

# United States

Jonathon H Foglia and Jol A Silversmith

KMA Zuckert LLC

## REGULATORY FRAMEWORK

### Regulators and primary legislation

1 | Which bodies regulate aviation in your country? Under what basic laws?

The federal government regulates aviation pervasively and has exclusive sovereignty over US airspace. The primary agencies are:

- the Federal Aviation Administration (FAA) (see question 2);
- the Department of Transportation (DOT), which has economic regulatory authority encompassing, among other areas, the licensing and continuing fitness of US carriers, foreign carrier traffic rights, subsidies for air services to small communities, joint-venture carrier agreements and aviation consumer protection and civil rights; and
- the Department of Homeland Security (DHS), which oversees civil aviation security through the Transportation Security Administration (TSA).

The US Customs and Border Protection (CBP) also has regulatory functions affecting air carrier operations, including the administration of the federal customs, immigration, agriculture and quarantine laws at US airports.

Finally, the National Transportation Safety Board (NTSB) investigates aircraft accidents to determine probable cause and makes regulatory recommendations to the FAA, and also reviews certain FAA civil penalty and certificate actions. The primary statutory authorities for federal aviation regulation are contained under Title 49 of the United States Code (USC) and under Titles 14 and 49 of the Code of Federal Regulations (CFR).

## AVIATION OPERATIONS

### Safety regulations

2 | How is air transport regulated in terms of safety?

Air transport safety is regulated primarily by the FAA through the issuance of regulations and minimum standards. Further, aviation 'rules of the road,' applicable to both private and commercial operations, are set forth under 14 CFR Part 91.

US carriers are subject to additional safety requirements in the form of FAA certificates and operations specifications issued pursuant to 14 CFR Part 119, establishing operating requirements under 14 CFR Part 135, for commuter and on-demand operations, and 14 CFR Part 121, for domestic, flag and supplemental operations, or operations specifications under 14 CFR Part 125, for certain non-common carriage operations.

Foreign carriers are subject to operations specifications issued under 14 CFR Part 129 and the operating rules of Part 91. The DOT

also monitors the safety performance of US and foreign carriers and, with respect to US carriers, places limits on the size of the air carrier's authorised large-aircraft fleet during its first several years of operation.

The FAA performs several other safety functions applicable to air transport, including but not limited to:

- operating the air traffic control (ATC) system;
- the certification of pilots, flight engineers, flight and ground instructors, ATC operators, dispatchers, mechanics and repairmen;
- establishing minimum rest and maximum duty periods for pilots and flight attendants;
- overseeing the issuance of design, production and airworthiness approval for aircraft; and
- enforcing regulations governing the transportation of hazardous materials by air.

3 | What safety regulation is provided for air operations that do not constitute public or commercial transport, and how is the distinction made?

Non-commercial operations must be conducted in accordance with 14 CFR Part 91, while most commercial operations (ie, operations for compensation or hire) are subject to a higher degree of safety oversight and must be conducted in accordance with the FAA's operations specifications or an air carrier certificate, pursuant to 14 CFR Parts 119, 121, 125, 129 and 135 (see question 2).

Fractional ownership operations and certain other limited operations not involving common carriage may be operated under Part 91, including:

- ferry or training flights;
- aerial work operations (eg, photography or surveys);
- aircraft customer demonstration flights (with limited expense recovery);
- aircraft operated by a company and carrying company personnel, guests and their property when such carriage is incidental to the company's business (with limited cost recovery);
- the carriage of groups having a common purpose or objective (where no compensation is involved); and
- aircraft time sharing, interchange or joint ownership arrangements (with limited expense recovery).

### Market access

4 | How is access to the market for the provision of air transport services regulated?

The Airline Deregulation Act of 1978 (ADA) sought to encourage competition and new entrant US carriers. However, access to the air transport services market is still regulated. Independent of FAA's safety authority (see question 2), new US carriers must obtain DOT 'economic authority' as follows:

- a certificate of public convenience and necessity for operations with large aircraft (ie, aircraft with a designed passenger capacity of more than 60 seats or a payload capacity above 18,000lbs);
- commuter air carrier authorisation (ie, operations without large aircraft on at least one passenger route involving at least five weekly round trips according to a published flight schedule); or
- air taxi registration (for other carriers).

Before the DOT issues a certificate of public convenience and necessity, or commuter air carrier authorisation, it must find that the applicant meets the DOT's 'fitness requirements'. The DOT employs a tripartite test to confirm that the applicant possesses:

- the managerial skills and technical ability to conduct the proposed operations;
- financial resources sufficient to commence operations without posing an undue consumer risk; and
- a positive compliance disposition.

The applicant must also be a US citizen (see question 5).

Once operations have commenced, US carriers remain subject, on an ongoing basis, to the DOT's fitness and citizenship requirements. The DOT certificates that authorise foreign air transportation are also subject to presidential review. Access to specific airports may be constrained due to slot controls, and access to foreign markets may be constrained due to limitations on designated carriers, routes or frequencies in the underlying air transport agreement.

**Ownership and control**

**5 | What requirements apply in the areas of financial fitness and nationality of ownership regarding control of air carriers?**

In issuing a US carrier certificate or commuter authority, the DOT will assess the applicant's financial position and confirm that the applicant has both a reasonable understanding of the costs of conducting operations and access to sufficient capital required to initiate services.

Before being granted effective authority, applicants must also provide verification of financial resources sufficient to cover pre-operating costs, plus all reasonably projected costs, during the first three months of normal operations. The applicant must also demonstrate that it is a citizen of the United States.

For partnerships, all partners must be US citizens; for corporations and associations, the president and at least two-thirds of the board of directors and other managing officers must be US citizens, 75 per cent of the voting interest must be owned and controlled by US citizens and the entity must be under the 'actual control' of US citizens. Limited liability companies (LLCs) are analysed as either partnerships or corporations, depending on the LLC's structure and governance.

