

## **A Primer on the Licensing Requirements for Commercial Operations to and from the United States**

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So you want to serve the United States on a commercial charter basis. As a foreign (non-U.S.) air carrier, you must comply with a myriad of licensing requirements from several U.S. government agencies. Below is a primer on those licensing requirements. It is recommended that any air carrier seeking to operate to/from the United States should begin the licensing process well in advance of the intended startup of operations and seek advice from knowledgeable U.S. aviation counsel.

### U.S. Department of Transportation (DOT)

Every foreign air carrier must have economic authority from DOT. This can take two forms. For limited commercial operations, a carrier may obtain a Part 375 Special Authorization. Such authority is limited to 12 commercial one way or roundtrip flights per year, is subject to certain notice requirements, and is valid for one year, though it is subject to renewal. Also, the carrier's homeland must be willing to grant similar authority to U.S. carriers. In other words, there must be reciprocity with the foreign carrier's homeland. Advantages to these Part 375 Special Authorizations include a shorter application processing time by DOT, the ability to operate to and from the United States to any location worldwide, and there is no need for corresponding safety authority from the Federal Aviation Administration (discussed below). Disadvantages include the same 12 flight limit, the flight notification requirements, and the one year duration requiring annual renewals.

The second form DOT authority can take is a Foreign Air Carrier Permit (FACP) and exemption. The request for a FACP and exemption are contained in the same application. Procedurally, DOT will grant the exemption first, while the FACP is subject to an additional presidential review period of up to 60 days.<sup>2</sup> The traffic rights granted will be no greater than those granted to the foreign carrier by its homeland and no greater than what is provided in the aviation agreement between the United States and the foreign carrier's homeland.<sup>3</sup> For example, if the U.S. and foreign carrier's homeland have an "open skies" aviation agreement, the FACP will be valid indefinitely and contain no limitations on flight frequency or the points to be served in the United States. However, the application process is much lengthier and safety authority from FAA is required before a carrier may exercise the privileges of the FACP. Once commercial operations begin pursuant to a FACP, carriers are required to provide DOT with

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<sup>2</sup> Both the FACP and exemption provide the same authority. For our purposes here, we treat the FACP and exemption as the same.

<sup>3</sup> Extra-bilateral authority, such as to operate 7th freedom passenger charters, may be applied for on an as needed basis, grant of which is subject to reciprocity with the foreign carrier's homeland.

monthly traffic reports; and if the carrier holds a Part 375 Special Authorization, that authority is no longer valid.

#### Federal Aviation Administration (FAA)

FAA issues foreign carriers safety authority in the form of Part 129 operations specifications. As mentioned previously, no such authority is required to accompany a DOT Part 375 Special Authorization. However, before granting a Part 375 Special Authorization, DOT will confirm with FAA that it is not aware of any safety reasons why a Part 375 Special Authorization should not be granted to the carrier.

Part 129 operations specifications are required to exercise the privileges of a FACP. Obtaining Part 129 operations specifications is a lengthy process and requires the submission of a significant amount of technical detail. This authority is valid indefinitely, though it must be updated when there are changes to the information contained in the operations specifications, such as the aircraft to be operated to the United States. FAA also often requires an in person meeting with carrier personnel before issuing the operations specifications. FAA will not issue the operations specifications until it receives a “sign off” from the Transportation Security Administration.

#### Transportation Security Administration (TSA)

TSA issues security authority to carriers. For operations under a Part 375 Special Authorization, no TSA authority is required if operating to or from the United States utilizing a foreign-registered aircraft regardless of aircraft size, provided certain Customs and Border Protection requirements discussed below are complied with.<sup>4</sup> Also, no TSA authority is required if operating within the United States utilizing a foreign-registered aircraft with a maximum takeoff weight (MTOW) of 100,309 lbs. or less, subject to the same Customs and Border Protection requirements. However, a TSA Airspace Waiver is required for operations within the United States utilizing a foreign-registered aircraft with a MTOW of greater than 100,309 lbs.<sup>5</sup>

For operations pursuant to a FACP and Part 129 operations specification, a foreign carrier must obtain a TSA security program. For the most part, the TSA security program requires the carrier to comply with the airspace waiver requirements discussed above and the CBP requirements discussed below. However, a carrier must make a certain amount of progress towards obtaining the security program before TSA will provide the “sign off” required for FAA to issue Part 129 operations specifications, which in turn is required for a DOT-issued FACP to be effective.

