



It's The Law

Office of the Assistant General Counsel for Finance and Litigation

Federal Assistance Law Division

Vol. 14

Feb 13, 2002

“Fly America - More Than Just A Name”

by Mike Cannon

INTRODUCTION

Recipients of Federal financial assistance funds are required to abide by the provisions of the Fly America Act -- but what does that mean? Is it just a bureaucratic restriction placed on Federal financial assistance recipients, or are there good reasons for compliance? How does one comply? Where does one go with questions on the Fly America Act? This article will explore these and other issues and is meant to be a synopsis of the restrictions flowing from the Act.

In a nutshell, the Fly America Act requires that foreign air travel funded with Federal dollars be performed on U.S. flag air carriers, unless one has a good reason not to.¹ This applies to ALL foreign travel funded by Federal dollars which means that these restrictions also apply to Federal Government employees on official travel, not just Federal financial assistance recipients and Federal contractors. As a matter of fact, the regulations implementing

the restrictions of the Fly America Act found at 41 CFR Parts 301-10.131 through 301-10.143 are part of the Federal Travel Regulations promulgated by the General Services Administration (GSA).

BACKGROUND

The “Fly America Act” originally referred to provisions enacted by section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 (Pub.L. 93-623, January 3, 1975), 49 U.S.C. App. 1517, as amended by section 21 of the International Air Transportation Competition Act of 1979 (Pub.L. 96-192, February 15, 1980), 94 Stat. 43.

In 1974 the Committee on Interstate and Foreign Commerce was referred a Bill to amend the Federal Aviation Act of 1958 to deal with discriminatory and unfair competitive practices in international air transportation. This Bill, enacted as Public Law 93-623, the International Air Transportation Fair Competitive Practices Act of 1974, dealt with problems that U.S. carriers operating in foreign air transportation encountered in their

¹ The acceptable reasons for not using a U.S. flagged air carrier are listed in the regulations implementing the Fly America Act and will be explained in detail below.

competition with foreign carriers. More specifically for our purposes, the Bill encouraged travel to and from the U.S. on U.S. carriers and required that transportation of Government-financed passengers and property be on U.S. carriers.² The Committee noted that discriminatory and unfair competitive practices were prevalent in many of the countries where U.S. carriers operated. Practices included the uneven application of national taxes, delays and considerable paperwork requirements imposed on U.S. carriers in currency conversions, preferences for the local carrier in accessibility to airport facilities and services, and denial to U.S. carriers of domestic connecting space within a foreign country.³ Subsection (a) of section 5 of the Act provided that when foreign transportation of persons or property is paid for or furnished by the U.S. Government, Agencies were to take steps to assure that the air transportation was furnished by U.S. air carriers. Additionally, expenditures from appropriated funds for foreign air travel that did not meet such standards were to be disallowed by the Comptroller General unless satisfactory proof of necessity was shown.

The International Air Transportation Competition Act of 1979 amended the 1974 Act in two ways. First, it allowed the use of foreign carriers if U.S. flagged air carrier services were not "reasonably available" between two foreign points. This was an

effort to avoid undue delays. Secondly, it authorized the U.S. Government to negotiate the right to carry U.S. Government-financed passenger traffic with foreign governments in return for liberal bilateral agreements that benefitted the public and U.S. air carriers.⁴ The Act was repealed by P.L. 103-272, which promulgated 49 U.S.C. § 40118, which is the present day version of the Fly America Act as amended.

FINAL RULES

Subsection 127(d) of the General Accounting Office Act of 1996 (P. L. 104-316) amended 49 U.S.C. § 40118 to require that the Administrator of GSA issue regulations under which agencies may permit payment for transportation on a foreign air carrier when such transportation is determined necessary. Prior to this amendment, regulations were promulgated by the Comptroller General and were found at 41 CFR 301-3.6. On April 7, 1998, GSA published a proposed rule,⁵ with request for comments, that amended the Federal Travel Regulation pertaining to the use of U.S. flag air carriers under the Fly America Act. The proposed rule allowed for a 30-day comment period during which GSA received comments from Federal agencies, U.S. air carriers, an air carrier association, and non-Government entities. GSA published the final rule on November 13, 1998,⁶ which was

² Legislative History of P.L. 93-623, as found in H.Rep.No. 93-1475, 1974 U.S.C.C.A.N. 7461,7462.

³ H.Rep.No. 93-1475, 1974 U.S.C.C.A.N. 7461,7463.

⁴ Legislative History of PL 96-192, as found in H.Rep.No. 96-329, 1979 U.S.C.C.A.N. 54, 65.

⁵ 63 FR 16936

⁶ 63 FR 63417

codified in the Code of Federal Regulations at 41 CFR Parts 301-10.131 to 301-10.143, which also removed the former regulations found at 41 CFR 301-3.6.

