

Aviation Regulatory Update

By Evelyn Sahr, Drew Derco, and Jay Julien

DOT PUBLISHES TWO NEW RULEMAKINGS IN FEDERAL REGISTER; EFFECTIVE DATES BELOW

On Friday, May 17, 2024, the President signed into law the Federal Aviation Administration (“FAA”) Reauthorization Act of 2024 (“the Act”). The Act [reauthorized the FAA](#) for the next five years and makes significant investment in air travel infrastructure including \$105 billion in funding for the FAA and \$738 million for the NTSB. Among the initiatives include:

- The controversial 1,500-hour rule will remain in effect which requires commercial pilots in training to record 1,500 hours in actual cockpit in order to become certified. The rule is seen by critics as unnecessary, and causative of pilot shortages.
- Commercial airlines would be required to maintain cockpit voice devices able to record 25 hours of data, up from the current 2 hours.
- Requires the FAA to study and address Air Traffic Controller shortages.
- Sets refund standards including automatic refunds when certain thresholds are met and prohibits airlines from charging additional fees to families that want to sit together onboard.
- Increased legal protections for gate and check-in agents.

Another item of interest is a five (5) year authorization of the National Transportation Safety Board (“NTSB”) which is responsible for investigating civil aviation accidents. The Act includes several significant modifications to existing family assistance legislation under 49 U.S. Code §1136, amended under § 1215 (Improving Delivery of Family Assistance) and is intended to enhance the support provided to passengers and their families involved in aircraft accidents. Among the more significant changes to the Act include:

1. Expansion of care to include psychological and family support services.
2. Emphasis on maintaining post-accident communication with both passengers and their families.
3. Greater protections from the release of passenger or family information.
4. Agencies must receive express authority to release information derived from passenger lists, and organizations and services must provide regular updates and support rather than periodic ones.

The NTSB’s Transportation Disaster Assistance Division [will discuss these changes](#) on June 13, 2024.

U.S. AIRLINES SUE DOT OVER FEE TRANSPARENCY RULE

Airlines For America (“A4A”) and several airlines including Alaska Airlines, American Airlines, Delta Air Lines, Hawaiian Airlines, JetBlue Airways, and United Airlines, filed a Petition to the Fifth Circuit Court of Appeals in Louisiana over the Department of Transportation’s (“DOT” or “the Department”) final rule that requires upfront disclosures of fees. The rule requires airlines and ticket agents to disclose service fees and any ancillary fees alongside the full airfare and is intended to help consumer avoid hidden fees. A4A argues that the rule violates several statutes - including 49 U.S.C. § 41712 (unfair and deceptive practices and unfair methods of competition), exceeds the Department's authority, and is “arbitrary, capricious, an abuse of discretion, and otherwise contrary to law.” A4A requests the Court to vacate and set aside the final rule. The Department has indicated that it is prepared to oppose the petition and “will vigorously defend [the] rule protecting people from hidden junk fees and ensuring travelers can see the full price of a flight before they purchase a ticket.” The case will be heard by the 5th U.S. Circuit Court of Appeals (New Orleans).

TSA PLANS TO RELEASE DRAFT ON TIGHTER SECURITY FOR CERTAIN PUBLIC CHARTERS

The Transportation Security Administration (“TSA”) is working on a plan to enhance security measures within terminals that serve certain public charter flights. Currently, charters have their own screening methods and do not have to adhere to the same security screenings performed by TSA for passengers on scheduled operations. Some commercial airlines have criticized charter screenings as insufficient and unfair, asserting that the lesser security requirements give charter operators a competitive advantage. Although some charter operators do follow stricter security standards, TSA is considering imposing stricter security measures across all charter operators and is seeking input from various stakeholders, including the FAA, to help weigh vulnerabilities against the costs of implementation. The draft plan will be shared within the industry for feedback before finalization, but this process is not open to the public due to security concerns.

DOT EXTENDS COMMENT PERIOD FOR SIGNIFICANT NPRM

On May 1, 2024, DOT [extended the comment period](#) regarding the Ensuring Safe Accommodations for Air Travelers with Disabilities Using Wheelchairs NPRM through June 12, 2024. This is an important and possibly onerous proposed rule that may significantly increase the obligations of airlines. Some of the more significant considerations include:

- DOT is reviewing what it means for wheelchair assistance to be provided “promptly.”
- DOT is considering making it a violation of Part 382 any time a passenger’s wheelchair is lost, damaged, delayed, or stolen. This would automatically subject airlines to liability and potentially to DOT fines of more than \$40,000 per violation, regardless of when the damage, delay, etc. occurred or who caused it.
- DOT is seeking to require a significant amount of increased training, including “hands on” training for all contractors and staff.

We can assist in preparing a comment on your behalf which may be submitted anonymously if desired.

VOLARIS ENTERS CONSENT ORDER FOR TARMAC DELAYS

On May 15, 2024, Volaris entered into a Consent Order with DOT in regard to tarmac delays. The Consent Order stated that on August 17, 2021, Volaris flight 5892 from Guadalajara to Dallas Fort Worth was diverted to George Bush Intercontinental Airport (IAH), resulting in a tarmac delay of 5 hours and 32 minutes without allowing passengers to deplane. On July 23, 2022, Volaris flight 826 from Mexico City to Chicago O'Hare was diverted to St. Louis Lambert Airport, resulting in a tarmac delay of 4 hours and 35 minutes without allowing passengers to deplane and failing to

provide food after two hours. Pursuant to 14 CFR 259.4(a), foreign air carriers with at least one aircraft seating 30 or more passengers must implement and follow contingency plans for tarmac delays at various U.S. airports. For international flights, carriers must allow passengers to deplane before a four-hour tarmac delay unless there are safety, security, or airport operations exceptions (14 CFR 259.4(c)(2)). Additionally, carriers must provide food and potable water within two hours of a tarmac delay's start unless prevented by safety or security considerations (14 CFR 259.4(c)(4)). Failing to adhere to these plans constitutes a violation of 49 U.S.C. § 41712, prohibiting unfair or deceptive practices.

