

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

Highlights of this edition of the Cozen O'Connor Aviation Regulatory Update include the FAA's recent rulemakings involving New York area airport slots and safety management systems for U.S. Part 121 air carriers, developments relating to unmanned aircraft, and DOT and FAA enforcement actions.

### Department of Transportation Regulatory

#### DOT Issues Final Rule on Carriage of Musical Instruments

DOT issued a final rule on the carriage of musical instruments by U.S. air carriers as carry-on or checked baggage onboard commercial passenger flights. The rule covers passenger stowage of small musical instruments in the aircraft cabin if space allows and prohibits carriers from requiring passengers to remove musical instrument that are already safely stowed to make room for carry-on baggage of other passengers. The rule also allows musical instruments that are too large to fit in cabin stowage areas to be secured to a seat as "seat baggage" or "cargo in passenger cabin" in certain circumstances, or to be stowed in the cargo compartment as checked baggage as long as the instruments comply with the size and weight limitations provided in FAA's safety regulations. The final rule was mandated by the FAA Modernization and Reform Act of 2012 (Pub. L. 112-95) and becomes effective on March 6, 2015.

#### DOT Institutes Proceeding to Consider Delta Air Lines' Retention of Tokyo Haneda Slot Pair

DOT issued an order instituting a proceeding to consider whether Delta Air Lines should retain its slot pair previously awarded by DOT for service between Seattle and Tokyo's Haneda Airport, or whether the slot pair should be reallocated to another carrier. The order was prompted by a motion filed by American Airlines requesting that DOT withdraw Delta's daily U.S.-Haneda slot pair due to Delta's plans to operate only 17 flights over a 182-day period. American contends that Delta's limited operations wastes the slots and that they should be reallocated to American for Los Angeles-Haneda services. Both American and Hawaiian Airlines have applied for reallocation of Delta's slots.

#### DOT Issues Guidance to Consumers Purchasing Tickets to Special Events That Include Air Transportation

DOT issued a notice providing guidance to consumers who purchase tickets to college bowl games and other "Special Event Tours" that are offered as part of a package that includes air transportation, cautioning them to obtain either the ticket to the game or special event or a written confirmation for the ticket at the time of purchase if a travel agent or other tour representative states that a ticket is included. DOT also advised consumers to ask if an event ticket is included whenever advertisements do not specifically state whether it is included. DOT cautioned that if a ticket is not specifically mentioned in advertisements, usually the event ticket is not included, and that consumers are entitled to a full refund, including the price of the airfare, if a tour operator offers game or other special event tickets, but does not have physical possession of the tickets or a written contract for the tickets. DOT also issued related guidance for colleges, universities and other organizations that arrange charter flights to special events, such as football bowl games and NCAA basketball playoff games, advising them on 1) the requirements for contracted airlines to



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#### Related Practice Areas

#### Industry Sectors

- Aviation

have DOT economic authority and be subject to FAA oversight and safety standards; (2) the requirements for reselling individual seats on charter flights and compliance with DOT Public Charter rules; and (3) the requirements for using a Public Charter Operator or a charter broker that is compliant with DOT and FAA rules.

## **Enforcement**

### **DOT Initiates Enforcement Proceeding Against Delta for Alleged Codeshare Disclosure Violations**

DOT initiated an [enforcement proceeding](#) against Delta Air Lines for alleged violations of DOT's code-share disclosure requirements and proposed to assess up to \$660,000 in civil penalties. DOT's investigation of Delta's telephone representatives in 2013 and 2014 found that they failed to disclose code-share arrangements to consumers during eight separate telephone conversations. DOT stated that Delta had been the subject of a 2010 consent order involving code-share disclosure violations with respect to online listings (not oral communications), and that each subsequent failure to comply with the cease and desist requirement of that 2010 consent order constituted additional violations of DOT regulations, subjecting Delta to additional civil penalties. Delta denies DOT's allegations and is contesting the case, which has been assigned to DOT Administrative Law Judge J.E. Sullivan.

