

Aviation Regulatory Update

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FEDERAL JUDGE RULES AGAINST JETBLUE-AMERICAN “NORTHEAST ALLIANCE”

On May 19, 2023, a U.S. federal judge [ruled](#) that the planned partnership between JetBlue Airways (“JetBlue”) and American Airlines (“American”) amounts to an illegal merger in violation of U.S. antitrust law because the deal would restrict competition by allowing two of the largest airlines in the U.S. to join forces. As background, JetBlue and American implemented a partnership known as the “Northeast Alliance,” allowing the carriers to coordinate routes and schedules, and to share revenues, on flights in the Northeastern U.S. to better compete with Delta Air Lines (“Delta”) and United Airlines (“United”), two of the largest carriers in the U.S. The venture had been in place since 2021. In response, the U.S. Justice Department (“DOJ”) and several U.S. states filed a [lawsuit](#) against American and JetBlue seeking to stop the partnership based on anti-competition concerns.

In the order striking down the partnership, the Court noted that the proposed Northeast Alliance would in fact violate the Sherman Act as the agreement between American and JetBlue would have essentially allowed the two airlines to “operate as one” for most flights to/from Boston, MA, and the New York City area. The judge also disagreed with American and JetBlue’s argument that they sought the partnership to better compete with Delta, noting that it seemed more likely that the airlines’ agreement was intended to keep the two airlines from having to compete with each other, as had been the case in the past, amounting to an unreasonable restraint on trade. In reaching a decision, the federal judge further compared the Northeast Alliance to the West Coast International Alliance (“WCIA”), a partnership between American and Alaska Airlines, which allowed for codesharing, reciprocal lounge/loyalty benefits, and capped/non-reciprocal revenue sharing, but notably did not include any coordination by the partners on pricing, capacity, scheduling, or network planning. The court reasoned that had JetBlue and American pursued a WCIA style agreement, there likely would not have been any antitrust issues.

DOJ CONSIDERING LAWSUIT TO PREVENT KOREAN AIRLINES’ MERGER WITH ASIANA

On May 18, 2023, DOJ announced that it is considering a lawsuit to restrict the merger of Korean Air and Asiana Airlines (“Asiana”), citing anti-competition concerns. Specifically, DOJ noted concerns that Korean Air’s planned acquisition of Asiana might harm competition related to passenger and cargo operations between the U.S. and Korea, and negatively affect the U.S. and U.S. airlines by giving too much control over cargo and the transport of key goods to one consolidated company. DOJ has been investigating the potential merger for nearly two years and has previously noted its concerns regarding overlapping routes to the U.S. cities of San Francisco, Los Angeles, Seattle, New York, and Honolulu. The European Commission has also been investigating the merger, and in a press release published on May 17th, noted that it had informed Korean Air of its objections to the acquisition based on the potential harm to competition concerning passenger routes to Barcelona, Frankfurt, Paris, and Rome.

While the U.S. does not have authority to restrict or otherwise influence the airlines’ conduct in South Korea, it can seek to stop the merger from happening on the basis of harm to competition in the U.S. Korean Air and Asiana have argued that their merger may be protected by the Act of State Doctrine, which effectively bars U.S. courts from ruling on the validity of official acts of foreign governments conducted in their home countries. Further, the U.S. Government is said to still be considering the lawsuit given all these issues and potential sensitive diplomatic issues that may be impacted.

We will continue to provide updates on this as we receive them.

TELECOM COMPANIES AGREE TO EXTEND 5G MITIGATION EFFORTS; IATA APPLAUDS EXTENSION AND URGES MORE ACTION

Recently, telecom companies AT&T, T-Mobile, Verizon, and UScellular agreed to extend voluntary mitigation measures first implemented in January 2022 related to the roll out of 5G C-band services at or around 188 U.S. airports including Los Angeles International (LAX), Washington Dulles International (IAD), San Francisco International (SFO), and John F Kennedy International (JFK). In 2022 the telecom companies voluntarily agreed to lower the power of 5G services at and around certain U.S. airports to allow 5G service roll out to move forward, but the voluntary agreement was set to expire on July 1, 2023. Given the parties new agreements, the mitigation efforts will now be effective until January 1, 2028, meaning even once additional 5G services are implemented at or around more U.S. airports on July 1st, telecom companies will continue to abide by certain voluntary mitigation measures to minimize the operational impact of 5G operations.

