airlines to provide ticket agents with all critical ancillary fee data, but also advocated for additional changes to the rulemaking, such as only requiring that ancillary fee information be provided "early" in the booking process, but not on the first page, and allowing airlines and ticket agents flexibility in determining the display of these fees.

On the second topic, a majority of commenters expressed concerns that DOT's proposal to require itinerary-specific ancillary fee information at the time of first search would cause consumer confusion and result in displays that would be overwhelming to consumers. Commenters noted that the proposal would overload the first search page with information, resulting in higher search times, and a reduction in consumers' ability to effectively comparison shop and find the most important information to them easily. Commenters arguing against DOT's proposal also indicated that the requirement would disproportionately harm ultra-low-cost carriers ("ULCCs") and cause more burden for all carriers that have been presenting complete and transparent unbundled, ancillary fee data for years.

On the last topic, comments were mixed on the technical feasibility of displaying all ancillary fees on the first page of a search. Some commenters simply noted that providing ancillary fee data at first search would be technically feasible, while a slight majority of others again urged DOT to amend its proposal to allow airlines and ticket agents to have more flexibility in determining where in the search process ancillary fees are displayed (such as "early" in the search process or sometime before purchase, but not on the first page). Other commenters argued that it would be infeasible to include all ancillary fee information on the first page because this information would take up a lot of screen space and could make searching fares and ancillaries, especially when using newer technologies and mobile devices, extremely difficult, frustrating, and overwhelming for consumers.

Lastly but importantly, to allow for further comment on this NPRM and comments made at the hearing, the comment period will remain open until **April 6, 2023**. Comments can be made in the relevant docket, [available here](#).

FAA ISSUES SAFETY ALERT FOR AIRLINE OPERATORS

On March 22, 2023, the Federal Aviation Administration ("FAA") issued a [Safety Alert for Operators](#) ("SAFO") as a "Call to Action" to urge all airlines and pilots to take certain actions to mitigate safety risks in response to incidents involving near-miss aircraft collisions at several U.S. airports. The actions largely mirror recommendations made by the airline industry during the FAA's safety summit. FAA is urging air operators to:

- Use all available internal communication processes to specifically highlight recent events and existing issues.

- Reinforce adherence to published processes and procedures, including checklists, Air Traffic Control instructions, and internal company procedures.
- Ensure pilots and flight attendants have the same understanding of what “sterile flight deck” means and the risks associated with extraneous communication during this time.
- Encourage crews to diligently follow Crew Resource Management (CRM) procedures and principles to control workload and reduce distractions.
- Encourage personnel to identify and report existing and emerging safety issues through voluntary reporting programs and understand the usefulness of the voluntary reporting system.
- Emphasize the importance of awareness of the aircraft in relation to taxiways, runways and other aircraft.
- Review the following previously published SAFOs:
 - [17012](#), High Collision Risk During Runway Crossing.
 - [11004](#), Runway Incursion Prevention Actions.
 - [08001](#), Flight crew techniques and procedures to enhance taxi, pre-takeoff, and after landing safety to reduce the risk of runway incursions.
- Ensure Safety Management Systems are accounting for the high rate of change and churn in industry.

FAA ISSUES LIMITED WAIVER OF SLOT USAGE REQUIREMENTS AT JFK, LGA, DCA, AND EWR DUE TO ATC STAFFING ISSUES

On March 22, 2023, FAA issued a [notice](#) announcing a limited, conditional waiver of the minimum usage requirements for slots at John F. Kennedy International Airport (JFK), New York LaGuardia Airport (LGA), and Ronald Reagan Washington National Airport (DCA) due to post-pandemic effects on Air Traffic Controller (“ATC”) staffing at the New York Terminal Radar Approach Control (“TRACON”) facility (“N90”). FAA noted that it is providing the slot relief to give carriers the opportunity to reduce operations at the specified airports during the peak summer travel period as it expects the uptick in air travel operations and expected increased delays will be exacerbated by ATC’s staffing shortfalls.