In such cases where foreign investors are from countries with which the US has an open skies air transport agreement, foreign ownership may go up to 49 per cent, provided foreign voting equity does not exceed 25 per cent. For foreign carriers seeking DOT authority, more limited financial information is required.

Additionally, under most air transport agreements to which the US is a party, carriers of each party must be substantially owned and effectively controlled by national interests. However, the DOT may grant waivers from the substantial ownership or effective control requirement in the case of foreign carriers and investors from countries with which the US has an open skies air transport agreement.

**Licensing**

**6 | What procedures are there to obtain licences or other rights to operate particular routes?**

For US carriers holding interstate certificates or commuter authority, generally no route-specific domestic authority is required (with the exception of congressionally-created exemptions to slot rules at a limited number of US airports, as discussed in question 22).

Domestic routes must be authorised under the carrier's FAA-issued operations specifications, and, in the case of scheduled services, certificated carriers must hold interstate scheduled authority from the DOT.

For international routes, the traffic rights must be provided for in the applicable bilateral or multilateral air transport agreement, or available on the basis of reciprocity, and the carrier must hold a DOT exemption or foreign certificate authority (in the case of US carriers) or a permit (in the case of foreign carriers) authorising service on the route. Certificate and foreign air carrier permit authorities are subject to presidential review.

In international markets with limited entry, the DOT will designate and award frequencies authorised under the air transport agreement to US carrier applicants. Foreign air carrier designations and frequency awards in limited-entry markets are made by the carrier's national civil aviation authority.

**7 | What procedures are there for hearing or deciding contested applications for licences or other rights to operate particular routes?**

If carrier applications exceed the number of opportunities available for an award (typically, in the case of US carriers seeking access to limited-entry international markets), the DOT may institute a formal carrier selection proceeding. The DOT's rules of practice provide that any party may file an answer in support of, or opposition to, carrier applications. Rules of practice contained under 14 CFR Part 302 are set forth as follows:

- subpart A – rules of general applicability;
- subpart B – rules applicable to US carrier certificate and foreign air carrier permit proceedings; and
- subpart C – rules of practice applicable to exemption proceedings (covering both US and foreign carriers).

Contested applications for traffic rights are typically decided on the basis of written submissions, although the DOT retains discretion to employ an oral evidentiary hearing before an agency administrative law judge, whose recommendations may be accepted or rejected by the DOT.

Orders are reviewed upon a petition for reconsideration, despite the fact that typically such petitions will not stay the effectiveness of order. Although rarely invoked in the case of traffic rights, judicial review of the DOT's final orders may be obtained in federal courts of appeal.

**Competition policy**

**8 | Is there a declared policy on airline access or competition? What is it?**

The ADA has established a number of procompetitive policy objectives that the DOT is required to adhere to when administering its economic regulatory functions, including:

- maximum reliance on competitive market forces;
- the prevention of unfair, deceptive, predatory or anticompetitive practices;
- the avoidance of unreasonable industry concentration, excessive market domination and monopoly power; and

- encouraging market entry by new and existing air carriers and strengthening small air carriers.

The airline industry remains subject to the US antitrust laws to the same extent as any other deregulated industry (see question 29). Further, the DOT has the special authority to approve, and immunise from the US antitrust laws, certain agreements in foreign air transportation under 49 USC sections 41308–41309 (see question 29). Finally, the DOT is empowered to investigate and determine whether carriers have engaged in unfair methods of competition, including anticompetitive conduct that may not amount to a violation of the US antitrust laws.

### Requirements for foreign carriers

#### 9 | What requirements must a foreign air carrier satisfy to operate in your country?

Foreign carriers must obtain:

- economic authority from the DOT in the form of a foreign air carrier permit or exemption;
- safety authority from the FAA in the form of operations specifications; and
- a TSA security programme, depending on the size of aircraft to be used in such operations and whether or not passengers are to be enplaned from, or deplaned into, a sterile airport area.

With respect to operations specifications, the FAA will assess whether the carrier's operations and its domestic civil aviation authority comply with the standards and recommended practices of the International Civil Aviation Organization (ICAO).

The TSA review process assesses carrier compliance with civil aviation security safeguards specified in 14 CFR Part 1546. The TSA will not authorise nonstop foreign air carrier flights to the US which depart from a foreign airport if the TSA has not completed an airport security assessment for that airport.

In addition to the DOT, FAA and TSA approvals, local agency or airport authority permits and approvals specific to the US airports to be served, and, in most cases, a CBP customs bond, must be secured.

### Public service obligations

#### 10 | Are there specific rules in place to ensure aviation services are offered to remote destinations when vital for the local economy?

When Congress largely deregulated domestic air transportation in 1978, it instructed the DOT to ensure that small and isolated communities would continue to receive continuous interstate air transportation, and to set aside funds in the form of carrier subsidies administered under the DOT's essential air service (EAS) programme. Congress has since moved to limit funding for the EAS programme by tightening criteria for eligible communities, including average daily enplanements and per-passenger subsidy levels.

Previous efforts by presidential administrations to drastically reduce or completely eliminate EAS funding have been unsuccessful, as the EAS programme enjoys popularity with Congress. EAS subsidies support air service at approximately 170 US communities at present.

The DOT, in selecting applicants to provide EAS service, must consider several factors, including the applicant's operational reliability, connecting service beyond hub airports and local community preference (which is accorded substantial deference). Carriers serving EAS communities and wishing to terminate such service must file a 90-day notice of intent with the DOT (in cases where the community would be left with no service), and the DOT has the authority to 'hold in' the

incumbent beyond that time frame (with payment of subsidy) while it searches for a replacement.