The International Air Transport Association (“IATA”) applauded the parties agreement, calling it a needed stop-gap for 5G implementation, but by no means a solution to the problem. IATA noted that the underlying safety and economic issues related to full 5G C-band deployment, such as the requirement that airlines cover the costs of completing altimeter retrofitting just to be able to operate, and concerns that 5G interference with aircraft altimeters could create significant safety issues for aircraft landings and the use of safety systems, still need to be addressed. IATA also called the altimeter retrofits that the U.S. Federal Aviation Administration (“FAA”) is requiring airlines to complete by July 1st a “temporary fix” since IATA believes the retrofits will not be sufficiently resilient once full 5G service is deployed and since new 5G tolerant radio altimeter standards are not expected to be approved until the end of 2024 at the earliest. IATA also reiterated that despite many airlines best efforts to complete retrofits on time, supply chain and other issues continue to make it difficult for all airlines to complete retrofitting by the July 1st deadline, which could translate to operational disruptions during the peak of the summer travel season.

5G UPDATE: FAA ISSUES CANIC ON ONGOING ACTIVITIES, NPRM TO SUPERCEDE AD 2021-23-12

On May 23, 2023, the FAA issued a Continued Airworthiness Notification to the International Community (“CANIC”) on FAA’s ongoing activities related to interference from 5G C-Band wireless broadband to air operations and various aircraft. The CANIC is applicable to all operators of transport and commuter category aircraft equipped with radio altimeters and is a follow-up to FAA’s December 2021 Airworthiness Directives (“AD 2021-23-12” or “AD”) requiring helicopter operators and passenger carrying aircraft to prohibit certain operations necessitating the use of radio altimeter data when 5G wireless transmissions are present through revisions to aircraft flight manuals prohibiting operations in areas where there could be potential 5G interference. The FAA then expanded its AD in January 2022 by issuing a proposed rulemaking to require aircraft modifications to mitigate safety risks in areas where increased 5G frequencies have been or will be deployed (i.e., the FAA’s required aircraft retrofits).

In the new CANIC, FAA reiterated that it issued its AD and the subsequent proposed rulemaking in an effort to address purported unsafe operating conditions related to the deployment of additional 5G frequencies, which FAA notes could cause a loss of continued safe flight and negative impacts to landings. FAA also noted that since it issued its AD, it has managed deployment of 5G transmitters through a monthly 5G deployment evaluation process, allowing 5G deployment to move forward along with the help of voluntary agreements with the telecommunications industry.

DOT ASSESSES \$1M CIVIL PENALTY AGAINST LATAM FOR FAILURE TO PROVIDE TIMELY REFUNDS

On May 22, 2023, the U.S. Department of Transportation (“DOT”) issued a Consent Order and Order of Dismissal for LATAM Airlines Group S.A. and some of its affiliates (“LATAM”) for the carrier’s alleged failure to provide timely refunds to

passengers for flights to/from the U.S. between March 2020 and November 2021. DOT found that LATAM had failed to provide timely refunds after cancelling flights, because the carrier required affected consumers who requested cash refunds to accept travel vouchers that could then be exchanged for cash via a bank transfer. DOT alleged that the procedure resulted in a “lengthy” process for passengers to be able to obtain a refund, as many refunds took more than 100 days to process to completion. DOT also acknowledged that LATAM changed its policy and began providing refunds in the original form of payment instead of mandatory travel vouchers, in most cases, on November 30, 2021, and discontinued issuing travel vouchers instead of entitled refunds altogether on May 24, 2022. In response, LATAM asserted that it was forced to cancel thousands of flights due to government restrictions related to the COVID-19 pandemic, which resulted in four times the amount of refund requests that it normally receives. LATAM also argued that because of pandemic related restrictions and other challenges, including the fact that it was unable to receive government-funded emergency assistance, it had to file for Chapter 11 Bankruptcy protection and radically downsize its company. Despite these challenges though, LATAM stated that it continued to honor its obligation to refund passengers for cancelled flights, even though refunds were delayed, and that it had issued more than \$62,000,000 in refunds since the beginning of the pandemic. DOT nevertheless concluded that enforcement action was warranted, ordering LATAM to cease and desist from future violations and imposing a \$1,000,000 civil penalty against the carrier, the latest in a string of penalties against U.S. and foreign carriers for failures to provide timely refunds for cancellations that occurred during the COVID-19 pandemic.

