

October 2017 Update on Significant DOT, FAA, and Other Federal Agencies' Aviation-Related Regulatory Actions

This edition of the Cozen O'Connor Aviation Regulatory Update discusses DOT's and CBP's comprehensive reviews of their regulations, Congress' FAA reauthorization extension legislation, the FAA's adoption of new Stage 5 airplane noise standards, GAO reports on airline ancillary service fees and TSA's aviation security oversight, and the latest DOT and FAA enforcement actions.

Department of Transportation

Regulatory

DOT Requests Comments on Comprehensive Review of Aviation Regulations

DOT issued a notice announcing its review of existing aviation-related regulations and other agency actions and requesting public comment to assist DOT in identifying rules and practices that should be repealed, replaced, suspended, or modified. DOT stated that "[t]here should be no more regulations than necessary, and those regulations should be straightforward, clear, and designed to minimize burdens" and that once they are issued, "regulations and other agency actions should be reviewed periodically and revised to ensure that they continue to meet the needs for which they originally were designed, remain cost-effective and cost-justified." However, DOT cautioned that any repeal, replacement, or modification of existing regulations or agency actions must not compromise safety. DOT stated that it is seeking comments that identify regulations that: "(a) eliminate jobs or inhibit job creation; (b) are outdated, unnecessary, or ineffective; (c) impose costs that exceed benefits; (d) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (e) could be revised to use performance standards in lieu of design standards, or (f) potentially burden the development or use of domestically produced energy resources." Although the regulatory review is part of DOT's ongoing review of its regulations, this year's review is further bolstered by the Trump administration's executive orders on regulatory review and calls for the replacement of two existing regulations for every new regulation implemented. Comments are due by November 1, 2017.

Enforcement

DOT Assesses \$1.5 Million in Civil Penalties Against Frontier Airlines for Alleged Tarmac Delay Violations

DOT issued a consent order assessing \$1.5 million in civil penalties against Frontier Airlines for alleged violations of DOT's tarmac delay rules under 14 C.F.R. Part 259. DOT states that on December 16-18, 2016, certain Frontier flights at Denver International Airport were forced to return to their gates due to winter storm conditions and several Frontier aircraft experienced mechanical difficulties while parked at the gate, resulting in all of Frontier's gates being occupied. DOT alleges that Frontier continued to land its flights at Denver despite the lack of available gates and increasing snow. According to DOT, Frontier's lack of sufficient ground staff inhibited its ability to clear aircraft from its gates in order to accommodate arriving flights, and that Frontier failed to accept services offered by the airport that could have mitigated or prevented lengthy tarmac delays. DOT contended that Frontier's operational decisions to continue operating flights in and out of Denver in order to mitigate the system-wide impact on its operations was also a "contributing factor to the tarmac delays." DOT's Enforcement Office determined that 11 arriving Frontier flights experienced excessive tarmac delays in violation of DOT's tarmac delay rule. DOT ordered Frontier to pay \$300,000 of the assessed penalty within 60 days and another \$300,000 by



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Related Practice Areas

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- Aviation Regulatory
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January 15, 2018. The carrier was credited \$900,000 of the assessed penalty for compensation paid by Frontier to passengers on the affected flights and on other delayed flights.

Federal Aviation Administration

Regulatory

FAA Establishes New Stage 5 Noise Standards for U.S.-Certificated Aircraft

The FAA issued a [final rule](#) setting new Stage 5 noise standards for certain newly certificated subsonic jet airplanes and subsonic transport category large airplanes. The standards will apply to applicants for type certificates and changes in type design for new airplanes with a maximum certificated takeoff weight of 121,254 pounds (55,000 kg) or more on or after December 31, 2017, or with maximum certificated takeoff weight of less than 121,254 pounds (55,000 kg) on or after December 31, 2020. The new standards will result in quieter designs and the use of currently available noise reduction technology by adopting noise certification standards for U.S.-certificated airplanes that are equivalent to ICAO standards. The final rule is effective November 3, 2017.

