

## CLIENT ALERT

### Omnibus Bill Brings Changes to Aircraft Certification System and Extends CARES Act Lifeline for Air Carriers

Dec.28.2020

On Monday, December 21, 2020, Congress passed the [Consolidated Appropriations Act of 2021](#), which includes the House-Senate compromise of the Boeing 737 MAX aircraft certification reform legislation, the Aircraft Certification, Safety and Accountability Act (“ACSAA”), as well as an extension of the Payroll Support Program, one of the significant lifelines provided to the aviation industry under the CARES Act.

#### **Aircraft Certification, Safety, and Accountability Act (Division V, Title I)**

The ACSAA lays the groundwork for, among other things, certain FAA rulemakings related to and increased FAA oversight of the Type Certification process and the Organization Designation Authorization (“ODA”) system.

At a high level, the legislation requires:

- **Safety Management System Rulemaking**: The FAA must issue a final rule to mandate safety management systems for manufacturers who hold U.S. type and production certificates no later than 25 months after the ACSAA is enacted. Certificate holders will have four (4) years after the final rule is published to implement a compliant SMS. The final rule must include, among other provisions, provisions to (i) permit operational feedback from operators and pilots qualified on the manufacturer’s equipment to ensure that operational assumptions made during the design and certification phase continue to remain valid, (ii) require certificate holders to undergo continuous FAA inspections, audits, and other monitoring activities to ensure that they continue to meet SMS requirements, (iii) require each certificate holder’s SMS to include a confidential employee reporting system through which employees can report hazards, issues, concerns, occurrences, and incidents without reprisal, with reports submitted to the FAA at least twice a year, as well as an established code of ethics applicable to all appropriate employees.
- **ODA Oversight**: The FAA must convene an expert panel to review and make findings with respect to each current holder of an ODA for design and production of transport category aircraft, including an assessment of the effectiveness of the ODA holder’s SMS, its commitment to safety, its ability to make reasonable and appropriate decisions with respect to its delegated functions, and any other matters as determined by the FAA. The panel will include a broad range of government and industry stakeholders, including representatives from NASA, the FAA, relevant labor unions, air carrier and ODA employees, and independent legal and technical experts. The panel will submit a final report to Congress and to the FAA Administrator, and, upon reviewing the findings, the FAA may limit, suspend, or terminate a specific ODA that was under review.
- **Scope of Delegation under ODA**: The FAA may not delegate any finding of compliance with applicable airworthiness standards or the review of any safety assessment required for the issuance of a certificate (including a Type Certificate) until the FAA has reviewed and validated the underlying assumptions related to human factors. The FAA must approve appointments of ODA unit members made on or after January 2, 2022.

- **Part 25 Amendments:** The FAA must amend its processes for certification of transport category aircraft and the underlying regulations, including a requirement that applicants for Type Certificates for transport category aircraft under Part 25 submit safety critical information, including (i) operating conditions that the applicant anticipates or has concluded could result in a hazardous or catastrophic outcome and (ii) any adverse handling quality that fails to meet the requirements of applicable regulations without the addition of a software system to augment the flight controls to produce compliant handling qualities. Type Certificate holders will also be required to submit newly discovered information or design or analysis changes that would materially alter any previous submissions to the FAA on an ongoing basis.

### **Extension of the CARES Payroll Support Program (Division N Title IV Subtitle A)**

The renewed Payroll Support Program will provide \$15 billion for passenger air carriers and \$1 billion for their contractors. The renewed PSP is open to both new applicants and applicants who previously received funding under the program as part of the CARES Act. As under the CARES Act, Treasury may, at its discretion, make pro rata reductions in award amounts based on the number of applications received, and the bill contemplates that awards for previous recipients will in the same form and on the same conditions (including audit requirements and clawback of financial assistance in the case of a recipient's default on the required assurances) as the awards made under the CARES Act. For new recipients, awards will be made in the same form and on the same terms as those extended to similarly situated recipients under the CARES Act. Grants of financial assistance will be subject to the similar assurances previously imposed under the CARES Act, with extended compliance dates. A detailed overview of the Payroll Support Program under the CARES Act can be found [here](#). Specifically, recipients may not:

- Institute furloughs or reduce pay rates or benefits until March 31, 2021 (for passenger airlines) or until March 31, 2021 or whenever the funds received are expended, whichever is earlier (for contractors).
- Engage in stock buy-backs in any form until March 31, 2022 (for passenger airlines) or until March 31, 2022 or whenever the funds received are expended, whichever is earlier (for contractors).
- Pay dividends or make other capital distributions through March 31, 2022 (for passenger airlines) or through March 31, 2022 or whenever the funds received are expended, whichever is earlier (for contractors)
- Increase compensation or provide severance pay or other benefits for certain highly-compensated employees (employees making more than \$425,000 per year in total compensation) until October 1, 2022.

The bill introduced limited new requirements on recipients related to the recall of furloughed employees. Specifically, recipients must:

- recall any employees involuntarily furloughed between October 1, 2020 and the date of execution of the agreement with Treasury within 72 hours of such execution (for recipients who previously received Payroll Support Program funds under the CARES Act)
- recall any employees involuntarily furloughed between March 27, 2020 and the execution date within 72 hours of execution of an agreement with Treasury (for recipients who did not previously receive Payroll Support Program funds under the CARES Act)
- compensate returning employees for lost pay and benefits (offset by any amounts received by such employees as a result of furlough such as severance or separation pay) between December 1, 2020 and the date of execution of an

agreement with Treasury (for airlines) or between the date of enactment and the date of execution of an agreement with Treasury (For contractors)

- restore rights and protections for returning employees if they were not involuntarily furloughed.

The bill gives the Treasury five (5) days to publish application guidance and ten (10) days to make initial payments. Treasury is expected to use the same application portal and form for the renewed Payroll Support Program that was used under the CARES Act. A detailed overview of previous Treasury guidance, including a form agreement, can be found [here](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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