EAS programme rules are set forth under 14 CFR Parts 271, 325 and 398. The DOT also administers a small community air service development programme (SCASDP), which is intended to help smaller communities enhance their air service and address issues related to high air fares through the awarding of direct grants to local governments. The SCASDP programme is separate from the EAS programme, with its own eligibility and selection criteria.

### Charter services

#### 11 | How are charter services specifically regulated?

Charters to or from the US may be flown by US or foreign carriers. Charters involving the taking on, and discharge of, traffic between US locations, may only be flown by US carriers, due to statutory prohibitions against 'cabotage' operations.

The DOT's charter regulations are set forth under 14 CFR Parts 212 and 298 (applicable to carriers). Charters must be flown by carriers holding appropriate economic authority from the DOT and safety authority from the FAA. Also, charters in foreign air transportation must be conducted in accordance with the provisions of the applicable air transport agreement.

Finally, the DOT regulates US and foreign public charter operators (ie, indirect carriers that, as principals, engage indirectly in air transportation by holding out and arranging public charters), under 14 CFR Part 380. The DOT has expressly disclaimed jurisdiction over foreign public charter operators operating foreign originating charters.

### Regulation of airfares

#### 12 | How are airfares regulated?

The carrier's duty to file airfares for interstate passenger air transportation, as well as interstate and foreign all-cargo air transportation, was eliminated following the passage of the ADA. For foreign passenger air transportation, carriers must still file tariffs with the DOT (with the scope of such filing varying in accordance with the underlying air services market).

For markets where an open skies air transport agreement is not presently enacted, certain passenger airfares and many passenger tariff rules must continue to be filed with the DOT. For markets where an open skies air transport agreement currently is being applied, it is not necessary for passenger airfares to be filed; however, certain general rules (including, but not limited to, rules addressing disability accommodations, carrier liability and refusal to transport) must continue to be filed. The DOT also regulates the advertising of airfares (including full-fare requirements) and the disclosure of significant restrictions or conditions to US consumers under its regulations contained in 14 CFR Part 399.

Consistent with the procompetitive objectives of the ADA, and notwithstanding certain residual authorities in Title 49 of the USC, the DOT does not dictate the reasonableness of airfare levels. However, it retains the authority to investigate and prohibit unfair or deceptive practices and unfair methods of competition in air transportation or the sale of air transportation.

### Drones

#### 13 | How is the operation of unmanned aircraft systems (drones) regulated?

The FAA has issued regulations under 14 CFR Part 107 governing the safe operation of non-hobbyist (ie, commercial), unmanned aircraft

systems (UAS or drones) weighing less than 55lbs – including payload capacity – in the national airspace system.

- Operating restrictions include, but are not limited to:
- maintaining the drone in the visual line of sight of the pilot or a visual observer;
  - prohibitions on operations during night;
  - yielding right of way to a manned aircraft;
  - prohibitions on operating drones from moving vehicles or over people not involved in the operation of the drone;
  - limitations on speed, altitude, maximum distance from clouds and national airspace operational areas;
  - prohibitions against operation in ATC-controlled airspace absent prior approval;
  - certificates and qualifications for pilots;
  - pre-flight inspections; and
  - compliance with FAA or NTSB accident reporting.

The regulations allow the FAA to issue waivers from certain of these requirements upon a finding that the operation can safely be conducted under the terms of the waiver. Among the more noteworthy of such FAA-issued waivers are those allowing operations:

- during night;
- from moving vehicles;
- beyond the operator’s visual line of sight; and
- over people not involved in the operation.

Commercial drones must also be registered with the FAA. At present, commercial drones heavier than 55lbs require either an FAA-issued special exemption under 49 USC section 44807 (which entails a risk-based approach to confirm that the drone does not create a hazard to users of the national airspace system or the public) or an airworthiness certificate (as with the design and production of manned aircraft), which entails a lengthy approval process.

In general, the FAA is statutorily prohibited from issuing additional regulations specifically regulating recreational or hobbyist drones not exceeding 55lbs in weight (including payload); however, such operations are subject to minimum safety-based operational parameters (such as passage of an aeronautical knowledge and safety test targeted for deployment by the FAA later this year) and registration and marking requirements.

All drone operations (whether commercial or recreational) are subject to the FAA’s prohibition against operating aircraft in a careless or reckless manner and federal law prohibiting interference with wild-fire suppression, law enforcement or emergency response efforts, or operations over designated national security sensitive facilities. The FAA’s efforts to safely integrate drones into the national airspace system are ongoing, and additional rules covering commercial operations not currently permitted under 14 CFR Part 107 are anticipated, including rules allowing for the operation of drones at night and over people not directly involved in the operation (for which proposed rules were issued in January 2019) and expanding areas of the national airspace where drone operations would be permitted.

**AIRCRAFT**

**Aircraft register**

**14 | Who is entitled to be mentioned in the aircraft register? What requirements or limitations apply to the ownership of an aircraft listed on your country’s register?**

To be eligible for FAA registration, the aircraft must not be registered on a foreign registry and, in the case of civil aircraft, the owner must be either be:

- a US citizen (see definition in response to question 5);
- a lawful permanent resident; or
- a corporate entity not qualified as a US citizen but organised and doing business in the United States, so long as the aircraft is based and primarily used in the United States.

Any aircraft of the US government or a US state, territorial, local or municipal government (ie, public aircraft) may be registered.

FAA regulations also provide for the registration of aircraft owned by a US citizen trustee holding legal title in trust for beneficiaries (including a beneficiary that is not a US citizen or permanent resident). Upon registration, the FAA issues a certificate of registration to the named aircraft owner. However, the aircraft registration certificate, by statute, cannot serve as evidence of ownership ‘in a proceeding in which ownership is or may be in issue.’