The final rules were written in plain language style in an effort to make the regulations easier to understand and use -- a question and answer format. The new regulations brought about a few changes. The new regulations reduced the connecting time for use of a U.S. flag air carrier service at an overseas interchange point from six hours down to four; required that airline tickets issued under a code share agreement identify the U.S. flag air carrier's designator code and flight number; removed references to "gateway airport in the United States" and "gateway airport abroad" for determining when a U.S. flag air carrier is available or reasonably available;⁷ and implemented a new method for calculation of a grantee's or recipient's liability for unauthorized transportation on a foreign air carrier. The regulations are easy to read and are the first place you should go if you have a question about compliance with the Fly America Act.

⁷ Under the old regulations, a "gateway airport in the United States" was the last airport in the U.S. from which the traveler's flight departed or the first airport in the U.S. at which the traveler's flight arrived; and a "gateway airport abroad" was the airport abroad from which the traveler last embarked en route to the U.S. or at which the traveler first debarked incident to travel from the U.S. The terms were used in determining whether a U.S. flag air carrier was available or reasonably available, and were a source of some confusion in the past.

WHEN DO THE RESTRICTIONS OF THE FLY AMERICA ACT APPLY?

The restrictions of the Fly America Act apply whenever travel is financed by U.S. Government funds. Essentially, if your travel is paid for by the U.S. Government, you have to use a U.S. flag air carrier.

U.S. flag air carrier means that the carrier providing the service holds a certificate under 49 U.S.C. § 41102, and the services are authorized by such a certificate, or by exemption or regulation. Additionally, U.S. flag air carrier service is also defined as service provided under a **code share agreement** with a foreign air carrier. A **code share agreement** is common industry practice. It is a marketing arrangement where one airline puts its code on the flights of another airline in order to coordinate services and advertise and sell the other airline's services as its own, i.e., the code-share flights are marketed by U.S. carriers as their own flights. Some or all of the transportation is provided by another carrier which carries its partner's designator code. Regulations promulgated by the Department of Transportation require airlines involved in code sharing to inform prospective passengers as soon as possible during calls to reservation offices when the flight involves a code share and to identify the carrier actually providing the service. The airlines must do this, even if the customer has not asked to book the flight. Therefore, when you book a

flight with an airlines, they are required to tell you if a code share agreement exists that will affect your travel. If you are not sure, ask the airlines representative.

Additionally, when using a code share, the ticket, or documentation for an electronic ticket, identifies the U.S. flag air carrier's designator code and flight number. The designator code and flight number are the essential features because this shows how the money flows.

SOME GENERAL EXCEPTIONS TO THE FLY AMERICA ACT

To every rule, there are some exceptions, and the Fly America Act is no different. As a matter of fact, there are many exceptions to the Act. Some of the exceptions are listed below.

A matter of necessity. It is determined that use of a foreign air carrier is a matter of necessity. How does one make that determination? 41 CFR 301-10.138 gives some guidance. Using a foreign air-carrier is deemed a necessity when service by a U.S. air-carrier is available, but cannot provide the air transportation needed or use of the U.S. air-carrier will not accomplish the agency's mission. Some circumstances dictating a necessity are when an agency determines that use of a foreign air-carrier is necessary for medical reasons, or if use is required to avoid an unreasonable risk to a traveler's safety (requires written approval by an agency on a case-by-case basis), or when a traveler can't purchase a ticket in his/her authorized class of service on a U.S. air-carrier, but can purchase one in

his/her authorized class on a foreign air-carrier.

Travel under a bilateral agreement. Transportation is provided under a bilateral or multilateral air transportation agreement between the U.S. and another country. The Secretary of Transportation has to have determined that the agreement meets the requirement of the Fly America Act.

Employees of Certain Agencies.

Another exception applies to officers and employees of the Department of State, U.S. Information Agency, U.S. International Development Corporation Agency, or the Arms Control Agency whose travel is paid for by funds appropriated to one of those agencies and the travel is between two places outside the U.S.

No U.S. Air-Carrier Service on that Particular Leg. If there is no U.S. air-carrier that provides service on a certain leg of your flight, then you may use a foreign air carrier. But only to or from the nearest exchange point on a usually traveled route to connect with a U.S. air-carrier.

Involuntary Re-routing. You can use a foreign air-carrier if a U.S. air carrier involuntarily re-routes your travel and puts you on a foreign air carrier.

Saving a Substantial Amount of Time. You can use a foreign air carrier if service on the foreign air carrier would be three hours or less, AND use of a U.S. air-carrier would

at least double your en route travel time.

Costs of Transportation

Reimbursed by a Third Party.

You may use a foreign air-carrier when the costs of your transportation are reimbursed in full by a third party, such as a foreign government or international agency.

SOME SPECIFIC EXCEPTIONS TO THE FLY AMERICA ACT

In addition to the general exceptions above, there are some specific exceptions to be aware of, and they depend on whether your origin and destination are outside of the U.S., or whether your travel is between another country and the U.S.

Travel between the U.S. and

another country. Below are some exceptions to keep in mind that only apply when your travel is between the U.S. and another country.

(1) If a U.S. flag air carrier offers nonstop or direct service (no aircraft change) from your origin to your destination, you have to use a U.S. air carrier, UNLESS, use of the U.S. air carrier would extend your travel time, including a delay at your origin, by 24 hours or more.

