

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

This edition of the Cozen O'Connor Aviation Regulatory Update includes an update on the Department of Justice's initiation of an antitrust investigation of alleged pricing and capacity collusion among the major U.S. airlines, the multi-agency review of U.S. carrier allegations of subsidy against three Gulf carriers, recent applications for antitrust immunity for airline alliances, EPA's initial action to address greenhouse gas emissions from aircraft, DOT's recent increases in denied boarding compensation, domestic baggage liability limits and the amount of certain civil penalties, TSA limits on passenger security service fees, DHS amendments to the ESTA program and planned expansion of customs and immigration preclearance facilities at additional foreign airports, Congressional hearings on FAA reauthorization, aviation security and drone operations, and recent DOT and FAA enforcement actions.

Department of Justice

Justice Department Initiates Investigation of Possible Pricing and Capacity Collusion by the Four Largest U.S. Airlines

The Department of Justice (DOJ) announced that it has initiated an investigation into possible price collusion and capacity coordination among the largest U.S. airlines. American Airlines, Delta Air Lines, Southwest Airlines and United Airlines have confirmed receiving a civil investigative demand from DOJ. The investigation was prompted by a request from Senator Richard Blumenthal (D-Conn.) (see below), who alleged the carriers were engaging in collusive and anti-competitive behavior by using capacity and pricing restraints to limit the supply of air services in order to retain high airfares and increased profitability.

Department of Transportation

Regulatory

American Airlines, Qantas Airways Apply for Antitrust Immunity; JetBlue Urges DOT to Impose 3-Year Limit on ATI Approval

American Airlines and Qantas Airways filed an application requesting antitrust immunity (ATI) for their proposed alliance agreements and expansion of their Joint Business Agreement (JBA), which was approved by DOT in 2011. The carriers propose to expand their coordination under the JBA by adding American-operated service between Los Angeles and Sydney, Qantas service between San Francisco and Sydney, and by adopting a "metal-neutral alliance structure" to facilitate their service integration. JetBlue responded to the application by filing a letter requesting that DOT limit any grant of ATI to a three-year period, and condition any renewal on whether the consumer benefits promised by the applicants actually occurred. JetBlue urged DOT to incorporate this periodic ATI review requirement and conditions into its ATI review process. Delta and Aeromexico also recently applied for ATI for their alliance in anticipation of the implementation of an open skies agreement between the United States and Mexico.

DOT, Commerce and State Departments Review Comments on Gulf Carrier Subsidies

The Departments of Commerce, State and Transportation are reviewing comments filed by aviation industry stakeholders regarding claims by American Airlines, Delta Air Lines and United Airlines that three gulf carriers – Emirates, Etihad Airways, and Qatar Airways – have received and are



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benefitting from subsidies provided by their respective governments of the United Arab Emirates and Qatar that are distorting competition and harming U.S. airlines. Emirates recently filed detailed rebuttal documents responding to the U.S. carriers' subsidy allegations. Etihad Airways also filed comments rebutting the major U.S. airlines' subsidy allegations, as well as a Risk Advisory Group study showing that American, Delta and United have received significant amounts of financial benefits from the U.S. federal and state governments. Etihad also submitted an Oxford Economics study demonstrating the U.S. economic benefits resulting from Etihad's U.S. air services. American, Delta and United have urged the U.S. government to order the gulf carriers to freeze their air services at January 2015 capacity levels pending the resolution of this matter through U.S. government consultations with the UAE and Qatari governments under the U.S. open skies agreements with those countries.

Norwegian Air International Urges DOT to Expedite Approval of Its Long-Pending Permit Application

Norwegian Air International (NAI) filed a motion urging DOT to approve the carrier's long-pending application for permit authority to serve the United States. NAI's permit application has been pending for more than 18 months, due to opposition from major U.S. carriers and labor unions that view NAI's proposed business model as a "flag of convenience" used to evade labor standards and other regulatory requirements. In order to address the "core concerns" raised by opponents of its application, NAI said that it would "use only European and U.S. pilots and crews on Norwegian [Air] International transatlantic flights (except if compelled by extraordinary and unforeseen operational reasons)."