DOT FORMS INTERAGENCY WORKING GROUP AND ISSUES REQUEST FOR INFORMATION ON ADVANCED AIR MOBILITY

On May 17, 2023, DOT completed steps to comply with its obligations related to the development of a national strategy on Advanced Air Mobility (“AAM”) as required under the Advanced Air Mobility Coordination and Leadership Act (the “Act”), enacted in 2022.

Under the Act, DOT is required to create an interagency working group (“IWG”) to help develop the U.S. strategy for implementing policies related to AAM, and to advance the Biden administration’s goal to accelerate the implementation of electric air taxi services by 2024. DOT has now officially created the IWG, which will be made up of 22 members from various federal agencies including, FAA, the National Aeronautics and Space Administration (“NASA”), the Transportation Security Administration (“TSA”), and the Federal Communications Commission (“FCC”), among others. The IWG is tasked with planning and coordinating efforts to integrate advanced air mobility aircraft into the national airspace system, particularly in terms of passenger carrying aircraft, to expand new transportation options, make recommendations regarding safety, operations, and security, increase jobs and economic activity, advance environmental sustainability and new technologies, and support emergency preparedness and competitiveness. To further efforts on AAM advancement, DOT also issued a request for information from airline industry officials and the public on a number of topics including but not limited to: (1) what should be addressed in the AAM national strategy, (2) what respondents believe are existing barriers to success of AAM implementation, (3) what steps the U.S. Government should focus on in the short, medium, and long term to maximize the potential for successful AAM implementation in the U.S (4) how AAM expansion will occur while maintaining aviation safety, (5) what statutes, regulations, or policies should be created or updated to support the expansion of AAM operations, (6) what environmental impacts the AAM industry as a whole might have, and (7) how the future of AAM could expand jobs in the U.S. Respondents are encouraged to submit comments on these topics by July 17, 2023, in the applicable docket, available [here](#).

NEW CALLS TO ADD MORE LONG-HAUL FLIGHTS AT DCA; SOME AIRLINES AND CONGRESSMEN VOICE OPPOSITION TO EXPANSION

Earlier this month a group of businesses known as the “Capital Access Alliance” introduced a new plan seeking to add long-haul flights at Ronald Reagan Washington National Airport (DCA). As background, under a current federal rule known as the DCA “Perimeter Rule”, only a limited number of nonstop long-haul flights, or flights over 1,250 miles, are allowed to operate out of DCA. Because of the rule, DCA has primarily served as a short-haul airport while nearby

Washington Dulles International Airport (IAD) served as the region's "long-haul growth airport." The plan immediately received opposition from several U.S. Congressmen, airlines and airline groups, and local residents, arguing against the expansion based on concerns that it would negatively affect IAD's operations, that DCA would likely be unable to handle the influx of passengers and operations, and that the expansion could lead to more noise and congestion in the region. On May 18th, the Metropolitan Washington Airports Authority ("MWAA"), which oversees DCA and IAD, issued a report on the proposals to expand long-haul flights at DCA in which MWAA also noted its opposition to changing the Perimeter Rule because in its view the change would likely negatively impact operations due to a number of factors.

Despite the opposition the plan received, on May 10th, Congressmen from Utah and Georgia officially introduced a bill called the "Direct Capital Access Act" (or the "DCA Act") that seeks to add 28 new long-haul flights at DCA. Arguments in support of the bill include the need for more competition and lower flight costs in the D.C. region given the surge in travel demand, creation of more jobs, and that the Perimeter Rule may no longer serve its original purpose. The bill is also believed to be appealing to many Congressmen, especially those from states outside of DCA's 1,250 perimeter, given the fact that DCA is the closest airport to the Capitol and more direct long-haul flights would allow them to get home easier. Since the DCA Act was just recently introduced, it has not yet been acted on by Congress, but we will continue to provide updates on the bill's progress as we receive them.

