

Aviation Alert

Treasury Releases Guidance on CARES Act Relief to Airlines and Aviation Workers

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On March 30, 2020, the Department of the Treasury published guidelines and procedures for passenger and cargo air carriers (together, “**Air Carriers**”) seeking relief under the recently passed Coronavirus Aid, Relief and Economic Security (CARES) Act. The Act, which provides significant relief to Air Carriers and aviation employees in the wake of the economic fallout from the coronavirus (COVID-19) pandemic, ordered the Secretary of the Treasury (together with the Department of the Treasury, “the **Treasury**”) to provide guidance in assisting eligible businesses in applying for (i) loans pursuant to the Act, and (ii) payroll support to enable the continued payment of employee wages, salaries, and benefits. In this Client Alert, we summarize both the [Procedures and Minimum Requirements for Loans](#) (“**Air Carrier Support Guidelines**”) as well as the [Guidelines and Application Procedures for Payroll Support](#) (“**Payroll Support Guidelines**”) released by the Treasury.¹

Treasury Guidance for CARES Act Relief to Passenger and Cargo Air Carriers

One of the key provisions of Title IV of the Act provides \$500 billion to support “**Eligible Businesses**.” The Act defines Eligible Businesses as both passenger and cargo air carriers and businesses that have not otherwise received adequate economic relief in the form of loans or loan guarantees under the Act.² The aggregate amount of the loans to which the recently released Air Carrier Support Guidelines apply is allocated as follows:

- \$25 billion in loans and loan guarantees for passenger air carriers;
- \$4 billion in loans and loan guarantees for cargo air carriers; and
- \$17 billion in loans and loan guarantees for businesses critical to maintaining national security.

Borrowers seeking relief under these allocated amounts will be able to apply for a loan directly from the Treasury, which will disburse the loan funds directly to approved borrowers.

Note, however, that the Air Carrier Support Guidelines do not apply to the \$454 billion earmarked for loans, loan guarantees, and investments in support of facilities established by the Federal Reserve to support lending to Eligible Businesses, states, and municipalities (referred to as “**4003(b)(4) Relief**” in our previous Alert, “[Congress Provides COVID-19 Relief to Airlines and Aviation Workers](#)”).

Eligibility for Under the Air Carrier Support Guidelines

The Air Carrier Support Guidelines list the following entities as eligible to apply for the loans and loan guarantees listed above:

- Passenger air carriers;
- Cargo air carriers;

¹ Please note that in both cases, the procedures may be updated, revised, or modified at any time, and the requirements contained in both sets of guidelines may be waived by the Treasury in its sole discretion to the extent permitted by law.

² At this point, it remains unclear which businesses would qualify as “businesses that have not otherwise received adequate economic relief in the form of loans or loan guarantees” under the Act. However, we expect that the Treasury will promulgate rules and regulations to provide further guidance.

- Businesses certified by the Department of Transportation under 14 C.F.R. Part 145 and approved to perform inspection, repair, replace, or overhaul services that have not otherwise received adequate economic relief in the form of loans or loan guarantees under other programs authorized by the Act;
- Ticket agents that have not otherwise received adequate economic relief in the form of loans or loan guarantees under other programs authorized by the Act; and
- Businesses critical to maintaining national security.

Moreover, the Air Carrier Support Guidelines also provide definitions of what constitutes passenger air carrier and cargo air carriers. For purposes of Air Carrier relief, “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, whereas “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.

Terms and Conditions for Monies Allocated for Air Carrier Relief

Our previous Alert, [“Congress Provides COVID-19 Relief to Airlines and Aviation Workers,”](#) outlined many of the key terms and conditions for the loans and guarantees consisting of monies specifically allocated for Air Carriers and businesses critical to maintaining national security. These included, among others, terms and conditions regarding (i) interest rates; (ii) prohibitions on stock buybacks and dividend payments; (iii) employment guarantees; (iv) limits on executive compensation; (v) continuation of certain air service; and (vi) required equity stakes to be taken by the government.

