

Aviation Regulatory Update

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ACPAC ISSUES NOTICE OF PUBLIC MEETING ON DOT'S NPRMS ON ANCILLARY SERVICE FEES AND AIRLINE TICKET REFUNDS

On November 10, 2022, the Aviation Consumer Protection Advisory Committee ("ACPAC") published a Notice announcing a two-day public meeting, to be held virtually on December 8 and 9, 2022. The schedule for the first day includes a general discussion of the U.S. Department of Transportation's ("DOT") notice of proposed rulemaking on Enhancing Transparency of Airline Ancillary Service Fees, which DOT is currently accepting comments on until December 21, 2022. The second day's topics will include information on how consumers have been adversely affected by airline delays or cancellations, the availability of airline flight information, and DOT's NPRM on Airline Ticket Refunds and Consumer Protections.

The virtual meetings, which are open to the public, will be held on Thursday, December 8, 2022, from 10:00 a.m. to 5:30 p.m., and on Friday, December 9, 2022, from 10:00 a.m. to 5:30 p.m. EST.

UPDATE: TSA ISSUES EMERGENCY AMENDMENT/SECURITY DIRECTIVE EXTENDING VACCINATION AND ATTESTATION REQUIREMENTS FOR NON-U.S. CITIZENS

The U.S. Transportation Security Administration ("TSA") issued an [emergency amendment](#) and [security directive](#) in early November, both extending the requirement that non-U.S. citizens traveling to the U.S. by air be fully vaccinated and requiring an attestation prior to boarding flights bound for the U.S. The vaccination and attestation requirements for non-U.S. citizens will remain in effect until at least **January 8, 2023**.

UPDATE: DOT EXTENDS COMMENT PERIOD FOR AIRLINE TICKET REFUNDS NPRM

On November 14, 2022, DOT extended the comment period for interested persons and entities to submit comments on its proposed rule on Airline Ticket Refunds and Consumer Protections. The new comment period deadline is **December 16, 2022**.

FAA ISSUES NEW RULES TO EXPAND COMMERCIAL AIR TAXI OPERATIONS

On November 21, 2022, the Federal Aviation Administration ("FAA") announced its plans to propose a new series of rules to amend its regulations governing Part 121, Part 135 and Part 91 commercial operations to help advance commercial air taxi operations by 2025. One such amendment is a proposal to update its air carrier definition to add "powered-lift" operations to the regulations that cover other commercial operations like airlines, charters, and air tours. This is intended to allow operators to use powered-lift aircraft such as battery-powered aircraft that can take off and land vertically for operations such as the ferry of travelers to airports or on short trips between cities to beat traffic. FAA also noted that it is planning to propose a powered-lift operations rule for certifying pilots and

operating requirements to fly electric vertical takeoff and landing aircraft (“eVTOLs”) and is developing a framework for the certification of eVTOL pilots and the creation of powered-lift/eVTOL related operations specifications.

This comes shortly after FAA issued new airworthiness criteria earlier in the month for the certification of air-taxi startup, Joby Aviation and its Model JAS4-1 eVTOL. Joby stated that it hopes to begin commercial eVTOL passenger air taxi services in 2025 through a partnership with Delta Air Lines that would offer commercial passenger air taxi services between airports in New York and Los Angeles, assuming it can obtain the required FAA approvals.

FAA LETTER DETAILS RENEWED CONCERNS OVER 5G SERVICE; AVIATION GROUPS CALL FOR LONG-TERM MITIGATION STRATEGY THROUGH CODIFIED REGULATIONS

The FAA recently indicated new concerns regarding the launch of 5G services across the U.S. In a letter dated October 21, the FAA asked the National Telecommunications and Information Administration (“NTIA”) and the Federal Communications Commission (“FCC”) to force certain wireless providers to make more concessions citing aviation safety concerns. Specifically, FAA noted that it obtained data indicating that aviation safety could likely be comprised if the U.S. government does not codify restrictions on operating limits related to 5G C-Band services. Without such restrictions, FAA stated it would have to take “immediate steps” to maintain aviation safety, which could likely result in flight disruptions across the U.S. Senior leaders at FAA and the U.S. Commerce Department’s telecommunications unit met to further discuss FAA’s aviation safety concerns regarding further 5G C-Band deployment in an effort to try to come to a resolution on the issue. While no official concessions or agreements were made, the FAA has apparently suggested that the U.S. government consider temporarily prohibiting the launch of some additional services, and instituting power limits until at least January 2024 to ensure that FAA and air carriers have additional time to ensure that aircraft and onboard instruments are protected and will not face interference from the deployment of additional 5G services.

Following this, on November 15, 2022, a number of airline groups sent a letter to DOT, FAA and the NTIA to request more time to upgrade radar altimeters onboard aircraft since some carriers have indicated that certain aircraft need to have retrofitted altimeters, which will not be done by the end of the year as previously expected. The airlines groups also requested that a long-term mitigation strategy be implemented and codified through regulations to better solve the issues that have been ongoing in regard to the implementation of new 5G services.

