

Aviation Regulatory Update

By Evelyn Sahr, Drew Derco, David Rockman, Jay Julien and Amanda Geary

AIR TRAVEL CONSUMER REPORT: JUNE 2023 AND 2ND QUARTER 2023 NUMBERS

DOT [released its Air Travel Consumer Report](#) (ATCR) on airline operational data compiled for the month of June 2023 and the first six months of 2023 for on-time performance, mishandled baggage, mishandled wheelchairs and scooters, and second quarter oversales. For the first six months of 2023, 1.6% of flights were canceled, far below the 3.2% cancellation rate for the first six months of last year and the 2.4% cancellation rate for first six months of pre-pandemic 2019. In June 2023, reporting marketing carriers canceled 2.1% of their scheduled domestic flights, higher than the rate 0.6% in May 2023 and lower than 3.1% in June 2022. This year, DOT has already issued the largest fine in the history of the consumer protection office primarily based on complaints received returning more than \$2.5 billion in refunds to travelers. In May, DOT announced plans to launch a new rulemaking that would propose to make passenger compensation and amenities mandatory so that travelers are taken care of when airlines cause flight delays or cancellations, such as staffing issues or mechanical problems.

FAA ISSUES WARNING FOR FAKE CFM ENGINE PARTS

The FAA [issued an alert](#) warning that unapproved parts might be installed in certain General Electric (GE.N) model CF6 jet engines, telling owners to inspect planes or inventories for the parts. The FAA says UK-based AOG Technics sold bushings for GE.N Model CF6 engines without having FAA approval. About 96 engines total are suspected to contain parts with forged documentation, CFM said. The CF6 is used mainly to power cargo planes, including the vast majority of Boeing 767 freighters, as well as the KC-767 tanker operated by Italy and Japan. American Airlines [has become the latest major airline](#) to discover engine parts on its aircraft potentially linked to those with falsified documentation. Several days later, Virgin Australia announced that it had grounded two of its Boeing 737s due to finding fraudulent parts. United Airlines also announced that it had found faulty parts on two of its aircraft.

INCREASING CARE NEEDED FOR ENVIRONMENTAL AND CARBON EMISSIONS REDUCTION CLAIMS

Austrian Airlines became the latest airline defending itself after being charged with making exaggerated environmental claims. A court in Vienna has held that Austrian [made misleading claims](#) about its use of Sustainable Aviation Fuels (SAF). The case against Austrian follows a prominent filing earlier this year against Delta Air Lines in California District Court, alleging Delta falsely misrepresented the environmental impact of its business operations by claiming to be the “first carbon-neutral airline in the world” in advertisements, social media posts, and even on airplane napkins. Delta’s carbon neutral claim is allegedly based on buying carbon credits to fund projects that positively impact the environment to offset its CO2 emissions from its normal operations. The litigation is ongoing. Caution is advisable when making claims or promises to customers and potential customers about environmental commitments and practices. Special care needs to be taken to ensure that advertising claims do not go beyond actual success in reducing emissions as any type of fabrication or exaggeration can result in a lawsuit.

U.S. DEPARTMENT OF TRANSPORTATION ANNOUNCES THAT UNITED AIRLINES WILL IMPLEMENT INDUSTRY-LEADING IMPROVEMENTS FOR PASSENGERS USING WHEELCHAIRS

The Department of Transportation (DOT) [announced](#) that United Airlines will implement industry-leading actions that go above and beyond Federal requirements to improve the air travel experience for passengers who use wheelchairs. This action is part of an [agreement](#) with DOT that follows a lengthy investigation by the Department into a disability-related complaint filed against United by a passenger.