Carriers will be allowed to voluntarily turn in up to 10% of their slots held at JFK and LGA, and 10% of impacted slots at DCA (namely slots for flights that will be impacted by the reduction in operations at the New York airports) for the **May 15, 2023**, to **September 15, 2023**, season subject to certain conditions and limitations. FAA also announced a limited policy to prioritize returned operations at Newark Liberty International Airport (EWR) due to post-pandemic effects on ATC staffing at N90 for purposes of establishing a carrier’s operational baseline in the next corresponding season. Based on this, carriers will also be permitted to voluntarily turn in up to 10% of their approved operating timings at EWR for the **May 15, 2023**, through **September 15, 2023**, season subject to certain conditions and limitations.

Importantly, FAA noted that the N90 staffing shortfalls should not be considered to be a basis for future relief from slot obligations as FAA does not foresee providing additional relief for the current ATC staffing issues, and it believes that going forward carriers will have had a “sufficient opportunity” to plan for future impacts. Nevertheless, carriers looking to take advantage of the slot relief for the summer season must notify FAA by identifying the slots and approved operating timings that they would like to turn in no later than **April 30, 2023**.

DOT ISSUES NOTICE ON AMENDMENT OF CONDITIONS IMPOSED FOR CHARTERS UNDER 14 CFR PART 375

On Friday, March 24, 2023, DOT issued a [notice](#) to announce the amendment of conditions imposed on all currently effective special authorizations and foreign aircraft permits that were granted to foreign air operations to conduct charter operations as outlined in 14 CFR Part 375. The new conditions are applicable to any foreign air operators that currently hold DOT authority under Part 375 to conduct occasional planeload charters for 12 months or less through a foreign aircraft permit allowing operation of up to six flights, or up to twelve flights through special authorization, and will be imposed by DOT on any future grants of occasional planeload charter authority under Part 375.

More specifically, as of March 24th, the following conditions are now applicable to affected air operators as detailed above: (1) a condition requiring compliance with ICAO Annex 18, “*The Safe Transport of Dangerous Goods by Air*,” and (2) a FAA preflight reporting condition. It is also important to note that the new FAA flight reporting requirement is an additional requirement to the DOT/OST and Transportation Security Administration (“TSA”) flight reporting requirements already in place.

DOT further noted that based on the changes detailed above, condition (4) of all special authorizations detailed in the Appendix will also be amended, or to the extent necessary have language added, to now read as follows:

“The operator must also comply with (1) all applicable requirements of 14 CFR Part 375; (2) all applicable requirements of the Federal Aviation Administration contained in the Federal Aviation Regulations and all applicable orders of the FAA; and (3) all applicable ICAO standards set forth in the following Annexes: Annex 1, Personnel Licensing; Annex 6 part 1, Operations of Aircraft; Annex 8, Airworthiness of Aircraft; and Annex 18, The Safe Transport of Dangerous Goods by Air. For further information on FAA requirements, the operator should contact the FAA’s Flight Standards Service in Washington, D.C. at (202) 267-0962.

In addition, using electronic mail, the operator must provide FAA Flight Standards with a preflight notification as soon as possible prior to operation of the flight. The subject line of the notification email must include the name and State of the operator. The email must be sent to 9-AVS-AFS-375-Flight-Notifications@faa.gov and include the following information:

- *Aircraft Registration, Make and Model.*
- *All arrival and departure airport(s) used within the United States.*
- *Estimated date/local time of arrival (ETA) and estimated date/local time of departure (ETD) at each U.S. airport. (As changes occur, send subsequent emails with updates – such as significant changes to ETA and ETD or aircraft information.)*
- *Purpose or description of flight, i.e., passengers, cargo, or both.*
- *Planned parking location (ramp, FBO, gate, etc.).*
- *If possible, a contact phone number within the United States. An example of this would be a Fixed-Based Operator (FBO) or other ground-handling company.”*

DOT PUBLISHES JANUARY 2023 AIR TRAVEL CONSUMER REPORT

On March 28, 2023, DOT issued its [Air Travel Consumer Report](#) for January 2023 incorporating airline operational data for on-time performance, mishandled baggage, and mishandled wheelchairs and scooters. A brief summary of some of the major topics covered in the report is included below.