Registration certificates must be renewed once every three years. FAA aircraft registration regulations are contained under 14 CFR Part 47.

**Mortgage register**

**15 | Is there a register of aircraft mortgages or charges? How does it function?**

Under 49 USC section 44107, the FAA maintains a system for recording conveyances, and leases and instruments executed for security purposes, that affect an interest in civil aircraft, specified aircraft engines, propellers or appliances, and spare parts. The FAA also records the release, cancellation, discharge or satisfaction of such conveyances, leases or instruments. FAA regulations are contained under 14 CFR Part 49.

The US is a contracting state to the Convention on International Interests in Mobile Equipment, and its Protocol on Matters Specific to Aircraft Equipment (the Treaty), applicable to specified airframes, helicopters and aircraft engines (aircraft objects), where the debtor, lessee or seller is situated in a contracting state. The FAA has been designated as the US entry point for the International Registry established under the Treaty.

To register an interest against an aircraft object under the Treaty, parties must first file transaction documents with the FAA, along with the FAA AC Form No. 8050-135. Filing with the FAA Registry and International Registry is required to perfect (and thereby prioritise) a security interest for recognition by other Treaty jurisdictions.

**Detention**

**16 | What rights are there to detain aircraft, in respect of unpaid airport or air navigation charges, or other unpaid debts?**

Creditors’ rights to seize aircraft are governed by state law, with both substantive and procedural requirements depending on the type of debt and the priority of the lien. Under the Uniform Commercial Code (UCC), which has been enacted by most states (but with some variations), aircraft lessors and secured parties generally may take possession in the event of default.

Possession without judicial process is permissible only where it can be done without breach of the peace (UCC sections 2A-525 and 9-609). However, some jurisdictions expressly prohibit self-help. Thus, a lessor or secured party will typically seek to obtain a court judgment to foreclose on a lien and take possession.

The right to take possession of aircraft is also limited by US bankruptcy law. Once a debtor has filed for bankruptcy, the right to take possession automatically is stayed for a period of 60 days, with the period extended either where the debtor-in-possession (DIP) has agreed to perform all obligations under the lease or financing agreement and cured all defaults, or the DIP and lessor or secured party stipulate to an extension of the stay. Aircraft, against which liens have been placed to

collect on certain civil penalties owed by the aircraft owner or operator to the DOT, FAA or TSA, may be seized summarily.

## Maintenance

### 17 | Do specific rules regulate the maintenance of aircraft? What are they?

Rules applicable to the maintenance of aircraft, for which an FAA airworthiness certificate has been issued, as well as airframes, aircraft engines, propellers, appliances, and component parts of such aircraft (collectively: products), are contained under 14 CFR Part 43, addressing, among other areas:

- approval for product return to service and persons authorised to provide such approval;
- the form and content of maintenance records;
- performance rules for inspectors; and
- airworthiness limitations.

Rules applicable to the FAA's airworthiness directives, issued when the FAA finds an unsafe product condition exists, are contained under 14 CFR Part 39. Additional maintenance rules applicable to operators of US-registered aircraft are contained under 14 CFR Part 91; US carriers are subject to further maintenance requirements specified in 14 CFR Parts 121, 125 and 135. The FAA also issues certificates and associated ratings, and establishes general licensing requirements, for mechanics and repairmen performing maintenance on aircraft.

Finally, the FAA licenses and regulates repair stations (including foreign repair stations performing maintenance on US-registered aircraft) under 14 CFR Part 145 and aviation maintenance technician schools under 14 CFR Part 147.

## AIRPORTS

### Ownership

#### 18 | Who owns the airports?

Most public US airports are state, municipal government or authority-owned. However, some public general aviation airports are privately owned, and some commercial airports utilise management companies for day-to-day operations.

The federal airport pilot privatisation programme enables the long-term lease of commercial airports (and privatisation of general aviation airports) while maintaining their eligibility for federal funding. The only airport currently participating in the programme is Luis Muñoz Marín International Airport in Puerto Rico. A preliminary application has been filed for St Louis Lambert Airport in Missouri, but no bidder has been selected and no final application has been filed.

### Licensing

#### 19 | What system is there for the licensing of airports?

An airport must obtain an operating certificate pursuant to 14 CFR Part 139 if it is served by scheduled flights with more than nine passenger seats or unscheduled flights with more than 30 passenger seats. Other airports are not generally required to comply with the FAA's standards (although compliance is a best practice).

Notable requirements include the maintenance of an airport certification manual, standards for pavement maintenance and staffing requirements for aircraft rescue and firefighting; additionally, the FAA inspects licensed airports at least once per year. Airports may also be subject to state or municipal regulations and there is a separate federal licensing scheme for spaceports.

### Economic regulation

#### 20 | Is there a system of economic regulation of airports? How does it function?

The Anti-Head Tax Act limits the taxes, fees and charges that states and municipalities may impose upon airports, but the airport owner or operator may collect 'reasonable rental charges, landing fees and other service charges from aircraft operators'. Although any airport user may complain to the DOT that airport fees are unreasonable, there is an expedited process for resolving complaints filed by air carriers.

Airports that have received federal financial assistance (broadly defined) must devote most – if not all – airport revenues to airport capital and operating costs. The terms of federal grants and donations of property also impose additional economic restrictions, including a prohibition on the grant of exclusive rights to airport users.

### Access

#### 21 | Are there laws or rules restricting or qualifying access to airports?

Federal grants and donations of property prohibit economic discrimination against aeronautical activities (ie, they must be allowed access on reasonable terms). Virtually all commercial airports, and many general aviation airports, are subject to these requirements. Additionally, medium and large hubs must maintain competition plans which explain how air carriers will be provided access, and submit reports to the DOT if they are unable to do so.

