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## GOVERNMENT GUARANTIES FOR AIRCRAFT FINANCING

MICHAEL DOWNEY RICE\*

TUCKED IN toward the end of the Airline Deregulation Act of 1978,<sup>1</sup> in section 42, is a series of amendments which revive a law and a program that had expired quietly the previous year. This was the program of loan guaranties administered by the Federal Aviation Administration that had been used off and on since 1957 to assist local service carriers in the financing of aircraft.<sup>2</sup> The old program had a limit of \$30,000,000 per carrier,<sup>3</sup> rather low when compared with the cost of modern aircraft. It had been small, nothing like the ship financing program administered by the Maritime Administration under Title XI of the Merchant Marine Act, 1936,<sup>4</sup> and had never been regarded as being very significant in the overall spectrum of aircraft equipment financing.<sup>5</sup> Only \$307 million in loans had been guaranteed dur-

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\* Port Washington, New York; member of the New York and District of Columbia Bars. This article is adapted from materials developed as part of a larger project on equipment financing for Salomon Brothers, and is made available with their permission. The author gratefully acknowledges the assistance of Regina Van Duzee of the Federal Aviation Administration but this article does not necessarily represent the views of the FAA.

<sup>1</sup> Pub L. No. 95-504, 92 Stat. 1705 (1978).

<sup>2</sup> Act of September 7, 1957, Pub. L. No. 85-307, 71 Stat. 629 (1957) [hereinafter referred to as the Original Statute], as amended by Pub. L. No. 86-3, 73 Stat. 13 (1959), Pub. L. No. 86-70, 73 Stat. 150 (1959), Pub. L. No. 86-624, 74 Stat. 421 (1960), Pub. L. No. 87-820, 76 Stat. 936 (1962), Pub. L. No. 90-568, 82 Stat. 1003 (1968), Pub. L. No. 92-556, 86 Stat. 1170 (1972) [the Original Statute, as so amended, being hereinafter referred to as the Former Statute].

<sup>3</sup> *Id.*, section 4.

<sup>4</sup> Pub. L. No. 705, ch. 600, 52 Stat. 953, 969 (1938), as amended, 46 U.S.C. §§ 1271-1280. See Cook, *Government Assistance in Financing—Title XI Federal Guarantees*, 47 TUL. L. REV. 653 (1973).

<sup>5</sup> See generally, Eyer, *The Sale, Leasing, and Financing of Aircraft*, 45 J. AIR L. & COM. 217, 247 (1979); Lambert, *Survey of Domestic and International*

ing the twenty-year history of the program.<sup>6</sup>

The Airline Deregulation Act not only revived this program but also substantially changed its scope and utility. Guaranties of up to \$100 million per carrier are now available<sup>7</sup> and the Administration estimates that more than \$400 million in loans will be guaranteed in each of fiscal years 1980 and 1981.<sup>8</sup> The carriers that may benefit from the program now include the commuter airlines that have assumed an important role in air service after deregulation, certificated local service carriers, Alaskan and Hawaiian carriers, charter air services and intrastate carriers.<sup>9</sup>

This new program must be considered in any financing decision made by eligible carriers. Government-guaranteed obligations can be placed in the institutional money market at interest rates only thirty or forty basis points over Treasury obligations having an equivalent maturity;<sup>10</sup> this gives these carriers, a traditionally capital-starved group, access to money at a cost approximately equal to that paid by corporations which have the highest bond ratings. Without this program, commuter air lines would be required to pay interest rates up to 500 basis points over the "prime" rate.<sup>11</sup> Lease financing is sometimes available at attractive rates,<sup>12</sup> but the airline acquires the aircraft only for the duration of the lease and must return it to the lessor upon the expiration of the term of the lease. If the airline wishes to retain the use of

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*Aspects of Aircraft Equipment Financing*, 18 Bus. Law. 627, 648 (1963).

<sup>6</sup> Federal Aviation Administration, Aircraft Loan Guaranty Program, Associate Administrator's Fact Book (1979) [hereinafter referred to as Fact Book].

<sup>7</sup> Former Statute, *supra* note 2, as amended by the Airline Deregulation Act of 1978, *supra* note 1 [the Former Statute, as so amended, being hereinafter referred to as the Current Statute], section 4(a)(4). The Current Statute is set forth in its entirety in Appendix A.

<sup>8</sup> Executive Office of the President, Office of Management and Budget, Special Analyses, Budget of the United States Government, Fiscal Year 1981 (1980), at 170.

<sup>9</sup> Current Statute, *supra* note 7, section 3.

<sup>10</sup> Informal advice of Miner H. Warner of Salomon Brothers, New York, New York, at breakfast on March 25, 1980. Scrambled eggs, bacon, toast, and coffee were served.

