Aviation Regulatory Update

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TRANSPORTATION SECRETARY ANNOUNCES FIRST-EVER PRIVACY REVIEW AMONG LARGEST U.S. AIRLINES

On March 21, 2024, the U.S. Department of Transportation ("DOT") issued a press release announcing its first industry-wide review of data security and privacy policies among the ten (10) largest U.S. airlines. To determine if sensitive personal information is sufficiently protected, DOT's Office of Aviation Consumer Protection ("OACP") will begin by conducting privacy reviews of Allegiant, Alaska, American, Delta, Frontier, Hawaiian, JetBlue, Southwest, Spirit, and United. OACP's review seeks information in the following three areas: policies and procedures relating to the monetization of passenger data, complaints alleging that the airline or its employees mishandled sensitive personal information, and information on what privacy training employees receive and the frequency of those trainings. The privacy review acts as the first step in what will likely become a more periodic assessment of airline privacy practices.

In coordination with the Federal Trade Commission ("FTC"), DOT also seeks to examine whether airlines are unfairly and deceptively monetizing or sharing passenger data with third parties. Doing so furthers the Biden administration's comprehensive effort to safeguard consumer privacy and dovetails with FTC's rules implementing the Children's Online Privacy Protection Act ("COPPA"). To enforce compliance with COPPA and other consumer protection statutes dealing with unfair or deceptive practices, DOT will use the privacy review to inform future investigations, enforcement actions, and upcoming rulemaking which may substantially change the obligations and responsibilities of airlines.

DOJ AND FTC CO-CHAIR NEW STRIKE FORCE TO CRACK DOWN ON "UNFAIR AND ILLEGAL" CORPORATE PRICING

To further implement President Biden's July 2021 Executive Order on Promoting Competition in the American Economy, the Biden administration recently launched a new Strike Force on Unfair and Illegal Pricing ("Strike Force") to crack down on perceived abuses related to corporate pricing. As the key enforcers of the Biden administration's aggressive regulatory agenda, the U.S. Department of Justice ("DOJ") and the FTC will jointly lead the Strike Force with a specific emphasis on reviving the largely dormant Robinson-Patman Act ("RPA"). When it was first passed in 1936, the RPA was seen as a tool for antitrust enforcers to prohibit price discrimination. In recent years, the RPA is rarely used, prompting DOJ and FTC officials to reconsider the 1936 statute's functionality when promoting price stability in the marketplace. Importantly, antitrust regulators like FTC Chair Lina Kahn plan to utilize the RPA to help smaller retailers compete against the larger players who regularly leverage price concessions from sellers. The Strike Force will focus its attention on the health care, food and grocery, housing, and financial services sectors. While not explicitly cited in the announcement, the Strike Force's launch comes on the heels of FTC's recent challenge to Kroger's acquisition of Albertsons, the largest proposed supermarket merger in U.S. history. It is unclear at this time what attention the Strike Force will pay to pricing strategies among airlines, but price discrimination arguments used in other sectors could be leveled against the aviation industry. As DOJ and FTC's antitrust enforcements progress, companies considering new pricing strategies or consolidation plans should keep an eye on the Strike Force's activities to mitigate potential exposure.

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COMMERCE, TREASURY, AND JUSTICE ISSUE TRI-SEAL COMPLIANCE NOTE ON U.S. SANCTIONS AND EXPORT CONTROL LAWS

On March 6, 2024, the U.S. Departments of Commerce, Treasury, and Justice published a Tri-Seal Compliance Note (the "Note") emphasizing the applicability of U.S. sanctions and export control laws to foreign-based persons and entities. As the primary enforcer of economic and trade sanctions, the U.S. Department of Treasury's Office of Foreign Assets Control ("OFAC") regularly exercises its enforcement authority against persons and entities located outside the United States. A foreign-based entity or person can become subject to the applicability of U.S. sanctions by causing U.S. persons to violate OFAC sanctions. For instance, behavior that obscures or omits reference to the involvement of a sanctioned party in the documentation of a financial transaction may subject a foreign-based person or entity to U.S. sanctions.

The Note also explains how the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") enforces export controls through the Export Administration Regulations ("EAR"). Importantly, the Note makes clear that U.S. export control laws extend to items anywhere in the world and to foreign persons dealing with items subject to the EAR. *In other words, U.S. export control laws follow the goods, meaning that the EAR applies to numerous movements of goods including reexports, in-country transfers, and exports from abroad in addition to initial exports*. While most countries limit export-related authorities to direct exports, the expansive reach of U.S. export control laws mitigates the efforts of bad actors attempting to bypass the EAR by shipping items through a third country.

