

September 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 2017 U.S.-Cuba Frequency Allocation Proceeding, the FAA's elimination of requirements to obtain Reduced Vertical Separation Minimum (RVSM) authorization for aircraft equipped with Automatic Dependent Surveillance-Broadcast (ADS-B) Out systems, CBP's extension of the Air Cargo Advance Screening (ACAS) pilot program, and the latest DOT and FAA enforcement actions.

Department of Transportation

Regulatory

DOT Initiates 2017 U.S.-Cuba Frequency Allocation Proceeding

DOT issued an order instituting the 2017 U.S.-Cuba Frequency Allocation Proceeding to reallocate three daily U.S.-Havana frequencies formerly held by Frontier Airlines and Spirit Airlines. Last year, Frontier was awarded daily frequencies for Miami-Havana service and Spirit was awarded twice daily frequencies for Fort Lauderdale-Havana service, but both carriers recently terminated their respective Havana services and their frequencies reverted to DOT for reallocation. Applications for the newly available frequencies have been filed by American Airlines, Delta Air Lines, Federal Express, JetBlue, Southwest Airlines, and United Airlines/Mesa Airlines. Applications for the available frequencies are due September 12, 2017, with answers to those applications due September 19, 2017, and replies due September 26, 2017.

Enforcement

Frontier Airlines Assessed \$440,000 in Civil Penalties for Alleged Denied Boarding, Baggage Liability, and Disabled Passenger-Related Violations

Frontier Airlines was assessed \$400,000 in civil penalties for alleged violations of DOT's oversales and disabled passenger regulations, according to a consent order issued by DOT. DOT's Enforcement Office reviewed complaints received by the carrier during 2014 and 2015 and identified situations where Frontier involuntarily denied boarding to passengers but failed to advise those passengers of their right to denied boarding compensation, furnish a written notice to those passengers, provide denied boarding compensation in a timely manner, or solicit volunteers before denying boarding involuntarily. DOT also found that the airline in some instances offered only vouchers, rather than cash or a check, as involuntary denied boarding compensation. DOT contended that these oversale violations were "indicative of a wide-spread practice of noncompliance" with 14 C.F.R. Part 250 by Frontier that "warrants enforcement action and must be rectified." Furthermore, DOT found that Frontier failed to provide "adequate and timely wheelchair assistance" when requested by disabled passengers. In addition, DOT found that the carrier's written responses to disabled passengers' complaints were not "dispositive" and did not discuss the complaint at issue, specifically admit or deny whether the carrier believed that a violation of DOT's Part 382 disabled passenger regulations occurred, summarize the facts and reasons that led the carrier to conclude whether or not a violation had occurred, explain the steps the carrier planned to take if it found a violation, and/or advise the complainant of his/her right to pursue DOT enforcement action. DOT ordered the carrier to pay \$325,000 of the assessed penalty within 30 days of the service date of the consent order, while crediting \$36,000 of the assessed penalty to Frontier for compensation provided to disabled passengers who filed complaints, \$25,000 of the assessed penalty credited for funds expended for Frontier's new quality assurance management



David Heffernan

Member

dheffernan@cozen.com
Phone: (202) 463-2537
Fax: (202) 640-5985



Mark W. Atwood

Member

matwood@cozen.com
Phone: (202) 463-2513
Fax: (202) 912-4830

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position, \$9,000 credited for the carrier's implementation of a "special service data feed application" to provide Frontier's largest wheelchair provider with "real-time information and response capabilities" to assist in automatically dispatching and tracking wheelchair assistance, and \$5,000 credited for the development of "an audit and accountability and evaluation process" to be used to determine Frontier agents' compliance with disability and oversales regulations.

DOT also issued a [consent order](#) assessing \$40,000 in civil penalties against Frontier for alleged violations of DOT rules governing denied boarding compensation and baggage liability limits. During audits carried out by DOT's Enforcement Office at various U.S. airports, DOT alleged that agents at Frontier's boarding gates and ticket counters failed to provide copies of the airline's written denied boarding policy statement or provided statements containing compensation amounts below the minimum required under 14 C.F.R. Part 250. DOT also alleged that Frontier displayed signage at certain airport ticket counters and boarding gates that limited the carrier's domestic baggage liability limit to amounts less than \$3,500 and in some cases displayed liability amounts that were more than eight years outdated.