DOT ISSUES JANUARY 2023 AIRLINE COMPLAINT DATA REPORT

On May 17, 2023, DOT published its updated March 2023 Air Travel Consumer Report, which now includes airline consumer complaint data from January 2023. A summary of some of the important points included in the report is included below.

Complaints About Airline Service:

In January 2023, DOT received a total of 10,822 airline service complaints, down 35.9% from December 2022, but up 111.7% from the 5,113 complaints received in January 2022. DOT noted that almost a quarter of these complaints (23.4%) were made against Southwest Airlines and related to its 2022 holiday season meltdown. DOT also noted that of the total number of complaints, 7,754 complaints, or 71.7% were against U.S. carriers, while 2,596, or 24% were against foreign carriers, and 469, or 4.3% were against travel companies. The highest number of complaints were related to flight problems like cancellations, delays, and other deviations from airline schedules (4,054, or 37.5%), followed by refunds (2,240, or 20.7%) and baggage issues (1,973, or 18.2%).

Complaints About the Treatment of Passengers with Disabilities

DOT received a total of 222 disability-related complaints in January 2023, up slightly from the 218 disability-related complaints received in December 2022, and the 144 complaints received in January 2022.

Complaints About Discrimination

DOT received a total of 26 discrimination complaints in January 2023, up from the 10 complaints it received on this topic in December 2022 and the 5 complaints it received in January 2022. 11 of these complaints were related to race, 1 complaint was related to ancestry/ethnicity, 8 complaints were related to national origin, 2 complaints were related to color, 3 complaints were related to religion, and 1 complaint was related to sexual discrimination.

AIR POLLUTION CLASS ACTION SUIT FILED AT SEA-TAC AIRPORT IN SEATTLE

A class action lawsuit was recently filed against Delta Airlines, Alaska Air Group, and the Port of Seattle, the operator of the Seattle Tacoma International Airport (Sea-Tac), for alleged harms resulting from air pollution affecting local residents within a five-mile radius around the airport. The complaint alleges that the residents living in the area around the airport suffer from increased rates of cancer, heart disease and chronic lower respiratory disease because pollutant emissions occurring at 3,000 feet or less, during takeoff and landing, are not able to disperse, and instead accumulate in the communities surrounding the airport, which has resulted in medical issues and medical concerns for local residents. The

plaintiffs are seeking damages for costs related to the remediation and use of their properties, and the establishment of a fund to pay for medical monitoring. The lawsuit cites and relies on several health studies done in communities around Sea-Tac, and claims that the airport and the airlines are aware of the alleged harm being caused. The claims asserted include common law claims of negligence, intentional trespass, public nuisance, and inverse condemnation. Alaska and Delta have been named as defendants in the lawsuit, likely because they are the two largest carriers operating out of Sea-Tac, however, it is possible that the plaintiffs could make similar claims against any other airline operating out of Sea-Tac. It is also possible that similar allegations may be asserted against other airports if there are similar pollution and health issues that may be asserted by people living near these airports.

AIRLINE INDUSTRY GROUPS ASK CONGRESS TO CODIFY LAW MAKING FAA THE SOLE REGULATOR OF DRONES AND AIR TAXIS

Recently, airline industry groups reasserted a request that the U.S. Congress codify laws to ensure that the FAA is the sole regulator of all issues related to aviation safety and operations in the National Airspace System (“NAS”), and of drone and air taxi operations, following increased instances of U.S. states and localities trying to regulate aircraft operations as well as expand labor protections for flight crews. The airline industry groups are concerned that if states and localities are allowed to regulate certain aircraft operations, such as where or how long a drone may operate, it would create an inconsistent application of the laws. The airline industry has argued that exclusive federal control over safety and operations in the NAS should be expressly codified so that it would preempt any state or local laws on the same issues.