To avoid U.S. sanction and export control violations, foreign-based persons and entities should implement a robust compliance program with internal controls to monitor the payment and movement of goods. Doing so helps to identify sanctioned persons or jurisdictions that may otherwise be obstructed by complicated payment and invoicing structures. By understanding their touchpoints to the United States, foreign-based persons and entities can avoid criminal prosecution which is punishable by imprisonment of up to 20 years and a $1 million fine per willful violation.

TREASURY AND EFG INTERNATIONAL REACH SETTLEMENT AGREEMENT OVER APPARENT SANCTIONS VIOLATIONS

On March 14, 2024, the OFAC announced a settlement agreement with EFG International AG ("EFG") to resolve potential civil liability relating to EFG's processing of some 873 securities transactions. As a global private banking group based in Switzerland, EFG oversees approximately 40 global subsidiaries providing a range of financial services, including the purchase and sale of securities on behalf of foreign clients. After determining that the company processed securities-related transactions for customers in Cuba, a comprehensively sanctioned jurisdiction, and for other sanctioned individuals, including a Specially Designated Narcotics Trafficking Kingpin ("SDNTK"), EFG agreed to pay $3,740,442 to settle the apparent violations of multiple sanctions programs.

Notably, the transactions at issue were conducted through and held in omnibus accounts with U.S. custodians and other market participants, underscoring the sanctions risk that financial institutions with foreign clients undertake when using omnibus accounts at U.S. firms. While EFG subsidiaries imposed internal restrictions on the questionable accounts of sanctioned individuals, the subsidiaries failed to notify their U.S. custodian or other U.S. securities firms transacting the impacted omnibus accounts, leading to continued processing of securities transactions on behalf of sanctioned parties. Upon discovering the failures to properly notify U.S. custodians transacting omnibus accounts for OFAC-designated clients, EFG took remedial measures. For instance, EFG implemented internal restrictions to prevent credits/debits to sanctioned-client accounts and required approval for account activity of any clients presenting a heightened sanctions risk. In addition to fully cooperating with the investigation, the OFAC cited EFG's subsequent remedial measures when determining that the apparent violations were voluntarily disclosed and not egregious.

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The settlement displays that U.S. firms often lack direct insight into underlying sub-accounts given omnibus account structures, meaning that foreign financial institutions should establish procedures to reduce the likelihood that U.S. firms inadvertently service sanctioned parties or jurisdictions. To avoid inadvertent violations of sanctions programs, companies with U.S. omnibus accounts should refer to OFAC's List of Specially Designated Nationals and Blocked Persons ("SDN List") to screen clients. Doing so facilitates the prompt identification of sanctioned parties and further expediates notification to affected U.S. firms.

SUPREME COURT PERMITS CHALLENGE TO NO FLY LIST PLACEMENT

The United States Supreme Court (the "Court") recently ruled that the federal government cannot render moot a No Fly List challenge by removing an individual from the list without a declaration that the government will not return the person to the list in the future. The Court's unanimous decision affirmed the Ninth Circuit which previously held that the party seeking to moot a challenge based on its own voluntary cessation must show that the conduct cannot "reasonably be expected to recur." In the aftermath of the September 11th terrorist attacks, the U.S. government retains a No Fly List which indefinitely bars certain individuals who present a potential national security risk from flying to and from the United States. The reasoning for placing a U.S. citizen on the No Fly List and subsequently removing them from the list is regularly kept secret.

In addition to alleging that the federal government violated his procedural due process rights by failing to provide any meaningful notice of his addition to the No Fly List, the plaintiff in this case sought an injunction prohibiting the government from keeping him on the list. After removing the plaintiff from the No Fly List and declaring that he would not be placed back on the list "based on currently available information," the government claimed that such a declaration was sufficient to render moot the challenge to his placement on the No Fly List. A unanimous Court found that argument unavailing and further resolved a circuit split by ruling that a U.S. citizen can continue to challenge his placement on the No Fly List even after removal from the list. Importantly, Justice Gorsuch reasoned that the government's "based on currently available information" declaration was insufficient to warrant dismissal because it provided no assurance that the government would not place the plaintiff back on the No Fly List in the future.

While the Court determined that the case was not moot as applied to the specific facts alleged, the Court also mentioned that its judgement was a provisional one. The ruling allows a U.S. citizen to continue challenging his placement on the No Fly List even after removal but cautions that the government may still be able to demonstrate mootness as the case unfolds.

