



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 19th day of November, 2003

Application of

DELTA AIR LINES, INC.

for an exemption from 14 CFR 212.8,
permitting use of letter of credit in lieu of
surety bond, and from 14 CFR 212.3,
permitting limited waiver of advance charter
payment

Served: November 19, 2003

Docket OST-2003-15944

ORDER GRANTING EXEMPTION IN PART

Summary

By this order, and subject to the conditions set forth herein, we grant Delta Air Lines, Inc. (Delta), a U.S. direct air carrier holding a certificate issued under 49 U.S.C. 41102, a one-year exemption from the requirements of 14 CFR 212.8(c), to permit Delta's use of a standby letter of credit in lieu of a bond to protect charter customer payments and to guarantee the performance of charter flights it undertakes.

At this time, we defer decision on Delta's request for an exemption from the advance payment requirement of 14 CFR 212.3(e). As discussed below, the Department will shortly address this portion of Delta's request by a separate order.

The two provisions with respect to which Delta seeks exemption authority require that direct air carriers who provide charter services (1) guarantee performance of all charter trips for which payment has been received by filing with the Department a surety bond, and (2) receive from the charter customer full payment of the total charter price, including payment of the return portion of round-trip flights, prior to the commencement of travel.

The granting of a one-year exemption as to the first of these provisions will permit Delta to sell or offer for sale, as principal, charter flights pursuant to 14 CFR 212.4, subject to a standby letter of credit in place of the surety/performance bond required by 14 CFR 212.8(c). We find, however, that the language of the proposed Standby Letter of Credit submitted by Delta is not equivalent to the bond required by 14 CFR 212.8(c), and, accordingly, grant this exemption contingent upon our further informal review of suitable alternative language.

The exemption granted by this order does not relieve Delta of its regulatory duty, under 14 CFR 212.3(f), to return to his or her point of origin any round-trip charter passenger who received the outbound portion of such transportation under this exemption.

Background

On August 12, 2003, Delta filed its request for an exemption from 14 CFR 212.3(e) and 212.8(c) with respect to its charter services involving large jet aircraft having 100 or more seats. Delta requests approval of its use of a standby letter of credit in lieu of a surety bond to provide financial protection for customer advance payments under §212.8(c), and an exemption from the advance payment requirement of §212.3(e), in the case of certain single-entity charters by “select Fortune 500 corporations, professional sports teams, or colleges or universities.”

In support of its application, Delta states that the requested exemptions are fully consistent with the objectives of the respective rules. Delta states first, that use of a standby letter of credit in lieu of a surety bond under §212.8(c) provides equivalent financial security for customer advance payments, and second, that the requested exemption from the advance payment requirement of §212.3(e) would reduce “burdensome and unnecessary transaction costs,” and would be consistent with the objectives of the Airline Deregulation Act (ADA), 49 U.S.C. 40101(a)(6).

In recognition of the novelty and scope of its request, Delta further states that if its request is granted it would agree to several conditions. With respect to the exemption from the surety bond requirement, Delta would agree to maintain a letter of credit in a form approved by the Department and in an amount equal to or greater than the sum of all advance payments received by Delta for Part 212 and/or Part 380 charter operations scheduled to operate within the next 12-month period, and for which Delta has elected to substitute a security agreement for the depository agreement required under each part respectively. Delta states that it would also agree to provide the Department with all relevant information regarding the letter of credit in a timely manner, including certified monthly reports of advance payments covered by the letter and any claims made against the letter.

Only one comment was received in response to Delta’s application. Kenneth A. Moninski supported Delta’s request for relief from 14 CFR 212.8, stating that “if a letter of credit provides acceptable security for advance payment in the case of a public charter [under Part 380], [then] it should also be sufficient protection for a transaction involving a single-entity charter.” However, Mr. Moninski objected to Delta’s request for a waiver of the advance payment requirement of 14 CFR 212.3(e), on the basis that the grant of such an exemption would give Delta an unfair competitive advantage relative to other similarly situated airlines.

