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DOT Announces a Series of Aviation Consumer Protection Initiatives

On October 18, 2016, the Department of Transportation (DOT) announced the release of four aviation consumer protection documents, including: (i) a Final Rule for Enhancing Airline Passenger Protections #3 (EAPP#3), one month ahead of schedule; (ii) a Final Rule on reporting data for mishandled baggage and wheelchairs/assistive scooters applicable to certain U.S. carriers; (iii) an Advanced Notice of Proposed Rulemaking (ANPRM) soliciting public comments on the refund of checked baggage fees for delayed baggage, as required by the FAA Extension, Safety and Security Act of 2016 ; and (iv) a Request for Information (RFI) "exploring industry practices on distribution and display of airline fare, schedule, and availability information." A number of the initiatives set forth in the final agency rules will have a wide-ranging impact on carrier and ticket agent operations and marketing activities, while the other initiatives may also have an impact depending on what action DOT takes following the submission of public comments.

EAPP#3 Final Rule

In August 2016, DOT announced that it had divided a complex consumer protection rulemaking initiative, entitled "Transparency of Airline Ancillary Service Fees and Other Consumer Protection Issues" and for which a Notice of Proposed Rulemaking was issued in May 2014 (the 2014 NPRM), into three separate rulemakings. The first rulemaking of these three rulemakings, entitled "Enhancing Airline Passenger Protections III" (EAPP#3) would address whether: the pool of U.S. carriers required to submit monthly airline service quality data to DOT should be expanded, including enhanced reporting of code-share operations; additional code-share disclosure regulations should be adopted; undisclosed display biasing of airline schedule, fare or availability information should be prohibited in a new regulation; ticket agents should disclose on their websites which carrier's tickets the agent sells; and "drafting errors" from the second rule on Enhancing Airline Passenger Protection released in 2011 (EAPP#2) should

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be corrected. DOT's October 2016 report on significant rulemakings had projected a November 15, 2016 publication date for the EAPP#3 Final Rule, but DOT issued the Final Rule on October 18, 2016 in conjunction with other significant consumer protection documents, discussed below.

Further to the 2014 NPRM, the EAPP#3 Final Rule expands the pool of U.S. carriers required to report airline service quality data, including on-time performance, mishandled baggage statistics, and passenger oversale statistics, to DOT's Bureau of Transportation Statistics (BTS). Currently, the threshold for such reporting carriers (as defined under 14 CFR part 234) is any U.S. certificated air carrier that accounts for at least 1% of domestic scheduled passenger revenue. DOT lowered the threshold to 0.5% of domestic scheduled passenger revenue in the new rule, thereby expanding the pool of reporting carriers. According to data from BTS, this will add seven (7) carriers to the pool of reporting carriers. The effective date for this portion of the EAPP#3 Final Rule is January 1, 2018.

DOT also issued new regulations requiring carriers reporting airline service quality data (at the new threshold defined above) to also report statistics for certain of their U.S. code-share partners. The new regulations also will be effective January 1, 2018 and expand the scope of airline service quality reportable data to include a reporting carrier's domestic code-share flights held out under the reporting carrier's designator code but not the operating carrier's designator code (e.g., flights operated by the reporting carrier's regional partner pursuant to a capacity purchase agreement).

For such flights, the reporting carrier will be responsible for filing service quality reports with BTS. DOT stated that this new requirement is intended is to afford passengers an opportunity to review a carrier's system-wide performance, including regional affiliates. The data will be published in DOT's monthly *Air Travel Consumer Report.* As a consequence, certificated U.S. carriers meeting the applicable threshold will be responsible for gathering statistics related to on-time performance, mishandled baggage, and oversales from certain of their domestic regional partners, even if that partner is not itself a reporting carrier under Part 234.

DOT also amended its code-share disclosure rules at 14 CFR part 257. The amendments in part codify its prior enforcement policy with respect to statutory requirements Congress enacted through 49 U.S.C. § 41712(c). However, in amending Part 257, DOT went beyond its prior enforcement policy and added new regulatory requirements concerning the font size carriers and ticket agents must use when identifying code-share flights on desktop browsers and applications as well as mobile websites and applications. Furthermore, DOT's amendments to Part 257, as they relate to oral communications with prospective customers, require that that the code-share disclosure must be provided "the first time that [a code-share] flight is offered to the consumer, or, if no such offer was made, the first time a consumer inquires about such a flight," which DOT asserts is consistent with its prior enforcement policy.

