Alert
June 2014

Aviation Regulatory Update

COZEN O'CONNOR

DOT Releases Passenger Protection Rulemaking #3; FAA Considers Commercial Drone Operations; Other Regulatory Issues

It has been a busy month at the Department of Transportation, with the DOT finally releasing its long-anticipated proposed rule on Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, better known as Passenger Protection Rulemaking #3 or PP3. DOT also issued a Show Cause Order tentatively approving IATA's Resolution 787 to establish a "new distribution capability" for air travel distribution. On Capitol Hill, the House passed the 2015 Transportation Appropriations bill, including an amendment that could have the effect of preventing DOT from approving the controversial application filed by Norwegian Airlines International for authority to begin operating to the United States. Meanwhile, the Federal Aviation Administration issued a Notice of Limited Slot Usage Waiver to accommodate expected congestion and delays caused by runway and taxiway construction at New York's John F. Kennedy International Airport during the Winter 2014-2015 and Summer 2015 traffic scheduling seasons. The FAA also authorized for the first time the commercial operation of a drone over land and received exemption applications filed by film and television companies requesting authority to allow them to commercially operate drones. In addition, the General Services Administration amended Federal Management Regulation provisions governing the use by certain U.S. government agencies of foreign air carriers for the transportation of freight and household goods.

Department of Transportation

Regulatory

Passenger Protection Rulemaking #3

DOT published on May 23, 2014 its Notice of Proposed Rulemaking on Transparency of Airline Ancillary Fees and Other Consumer Protection Issues that contains a number of controversial provisions, including a requirement that airlines and ticket agents disclose at all points of sale the fee information for basic ancillary services such as a passenger's first checked bag, second checked bag, carry-on item and advance seat selection. The NPRM also proposes to require airlines to disclose fee information for basic ancillary services to all ticket agents, including Global Distribution Systems (GDSs), although DOT is also considering an alternative that would require airlines to disclose basic ancillary services fee information only to ticket agents that actually sell air transportation directly to consumers. In addition, the proposed rule would give airlines the discretion on whether or not to allow ticket agents to sell optional or ancillary services, while at the same time require airlines and ticket agents to disclose to consumers when and how optional or ancillary service fees should be paid. The rule would also expand the number of U.S. airlines required to report operating data, require enhanced reporting by mainline U.S. carriers for their domestic code-share partners, and codify DOT's definition of "ticket agent" to include GDSs, websites with flight metasearch engines, and intermediaries that do not sell air transportation but merely arrange for air transportation and receive compensation in connection with the sale of air transportation. Large travel agents (those with annual revenue of $100 million or more) would also be required to adopt minimum customer service commitments. DOT is also considering a revision to its post-purchase price increase restrictions to better address the issue of "mistaken fares." DOT admitted that the "quantifiable costs" of the rulemaking exceed the "quantifiable benefits," but stated that the consumer benefits of the rulemaking, including improved on-time performance for newly reporting airlines and code-share flights of reporting carriers, improved customer goodwill towards ticket agents, and greater competition and lower overall prices for ancillary services and products, justify the costs. Comments on the proposed rule are due August 21.

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Related Practice Areas

- Aviation Litigation
- Aviation Regulatory
- Transportation & Trade
- Unmanned Aircraft Systems (UAS) / Drones

Industry Sectors

- Aviation

Tentative Approval of IATA Resolution 787

On May 21, 2014, DOT issued an Order to Show Cause tentatively approving IATA's Resolution 787, which would establish a process for the development of a "new distribution capability (NDC)" for air travel distribution that would provide "personalized pricing offers" to air travel consumers. Under the NDC, consumers would be able to shop, select and purchase ancillary services or fares packaged with ancillary services, including leg room, premium seats, in-flight entertainment, lounge access or Wi-Fi access, enhancing competition on services and price. The primary purpose of adopting NDC is to foster greater competition in the air travel distribution marketplace by promoting third-party technology providers' development of methods outside of the current GDS-based distribution system. DOT tentatively agreed that IATA's resolution meets the public interest test for approval under 49 U.S.C. § 41309(b) because the proposed NDC "modernized communication standards and protocols and the marketing innovation they could facilitate would be procompetitive and in the public interest, provided that certain safeguards are imposed." These safeguards include: 1) ensuring that airlines will not be restricted in their choice of air travel distribution methods, business models or data transmission standards; 2) ensuring that the communications or message standards or protocols developed under Resolution 787 will be open standards, meaning useable by distributors of air transportation and intermediaries in the distribution of air transportation, including GDSs and other aggregators, on a non-discriminatory basis and that individual IATA member airlines may continue to utilize any communication or message protocol, including existing standards; 3) ensuring that personal information of the buyer of air transportation will be protected and airlines and ticket agents requesting and receiving such personal information will be required to follow their privacy policies for the sharing and storage of personal information; and 4) requiring that the issue of data ownership will not be included in the approved resolution in order to address concerns that section 1.2.7 of the resolution, which states that "each airline distributing its products and services is the owner of its own content," could create new limitations on the use of data or raise legal concerns such as privacy issues. Objections to the order were due June 12, and answers to objections are due by June 23.