However, the FAA may allow certain activities to be prohibited. For example, an airport is obligated to allow skydiving only if it can be conducted safely. Additionally, the DOT has allowed certain airports to impose operating limits or perimeter rules (eg, setting a maximum permissible distance for nonstop flights), but such local restrictions are disfavoured and not likely to be expanded. Similarly, the FAA has authorised congestion pricing, but only under limited circumstances.

### Slot allocation

#### 22 | How are slots allocated at congested airports?

Only three major US airports – New York JFK, New York LaGuardia (LGA) and Washington Reagan National (DCA) – are subject, with FAA approval, to slot controls.

At JFK and LGA, slots are administered in accordance with long-standing FAA scheduling orders from 2008 and 2006, respectively. At DCA, slots are administered in accordance with regulations under 14 CFR Part 93, with a designated number of slots set aside for commuter operations, ie, aircraft with 76 or fewer seats.

Flights at DCA and LGA are generally subject to perimeter restrictions that limit the points which can be served nonstop from those airports. However, Congress has created a limited number of slot exemptions at DCA to facilitate nonstop flights to and from points beyond the perimeter.

At JFK and LGA, slots cannot be sold, leased or traded without FAA approval. DCA slot exemptions cannot be sold, leased or traded. At all three airports with slot controls, slots that are not used at least 80 per cent of the time are subject to withdrawal and reallocation, with usage monitored through regular reports.

Additionally, although slots and other access restrictions generally require FAA approval, a few smaller airports have grandfathered hourly operating limitations, notably Long Beach (LGB) and John Wayne (SNA), based on noise considerations (not congestion).

### Ground handling

23 | Are there any laws or rules specifically relating to ground handling. What are they?

Although ground handling is not specifically regulated, economic discrimination against and exclusive rights for aeronautical activities are prohibited. Accordingly, an airport generally cannot grant an exclusive franchise to a ground handler, nor deny access to a new ground handler. However, the mere existence of a single ground handler would not constitute a violation, and under limited circumstances the DOT might find an airport that is not obligated to accommodate new providers (eg, if no facilities were available). Additionally, US bilateral air service agreements typically require air carriers to be allowed to self-handle.

### Air traffic control

24 | Who provides air traffic control services? And how are they regulated?

Currently, the FAA's Air Traffic Organization (ATO) manages aircraft operations in the US and in neighbouring oceanic airspace. The ATO also staffs more than 250 airport towers, and 250 further towers are operated on a contract basis. There are regulations for the ATC workforce (14 CFR Part 65) and thresholds for establishing an FAA tower (14 CFR Part 170); other requirements appear in internal FAA orders.

## LIABILITY AND ACCIDENTS

### Passengers, baggage and cargo

25 | What rules apply in respect of death of, or injury to, passengers or loss or damage to baggage or cargo in respect of domestic carriage?

Carrier liability for death of or injury to passengers, occurring in domestic carriage, is generally governed by state and territorial laws, with courts often engaging in a choice of law analysis. In determining which state or territorial substantive laws to apply, courts may look to the jurisdiction where the 'wrong' occurred, or the jurisdiction with the most significant relationship to the occurrence or the parties, or both (sometimes referred to as the centre of gravity approach). Principles of *dépeçage* – different rules governing different issues in the same litigation – may also apply.

Under state and territorial laws, common carriers owe their passengers the utmost duty of care, a higher standard of care than the traditional negligence standard. In certain cases, federal pre-emption may establish the standard of care. However, courts have frequently held that, even where the federal standard of care applies, state or territorial remedies (ie, recoverable damages) are not so pre-empted.

Liability for loss of or damage to baggage or cargo, occurring in domestic carriage, is ordinarily governed by contract (as specified in the carrier's conditions of carriage). For passenger baggage, a carrier may not limit its maximum liability to less than the amount specified under 14 CFR section 254.4 (currently US\$3,500 per passenger). The federal government may also be held liable under the Federal Tort Claims Act, 28 USC section 1346(b), for negligent acts or omissions, to the same extent as a private individual, unless a statutory exception applies, such as the performance of a discretionary function or duty.

### Surface damage

26 | Are there any special rules about the liability of aircraft operators for surface damage? What are they?

Operators are liable for surface damage caused to third parties in accordance with state and territorial laws which apply negligence principles. The US is not a contracting state to the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952 Rome Convention), as supplemented by the 1978 Montreal Protocol. Nor is the US a signatory to the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft (2009 Montreal Convention I) or the Convention on Compensation for Damage Caused by Aircraft to Third Parties (2009 Montreal Convention II), both of which address liability for surface damage caused to third parties and neither of which has entered into force.

### Accident investigation

27 | What system and procedures are in place for the investigation of air accidents?

The NTSB, an independent agency, conducts investigations of civil aircraft accidents and incidents. The NTSB's statutory authorities are contained at 49 USC section 1001 et seq.

The NTSB, during investigations, may rely upon assistance from the FAA, other federal agencies and third parties with specialised technical expertise. Final reports issued by the NTSB contain factual findings, a probable cause determination and, frequently, recommendations to the FAA regarding regulatory actions to be taken in response to the accident.

Under statute, parties in civil litigation may not access the cockpit voice recorder transcript or recording unless a court finds such release necessary to ensure a fair trial, and NTSB final accident reports are inadmissible as evidence in civil litigation. NTSB rules applicable to accident investigations are contained under 49 CFR Parts 831 and 845.

In general, the NTSB's rules have been harmonised with ICAO Annex 13, Aircraft Accident and Incident Investigation. The NTSB also represents the US government in foreign accident investigations.

### Accident reporting

28 | Is there a mandatory accident and incident reporting system? How does it operate?

NTSB regulations require immediate initial notification to the NTSB in the case of aircraft accidents and serious incidents involving any US civil aircraft, or foreign civil aircraft where the event occurs in the United States.