The announcement specifies that United will take the following actions:

- Roll out a flight filter on its booking engine to make it easier for passengers who use wheelchairs to find flights operated by aircraft where their wheelchairs can fit and be safely transported.
- Refund the fare difference for passengers with wheelchairs that use the flight filter when the passenger's preferred flight cannot accommodate their wheelchair and the flight that they travel on with their wheelchair is more expensive.
- Conduct a pilot program to explore whether additional equipment, such as a medical wheelchair or other form of moveable or non-moveable chair, can be utilized to safely accommodate passengers waiting for loaner wheelchairs because of damage or delay to their personal wheelchairs during a flight.
- Provide persons whose wheelchairs were damaged or delayed accommodation options, including United ensuring the timely delivery of the loaner wheelchair to the passenger, as part of the pilot program.
- Leverage the expertise of DOT's Accessible Travel Advisory Board, which includes representatives of the Christopher and Dana Reeve Foundation and United Spinal Association, to determine how to implement the accommodation options in the pilot program. This will include what type of specialized seating equipment should be tested, how and where it will be utilized within the airport, and how best to collect user feedback.
- Seek feedback from each passenger who checks a wheelchair for transport in the aircraft cargo compartment. United will take the feedback into consideration when developing and enhancing its practices and procedures for handling wheelchairs.

US GOVERNMENT INVESTING \$26M TO TACKLE CLOSE CALL INCIDENTS BETWEEN AIRPLANES

[The White House announced](#) that it wants to improve aviation safety across the United States by allocating \$26 million in fresh funding to implement new technology. The funding will first be used to improve air traffic controller situational awareness. The FAA will implement automation systems to alert air traffic controllers when aircraft are approaching the wrong runway. In addition, the FAA will deploy a runway incursion device, commonly used by air traffic controllers for occupied and closed runways, to an additional 72 airports. In the meantime, the FAA will extend its terminal automation systems to an additional 84 airports to prevent incorrect runway landings that can lead to near-miss incidents. These systems will provide controllers with alerts regarding aircraft alignments. In July 2023 alone, there were at least 46 reported close calls.

TSA ISSUES NPRM TO CLARIFY THE USE OF MOBILE IDS AHEAD OF 2025 REAL ID DEADLINE

The U.S. Transportation Security Administration (TSA) issued a [notice of proposed rulemaking](#) that would allow a waiver from some REAL ID rules in order to accept mobile driver's licenses in the future. In the notice of

proposed rulemaking, the [TSA said the move would](#) allow federal agencies to approve mobile forms of identification and also would give states a playbook for acceptable forms of digital IDs without prematurely making investments in technologies that could soon be outdated.

FAA ISSUES NOTICE FOR JFK AND LGA SCHEDULE SUBMISSION WAIVER

The FAA issued two notices for the [W23/24](#) and [S24](#) scheduling seasons that state that the FAA is issuing a limited waiver of minimum slot usage requirements at JFK and LGA, to allow carriers to return up to 10% of slots at each airport. The FAA is making such changes because there has not been a big enough increase in the number of certified controllers at the New York Terminal Radar Approach Control (N90) that would allow the FAA to handle normal traffic levels. Similarly for the same seasons, the FAA is allowing a limited policy for prioritizing returned operations at EWR to allow carriers to return up to 10% of their approved operating timings, for purposes of establishing operational baselines for the next corresponding seasons. In addition, to better align scheduled operations with runway operational capacity, the S24 Schedule Submission Notice announces a new voluntary, targeted hourly scheduling limit at EWR. Based on actual runway operations, the targeted scheduling limit is reduced to 77 operations per hour and 42 operations per half hour. To balance arrivals and departures, the targeted maximum number of scheduled arrivals and departures, respectively, will be 42 in an hour and 23 in a half-hour. Please note that this “voluntary targeted hourly scheduling limit” is not being offered at JFK.

DHS ISSUES RECOMMENDATIONS TO HARMONIZE CYBER INCIDENT REPORTING FOR CRITICAL INFRASTRUCTURE ENTITIES

The Department of Homeland Security (DHS) outlined a series of [actionable recommendations](#) on how the federal government can streamline and harmonize the reporting of cyber incidents to better protect the nation’s critical infrastructure. The recommendations are a requirement of the Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA). Key recommendations include establishing model definitions, timelines, and triggers for reportable cyber incidents; creating a model cyber incident reporting form that federal agencies can adopt; and streamlining the reporting and sharing of information about cyber incidents, including the assessment of a potential single reporting web portal. The CIRCIA includes representation from 33 federal agencies. The report’s recommendations will inform the Cybersecurity and Infrastructure Security Agency’s ongoing rulemaking process to implement landmark cyber incident reporting requirements applicable to covered critical infrastructure entities, as mandated under CIRCIA.