FAA and telecom companies AT&T and Verizon came to an agreement earlier this year in which the two companies agreed to certain voluntary concessions and a phased approach to launching 5G service around many low-visibility and high-volume airports in the U.S. to help ensure aviation safety by mitigating the potential risk of 5G signals impacting airplane equipment. The limited deployment of 5G services by the two companies was also intended to allow airlines time to upgrade aircraft to avoid potentially problematic signal interference.

GAO ISSUES UPDATED REPORT ON THE BARRIERS FACING PASSENGERS WITH DISABILITIES

On November 17, 2022, the U.S. Government Accountability Office (“GAO”) issued a report “[Passengers with Disabilities: Barriers to Accessible Travel Remain](#)” on GAO’s findings related to the barriers that passengers with disabilities face during air travel and steps that certain airports and airlines, as well as DOT have taken to reduce these barriers.

In the new report, GAO largely highlights its [past report](#) issued in April 2021 while providing some additional findings on the barriers that passengers with disabilities face in air travel. For example, GAO notes that it made three main findings, (1) large, complex airports can affect accessibility (since it can be difficult for passengers with disabilities

to navigate their layouts and the long distances between gates, and that essential travel information is not always available in a format accessible to all passengers, among other things), (2) TSA screening practices may subject passengers with disabilities (particularly those in wheelchairs or who have prosthetics) to additional screening more often than other passengers, and (3) that passengers with disabilities often face barriers related to services that airlines are responsible for addressing such as obtaining wheelchair or customer assistance, assistance with accessing onboard lavatories, and proper handling and storage of wheelchairs without damage. The report also details some of the steps that airlines and airports have taken to address barriers and make air travel more accessible, such as by expanding and/or renovating airports to implement improvements designed to comply with the Americans with Disabilities Act and implementing more technology and other solutions to increase accessibility. GAO also reported on steps that DOT and the Federal Aviation Administration (“FAA”) have taken to implement certain accessibility-related provisions of the FAA Reauthorization Act of 2018. This includes DOT’s requirement that airlines report the number of wheelchairs and scooters that were transported and damaged, its rulemaking to harmonize service animal standards, and its study to issue findings to Congress on the aircraft cabin evacuation procedures used by airlines. At the end of its report, GAO restated two of its prior recommended actions to further reduce barriers related to accessibility which are (1) for DOT to provide more transparency into its enforcement of consumer protection issues, and (2) enhancement of TSA’s efforts to protect civil rights in passenger screening.

FAA ANNOUNCES EXTENSION OF AIRCRAFT REGISTRATIONS TO 7 YEARS

On November 16, 2022, the FAA [announced](#) that it will extend the duration of aircraft registration certificates from three (3) years to seven (7) years unless an event or circumstance requires that a new registration be submitted prior to the expiration date of a certificate. For example, if FAA determines that a holder’s registration information is inaccurate, it may require it to submit new registration forms prior to the stated expiration date of their certificate. All initial certificates of aircraft registration will now expire seven years from the month during which they are issued, and certificates for all current aircraft registered under FAA regulations will be extended to a seven-year duration.

TWO COMPLAINTS FILED AGAINST UNITED AND SOUTHWEST FOR FOOD ALLERGY-RELATED DISABILITY DISCRIMINATION

Two complaints were recently filed with DOT in which passengers alleged disability related discrimination on the part of airlines related to severe food allergies.

On November 1, an unnamed passenger submitted a complaint against United Airlines (“United”) for allegedly being removed from a United flight due to disclosing a food allergy. The complainant alleged that United employees acted in violation of the Air Carrier Access Act (“ACAA”) and the recently published Airlines Passengers with Disabilities Bill of Rights by allegedly berating her, and removing her from a flight from Huntsville, AL to Washington D.C. upon disclosing the fact that she had a severe food allergy to a flight attendant. The complainant alleged that she was ordered off her flight without being offered a seat on another flight or compensation, which forced her to rent a car at her own expense and drive from Huntsville to Washington D.C., since there were no other direct flights to Washington D.C. leaving the same night. Based on this the complainant alleged that she incurred \$1,427.31 in additional travel related expenses but was told by United that she could only be given a partial refund and a small flight credit for future travel, or a small stipend. Eventually the complainant was able to obtain a full refund for her ticket but was allegedly never reimbursed for her travel expenses or given additional information on what safety concerns caused her removal as she requested. In response the complainant filed a complaint with DOT requesting, among other things, reimbursement for additional travel expenses, a statement from United admitting that it discriminated against her in violation of the ACAA, a fine on United according to the ACAA, and mandated training for United employees to ensure that passengers with food allergies are not removed or prevented from traveling on its flights. Following this United filed an answer to the complaint generally denying most of the

allegations made by the complainant and asserting an affirmative defense arguing that having to grant the relief requested by the complainant would result in an undue burden on United. DOT has yet to issue a response or take further action in this case.