DOT Assesses \$250,000 in Civil Penalties Against American Airlines for Alleged Ticket Refund Violations

DOT issued a [consent order](#) assessing \$250,000 in civil penalties against American Airlines for alleged violations of DOT's regulations governing prompt refunds for airline ticket purchases. DOT regulations require airlines and other sellers of air travel that receive requests for refunds involving purchase by credit card to transmit a credit statement for a passenger refund to the credit card issuer within seven business days of receipt of full documentation for the refund requested. DOT also requires that refunds for tickets purchased with cash or similar forms of payment be provided within 20 business days of receipt of full documentation of such a request. DOT's Enforcement Office found that in the first and second quarters of 2015, American failed to process certain refund requests in a timely manner as required by 14 C.F.R. Part 374. In response, American said that its merger with US Airways required the two airlines to consolidate their Refunds and Customer Relations systems in late 2014 and early 2015, which caused a "degradation" of timely refund processing.

Delta Air Lines Ordered to Pay \$200,000 in Civil Penalties for Alleged Mishandled Baggage Reporting Violations

Delta Air Lines was ordered to pay \$200,000 in civil penalties under a [consent order](#) issued by DOT that alleges that the airline misclassified and misreported certain mishandled baggage claims filed by passengers. DOT's Enforcement Office found that Delta's Standard Operating Procedures for Damage Liability for Baggage Recovery used a "problematic internal policy" that required agents who were unable to settle a mishandled baggage claim with a customer to create a "WorldTracer" entry for that claim. Delta's procedures also stated that it was "preferred that bag damages be settled via replacement bags" and in that case, the claim would be entered in the Passenger Name Record, but no WorldTracer entry was required. As a result, any mishandled baggage reports that were not entered into WorldTracer by Delta were also not included in the mishandled baggage reports the carrier filed with DOT. DOT requires reporting carriers to count and report all domestic reports of mishandled checked baggage, even when a passenger's report of mishandled baggage does not result in a claim for compensation. DOT ordered Delta to pay \$100,000 of the civil penalties within 30 days of the issuance of the consent order, while crediting the remaining \$100,000 to Delta for expenditures the carrier pledged to make to develop a mobile application to improve customers' experience with mishandled bags.

DOT Assesses Civil Penalties Against TAP Air Portugal for Alleged Tarmac Delay-Related Violations

DOT issued a [consent order](#) assessing \$100,000 in civil penalties against TAP Air Portugal for alleged violations of DOT's extended tarmac delay rules under 14 C.F.R. Part 259. An investigation by DOT's Office of Aviation Enforcement and Proceedings found that on July 25, 2016, a TAP Air Portugal flight from Porto, Portugal to Newark was delayed on the tarmac for more than four hours after being diverted to Boston due to bad weather. The aircraft was parked at a remote area and experienced a failure of the aircraft's auxiliary power unit (APU), which resulted in a lack of air conditioning for nearly two hours during the delay and inoperable lavatories for a period of 35

minutes. In addition, the carrier lacked sufficient food to provide to passengers within the required two hours after landing. DOT alleged that TAP Air Portugal allowed its aircraft to remain on the tarmac for more than four hours without any safety-related or security-related reason to do so and without being advised by air traffic control that returning to the gate or another disembarkation point to deplane passengers would disrupt airport operations. The carrier told DOT that it would have had “ample time” to proceed to an open gate and deplane passengers had there been the necessary gate and ground services and equipment available. Nevertheless, DOT held that the carrier “failed to adhere to the assurances in its contingency plan for lengthy tarmac delays regarding timely deplaning of passengers, provision of adequate food, and access to operable lavatories.” TAP Air Portugal was ordered to pay \$50,000 within 30 days of the issuance of the order, with the remaining \$50,000 due and payable if, within one year, the carrier violated the order’s cease and desist or payment provisions.

United Airlines Assessed \$80,000 in Civil Penalties for Alleged Reporting Violations

United Airlines was assessed \$80,000 in civil penalties under a consent order issued by DOT alleging that United violated DOT’s animal incident reporting requirements. According to DOT, United reported that it transported a total of 196,920 animals in 2015, but later disclosed that it had actually transported only 97,156 animals. United explained to DOT that it discovered during a self-audit that its records system erroneously counted types of animals that are not required to be reported under 14 C.F.R. Part 235. As a result of its misreporting, United’s “incidents per 10,000 animals transported rating” increased from 1.17 to 2.37. DOT ordered United to pay \$40,000 within 30 days, with the remaining \$40,000 due and payable if, within one year, United violates the order’s cease and desist or payment provisions.