FAA ISSUES NOTICE ON ITS CIVIL AVIATION NOISE POLICY; NOTICE OF PUBLIC MEETING

On May 1, 2023, FAA issued a Notice requesting comments on four key considerations of its civil aviation noise policy. As background, FAA’s civil aviation noise policy sets forth how FAA analyzes, explains, and publicly presents changes in noise exposure from aviation activity for recreational and commercial fixed wing aircraft, helicopters, commercial space transportation vehicles, unmanned aircraft systems, and emerging technology vehicles. FAA is reviewing four key considerations relevant to the policy including: (1) determining how changes to its policy could better affect its decision-making process regarding how noise may impact things like community annoyance, economic impacts, and certain types of adverse health effects related to aviation noise exposure, (2) FAA’s standard noise metric that describes exposure to aircraft noise, and potential revisions to the choice of standard metric(s), (3) FAA’s definition of the threshold of significant noise exposure determine if the threshold is appropriate or should be revised, and (4) consideration of the level of aircraft noise exposure below which land uses are considered “normally compatible” with airport operations and noise mitigation measures to address adverse noise exposure in areas considered to be “normally compatible” with airport operations. FAA is also looking to find ways to improve how it analyzes, explains, and presents changes in exposure to civil aviation noise.

Interested parties are encouraged to submit comments on the four key considerations of FAA’s noise policy until July 31, 2023, in the relevant docket: FAA–2023–0855.

GAO ISSUES REPORT ON U.S. FLIGHT DELAYS, CANCELLATIONS, AND DOT EFFORTS TO ADDRESS THEM

On April 28, 2023, the U.S. Government Accountability Office (“GAO”) issued a report on the causes of U.S. flight delays and cancellations. The report comes in response to lingering questions on airline scheduling practices and the effect of the COVID-19 pandemic on the airline industry. GAO investigated U.S. flight delays and cancellations by examining three main topics: (1) trends in and causes of flight disruptions before and after the pandemic, (2) challenges airlines faced managing and responding to flight disruptions, and (3) FAA and DOT actions to help address these challenges. In the report, GAO noted that cancellation rates in the last six months of 2021 outpaced 2018 and 2019 rates, despite the lower percentage of total flights operated, and that increased cancellation rates continued through April 2022. The major factors

that caused cancellations were found to be “within the airlines’ control” and included issues like aircraft maintenance and/or short staffing. The report also noted that “sustained cancellations,” which are defined as a series of days where an airline cancelled a large percentage of its flights, lasted longer, and became more common as travel demand increased in late 2021 and early 2022 when the pandemic recovery began. In contrast, flight delay rates remained at relatively the same rate as reported for pre-pandemic 2018 and 2019, though, GAO did report that airline-caused delays were the leading cause of delays when the pandemic began in March 2020 and continued to be the leading cause of delays throughout 2021 as air traffic began returning to normal levels. GAO noted that based on its estimate, flight cancellations between July 2021 and April 2022 potentially affected over 15 million passengers, and flight delays during the same timeframe potentially affected over 116 million passengers.

DOT ISSUES RECOMMENDATIONS TO FAA ON RISK ASSESSMENTS AND CERTIFICATION PROCESSES

On April 26, 2023, DOT’s Office of Inspector General (“OIG”) issued a report including recommendations for the FAA to improve its risk assessments, and the oversight of and certification processes for civilian aircraft manufactured and operated in the U.S. The report was requested by DOT’s former Secretary and the U.S. Congress in response to two Boeing 737 MAX fatal accidents that occurred in 2018 and 2019. In the report, OIG noted that it found that FAA took steps to follow its post-event risk assessment processes following the accidents, but that it could still improve these processes. Based on this, OIG suggested seven recommendations for improvement, including but not limited to: (1) documenting the process by which key safety decisions, such as a potential grounding of an aircraft fleet, are made when the Agency identifies that urgent action is necessary, (2) revising the Transport Airplane Risk Assessment Methodology (“TARAM”) handbook to incorporate current safety data, including available international data when appropriate, (3) formalizing training requirements for engineers responsible for completing TARAM analysis and managers responsible for reviewing the analysis, and (4) incorporating integrated System Safety Assessments into regulations or FAA guidance for future transport category airplane certification projects.