'Accidents' are occurrences involving death or serious injury or substantial damage to aircraft, and 'serious incidents' are certain occurrences, other than accidents, as specified in 49 CFR section 830.5(a). More detailed accident reports must be provided to the NTSB within 10 days after the occurrence; in the case of serious incidents, more detailed reports are provided only as requested by the NTSB.

## COMPETITION LAW

### Specific regulation

29 | Do sector-specific or general competition rules apply to aviation?

US competition laws apply to air transport. The general US competition laws are the Sherman Act, which prohibits agreements that unreasonably restrain trade (15 USC section 1) and monopolies, attempts to monopolise or conspiracies to monopolise, or a combination of the

above (15 USC section 2), and the Clayton Act, which prohibits mergers and acquisitions when the effect may be to substantially lessen competition or to create a monopoly (15 USC section 18).

The Department of Justice (DOJ) enforces the general US competition laws and, for mergers, follows the Horizontal Merger Guidelines.

Sector-specific competition laws are enforced by the DOT and include 49 USC section 41712, which prohibits airlines from engaging in unfair methods of competition in air transportation or the sale thereof, and 49 USC section 41720, which entails prior DOT review of joint venture agreements between two or more major US airlines (see question 32).

Additionally, under 49 USC section 41309, cooperative agreements between airlines relating to foreign air transportation may be submitted to the DOT for prior approval and, under 49 USC section 41308, may be immunised from the US antitrust laws when required by public interest, and must be so immunised when the agreement substantially reduces competition but is necessary to meet a serious transportation need or achieve important public benefits, provided the need cannot be met, or the benefits cannot be achieved, by reasonably available alternatives that are materially less anticompetitive.

Finally, under 49 USC section 41105, the DOT has jurisdiction over the transfer of US airline international route authorities, with approval issued when the transfer is consistent with the public interest.

## Regulator

**30** | Is there a sector-specific regulator, or are competition rules applied by the general competition authority?

See question 29.

Both the DOJ and DOT enforce competition laws against the airline industry. The general US competition laws, under the Sherman and Clayton Acts, are enforced by the DOJ, and the sector-specific competition laws, 49 USC sections 41105, 41712, 41720 and 41308–41309, are enforced by the DOT.

Importantly, the DOT's authority under section 41712 is broader than that of the DOJ under the foregoing general US competition laws, allowing the DOT to take action in cases where anticompetitive conduct is:

- not serious enough to violate the antitrust laws but may do so if left unchecked; or
- not technically a violation of the letter of US antitrust law but is close to a violation or otherwise contrary to the spirit of US antitrust law.

## Market definition

**31** | How is the relevant market for the purposes of a competition assessment in the aviation sector defined by the competition authorities?

The relevant market is determined by identifying the relevant product or service (eg, scheduled passenger air services) and the relevant geographic area (eg, domestic routes or city pairs) where the parties compete. The analysis examines whether the proposed transaction would be likely to lessen competition in the relevant market.

## Code-sharing and joint ventures

**32** | How have the competition authorities regulated code-sharing and air-carrier joint ventures?

Code-sharing between US airlines operating aircraft with more than 60 seats and foreign airlines or between two or more foreign airlines require DOT approval under 14 CFR section 212, and DOT routinely approves such applications if the arrangement is authorised by the applicable air transport agreements or on the basis of comity and

reciprocity. Where the arrangement involves a foreign airline's display of a US airline designator code, the US airline must audit the safety standards of its foreign partner(s). Additionally, DOT will not allow US airlines to place their designator codes on foreign airlines from countries that FAA has concluded do not maintain adequate safety oversight of their airlines.

DOT has the authority to approve and immunise from the antitrust laws joint ventures between airlines relating to foreign air transportation (see question 29). Most applications have been approved, but some have been denied on competition grounds, or have been approved only with conditions (see question 34). Although DOJ has general authority to enforce the antitrust laws in the airline sector, DOT has exclusive authority over the immunisation of such joint ventures.

Finally, under 49 USC section 41720, joint ventures between two or more major US airlines (ie, airlines with more than US\$1 billion in annual revenues), if affecting 15 per cent or more of all capacity offered by the major US airlines, must be filed with DOT prior to implementation, which DOT will review to assess whether the joint venture would constitute an unfair method of competition under 49 USC section 41712 (see question 30). Regardless of any determination made by DOT with respect to joint ventures submitted under 49 USC section 41720, the DOJ retains authority to file suit to prevent the transaction on antitrust law grounds.

## Assessing competitive effect

**33** | What are the main standards for assessing the competitive effect of a transaction?

Regulators look to whether the transaction would have an anticompetitive effect, either by creating or enhancing market power (ie, the ability to price above levels charged in a competitive environment), or facilitating the exercise of market power. The analysis considers post-transaction market concentration and the increase in that concentration, often utilising the Herfindahl–Hirschman Index (HHI), which is calculated by squaring the individual market shares of all participants. Mergers in highly concentrated industries that produce more than a small increase in HHI levels are closely scrutinised, particularly where the prospect of entry by other firms is low (such as at slot-controlled airports).

In the context of airline mergers, regulators evaluate the transaction in all city-pair markets served by both carriers, including on a nonstop basis and on a connecting basis. Within each of those markets, the regulators will then identify the number of airlines serving the market and the nature of that service in order to assess the availability of alternative products and services to which consumers may reasonably turn.

In general, transactions involving a high degree of overlap in markets where the parties are the dominant service providers are more likely to trigger competition concerns from regulators.