<sup>11</sup> F. Belina, Commuter Air Carrier Loan Guarantee Study 5 (1980) (report prepared by The Aerospace Corporation for the Office of Aviation Policy of the Federal Aviation Administration).

<sup>12</sup> See generally Eyer, *supra* note 5; Gritta & Laynagh, *Aircraft Leasing—Panacea or Problems?* 5 TRANS. L. J. 9 (1973).

the aircraft at that time, it must renew the lease or purchase the aircraft, a cost which must be considered when comparing financing methods.<sup>13</sup>

### *History*

The Douglas DC-3, called the C-47 by the Army Air Force, the Dakota by the British, and the LI-2 by the Russians who copied it from aircraft furnished to them under the lend-lease program, was the mainstay of local service air carriers in the United States in the mid-1950's.<sup>14</sup> The aircraft were reliable but were slow, noisy and uncomfortable compared with the Douglas DC-7's and the Lockheed Constellations and Electras used by the trunk carriers. The design of the DC-3 was twenty years old and most of the airplanes were, too. In an age of rapid development of passenger aircraft which established new standards of comfort for air travelers, local service air carriers needed new, pressurized machines with the capacity and speed to reduce seat-mile costs and the comfort to attract traffic to build revenues and emerge as an economically viable industry.<sup>15</sup>

New aircraft were needed, but the prices of aircraft to replace the venerable DC-3, such as the Fairchild/Fokker F-27, started at \$600,000, a substantial figure when compared to the meager capitalization of many of the local service air carriers.<sup>16</sup> The new types of aircraft promised significant improvements in the economics of short-range air service, perhaps enough to reduce substantially the subsidies that the government was providing for local and feeder air service. An important problem was the lack of available capital for an industry whose short history suggested that earnings were by no means assured and whose financial prospects did not thrill sources of equity and debt capital.

Rather than direct governmental assistance, government credit was the solution. This would be implemented by the creation of a program of government guaranteed loans for the acquisition of aircraft by local service carriers. The Act of September 7, 1957

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<sup>13</sup> See, e.g., Marcus, *The Cost of Leasing: Inflation and Residual Value*, FINANCIAL ANALYSTS J., March-April, 1978, at 58.

<sup>14</sup> H.R. REP. NO. 85-981, 85th Cong., 1st Sess. (1957).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

set up a program of government guaranties of loans for aircraft purchases to "promote the development of local, feeder, and short-haul air transportation."<sup>17</sup> The program was to be administered by the Civil Aeronautics Board, which had suggested the legislation, and would benefit several categories of carriers:

those air carriers designated by the CAB as providing local or feeder service;

air carriers operating within Hawaii;

air carriers providing service within Alaska, or between Alaska and adjacent Canadian territories or the United States;

certain Caribbean air carriers; and

metropolitan helicopter services.<sup>18</sup>

Loan guaranties under the program were made available up to a maximum amount of \$5,000,000 to any carrier,<sup>19</sup> covering ninety percent of the amount of a loan, not to exceed ninety percent of the cost of the aircraft,<sup>20</sup> if the carrier could show that financing was not available on reasonable terms without the guaranty.<sup>21</sup> The CAB was authorized to collect "a reasonable guaranty fee" from the lender, not the borrower,<sup>22</sup> one-fourth of one percent of the loan was soon found to be adequate to cover the administrative costs of the program.<sup>23</sup>

The loan guaranty program was authorized initially for a period of five years.<sup>24</sup> It was renewed for a second five-year period,<sup>25</sup> but there was a hiatus from 1967 until its renewal again in 1973 with certain changes, including an enlargement of the maximum limit for any carrier to \$30,000,000.<sup>26</sup> The Federal Aviation Administration of the Department of Transportation took over the program from the CAB when the Department of Transportation was

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<sup>17</sup> Original Statute, *supra* note 2, preamble.

<sup>18</sup> *Id.*, section 3.

<sup>19</sup> *Id.*, section 4(d).

<sup>20</sup> *Id.*, section 4(a), 4(b).

<sup>21</sup> *Id.*, section 4(e).

<sup>22</sup> *Id.*, section 5.

<sup>23</sup> H.R. REP. NO. 95-1211, 95th Cong., 2d Sess. 20 (1978) [hereinafter cited as House Report]. See also Fact Book, *supra* note 6.

<sup>24</sup> Original Statute, *supra* note 2, section 8.

<sup>25</sup> Act of Oct. 15, 1962, Pub. L. No. 87-820, 76 Stat. 936.

