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PRESIDENT SIGNS VISION 100 - FAA REAUTHORIZATION, AND MORE.

Late Friday, December 12, the President signed Vision 100 - the Century of Aviation Reauthorization Act. Apart from setting spending limits for aviation infrastructure funding for the next four years, Vision 100 addresses a number of other aviation-related matters.

As with similar legislation in the past, the following analysis provides only subjective snapshots of selected topics. Vision 100 is comprehensive, and the full text and history must be reviewed to understand fully all of the implications. For more information, please contact any person identified on the last page of this Special Edition.

Infrastructure Funding

The news generally is good for proponents of increased infrastructure spending. Included in the \$60 billion total authorization are: \$14.2 billion for AIP funding, starting at \$3.4 billion in the first year and increasing by \$100 million in each of the next three years; and \$2 billion for airport security projects (at \$500 million per year).

Sourcing for these funds largely reflects the compromise worked out three and one-half years ago in the AIR 21 legislation, *i.e.*, a mix of rules of order and quasi-guarantees.

Environment

Vision 100 includes the most significant changes to the airport-related environmental review process since 1990.

Environmental review of major airport capacity, safety and security projects is streamlined by making the DOT the lead agency in the process. Other environmental measures include: directing the FAA to implement the ICAO Chapter 4 noise standards by April 1, 2005 (on December 1, the FAA issued an NPRM that proposes to make the Chapter 4 standards applicable to all aircraft certificated on or after January 1, 2006); directing the FAA to make Part 150 noise exposure maps available on the internet (and studying whether it is feasible to make such maps available to all persons buying property in the vicinity of an airport); language that effectively allows a ban on Stage 2 operations to be

imposed at the Jackson Hole, Wyoming Airport without completing a Part 161 study; and language barring the FAA (for three years) from approving a Part 150 noise compatibility program if it would expend AIP funds for mitigation measures outside the 65 dB DNL contour.

General Aviation

Apart from increased funding for general aviation airports, Vision 100 contains several other measures intended to assist that segment of the industry.

The DOT is authorized to make up to \$100 million in grants to "general aviation entities," primarily in the Washington metropolitan area, for security costs incurred and revenue foregone as a result of post 9/11 security measures undertaken by the Federal Government. The term "general aviation entity" includes Part 91 business aircraft operators, companies that provide services for those operators, manufacturers of non-military aircraft with a maximum seating capacity of fewer than 20 and passengers (or parts to be used in such aircraft) and non-primary airports closed

as a result of the closing of Class B airspace.

Ronald Reagan Washington National Airport has been closed to general aviation since the September 11 tragedies. The Department of Homeland Security (DHS) is directed to develop and implement a security plan that will allow the resumption of those operations. Once implemented, the plan may be suspended by the President due to national security concerns, but the reasons for that suspension must be reported to the Senate not later than 30-days following the suspension.

Present law allows the FAA to suspend an airman certificate upon being advised by DHS that the holder of that certificate poses a risk of air piracy or terrorism or a threat to airline or passenger safety. Vision 100 adds a provision that allows a U.S. citizen affected by such an order to request a hearing before an Administrative Law Judge, with appeal rights to the Transportation Security Oversight Board and then to a U.S. court of appeals. The suspension order remains effective during this process, if so directed by DHS.

Finally, in response to the unilateral closing of Meigs Field by the City of Chicago, the civil penalty for failing to give at least 30-days notice for any future airport closure is increased to \$10,000 per day.

Security

CAPPS 2 is slowed down, but not stopped. This next-generation passenger pre-screening program may not be implemented, except on a test basis, until TSA has certified

that a number of changes have been made relating to due process and privacy issues. Once those changes are made, both GAO and Congress will review the revised program.

Enhanced security training for flight and cabin crews is required. This will include voluntary "advanced" self-defense training.

PFC Streamlining

The general PFC application process is better defined. The FAA also is directed to initiate a pilot program for non-hub airports that would allow a "notice of intention" rather than a formal application to be filed; and the FAA is given 30-days to object. Finally, the FAA is permitted to allow the use of PFCs to service debt on non-eligible projects, provided that "such use is necessary due to the financial need of the airport."

Antitrust Immunity for Capacity Discussions

Vision 100 offers two forms of immunity for capacity discussions at congested airports, one indirect and the other direct.

Indirect immunity would be accomplished by allowing the FAA to convene a meeting "to discuss flight reductions at severely congested airports to reduce overscheduling and flight delays during peak hours of operation." The FAA would announce flight reduction targets before the meeting. The carriers would then make offers to the FAA (but not to each other) to meet the targets, presumably on the theory that this would not violate Section 1 of the Sherman Act given the FAA's intervention.

Direct immunity is contained in a "collaborative decisionmaking pilot program" at not more than two capacity-restrained airports. Under this program, if the FAA determines that there is a "capacity reduction event" at the airport, the DOT may grant antitrust immunity to the airlines serving the airport and those airlines may meet to coordinate schedules. After two years, the FAA, with the concurrence of the Justice Department, may extend the program to up to seven additional airports.

