

Covid – 19 coronavirus: opportunities for financial relief in the aviation industry under the CARES Act

This note summarizes the provisions of the CARES Act that address financial assistance for the U.S. aviation industry in the wake of the Covid-19 coronavirus.

Background

On March 27, 2020 President Trump signed into law the "Coronavirus Aid, Relief, and Economic Security Act" or the "Cares Act" (the "**Act**"). As part of a \$2 trillion stimulus package to provide relief from losses incurred as a direct result of Covid-19 coronavirus, the Act authorizes the Treasury Department to use federal funds to provide financial assistance to Eligible Borrowers and Contractors in the aviation industry in the form of direct loans, loan guarantees, grants, tax relief and other investments.¹

Under the Act, funding for Eligible Borrowers is split into the following three categories²:

1. Up to \$25 billion in loans and loan guarantees for Passenger Air Carriers, businesses certified by the Department of Transportation under 14 C.F.R. Part 145 to perform inspection, repair, replace or overhaul services, and ticket agents that have not otherwise received adequate economic relief in the form of loans or loan guarantees under other programs authorized under the Act;
2. Up to \$4 billion in loans and loan guarantees for Cargo Air Carriers; and
3. Up to \$17 billion in loans and loan guarantees for businesses critical to maintaining national security.

¹ Companies that do not meet the eligibility criteria for financial assistance discussed in this memorandum may nonetheless be eligible under other provisions of general applicability, as provided under the Act.

² See also discussion below on financial assistance to Contractors in the form of grants.

Definitions:

"**Air Carrier**" means a "citizen of the United States" undertaking by any means, directly or indirectly, to provide air transportation as provided in 49 U.S.C. § 40102(a) and (15).

"**Cargo Air Carrier**" means an air carrier that, during the time period from April 1, 2019 to September 30, 2019, derived more than 50% of its air transportation revenue from the transportation of property or mail, or both.

"**Catering Functions**" means the preparation, assembly, or both, of food, beverage, provisions and related supplies for delivery, and the delivery of such items, directly to aircraft or to a location on or near airport property for subsequent delivery to aircraft.

"**Contractor**" means:

- 1) A person that performs, under contract with a passenger air carrier conducting operations under part 121 of title 14, Code of Federal Regulations:
 - a) Catering Functions, or
 - b) functions on the property of an airport that are directly related to the air transportation of persons, property, or mail, including but not limited to the loading and unloading of property on aircraft; assistance to passengers under 14 C.F.R. part 382; security; airport ticketing and check-in functions; ground-handling of aircraft; or aircraft cleaning and sanitization functions and waste removal; or
- 2) A subcontractor that performs the above functions.

"**Covered Loss**" includes losses incurred directly or indirectly as a result of Covid-19 coronavirus, as determined by the Treasury Department.

"**Eligible Borrower**" means Passenger Air Carriers, Cargo Air Carriers, businesses certified by the Department of Transportation under 14 C.F.R. Part 145 to perform inspection, repair, replace or overhaul services, and ticket agents that have not otherwise received adequate economic relief in the form of loans or loan guarantees under other programs authorized under the Act.

"**Passenger Air Carrier**" means an air carrier that, during the time period from April 1, 2019 to September 30, 2019, derived more than 50% of its air transportation revenue from the transportation of passengers.

Conditions and eligibility criteria under the act:

The Treasury Secretary has sole discretion, subject to oversight, to determine the conditions and eligibility criteria for loans or loan guarantees under the Act, including whether:

- the borrower is an Eligible Borrower for which credit is not reasonably available at the time of the transaction;
- the intended obligation is "prudently incurred" by the borrower;

- the loan is sufficiently secured or is made at a rate that reflects the risk of the loan and that is, to the extent practicable, not less than an interest rate based on market conditions for comparable obligations prevalent prior to the outbreak of Covid-19 coronavirus;
- the duration of the loan is as short as practicable, and in any case not longer than 5 years;
- the loan or loan guarantee provides that, until the date 12 months after the date the loan or loan guarantee is no longer outstanding, neither the borrower nor any affiliate of the borrower or any parent company of the borrower may purchase publicly traded securities of the borrower or any parent company of the borrower, except to the extent required under a contractual obligation in effect as of March 27, 2020;
- the loan or loan guarantee provides that, until the date 12 months after the date the loan is no longer outstanding, the borrower will not pay dividends or make other capital distributions with respect to the common stock of the borrower;
- the loan or loan guarantee provides that, until September 30, 2020, the borrower will maintain its employment levels as of March 24, 2020, to the extent practicable, and in any case will not reduce its employment levels by more than 10% from the levels of such date;
- the loan or loan guarantee includes a certification by the borrower that it is created or organized in the U.S. or under the laws of the U.S. and has significant operations in and a majority of its employees based in the U.S.; and
- the borrower has incurred or is expected to incur Covered Losses such that the continued operations of the borrower are jeopardized.

