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October 23, 2018

VIA CM/ECF

Mark Langer, Clerk of Court
U.S. Court of Appeals for the D.C. Circuit
333 Constitution Ave, N.W.
Washington D.C. 20001

Re: *Paralyzed Veterans of America, Inc. v. U.S. Department of
Transportation*, Nos. 17-1272, 18-5016

Dear Mr. Langer,

The government writes to inform the Court of developments affecting the compliance date of the Department of Transportation's (DOT's) Reporting Rule, 81 Fed. Reg. 76300 (Nov. 2, 2016).

The Reporting Rule imposes new data reporting obligations on airlines regarding mishandled checked baggage, including mobility aids. DOT's Extension Rule, 82 Fed. Reg. 14437 (Mar. 21, 2017)—which petitioners seek to challenge—established January 1, 2019, as the Reporting Rule's compliance date.

On October 5, 2018, the FAA Reauthorization Act of 2018, Pub. L. No. 115-254, was enacted. Section 441 of the Act provides that “[t]he compliance date” of the Reporting Rule “shall be effective not later than 60 days after the enactment of this Act”—*i.e.*, December 4, 2018.

In an Enforcement Notice submitted to the Federal Register and posted online today,¹ DOT provides guidance to affected airlines regarding the Reporting Rule's compliance date in light of Section 441. The Notice explains that the agency's Office of Aviation Enforcement and Proceedings “expects that airlines should be able to accurately report mishandled wheelchair and scooter data” for flights beginning December 4, 2018. Notice, p.4. “[A]ny airline asserting that it is not able to accurately report wheelchair and scooter data” for flights from December 4 through

¹ <https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/323201/enforcement-notice-final-oct-23-2018.pdf>

December 31 is instructed to submit “a detailed explanation” for this “no later than January 3, 2019,” so that DOT may determine whether to exercise enforcement discretion for that period. Notice, pp.4-5.

In addition to discussing Section 441 and the compliance date, the Enforcement Notice also observes that Section 410 of the FAA Reauthorization Act pertains to mishandled baggage reporting. Section 410 states that “[n]ot later than 6 months after the date of enactment of this Act,” the Secretary “shall study and publicize for comment a cost-benefit analysis to air carriers and consumers of changing the baggage reporting requirements of [14 C.F.R. §] 234.6 . . . before implementation of such requirements.” The Notice explains that this provision does not require any delay of the compliance date for the Reporting Rule because it applies only to prospective changes. Notice, p.2 n.2.

Sincerely,

s/ Samantha L. Chaifetz

Samantha L. Chaifetz

Attorney for Appellees/Respondents

Encl.

cc: Counsel of Record (via CM/ECF)

CERTIFICATE OF COMPLIANCE

This letter complies with the word count limitation of Fed. R. App. 28(j), as its body contains 346 words as automatically totaled by Microsoft Word.

s/ Samantha L. Chaifetz
SAMANTHA L. CHAIFETZ

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Samantha L. Chaifetz
SAMANTHA L. CHAIFETZ

DEPARTMENT OF TRANSPORTATION**Office of Aviation Enforcement and Proceedings****Airline Reporting of Data on Mishandled Baggage, Wheelchairs, and Scooters**

AGENCY: Office of Aviation Enforcement and Proceedings, U.S. Department of Transportation (Department).

ACTION: Enforcement Notice

SUMMARY: This notice addresses the obligations of large U.S. airlines to report to the Department mishandled baggage, wheelchairs, and scooters data following the enactment of the FAA Reauthorization Act of 2018.

DATES: This enforcement notice is applicable on [date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: John Wood, Senior Attorney, Office of Aviation Enforcement and Proceedings (C-70), U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, 202-366-9342 (telephone), john.wood@dot.gov (email).

SUPPLEMENTARY INFORMATION:

On November 2, 2016, the Department published a final rule in the **Federal Register** titled “Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments.” 81 FR 76300. This November 2 final rule changed the methodology that airlines are required to use in reporting to the Department their mishandled baggage data, from the number of mishandled baggage reports (MBRs) filed with the airline and the number of domestic passenger enplanements to the number of

mishandled bags and the number of enplaned bags.¹ The rule also requires airlines to report separate statistics for mishandled wheelchairs and scooters. On November 3, 2016, the Department published another final rule titled “Enhancing Airline Passenger Protections III,” 81 FR 76826, that, among other things, lowered the reporting carrier threshold for mishandled baggage from at least 1 percent of domestic scheduled passenger revenues to at least 0.5 percent. The November 3 final rule further requires reporting carriers that market domestic scheduled codeshare flights to file separate mishandled baggage data for codeshare flights that carry only one U.S. carrier’s code. In March 2017, the Department provided that carriers would be required to comply with the changes to mishandled baggage reporting requirements made by these two final rules with respect to air transportation occurring on or after January 1, 2019. See 82 FR 14437 (March 21, 2017); 82 FR 14604 (March 22, 2017).

On October 5, 2018, the President signed the FAA Reauthorization Act of 2018 (FAA Act) into law. See Pub. L. No. 115-254. Section 441 of the FAA Act states that “[t]he compliance date of the final rule, dated November 2, 2016, on the reporting of data for mishandled baggage and wheelchairs in aircraft cargo compartments (81 Fed. Reg. 76300) shall be effective not later than 60 days after the date of enactment of this Act.”²

¹ Currently, airlines report the number of MBRs filed by passengers with the airline. One MBR might cover more than one bag because a single MBR could be submitted by a family – or even an individual – with multiple mishandled bags. Under the new methodology, airlines report the number of bags that were mishandled as opposed to the number of MBRs filed by passengers. Also, today, airlines report the number of passenger enplanements. Under the new methodology, U.S. airlines will report the number of checked bags enplaned (including bags checked at the gate and “valet” bags) rather than the number of passenger enplanements.

