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Aviation Update: FAA Proposes Extension of Slot Utilization Waiver at JFK, LGA and DCA Given COVID-19's Continued Impact on Air Travel Demand

The Federal Aviation Administration ("FAA") is proposing to extend its slot utilization waiver at John F. Kennedy International Airport ("JFK"), LaGuardia ("LGA") and Ronald Reagan Washington National ("DCA") through March 27, 2021. The proposal is a direct result of COVID-19's continued impact on air travel demand and legacy carriers' request for a further extension of the FAA's current slot utilization waiver. The proposed extension is opposed by some air carriers and will impose new requirements regarding slot usage until expiration of the waiver on March 27, 2021.

This alert is being provided as a follow up to our prior client alert titled "Uncertainty in the Airline Industry: An Overview of Slots, Gates and Routes Pledged as Collateral in the Wake of COVID-19" published on August 3, 2020¹ and is intended to keep lenders informed about regulatory activity affecting slots—a key piece of collateral securing billions in airline financings entered into since March 2020.

WHAT ARE SLOTS AND WHAT IS THE SLOT UTILIZATION RULE?

A "slot" is the authorization granted by the applicable governmental authority for an aircraft to either take-off or land at a particular airport during a particular time. Whether or not an airport utilizes slots depends on how busy it is as determined by the applicable governmental authority.

Here in the U.S., the FAA monitors slot allocations and imposes strict slot controls at each of JFK, LGA and DCA. Specifically, the FAA imposes an 80% slot utilization rule at those airports, whereby if an airline's slots are not used at least 80% of the time over a two-month period, they will be withdrawn by the FAA and may be reallocated to other airlines at the

¹ <https://www.kslaw.com/news-and-insights/uncertainty-in-the-airline-industry-an-overview-of-slots-gates-and-routes-pledged-as-collateral-in-the-wake-of-covid-19>



FAA's sole discretion. Any such reallocation typically takes place via random lottery, generally no more than twice a year, and is open, subject to certain exceptions, to air carriers that are not operating scheduled service at the applicable airport and that wish to initiate scheduled passenger service at such airport.

Recently, in light of COVID-19 and the sharp decrease in air travel demand, the FAA temporarily suspended the 80% slot utilization rule at JFK, LGA and DCA to prevent airlines from having to fly empty flights simply to keep their slots at these airports. The initial waiver ran through May 31, 2020, which was subsequently extended through October 24, 2020. In a notice published on September 15, 2020, the FAA indicated its intent to further extend the waiver through March 27, 2021, which corresponds with the end of the winter flying season at those airports.

The FAA indicated in its notice that it expects foreign slot coordinators to provide reciprocal relief to U.S. carriers. To date, many coordinators have indicated that they will provide similar relief to what the FAA is proposing, including the European Commission, which announced last week that it would extend its slot-use waiver through March 27, 2021. As detailed below, these decisions follow a pro-waiver campaign from various associations and airlines, including the International Air Transport Association ("IATA"), which publishes the Worldwide Slot Guidelines generally followed by the FAA and has shaped commercial standards in the airline industry on a global scale since its inception in 1945.

ARGUMENTS FOR AND AGAINST AN EXTENSION OF THE SLOT UTILIZATION REQUIREMENT

After the initial slot utilization waiver, the FAA received numerous written submissions from various organizations and airlines reflecting competing interests and views with respect to a further extension of the waiver beyond October 24, 2020.