Flight Operations

DOT reported that a total of 562,845 flights were operated in January 2023, an increase from the 547,134 flights operated in December 2022, and the 528,070 flights operated in January 2022.

On-time Arrival Rates and Flight Cancellations

For January 2023, reporting marketing carriers recorded a total on-time arrival rate of 76.2%, an increase from the 69% rate reported in December 2022, and the 75.2% rate reported in January 2022. Carriers with the highest on-time arrival rates included Delta, Alaska Airlines, and Southwest, while carriers with the lowest on-time arrival rates included Frontier, Spirit, and Allegiant.

Flight cancellations decreased to a rate of 1.9% for January 2023, down from 5.4% in December 2022, and 6.3% in January 2022. Carriers with the lowest cancellation rates included JetBlue, Hawaiian, and Delta, while those with the highest cancellation rates included Frontier, Southwest, and Spirit.

Air Service Complaints

DOT reported a high volume of air travel service-related complaints against airlines and ticket agents in January 2023, accordingly it expects the release of its consumer complaint data for January 2023 to be delayed until May 2023.

Tarmac Delays

Airlines reported 18 tarmac delays of more than three hours for domestic flights, and no tarmac delays of more than four hours for international flights in January 2023, a decrease from the 79 domestic flight tarmac delays and 3 international flight tarmac delays reported in December 2022.

Mishandled Wheelchairs and Scooters

Airlines reported mishandling 1.60% of wheelchairs and scooters in January 2023, down slightly from the 1.62% mishandling rate reported in December 2022.

DOT CALLS FOR CONGRESS TO PROHIBIT FAMILY SEATING FEES; PROPOSES NEW LAW TO BAN FAMILY SEATING FEES

On March 13, 2023, the Secretary of Transportation sent a letter to the U.S. Congress urging it to pass a new law to ensure that families are allowed to sit together onboard the flights of U.S. airlines for no additional cost. This comes as the Biden administration and Congress have been continually pushing to either get a new law passed, or have DOT implement a new rulemaking to ban so called “junk fees” like those charged for family seating.

Relatedly, on March 10th, DOT also sent [letters](#) to the Vice President of the United States and the Speaker of the House of Representatives proposing [new legislation](#) that would require both U.S. and foreign airlines to allow young children and at least one accompanying adult to sit together on flights at no additional cost, subject to certain conditions. As written, the legislation would also require that airlines that do not assign seats in advance, or allow consumers to select seats in advance, board passengers in a manner to ensure that families can sit together. DOT noted that the legislative proposal was based upon a recent review of airline seating policies that uncovered “concerning evidence” that many airline policies still do not guarantee adjacent seating for families, and that many also do not guarantee adjacent seating for no additional cost.

DOT ISSUES 2022 AIR TRAVEL CONSUMER REPORT

On March 16, 2023, DOT released its [Air Travel Consumer Report](#) on airline operational data including on-time performance, mishandled baggage, and mishandled wheelchairs and scooters for December 2022 and the full calendar year 2022. A brief summary of the report is included below.

Operated Flights:

In December 2022, operated flights were down compared to the year prior, and airlines operated about 81% of the flights they operated during the same time in pre-pandemic December 2019.

On-time Arrival Rates:

For December 2022, the on-time arrival rate for reporting marketing carriers dropped to 69% from 80% in November 2022, and nearly 78% in December 2019. Carriers reporting the best on-time rates for December 2022 included Delta, American, and United, while the carriers with the worst on-time rates for this period included Frontier, Allegiant, and Hawaiian.

Flight Cancellations:

Flight cancellation rates increased for both December 2022 and the full calendar year 2022 for reporting marketing carriers. The carriers with the highest cancellation rates included Alaska Airlines and Allegiant, but the largest share of the cancellations was attributable to Southwest, which suffered technical and operational issues resulting in over 16,000 cancelled flights during this period. Carriers reporting the lowest cancellations rates during this time included American, JetBlue, and Delta.

Airline Service Complaints:

DOT reported a “high volume” of air travel service-related complaints against airlines and ticket agents in December 2022. DOT noted that its issuance of the full consumer complaint report has been delayed due to the high number of complaints it received, which it still needs to review and process. DOT expects the 2022 report on consumer complaints to be available in early April 2023, [here](#).