#### U.S. Customs and Border Protection (CBP)

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<sup>4</sup> A TSA Airspace Waiver is required for operations overflying U.S. territorial airspace with a foreign-registered aircraft regardless of aircraft size.

<sup>5</sup> Foreign air carriers may not transport a passenger solely between two U.S. points, i.e. where a passenger enplanes at one U.S. point and deplanes at another U.S. point, which is known as cabotage. A TSA Airspace Waiver does not authorize a foreign air carrier to conduct cabotage.

CBP imposes several requirements on commercial operations to/from the United States. First, the carrier must obtain a \$100,000 International Carrier Bond from a U.S. insurer and submit the bond to CBP for approval. An experienced Customs broker can assist with this process.

Second, the carrier must establish an account with CBP to submit electronic Advance Passenger Information System (eAPIS) reports. Both of these CBP requirements must be met for operations under either a DOT Part 375 Special Authorization or FACP.

Third, if a carrier would like to transport passengers who are citizens of countries included in the U.S. Visa Waiver Program (VWP) without the need for those citizens to obtain U.S. visas, the carrier must obtain admission to the VWP. The VWP application requires the carrier provide certain operations information and execute an agreement with CBP.

Lastly, aircraft entering from south of the United States are required to land and be inspected by CBP at certain airports. To avoid these “drug stops” and proceed uninterrupted to the carrier’s intended destination in the United States, the carrier must obtain a Border Overflight Exemption from CBP. This requires providing CBP with certain information on the aircraft to be operated and the crew onboard those aircraft. A Border Overflight Exemption is valid for one year but is available for renewal.

#### Internal Revenue Service (IRS)

To obtain an International Carrier Bond discussed above, a carrier either must obtain a Customs Importer Number from CBP or an Employer Identification Number (EIN) from the IRS. Also, each passenger arriving or departing the United States on a commercial flight is subject to the International Arrival and Departure Tax imposed by IRS. The tax is applicable no matter the type of DOT authority utilized. The carrier generally must remit the taxes to the IRS on a quarterly basis, and a carrier must have an EIN to remit the taxes.

#### Other Fees

In addition to the International Arrival and Departure Tax, other U.S. agencies impose fees on a carrier’s commercial operations to the United States. CBP imposes both a Customs User Fee and an Immigration User Fee on every passenger arrival. The Animal and Plant Health Inspection Service (APHIS) imposes a fee for each passenger arrival and each aircraft arrival. Also, TSA imposes a fee on passengers enplaning from an airport sterile area. And depending on the airport, there may be a Passenger Facility Charge imposed per passenger enplanement by the airport authority, which is in addition to any applicable airport landing fees. Some of these fees must be remitted quarterly, while others are remitted monthly. Accounts must be established with each agency in order to remit payments. These fees, if otherwise applicable, are applicable no matter the type of DOT authority utilized.

#### Conclusion

The above is only a primer as to the various licensing requirements imposed on a foreign air carrier's commercial operations to the United States. There are additional regulatory and operational requirements applicable to such service. Moreover, non-commercial operations – so called Part 91 operations – to the United States are subject to their own requirements.

While proceeding down the path of U.S. commercial licensing appears to be a daunting task, please keep in mind that over the years many small foreign air carriers have succeeded in this endeavor... and so can you. To navigate these requirements, we recommend seeking advice from U.S. aviation counsel.