For example, IATA, Airlines for America ("A4A"), and multiple U.S. air carriers, including American Airlines, Delta Air Lines, JetBlue and United Airlines have urged the FAA to extend the waiver through the winter 2020/2021 scheduling season (i.e., through March 27, 2021). In a letter to the FAA, IATA and A4A noted an anticipated \$84.3 billion loss for airlines globally in 2020, and estimated that a full recovery to pre-COVID-19 travel demand is not expected for at least three years. IATA and A4A expect that the requested waiver will provide the flexibility necessary for airlines to manage operations in the current environment without fear of losing their slots. Similarly, American Airlines has argued that such flexibility will allow airlines to create flight schedules based on rapidly evolving consumer demand rather than slot usage requirements. Delta has also stated that absent continued relief from the minimum slot utilization requirement, critical improvements, including service expansion to numerous new destinations from JFK and LGA in recent years, as well as capital investments at those airports for expansion and redevelopment, would be threatened. Additionally, a letter from leaders of twenty-nine airlines around the world, including United Airlines, stated that this waiver is "critical to...manage through this crisis, recover, and provide the significant consumer community, competitive, employment, and economic benefits synonymous with aviation" and will "help stabilize a very tenuous operational and commercial environment." The letter further stated that "[a]irlines should not have to fly empty planes in order to hold their historical slot rights—it is inefficient and irresponsible."

In contrast, others, including the Airports Council International-North America ("ACI-NA") and certain low-cost carriers such as Spirit Airlines and Allegiant Air, oppose the FAA's proposed extension of the slot utilization waiver. In a letter by ACI-NA, ACI-NA asserted that the continued waiver would "encourag[e] the underutilization of valuable public resources" which would be contrary to public interest and negatively impact the economic viability of airports and the communities they serve. In a letter by Spirit Airlines, Spirit predicted that "legacy incumbent carriers" will continue to seek further extensions of the waiver in the future, asserting that an extension of the waiver "would have a pernicious effect on both the short and long-term realignment of the industry following the pandemic and is contrary to the public interest". Therefore, Spirit argued that "public policy should be directed toward enabling the free market to reallocate the use of these slots/authorizations – a public resource – such that passengers receive greater choice among offerings in these key markets." In a letter by Allegiant Air, Allegiant argued that "the existence of a public health crisis does not justify



hoarding of public assets...by any carrier when others are prepared to utilize at least some of those assets, benefitting the public.”

CAVEATS TO CURRENT PROPOSAL

To balance these competing views and interests, the FAA’s proposal went further than its prior order, and imposes additional requirements and restrictions for the extended waiver to apply. Specifically, slot holders at JFK, LGA and DCA seeking a continued waiver of the minimum slot usage requirement will be subject to the following conditions:

- All slots not intended to be operated would be required to be returned at least on a monthly basis 4 weeks prior to the start of the month (for example, by November 1, 2020, carriers must give up all December slots not intended to be operated due to COVID-19) to allow other carriers an opportunity to operate these slots on an ad hoc basis without historic precedence;
- The waiver would not be made available for newly allocated slots eligible for historical precedence, based on allocation decisions made prior to the start of the winter 2020/2021 scheduling season; and
- The waiver would not apply to slots newly transferred on an uneven basis (i.e. via one-way slot transaction/ lease) 14 days following a final decision in the federal registrar for the duration of the transfer.

The FAA has indicated that it will consider granting exceptions to the above requirements “if a government’s action (i.e., travel restriction) directly prevents the operation of a flight on a particular route that a carrier otherwise intended to operate.” Such an exception would only apply “under extraordinary circumstances only in which a carrier is able to demonstrate an inability to operate a particular flight or comply with the conditions of the proposed waiver due to a governmental restriction.” An air carrier seeking such an exception will need to provide supporting documentation to demonstrate it made all efforts to operate a flight and that it was unable to determine with reasonable advance notice whether it was able to do so.

CONCLUSION

The comment period to the FAA’s proposal expires on September 22, and the final order is expected to be published on or before October 24, 2020, when the current order is set to expire. The FAA has indicated that it will provide notice of its final decision only after the receipt and review of comments. Given the opposing interests surrounding the extension and the new slot use requirements being proposed – specifically the requirement to return slots not intended to be operated – the FAA’s proposal may evolve before becoming effective.

In the coming weeks, King & Spalding will continue to provide further updates on the airline and transportation industries. Please be on the lookout for additional information and in the meantime, please reach out to us with any questions.

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