² The FAA Act also includes another section related to mishandled baggage reporting. Section 410 of the FAA Act states that “[n]ot later than 6 months after the date of enactment of this Act, the Secretary of Transportation shall study and publicize for comment a cost-benefit analysis to air carriers and consumers of changing the baggage reporting requirements of section 234.6 of title 14, Code of Federal Regulations, before implementation of such requirements...” The Department must also report to Congress on the findings of the cost-benefit analysis. The Department does not view sections 441 and 410 as inconsistent with each other, because it interprets section 410 as applying only to prospective changes, and as not applying to the changes made by the final rules issued November 2, 2016 and November 3, 2016. In June 2018, the Department

By this notice, the Office of Aviation Enforcement and Proceedings (Enforcement Office) is providing guidance to affected U.S. carriers on compliance with mishandled baggage, wheelchair, and scooter reporting requirements following the enactment of the FAA Act. Section 441 of the FAA Act provides that the compliance date for the November 2, 2016 final rule shall be effective not later than 60 days after enactment of the Act, which is December 4, 2018. Accordingly, airlines determined by the Department's Office of Airline Information (OAI) as accounting for at least 1 percent of domestic scheduled passenger revenues for calendar year 2018³ must submit mishandled baggage data to the Department using the new mishandled baggage methodology and must separately report statistics for mishandled wheelchairs and scooters for domestic scheduled flights they operate beginning December 4, 2018 and through December 31, 2018. See 81 FR 73000 (November 2, 2016). The airlines must submit this data to the Department no later than January 15, 2019.⁴ The data would consist of: (1) operating carrier code; (2) month and year of data; (3) number of mishandled bags; (4) number of bags enplaned; (5) number of mishandled wheelchairs and scooters; (6) number of wheelchairs and scooters enplaned; (7) certification that to the best of

announced its initiation of a rulemaking, Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transportation in Aircraft Cargo Compartments II (RIN #2105-AE77), "to address substantial challenges in accurately reporting, under the mishandled baggage reporting final rules published in November 2016, data for bags handled by multiple airlines and bags that traveled on both reportable domestic segments and nonreportable international segments." See <https://www.transportation.gov/regulations/report-on-significant-rulemakings>. The Department will conduct a cost-benefit analysis for proposed changes to the baggage reporting requirements of 14 CFR 234.6 and report to Congress as required by section 410 of the FAA Act.

³ For calendar year 2018, 12 airlines reached the reporting threshold of 906,261,000 in domestic scheduled passenger revenue (one percent of total domestic scheduled passenger revenue) and are required to report mishandled baggage data. These airlines are: Alaska Airlines, American Airlines, Delta Air Lines, Envoy Air, ExpressJet Airlines, Frontier Airlines, Hawaiian Airlines, JetBlue Airways, SkyWest Airlines, Southwest Airlines, Spirit Airlines and United Airlines.

⁴ As section 441 only changes the compliance date of the November 2 final rule, airlines are not required to submit data for any code-share operations, which is a requirement of the November 3, 2016, final rule.

the signing official's knowledge and belief the data is true, correct, and complete; and (8) date of submission, name of airline representative, and signature.

If a reporting carrier is unable to report accurate data on the total number of mishandled bags and enplaned bags for the entire reportable period beginning December 4, 2018, and ending December 31, 2018, the Enforcement Office will exercise its enforcement discretion as appropriate.⁵ An airline should inform the Enforcement Office no later than January 3, 2019, if the airline is unable to provide accurate mishandled baggage data using the methodology set forth in the November 2, 2016 rule for the December 2018 reportable period. To the extent the Enforcement Office decides not to pursue action against an airline that does not report the required data because of reliability concerns, in the interest of providing air travel consumers with access to reliable mishandled baggage data, the Enforcement Office expects that the airline will accurately report mishandled baggage data to the Department using the prior mishandled bag reporting methodology (i.e., the total number of passengers enplaned and the total number of MBRs filed with the airline in the manner described in 14 CFR 234.6(a) and OAI Technical Reporting Directive #29A, for the flights it operates December 1 through 31, 2018). Even if an airline indicates an inability to report accurately the total number of mishandled bags and enplaned bags, the Enforcement Office will expect the airline to accurately report the total number of mishandled wheelchairs and scooters and total number of wheelchair and scooters enplaned. Because the Enforcement Office expects that airlines should be able to accurately report mishandled wheelchair and scooter data, the Enforcement Office requests a detailed explanation no later than January 3,

⁵ During the past year, the Enforcement Office has been working with the reporting carriers to ensure that they are able to report new mishandled baggage data for flights on or after January 1, 2019. This notice is not intended to suggest an airline's delay in submitting the new mishandled baggage data for flights occurring on or after January 1, 2019, would lead the Enforcement Office to exercise its enforcement discretion.

2019, from any airline asserting that it is not able to accurately report wheelchair and scooter data to the Department for flights beginning December 4, 2018.

Issued in Washington, DC, on October 22, 2018,

Blane A. Workie,
Assistant General Counsel
for Aviation Enforcement and Proceedings.

FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3187**Section 441:**

The compliance date of the final rule, dated November 2, 2016, on the reporting of data for mishandled baggage and wheelchairs in aircraft cargo compartments (81 Fed. Reg. 76300) shall be effective not later than 60 days after the date of enactment of this Act.

Section 410:

Not later than 6 months after the date of Enactment of this Act, the Secretary of Transportation shall—

- (1) study and publicize for comment a cost-benefit analysis to air carriers and consumers of changing the baggage reporting requirements of section 234.6 of title 14, Code of Federal Regulations, before implementation of such requirements; and
- (2) submit a report on the findings of the cost-benefit analysis to the appropriate committees of Congress.