## Remedies

**34** | What types of remedies have been imposed to remedy concerns identified by the competition authorities?

Both the DOJ and DOT have imposed competition remedies on airline transactions. Examples of DOJ remedies include:

- the *United/Continental* merger in 2010 (entailing the divestiture of slots and related gates at Newark Liberty International (EWR));
- the *US Airways/American* merger in 2013 (entailing the divestiture of slots and related gates at DCA and LGA as well as a small number of gates at five other US airports); and
- the *Alaska/Virgin America* merger in 2016 (involving post-merger restrictions on code-sharing with American).

Examples of DOT remedies include:

- the *Delta/Aeromexico* joint venture in 2016 (involving the divestiture of slots at JFK and Mexico City's Benito Juárez International (MEX) and limiting a grant of requested antitrust Immunity to an initial term of five years); and
- the *Delta/US Airways* slot transaction in 2011 (involving the divestiture of slots at DCA and LGA).

The DOT denied approval for a proposed *American/Qantas* immunised joint venture in 2016 on competition grounds; however, the carriers reapplied for approval in 2018, and in July 2019 obtained final DOT approval. Also in July 2019, Delta and Aeromexico petitioned the DOT to eliminate the previously imposed five-year limit on their antitrust immunity, citing changed competitive circumstances in the US-Mexico air services market.

The DOJ also sued United and Delta in 2016 over United's proposed acquisition of slots from Delta at EWR. However, the suit was subsequently rendered moot when slot controls were eliminated at that airport.

**FINANCIAL SUPPORT AND STATE AID**

**Rules and principles**

35 | Are there sector-specific rules regulating direct or indirect financial support to companies by the government or government-controlled agencies or companies (state aid) in the aviation sector? Is state aid regulated generally?

The federal government does not have sector-specific or general state aid rules for, and currently does not provide direct financial support to, the US airline industry. Following the 9/11 terrorist attacks, Congress passed, and the President signed into law, the Air Transportation Safety and System Stabilization Act, which provided US\$5 billion in grants to, and set aside a further US\$10 billion in federal loan guarantees for, US carriers. Ultimately, only US\$1.2 billion in loan proceeds were disbursed (all of which were subsequently repaid).

Under 49 USC section 44305, the DOT has the authority to provide aviation insurance to US carriers, without premium, if another federal agency agrees to indemnify the DOT for all losses. Pursuant to this authority, such insurance is currently available to US carriers that have contracts with the Department of Defense. Previously, the DOT had the authority to provide third-party liability war-risk insurance, at premium, to US carriers, but that authority has since expired.

US carriers are eligible to participate in the essential air service programme, which provides subsidies for air services in small and rural communities (see question 10). Additionally, the Export-Import Bank of the United States (EXIM), the official export credit agency of the US, assists in financing and facilitating exports of US goods, including airframes and engines; however, between July 2015 and May 2019, due to a lack of a quorum among its board of directors (who must be confirmed by Congress), the EXIM could not consider medium- and long-term transactions exceeding US\$10 million.

36 | What are the main principles of the state aid rules applicable to the aviation sector?

Not applicable.

**Exemptions**

37 | Are there exemptions from the state aid rules or situations in which they do not apply?

Not applicable.

**Clearance of state aid**

38 | Must clearance from the competition authorities be obtained before state aid may be granted? What are the main procedural steps for doing so?

Clearance from competition authorities is not required before state aid may be granted. However, state aid is not currently provided to the US airline industry.

**Recovery of unlawful state aid**

39 | If no clearance is obtained, what procedures apply to recover unlawfully granted state aid?

Not applicable.

**CONSUMER PROTECTION**

**Passengers**

40 | What rules regulate denied boarding, cancellation or (tarmac) delay?

DOT imposes denied boarding requirements for most flights within and departing the US (14 CFR Part 250). DOT sets requirements for soliciting volunteers, boarding priority, notice to passengers and compensation (up to US\$1,350 per passenger, depending on the circumstances).

Carriers are required to notify passenger of flight cancellations and identify the services that they will provide in the event of a flight cancellation, but are not required to provide any specific mitigation in the event of a flight cancellation (14 CFR Part 259), other than refunding the value of any unused portions of the ticket if a passenger opts not to travel.

DOT requires most US and foreign carriers to adopt contingency plans for lengthy tarmac delay, with requirements such as that passengers will be allowed to deplane within three hours for domestic flights and four hours for international flights (with certain exceptions, such as if deplaning is not possible for safety or security reasons), and that the carrier will provide, food, water and lavatory facilities during the delay. DOT also has taken the position that in the event of a tarmac delay, it may impose a civil penalty on a per-passenger basis, not just on a per-flight basis. Currently, the maximum DOT civil penalty is US\$34,174 per violation.

**Package holidays**

41 | What rules apply to the sale of package holiday products?

The sale of package holidays is within the scope of DOT's generally-applicable consumer protection rules (eg, rules addressing full fare advertising as well as the disclosure of baggage fees and other significant conditions, and rules limiting or prohibiting post-purchase price increases) and, if applicable, DOT's rules for public charter flights (14 CFR Part 380), which regulate not just the flight but the hotel and other elements of the charter programme.

**Other consumer legislation**

42 | Is there any other aviation-specific consumer legislation?

Additional DOT regulations also govern aviation consumer protection matters, including regulations addressing:

- the required notice of international tariff rules and domestic contract terms (14 CFR Parts 221 and 253);
- undisclosed display biasing on electronic airline information systems (14 CFR Part 256);
- the disclosure of code-sharing arrangements (14 CFR Part 257);

- carrier adherence to DOT-mandated customer service plans, consumer notifications regarding flight irregularities and responses to consumer complaints (14 CFR Part 259);
- fare advertising, ancillary fee disclosures and price increases (14 CFR Part 399);
- the timely processing of ticket refunds (14 CFR Part 374); and
- the performance of, and protection of consumer funds paid for, public charter flights (14 CFR Part 380).