### **DOT Assesses \$1.6 Million in Civil Penalties Against Southwest Airlines for Alleged Tarmac Delay Violations**

DOT issued a [consent order](#) imposing \$1.6 million in civil penalties against Southwest Airlines for alleged violations of DOT's tarmac delay rule. DOT said that in early January 2014, 16 Southwest flights experienced lengthy tarmac delays at Chicago Midway International Airport in excess of three hours due to severe winter weather. DOT found that Southwest failed to allow passengers the opportunity to deplane within three hours of their arrival at the airport and failed to have adequate staffing available to implement its tarmac delay contingency plan. Southwest disputed DOT's imposition of civil penalties on a per-passenger basis for its alleged tarmac delay violations, but agreed to a compromise settlement under which Southwest will pay \$600,000, with \$269,000 of the assessed penalty credited to Southwest for compensation provided to passengers on the affected flights, \$431,000 credited for the carrier's cost of implementing a surface management and surveillance system to monitor aircraft location on the airfield, and the remaining \$300,000 to be forgiven unless Southwest commits any additional tarmac delay-related violations within the next year.

## **Federal Aviation Administration**

### **Regulatory**

#### **FAA Issues Proposed Rule on Slot Management at New York Area Airports**

The FAA issued a [proposed rule](#) to replace its current slot management orders limiting operations at New York's John F. Kennedy International Airport (JFK), Newark Liberty International Airport (EWR) and LaGuardia Airport (LGA). The proposed rule would maintain the limits on scheduled and unscheduled operations currently in place, limit unscheduled operations at JFK and EWR, and require the use of each allocated slot 80 percent of the time for the same flight or series of flights to retain historic precedence. The FAA has also proposed five alternatives for a secondary market that would allow carriers to buy, sell, lease and trade slots. Comments on the proposed rule are due April 8, 2015.

#### **FAA Issues Guidance for Law Enforcement's Handling of Unauthorized UAS Operations**

To address the increasing operation of unauthorized unmanned aircraft systems (UAS), the FAA published [guidance](#) for the law enforcement community regarding the legal framework for FAA oversight of aviation safety in general, and specifically with respect to UAS operations. The guidance outlines how UAS and model aircraft can be operated legally, and the actions that can be taken by law enforcement officers against unauthorized or unsafe UAS operators.

## **FAA Approves Unmanned Aircraft Exemptions for Real Estate, Agricultural Uses**

The FAA granted regulatory exemptions for commercial unmanned aircraft systems (UAS) operations to Advanced Aviation Solutions, which plans to use a fixed-wing eBee Ag UAS to make photographic measurements and perform agricultural crop scouting, and to Douglas Trudeau and Tierra Antigua Realty for real estate photography. The FAA has received more than 200 requests for UAS exemptions from commercial entities.

## **FAA Denies UAS Privacy-Related Petition for Rulemaking**

The FAA issued a decision denying a petition filed by the Electronic Privacy Information Center (EPIC) requesting a rulemaking to address privacy-related issues posed by the operation of unmanned aircraft in the United States. The FAA based its denial on a determination that privacy issues posed by unmanned aircraft operations were not “an immediate safety concern.” The FAA said that it would consider EPIC’s privacy-related comments as part of its soon-to-be-released rulemaking to address civil operation of small unmanned aircraft systems.

## **FAA Publishes Part 121 Carrier Safety Management Systems Final Rule**

The FAA published a final rule requiring Part 121 air carriers to develop and implement a Safety Management System (SMS) to provide “decision-making tools” to enhance hazard identification and mitigation and increased communication of safety issues in order to improve carrier safety. The final rule was mandated by the Airline Safety and Federal Aviation Administration Extension Act of 2010 (Pub. L. 111–216, August 1, 2010) and was prompted by NTSB recommendations and ICAO standards. Part 121 air carriers are required to submit an SMS implementation plan to the FAA no later than September 9, 2015, SMS implementation plans are required to be approved by the FAA no later than March 9, 2016, and carriers are required to develop and implement an SMS no later than March 9, 2018. The final rule is effective March 9, 2015. The FAA subsequently issued a correction of the SMS implementation date (March 9, 2018).