Enforcement

Fare Advertising Violation

DOT issued a consent order on May 29, 2014 finding that Southwest Airlines violated DOT's rules by advertising fares for which no seats were available. In its consent order, DOT stated that in addition to having a reasonable number of seats available each time an advertisement appears, carriers must also ensure that, during the period when fares are offered, there is no lengthy period of time when seats are unavailable. DOT cautioned that once a carrier determines that a reasonable number of seats are no longer available, it must promptly discontinue the advertisement or amend it to clarify to which destinations or date ranges the advertisement applies. DOT reminded carriers that failure to have a reasonable number of seats available at the advertised fare is a violation of 14 C.F.R. § 399.84(a) and constitutes an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712. Southwest was assessed a relatively heavy civil penalty of $200,000 because it also violated the cease and desist provision of a previous order and was required to pay an additional $100,000 that had been suspended from an order issued in July 2013.

Federal Aviation Administration

Regulatory

Limited Slot Usage Waiver at JFK

On May 29, 2014, the FAA issued a Notice of Limited Waiver of the Slot Usage Requirements for New York's John F. Kennedy International Airport (JFK) to address likely operational, congestion and delay impacts caused by runway and taxiway construction at the airport taking place during the Winter 2014/2015 and Summer 2015 scheduling seasons. The FAA will be seeking voluntary schedule reductions and retiming of flights to less congested periods, as well as increasing scheduled block time, limiting the allocation of new slots to off-peak hours, optimizing the use of airport capacity based on demand and aircraft fleet mix, and revising air traffic control operational

plans and procedures as warranted. Carriers that temporarily reduce flights and temporarily return slots to the FAA rather than transfer them for use by another carrier will not be penalized by permanently losing those slots and will retain "historical precedence" for them. The deadlines for temporary slot returns under the waiver are December 15, 2014 for slots that would be used from March 1 through March 28, 2015 and January 15, 2015 for slots that would be used from March 29 through October 24, 2015. Temporary slot returns should be submitted to the FAA's Slot Administration Office by email at 7-awa-slotadmin@faa.gov and slot return notifications should indicate they are subject to the slot usage waiver.

FAA Approval of First Commercial Operation of Unmanned Aircraft Systems Over Land

The FAA announced that for the first time, it would allow the commercial operation of a drone over land, permitting energy company BP and manufacturer AeroVironment to fly an AeroVironment Puma AE drone for the purpose of aerial surveys of BP pipelines, roads and equipment at Prudhoe Bay, Alaska. AeroVironment performed the first flight for BP on June 8, 2014.

FAA Consideration of Requests for Commercial Use of Unmanned Aircraft Systems by Movie and TV Production Companies

Seven film and television industry aerial photo and video production companies filed applications with the FAA requesting regulatory exemptions to allow them to use unmanned aircraft systems (UAS), i.e., drones. The companies asked the FAA to grant exemptions from regulations regarding general flight rules, pilot certificate requirements, manuals, maintenance and equipment mandates. They also requested relief from airworthiness certification requirements as allowed under Section 333 of the FAA Modernization and Reform Act of 2012. Under Section 333, certain airworthiness requirements can be waived to let specific UAS fly safely in narrowly defined, controlled, low-risk situations. In order to obtain exemptions, the companies must show that their UAS operations will not adversely affect safety or provide at least an equal level of safety to the rules from which they seek the exemptions. They must also show why granting the exemptions would be in the public interest.

Legal Interpretation of Second in Command and Relief Pilot Qualifications

The FAA published on June 4, 2014 a notice regarding the qualification requirements for pilots assigned as second in command (SIC) on long range flights in Part 121 operations that require three or more pilots, and for pilots who provide relief to the assigned SIC during the en route cruise portion of such flights. Part 121 operators assign one or more additional pilots to a long range flight to ensure that the assigned pilot in command (PIC) and assigned SIC may each comply with the flight duty and rest requirements of Parts 117 and 121. Pilots who serve as SIC of an operation that requires three or more pilots are required to be fully qualified to act as PIC of that operation, including being required to complete qualification and recurrent training and evaluation (proficiency checks) with the same content and frequency as PIC training and proficiency checks, but excepting PIC operating experience under 14 C.F.R. § 121.434. SICs may only leave their duty station for purposes of rest during the en route cruise portion of the flight, if relief is provided by a pilot who meets the requirements identified in 14 C.F.R. § 121.543(b)(3)(ii) to act as SIC of the aircraft during the en route cruise portion of the flight. A relief pilot that acts as SIC must meet the Part 121 SIC qualification requirements, except for the recency of experience requirement in § 121.439 (three takeoffs and landings within 90 days). The FAA clarified that an assigned SIC in a Part 121 operation that requires three or more pilots must satisfy the PIC qualification requirements under § 121.432(a), but the § 121.432(a) requirements do not apply to a pilot who relieves the assigned SIC for a period of time en route.

