Aviation Regulatory Update

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COMMENT PERIOD NOW OPEN FOR DOT NPRM ON ENHANCING TRANSPARENCY OF AIRLINE ANCILLARY SERVICE FEES

On October 20, 2022, DOT officially published the above referenced NPRM. The deadline to file comments is **December 19, 2022**.

DOT announced the proposed rule in September, noting its intention to increase transparency for airline ancillary service fees. If promulgated, the rule would require U.S. and foreign air carriers to clearly display passenger-specific or itinerary-specific bag fees, change fees, and cancellation fees wherever fare and schedule information is shown to consumers for flights to, from or within the U.S., and disclose any fees charged for seating children aged 13 or younger with an accompanying adult. The rule would also require that airlines and ticket agents allow passengers travelling with young children to purchase adjacent seats with their airline tickets at all points of sale.

If you are interested in submitting comments on the proposed rule, please feel free to contact us.

U.S. TO MAINTAIN VACCINATION REQUIREMENT FOR ENTRY OF NON-U.S. CITIZENS

Based on recent guidance it seems likely that the current requirement that non-U.S. citizens be fully vaccinated in order to enter the U.S. by air will be maintained for at least an additional 180 days (or through the end of February 2023).

As background, TSA issued a security directive to implement the vaccination requirement for non-U.S. citizens following the Biden administration's October 2021 Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic. At the same time, the U.S. Centers for Disease Control and Prevention ("CDC") also issued an Order instituting the vaccination requirement, which requires that all non-U.S. citizens traveling to the U.S. show proof of being fully vaccinated against COVID-19 in order to travel to the U.S. by air. Notably, the most recent CDC guidance still indicates that a person is considered "fully vaccinated" two weeks after they receive a dose of an accepted single-dose vaccine or the second dose of an accepted 2-dose series vaccine, meaning that receiving a booster is still not required in order to be considered fully vaccinated. Both TSA's directive and CDC's Order were expected to expire on November 8, 2022, but CDC has indicated that its Order will remain in place and effective at least temporarily. It is also important to note that the attestation required under CDC's Order will also be maintained as a requirement until the current vaccination requirement is rescinded.

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U.S. PUBLISHES EXECUTIVE ORDER ON TRANS-ATLANTIC DATA TRANSFERS – EU-U.S. DATA PRIVACY FRAMEWORK

On October 7, 2022, the Biden administration issued a long-awaited executive order on transatlantic data transfers that includes expanded protections for U.S. and European citizens and new guidance on how U.S. security agencies can access and use an individual's data.

The executive order lays out steps the U.S. will take to implement U.S. commitments under the European Union-U.S. Data Privacy Framework ("EU-U.S. DPF") to bolster privacy and civil liberties safeguards during U.S. intelligence-gathering activities. The commitments included in the EU-U.S. DPF were originally announced by President Biden and European Commission President von der Leyen in March 2022 following surveillance concerns and the EU Court of Justice's decision to strike down the previous data privacy framework known as the Privacy Shield. The new EU-U.S. DPF outlines how U.S. intelligence officials can conduct intelligence activities and make transfers of information that involve personal data from the EU to the U.S. The EU-U.S. DPF also outlines what is "necessary and appropriate" for federal agencies to collect during their surveillance activities and details how individual data can be used for national security purposes on both sides of the Atlantic. Also, the EU-U.S. DPF will require that a multilayer redress mechanism be established so that individuals in the EU can submit complaints or grievances if they believe their personal data was collected or handled improperly by intelligence officials in violation of U.S. law.

The executive order on the EU-U.S. DPF comes in response to concerns regarding surveillance practices in the U.S. and the U.S. and Brussels' agreement to establish a revamped Privacy Shield agreement to allow for personal data such as payroll information, family pictures, etc. to be sent across the Atlantic.

CFIUS RELEASES FIRST-EVER ENFORCEMENT AND PENALTY GUIDELINES

On October 20, 2022, the U.S. Department of the Treasury's Committee on Foreign Investment in the United States ("CFIUS") issued the agency's first-ever Enforcement and Penalty Guidelines to provide the public with more detailed information on how CFIUS assesses violations.

One of CFIUS' main responsibilities is to determine potential risks and violations of U.S. law and regulations as it relates to certain foreign investments in U.S. companies and real estate, however it was recently given expanded authority to protect national security. Under the new Guidelines, CFIUS identified three types of violations that may trigger penalties, (1) failure to notify CFIUS of a transaction that requires a CFIUS declaration or notice, or timely submit a mandatory declaration or notice, (2) failure to comply with CFIUS Mitigation, which are modifications CFIUS may require for a proposed deal in order to prevent or reduce national security threats, and (3) making material misstatements or omissions, or otherwise misleading CFIUS, either actively or through omission, in connection with CFIUS assessments, reviews, investigations, or CFIUS Mitigation. CFIUS noted that not all violations will result in penalties, but that penalties will nevertheless be considered by weighing aggravating and mitigating factors to determine the appropriate enforcement response on a case-by-case basis. Some examples CFIUS gave of aggravating and mitigating factors include the impact of enforcement action on protecting U.S. national security and ensuring parties involved in violations are held accountable, whether parties involved in a violation submit a self-disclosure of the violation and cooperate in CFIUS' investigation(s), and a party's record of compliance with CFIUS Mitigation, and general compliance with applicable legal obligations.

Lastly, it is important to note that while CFIUS' publishing of the Guidelines shows its efforts to make the CFIUS enforcement process more transparent, it also seems to indicate that going forward CFIUS plans to pursue enforcement action more vigorously.