Loans or loan guarantees will also be subject to the following 5 conditions under the Act:

1. The borrower must not have publicly traded securities unless the Treasury Department receives a warrant or equity interest in the borrower. If the borrower does not have publicly traded securities, the Treasury Department must receive a warrant or other equity interest in, or a senior debt instrument issued by, the borrower;³
2. The principal amount of a loan provided under the Act cannot be reduced through loan forgiveness;
3. The borrower must agree to specified limitations on the total compensation of certain employees⁴;
4. A borrower that is an air carrier must maintain scheduled air transportation services that the Secretary of Transportation deems necessary to ensure services to any point served by such air carrier before March 1, 2020;
5. The principal executive and financial officers of the borrower, or individuals performing similar functions, must certify, prior to approval of the transaction, that the borrower is eligible to enter into such transaction, including that the borrower is not a Covered Entity, as defined in Section 4019(a)(2).

³ The Treasury Department may not exercise voting power with respect to any shares of common stock acquired under Section 4003 of the Act.

⁴ During the 2 year period beginning March 1, 2020, and ending March 1, 2022, no officer or employee of the eligible business whose total compensation (including salary, bonuses, stock awards and other financial benefits) exceeded \$425,000 in calendar year 2019 (other than an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020) may receive from the eligible business 1) total compensation exceeding, during any 12 consecutive months of such 2 year period, the total compensation received by such officer or employee in calendar year 2019; or 2) severance pay or other benefits upon termination of employment which exceeds twice the maximum total compensation received by such officer or employee in calendar year 2019.

Grants⁵:

Under Title IV, Subtitle B, of the Act, companies in the aviation industry may be eligible for grants to be used exclusively for the continuation of employee wages, salaries and benefits. The aggregate total of available funds for grants includes \$25 billion for Passenger Air Carriers, \$4 billion for Cargo Air Carriers, and \$3 billion for Contractors. To be eligible to receive a grant, a borrower must:

- Use such payments exclusively for the continuation of employee wages, salaries and benefits;
- Refrain from conducting involuntary layoffs or furloughs, or reducing pay rates and benefits, of employees of the borrower and its subsidiaries (or, in the discretion of the Secretary of the Treasury, any affiliated entity) until September 30, 2020;
- Through September 30, 2021, ensure that neither the borrower nor any subsidiary or affiliate of the borrower purchases, in any transaction, a publicly traded security of the borrower or the direct or indirect parent company of the borrower; and
- Through September 30, 2021, ensure that the borrower will not pay dividends, or make other capital distributions, with respect to the common stock (or equivalent interest) of the borrower or any subsidiary thereof.⁶

Tax relief:

The Act also provides financial assistance to companies in the aviation industry in the form of relief from certain excise taxes, including taxes owed in connection with transportation by air under Sections 4261 and 4271 of the Internal Revenue Code (e.g. ticket and cargo taxes) and taxes arising from the use of kerosene in commercial aviation

Information required for loan application process:

The Treasury Department has not yet posted its form of loan application. However, to obtain a loan or loan guarantee under the Act, a borrower will be required to provide certain information to the Treasury Department, including:

- Evidence based on factors such as market conditions, the borrower's circumstances, or relationships with existing and potential creditors that the borrower cannot reasonably obtain credit elsewhere;
- The purposes for which the borrower will use the loan proceeds;

⁵ This section does not cover all required assurances and conditions necessary for the award of grants and provides instead a high-level overview of the principal conditions.

⁶ Note that the Limitation on Certain Employee Compensation also applies to grants.

- A discussion of the borrower's operating plan for the remainder of 2020 if the loan is approved, including how the proposed loan fits within the borrower's business plan and an analysis showing that the loan is prudently incurred;
- A description of any plans the borrower has to restructure its obligations, contracts, staffing, or organization to improve the borrower's financial condition;
- For Passenger Air Carriers, the borrower's available seat miles, revenue per seat mile, and cost per available seat mile for 2019, and a forecast of the same for 2020 prepared by or for the air carrier no earlier than October 1, 2019, including any assumptions underlying the forecast;
- For Cargo Air Carriers, the borrower's available ton miles, revenue per ton mile, and cost per available ton mile for 2019, and a forecast of the same for 2020 prepared by or for the air carrier no earlier than October 1, 2019, including any assumptions underlying the forecast;
- Quantitative information on the borrower's financial needs for the remainder of 2020, including expected revenues, operating costs, and credit, and how the loan will address those needs together with other sources of funding and financing, such as Air Carrier Worker Support payments under Division A, Title IV, Subtitle B of the Act;
- A description of 1) the borrower's existing secured and unsecured debt, bank and other credit lines with outstanding and maximum balances, and major classes of existing security holders and creditors, 2) the borrower's scheduled debt service for the next 3 years, and 3) the type and general value of all security, including but not limited to assets, property, and revenue streams, available to be pledged by the borrower and its subsidiaries to secure the loan, on both a senior and a subordinated basis;
- The borrower's employment levels, by head count and total compensation amount, as of March 24, 2020, and any proposed changes to the borrower's employment levels, relative to March 24, 2020, during 2020; and
- The consolidated financial statements of the borrower and any corporate parents for the previous 3 years, including, if available, financial statements that have been audited by an independent certified public accountant, including any associated notes, and any interim financial statements and associated notes for the current fiscal year.

Resources:

See the [CARES Act](#).

**This memorandum is based solely on our review of specific provisions of the CARES Act related to the aviation industry and the accompanying guidelines issued by the Treasury Department on March 30, 2020. This memorandum does not address provisions of general applicability under the Act and remains subject to the further review of additional information to be set forth in the supplemental procedures to be issued by the Treasury Department.*

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