<sup>26</sup> Act of Oct. 25, 1972, Pub. L. No. 92-556, 86 Stat. 1170.

created in 1966.<sup>27</sup> The program lapsed again in 1977 after \$307,420,000 in loan guaranties had been made, covering equipment costing \$355,366,000.<sup>28</sup>

In the early days of the program, the guaranties were used for relatively small transactions involving the acquisition of F-27's, Convair 240's and 340's, Martin 404's and some DC-6 hand-me-downs from the trunk carriers.<sup>29</sup> When the jet age arrived and the program was expanded to cover larger loans, federal guaranties were obtained for the financing of fancy new Boeing 727's and Douglas DC-9's. In 1975, Southern Airways arranged a guaranty to cover a loan of \$27,000,000 for 13 DC-9's, and soon thereafter North Central Airlines, Hawaiian Airlines, Hughes Airwest and Piedmont Aviation arranged deals of similar magnitude.<sup>30</sup> Aloha Airlines, Texas International Airlines and Alaska Airlines approached their quotas in a series of smaller transactions.<sup>31</sup>

The aircraft loan guaranty program was a clear and definite success within its limited scope.<sup>32</sup> The guaranty fees produced revenues of \$1,648,460 through fiscal year 1978, contrasted against only \$615,800 in administrative expenses.<sup>33</sup> There were no losses due to defaults on the guaranteed loans.<sup>34</sup> Because of the limited authority to guarantee loans of a single carrier, however, the program was not regarded as a significant element in the larger sphere of aircraft equipment financing. By the time the program lapsed in 1977, many of the local service carriers had expanded into longer-range, more lucrative service, and they were able to finance aircraft purchases without the government guaranty.

The deregulation of air service initiated by the Airline Deregulation Act of 1978<sup>35</sup> included the removal of impediments to cessation of service in unprofitable markets. Industry analysts

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<sup>27</sup> Department of Transportation Act, Pub. L. No. 89-670, § 6(a)(3)(A), 80 Stat. 931 (1966).

<sup>28</sup> Fact Book, *supra* note 6.

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *See* House Report, *supra* note 23, at 20.

<sup>33</sup> Fact Book, *supra* note 6.

<sup>34</sup> House Report, *supra* note 23, at 20.

<sup>35</sup> Pub. L. No. 95-504, 92 Stat. 1705 (1978); *see also* 49 U.S.C. § 1324 (Supp. 1978).

predicted that the local service carriers would pull out of the smaller communities, leaving them to be served by the emerging third level of the industry, the commuter air lines. For this expanded role of the commuter air lines, larger and more modern equipment than the Beech 99's and other light aircraft that had theretofore been used in commuter service would be needed. These fledgling carriers faced the same credit problems that the local service carriers had faced twenty years before and Congress thought that the loan guaranty program that had worked so well then might work again. Thus the deregulation legislation amended the Act of September 7, 1957 to bring it into force for another five years and to expand its coverage to include the commuter airlines.<sup>36</sup>

### *Eligible Carriers*

Lobbyists for other segments of the airline industry were not asleep when the Airline Deregulation Act of 1978 was being considered, and the list of carriers eligible for the re-established loan guaranty program received other additions. Under the new legislation, the Secretary of Transportation is authorized to

guarantee any lender against loss of principal or interest on any loan made by such lender to—

(1) any air carrier whose certificate (A) authorizes such air carrier to provide local or feeder air service, (B) authorizes scheduled passenger operations the major portion of which are conducted within the State of Hawaii, (C) authorizes operations (the major portion of which is conducted either within Alaska or between Alaska and the forty-eight contiguous States), within the State of Alaska (including service between Alaska and the forty-eight contiguous States, and between Alaska and adjacent Canadian territory), or (D) authorizes metropolitan helicopter service,

(2) any charter air carrier for the purchase of any all-cargo nonconvertible aircraft,

(3) any commuter air carrier, or

(4) any intrastate air carrier.<sup>37</sup>

The terms "air carrier," "charter air carrier," "commuter air carrier" and "intrastate air carrier" are defined in section 2 of the

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<sup>36</sup> Current Statute, *supra* note 7.

<sup>37</sup> *Id.*, section 3.

Act of September 7, 1957, as amended by the new legislation,<sup>38</sup> but these definitions do not contain any surprises. Section 4(b) of the amended act limits the loan guaranties available to charter air carriers in relation to the amount of service that they provide to "medium, small, and non-hub airports."<sup>39</sup> The FAA regulations tell us that "adjacent Canadian territory," language found within the description of eligible Alaskan carriers, will be taken to mean the Yukon Territory and British Columbia.<sup>40</sup>

During the Congressional deliberations on the new provisions, certain members of the staff at the Federal Aviation Administration had occasion to travel the six blocks down Independence Avenue to observe the proceedings, and it may safely be surmised that they brought suggestions along with them from time to time. Consequently, when the administrators of the new program set about writing regulations to implement the legislation, they had some notions about the intent of Congress and some familiarity with the legislative history. They therefore should not be accused of misfeasance for adopting a policy, based upon this knowledge, favoring commuter air carriers.

