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Airport Law Alert: Airport Law in the Time of COVID-19

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The COVID-19 pandemic has changed nearly every corner of American society and disrupted the air travel industry in unprecedented ways. The slow recognition and extended length of the crisis has delivered a different kind of shock to the system than the terrorist attacks of September 11, 2001. Policymakers at all levels of government, airport sponsors, and other players in the industry are reacting in real-time, trying to address the immediate impact of the pandemic while simultaneously planning for an uncertain future.

As a result of the pandemic, airport sponsors and the FAA have been forced to create new policies or apply existing policies and guidance in creative ways to fit unique and changing circumstances. New federal legislation also may fundamentally change the way airports do business in the future. It is not clear what new obligations might be placed upon (or assumed by) airport sponsors with respect to the health and safety of the traveling public, but sponsors should begin to prepare on several fronts.

FAA Compliance Guidance for Airport Sponsors

A dramatic drop in operations, nearly empty terminals, requests from tenants and airlines for rent or fee deferrals or abatements, and state and local health restrictions, have all raised new concerns about how airport sponsors may remain in compliance with their federal grant obligations. In response to many questions from airport sponsors and industry groups, FAA released a series of compliance guidance documents and new policies over the past six weeks.

In the early days of the pandemic, when state and local governments began imposing the first series of shutdown orders and closing many public facilities, FAA issued a Compliance Guidance Letter ("CGL") stating that the complete or partial closure of an airport for public health concerns would qualify as closure for a "non-aeronautical purpose," which must be approved by the FAA. Shortly thereafter, FAA issued separate guidance for state and local governments considering restrictions that might adversely affect air transportation (*e.g.*, quarantine or travel restrictions on persons coming from virus hot spots). That guidance again noted that an airport cannot close for public-health reasons without FAA approval, and encouraged governments to work with aviation stakeholders (including airports) in the development and implementation of any restrictions.

With demand for air travel near zero, airlines also sought to ground their fleets and temporarily park aircraft at airports across the country. In response, FAA published a Part 139 Cert Alert reminding sponsors of their safety and accessibility obligations related to runways and taxiways. FAA more recently published a second Part 139 Cert Alert regarding best practices for the issuance of Notice to Airmen (NOTAMs) when closing runways and/or taxiways to temporarily park aircraft.

On April 4, FAA published an updated version of its more comprehensive guidance for airport sponsors that touched on a wide variety of compliance issues. It refined several of the earlier documents discussed above, and also addressed several new and critical points. While largely avoiding black-and-white statements or bright-line rules, FAA generally stated that airport sponsors may consider waiving (not just deferring) fees and rents owed by airport tenants, so long as its determination carefully considered contractual terms, debt service requirements, and other sponsor financial obligations, as well as any decline in fair market value, loss of services, and/or changes to volume of traffic and economy of collection as a result of COVID-19. On the issue of closing airports, the guidance clarified FAA's earlier positions and distinguished between closing aeronautical facilities (allowed only after advance consultation with the FAA) and closing non-aeronautical facilities (not likely to be a grant assurance violation). The guidance instructed that prohibiting flights from particular locations (*e.g.*, virus hot spots) is a violation of federal law, unless approved in advance by the FAA. However, the FAA also acknowledged

there may be instances in which it would be appropriate to require flights to land at certain airports for health screening, provided that the FAA approved such a measure.

With respect to public health measures, the guidance stated that the FAA will not generally allow an airport sponsor to commit airport employees or resources to conducting public health screenings, although the sponsor may accommodate local public health officials to conduct screenings at the airport. Significantly, the FAA did not object to temporary limits on recreational aeronautical activities (*e.g.*, flight training, sky diving), provided that they are implemented pursuant to the order of public health officials whose geographic jurisdiction includes the airport.

The FAA stresses that these guidance documents are not binding and sponsor compliance is voluntary, but they are nevertheless an important indication of the FAA's views on sponsors' grant assurance obligations in the context of the current crisis. The guidance emphasizes that the FAA will be flexible in accepting certain temporary or emergency accommodations that might otherwise be impermissible, and that it will evaluate all restrictions or accommodations in the unique context of the particular airport.

CARES Act Implications for Airports

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act into law as Public Law No. 116-136. The CARES Act is a sprawling piece of legislation that provides financial relief to many sectors of the American economy, including airports and some of their business partners (primarily airlines and airline service providers).

Of most interest to airport sponsors, the CARES Act allocates $10 billion in funds to be made available to airports, which are not subject to many of the usual restrictions associated with federal grant money. The CARES Act prescribes a methodology for allocating amounts to individual airports that is multi-faceted and generally tied to an airport's level of debt and activity level. The FAA's calculation of the amounts available to each airport has been heavily scrutinized, as some small airports with no debt are presumptively entitled to millions of dollars in funding. This apparent discrepancy has led the FAA to cap the CARES Act funds available to an airport at four times that airport's annual operating budget.

