

COVID-19: UPDATED THE PROMISE OF THE “CARES ACT” ON THE AIRLINE INDUSTRY

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Aviation Industry Alert

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The novel coronavirus ("COVID-19") has devastated air travel demand, forcing thousands of cancellations. U.S. airlines have been slashing their schedules, waiving change/cancellation fees, and sanitizing aircrafts as COVID-19, and efforts to contain it, continue to sap demand. At least one U.S. carrier is finding a purpose for some of its idle planes, flying its first cargo-only flight since 1984 between the United States and Europe, and carrying medical supplies (including much-needed COVID-19 testing kits), mail for members of the U.S. military, packages, and telecommunications equipment. In the wake of this crisis, U.S. airlines are hopeful for a comprehensive economic relief package similar to the relief the U.S. federal government provided to airlines through the Air Transportation Stabilization Board (the "ATSB") following the tragedies of 9/11. The ATSB was an office of the U.S. Department of Treasury authorized by the Air Transportation Safety and System Stabilization Act (the "ATSB Act") to provide up to \$10 billion in federal loan guarantees where commercial loans were not available and, if necessary, "to provide a safe, efficient, and viable commercial aviation system in the United States."^[1]

Accordingly, Congress is currently considering the Coronavirus Economic Stabilization Act of 2020 (the "Act"), which will provide, among other things, immediate liquidity to the airline industry in the form of a combination of direct loans and loan guarantees to, as well as indirect loans and other investments in, entities providing financing to airlines. To this end, it authorizes the Secretary of the Treasury (the "Secretary") to make loans, loan guarantees, and other investments in (i) U.S. air carriers and (ii) other U.S. businesses that have not otherwise received adequate economic relief through loan or loan guarantees under the Act (each of (i) and (ii), an "Eligible Business") up to a total of \$500 billion.

TYPES OF LIQUIDITY ASSISTANCE

The loans, loan guarantees, and other investments are divided into the following categories:

- Up to \$50 billion in loans and loan guarantees for passenger air carriers;
- Up to \$8 billion in loans and loan guarantees for cargo air carriers;
- Up to \$17 billion in loans and loan guarantees for "businesses critical to national security." This category of businesses is not further defined in the Act, but presumably could include emergency medical air transportation, emergency charter air service, and civil cybersecurity.
- Additionally, the bulk of the available assistance — up to \$425 billion and any unused amounts in the previous categories — will be made available to Eligible Businesses by way of: (a) making loans, loan guarantees, and "other investments" for programs or facilities established by the Board of Governors of

the Federal Reserve System that support lending to states, or municipalities and other Eligible Businesses or (b) purchasing, directly or indirectly, obligations or other interests.

DISCRETION OF THE SECRETARY

The Secretary is given some leeway to specify the terms and conditions of such loans or loan guarantees and has the right to waive eligibility criteria to the extent such waiver does not negatively affect the interests of the federal government. It is not clear whether the Secretary would set up another ATSB-type board to review and agree to guarantee the loans, although the Secretary is given the ability to choose appropriate administrators of the program. It should be expected that some delegation will occur as the amount directly available to the air carriers (\$58 billion) exceeds the ATSB Act.[2]

Application procedures and minimum requirements are required to be published by the Secretary within 10 days of the entry into force of the Act.

The Secretary may also cause the federal government to enter into profit participation agreements pursuant to which the federal government could participate in the future gains of air carriers or its security holders by being granted options, warrants, or profit interests, but the Secretary is not allowed to own any voting security. Any such profit interests are to be liquidated as soon as practicable, consistent with maximizing returns for the federal government.

ELIGIBILITY CRITERIA

To qualify for assistance under the Act, Eligible Businesses and air carriers applying for loans or loan guarantees need to meet the following conditions:

- Credit is not otherwise reasonably available;
- The new obligation will be prudently incurred;
- The loan or loan guarantee is sufficiently secured or is made at a rate that (i) reflects the risk and (ii) to the extent practicable, the interest rate is not less than the market rate for comparable obligations prevalent prior to the outbreak;
- The term of the loan or loan being guaranteed is as short as practicable and in any case no longer than five years;
- In the case of direct loans, equity interest buybacks are prohibited while the loan/loan guarantee is outstanding, unless required by a contract predating the effective date of the Act
- The business must maintain its existing employment levels as of March 13, 2020, to the extent practicable while the loan/loan guarantee remains outstanding
- The eligible business must have incurred or is expected to incur losses such that the continued operation of the business is jeopardized, as determined by the Secretary; and
- For two years, beginning on March 1, 2020, no officer or employee of the business whose total compensation exceeded \$425,000 in calendar year 2019 (not including employees' compensation established by an existing collective bargaining agreement) (a) will receive compensation exceeding the

amount of total compensation received in 2019 and, (b) upon termination of employment, will receive no more than twice the maximum total compensation received in 2019 in termination benefits/severance.

MANDATE FOR ESSENTIAL AIR SERVICE

The Secretary of Transportation is authorized to require a recipient of loans or loan guarantees under this Act to continue to provide scheduled air transport to any destination served by such carrier prior to March 1, 2020, taking into account air transport needs of small and remote communities. This authority expires on March 1, 2022.

EXCISE TAX HOLIDAY

To provide further relief for the airlines, from the effective date of the Act until January 1, 2021, no excise tax will be imposed on (A) amounts paid for air transportation under Section 4261(e)(3) of the IRS Code and (B) kerosene under Section 4041(c) of the IRS Code, or Section 4081 of the IRS Code (except for at the rate provided in subsection (a)(2)(B)).

NOTES:

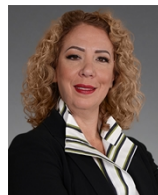
[1] <https://www.congress.gov/bill/107th-congress/house-bill/2926/text>

[2] It should be noted that not all of the airlines seeking relief under the historical ATSB Act received relief. Only seven airlines (America West Airlines, US Airways, American Trans Air, World Airways, Aloha Airlines, Frontier Airlines, and Evergreen International Airlines) received loan guarantees totaling \$1.79 billion; however, the crisis posed by COVID-19 is widely viewed as even more detrimental to the airline industry.

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