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India's Aviation Safety Rating Downgrade Could Have Cascading Effects

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On January 31, 2014, the U.S. Federal Aviation Administration (FAA) downgraded India's aviation safety rating to Category 2 under the FAA's International Aviation Safety Assessment (IASA) program – a program designed to ensure safety oversight by foreign aviation authorities in accordance with applicable International Civil Aviation Organization (ICAO) standards and recommended practices. FAA's foreign assessment program focuses on a country's ability, not the individual air carrier's, to adhere to ICAO's standards and recommended practices for aircraft operations and maintenance, largely under Annex 6 of the Chicago Convention. The downgrade, which came after years of consultations with the FAA, serves as a stark reminder to governments undergoing IASA and ICAO reviews to promptly and comprehensively address concerns before their status is downgraded.

For India's civil aviation authority, the Directorate General of Civil Aviation (DGCA), the downgrade begins what could be a protracted process to restore India's Category 1 rating and demonstrate its safety oversight capabilities. For India's air carriers, the downgrade means they cannot add new service or aircraft to the U.S. and may be subjected to heightened oversight by the FAA until Category 1 status is restored. The determination has similar impacts on U.S. airlines placing their code on flights operated by Indian airlines, as the FAA does not support code-sharing between U.S. carriers and carriers of Category 2 countries. While not likely, if India fails to correct deficiencies within a reasonable period of time, the FAA can recommend that the U.S. Department of Transportation (DOT) revoke or suspend the operating authority of all Indian carriers operating to the U.S.

To reinstate its Category 1 status, DGCA must develop and implement an action plan to respond to the FAA's most recent IASA assessment. In the meantime, India's airlines need to examine how the downgrade may increasingly affect their existing and future operations, both in the U.S. as well as in other markets, and aircraft manufacturers, lessors, and insurers should actively consider the implications of the downgrade on their contractual arrangements and aircraft delivery schedules.

IASA Reviews

Under IASA, the FAA audits civil aviation authorities of countries whose air carriers serve or intend to serve the United States or code-share with U.S. air carriers, to determine compliance with ICAO Standards for safety oversight in aviation. The ICAO Standards are presumptively binding on ICAO Member States as signatories to the Chicago Convention. FAA groups the ICAO Standards on safety oversight into eight critical elements: (1) Primary aviation legislation (2) specific operating regulations (3) organization structure and safety oversight functions (4) technical personnel qualification and training (5) technical guidance (6) certification personnel and procedures (7) surveillance obligations and (8) resolution of safety issues.

Unlike the European Union's black list, which rates *carriers* whether or not they serve Europe, the FAA IASA program rates the government's oversight. Many factors go into FAA IASA category ratings, including in-country assessments as well as other sources of information regarding compliance with international standards. The FAA uses standardized checklists and processes to complete the assessment. While the assessment itself is typically conducted over the course of weeks, the entire process often takes several months or years of informal dialogue and preparation for the FAA assessment. It is during this time that it is most critical that countries take steps to address any known concerns to avoid a downgrade, as the process for restoring Category 1 status – even when issues have been addressed – can be lengthy.

The Downgrade

India's path to Category 2 status began as early as 2009 when the FAA conducted an assessment, identifying safety concerns related to the number of qualified inspectors to oversee airline operations. India narrowly averted a downgrade at the time by announcing the recruitment of substantially more staff for safety oversight operations. However several of these positions remained vacant and DGCA undertook inspections with a combination of its own staff and inspectors seconded from the airlines, raising questions about objectivity.

In 2012, ICAO conducted an audit of DGCA's safety oversight regime and found it to be lacking in several respects. This audit was followed by the FAA's own assessment in September and December 2013, which led to the downgrade this year. Although ICAO audits and FAA assessments are conducted by different entities with different regulatory responsibilities, the issues identified in ICAO audits are good indicators of issues that will be of concern for the FAA.

In the most recent assessment leading to the downgrade, the FAA remained principally concerned with the lack of full-time, qualified flight inspectors to conduct airline inspections, especially in light of the aviation sector's rapid growth in India.

Impacts of Downgrade on Indian Carriers

While the FAA does not assess the safety of Indian carriers, the downgrade will have immediate and potentially increasing adverse impacts on Indian carriers and their operations. Those most affected by the downgrade are state-run Air India and privately owned Jet Airways, which offer service to the United States. Already, United and American Airlines have terminated their codeshare agreements with Jet

Airways, given restrictions on U.S. carriers code-sharing with Category 2 carriers. Air India's entry into the Star Alliance network may also be at risk and, if accepted, the benefits of membership will be limited as U.S. airlines will not be able to code share with Air India.

The downgrade means that Indian airlines cannot add new routes and or new aircraft on existing routes between India and the US. The downgrade will delay Air India's ability to deploy new Boeing aircraft on its New York, Newark and Chicago routes, and it will stall Jet Airways' plans to restore and increase North American routes now that it has received an equity infusion from Etihad. An Indian carrier may even be restricted from temporarily substituting aircraft on existing routes for regularly scheduled service. Unless other arrangements can be made, the downgrade may effectively result in a contraction of service.

The downgrade likely will also have a dampening effect on India's newer carriers. For example, any international expansion plans extending to the U.S. by airlines like IndiGo or SpiceJet will have to be put on hold. The same is true of India's potentially two newest airlines, formed via tie-ups between AirAsia and Tata and Singapore Airlines and Tata. For example, Air Asia may be coming close to overcoming a rule that requires any Indian domestic airline to fly within the country for five years before it can expand to flying international routes. As to the U.S., the downgrade eliminates the benefits of obtaining this exemption.

Potential Effects Outside the United States

Though the downgrade was an action by the FAA, its impacts may extend beyond the United States. Other countries may follow suit in making similar determinations or otherwise in undertaking increased scrutiny of the fleets and operations of Indian carriers. For example, Singapore announced that it has stepped up ramp inspections of aircraft owned by Indian airlines.

Indian carriers may be subject to increased financing, leasing, and insurance costs, as the downgrade renders them unable to deploy new aircraft or causes them to be considered a greater business risk. They may also face greater reputational risks, as consumers in more markets may increasingly perceive that Indian airlines are being singled out because of safety concerns. In sum, the downgrade threatens to trigger spiraling costs and complexity. Trade and tourism between the U.S. and India likely will take a hit.

In the past, Category 2 downgrades have taken several years to be reversed. Israel's downgrade took four years, while the Philippines and Indonesia are yet to restore their ratings more than five years after their downgrades. Any chance of a prompt restoration of India's rating will require a swift and sustained effort by DGCA accompanied by dedicated resources. In the meantime, Indian airlines will have to make important adjustments, in order to operate in this challenging environment.

As demand for international air service to the U.S. grows, all governments with carriers operating to the U.S. should take note of this development and take seriously FAA assessments and ICAO audits to avoid downgrades.

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

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