FAA Announces New Management Advisory Council Members

DOT issued a [release](#) announcing the appointment of new members to the FAA's 13-member Management Advisory Council, which advises the FAA's senior management on policy, spending, long-range planning, and regulatory matters. The new members include: Philip Trenary, former CEO of Pinnacle Airlines; Brian Wynne, CEO of the Association of Unmanned Vehicle Systems International (AUVSI); William Ris, former Senior Vice President, Government Affairs, of American Airlines; Donna McLean, former DOT Assistant Secretary for Budget and Programs and Chief Financial Officer; Jeffrey Shane, former DOT Undersecretary for Policy; Huntley Lawrence, Director, Aviation Department, Port Authority of New York and New Jersey; and Richard DeVos, President of Windquest Group and former CEO of Amway.

FAA Issues Revised Schedule of Charges for Services Performed Outside the U.S.

The FAA issued a [notice](#) announcing the availability of [Advisory Circular \(AC\) 187-1L](#), which provides an updated schedule of charges for the services of FAA Flight Standards Aviation Safety Inspectors provided outside the United States. Most of the increases in charges are relatively modest. For example, the FAA's charge for repair station certification/approval/authorization/inspection/renewal has been increased from \$191 per inspector per hour to \$193 per inspector per hour. The cost of knowledge/written testing of certain pilots, flight engineers, aircraft dispatchers, and mechanics has increased from \$96 to \$97. The AC and its updated charges became effective on October 1, 2017.

Enforcement

FAA Assesses Civil Penalties Against Burgess Aircraft Management for Alleged Pilot Safety Violations

The FAA issued a [release](#) proposing to assess \$231,350 in civil penalties against Burgess Aircraft Management, LLC, of Springfield, Missouri, for alleged pilot proficiency check violations. The FAA alleges that the company operated 251 flights under instrument flight rules with five pilots who lacked complete instrument proficiency checks. The FAA stated that such proficiency checks are required under the company's airman training program to confirm its pilots are proficient at flying in instrument conditions.

Interscience Assessed \$54,000 in Civil Penalties for Alleged Hazmat Violations

Interscience of Saint-Nom-la-Breteche, France, was assessed \$54,000 in civil penalties by the FAA for alleged violations of the Hazardous Materials Regulations, according to an [FAA release](#). The FAA alleges that Interscience provided six bottles of flammable liquid disinfectant spray to American Airlines for shipment by air from Blagnac, France, to Nuevo Leon, Mexico. According to the FAA, the package did not have the required shipper's declaration of dangerous goods and was not "properly classed, described, packaged, marked, labeled or in the proper condition for

shipment.” The FAA also alleged that Interscience did not provide required hazardous materials training to its employees and did not include emergency response information with the shipment.

FAA Alleges DebMed USA Violated Hazmat Regulations

The FAA issued a [release](#) alleging that DebMed USA LLC, of Charlotte, N.C., violated the Hazardous Materials Regulations and proposing to assess \$50,000 in civil penalties. The FAA alleges that DebMed USA attempted to ship 142 lithium metal batteries in the checked baggage of a DebMed employee onboard an American Airlines flight from Dallas-Fort Worth to San Francisco. The FAA prohibits the air transportation of lithium metal batteries on passenger aircraft and also prohibits their carriage in checked baggage. FAA rules only allow airline passengers to carry uninstalled, spare lithium batteries in carry-on baggage for personal use in portable electronic devices.

Customs and Border Protection

CBP Requests Information On Ways to Reduce Regulations

U.S. Customs and Border Protection (CBP) issued a [Request for Information \(RFI\)](#) on ways CBP can “reduce, modify or repeal” regulations, paperwork requirements, policy guidance, interpretative documents, information collections, and other regulatory obligations, consistent with law, to achieve time savings and cost reductions while continuing to meet CBP’s statutory obligations. The RFI was issued in response to the Trump administration’s Executive Order on “Reducing Regulation and Controlling Regulatory Costs,” issued on January 30, 2017, and Executive Order on “Enforcing the Regulatory Reform Agenda,” issued on February 24, 2017. The RFI requests assistance in identifying “rules that are obsolete, unnecessary, unjustified, or simply no longer make sense, or rules that could be better modernized to accomplish their objectives.” The RFI states that although CBP intends to consider all information and comments submitted, it does not plan to respond individually to comments and “none of the comments submitted will bind CBP to take any further action.” Comments and information are due December 11, 2017.