In the regulations first proposed in January 1979,<sup>41</sup> the FAA established a system of priorities in case the program was limited, assigning first consideration to commuter air carriers, then proceeding to other eligible carriers in the order of their demonstrated service to the smaller communities.<sup>42</sup> During the period for public comment on the proposed rules, comments on this section were, in a word, numerous.<sup>43</sup> In the final regulations the FAA did not retreat from its interpretation of legislative history, but it did modify the wording of the policy somewhat and moved it out of the regulations into "Appendix A."<sup>44</sup>

The FAA announced in Appendix A to the new regulations that it will set aside a portion of the available assistance for the first

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<sup>38</sup> *Id.*, section 2.

<sup>39</sup> *Id.*, section 4(b).

<sup>40</sup> 14 C.F.R. § 199.7(c) (1980).

<sup>41</sup> 44 Fed. Reg. 5153 (1979).

<sup>42</sup> *Id.* at 5155.

<sup>43</sup> See 44 Fed. Reg. 44,806, 44,807 (1979).

<sup>44</sup> See 14 C.F.R. § 199 (1980).

or exclusive use of commuter air carriers.<sup>45</sup> The remainder of the available assistance will be allocated first to carriers serving "communities designated as eligible for essential air service by the CAB under section 419 of the Federal Aviation Act."<sup>46</sup> These are the communities in the greatest danger of losing air service due to suspension of service by regulated carriers. Next on the list comes service by carriers to "non-hub" communities and, finally, allocation is made to carriers serving "small hubs."<sup>47</sup> Of the \$650 million in loan guaranties budgeted for fiscal year 1980, \$150 million was set aside by Congress for commuter airlines.<sup>48</sup>

In the rule-making proceedings the FAA made it clear, if it was not already so, that lease transactions would not be covered by the program of guaranties. To be guaranteed loans must be made to one of the types of air carriers listed in the statute, and arguments that leasing brokers or investors who intended to lease a machine to an air carrier qualified as "air carriers" under the law providing for the guaranties were not well received.<sup>49</sup> Carriers would not be prohibited from leasing aircraft to one another pursuant to a pooling arrangement or other arrangement for temporary use of aircraft by another carrier to accommodate seasonal traffic variations.<sup>50</sup>

### *Eligible Aircraft*

The aircraft loan guaranty program is not as fussy in its requirements for the equipment to be purchased as is the Title XI ship financing program,<sup>51</sup> due to different objectives. The Merchant Marine Act of 1936 was designed, *inter alia*, to protect and preserve the United States shipbuilding industry,<sup>52</sup> and thus guaranties

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* "Non-hub communities" and "small hubs" are defined in the FAA statistical publication "Airport Activity Statistics of Certificated Route Air Carriers." *Id.*

<sup>48</sup> Department of Transportation and Related Agencies Appropriation Act, Pub. L. No. 96-131, § 314, 93 Stat. 1023 (1979).

<sup>49</sup> 44 Fed. Reg. 5153, 5154 (1979).

<sup>50</sup> 44 Fed. Reg. 44,806 (1979).

<sup>51</sup> Note 4 *supra*.

<sup>52</sup> Pub. L. No. 835, ch. 858, 49 Stat. 1985 (1936), section 101, 46 U.S.C. § 1101. See G. GILMORE & C. BLACK, JR., *THE LAW OF ADMIRALTY* 963 (2d ed. 1975).

of ship financing under Title XI of that act are limited to new construction in United States shipyards.<sup>53</sup> The United States aircraft industry has traditionally been the supplier of the world's aircraft and has not needed the same sort of assistance.<sup>54</sup> Therefore, the aircraft that can be financed with government loan guaranties need not be new and they need not bear the label "made in U.S.A."

An aircraft purchase loan guaranteed under the Act of September 7, 1957, as amended, can be used for the purchase of "commercial transport aircraft, including spare parts normally associated therewith."<sup>55</sup> The act requires that any new turbo-jet powered aircraft purchased with a guaranteed loan comply with Federal Aviation Administration noise standards in effect on January 1, 1977,<sup>56</sup> but it is otherwise silent on the specifics of aircraft design.

There is within the act a restriction applicable to charter air carriers; guaranties to their lenders are only available for the purchase of "all-cargo, nonconvertible aircraft."<sup>57</sup> The House bill would have permitted guaranties for the purchase of passenger aircraft by the charter carriers,<sup>58</sup> but this competitive threat to the scheduled carriers did not survive conference.<sup>59</sup>

In order for a particular type of aircraft to be considered eligible for a purchase loan guaranty a finding must be made by the Secretary of Transportation<sup>60</sup> that "the aircraft to be purchased with the guaranteed loan is needed to improve the service and efficiency of operation of the air carrier, charter air carrier, commuter air

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<sup>53</sup> Title XI, *supra* note 4, section 1104, 46 U.S.C. § 1274.