In the Order, the Department found that Volaris had failed to adhere to its contingency plan for lengthy tarmac delays by not deplaning passengers timely and not providing food within two hours during tarmac delays. The order directs Volaris to cease and desist from future violations and imposes a \$300,000 civil penalty. Volaris acknowledged its responsibility but cited uncontrollable circumstances for the delays, such as severe weather and ground congestion for flight 5892 and cited service provider delays for flight 826. Volaris argued that it had acted in the passengers' best interests but ultimately agreed to a settlement as to avoid litigation.

DEPARTMENT'S RESPONSES TO QUESTIONS REGARDING NPRM: ENSURING SAFE ACCOMMODATIONS FOR AIR TRAVELERS WITH DISABILITIES USING WHEELCHAIRS

On May 1, the Department released its answers to five (5) questions from A4A, the International Air Transport Association, the National Air Carrier Association, the Regional Airline Association, and the Airline Service Providers Association regarding the Department's Notice Of Proposed Rulemaking ("NPRM"): Ensuring Safe Accommodations For Air Travelers With Disabilities Using Wheelchairs.

Question 1: When must an airline provide a choice between picking up the wheelchair or scooter at the passenger's final destination airport or having the wheelchair or scooter delivered?

Answer 1: When an airline fails to transport the passenger's wheelchair or scooter on the passenger's same flight for any reason and the passenger arrives before the device.

Question 2: What does the Department mean by a "controlled/simulated" environment for hands-on training?

Answer 2: In-person training (excluding virtual or online training) that offers a safe and controlled environment by the trainer where employees can learn and practice real-life scenarios without the possibility of real-life consequences to passengers with disabilities

Question 3: Which party elects whether a replacement wheelchair or scooter is of equal or greater function?

Answer 3: The NPRM does not specify which party would elect whether a replacement device.

Question 4: What training programs and related policies and procedures does DOT consider will have "a significant impact on assistance provided to individuals with disabilities"?

Answer 4: Airlines should consult with disability rights organizations if changing or enhancing their disability training program.

Question 5: What is the Department's basis for amendments to Complaint Resolution Officials' ("CRO") training? Also, what is the Department's basis for considering creating wheelchair expert and transfer expert roles over and above the requirement for a CRO?

Answer 5: Safe and proper transfer assistance and wheelchair handling can be complex and requires the handler to work with a variety of features and wheelchair types. Therefore, the Department sees value in designating transfer experts who could be consulted in the event that airline personnel have questions about the transfer process.

SOWUNMI V. AMERICAN AIRLINES, INC.

In May of 2022, a passenger on a rescheduled flight from Jamaica to Philadelphia tested positive for COVID-19 five (5) days after the flight. The passenger initiated an action against American Airlines under the Montreal Convention, seeking damages and declaratory relief related to her COVID-19 infection and the overnight delay of her flight. The airline had cancelled the original flight and rebooked the passenger for the following day. At this time, the U.S. government required all airline passengers on international flights to show proof of a negative COVID-19 test, or proof of recovery from COVID-19 in the last 90 days, in order to board a flight. The passenger cleared two tests in the days leading up to the rescheduled flight, but on the day of the rescheduled flight, the airline allegedly failed to ask passengers for the required COVID-19 documentation. The passenger learned that at least three passengers had tested positive the day before for COVID-19. She would later experience severe symptoms, including damage to her olfactory epithelium and bulb, as well as to her blood vessels and brain cells and subsequently initiated this action in state court. The case was removed to federal court in the Eastern District of Pennsylvania and before this Court was the airlines Motion to Dismiss. The Court held that at this time, the plaintiff had pled sufficient facts showing a causal link between her wrongful exposure to COVID-19 and her injuries, and therefore the Court denied the airline's Motion to Dismiss.

USDA ADDS SEVEN COUNTRIES TO SCREWORM AFFLICTED LIST

On May 23, 2024 the United States Department of Agriculture ("USDA"), Animal and Plant Health Inspection Service ("APHIS") published an advisory adding Aruba, Eritrea, Ethiopia, Hong Kong, Iran, Timor-Leste, and Yemen to its [list of regions considered affected by screwworm](#). Screwworm are a parasite that kill livestock and wildlife and can infest humans. Pursuant to 9 CFR Part 93 which prevents the importation of certain animals into the U.S. to prevent the spread of communicable diseases and pests - Horses, ruminants, swine, and dogs from a region with screwworm may only be imported to the U.S. if they are inspected and, if necessary, treated for screwworm using the following procedures:

- a) Horses § 93.308(a)(3): Predeparture and post-arrival inspection and treatment including a seven (7) day quarantine after arrival, and examination by a veterinarian before release from quarantine.
- b) Swine/ruminants §§ 93.405(a)(3) and 93.505(b): Predeparture and post-arrival inspection and treatment.
- c) Dogs § 93.600: Predeparture inspection and if necessary, treatment prior to importation.