Department of Commerce – International Trade Administration

ITA Issues Preliminary Countervailing Duty Determination and Antidumping Duty Determination Regarding Bombardier 100-150-Seat Aircraft

The Department of Commerce’s International Trade Administration (ITA) issued a [preliminary determination](#) that countervailable subsidies are being provided to Bombardier for its production and export of 100-150-seat large civil aircraft from Canada. ITA proposed a preliminary countervailing duty of 219.63 percent on imports of Bombardier’s new C-Series aircraft. Boeing claims that subsidies are being provided to Bombardier by the Canadian government for its manufacturing and export of the aircraft.

Government Accountability Office

GAO Publishes Report on Airline Ancillary Service Fees

GAO issued a [report](#) discussing the increase in both the number and amount of airline fees for ancillary services. The report states that between 2010 and 2016, U.S. airline revenues from fees for checked baggage and reservation changes or cancellations increased from \$6.3 billion to \$7.1 billion. The report also found that on average, customers who paid for at least one checked bag paid more in total for their fare and baggage fees than they did when fares included checked baggage. The report outlines steps that DOT has taken since 2010 to make airlines’ fees for optional services more transparent to consumers and also discusses 1) how certain U.S. airlines have changed their optional service offerings and pricing since 2010; 2) the factors used by such airlines to determine whether such fees should be charged and what amount should be charged for optional services; and 3) regulatory and enforcement actions DOT has taken and the views of industry stakeholders regarding those DOT actions.

GAO Report Shows TSA Progress in Assessing Security at Foreign Airports and

Inspecting Airlines but Criticizes TSA's Continuing Lack of Information

According to a report issued by GAO, TSA has made significant improvements in its foreign airport security assessments and air carrier inspections since 2011. These improvements have included: 1) aligning security-related resources based on risk; 2) resolving airport access issues; 3) instituting a more comprehensive evaluation process; and 4) developing greater operational efficiencies. However, the report criticized TSA's continuing lack of key information necessary for decision making, including the agency's inability to track the status of security deficiencies and actions taken to correct such deficiencies. GAO found that 70 percent of FY2016 records in TSA's database contained "empty fields pertaining to root cause or recommended corrective action." GAO also criticized TSA's database for lacking a field to "categorize specific root causes." The report said that by fully collecting data and improving the categorization of root causes, TSA would be better able to ensure that corrective actions are taken to address "specific, underlying reasons for security vulnerabilities."

GAO Issues Report Questioning TSA's Measurement of the Cost and Effectiveness of Aviation Security Countermeasures

GAO issued a report criticizing TSA's ability to measure the cost and effectiveness of certain passenger aviation security countermeasures, including its Behavior Detection and Analysis (BDA) program and the U.S. Federal Air Marshal Service (FAMS). GAO found that TSA still lacks valid evidence supporting most of the behavioral indicators it utilizes in its BDA program and determined that TSA should limit the funding for its behavior detection activities until it can provide such evidence. For FAMS, which deploys armed law enforcement officers on certain flights at an annual cost of about \$800 million, GAO found that TSA lacks information on the program's effectiveness and deterrent effect.

Congressional Action Impacting Aviation

Congress Passes Six-Month FAA Reauthorization Extension Legislation

The House and Senate passed H.R. 3823, legislation extending the funding of FAA programs through March 31, 2018. The bill was passed only days before the FAA's funding ran out on September 30, 2017. Although the bill contained provisions extending certain expiring federal health programs and provided hurricane relief, it did not contain any new aviation provisions, including House Transportation and Infrastructure Committee Chairman Bill Shuster's (R-PA) proposal to reorganize U.S. air traffic control by transferring ATC assets and oversight to an entity independent of the FAA. The extension provides additional time for the House and Senate to further develop their long-term FAA reauthorization proposals.

Please contact David Heffernan, Mark Atwood, or Jennifer Urban members of the Cozen O'Connor Aviation Regulatory Practice Group, for more information regarding aviation regulatory issues. For additional information regarding legislative developments affecting aviation, please contact Robert Freeman, Government Relations Principal of Cozen O'Connor Public Strategies.