<sup>54</sup> The dominant position of the United States aircraft industry has been somewhat reduced in recent years in the world market for the size and type of aircraft that are useful to commuter air lines. The most common medium size aircraft in the range of sixteen to nineteen passengers are the De Havilland Twin Otter and the Swearingen Metro, foreign-made aircraft. Smaller and larger size aircraft are usually American-made, however. Belina, *supra* note 11, at 26.

<sup>55</sup> Current Statute, *supra* note 7, section 2.

<sup>56</sup> *Id.*, section 4(a)(8).

<sup>57</sup> *Id.*, section 3.

<sup>58</sup> H.R. 12611, 95th Cong., 2d Sess. (1978).

<sup>59</sup> H.R. REP. NO. 95-1779, 95th Cong., 2d Sess. 107 (1978).

<sup>60</sup> This function has been delegated by the Secretary of Transportation to the Administrator of the Federal Aviation Administration. 49 C.F.R. § 1.47(c) (1979).

carrier, or intrastate air carrier."<sup>61</sup> Thus the range, speed and size of the aircraft proposed to be purchased through the financing must be consistent with the service the carrier will be furnishing, as represented in the application.

### *Nature of the Guaranty*

Unlike Title XI of the Merchant Marine Act of 1936,<sup>62</sup> the legislation establishing the aircraft loan guaranty program does not refer to the "full faith and credit of the United States,"<sup>63</sup> language dear to the hearts of lending institutions. Loans for aircraft purchases are guaranteed by the Secretary of Transportation, and questions have frequently been asked about the nature of the obligation of the United States under these circumstances.<sup>64</sup>

The Attorney General has issued an opinion to the effect that any obligation undertaken by a government official pursuant to specific legislative authority constitutes an obligation of the United States.<sup>65</sup> Furthermore, there is no order of priority for general obligations of the United States, so that general obligations contracted pursuant to an express pledge of faith and credit do not have any greater priority than obligations contracted without such an express pledge.<sup>66</sup> Because lending institutions like to see such matters expressed very specifically in writing, and have frequently asked for opinions of FAA counsel on the subject, the new regulations contain a statement that "[a]ny guarantee which is issued pursuant to this part shall be secured by and entitled to the full faith and credit of the United States."<sup>67</sup>

### *Terms of the Guaranteed Loans*

Guaranties for loans for the purchase of aircraft can extend to the full amount of the unpaid interest and ninety percent of the unpaid principal of the loan. The loan cannot be for more than ninety percent of the purchase price of the aircraft and the

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<sup>61</sup> Current Statute, *supra* note 7, section 4(a)(6); see 44 Fed. Reg. 44,806, 44,809 (1979).

<sup>62</sup> Note 4 *supra*.

<sup>63</sup> 46 U.S.C. § 1273(d) (1976).

<sup>64</sup> 44 Fed. Reg. 5153, 5156 (1979).

<sup>65</sup> 41 Op. Att'y Gen. 403, 405 (1959); see *id.*

<sup>66</sup> 41 Op. Att'y Gen. 363 (1959).

<sup>67</sup> 44 Fed. Reg. 44810 (1979).

spare parts purchased therewith.<sup>68</sup> Thus the guaranteed loan can represent eighty-one percent of the cost of the aircraft, with nine percent of the cost unguaranteed and a ten percent equity furnished by the airline. The unguaranteed portion of the loan can be a serious problem in arranging a transaction. Certain lenders are quite willing to purchase a government-guaranteed obligation, but the unguaranteed part is a different animal, with different treatment under legal investment laws and securities laws. Often these transactions are arranged with different lending institutions participating in the guaranteed and the unguaranteed portions, the unguaranteed part carrying a much higher interest rate.<sup>69</sup>

Refinancing by a guaranteed loan would not be permitted under the program, but a refund of a deposit made to an aircraft supplier, not to exceed thirty percent of the cost of the aircraft, is permissible.<sup>70</sup> This limit on deposit refunding does not impede the financing of the older types of aircraft still in regular production, the manufacturers of which do not demand large advance payments, but it can be a handicap in the financing of the newer types, the manufacturers of which often require progress payments that would exceed the thirty percent limit.<sup>71</sup>

The new legislation, recognizing the longer useful life of modern aircraft, permits the guaranties to be made for loans maturing up to fifteen years from the date of issuance.<sup>72</sup> FAA practice has been to provide guaranties for loans of up to fifteen years for jet aircraft, but for loans of not more than twelve years for other types.<sup>73</sup> The regulations are silent as to the methods of loan amortization that would be approved by the program administrators.