DCA Slots

The available slots at Ronald Reagan Washington National Airport are increased by 12 for beyond-perimeter flights and by 8 for within-perimeter flights. As with the slots made available by AIR 21, the DOT has 90-days from the date of enactment to award the slots.

Essential Air Service

Vision 100 includes numerous provisions affecting a subject of frequent congressional tinkering – the Essential Air Service program:

The authorized (but not necessarily appropriated) EAS budget is set at \$115 million annually. The DOT may designate ten communities within 100 miles of a hub to pay a 10% local share, though only one such community may be designated in a single state. The DOT also is authorized to hire four additional EAS staffers.

A carrier may begin service to a community that has been eliminated from the EAS program without being subject to the hold-in requirements of the program (which can last up

to 120 days), if the carrier subsequently should decide to terminate service to that community. This provision aims to remove a requirement that might be a disincentive to a carrier resuming service to a EAS community that has no service.

If a carrier experiences “significantly increased costs” in performing EAS services, the DOT may increase the rate of subsidy the carrier receives without renegotiating the carrier’s contract or re-bidding service to the city involved. A “significant increase” is defined as a 10% increase in unit costs that persists for at least two consecutive months.

The DOT is directed to establish a pilot program under which EAS carriers and network carriers serving large hubs would be required “to participate in multiple code-share arrangements consistent with normal industry practice whenever and wherever” the DOT determines that such arrangements would improve service. No EAS or network carrier may be required to code-share to more than ten EAS points.

Using \$15 million authorized in addition to the conventional EAS subsidy fund, Vision 100 establishes an EAS marketing incentive program for communities to develop and implement marketing plans to increase passenger boardings, and it offers annual grants of up to \$50,000 to pay for such plans. To be eligible, participating communities must come up with a minimum 25% local/state match.

In an effort to change how EAS support is delivered to small

communities, Vision 100 creates an alternate EAS pilot program. Rather than receiving subsidized service from a carrier, a state or municipal government could receive a grant directly from DOT to establish and pay for its own service. This could include scheduled service, air taxi service, surface transport, or – once FAA’s new rule on fractional ownership takes effect – fractional ownership of aircraft. A community that participates in the alternate program in one fiscal year may switch back to participation in the conventional program the next fiscal year. As a subset of the overall alternate program, however, the Act also directs DOT to choose a maximum of ten communities to participate in the alternate program for ten years. In exchange for this long-term commitment, the ten communities would receive double the amount of EAS subsidies they would have received in the conventional program. DOT will fund the alternate program out of the general EAS budget.

Vision 100 establishes a National Commission on Small Community Air Service to study the challenges faced by small communities striving to retain and enhance scheduled passenger service and to assess whether the EAS program is adequate to meet such communities’ needs.

Other Provisions

Vision 100, like its predecessors, contains a miscellany of provisions related to aviation but not necessarily to other parts of the legislation, including:

War risk insurance. The program is expanded to include

manufacturers and extended to March 30, 2008.

Citizenship definition. The definition of “citizen of the United States” now specifically includes a requirement that a corporation be “under the actual control of citizens of the United States.” This memorializes, prospectively, the de facto control test long applied by the DOT.

Overflight fees. Another attempt is made to resolve the FAA’s inability to design a schedule of overflight fees that will withstand judicial review. This time, the FAA’s “interim” final order is adopted “as if the same had been by prior Act of Congress” but collection is deferred until the FAA has reported to Congress on the issues raised in the last appellate court decision and the FAA has consulted with carriers and other interested parties concerning the treaty issues raised by the new fees. In other words, it is not over yet.

New FAA certificates. Within one year, the FAA will issue certificates to all qualified flight attendants. This is a change in status, not in required training.

Vision 100 also starts a process to authorize third parties to certify compliance by manufacturers with minimum standards for aircraft, aircraft engines, propellers and aircraft appliances. The FAA has four years to submit to the Congress a plan for the issuance of “design organization certificates.” Such certificates cannot be issued until December 2010, at the earliest.

Alaskan cabotage. With respect to cargo moving between a U.S. point and a

foreign point via a connect point in Alaska (e.g., Anchorage), Vision 100 authorizes foreign airlines to carry "eligible cargo" between a point in Alaska and another U.S. point, even if that cargo is transported between the Alaska point and a foreign point on another airline. This accommodation for foreign airline transshipments at Anchorage represents an exception to DOT's traditional interpretation of what constitutes "cabotage." To be "eligible," the cargo must be moving under the code of a U.S. air carrier, or on a U.S. air carrier waybill, or under a term or block space agreement between the foreign carrier and a U.S. air carrier.

Civil penalties. Vision 100 increases the limit for most civil penalties imposed by the DOT and the FAA to \$25,000 per violation, with exceptions for individuals and small businesses. It also increases the limit for administrative imposition of civil penalties by the FAA (i.e., the point at which a district court assumes jurisdiction) from \$50,000 to \$400,000.

Appellate jurisdiction. Vision 100 makes it clear that all appeals of FAA decisions concerning airport development projects must go to a U.S. court of appeals. It also clarifies that appeals from final TSA orders are subject to the same review procedure.

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