The recently released Air Carrier Support Guidelines provide additional explanation on the following criteria, terms and conditions:

- *No Credit Elsewhere* – the borrower must not have access to any other reasonably available credit.
- *Prudent Borrowing* – the borrow must prudently incur the intended obligation.
- *Covered Losses* – the borrower must have incurred or expect to incur covered losses such that the continued operations of its business are jeopardized.
- *Conflict of Interest Certification* – before the transaction is approved, the principal executive officer and the principal financial officer, or individuals performing similar functions, of the borrower must certify that the borrower is eligible to enter into the transaction, including that the borrower is not a covered entity (which the Act defines as any entity in which (i) persons elected to certain federal positions, (ii) persons acting as certain political appointees, or (iii) any relatives of such persons, directly or indirectly hold a controlling interest).

Required Application Information Under the Air Carrier Support Guidelines

The Air Carrier Support Guidelines also set forth an initial list of information that borrowers will be required to provide as part of the loan application process. These include:

- *Debt* – a description of 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.
- *Debt Service* – a description of the borrower’s scheduled debt service for the next three years.
- *Employment Levels* – 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.

- *Financial Statements* – the consolidated financial statements of the borrower and any corporate parents for the previous three 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.
- *Covered Losses* – a description of the covered losses that the borrower has incurred or will incur as a result of coronavirus, by line items detailing the cause of the loss, such as reduced demand, unavailability of credit, unbudgeted medical expenses, or other causes.
- *Lack of Credit Elsewhere* – 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.
- *Passenger Service Operations* – 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 that was prepared by or for the air carrier no earlier than October 1, 2019, including any assumptions underlying the forecast.
- *Cargo Service Operations* – 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 that was prepared by or for the air carrier no earlier than October 1, 2019, including any assumptions underlying the forecast.
- *Use of Proceeds* – the purposes for which the borrower will use the loan proceeds.
- *Financial Needs* – 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 discussed both below and in our previous [Alert](#)).
- *Cost Operating Plan* – 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.
- *Cost Restructuring* – a description of any plans the borrower has to restructure its obligations, contracts, staffing, or organization to improve the borrower’s financial condition.
- *Government Equity Stake* – the borrower will be required to identify the financial instruments it proposes to issue to the Treasury as part of the equity stake that it is required to provide to the federal government as a condition of the loan or loan guarantee.

Note that the above list is only an initial list, and the Treasury has indicated that it will subsequently issue supplemental procedures requiring additional information as part of the loan application.

Future Supplemental Guidance

As noted above, the Treasury has made clear that the procedures and requirements contained in the Air Carrier Support Guidelines are preliminary and will be supplemented with additional terms and a loan application form.

Treasury Guidance for CARES Act Relief to Aviation Employees

In addition to relief for Air Carriers, the CARES Act also provides financial assistance targeted to Air Carrier and aviation industry workers. More specifically, the Act allocates funds to Air Carriers and certain contractors on the condition that they be used to continue wages, salaries, and benefits for Air Carrier and aviation industry employees (excluding corporate officers). The aggregate amount of the funds to which the recently released Payroll Support Guidelines apply is allocated as follows:

- \$25 billion for passenger air carriers;

- \$4 billion for cargo air carriers; and
- \$3 billion for certain contractors and subcontractors.

Eligibility Under the Payroll Support Guidelines

According to the Payroll Support Guidelines, payments may only be provided to applicants that are Air Carriers or certain contractors and subcontractors. Similar to the Air Carrier Support Guidelines, the Payroll Support Guidelines provide definitions of what constitutes passenger air carriers and cargo air carriers. For purposes of aviation employee relief, “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, whereas “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.

Awardable Amounts

As outlined in our previous Alert, [“Congress Provides COVID-19 Relief to Airlines and Aviation Workers,”](#) awardable amounts are capped at the total amount of salaries and benefits (or, in certain cases, the total amount of wages, salaries, benefits and other compensation) reported by a recipient from April 1, 2019 through September 30, 2019. Note, however that if the awardable amounts payable to approved applicants in any category (passenger air carriers, cargo air carriers, or contractors) exceed the aggregate amount authorized to be provided to such category, the Treasury may reduce, on a pro rata basis, the amounts payable to approved applicants in such category in order to address such shortfall.