The statute and the regulations are vague on the topic of the security that the government might demand for its guaranty. The need for a security interest in the aircraft is suggested by the section of the act which prohibits issuing a guaranty unless the prospective earning power of the applicant carrier, "together with the

<sup>68</sup> Current Statute, *supra* note 7, section 4(a)(1), 4(a)(2).

<sup>69</sup> Note 10 *supra*.

<sup>70</sup> 44 Fed. Reg. 44,806, 44,809 (1979); 14 C.F.R. § 199.9(c) (1980).

<sup>71</sup> Belina, *supra* note 11, at 47.

<sup>72</sup> Current Statute, *supra* note 7, section 4(a)(3).

<sup>73</sup> Informal advice of Regina Van Duzee of the Federal Aviation Administration Office of Aviation Policy.

character and value of the security pledged," furnishes reasonable assurances that the loan will be repaid and that the interests of the United States will be protected.<sup>74</sup> The lenders in these transactions require some security for their ten percent exposure, so the practice has developed for the lender to take a security interest in the aircraft, perhaps by chattel mortgage, and for the government and the lender to enter into an agreement providing for rights of the government in the collateral in the event that the government is called upon to make good upon its guaranty. These matters are covered in the guaranty agreement, which also is the vehicle for the government guaranty.<sup>75</sup>

The FAA expects to see typical default and remedy provisions in the loan documents. In general, the provisions of these loan documents will be measured against a test of commercial reasonableness.<sup>76</sup>

### *Procedure*

In comparison to the complexities of the Title XI ship financing program,<sup>77</sup> the procedural aspects of the FAA aircraft loan guaranty program (a much smaller program with a lighter case load) are rather straightforward and somewhat more flexible. The application forms<sup>78</sup> suggest that the carrier and the lender would apply for a guaranty after arrangements are made for the loan, but in practice the carrier usually applies before obtaining a firm financing commitment to test the wind and to obtain some indication from the FAA staff as to the likelihood of the project's moving forward. Ultimately, the lender must furnish information on a special form,<sup>79</sup> but if the transaction is arranged with several institutions, and if a bank or trust company acts as indenture trustee, only the indenture trustee must be a party to the application.<sup>80</sup>

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<sup>74</sup> Current Statute, *supra* note 7, section 4(a)(7).

<sup>75</sup> The FAA Office of Aviation Policy will furnish sample forms of the Guarantee Agreement.

<sup>76</sup> 44 Fed. Reg. 5153, 5155 (1979).

<sup>77</sup> Note 4 *supra*. See United States Department of Commerce, Maritime Administration, MarAd '78, The Annual Report of the Maritime Administration for the Fiscal Year 1978, at 10 (1979).

<sup>78</sup> FAA forms 2950-1 and 2950-2 (available from the FAA Office of Aviation Policy, AVP-1, 800 Independence Avenue, S.W., Washington, D.C. 20591).

<sup>79</sup> FAA form 2950-1.

<sup>80</sup> Current Statute, *supra* note 7, section 4(a)(3).

The form of the loan agreement and any collateral documents need not be furnished with the application but can be sent later as they are prepared. The FAA will not provide a binding commitment until the loan papers, with all essential terms, are in final form, but it will furnish advice to the applicant and to the lender in the form of an advisory letter as to whether the particular application is eligible for a guaranty.<sup>81</sup>

The development of the legal papers and the investigation by the FAA proceed as parallel activities, working toward favorable findings by the FAA and establishment of the final form of the documents. Only when the necessary findings have been made and all documents are in final form will the FAA administrator issue the guaranty.

The required findings are set forth in section 4 of the Act of September 7, 1957, as amended.<sup>82</sup> In addition to technical compliance with the terms for permissible loans and adherence to the limits of assistance available to any carrier, the following findings are necessary: that the carrier would be unable to obtain the necessary funds for the purchase of needed aircraft on favorable terms without the guaranty; that the aircraft is needed to improve the services and efficiency of operation of the carrier; and, that the earning power of the applicant, together with the security pledged, is sufficient to provide reasonable assurances of the repayment of the loan and protection of the interests of the government.<sup>83</sup> These findings are developed from the application materials and from investigation by the FAA. The applicant should keep the need for these findings in mind when furnishing application materials and should be sure to provide the FAA with the documentary wherewithal to reach a favorable decision.

The Director of Aviation Policy is in charge of the program at the FAA, but the Office of Chief Counsel must participate in the review of the legal documents.<sup>84</sup> It had been customary for the FAA to obtain the approval of the Office of the Secretary of the Department of Transportation before approving any loan guar-

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<sup>81</sup> 44 Fed. Reg. 44,806, 44,807 (1979).

<sup>82</sup> Current Statute, *supra* note 7.

<sup>83</sup> *Id.*, section 4(a).