## **FAA Allows American Airlines, US Airways to Include Both Carriers on Single Operating Certificate**

The FAA Chief Counsel’s Office issued a legal interpretation allowing American Airlines to include, on a temporary basis, both “American Airlines” and “US Airways” on American’s Air Carrier Certificate at the time of single operating certificate (SOC) authorization. The FAA said that generally it does not permit two names on an operating certificate because it would assume that two different entities were attempting to operate under a single certificate, and could not meet the requirements of Part 119. However, the FAA found that AA and US have taken steps to assure that any concerns on the part of the FAA would be fully resolved by the time the largely merged entity applies for an SOC, and that the two companies have already begun to “mingle corporate control” and both carriers appear to understand the need for a single management team that exercises full operational control over the SOC. The FAA stated that AA’s and US’s operations will have been sufficiently merged to permit an SOC during the second quarter of 2015, at which point the US certificate would be surrendered to the FAA.

## **FAA Extends Prohibition on Certain U.S. Carrier Flights Over Damascus, Syria**

The FAA issued a Special Federal Aviation Regulation (SFAR) prohibiting certain flight operations in the Damascus, Syria Flight Information Region by all U.S. air carriers, U.S. commercial operators, persons exercising the privileges of a U.S. airman certificate, except when operating a U.S.-registered aircraft for a foreign air carrier, and operators of U.S.-registered civil aircraft, except for foreign air carriers, due to the potential hazard to persons and aircraft engaged in such flight operations resulting from the ongoing armed conflict and volatile security environment in Syria. The SFAR adopts prohibitions currently in effect via Notice to Airmen (NOTAM) 4/4936 issued on August 18, 2014, which, absent the adoption of the SFAR, would have expired on December 31, 2014. The SFAR requires compliance with the prohibitions through December 30, 2016, unless the FAA amends or rescinds the rule based on the situation in the region.

## **FAA Issues Proposed Rule on Transport Airplane Fuel Tank and System Lightning Protection**

The FAA issued a [notice of proposed rulemaking](#) to amend certain airworthiness regulations for transport category airplanes relating to lightning protection of fuel tanks and systems. The proposed rule would establish new design requirements for both normal conditions and possible failures of fuel tank structure and systems that could lead to fuel tank explosions, add new maintenance requirements related to lightning protection features, and impose specific requirements for airworthiness limitations in the instructions for continued airworthiness. The proposed rule would also create performance-based standards for prevention of catastrophic fuel vapor ignition caused by lightning by regulating the risk due to both ignition sources and fuel tank flammability. Comments on the proposed rule are due March 18, 2015.

## **Enforcement**

### **United Airlines Files Fees-Related Complaint Against Port Authority of New York/New Jersey**

United Airlines filed a [complaint](#) with the FAA against the Port Authority of New York and New Jersey (PANYNJ) alleging that PANYNJ imposes “excessive, unreasonable, and discriminatory charges” on airport users in order to collect “huge surpluses” that United believes are used for non-aeronautical purposes such as roads and bridges. United also alleges that PANYNJ uses a fee methodology that is “not cost-based and lacks transparency.” United’s complaint states that PANYNJ sets fees at Newark International Airport through a hidden “cost-plus” formula that creates a 38 percent markup above actual costs in violation of FAA regulations.

### **FAA Proposes Civil Penalties Against United Airlines for Operation of Allegedly Non-Safety Compliant Aircraft**

The FAA issued a [release](#) alleging that United Airlines operated an aircraft on 35 passenger flights while the aircraft was not in compliance with Federal Aviation Regulations. According to the FAA, United mechanics replaced a nose landing gear wheel and tire on a Boeing 767 without installing a required axle washer, which could have caused the wheel bearing to fail. An FAA inspector discovered the missing washer during a routine inspection. The FAA is proposing to assess \$317,500 in civil penalties against United.

### **FAA Alleges Seven Companies Violated Hazardous Materials Regulations**

The FAA issued a [release](#) alleging that New Chapter, Inc. of Brattleboro, Vt., Q.G. Investments, LLC of Sanford, Fla., Click Bond, Inc. of Carson City, Nev., All Tire Supply Co. of Houston, Kretek International, Inc., of Moorpark, Calif., Harland Clarke Holdings Corp. of San Antonio, and Quimica Bicentenario de la Ind., of Guadalajara, Mexico violated hazardous materials regulations. The FAA proposed to assess civil penalties ranging from \$54,000 to \$91,000 against each of the seven companies.