In terms of payments, the Payroll Support Guidelines provide that approved applicants may receive payroll support in multiple payments, with the amounts and timing of such payments determined by the Treasury in its discretion. Moreover, to the extent an approved applicant’s initial payment or payments are less than the applicant’s awardable amount, the Treasury will make additional payments to the applicant up to its awardable amount from any available remaining funds (subject to any pro rata apportionment described above).

Terms and Conditions for Monies Allocated to Aviation Employee Relief

Our previous [Alert](#) outlined many of the key terms and conditions for financial assistance specifically allocated for aviation employee relief. These included, among others, (i) prohibitions on furloughs, pay reductions, stock buybacks, and dividend payments; (ii) limits on executive compensation; (iii) continuation of certain air service; and (iv) the condition that funds be used exclusively for the continuation of employee wages, salaries, and benefits.

The recently released Payroll Support Guidelines provide additional explanation on the following criteria, terms and conditions:

- *Collective Bargaining Agreements* – through September 30, 2020, neither the Treasury nor any other actor, department, or agency of the Federal Government may condition the provision of payroll support payments on the applicant’s implementation of measures to enter into negotiations with the certified bargaining representative of a craft or class of employees of the applicant under the Railway Labor Act (45 U.S.C. § 151 et seq.) or the National Labor Relations Act (29 U.S.C. § 151 et seq.), regarding pay or other terms of employment.

- *Taxpayer Protection* – the Treasury is authorized to receive warrants, options, preferred stock, debt securities, notes, or other financial instruments issued by recipients of payroll support which, in the sole determination of the Treasury Department, provide appropriate compensation to the Federal Government for the provision of the payroll support.
- *Audits and Report* – the Inspector General of the Treasury will audit certifications regarding an applicant's awardable amount.
- *Suspension or Debarment* – the Treasury may refuse to provide payroll support payments to applicants that have been debarred, suspended, deemed ineligible, or voluntarily excluded from participation.
- *Insolvency* – the Treasury may refuse to provide payroll support payments to applicants that have taken, or are currently evaluating, any action to commence a bankruptcy or insolvency filing in any applicable jurisdiction.
- *Consultation with Transportation* – the Treasury may disclose to the Department of Transportation any information submitted as part of an application for payroll support and may consult with the Department of Transportation on any aspect of application screening or evaluation.

Application Form and Agreement

The Payroll Support Guidelines require applicants to complete a Payroll Support Application Form (available on the Treasury's website).³ As part of the application, applicants must identify a financial instrument (or instruments), together with proposed terms for such instruments, that would provide appropriate compensation to the federal government in exchange for financial assistance for payroll support. Moreover, certain applicants may also be required to provide a sworn financial statement certifying their claimed awardable amounts (for which the Treasury may request appropriate documentation at a later time). Additionally, applicants must also complete a Payroll Support Agreement (provided by the Treasury after an application is received).

Applicants may submit their application materials to PayrollSupportApplications@treasury.gov, while the Treasury will soon provide a web-based form for application submissions in the coming days.

Application Deadlines

Finally, the Payroll Support Guidelines stress that in order to receive approval of their applications as soon as possible, applicants should submit their completed application materials no later than 5:00 p.m. EDT on April 3, 2020. Applications received after 5:00 p.m. EDT on April 3 will be considered but may not receive approval as quickly. Applications received after 11:59 p.m. EDT on April 27, 2020, may not be considered, but the Treasury may, in its discretion and subject to the availability of funds, consider such applications for approval.

For additional information, please contact any member of Haynes and Boone's [Aviation Practice Group](#).

³ The Payroll Support Application Form can also currently be found at the end of the Payroll Support Guidelines, beginning after page 5. A link to the Payroll Support Guidelines is available [here](#).