Then on November 16, the Allergy & Asthma Network, Asthma and Allergy Foundation of America, Food Allergy & Anaphylaxis Connection Team, and No Nut Traveler, three national non-profit organizations who advocate on behalf of individuals with food allergies, filed a joint complaint against Southwest Airlines for alleged violations of the Air Carrier Access Act and Airline Passengers with Disabilities Bill of Rights. They alleged that Southwest recently changed its policies and now does not allow individuals with food allergies to pre-board and rejects “necessary accommodations.” Some of the arguments alleged in the complaint are that passengers with food allergies qualify as individuals with disabilities under the Air Carrier Access Act and its implementing regulation, 14 CFR Part 382, and therefore, should be allowed to pre-board to secure and wipe down their seating area. The complainants also argue that under Part 382 rules, airlines are required to allow such passengers to pre-board if they self-identify at the gate and must grant accommodations if requested, such as requests for additional time or assistance to board or requests to stow accessibility equipment. The complainants’ claims in this case therefore center on the question of whether an allergy can be considered to be a disability. DOT has yet to issue a response or take further action in this case as well.

These cases present interesting issues because the topic of food allergies was discussed when DOT was implementing Part 382 but ultimately, the Department decided not to generally regulate allergy issues by making, for instance, carriers operate nut-free flights or serve nut-free food. Nevertheless, DOT has indicated in prior guidance that passengers with severe allergies can be considered passengers with disabilities under Part 382, and therefore such passengers should be allowed to request accommodations prior to arriving at the airport or at the gate. Based on this, carriers can take certain actions such as allowing passengers to pre-board and wipe down their seating area.

DOT PROPOSES NEW SIGNIFICANT CIVIL PENALTIES AGAINST SIX AIRLINES FOR DELAYS IN PROVIDING REFUNDS

On November 14, 2022, DOT issued a press release announcing its decision to assess over \$7.25 million in civil penalties against six airlines for alleged “extreme delays in providing refunds” to passengers for cancelled or significantly delayed flights. The airlines that have been fined and the amounts of civil penalties assessed are as follows:

- Frontier – \$222 million in required refunds paid and a \$2.2 million penalty
- Air India – \$121.5 million in required refunds paid and a \$1.4 million penalty
- TAP Portugal – \$126.5 million in required refunds paid and a \$1.1 million penalty
- Aeroméxico – \$13.6 million in required refunds paid and a \$900,000 penalty
- EI AI – \$61.9 million in required refunds paid and a \$900,000 penalty
- Avianca – \$76.8 million in required refunds paid and a \$750,000 penalty

DOT noted that the fines imposed are part of its ongoing efforts to make sure that American passengers receive refunds when they are due given the large number of complaints the Department received since the beginning of the COVID-19 pandemic related to refunds for significantly changed or cancelled flights. DOT has also notably decided to impose the civil penalties on the six airlines despite them having already paid back more than \$600 million in refunds to passengers. To date, DOT has assessed more than \$8 million in civil penalties in 2022, which

is the largest number of penalties ever issued by DOT in a single year. DOT also noted that it expects to issue additional civil penalties for consumer protection violations before the end of the year.

DOT ISSUES \$200,000 PENALTY AGAINST ETIHAD AIRWAYS FOR ALLEGED VIOLATIONS OF 14 CFR PART 382

On November 4, 2022, DOT issued a consent order assessing \$200,000 in civil penalties against Etihad Airways (“Etihad”) for alleged violations of the requirements of 14 CFR Part 382 related to handling and reporting of disability-related complaints.

As background, Part 382, imposes several complaint response, reporting, and training requirements on U.S. and foreign carriers that operate passenger service to/from the U.S. For example, carriers are required to provide a written response to any written disability-related complaint that alleges a violation of Part 382 within 30 days of receiving the complaint, and ensure that such responses specifically discuss the complaint, provide an admission or denial regarding whether the carrier believes a violation of Part 382 took place, summarize the facts that led to the carrier’s conclusion, and advise the complainant of their right to refer the complaint to DOT for an official investigation. Under the rules carriers are also required to submit an annual report detailing all of the disability-related complaints they received for the preceding calendar year, and ensure that employees and contractors are trained on all rule requirements.

In Etihad’s case, DOT’s Office of Aviation Consumer Protection (“OACP”) investigated the carrier’s handling of disability-related complaints and allegedly found that between 2017 and 2020, Etihad’s responses to such complaints were not compliant with the requirements of Part 382 as they failed to admit or deny whether a violation had occurred, did not summarize the facts, and did not properly advise complainants of their right to refer complaints to DOT for investigation. OACP also alleged that in some cases, Etihad’s responses pre-dated their investigations meaning that Etihad was allegedly preparing some responses before it even began an investigation into the relevant complaint. Etihad also allegedly failed to properly categorize passenger complaints as being disability-related complaints, which resulted in Etihad handling its complaints in a manner that was inconsistent with the regulations. OACP also alleged that between 2014 and 2020, Etihad had not accurately reported the number of disability-related complaints it received. Lastly, OACP alleged that Etihad’s alleged violations of Part 382 requirements showed that it was not properly training its personnel to proficiency on how to appropriately respond to complaints or on how to report complaints.

The implementation of the penalty on Etihad serves as a further reminder of how seriously DOT takes violations of Part 382 and illustrates the importance of training on Part 382 as well as keeping up with the relevant complaint response and reporting requirements under the rule.