DOT Confirms Delta Air Lines' Retention of U.S.-Haneda Slots and Imposes Service Conditions; Delta Returns Slots to DOT for Reallocation

DOT issued a final order allowing Delta Air Lines to retain its U.S.-Haneda slot pair that the carrier currently uses to operate Seattle-Haneda service. American Airlines and Hawaiian Airlines had contested Delta's retention of the slot pair based on Delta's limited use of the slots and DOT initiated a proceeding to determine whether the slots should be reallocated. (For additional information regarding DOT's initiation of the Haneda slot proceeding and DOT's tentative decision to allow Delta to retain its Haneda slots, see the [January 2015](#) and [April 2015](#) editions of the Cozen O'Connor Aviation Regulatory Update). DOT also finalized "use-or-lose" conditions imposed on Delta to ensure the carrier's operation of year-round daily Seattle-Haneda service in the market. DOT also finalized its selection of American Airlines for backup authority to operate Los Angeles-Haneda services in the event that Delta was unable to meet DOT's service conditions and continue its Haneda operations. Shortly after the issuance of the order, Delta filed a letter informing DOT that it was not "commercially feasible" for Delta to operate the slots allocated for Seattle-Haneda service on a consistent daily basis year-round as required by DOT and that Delta planned to operate Seattle-Haneda service through September 30, 2015, at which time it would return the slots for reallocation. American responded that it will use the slots for Los Angeles-Haneda service.

DOT Increases Denied Boarding Compensation, Domestic Baggage Liability Limits and Certain Civil Penalty Amounts

DOT issued a final rule increasing the amounts of denied boarding compensation, domestic baggage liability, and certain civil penalties based on changes in the Consumer Price Index. The maximum denied boarding compensation amounts for U.S. domestic flights were increased from: 1) \$650 to \$675 for passengers denied boarding involuntarily where alternate transportation is provided that delays the passenger's arrival by more than one hour but less than two hours after the planned arrival time of the passenger's original flight; and 2) from \$1,300 to \$1,350 for passengers denied boarding involuntarily where alternate transportation is provided that delays the passenger's arrival by more than two hours after the planned arrival time of the passenger's original flight. The final rule also increased the minimum liability limit air carriers may impose for the loss, damage or delay in the delivery of baggage in domestic air transportation from the current amount of \$3,400 to \$3,500. DOT also increased the maximum civil penalties that can be assessed for violations of certain statutes and aviation economic and consumer protection rules by small businesses and individuals from \$2,500 to \$2,750. The final rule is effective on August 25, 2015.

Enforcement

DOT Assesses \$160,000 in Civil Penalties Against Hawaiian Airlines for Alleged Baggage Liability Limitation and Fare Advertising Violations

DOT issued a consent order assessing \$160,000 in civil penalties against Hawaiian Airlines for allegedly limiting its liability for damages resulting from the delay in delivery of passenger baggage to an amount less than the amount allowed under DOT regulations. DOT found that Hawaiian had, on numerous occasions, told passengers that reimbursement for damages associated with delayed baggage was limited to \$30.00 a day for a maximum of three days regardless of the specific facts of the passengers' claims. DOT stated that by limiting liability for delayed baggage to an amount less than the minimum level required, Hawaiian violated 14 C.F.R. §§ 254.4 and 259.5(b) (3) and engaged in unfair and deceptive practices in violation of 49 U.S.C. § 41712. DOT also alleged that Hawaiian advertised fares that could not be purchased as part of a promotional program associated with Hawaiian's Visa Signature credit card program. Hawaiian was assessed \$160,000 in civil penalties, with \$80,000 immediately payable and the remainder due only if Hawaiian commits similar violations within the next year.

DOT Imposes Civil Penalties on Inter Island Airways and Charter Air Transport, Inc. for Alleged Reporting Violations

DOT issued a consent order against Inter Island Airways for allegedly failing to file its Form 298-C financial data reports and Schedule T-100 traffic data reports for an extended period despite repeated requests from DOT's Bureau of Transportation Statistics. DOT assessed \$20,000 in civil penalties against the carrier, with \$10,000 immediately due and payable and the remainder due and payable only if Inter Island Airways commits similar violations within the next year. In addition, a consent order was issued by DOT alleging that Charter Air Transport, Inc. had also failed to file its Form 298-C "Report of Financial Data" and Schedule T-100 traffic data in a timely manner. The carrier was assessed \$30,000 in civil penalties, with \$15,000 to be paid in installments over a 150-day period and the remaining \$15,000 payable only in the event that Charter Air Transport commits similar violations within the next year.