Tarmac Delays:

In December 2022, U.S. airlines reported 79 tarmac delays of more than three hours on domestic flights, an increase compared to just 8 tarmac delays reported in November 2022. In contrast, airlines reported 3 tarmac delays of more than four hours on international flights, down from the 5 tarmac delays reported in November 2022. For the full calendar year 2022, airlines reported 376 tarmac delays for domestic flights, and 21 tarmac delays for international flights, both increases from the 155 domestic flight tarmac delays, and 9 international flight tarmac delays reported in calendar year 2021.

Mishandled Baggage, Wheelchairs, and Scooters:

In December 2022, carriers reported handling nearly 40 million bags and posted a mishandled baggage rate of 1.09%, an increase from the 0.51% rate reported in November 2022, and the 0.66% rate reported in pre-pandemic December 2019. Of the industry-wide 1.09% mishandling rate reported in December 2022, 26.68% of the mishandlings were attributed to Southwest. The mishandled baggage rate also increased for the full calendar year 2022, to 0.64%.

For mishandled wheelchairs and scooters, carriers reported checking 62,086 wheelchairs and scooters of which 1.62% were mishandled, an increase from the 1.48% rate reported in November 2022 and the 1.53% rate reported in pre-pandemic December 2019. For calendar year 2022, the reported mishandled wheelchair and scooter rate was equal to the 2019 rate of 1.54%.

FAA HOLDS AVIATION SAFETY SUMMIT

On March 15, 2023, FAA held an emergency aviation safety summit to discuss ways to improve flight safety in the U.S. in response to several recent safety issues including at least six near-miss collisions by aircraft at different U.S. airports. This included breakout sessions on commercial operations, the air traffic system, airport and ground operations, and general aviation operations. Industry groups and FAA subject matter experts were tasked with reviewing recent safety incidents to try to identify ways to address areas where the existing safety system could be improved to prevent future incidents. Each group put forth ideas for improving safety such as working on the effective implementation of Safety Management Systems at the 200 busiest airports to comply with FAA's recently published final rule on SMS programs, and working towards creating more efficient methods for sharing safety information in near real-time and between all aviation industry groups. After the summit, FAA also noted that discussions also helped to pinpoint some of the root causes for recent incidents like overstressed and/or overworked pilots and flight attendants, lack of workforce experience, and issues with air traffic control technology.

During the summit, the chair of the National Transportation Safety Board ("NTSB"), the agency tasked with investigating civil aviation accidents, also voiced concern that FAA has not been quick enough in its actions to address safety issues, citing the safety recommendations NTSB has made over the years that FAA has not acted on. For example, according to the NTSB chair, the agency made a recommendation 23 years ago that the FAA work to implement cockpit equipment to notify pilots of potential runway hazards, which FAA has until this point allegedly declined to implement.

5G UPDATE – FAA NOT LOOKING TO EXTEND JULY 2023 RETROFIT DEADLINE

In response to several U.S. Senators' requests for more details on the 5G C-Band roll out set to occur in Summer 2023, FAA's Acting Administrator stated that the agency currently has no plans to change the July 2023 deadline for carriers to retrofit aircraft or install altimeters to prevent 5G interference. The FAA previously issued directives requiring that all airlines obtain new or upgraded altimeters by February 2024 and update flight manuals to prohibit low-visibility landings at a number of U.S. airports beginning July 1, 2023, to allow for the full implementation of 5G service in many new areas including around airports. FAA's Acting Administrator further noted that FAA feels it has given carriers enough time to complete the retrofits and ensure they can continue to serve U.S. airports in affected areas, despite airline industry concerns that retrofits will not be completed in time, through no fault of the carriers. Based on the concerns, U.S. Senators have again asked FAA for more details on the planned 5G implementation, and the FAA's plans for the completion of altimeter retrofitting by airlines, citing concerns that aircraft not retrofitted in time may be grounded, to the detriment of the U.S. traveling public. The Senators have also requested more information on the specific airlines that are currently at risk of not meeting the retrofitting deadline, though, FAA has yet to provide this information.