Air X Aviation, Inc. Assessed \$25,000 in Civil Penalties for Allegedly Operating Without DOT Authority

DOT issued a consent order assessing \$25,000 in civil penalties against Air X Aviation, Inc. for holding out air transportation without the requisite DOT economic authority. DOT alleges that Air X Aviation, a company that specializes in air charter broker services, advertised its operation of four aircraft even though these aircraft were operated by Air X Charter, Ltd., the sister company of Air X Aviation, which holds a foreign air carrier permit. DOT said the advertisements did not contain a disclaimer indicating that Air X Aviation was not the operator of the aircraft and that Air X Aviation was acting only as an air charter broker. DOT contended that the advertisements made Air X Aviation appear to be a direct air carrier, which it is not, and that in these advertisements, Air X Aviation held out air transportation as a direct air carrier when it did not have proper DOT-issued economic authority. DOT ordered the company to pay \$12,500 of the civil penalties within 30 days, with the remainder due only if Air X Aviation violates the cease and desist or payment provisions of the consent order.

Federal Aviation Administration

Regulatory

FAA Issues Proposed Rule to Eliminate RVSM Authority Requirements for Aircraft Equipped with ADS-B Out Systems

The FAA issued a notice of proposed rulemaking that would eliminate operators’ need to obtain from the FAA a Reduced Vertical Separation Minimum (RVSM) authorization if their aircraft are equipped with qualified Automatic Dependent Surveillance-Broadcast (ADS-B) Out systems and meet certain altitude keeping equipment requirements for operations in RVSM airspace. The proposed rule would also remove the detailed designations of where RVSM may be applied that are contained in 14 C.F.R. Part 91, Appendix G. Operators are currently required to submit information to the FAA regarding their compliance with RVSM equipment standards, a description of their RVSM maintenance program, and evidence of their initial and recurrent pilot training in order to obtain FAA authorization. The proposal would remove these regulatory requirements, which the FAA no longer finds necessary for safe operations in RVSM airspace due to “enhancements in aircraft monitoring resulting from the use of ADS-B Out systems.” Comments on

the proposed rule were due September 6, 2017.

FAA Finalizes Reduction in Remote Communications Outlets Used by U.S. Flight Service Stations

The FAA issued a [Notice of Final Policy](#) decommissioning 641 remote communications outlets (RCOs), including 404 RCOs and 237 Very High Frequency Omni-directional Range (VOR) outlets, used by Flight Service Stations in the continental United States, Hawaii, and Puerto Rico. The RCOs are used by contract service providers to communicate with pilots in flight and allow pilots to obtain weather briefings, file flight plans, and receive other flight-related services. The policy was adopted to eliminate “duplicate, overlapping, and seldom used frequencies” among the current network of 1,223 RCOs and 398 VOR frequencies. By eliminating these RCOs, the FAA estimates it will save approximately \$2.5 million annually in maintenance costs, with additional savings to come from the termination of property leases and a decrease in voice-switch communications infrastructure. The policy became effective on August 30, 2017.

Enforcement

FAA Assesses \$285,800 in Civil Penalties Against Exec 1 Aviation for Alleged Safety Violations

The FAA issued a [release](#) assessing \$285,800 in civil penalties against Exec 1 Aviation for alleged operations of passenger-carrying flights with unqualified pilots. The FAA alleges that Exec 1 operated 100 flights using Citation 500 jet aircraft with 12 unqualified pilots. The FAA alleges that during May and June 2015, Exec 1 operated 79 of these flights with passengers onboard the aircraft. The FAA said that the pilots were unqualified because they had failed to complete required initial or recurrent training in subjects such as cold weather operations, engine inoperative procedures, and abnormal and emergency procedures, among other things.

FAA Proposes \$54,000 in Civil Penalties Against the Carboline Company for Alleged Hazmat Violations

The FAA also issued a [release](#) proposing to assess \$54,000 in civil penalties against the Carboline Company of St. Louis, Missouri, for alleged violations of the Hazardous Materials Regulations. According to the FAA, Carboline offered two pails of flammable paint to FedEx for overnight delivery from St. Louis to Elmendorf, Texas, on September 16, 2016, and the package was transported on a FedEx flight from Memphis to San Antonio. The FAA stated that the shipment leaked due to improper packaging, was not accompanied by a shipper’s declaration of dangerous goods, and was not properly classed, described, marked or labeled. Additionally, the FAA alleged that Carboline failed to provide emergency response information with the shipment.

Animal and Plant Health Inspection Service

APHIS Publishes Notice of Availability of Treatment Evaluation Document for Certain Aircraft Insecticide Treatments

The U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS) published a [notice](#) regarding the availability of, and requesting comments on, an evaluation document that describes new insecticide treatments targeting regulated pests in the cargo holds of aircraft. APHIS has determined that two new insecticide treatments should be added to the Plant Protection and Quarantine (PPQ) Treatment Manual: 1) T409–a, a surface spray with deltamethrin 4.75 percent active ingredient to mitigate the risk of Khapra beetle on aircraft; and 2) T409–b–3, an aerosol spray with “1-Shot” treatment containing 2 percent dphenothrin and 2 percent permethrin to mitigate the risk of Japanese beetle and other hitchhiking pests, except Khapra beetle, on aircraft. Comments are due by October 10, 2017.