Significantly, 49 U.S.C. § 41712(c) was enacted by Congress in order to provide greater code-share disclosure, including requiring that such disclosure be "easily viewable" to a user of an Internet display and displayed on the first screen on which a code-share flight is offered in response to an itinerary search. Prior to issuing the 2014 NPRM, DOT in 2011 issued industry guidance indicating that DOT would follow the statute in enforcing its code-share disclosure regulation. In the 2014 NPRM, DOT "emphasized" that that the proposed amendments to Part 257 were "primarily non-substantive and would not affect what carriers and ticket agents [were] already obligated to do under the combination of the current section 257.5, the amended 49 U.S.C. § 41712, and the Department's guidance document." However, DOT, in the 2014 NPRM, did seek comment on whether it should specify a minimum font size

for code-share disclosure, which would be a departure from previous guidance. In the EAPP#3 Final Rule, DOT modified the proposed regulatory text in the NPRM with respect to the disclosure font size requirement applicable to desktop and mobile websites/applications. This new font-size requirement will likely necessitate widespread desktop and mobile website programming changes for carriers and ticket agents. Nevertheless, in the cost estimate for the code-share disclosure regulation accompanying the EAPP#3 Final Rule, the Regulatory Impact Analysis only refers to a small "incremental" cost to update mobile websites and applications, to the extent carriers and ticket agents are not already in compliance, and does not address the cost of updating desktop websites and applications as well. The effective date of the new code-share disclosure regulation is 30 days after publication of the EAPP#3 Final Rule in the Federal Register.

The EAPP#3 Final Rule also includes new regulations at 14 CFR Part 256, applicable to airlines or ticket agents that operate electronic airline information systems (EAISs), i.e., systems that combine multiple airlines' "schedule, fare or availability information for transmission or display" to consumers, business entities, or other airlines or ticket agents. More specifically, new Part 256 generally prohibits "display bias," i.e., the use of any factor relating to carrier identity in ordering the information displayed, on EAISs unless the biasing is clearly and conspicuously disclosed to the user "at the top of the first search result page presented." Importantly, the disclosure requirement does not apply where the biasing is based on user selection or corporate contract travel arrangements. The requirements of the new 14 CFR part 256 go into effect 30 days after publication of the EAPP#3 Final Rule in the Federal Register.

DOT also addressed in the EAPP#3 Final Rule a number of unresolved issues from EAPP#2, some of which were described by DOT as "drafting errors" in the EAPP#2 final rule. Along these lines, 14 CFR part 250, dealing with airline oversales, has been amended to require oral disclosures of material restrictions on the use of vouchers, when vouchers are offered instead of denied boarding cash/check compensation to either voluntarily or involuntarily bumped passengers. The prior rule only required such disclosure when a passenger was involuntarily bumped from an oversold flight. Additionally, DOT has amended 14 CFR § 259.8, dealing with airline flight-status notifications to consumers, to clarify that the required notifications are triggered only when the flight is departing within seven (7) days, consistent with prior DOT industry guidance.

Moreover, DOT proposed in the 2014 NPRM to codify its controversial stance that it has the legal authority to fine carriers on a per passenger basis for violations of the DOT's tarmac delay rule, which generally prohibits carriers from allowing an aircraft to remain on the tarmac beyond a set number of hours without offering passengers the opportunity to deplane. In the preamble to the EAPP#3 Final Rule discussing the reasons for DOT's decisions with respect to proposals included in the 2014 NPRM, DOT maintained that it has the authority to assess carriers civil penalties on a per passenger basis in the case of tarmac delays, but explained that it decided not to amend the rule as proposed, stating that it would instead continue to exercise enforcement discretion on a case-by-case basis. However, in the final rule text itself, DOT did amend the tarmac delay rule, 14 CFR § 259.4(f), to state that failure to comply with the rule is "subject to enforcement action by the Department and the maximum amount of civil penalties as prescribed in 14 CFR 383.2 per affected passenger."