<sup>84</sup> 44 Fed. Reg. 5153, 5156 (1979); 14 C.F.R. § 199.27 (1980).

anty, but the full responsibility for the program has been delegated to the Federal Aviation Administrator and approval of the Office of the Secretary is no longer considered necessary. The recommendations of the Civil Aeronautics Board are also sought as part of the review of an application,<sup>85</sup> but otherwise it is unnecessary to go outside of the FAA.

The entire process, given the current backlog of new applications occasioned by the liberalization of the terms of the program, takes about three months if the application is in good order at the outset and financing has been arranged.<sup>86</sup> In many cases, matters outside of the control of the FAA, especially the arrangements with the lending institutions, cause delays in obtaining approval of the guaranty.<sup>87</sup>

### *Observations*

When the aircraft loan guaranty program was revived in 1978, some time was required to implement new regulations and to accept and process the first applications. Consequently, during fiscal year 1979 only \$11 million in new loan guaranties was awarded under the program.<sup>88</sup> After this brief period of warm-up, the program has become a much-used adjunct to other aircraft financing with estimates of grants of new guaranties of \$446 million and \$444 million in fiscal years 1980 and 1981, respectively.<sup>89</sup> The revised program promises to be much more useful than the former, more limited program, because the \$100 million limit for each carrier permits the financing of aircraft used by commuter air lines (up to fifty-six passengers)<sup>90</sup> and of the larger aircraft used by some intrastate carriers.

Some problems from the old program remain, however. The ten per cent equity contribution to the cost of the aircraft required for receiving the loan can be a problem for some carriers, and the unguaranteed ten per cent of the loan is a problem for

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<sup>85</sup> Current Statute, *supra* note 7, section 4(a)(3).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Note 8 *supra*.

<sup>89</sup> *Id.*

<sup>90</sup> Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958), as amended, section 416(b)(4), 49 U.S.C. § 1386(b)(4) (1976).

the lending institutions. Because of this latter factor, most transactions involve two lending entities: one institution or group provides the guaranteed portion of the financing at interest rates reflecting the government guaranty, and another institution, frequently the carrier's regular bank, provides the unguaranteed part at a much higher rate. This unguaranteed portion is often the most difficult to obtain and is the greatest impediment to successful financing.

An important positive aspect of the program is the position taken by the FAA in its administration. The FAA is charged with the promotion of air carriage,<sup>91</sup> and thus it works as hard as its limited resources allow to implement the program and to expedite the processing of applications. The program is remarkable for the absence of the usual bureaucratic "red tape" and rigid procedures. While the letter of the law will be complied with in the granting of a loan guaranty, the FAA does not set up procedural obstacles and takes all reasonable steps to assist the carriers in taking advantage of the loan guaranty program.

#### APPENDIX A

An Act to provide for Government guarantee of private loans of certain air carriers for purchase of modern aircraft and equipment, to foster the development and use of modern transport aircraft by such carriers, and for other purposes.

SECTION 1. It is hereby declared to be the policy of Congress, in the interests of the commerce of the United States, the postal service, and the national defense to promote the development of local, feeder, and short-haul air transportation and to promote the development of local, feeder, and short-haul charter air transportation of cargo. In furtherance of this policy it is deemed necessary and desirable that provisions be made to assist certain air carriers, charter air carriers, commuter air carriers, and intrastate air carriers engaged in such air transportation by providing governmental guaranties of loans to enable them to purchase aircraft suitable for such transportation on reasonable terms.

SECTION 2. As used in this Act—

"(1) 'aircraft purchase loan' means any loan, or commitment in connection therewith, made for the purchase of commercial transport aircraft, including spare parts normally associated therewith;

"(2) 'air carrier' means any air carrier holding a certificate of public convenience and necessity issued by the Civil Aeronautics Board under section 401(d)(1) of the Federal Aviation Act of 1958 (49 U.S.C. § 1371(d)(1));

"(3) 'charter air carrier' has the meaning given such term in section 101(14) of the Federal Aviation Act of 1958;

"(4) 'charter air transportation' has the meaning given such term in section 101(15) of the Federal Aviation Act of 1958;

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<sup>91</sup> *Id.*, section 103, 49 U.S.C. § 1303 (1976).

"(5) 'commuter air carrier' means any air carrier operating pursuant to section 416(b)(3) of the Federal Aviation Act of 1958 (49 U.S.C. § 1386(b)(3)) who operates at least five round trip flights per week between one pair of points in accordance with published flight schedules;

"(6) 'intrastate air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage primarily in intrastate air transportation (as such term is defined in section 101(26) of the Federal Aviation Act of 1958); and

"(7) 'Secretary' means the Secretary of Transportation."

