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U.S. and EU Sign Enhanced Open Skies Agreement

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The United States and European Union entered into the second stage of their historic Open Skies Air Transport Agreement, providing fresh incentives to further liberalize air services and airline traffic rights.

In 2007, after years of negotiations, the U.S. and EU signed a historic Open Skies agreement that liberalized air routes and markets between the U.S. and the EU. This initial agreement replaced the patchwork of older and widely varying bilateral air transport agreements between the U.S. and individual European countries. As part of this process, the parties agreed to revisit certain contentious issues by November 2010 in "second stage" negotiations. Chief among these were limits set by the U.S. on foreign investment in its airlines, cabotage rights, and EU environmental restrictions on noise around its airports.

On June 24, 2010, the parties signed a Protocol to Amend the Air Transport Agreement ("Protocol") out of the second stage negotiations. The Protocol reflects the shared goal of eliminating "market access barriers in order to maximize benefits for consumers, airlines, labour and communities on both sides of the Atlantic,"[1] while also providing specific opportunities and incentives for the parties to make further progress.

Foreign Ownership Limits

Under long-standing U.S. law, substantial ownership and effective control of U.S. airlines must be vested in citizens of the U.S.. EU parties have long sought to relax these requirements in order to enable increased investment in U.S. air carriers by European citizens. A change in the law would require an act of the U.S. Congress. To encourage such an act, the new Protocol provides that the U.S. will enjoy the following benefits as soon as it permits majority ownership and effective control by EU nationals:

- The EU will reciprocally permit majority ownership and effective control of its airlines by U.S. nationals.

[1] Protocol to Amend Air Transport Agreement, Article 6. June 24, 2010.

- U.S. airlines will have unlimited Seventh Freedom cargo rights (e.g., to operate cargo flights between the EU and non-EU countries without stopping in the U.S.). The 2007 agreement provided European airlines with analogous rights, but limited the U.S. to such flights to and from only eight EU countries.

- Seventh Freedom rights for scheduled passenger service between the EU and five as-yet undetermined non-EU countries.

- The EU will lose the right to deny authorizations or permissions to third-country airlines owned or controlled by U.S. nationals on the basis that ownership and control of those airlines is not vested in nationals of the third country, as long as the third country has a record of cooperation in air services with both parties.

Environmental Concerns

U.S. negotiators were particularly concerned with the proliferation of noise-based operating restrictions at EU airports and were keen to encourage member states of the EU to grant the European Commission authority to review and potentially halt any new noise-based operating restrictions at EU airports having more than 50,000 annual movements of jet aircraft. Accordingly, the Protocol provides the EU with the following benefits should such authority be granted:

- Seventh Freedom rights for scheduled passenger service between the U.S. and five as-yet undetermined non-EU countries.

- The U.S. will lose the right to deny authorizations or permissions to third-country airlines owned or effectively controlled by EU nationals on the basis that ownership and effective control of those airlines is not vested in nationals of the third country, as long as the third country has a record of cooperation in air services with both parties.

U.S. Open Skies Gains Momentum

At last count, the U.S. has signed Open Skies agreements with 99 different countries. This year alone the U.S. added Israel, Zambia, Trinidad and Tobago, Switzerland, and Barbados to its growing list of Open Skies partners.

The U.S. views Open Skies as a key part of airline globalization and has stated, “By allowing air carriers unlimited market access to our partners’ markets and the right to fly to all intermediate and beyond points, Open Skies agreements provide maximum operational flexibility for airline alliances.” [2]

While each agreement contains certain core principles common to all Open Skies agreements, some contain special provisions tailored to reflect the unique circumstances of the particular countries and markets involved. The U.S.-EU Protocol is a good example of this tailored approach.

[2] U.S. Department of State, Open Skies http://www.state.gov/e/eeb/tra/ata/

If you have any questions about the content of this client alert, please contact the Pillsbury attorney with whom you regularly work or the authors below:

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