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# Foreign Air Carrier Part 375 Operations During COVID-19 – A Partially Open Door to the U.S. Market

*David Endersbee and Barbara Marrin*
*KMA Zuckert LLC*

The U.S. Department of Transportation (DOT) has adopted regulations codified in 14 CFR Part 375 ("Part 375") to allow limited commercial air operations by foreign air carriers to and from the United States. Part 375 serves as a limited exception to the general requirement that a foreign air carrier hold DOT economic authority (in the form of either an exemption or foreign air carrier permit) to operate to the U.S. (as well as Federal Aviation Administration operations specifications).[1]

As written, Part 375 contemplates a foreign air carrier operating no more than six flights per calendar year and DOT formerly required individual applications for a "foreign aircraft permit" on a flight-by-flight basis, a tedious and time-consuming process which resulted in lost charter opportunities for foreign air carriers. However, following the U.S. – EU Open Skies Agreement in 2007, DOT in 2008 adopted a much more liberalized and simplified policy. In short, upon receipt of a "Special Authorization" pursuant to Part 375, foreign air carriers may now apply to operate up to 12 flights per calendar year or other 12-month period. With a Special Authorization, foreign air carriers may operate most flights with no advance notice to DOT or necessary prior approval.

Instead, the foreign air carrier need only provide notice to DOT within five business days for routings covered by the applicable bilateral

The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on defense of federal agency enforcement actions including DOT, FAA, TSA, and CBP.

For further information regarding the matters discussed in this article, please contact any of the following attorneys:

David M. Endersbee
(202) 973-7935
dendersbee@kmazuckert.com

Barbara M. Marrin
(202) 973-7961
bmarrin@kmazuckert.com

KMA Zuckert LLC
888 17th Street, NW, Suite 700
Washington, D.C. 20006
Telephone: (202) 298-8660
Fax: (202) 342-0683
www.kmazuckert.com

agreement. For example, an EU-based carrier could operate "(a) between any point or points behind any Member State of the European Union, via any point or points in any Member State and via intermediate points, to any point or points in the United States and beyond, (b) between any point or points in the United States and any point or points in any member of the European Common Aviation Area, or (c) for all-cargo operations only, between any point or points in the United States and any other point or points." A flight on another routing (i.e., a seventh freedom flight with no traffic stop in the foreign air carrier's homeland) requires at least three business days advance notice to provide DOT with an opportunity to deny permission to operate if DOT finds the public interest requires it (e.g., a flight to or from a nation with which the U.S. does not have good relations and/or which has demonstrated, by a lack of reciprocity, that similar operations by U.S. carriers would likely be denied). DOT will waive this three-day notice requirement for good cause shown.

While Part 375 has served business jet operators well, the COVID-19 crisis has upended the premium travel market. High net worth and executive clientele now frequently seek private charter opportunities for health and safety reasons, which means that operators that in past years had limited operations – and thus comfortably operated within the confines of Part 375's 12 flight limit – may now exhaust their flight allocation. To date, DOT has not permitted more than 12 flights under Part 375 and has shown no inclination that it will increase the number of flights allowed notwithstanding the COVID-19 crisis. Thus, foreign air carriers operating under Part 375 may find themselves effectively barred from the U.S. market.

To avoid such an outcome, foreign air carriers operating under Part 375 (or considering it) should carefully assess their market and determine whether 12 flights a year will suffice. Foreign air carriers may pursue both a Part 375 Special Authorization and economic authority from DOT and operations specifications from FAA concurrently or successively (i.e., permitting operations on an interim basis), which in this environment may be the most prudent course of action. Current Part 375 Special Authorization holders are well-advised to determine whether their projected demand will outstrip their available flight allocation, in which case an investment in DOT and FAA authority would likely be merited. It is critical to note that significant time should be budgeted to obtain such authorities – on the order of months – due to COVID-19-related delays at both agencies.

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Foreign air carriers – particularly business jet operators – have an excellent mechanism to enter the U.S. market through Part 375's low barrier to entry. Part 375 does, however, have its limitations. Foreign air carriers considering entering the U.S. market in a limited way should consult with counsel to determine the best course of action for the scope of the carrier's intended operations.

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[1] "Foreign air transportation" is defined by 49 U.S.C. § 40102(23) as "the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between

a place in the United States and a place outside the United States when any part of the transportation is by aircraft." An exemption or foreign air carrier permit issued pursuant to 49 U.S.C. § 40109 or § 41301, respectively, authorizes foreign air carriers to engage in common carriage. Part 129 of FAA's regulations requires operations specifications for foreign air carriers engaged in common carriage. 14 CFR § 129.5(a). In contrast, Part 375 does not permit common carriage, but rather contemplates (for passenger operations) occasional single-entity charters. 14 CFR § 375.40.