Enforcement

FAA Hazmat-Related Enforcement Action

The FAA instituted enforcement proceedings against Hixwood Metal, Inc. and Atlantic Technical Systems, Inc. for allegedly violating the Hazardous Materials Regulations. The FAA alleged that on August 28, 2013, Hixwood Metal offered a five-gallon container of flammable lightweight industrial lubricant to United Parcel Service, Inc. for shipment by air that was later found to be leaking. The

FAA stated that Hixwood Metal did not declare the hazardous materials and the agency proposed a $63,000 civil penalty against the company. The FAA also alleged that on November 11, 2013, Atlantic Technical Systems offered four-liter containers of flammable isopropyl alcohol to FedEx Corp. for shipment by air that were later found to be leaking. The FAA alleged that the shipment offered by Atlantic Technical Systems was not properly classed, described, packaged, marked, labeled or in proper condition for shipment and proposed a $76,000 civil penalty.

General Services Administration

Regulatory

GSA Amendment of Rules Governing the Use by Federal Agencies of Air Carriers Transporting Cargo Under the Fly America Act

The GSA has issued a final rule amending the Federal Management Regulation (FMR) provisions on the use by federal agencies of foreign air carriers for the transportation of freight and household goods funded by the U.S. government (not including the U.S. military) under the Fly America Act. The amendments clarify that federal agencies may only pay for cargo transportation provided by foreign air carriers when deemed necessary and in "very limited" situations. The amendments reflect certain U.S. bilateral and multilateral air transport agreements that allow foreign air carriers to transport U.S. government-funded cargo. Rather than amend the FMR to include language from the agreements, GSA's final rule references the State Department's webpage regarding such agreements, allowing the GSA to quickly update relevant information as new agreements are signed or current agreements are amended without invoking the regulatory process. The GSA also revised the FMR to specifically exclude from coverage under the Fly America Act any cargo transportation services for which the U.S. government is not expending any of its own funds and for which the costs are fully reimbursed by a third party, such as a foreign government, an international agency or other organization. The final rule became effective on June 11, 2014, the same day it was published in the Federal Register.

Congressional Action Impacting Aviation

House Passage of the 2015 Transportation Appropriations Bill

On June 10, 2014, the U.S. House of Representatives passed by a vote of 229-192 the 2015 Transportation Appropriations Bill (H.R. 4745), which funds DOT and certain other agencies. The bill provides $17 billion for DOT, which is $727.3 million below the fiscal year 2014 enacted level and $5.8 billion below the Obama administration's request. The bill also provides $15.7 billion for the FAA, which is $7.3 million below the fiscal year 2014 enacted level and $446 million above the requested amount. The bill fully funds the FAA's Next Generation Air Transportation Systems (NextGen) at $852.4 million. Meanwhile, the Senate Appropriations Committee passed their version of the 2015 Transportation Appropriations bill (S. 2438) on June 5, 2014. The Senate bill provides a total of $18.1 billion in discretionary budget authority for DOT for 2015 and $15.9 billion for the FAA.

House Amendment Limiting DOT's Ability to Grant Norwegian Airlines International U.S. Operating Authority

On June 9, 2014, the House passed an amendment to the 2015 Transportation Appropriations bill that could have the effect of preventing DOT from granting Norwegian Airlines International (NAI) a foreign air carrier permit or exemption allowing the carrier to operate to the United States. The amendment, offered by Congressmen Peter DeFazio (D-Ore.) and Lynn Westmoreland (R-Ga.), prohibits DOT from approving a new foreign air carrier permit under 49 U.S.C. §§ 41301 through 41305 or exemption application under 49 U.S.C. § 40109 filed by an air carrier "already holding an air operators certificate issued by a country that is party to the U.S.-E.U.-Iceland-Norway Air Transport Agreement where such approval would contravene United States law or Article 17 bis of the U.S.-E.U.-Iceland-Norway Air Transport Agreement." Congressman DeFazio likened NAI, a subsidiary of a Norwegian-based carrier that is incorporated in Ireland, to cruise ship operators that "go forum shopping" looking for a nation that has weaker laws regulating labor and safety, and that allows crew outsourcing. DeFazio said that DOT approval of NAI's application would be a

“recipe for disaster” that would both threaten consumers and national security. He declared that passage of the amendment would send a message to the Obama administration that Congress will not let this happen. NAI filed its application with DOT last December, generating strong opposition from U.S. airlines and labor unions. Unlike previous applications filed by European carriers under the provisions of the U.S.-EU open skies agreement that are approved relatively quickly by DOT, the NAI application has been pending for months.

Please contact a member of the Cozen O’Connor Aviation Practice Group for more information.