AIR TRAVEL CONSUMER REPORT: DECEMBER 2023 AND FULL YEAR 2023

On March 1, 2024, DOT released its Air Travel Consumer Report ("ATCR") for the month of December 2023 and calendar year 2023. In addition to providing passengers with useful information on the quality of services provided by airlines, the ATCR also informs DOT's enforcement activities and rulemaking approach. Consumers broadly experienced better-quality airline service in 2023 based on the ATCR's calendar year metrics. The 603,756 flights operated in December 2023 were 10.35% more than the 547,134 flights operated in December 2022. Reporting airlines also bettered their on-time arrival rate in 2023 to 78.34%, up from 76.22% in the prior year. In December 2023, the on-time arrival rate for reporting airlines increased to 83.9%, showing significant improvement from 69.0% in December 2022. Airlines reported 289 tarmac delays of more three (3) hours on domestic flights in 2023, down from 376 tarmac delays of more than three (3) hours on domestic flights in 2022. December 2023 featured no tarmac delays of more than four (4) hours on international flights, compared to one (1) such tarmac delay in November 2023.

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FAA PROPOSES HAZMAT VIOLATION PENALTY AGAINST SPIRIT

On March 22, 2024, the Federal Aviation Administration ("FAA") proposed a $146,500 civil penalty against Spirit Airlines ("Spirit") for allegedly violating the DOT's Hazardous Materials Regulations. The FAA specifically alleged that Spirit employees handled five separate shipments containing compressed oxygen cylinders for air transportation from Detroit to New York. The shipments were offered to FedEx which rejected one because the box containing the compressed oxygen cylinder was damaged and did not comply with Flame Penetration Resistance Test requirements. The FAA further asserts that Spirit employees failed to properly process the shipments and did so without the required training. The proposed civil penalty accounts for the fact that the Spirit employees who handled the five shipments did not complete the required hazardous materials training and had yet to receive certification for handling dangerous cargo. Spirit must respond to FAA withing 30 days.

HUMAN TRAFFICKING CONCERNS AMID CIVIL UNREST AND MIGRATION

On March 22, 2024, the U.S. Customs and Border Protection ("CBP") issued a human trafficking awareness bulletin reminding air carriers to be watchful when transporting passengers who are fleeing conflict and may potentially be victims of human trafficking operations. Citing safety and security concerns in countries with civil unrest and mass migration, CBP recognized that there is potential for an increase in human trafficking. The bulletin furthers the Blue Lightning Initiative ("BLI") and its objective to educate the aviation industry on how to identify human traffickers and their victims. The BLI also trains aviation personnel on how best to report suspicious activity to federal law enforcement. Doing so ensures that actionable tips are promptly reported to law enforcement. As countries continue to undergo civil unrest and mass migration, CBP encourages air carriers to remain vigilance because a sudden departure from an unstable region creates ample opportunities for malign actors to take advantage of vulnerable populations. To hinder human trafficking efforts worldwide, CBP requests that air carriers observe, document, and report their suspicions to law enforcement.

THE BIDEN ADMINISTRATION TARGETS PRIVATE JET OWNERSHIP

On March 11, 2024, the White House released a fact sheet which included proposed changes to the tax treatment of corporate jet purchases and calls for a fuel tax increase on private jet travel. Specifically, the proposal seeks to eliminate a preferential tax treatment used by wealthy individuals to write off corporate jet purchases. A business or wealthy individual can currently write off a corporate jet purchase over five years while commercial purchases can only be written off over a seven-year period. To end alleged abuses of corporate jet write-offs, the proposal would impose the seven-year tax treatment on corporate jet purchases, raising an estimated $4 billion over ten years. Similarly, the proposed fuel tax increase would raise an estimated $1.1 billion over five years by gradually increasing the tax on fuel used by private jets from approximately $0.22 per gallon to $1.06 per gallon within five years. Revenues from the fuel tax on private jet travel partly fund the Airport and Airway Trust Fund, a financing mechanism for aviation-related federal investments. According to the White House, corporations and wealthy Americans unfairly benefit from aviation-related federal investments because private jet travel accounts for approximately 7% of all flights handled by FAA but contributes less than 1% of the taxes into the Airport and Airway Trust Fund. While both the proposed elimination of the corporate jet purchase tax write-off and the proposed fuel tax increase require congressional approval, the changes could cost private jet owners billions more in taxes if implemented.

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