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FAA Grant Assurances – Recent Developments and the COVID-19 Pandemic (July 2020)

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), in addition to authorizing $54 billion in grants and loans to U.S. air carriers, also authorized $10 billion in grants to U.S. airports. The Federal Aviation Administration (FAA), in an FAQ explaining the obligations attached to the airport grants, noted that the funds were not subject to the "standard set of FAA Airport Sponsor Grant Assurances." For many readers, the likely response was: What **are** those grant assurances?

Since 1982, FAA has administered the Airport Improvement Program (AIP), which provides grants for capital improvements at U.S. airports. More than 3,300 U.S. airports are eligible, and the vast majority of those airports have actually accepted AIP grants. In a typical year, more than $3 billion is disbursed – funded by aviation taxes and fees paid into the Airport and Airway Trust Fund, not by taxpayer dollars.

But AIP grants come with conditions. Airports must comply with 39 "assurances" – which typically apply not just to grant-funded improvements, but to all of an airport's operations. The assurances usually have a 20-year term – but since most airports accept new AIP grants on an ongoing basis, in practice they have perpetual obligations. (Additionally, grants used to acquire real property – and surplus real property provided by the federal government – usually impose explicitly perpetual obligations.)

The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with DOT, FAA and other agency requirements related to the ongoing COVID-19 pandemic.

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Some of the assurances are typically uncontroversial – e.g., that airports comply with federal statutes of general applicability (civil rights, disadvantaged businesses, etc.). But at least three of the assurances have significant implications for airports:

- **A prohibition on "unjust discrimination"** – Airports generally must allow all types of aeronautical activities access to their facilities, on reasonable terms.

- **A prohibition on "exclusive rights"** – Airports generally cannot grant an exclusive franchise to an aeronautical business, such as to be its only FBO.

- **A prohibition on "revenue diversion"** – Revenue generally can be used only for airport purposes, and not for general funds purposes by its municipal parent.

For all of the assurances, the devil can be in the details – for example, with FAA concurrence, an airport can prohibit activities that are unsafe; an airport can choose to directly operate a business such as an FBO and exclude competition; and certain otherwise impermissible uses of airport revenue have been grandfathered by FAA.

In 1996, FAA established a special set of procedures to review grant-based complaints (14 C.F.R. Part 16). Approximately 350 complaints have been filed over the past 25 years, and about half of them have been resolved by a public FAA order – sometimes finding an airport to be in compliance with its obligations, but sometimes requiring corrective action. FAA has emphasized that its goal in these proceedings is to ensure both **current** compliance and that private damages are **not** available.

FAA issued seven Part 16 decisions in 2019 – four generally resolved in favor of the airport respondents, and three generally in favor of the complainants. Notably, FAA upheld an earlier finding that that Seattle-Tacoma International Airport had complied with its obligations to provide opportunities to disadvantaged business enterprises, but issued a preliminary ruling that Hartsfield-Jackson Atlanta International Airport was not in compliance because it had failed to monitor contractor-subcontractor relationships.

In three other cases, FAA dismissed economic complaints against general aviation airports. In a fourth case, FAA preliminarily held that a ban on operations by jet aircraft at Palm Beach County Park Airport was improper. In a long-running dispute involving Santa Monica Municipal Airport, FAA issued a split decision, holding that certain intra-city loans and financial practices had not complied with federal requirements, but that updated information was required to resolve other allegations, such as of excessive fees and an impermissible surplus. Additionally, Airlines for America unsuccessfully appealed to a federal court an FAA decision that Portland International Airport could use airport revenue to pay certain storm water utility fees.

Looking ahead, FAA Associate Administrator for Airports Kirk Shaffer in public statements has emphasized that revenue diversion is a top priority for his office, including but not limited to fuel tax revenue. Since 2014, FAA has taken the position that revenue from state taxes on aviation fuel – even if collected as part of a generally applicable sales tax – is airport revenue and must be used only for airport purposes. Jurisdictions that do

not comply are at risk of not only having future AIP grants suspended but also civil penalties of up to three times the amount of the diverted revenue. Nevertheless, revenue diversion may continue to be a temptation for state and local governments, especially as they confront post-pandemic budget shortfalls.

It remains to be seen how COVID-19 may affect FAA's priorities. As above, the grants made available to airports by the CARES Act are not subject to the standard assurances – but FAA's CARES Act FAQ also cautioned that the grants can only be used for airport capital and operating expenses. FAA also provided a second guidance document regarding how airports should comply with the standard grant assurances during the pandemic. Notably, FAA emphasized airports' obligation to remain open and accessible to aeronautical activities, as well as that the abatement of rent for airport tenants was potentially permissible, depending on an airport's financial situation.

As the economy recovers and airport operations return to normal – or, at least, a "new normal" – it is likely that FAA and the DOT Inspector General will investigate whether airports complied with both the limited requirements of CARES Act grants and the more expansive requirements of the standard assurances attached to AIP grants. Given the importance of continued AIP funding for many airports' budgets, it is not too early for counsel and managers to review airport initiatives undertaken during the COVID-19 pandemic to confirm that they have complied with the CARES Act or the standard assurances for AIP grants, as applicable.