Federal Aviation Administration

Regulatory

FAA Issues Final Rule on Flight Prohibitions within Baghdad (ORBB) Flight Information Region

The FAA issued a final rule incorporating its August 8, 2014 NOTAM prohibiting flights in the Baghdad (ORBB) Flight Information Region (FIR) at all altitudes (with certain limited exceptions) into SFAR No. 77 (Prohibition Against Certain Flights Within the Territory and Airspace of Iraq). The final rule prohibiting all flights by U.S. operators within the Baghdad ORBB FIR, including those previously allowed, tightens the already existing limitations of SFAR No. 77, except for certain operations approved by the FAA. The final rule also amends the FAA approval process for government agencies that hire U.S. airlines to support their activities in Iraq. The final rule is effective through May 11, 2017.

Enforcement

FAA Proposes \$735,000 Civil Penalty Against Volaris

The FAA proposed a \$735,000 civil penalty against Mexican air carrier Volaris for allegedly violating safety regulations concerning aircraft maintenance. The FAA alleged that in March 2013, Volaris returned an Airbus A319 to passenger service after undergoing a heavy maintenance inspection during which mechanics failed to ensure that certain safety tasks were completed. These tasks included replacing an emergency slide, verifying that ailerons were properly rigged, and verifying the aircraft's weight and balance calculations, among others. The FAA also alleged that Volaris flew 121 passenger flights using the aircraft before bringing the aircraft into compliance.

FAA Proposes \$66,000 in Civil Penalties Against Centurion Air Cargo for Alleged

Aircraft Maintenance Violations

Centurion Air Cargo faces \$66,000 in civil penalties for alleged aircraft maintenance violations. In a release issued June 17, 2015, the FAA alleged that Centurion operated an MD-11 aircraft on at least 12 flights in June 2013 while failing to comply with minimum equipment list (MEL) procedures after receiving a fuel quantity fault indication during a previous flight. The FAA also alleged that Centurion operated the aircraft on four flights after discovering that the door slide indicator did not light up.

FAA Alleges Home Depot, Sherwin Williams Violated Hazmat Regulations

The FAA proposed to assess a \$70,000 civil penalty against Home Depot for allegedly violating hazmat regulations by offering a shipment of flammable aerosol spray paint to UPS for transportation by air. The FAA alleges the shipment was not accompanied by shipping papers to indicate the hazardous nature of the contents and was not properly marked or labeled. Also, the FAA issued a release proposing \$71,500 in civil penalties against Sherwin-Williams Company for alleged violations of the hazmat regulations. The FAA said that in October 2014, Sherwin-Williams knowingly offered undeclared shipments of “paint-related” hazardous materials for transport aboard FedEx Corp. flights. The FAA said that the shipments were not accompanied by shipping papers describing the type or quantity of the hazardous materials and were not properly marked, labeled or packaged.

FAA Proposes Civil Penalties Against CTC Battery for Alleged Hazmat Violations

The FAA issued a release proposing civil penalties in the amount of \$63,000 against CTC Battery Inc. of Hayward, Calif., for allegedly violating Hazardous Material Regulations. The FAA alleged that on April 25, 2013, CTC Battery offered an undeclared shipment of four 12.8V rechargeable lithium ion phosphate batteries to UPS for air transportation to Tampa, Fla. The shipment allegedly did not include the required shipping papers indicating the hazardous nature of the shipments, nor was the shipment marked, labeled or packaged as required. Further, the FAA alleged that CTC Battery did not provide emergency response information nor did it ensure its employees received required hazardous materials training.

Environmental Protection Agency

EPA Issues Advance Notice of Proposed Rulemaking Concerning the Regulation of Aircraft Emissions

EPA has taken its first steps in addressing the regulation of greenhouse gas emissions from aircraft, issuing a preliminary endangerment finding and declaring under the Clean Air Act that greenhouse gas emissions from commercial aircraft contribute to the pollution that causes climate change. Such a finding would allow the EPA to implement the global emissions standard that the International Civil Aviation Organization (ICAO) has been developing, in cooperation with industry stakeholders, over the past five years. In furtherance of its efforts, the EPA issued an Advance Notice of Proposed Rulemaking (ANPRM) that explains the ICAO standard and EPA’s involvement in its development. The ANPRM also describes and seeks input on issues related to setting an international CO2 standard for aircraft, and the potential use of section 231 of the Clean Air Act to adopt a corresponding aircraft engine standard domestically. ICAO is set to release its CO2 standard in February 2016. If adopted, the future regulations would only apply to commercial and private jets and not to military aircraft.