(2) If a U.S. flag air carrier does not offer nonstop or direct service (no aircraft change) between your origin and your destination, you MUST use a U.S. air carrier on every portion of your route where the U.S. carrier provides service, unless, when compared to using a foreign air carrier, use of the U.S. carrier would (a) increase the number of aircraft changes you make outside the U.S. by 2 or more; (b) use of the U.S. air

carrier would extend your travel time by at least 6 hours or more, or (c) the use of a U.S. air carrier would require a connecting time of 4 hours or more at an overseas interchange point.

Travel solely outside the U.S.

Below are some exceptions to the Fly America Act requirements that apply when you travel solely outside the U.S., and a U.S. flag air carrier provides service between your origin and destination.

Basically, you have to use the U.S. air carrier unless, when compared to using a foreign air carrier, use of the U.S. air carrier would: (1) increase the number of aircraft changes you have to make en route by 2 or more; (2) extend your travel time by 6 hours or more; or (3) require a connecting time of 4 hours or more at an overseas interchange point.

DOCUMENTATION REQUIRED WHEN USING A FOREIGN AIR CARRIER

When using a foreign air carrier, a grantee will need to provide a certification as to why a foreign air carrier must be used. According to section 301-10.142, the certification must include (a) the traveler's name; (b) the dates of travel; (c) the origin and destination of travel; (d) a detailed itinerary of the travel, including the name of the air carrier and flight number for each leg of the trip; and (e) a statement explaining why the travel performed by the grantee met one of the exceptions to the requirements of the Fly America Act. The certification should go to the Grants Officer when requesting approval to use a foreign flag air carrier, and a

copy of the certification should be kept in the grant file.

LIABILITY FOR IMPROPERLY USING A FOREIGN AIR CARRIER

Under the old regulations, when a traveler failed to use available U.S. flag air carrier service, the amount disallowed was based on the loss of revenues suffered by the U.S. flag air carrier as determined under a formula. This is no longer the case. Under the current regulations, a traveler will not be reimbursed for any transportation cost for which the traveler improperly used a foreign air carrier service.

and answer format, and should address most issues. Additionally, our office has prepared a checklist to assist in determining whether the travel in question may qualify for a waiver of the restrictions of the Act. A copy of the checklist is included at the end of this article. Also, ask if code shares exist when you are booking your flights out of the country and you are booked on a non-U.S. flagged air carrier. Further, be sure to provide the certification information required by the regulations when using a non-U.S. flag air carrier. Finally, if you have a question, seek guidance from our office. We can be reached on (202) 482-8035.

HOW DO YOU COMPLY?

The best way to maintain compliance with the restrictions of the Fly America Act is to familiarize yourself with the regulations. The regulations are in an easy question

FLY AMERICA ACT WAIVER CHECKLIST

(To assist in determining qualification for a waiver of the restrictions of the Fly America Act under 41 CFR Part 301-10, check the applicable statement(s) below. Use this checklist after January 1, 1999)

_____ Foreign air travel on a non-U.S. air carrier is financed by U.S. Government, or will be claimed as costs under an award. *(If you do not check this block, the restrictions of the Fly America Act do not apply. Check at least one of the statements below to qualify for a waiver of the restrictions of the Fly America*

Act.) _____

_____ Use of foreign air carrier is a matter of necessity because of: *(Must check one below)*

_____ U.S. flag air carrier cannot provide the air transportation needed, e.g.

_____ Use of foreign air carrier is necessary for medical reasons.

_____ Use of foreign air carrier is required to avoid unreasonable risk to traveler's safety. *(see 41 CFR 301-10.138(b)(2) for supporting evidence needed)*

_____ Seat on U.S. air carrier in authorized class of service is unavailable, seat on foreign air carrier in authorized class of service is available.

_____ Other. *(Provide detailed explanation.)*

_____ Use of U.S. flag air carrier will not accomplish the Department's mission.

(Provide detailed justification)

_____ Bilateral or multilateral air transportation agreement. U.S. is a party and Dept.
of _____

Transportation determines agreement meets requirements of Fly America Act.

_____ No U.S. flag air carrier provides service on a particular leg of your route *(can*
only _____ *use foreign air carrier to or from the nearest interchange point to connect with a U.S. carrier).*

_____ A U.S. flag air carrier involuntarily reroutes traveler on a foreign air carrier.

_____ Service on a foreign air carrier is three hours or less, and use of U.S. flag air
carrier doubles en route travel time.

_____ Air travel is between the U.S. and another country and use of a U.S. carrier on a
nonstop flight extends travel time by 24 hours or more.

_____ Any other air travel. *(you must check at least one of the following statements to qualify*
for _____ *a waiver of the Fly America Act restrictions in this section)*

_____ Use of a U.S. carrier increases the number of aircraft changes outside
the _____
U.S. by 2 or more.

_____ Use of a U.S. carrier extends travel time by 6 hours or more.

_____ Use of a U.S. carrier requires a connecting time of 4 hours or more at an
overseas interchange point.

Remember, you **must use a U.S. flag air carrier on every portion of the route where it
provides service** unless you qualify for a waiver.