Finally, DOT declined in the EAPP#3 Final Rule to take further action in two areas for which it sought public comment in the 2014 NPRM; DOT decided against (i) requiring ticket agents that engage in display bias (for which disclosure generally will be required under new Part 256) to also disclose information on airline incentive payments; and (ii) adopting a regulation requiring large travel agencies to disclose in

online flight information displays the fact that not all carriers serving a particular city-pair are marketed by the travel agency (if that is the case).

Final Rule on the Reporting of Mishandled Baggage and Mishandled Wheelchairs/Assistive Scooters

This final rule, concerning the reporting of mishandled baggage and wheelchairs/assistive scooters finalizes a portion of an NPRM issued by DOT in 2011. In the original NPRM, DOT proposed to require U.S. carriers covered by Part 234 to report ancillary service fee revenue, mishandled bags per enplaned bag (as opposed to mishandled bags per 1,000 passengers as had previously been the case), and specific reporting of damage, delay, or loss of wheelchairs and assistive scooters transported in the aircraft cargo compartment. Subsequent to the 2011 NPRM and after a review of comments received, DOT held a public meeting on the issue. Based on the complexities raised in the public meeting, DOT decided to bifurcate the rulemaking into two separate rulemakings: (i) one for the reporting of ancillary service fee revenue, which remains open and is scheduled for publication in the spring of 2017, and (ii) one for the reporting of mishandled bags and wheelchairs/scooters. In this final rule, DOT is requiring reporting carriers under Part 234 to report the number of mishandled bags and the total number of domestic enplaned bags (to include checked bags, gate-checked bags, valet bags, and interlined bags), excluding charter flights. A bag is "enplaned" on each segment of a passenger's journey. DOT is also requiring that reporting carriers report the number of mishandled wheelchairs and assistive scooters and the number of wheelchairs and assistive scooters transported in the aircraft cargo hold. A mishandled wheelchair or assistive scooter is one that is lost, delayed, damaged, or pilfered. DOT will publish the data associated with the new reporting requirements in the monthly *Air Travel Consumer Report*. The compliance date for this rule is January 1, 2018.

ANPRM on Refunding Checked Baggage Fees

The FAA Extension, Safety, and Security Act of 2016 (the Act) signed by President Obama on July 15, 2016 required DOT to issue regulations requiring carriers to refund fees charged for the transportation of checked baggage that is "unreasonably delayed." The Act defines an unreasonable delay as a delay of 12 or more hours in the delivery of checked bags for a domestic flight and 15 or more hours for an international flight. The Act does give DOT discretion to set a different time limit for domestic and international flights, but states that the final rule cannot define an unreasonable delay as exceeding 18 hours for a domestic flight or 30 hours for an international flight. Currently, 14 CFR § 259.5(b)(3) requires carriers to make reasonable efforts to deliver baggage on time and requires carriers to refund baggage fees in the event that the checked bag is lost. In the second rule for Enhancing Airline Passenger Protections issued in 2011, DOT specifically declined to require carriers to refund baggage fees in the event a checked bag is delayed. However, based on the Act, DOT must issue regulations addressing the refund of checked baggage fees, and the ANPRM is the first step in the rulemaking process. In the ANPRM, DOT has solicited public comment on a number of issues, including but not limited to (i) information on how carriers handle interline itineraries and mixed itineraries when the passenger has both a domestic and international segment, and (ii) particular circumstances, such as frequency of flights to a specific destination, that DOT should take into account when proposing rule text. DOT also recognized in the ANPRM that there is flexibility within the statutory framework regarding the length of a delay that would trigger a refund, including the feasibility of returning baggage within a prescribed timeframe and the effects on consumers. DOT plans to use the comments received as part of the ANPRM to develop a

proposed rule. Comments on the ANPRM are due within 30 days from the date of publication in the Federal Register.

Request for Information: Industry Practices on Distribution and Display of Airline Fare, Schedule, and Availability Information

In addition to the regulatory actions described above, DOT issued a Request for Information (RFI) to solicit comments on whether airline practices of restricting the distribution or display of airline flight information via OTAs and metasearch websites harms consumers or is an unfair and/or deceptive business practice or an unfair method of competition.