To obtain CARES Act funds, sponsors must complete a short application (if funds will be used for new capital projects, additional coordination with the ADO is required). Once funds are received, they may be used for any purpose for which airport revenue may lawfully be used: operating or maintenance expenses, capital costs, or debt service. As a condition of receiving the funds, sponsors of hub or primary airports must continue to employ, through December 31, 2020, at least 90% of the number of full-time equivalent employees employed (after making adjustments for retirements or voluntary employee separations) as of March 27, 2020. FAA has indicated that, consistent with the CARES Act, it will not require compliance with all Airport Improvement Program grant assurances, but that a certain subset may be included in the grant agreement. FAA has published an extensive FAQ document on CARES Act issues, but again cautions that it is not binding and subject to future revisions.

Airlines are also eligible for certain financial relief in the form of grants and loans through the CARES Act. As a condition of receiving that aid, airlines must commit to a host of conditions, including providing minimum air service nationwide. On April 7, the United States Department of Transportation issued its final order specifying the carriers and points that would be covered by the minimum air service obligations. Many airlines have subsequently applied for exemptions from parts of these obligations, though the Department has denied many of those requests.

Looking Ahead: Public Health Requirements and Other Considerations

As the expiration of the state stay-at-home orders leads to the slow recovery of air travel, there is little doubt that the industry will look significantly different from just two months ago. There have not yet been any federally mandated health screenings or personal protective equipment measures directed at airports in particular. More broadly, the Equal Employment Opportunity Commission (EEOC) has provided guidance indicating that employers may require employees to wear masks to prevent the spread of

COVID-19. Many state and local governments have mandated that individuals wear masks in public places (including airports in some cases) or that employers provide masks for their employees. In addition, many airlines have announced that they will require passengers to wear masks on flights. At least one airport terminal operator is independently taking steps to implement health screenings.

For now, all of these requirements, guidelines, and practices are an evolving patchwork, but airport sponsors should be prepared to act as new federal or state mandates are announced (or public pressure demands additional health precautions). Momentum is already building on this front; on May 5, Senators Edward Markey and Richard Blumenthal introduced a bill that would require several federal agencies to assemble a joint task force (with airport operator participation) to provide emergency plans, guidelines, and recommendations on the safe and healthy resumption of air travel. Both during and after any federal process for imposing new mandates or recommendations, it will be critical for airport sponsors to coordinate with the FAA, airline stakeholders, and other tenants to ensure that responsibility for compliance and enforcement is appropriately allocated. Airport sponsors need to consider carefully both their state and local authority to implement health screening, the liability implications of screenings, any applicable state privacy laws regarding the collection and storage of medical information, as well as equal protection issues related to disability rights or accommodations. The practicality of handling persons who test positive under the screening protocol will also raise legal issues.

Sponsors will likely face a slew of issues that are not a result of a change in the law but rather brought on by the harsh reality of the economic fallout of the crisis. Sponsors should expect and plan for stakeholder bankruptcies, including airlines, FBOs, concessionaires, rental car companies, and others. Airport lawyers will need to advise airport management in careful planning for bankruptcy and structuring any accommodations to minimize bankruptcy exposure. Given the likelihood of significant bankruptcy filings, Kaplan Kirsch & Rockwell's bankruptcy lawyers are providing advance planning advice to many airport sponsors.

Claims for damages related to potential infections at airports (both from passengers and employees) are possible, and sponsors should check whether such claims might be mitigated or eliminated through state sovereign immunity statutes or physical protective measures at the airport itself. Sponsors should also consider whether it is necessary to update its insurance coverages, governing or form documents (*e.g.*, minimum standards, rules and regulations, standard leases), and planning and forecast documents to account for new compliance measures, increased liability risks, or reductions in revenue.

This Airport Law Alert provides a high-level overview of airport law issues related to the COVID-19 pandemic. It is not intended to be a comprehensive analysis of all applicable law, nor should it be interpreted as applying to any particular factual situation. For more information or to discuss a specific set of circumstances, please contact the Kaplan Kirsch & Rockwell attorney(s) that normally represent you or any member of our Airports practice. For questions about bankruptcy planning, contact Eric Smith, Dave Bannard, or Eric Pilsk.

Every year, we look forward to our annual Airport Law Workshop, which is currently scheduled for October 11-13, 2020 in Seattle, Washington. We remain hopeful that the Workshop will go on as planned, but recognize that the realities of the pandemic may force us to adapt. We will continue to evaluate the situation in the coming weeks and will provide an update in the event of a change to the schedule or format of the Workshop.