"SECTION 3. The Secretary is authorized to guarantee any lender against loss of principal or interest on any aircraft purchase loan made by such lender to—

"(1) any air carrier whose certificate (A) authorizes such air carrier to provide local or feeder air service, (B) authorizes scheduled passenger operations the major portion of which are conducted within the State of Hawaii, (C) authorizes operations (the major portion of which is conducted either within Alaska or between Alaska and the forty-eight contiguous States), within the State of Alaska (including service between Alaska and the forty-eight contiguous States, and between Alaska and adjacent Canadian territory), or (D) authorizes metropolitan helicopter service.

"(2) any charter air carrier for the purchase of any all-cargo nonconvertible aircraft,

"(3) any commuter air carrier, or

"(4) any intrastate air carrier.

Such guarantee shall be made in such form, on such terms and conditions, and pursuant to such regulations, as the Secretary deems necessary and which are not inconsistent with the provisions of this Act."

"SECTION 4. (a) Subject to subsection (b) of this section, no guaranty shall be made—

"(1) extending to more than the unpaid interest and 90 percent of the unpaid principal of any loan;

"(2) on any loan or combination of loans for more than 90 percent of the purchase price of the aircraft, including spare parts, to be purchased therewith;

"(3) on any loan whose terms permit full repayment more than 15 years after the date thereof;

"(4) wherein the total face amount of such loan, and of any other loans to the same air carrier, charter air carrier, commuter air carrier, or intrastate air carrier or corporate predecessor of such air carrier, charter air carrier, commuter air carrier, or intrastate air carrier guaranteed and outstanding under the terms of this Act exceeds \$100,000,000;

"(5) Unless the Secretary finds that, without such guaranty, in the amount thereof, the air carrier, charter air carrier, commuter air carrier, or intrastate air carrier would be unable to obtain necessary funds for the purchase of needed aircraft on reasonable terms.

"(6) unless the Secretary finds that the aircraft to be purchased with the guaranteed loan is needed to improve the service and efficiency of operation of the aircarrier, charter air carrier, commuter air carrier, or intrastate air carrier;

"(7) unless the Secretary finds that the prospective earning power—

"(A) of the applicant air carrier or charter air carrier, together with the character and value of the security pledged, furnish (i) reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and (ii) reasonable protection to the United States; and

“(B) of the applicant commuter air carrier or intrastate air carrier, together with the character and value of the security pledged, furnish (i) reasonable assurances of the applicant’s ability and intention to repay the loan within the time fixed therefor, to continue its operations as a commuter air carrier or intrastate air carrier, and to the extent found necessary by the Secretary, to continue its operations as a commuter air carrier or intrastate air carrier between the same route or routes being operated by such applicant at the time of the loan guarantee, and (ii) reasonable protection to the United States; and

“(8) on any loan or combination of loans for the purchase of any new turbojet-powered aircraft which does not comply with the noise standards prescribed for new subsonic aircraft in regulations issued by the Secretary acting through the Administrator of the Federal Aviation Administration (14 CFR part 36), as such regulations were in effect on January 1, 1977.

“(b) No guaranty shall be made by the Secretary under subsection (a) of this section on any loan for the purchase of any all-cargo nonconvertible aircraft by any charter air carrier in an amount which, together with any other loans guaranteed and outstanding under this Act to such charter air carrier, or corporate predecessor of such charter air carrier, would result in the ratio of the total face amount of such loans to \$100,000,000 exceeding the ratio of the amount of charter air transportation of such charter air carrier provided to medium, small, and non-hub airports during the twelve-month period preceding the date on which the application for such guaranty is made by such charter air carrier to the total amount of charter air transportation of such charter air carrier during such twelve-month period.

“SECTION 5. The Secretary shall prescribe and collect from the lending institution a reasonable guaranty fee in connection with each loan guaranteed under this Act.

“SECTION 6. (a) To permit him to make use of such expert advice and services as he may require in carrying out the provisions of this Act, the Secretary may use available services and facilities of other agencies and instrumentalities of the Federal Government with their consent and on a reimbursable basis.

“(b) Departments and agencies of the Federal Government shall exercise their powers, duties, and functions in such manner as will assist in carrying out the objectives of this Act.

“(c) The Secretary shall make available to the Comptroller General of the United States such information with respect to the loan guaranty program under this Act as the Comptroller General may require to carry out his duties under the Budget and Accounting Act, 1921, 31 U.S.C. § 1.

“SECTION 7. (a) Receipts under this Act shall be credited to miscellaneous receipts of the Treasury.

“(b) Payments to lenders required as a consequence of any guaranty under this Act may be made from funds which are hereby authorized to be appropriated to the Department of Transportation for that purpose.

“(c) Administrative expenses under this Act shall be paid from appropriations to the Department of Transportation for administrative expenses.

“SECTION 8. The authority of the Secretary under section 3 of this Act shall terminate five years after the date of enactment of this section.”



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