In the 2014 NPRM, DOT issued a proposed rule that would require airlines to provide their ticket agents with information on fees for certain "basic" ancillary services, tentatively defined as "fees for a first checked bag, a second checked bag, one carry-on bag, and an advance seat assignment" (the Transparency Proposal). Among the comments sought by DOT were whether the requirement should apply in the case of all ticket agents that receive and distribute the carrier's fare, schedule and availability information, including GDS operators and other intermediaries, or only those ticket agent's selling the carrier's services directly to consumers. DOT did not propose in the 2014 NPRM that carriers be required to allow their ticket agents to sell ancillary services. In August 2016, DOT disclosed that it plans to issue a supplemental notice of proposed rulemaking (SNPRM) soliciting further public comment on the Transparency Proposal in January 2017.

However, DOT also indicated in the 2014 NPRM that it was considering a prohibition on carriers restricting the information they provide to ticket agents when those ticket agents "do not sell air transportation directly to consumers but rather provide consumers with different airlines' flight information for comparison shopping." Subsequent to the 2014 NPRM, DOT met with representatives of certain online travel agencies (OTAs), metasearch websites focused on travel, airlines and other stakeholders "to learn about the issue and how airline decisions to place restrictions on the distribution and display of airline flight information may impact both consumers and the broader air transportation industry." The OTAs and metasearch websites urged DOT to take action. Additionally, several members of Congress, led by Senator Charles Schumer (D-NY), called on DOT in 2015 to investigate this issue. Meanwhile, in their meetings with DOT, certain airlines explained that restrictions are imposed for a variety of reasons, including a desire "to control how the information regarding their flights is distributed so that the airline can market services it chooses, through the outlets it chooses," as well controlling airline distribution costs.

The RFI commits DOT to examine the issue further, and has been issued pursuant to DOT's aviation consumer protection powers, specifically (i) its authority under 49 U.S.C. § 41712 to prevent unfair or deceptive practices or unfair methods of competition in air transportation or the sale of air transportation, and (ii) its mandate to "encourage and enhance consumer welfare through the benefits of a deregulated, competitive air transportation industry" consistent with the Airline Deregulation Act of 1978 and 49 U.S.C. § 40101. The RFI invites stakeholders to submit information to DOT about the nature of airline restrictions on flight information, consumer access to such information, the reasons for the restrictions, and the restrictions' effect on competition and new entry in the air transportation marketplace. Based on the responses, DOT may consider taking further action if it finds that the restrictions amount to an unfair or deceptive practice or unfair method of competition. Responses to the RFI are due within 60 days of the date of publication in the Federal Register.

Future Rulemaking Initiatives

As noted above, DOT is expected to issue a SNPRM for the Transparency Proposal in January 2017. During the comment period for the 2014 NPRM, a number of ticket agents, including OTAs, as well as consumer advocates, urged DOT to include change and cancellation fees within the scope of "basic" ancillary service fee information that airlines should be required to provide to their ticket agents. In announcing the aviation consumer protection rulemakings on October 18, 2016, DOT issued a press release and the White House issued a fact sheet indicating that DOT is considering whether to require that (i) airline change/cancellation fees be included within the scope of such ancillary fee information, and (ii) consumers be provided with an opportunity to obtain an "all-in" price, including "baggage fees, seat assignment fees, and change and cancellation fees," when shopping online. (DOT had considered an "all-in" price in the second Enhancing Airline Passenger Protections rulemaking but declined to adopt such a mandate in 2011.) It is reasonable to anticipate that the forthcoming Transparency Proposal SNPRM will solicit comments on change/cancellation fees and "all-in" pricing.

Finally, DOT's latest report on significant rulemakings indicates that DOT plans to publish a final rule in July 2017 addressing three proposals from the 2014 NPRM: (i) a proposal to codify DOT's interpretation of the term "ticket agent" under 49 U.S.C. § 40102(a)(40), to expressly include entities acting as intermediaries involved in the sale of air transportation, if the entity holds itself out as "a source of information about, or reservations for, the air transportation industry" and receives compensation "in any way related to the sale of air transportation"; (ii) whether large travel agencies should be required to adopt and adhere to minimum customer services standards similar to those required of airlines under DOT's regulations, including standards governing: the timing for ticket refunds; the holding/cancellation of reservations within 24 hours of booking; the disclosure of carrier cancellation policies, aircraft seating configurations and lavatory availability; the timing for communicating carrier-initiated itinerary changes; and the handling of customer complaints; and, (iii) whether to amend the DOT's prohibition on post-purchase price increases (14 CFR §§ 399.88 and 399.89) to include baggage fees and address so-called "mistake fares."

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