### **FAA Ramps Up Enforcement Actions Against Companies for Alleged Hazardous Materials-Related Violations**

The FAA issued a [release](#) proposing to assess between \$63,000 and \$91,000 in civil penalties against Amazon.com of Seattle, Harrison Contracting Co. of Villa Rica, Ga., and Red Dot Corp. of Athens, Texas for allegedly violating hazardous materials regulations by providing flammable items for transportation by air. The FAA alleges that none of the shipments were properly marked, labeled or packaged. The FAA also issued a [release](#) proposing civil penalties ranging from \$65,000 to \$78,000 against Max-Pak, LLC of Lakeland, Fla., CMC Construction Services, Inc. of Houston, and Allender & Company, Inc. of Fernadale, Mich., for alleged violations of the hazardous materials regulations. The FAA alleges that these companies’ shipments were not declared to contain hazardous materials and were not properly classed, described, packaged, marked, labeled and in proper condition for shipment. The FAA also alleges the companies did not provide emergency response information with the packages and did not provide required hazmat training to their employees. An FAA [release](#) was also issued proposing a \$90,000 civil penalty against Pearl Paint North America of Harvey, Ill., for allegedly offering a package containing flammable paint for transportation by air without shipping papers indicating the hazardous nature of its contents.

## Transportation Security Administration

### Regulatory

#### TSA Announces Plans to Expand Pre-Check Enrollment Options

TSA issued a [notice and request for comments](#) regarding its plans to expand enrollment options for its Pre✓ Application Program, TSA's voluntary passenger prescreening program for low risk passengers eligible to receive expedited screening at participating U.S. airports. TSA plans to expand enrollment options for the Pre✓ Application Program by seeking proposals from the private sector regarding marketing, enrollment and pre-screening of applicants that would include, at a minimum, options to collect biographic and biometric information, to validate identity, and to perform a criminal history records check to ensure that applicants do not have criminal offense convictions that would disqualify them from the TSA Pre✓ Application Program. As of December 5, 2014, 734,761 individuals have been enrolled by TSA in the Pre✓ Program at the 328 enrollment centers across the United States. Comments on TSA's planned enrollment expansion are due by January 30, 2015.

## Customs and Border Protection

### Regulatory

#### Customs Expands Global Entry to Seven Additional U.S. Airports

U.S. Customs and Border Protection issued a [notice](#) extending its Global Entry international trusted traveler program to seven additional designated airports: Ted Stevens Anchorage International Airport, Anchorage, Alaska (ANC), Chicago Midway International Airport, Chicago (MDW), Cincinnati/Northern Kentucky International Airport, Hebron (CVG), Cleveland Hopkins International Airport, Cleveland (CLE), Pittsburgh International Airport, Pittsburgh, Pa. (PIT), Austin-Bergstrom International Airport, Austin, Texas (AUS), and General Mitchell International Airport, Milwaukee (MKE). Global Entry will become operational at all seven airports on or before July 13, 2015.

## Pipeline and Hazardous Materials Safety Administration

### Regulatory

#### PHMSA Issues Final Rule Harmonizing Hazmat Regulations With International Standards

The Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a [final rule](#) to harmonize the Hazardous Materials Regulations (HMR) with recent amendments made to the International Maritime Dangerous Goods (IMDG) Code, the International Civil Aviation Organization's Technical Instructions (ICAO TI) for the Safe Transport of Dangerous Goods by Air, and the United Nations Recommendations on the Transport of Dangerous Goods (UN Model Regulations). The final rule, among other things, amends certain proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, bulk packaging requirements, and passenger and cargo aircraft maximum quantity limits from the Hazardous Materials Table (HMT). The rule also requires a "CARGO AIRCRAFT ONLY" label on packages containing small lithium metal batteries not packed in or with equipment. The final rule is effective January 1, 2016, but PHMSA is authorizing voluntary compliance with the rule beginning January 1, 2015.