DHS ANNOUNCES NEW POLICIES AND MEASURES PROMOTING RESPONSIBLE USE OF ARTIFICIAL INTELLIGENCE

DHS [announced new policies](#) to ensure its responsible use of artificial intelligence (AI). The policies, developed by the DHS Artificial Intelligence Task Force (AITF), use AI technologies to combat fentanyl trafficking, strengthen supply chain security, counter child sexual exploitation, and protect critical infrastructure. [Policy Statement 139-06 Acquisition and Use of Artificial Intelligence and Machine Learning by DHS Components](#) directs DHS to only acquire and use AI in a manner that is consistent with the Constitution and all other applicable laws and policies. [Directive 026-11, Use of Face Recognition and Face Capture Technologies](#) dictates that all uses of face recognition and face capture technologies be thoroughly tested to ensure there is no unintended bias or disparate impact in accordance with national standards. The Directive establishes a process for Department oversight offices including the Privacy Office, the Office for Civil Rights and Civil Liberties (CRCL), and the Office of the Chief Information Officer, to review all new uses of face recognition and face capture technologies.

COURT DENIES DEFENDANTS’ MOTION FOR SUMMARY JUDGEMENT IN CLASS ACTION ANTITRUST LAWSUIT

The United States District Court of the District of Columbia, [issued an opinion](#) in which it denied the defendants’ Delta Air Lines and United Airlines motion for summary judgement. The action stems from a class action lawsuit brought against American Airlines, Southwest Airlines, Delta Air Lines, and United Airlines alleging that they

conspired with one another to “limit capacity for purposes of increasing airfares.” This allegation, if true, would represent a violation of the Sherman Act. Both American Airlines and Southwest Airlines entered into a settlement agreement with the plaintiffs whereas Delta Air Lines and United Airlines opted to submit a Motion for Summary Judgement. At issue was whether the parallel behavior of the airlines is attributed to an unfair business practice or simply a natural and independent course of business decisions that have led to the same result. Ultimately, the Court denied this Motion, reasoning that the divergence in the expert opinions presented by the parties is indicative of a finding that Summary Judgement would be inappropriate at this time.

NINTH CIRCUIT ISSUES OPINION REVERSING LOWER COURT DECISION AND HOLDS AGAINST THE CITY AND COUNTY OF SAN FRANCISCO

The Ninth Circuit Court of Appeals [reversed and remanded](#) a district court decision that sided with the City and County of San Francisco. The parties to the dispute are the City and County of San Francisco (the City) who own and operate San Francisco International Airport (SFO) and Airlines for America (A4A) who represent airlines that contract with the City to use SFO. During the COVID-19 pandemic, the City enacted the Healthy Airports Ordinance (HAO), a policy similar to the Healthy Terminals Act (“HTA”) codified in New York, requiring airlines who use SFO to provide employees with certain health insurance benefits. Like the HTA, HAO requires employees to either offer qualifying health plan benefits to each Covered Employee or pay \$9.50 per employee per hour towards the “Healthy Access Program.” The Ninth Court found that the HAO is preempted by federal law resulting in the Court finding against the City.

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 [Evelyn Sahr](#) at 202.659.6622 or esahr@eckertseamans.com; [Drew Derco](#) at 202.659.6665 or dderco@eckertseamans.com; [David Rockman](#) at 412.566.1999 or drockman@eckertseamans.com; [Jay Julien](#) at 202.659.6648 or jjulien@eckertseamans.com, [Amanda Geary](#) at 202.659.6656 or ageary@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.