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SEC FINES ORACLE $23 MILLION TO RESOLVE SLUSH FUNDS FCPA CLAIMS

On September 27, 2022, the U.S. Securities and Exchange Commission ("SEC") announced via press release that it has reached a settlement with Oracle Corporation ("Oracle") under which Oracle agreed to pay $23 million in fines to resolve claims that its subsidiaries in Turkey, India, and the United Arab Emirates ("UAE") allegedly created and used slush funds to bribe foreign officials in violation of the U.S. Foreign Corrupt Practices Act.

SEC said that the alleged slush fund schemes took place between 2009 and 2019 during which time Oracle used direct and indirect sales models. While SEC said that it believed that Oracle did use the indirect sales model for some legitimate business purposes, it alleged that Oracle also used the indirect sales model to make transactions through value-added distributors and value-added resellers ultimately leading to the creation of improper slush funds. SEC also alleged that Oracle subsidiaries had been using company discount processes to create the slush funds. For example, for over a decade Oracle Turkey allegedly used "excessive discounts" and "sham marketing reimbursements" to create slush funds and then used the slush funds to pay for travel and accommodation expenses for customers and foreign officials to attend events in the U.S. and Turkey. SEC also noted that an Oracle Turkey sales manager allegedly bribed Turkish officials with a week-long paid trip to California in May 2018 while Oracle Turkey was bidding on a contract with Turkey's Ministry of Interior and that the trip was allegedly likely to have been paid for with slush fund money. Coincidentally, Oracle Turkey ended up winning a large order project awarded by the Turkish Ministry in May 2018. SEC also alleged that similar schemes were conducted by Oracle employees in India and the UAE in relation to a deal with the Indian Ministry of Railways and the use of alleged slush fund money to pay bribes to UAE government officials in exchange for business contracts awarded in 2018 and 2019.

U.S. DISTRICT COURT ISSUES RULING IN FAVOR OF UNITED IN RACIAL DISCRIMINATION CASE

On September 30, 2022, the U.S. District Court for the District of New Jersey issued a decision in a case brought against United Airlines by two passengers alleging unlawful and discriminatory treatment. The plaintiffs, an Asian American woman and her husband, a Black man of Jamaican descent allegedly were permanently removed from their Newark to Miami flight following an on-board incident involving a change in seats with a white passenger. Following the incident, the plaintiffs were confronted by an air marshal, a gate manager, and a Port Authority officer. The officer allegedly ordered the plaintiffs to deboard while threatening to arrest them and/or ban them from flying out of EWR airport in the future. The plaintiffs also alleged that following their disembarkment, they were surrounded by several armed officers. The plaintiffs allegedly were then informed that the pilot had decided to permanently remove them from the flight to appease the white passenger and that they would need to book another flight. United sent an apology to the plaintiffs nearly a month after the incident and offered to compensate them, but the plaintiffs declined and filed the instant action.

The plaintiffs asserted 8 total claims for: (1) racial discrimination in violation of 42 U.S.C. § 1981; (2) discrimination in violation of the Federal Aviation Act (the "FAA Act"); (3) false imprisonment; (4) intentional infliction of emotional distress; (5) negligence; (6) negligent hiring, training, supervision, and retention; (7) race discrimination in violation of the NJLAD; and (8) a claim for equitable relief under the NJLAD. In response, United made a motion to dismiss the plaintiffs' claims arguing that claims 1, 7 and 8 failed because the plaintiffs did not allege a discrimination claim under 42 U.S.C. § 1981 or the NJLAD, that the FAA Act's discrimination provision provides no private right of action (to which the plaintiffs ultimately agreed), and that counts 3, 5 and 6 should be dismissed because they were preempted by the NJLAD or if not preempted, for failure to state a valid claim.

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The Court generally agreed with United's arguments, finding that the plaintiffs had not presented any facts showing that discrimination on the part of United had occurred and resulted in their removal. The Court pointed out that the plaintiffs were ultimately removed based on the pilot's decision to ban them from the flight following the incident on board, but that no facts were alleged to suggest that the pilot knew the plaintiffs' races at the time he made the decision. On the plaintiffs' common law claims (i.e., the false imprisonment, intentional infliction of emotional distress, general negligence, and negligence in hiring, training, supervision, and retention claims), the Court also found in favor of United, stating that the plaintiffs had not plead enough facts to support their claims that United employees were the ones who falsely imprisoned them or inflicted intentional emotional distress. Likewise, the Court also reasoned that the plaintiffs had not shown that United owed a duty of care to protect them from the actions of outside third parties, meaning their negligence claim was unsupported, and that the plaintiffs also had not shown a lack of training on the part of United, thus undercutting their negligent training claim.

The plaintiffs have been granted leave to file an amended complaint within 30 days, but no further action has been taken.

CBP ISSUES FINAL RULES TO ELIMINATE CUSTOMS BROKER DISTRICT PERMIT FEE AND MODERNIZE ITS CUSTOMS BROKER REGULATIONS

On October 18, 2022, U.S. Customs and Border Protection ("CBP") published two final rules to amend CBP regulations to eliminate customs broker district permit fees and modernize CBP's Customs Broker Regulations. The new rules will modernize operations by instituting changes to broker fees and expanding the forms of accepted payment to include electronic options. CBP also plans to update and modernize broker reporting and the Automated Commercial Environment capabilities in the broker account portal to align with the new regulations. CBP also noted that to recover a portion of the costs of licensing, it will raise customs broker license application fees for all applicants.

Both final rules will go into effect on **December 19, 2022**.

ECKERT SEAMANS ATTORNEYS AT LAW

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@eckertsemans.com or any other attorney at Eckert Seamans with whom you have been working.

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