TSA ISSUES NEW CYBERSECURITY REQUIREMENTS FOR AIRPORTS AND AIRCRAFT OPERATORS

On March 7, 2023, TSA issued an [emergency cybersecurity amendment](#) for certain airports' and aircraft operators' security programs. The goal of the new requirements is to increase resilience and protect the U.S. transportation system from cybersecurity threats. The new amendment will require that affected airports and aircraft operators

develop an approved implementation plan that describes the measures they are taking to improve their cybersecurity and prevent threats to their infrastructure. Specifically, this includes taking the following actions:

1. Developing network segmentation policies and controls to ensure that operational technology systems can continue to safely operate in the event that an information technology system has been compromised, and vice versa.
2. Creating access control measures to secure and prevent unauthorized access to critical cyber systems.
3. Implementing continuous monitoring and detection policies and procedures to defend against, detect, and respond to cybersecurity threats and anomalies that affect critical cyber system operations.
4. Reducing the risk of exploitation of unpatched systems through the application of security patches and updates for operating systems, applications, drivers and firmware on critical cyber systems in a timely manner using a risk-based methodology.

Issuance of the new requirements comes in response to the Biden administration's push to strengthen cybersecurity protections and defend against threats to critical infrastructure like the U.S.' transportation system.

9TH CIRCUIT ORDERS FAA TO COMPLETE ENVIRONMENTAL REVIEW FOR FLIGHT PATH CHANGES AT LAX

On March 10, 2023, a 9th Circuit panel issued a decision ordering the FAA to file a timeline and submit status reports every 90-days related to the completion of its environmental review of flight path changes at Los Angeles International Airport ("LAX") , which was previously ordered by the Court to be completed nearly two years ago.

The decision comes in response to the City of Los Angeles' (the "City") request that the Court enforce a 2021 order requiring FAA to finish an environmental review required by the U.S. Environmental Protection Act and other laws to study noise and other impacts to neighborhoods related to three LAX flight routes that were changed in May 2018 without a proper analysis being conducted and without FAA providing an opportunity for public comment. The City alleged that FAA has made no progress towards completing the review and that under federal guidelines, the review should have been completed in no more than a year. FAA argued that the Court no longer had jurisdiction over the issue, but the Court disagreed, siding with the City and noting that it still had authority to make sure its previous order is enforced.

DOT ISSUES CONSENT ORDER AGAINST EUROWINGS FOR TARMAC DELAY RULE VIOLATIONS

On March 8, 2023, DOT issued a consent order against Eurowings GmbH ("Eurowings") for alleged violations of DOT's tarmac delay rule, ordering Eurowings to pay a \$225,000 civil penalty.

DOT alleged that Eurowings had failed to adhere to the assurance in its contingency plan for lengthy tarmac delays related to the timely deplaning of passengers and also violated the Department's rule against allowing an aircraft to remain on the tarmac for more than four hours without allowing passengers an opportunity to deplane. The alleged violations centered around a Eurowings flight from Dusseldorf Airport (DUS) to Miami International Airport (MIA) that was diverted to Fort Lauderdale-Hollywood International Airport (FLL) because of a weather-related closure at MIA. This resulted in passengers being held in the aircraft and on the tarmac for nearly five and a half hours before being given the opportunity to deplane, a violation of DOT rules. Eurowings argued that due to the diversion to FLL, an airport that it does not usually operate to and therefore did not have pre-existing arrangements for ground handling that could have allowed it to deplane passengers, and due to continued delays and closures at MIA due

to weather, it was impeded by a series of factors outside of its control and tried to complete the flight as scheduled several times. Nevertheless, DOT noted that it takes seriously violations of the tarmac delay rules and therefore, despite Eurowings' arguments, issuance of the consent order and civil penalty was warranted.

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 author Evelyn Sahr at 202.659.6622 or esahr@eckertseamans.com; Drew Derco at 202-659-6665 or dderco@eckertseamans.com; or Alexis George at 804-788-7772 or ageorge@eckertseamans.com or any other attorney at Eckert Seamans with whom you have been working.