## Office of Foreign Assets Control

### Regulatory

#### OFAC Issues Updated Cuban Assets Control Regulations, Including Air Travel-Related Provisions

The Department of the Treasury's Office of Foreign Assets Control (OFAC) issued [amendments](#) to

its Cuban Assets Control Regulations that would implement policy changes announced by President Obama relating to U.S. relations with Cuba, including the facilitation of authorized travel to Cuba. The amendments authorize certain travel-related transactions under a general license, the processing and payment of U.S. credit cards, debit cards and travelers' checks used in Cuba for travel-related transactions, and the receipt of services from Cuba and payment to Cuba of charges for services in connection with overflights of Cuba or emergency landings in Cuba by U.S.-registered aircraft or aircraft owned or controlled by, or chartered to, persons subject to U.S. jurisdiction. Travel to Cuba for tourist activities is still prohibited by statute. While only charter air service to Cuba is currently available by purchase through a tour operator, the new OFAC regulations no longer preclude scheduled operations. However, DOT will need to establish procedures for restoration of scheduled service to Cuba.

## Government Accountability Office

### GAO Report Finds Raising Passenger Facility Charges Would Increase Airport Funding, But Questions Other Effects

The GAO issued a report that found that although raising the Passenger Facility Charges (PFC) cap would significantly increase PFC collections for airports, it could also slow passenger growth and constrain the growth in revenues to the Airport and Airway Trust Fund. The report also stated that the FAA could take additional steps beyond what is stated in its PFC audit guidance to provide assurances to Congress, airports and airline passengers about the reliability and accuracy of airlines' voluntary audits of their PFC collections and remittances to airports. The report said that the FAA relies on airports to alert them of PFC collection and remittance discrepancies but some airports may not be aware that they can review audits. Stakeholders told GAO that alternative methods to collect PFCs, such as airport kiosks or online or mobile payments, could impose additional steps for passengers, costs for airports, and changes in business processes, and that current collection methods are better than such alternative PFC collection methods.

### GAO Issues Report Showing Little Interest in FAA's Airport Privatization Pilot Program

The GAO issued a report showing a general lack of interest in the FAA's Airport Privatization Pilot Program. Since the program's establishment in 1997, only 10 airports have applied to the pilot program, with two being privatized, seven not completing the program, and one application currently under FAA review. The report found that higher financing costs for privatized airports and the possible lack of state and local property tax exemptions reduced both public and private sector interest in airport privatization in the United States. The report also found that privatization requires "considerable time and cost to navigate." The report stated that public sector airport owners have found other ways to benefit without ceding control under full privatization, such as entering airport management contracts and joint development agreements for managing and building an airport terminal.

## Congressional Action Impacting Aviation

### House Transportation Committee Selects Aviation Subcommittee Chairman, Schedules Hearing on FAA Reauthorization

The House Transportation and Infrastructure Committee retained Rep. Frank LoBiondo (R-N.J.) as Aviation Subcommittee chairman, while Bill Shuster (R-Pa.) remains as chairman of the full committee and Rep. John Duncan (R-Tenn.) is staying on as vice chairman of the full committee. House T&I Committee Democrats have not yet confirmed their subcommittee ranking members. The T&I Committee and Aviation Subcommittee are preparing for a busy year that includes deliberations on the FAA Reauthorization bill. The Committee has scheduled a hearing on January 21, 2015 on "FAA Reauthorization: Reforming and Streamlining the FAA's Regulatory Certification Processes."

### House Aviation Subcommittee Holds Hearing on Unmanned Aircraft Systems

The House Transportation and Infrastructure's Subcommittee on Aviation held a hearing on

December 10 on the FAA's progress on safely integrating unmanned aircraft systems into the National Airspace System. The subcommittee heard testimony from Peggy Gilligan, FAA associate administrator for aviation safety, Matthew Hampton, DOT assistant inspector general for aviation audits, Gerald Dillingham, GAO director of civil aviation issues, Captain Lee Moak, president, Air Line Pilots Association, Jesse Kallman, head of business development and regulatory affairs, Airware, and Dr. Nicholas Roy, associate professor of aeronautics and astronautics, Massachusetts Institute of Technology.

### **President Obama Signs Legislation Limiting Passenger Security Fees**

President Obama signed into law H.R. 5462, a bill passed by Congress that limits the amount of security fees paid by airline passengers to \$11.20 per round trip.

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**Please contact David Heffernan or Mark Atwood, 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.**