Department of Homeland Security

DHS/CBP Amend ESTA Travel Authorization Program

DHS/CBP issued a final rule amending the Electronic System for Travel Authorization (ESTA) program, effective immediately. Under the final rule, DHS may now adjust ESTA travel authorization validity periods on a per-country basis to the three-year maximum or to a lesser period of time. In terms of process, the final rule eliminates the need for Visa Waiver Program (VWP) travelers to complete the Form I-94W Nonimmigrant Visa Waiver Arrival/Departure paper form upon arrival in

the United States at air and sea ports of entry. Also, VWP travelers who provide an email address to DHS when they submit their application will receive an automated email notification indicating that their ESTA travel authorization will be expiring soon. Additionally, DHS has made some changes to the required ESTA application and paper Form I-94W.

DHS Announces Plans to Expand Customs/Immigration Preclearance to 10 New Overseas Airports

DHS announced plans to enter into negotiations to expand U.S. customs, immigration and agricultural inspection preclearance operations to 10 new foreign airports: Brussels Airport, Belgium, Punta Cana Airport, Dominican Republic, Narita International Airport, Japan, Amsterdam Airport Schiphol, Netherlands, Oslo Airport, Norway, Madrid-Barajas Airport, Spain, Stockholm Arlanda Airport, Sweden, Istanbul Ataturk Airport, Turkey, and London Heathrow Airport and Manchester Airport, United Kingdom.

Transportation Security Administration

TSA Issues Interim Final Rule Limiting Passenger Security Service Fees

TSA issued an interim final rule imposing a limit of \$11.20 on the amount of passenger security service fees that can be collected per passenger for a round-trip itinerary. The round-trip fee limitation was imposed by Congress to correct what Congress considered to be TSA's misinterpretation of congressional intent in establishing the fee amount and to set a mandatory cap on the fees that TSA collects for round trips. When the Bipartisan Budget Act of 2013 authorized TSA to increase these fees, TSA interpreted the statute as authorizing it to collect an even higher amount than Congress intended, and TSA eliminated its own longstanding cap on round-trip fees. The amendments mandated by Congress provide that the fee imposed per round trip must not exceed \$11.20 and define "round trip" to mean "a trip on an air travel itinerary that terminates or has a stopover at the origin point (or co-terminal)." The final rule became effective on June 4, 2015.

Department of Defense/U.S. TRANSCOM

DOD/TRANSCOM Establishes Ratemaking Procedures for CRAF Program Participants

DOD/TRANSCOM issued a final rule establishing ratemaking procedures for airlift services provided to DOD by U.S. carriers that participate in the Civil Reserve Air Fleet (CRAF) Program. The rule closely tracks longstanding ratemaking procedures and methodologies for CRAF contracts as utilized under previous and current MOUs between U.S. carrier CRAF participants and USTRANSCOM and its predecessor entities. The final rule became effective June 29, 2015.

Government Accountability Office

GAO Report Focuses on Funding of U.S. Airport Development

The GAO issued a report discussing U.S. airport infrastructure plans and funding, including the amount of funding airports received for capital development projects between 2009 and 2013 and the estimated costs of airports' planned capital development from 2015 through 2019. The report also provided a comparison of past airport funding levels with proposed development costs, and outlined how changes in AIP funding and proposed PFC increases might affect airport funding. The GAO surveyed state aviation officials, reviewed airports' development plans, analyzed FY 2016 budget proposals for airport funding, and interviewed FAA officials, industry representatives, airport financial-consulting firms, and bond-rating agencies.

GAO Issues Report on Aircraft Tracking and Flight Data Recovery

In response to the disappearance of Malaysia Airlines Flight 370 over the Indian Ocean in March 2014, GAO issued a report providing Congress with an overview of international efforts to improve aircraft tracking and flight data recovery as part of aircraft accident investigations. The report describes the challenges of aircraft tracking and flight data recovery during recent commercial

aviation accidents over oceanic regions, and government and industry proposals to improve aircraft tracking and flight data recovery. GAO interviewed 21 aviation stakeholders, including the FAA, the NTSB, and the airline industry.

Congressional Action Impacting Aviation

Senator Blumenthal Urges Justice Department Investigation of U.S. Airline Industry Collusion on Capacity Discipline

Senator Richard Blumenthal (D-Conn.) sent a letter to the Justice Department's Antitrust Division urging an investigation of U.S. airline industry "collusion and anti-competitive behavior" in maintaining capacity discipline to "artificially raise fares and boost profit margins." Senator Blumenthal cited a New York Times article on efforts by large U.S. airlines to discourage and punish competitors for increasing capacity and reducing fares as evidence for the need for an investigation and possible antitrust enforcement action.