Customs and Border Protection

CBP Extends Air Cargo Advance Screening (ACAS) Pilot Program

Customs and Border Protection (CBP) issued a [notice](#) extending the Air Cargo Advance Screening

(ACAS) pilot program for an additional year through July 26, 2018. The ACAS program is a voluntary test in which participants submit a subset of required advance air cargo data to CBP at the earliest possible point prior to the loading of cargo onto aircraft destined to or transiting through the U.S. The ACAS data is used by CBP to target high-risk air cargo and CBP intends to eventually incorporate ACAS as an ongoing regulatory program. The current pilot program includes participants that represent a good sample of the air cargo community and CBP is no longer accepting new pilot program participants.

Government Accountability Office

GAO Issues Report Critical of TSA's Aviation Security-Related Behavioral Indicators Used in Behavior Detection Activities

The Government Accountability Office (GAO) issued a report criticizing the Transportation Security Administration's (TSA) use of "behavioral indicators" as part of its aviation security-related behavior detection activities without evidence that most of these indicators are effective in identifying individuals who may pose a threat to aviation security. GAO said that TSA lacks "original research that meets generally accepted research standards" to support the specific behavioral indicators it uses. GAO's review of the sources TSA cited as support for its behavioral indicators found that 98 percent of the sources fail to provide valid evidence applicable to the specific behavioral indicators TSA cited them as supporting. GAO also found that 77 percent of the sources TSA cited were news articles, opinion pieces, presentations created by law enforcement entities and industry groups, and screen shots of online medical websites that did not meet GAO's definition of valid evidence. GAO said that only three of the 178 total sources cited could be used as valid evidence to support eight of the 36 behavioral indicators in TSA's list of behavioral indicators. Since GAO published a similar report in 2013, TSA has reduced funding for its behavior detection activities, edited its list of behavioral indicators, and attempted to identify additional evidence to support its indicators. GAO made no new recommendations in its latest report.

GAO Report Calls for Increased DOT Oversight of Air Ambulance Competition and Pricing

The GAO also issued a report recommending increased DOT oversight and investigation of potentially unfair pricing practices in the sale of air transportation provided by helicopter air ambulances. The report found that median prices providers charged for helicopter air ambulance service nearly doubled between 2010 and 2014, from approximately \$15,000 to approximately \$30,000 per flight. The GAO stated that a lack of competition and market concentration may be responsible for this dramatic increase in price, since three large independent air ambulance providers operated 73 percent of the industry's total helicopters in 2016. The report criticized DOT for not exercising its "discretionary authority to investigate potentially unfair practices in air transportation or the sale of air transportation" and stated that DOT currently lacks data to investigate the number of transports or the industry's composition by provider. The GAO said that certain industry stakeholders recommended allowing "state-level regulation of air ambulance prices" and improving DOT's data collection to facilitate investigations and transparency regarding prices.

Congressional Action Impacting Aviation

Congress is currently considering legislation that would reauthorize the Federal Aviation Administration (FAA) and its various aviation-related programs. Bill Shuster (R-Pa.), chairman of the House Transportation and Infrastructure Committee, has set the week of September 11 as his target for the House to consider its version of the legislation. Congressman Sam Graves (R-Mo.), a member of the House Aviation Subcommittee, confirmed that the House is scheduled to consider the bill, H.R. 2997, on Wednesday, September 13. Both Shuster and Graves have acknowledged that competing legislative priorities, including providing disaster relief for damage caused by Hurricane Harvey, may impact this schedule. However, the House is now expected to complete consideration of a relief bill quickly, despite significant opposition from Republican members, clearing the schedule for consideration of the FAA reauthorization legislation.

There are major differences between H.R. 2997 and its Senate counterpart, S. 1405, including air

traffic control reform and co-pilot training requirements, that will need to be resolved before consideration of a final version of the legislation in both chambers. The Senate has not yet completed consideration of S. 1405, so even if the House completes its consideration of H.R. 2997, Congress will not be able to send a final bill to President Trump by September 30, when the current FAA authorization is set to expire. Congress is therefore likely to pass a short term FAA reauthorization extension bill to allow themselves additional time to come to an agreement on the legislation. Chairman Shuster has not indicated his preference for the length of time for a potential extension bill, but Senate Commerce Committee Chairman John Thune (R-S.D.) has called for a six-month extension.

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.