

Aviation and Aerospace



COVID-19: Issues Facing the Airline Industry

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As the novel coronavirus COVID-19 continues to cause economic and social turmoil across the globe, the airline industry is suffering particularly acute hardships. US carriers, including Delta, American, United and Southwest, have announced plans to cut their international routes by as much as 80% to 90% over the next several months, and domestic capacity is now being reduced by 20%-40%. Foreign carriers have been impacted even more harshly. Ryanair has announced it may have to ground its entire fleet, Air France has announced cuts into its flight schedule of up to 90% and British Airways has made similar cuts of up to 75%. Furthermore, the aircraft that continue to fly are far from full. Along with these flight reductions, airlines have grounded fleets of their larger aircraft, instituted hiring freezes and in some cases commenced layoffs, and US airlines are actively seeking ways to preserve cash on hand and obtain relief from the federal government.

Most visibly, Airlines for America recently put forth a proposal for aid from the federal government for part 121 passenger and cargo airlines. Broadly, this request seeks (1) \$25 billion in grants and loans to bolster liquidity for part 121 passenger airlines and \$4 billion in similar aid for cargo airlines, (2) \$25 billion in unsecured loans or loan guarantees for part 121 passenger airlines and \$4 billion for part 121 cargo airlines and (3) tax relief in the form of federal excise tax rebates to part 121 air for taxes paid from January 1, 2020 through March 31, 2020 and a temporary repeal of the aviation excise taxes on part 121 air carriers through December 31, 2021.

While this proposal addresses some of the most immediate financial needs of US carriers, the impact on airlines—and the relief necessary to mitigate that impact—goes far beyond a simple fiscal stimulus. For example:

- Local and state orders limiting public gatherings, recommending “social distancing,” or ordering closure or restrictions on “non-essential” businesses have caused confusion at airports as to whether such orders apply to airports and even on-board aircraft. Moreover, although the Federal Aviation Administration (FAA) issued Compliance Guidance Letter 2020-01 on March 16, 2020, reiterating its position that an airport “must obtain FAA approval to allow airport closure for a non-aeronautical purpose,” the Department of Transportation (DOT) and FAA must take additional steps to ensure that public health policies and guidelines are reviewed for consequences to the national air transportation system.
- 49 U.S.C. §§ 41731 through 41742 require that an airport must have a minimum number of daily enplanements in order to qualify for essential air service (EAS) program subsidies. The planned cancellations will undoubtedly cause certain EAS programs to fall below the mandated minimums, causing them to lose their valuable program subsidies. Suspension of these constraints would allow small community airports to retain airline service regardless of the number of passengers and regardless of the airport’s distance to another airport. Additionally, airports located within the contiguous 48 states are limited to receiving a maximum per-passenger subsidy of \$200. Such a limit will likely cause undue economic hardship to these smaller and less frequented airports and consideration should be given to suspending such a cap.

- Service suspensions (and changes in routes, schedules and service) could be viewed by FAA as an “additional stressor” for purposes of triggering enhanced oversight and targeted surveillance. Service suspensions resulting in a complete cessation of operations at an airport could also cause FAA to suspend an air carrier’s authority to operate into that airport, potentially requiring airlines to revalidate operations upon resumption of service. Even service suspensions that result in reduced schedules could cause airlines to pay higher landing fees and associated costs due to its failure to maintain a sufficient number of operations at the airport to qualify for reduced rates. Finally, foreign airports may have a continuity of service requirement in order to maintain airport access and/or authority to operate in the country, which could be affected due to service suspensions or reductions.
- In the event that an airline cancels a flight, passengers are entitled to ask for a full refund rather than rebook the flight or accept a travel voucher. Additionally, 14 CFR § 259.5 requires air carriers to publish a customer service plan, which includes an assurance that when refunds are due, refunds for cash payments will be processed in cash within twenty days of the refund request and within seven days for credit card refund requests. DOT has treated a failure to comply with this requirement as an unfair and deceptive practice under 49 USC § 41712. The requirement to provide cash refunds on demand will undoubtedly be increasingly difficult for the already cash-strapped airlines to meet. DOT should consider suspending this requirement of its own accord and allow airlines to offer travel vouchers in lieu of cash refunds.

The COVID-19 crisis will uniquely affect airlines, and providing financial support is only one aspect of the help that the industry will surely need. The concerns listed above are just some of the numerous second and third order effects the industry will experience due to travel restrictions and health advisories. We are prepared to assist our clients as they navigate these troubled times.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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