There are no aviation consumer rules specific to airline bankruptcies; however, for US airlines undergoing reorganisation under the US bankruptcy code, DOT will undertake a continuing fitness review to ensure the carrier's continued operations will not pose an undue risk to consumers. Moreover, passengers affected by a carrier's cessation of operations owing to bankruptcy have certain protections under the Fair Credit Billing Act.

In 2004, DOT largely deregulated CRS/GDS operations; however, as such entities are considered ticket agents under 49 USC section 40102, they continue to be subject to DOT's prohibition on unfair or deceptive practices, and unfair methods of competition, under 49 USC section 41712, as well as the prohibition against undisclosed display bias noted above (14 CFR Part 256).

Additionally, the DOT has issued a comprehensive set of technical regulations under 14 CFR Part 382, implementing the Air Carrier Access Act, 49 USC section 41705, which establishes specific accommodations that airlines must provide to individuals with disabilities. Furthermore, under 49 USC section 40127, the DOT may bring enforcement action to prevent airlines from subjecting passengers to discrimination on the basis of race, colour, national origin, religion, sex or ancestry.

US courts have routinely held that no private right of action exists with respect to the DOT's aviation consumer protections and civil rights requirements. State laws and regulations related to airline prices, routes or services are expressly pre-empted.

## INSURANCE AND SECURITY

### Insurance for operators

#### 43 | What mandatory insurance requirements apply to the operation of aircraft?

Under 49 USC section 41112, the DOT has established minimum insurance requirements for US and foreign carriers, with such requirements contained under 14 CFR Part 205. Minimum coverages are as follows:

- third-party liability coverage for bodily injury to, or death of, persons (other than passengers) and damage to property, with minimum limits of US\$300,000 for any one person in any one occurrence, and a total of either US\$20 million per involved aircraft (for large aircraft) or US\$2 million (for small aircraft) for each occurrence; and
- aircraft accident liability insurance coverage for bodily injury to or death of passengers, with minimum limits of US\$300,000 for any one passenger, and a total per aircraft or each occurrence coverage of US\$300,000 times 75 per cent of the number of aircraft passenger seats installed.

Lower minimum coverage requirements apply to US and Canadian on-demand air taxi operators (ie, carriers that only operate small aircraft).

### Aviation security

#### 44 | What legal requirements are there with regard to aviation security?

Aviation security requirements are enforced by the TSA. Prior to 9/11, airlines were responsible for providing passenger and baggage screening at US airports, as well as checking passenger names against terrorist watch lists. Thereafter, such security functions were federalised and placed within the TSA. Additionally, post-9/11, the TSA took over aviation security functions previously performed by the FAA, including the Federal Air Marshal Service, the issuance of operator security plans and the assessment of civil aviation security at foreign airports serving as the last point of departure for inbound US flights.

The TSA's statutory authorities are contained at 49 USC, Chapter 449. Specific TSA requirements are contained under 49 CFR Parts 1540–1562, as supplemented by operator security plans and emergency amendments thereto, as well as security directives. Several TSA regulations and programmes also cover airport operators, freight forwarders, cargo screening facilities, flight schools and aircraft repair facilities.

### Serious crimes

#### 45 | What serious crimes exist with regard to aviation?

A number of statutes criminalise conduct with respect to aviation operations, punishable by fine, a term of imprisonment, or both. These statutes include:

- 49 USC section 46502(a) (aircraft piracy);
- 49 USC section 46503 (interference with airport security screening personnel);
- 49 USC section 46504 (interference with flight crew members and attendants);
- 49 USC section 46505 (carrying weapons or explosives on aircraft);
- 49 USC section 46507 (false information and threats); and
- 18 USC section 32(a) (destruction of aircraft or aircraft facilities).

For acts occurring on aircraft, US jurisdiction attaches when the aircraft is in the special aircraft jurisdiction of the United States, which covers any US civil or military aircraft, any foreign aircraft in the US, and certain other aircraft outside the US, such as any aircraft with its next scheduled destination or last point of departure in the US if the aircraft does, in fact, next land in the US.

The US is a contracting state to the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), but has not signed the 2014 Montreal Protocol amending the Tokyo Convention.

## UPDATE AND TRENDS

### Emerging trends

#### 46 | Are there any emerging trends or hot topics in air transport regulation in your jurisdiction?

Under the US Transportation Code, companies operating aircraft involving the intrastate carriage of cargo for compensation or hire must obtain FAA air operator authorisation, and with respect to the interstate or foreign carriage of such cargo, both FAA and DOT air carrier authorisation. In 2018, Congress as part of comprehensive legislation re-authorising the FAA's activities for a five-year period, instructed the FAA to update its regulations to specifically enable the certification of drone operators to conduct cargo operations, based on requirements addressing drone airworthiness, operator minimum qualifications and operations specifications governing the type and nature of authorised operations. In April 2019, the FAA issued its first drone cargo airline

certification to Wing Aviation LLC, a subsidiary of Alphabet, Inc, paving the way for the delivery of commercial packages (initially identified as medicine and food) via drones to residential customers in two rural Virginia communities. The FAA's action followed an earlier announcement from DOT allowing drone cargo operators to rely on streamlined procedures at 14 CFR section 298 to obtain corresponding economic authority. Importantly, to be eligible for FAA and DOT authority to engage in operations as a US drone cargo airline, the airline must qualify as a 'citizen of the United States' (see question 5), a requirement that will drive decisions around ownership structures and foreign investment as US drone cargo airlines grow in number over the next several years.



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**Jonathon H Foglia**

jfoglia@kmazuckert.com

**Jol A Silversmith**

jsilversmith@kmazuckert.com

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888 17th Street, NW  
Suite 700  
Washington  
DC 20006  
United States  
Tel: +1 202 298 8660  
Fax: +1 202 342 0683  
www.kmazuckert.com