House Transportation and Infrastructure Committee Chairman Shuster Outlines Principles for FAA Reform

House Transportation and Infrastructure Committee Chairman Bill Shuster (R-Pa.) outlined principles for FAA reform on June 15, 2015, at a speech made to the Aero Club of Washington. Chairman Shuster's remarks included his belief that an independent, nonprofit corporation should be established to operate the ATC system.

Senate Commerce, Science and Transportation Committee Holds Hearing on Air Traffic Control Modernization and Reform

The Senate Committee on Commerce, Science and Transportation held a hearing on May 19, 2015 on ATC modernization and reform. The fifth in a series of hearings on FAA reauthorization, the hearing discussed NextGen development and structural reforms to the ATC system, including the possibility of privatization due to governance limitations that inhibit the FAA's ability to both manage and finance the system. Hearing witnesses included FAA Administrator Michael P. Huerta, Business Roundtable President John Engler, former senator Byron Dorgan, now a senior policy adviser at Arent Fox LLP, United Airlines Chairman, President and CEO Jeff Smisek, National Air Traffic Controllers Association President Paul Rinaldi, and National Business Aviation Association President and CEO Ed Bolen.

House Subcommittee on Space Holds Hearing on "Transforming America's Air Travel"

The House Science, Space and Technology Subcommittee on Space held a hearing on June 11, 2015, on "transforming America's air travel," focusing on FAA reauthorization, specifically the current state of civil aeronautics research. Topics included a review of the current state of NextGen, as well as concerns over cybersecurity threats to the ATC system. Hearing witnesses included Dr. Jaiwon Shin, associate administrator of NASA's Aeronautics Research Mission Directorate and member of the FAA Research and Development Advisory Committee, Dennis Miller, director of the FAA's William J. Hughes Technical Center, William Leber, vice president of Air Traffic Innovations, PASSUR Aerospace, Dr. R. John Hansman, chairman of the FAA Research and Development Advisory Committee and T. Wilson Professor of Aeronautics and Astronautics at MIT, and Dr. Greg Hyslop, senior member of the American Institute for Aeronautics and Astronautics, vice president and general manager of Boeing Research & Technology, and chief engineer of Engineering, Operations, and Technology for Boeing.

House Subcommittee on Transportation Security Holds Hearing on Aviation Personnel Vetting

The House Subcommittee on Transportation Security held a hearing on June 16, 2015 on how TSA can improve aviation personnel vetting in light of a recent DHS Inspector General's report that found that 73 aviation workers at various airports had terrorism ties. The subcommittee heard testimony from DHS Inspector General John Roth; DHS Deputy Assistant Administrator Stacey Fitzmaurice; and Jennifer Grover, GAO director of transportation security and Coast Guard issues.

House Committee on Oversight and Government Reform Holds Hearing on Commercial Drones

The House Committee on Oversight and Government Reform held a hearing on June 17, 2015, titled “Drones: The Next Generation of Commerce?” The committee discussed the regulatory challenges surrounding the emerging technology of personal and commercial drones, including the economic impact of regulating their proliferation. The committee heard testimony from FAA Deputy Administrator Michael Whitaker, Dr. John Cavolowsky, director of NASA’s Airspace Systems Program Office, Brian Wynne, president and CEO of the Association for Unmanned Vehicle Systems Operation, Paul E. Misener, vice president of global public policy, Amazon, Inc., and Harley Geiger, advocacy director and senior counsel, Center for Democracy and Technology.

House Passes the Homeland Security Drone Assessment and Analysis Act

On June 23, 2015, the House passed the “Homeland Security Drone Assessment and Analysis Act,” which would require DHS to research the ways in which small and medium-size drones could be used to attack the United States, as well as ways to reduce the risk and impacts of such an attack. The bill, introduced by Rep. Bonnie Watson Coleman (D-N.J.), passed by voice vote under suspension of the rules and is headed to the Senate.

Senator Feinstein Introduces Consumer Drone Safety Bill

Senator Dianne Feinstein (D-Calif.) introduced a bill, S. 1608, on June 18, 2015, to “protect the safety of the national airspace system from the hazardous operation of consumer drones.” Although neither text nor summary of the bill were available at the time of publication, Senator Feinstein’s remarks during her introduction of the bill indicate that this bill would essentially create a “Consumer Drone Safety Act” directing the FAA to further clarify what is acceptable consumer drone activity. The bill was referred to the Senate Committee on Commerce, Science, and Transportation.

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.