Discussion

The current charter rules contain provisions designed to protect both the funds of persons who pay for and the travel expectations of persons who travel on charter flights. In the case of Public Charters under Part 380, we have long recognized that unique financial risks are inherent in the sale of charter transportation by charter operators who are not themselves

direct air carriers, and thus are not required to hold a certificate issued under 49 U.S.C. 41102. *See, e.g.*, Aviation Charter Rules (Final Rule), 63 Fed. Reg. 28225, 28230 (May 22, 1998) (“Final Rule”).

The interlocking financial security rules found in both Parts 212 and 380 were originally adopted at a time when charter operators, and even many air carriers specializing in charters, tended to be less capitalized or did not otherwise meet the same fitness requirements applicable to air carriers conducting scheduled service. *See* Notice of Proposed Rulemaking (“NPRM”), 57 Fed. Reg. 42864, 42867 (Sept. 16, 1992).

As the charter industry has matured, our rationale for maintaining the financial security rules has evolved. Five years ago, during our most recent comprehensive re-examination of these rules, we recognized that air carriers specializing in charters are now subject to the same initial and continuing fitness requirements as those specializing in scheduled service. *See* NPRM, *supra*, 57 Fed. Reg. at 42867. We accordingly proposed to eliminate the financial security arrangements found in Part 212. *Id.* Although most air carriers who responded to this proposal agreed, others, including at least one air carrier, several charter operators, two travel agency associations, the banks and most of the individuals filing comments objected, citing the number of liquidations and bankruptcies affecting the airline industry in recent years. After considering the objections, and noting in particular that “in the event of a stranding, charter participants are less likely than scheduled passengers to be carried by other airlines or to benefit from ticketing procedures common among scheduled carriers (*e.g.*, where travel on a defaulting airline is via a ticket issued by another carrier, or vice-versa),” we concluded that “the public benefits of retaining financial protections for charter participant funds significantly outweigh the cost of compliance.” Final Rule, *supra*, 63 Fed. Reg. at 28230.

Accordingly, as they exist today, the charter rules are intended to protect the expectations of charter customers and charter participants by ensuring (1) that the charter operates or that funds are available to refund the customer for service paid for but not provided, and (2) that charter participants, whether under Part 212 or Part 380, are not stranded by a direct air carrier’s inability or unwillingness to provide return lift for pre-paid round-trip carriage. We have long required that a charter flight be operated by the carrier before the corresponding payment for such operations is released to the carrier. Moreover, under Part 212, a direct air carrier is required to hold charterers’ payments in escrow, or maintain a corresponding surety bond, to guarantee that if the carrier is unable or unwilling to provide the charter services it has contracted to operate, then either a refund or lift by another carrier will be provided. *See* Final Rule, *supra*, 63 Fed. Reg. at 28231.

Standby Letter of Credit under Part 212

Under Part 380, we recognize that, appropriately structured, a standby letter of credit can constitute a “security agreement” capable of insuring the financial responsibility of the Public Charter operator equal to a surety bond or surety trust agreement. 14 CFR 380.34(c)(2)(iii). Critically, a standby letter of credit under Part 380 must include “a statement that, in the event that the other provisions of the agreement do not provide protection to charter participants comparable to that provided under a bond in the form [provided], the bank shall assume, for

the benefit of the charter participants, all the liabilities it would have if it entered into the bond.” 14 CFR 380.34(c)(3). Thus, a substitute security agreement must expressly incorporate the regulatory requirement under §380.34(c)(2)(iii), that a standby letter of credit “that furnishes a lesser degree of protection than would be provided under the [corresponding] bond[, including protection against the risk of the charter operator’s bankruptcy,] shall be invalid to that extent, and instead the bank, the charter operator or foreign charter operator, and the charter participants shall have the same rights and liabilities as provided under [such] a bond.”

We have seen no evidence to suggest that a standby letter of credit, under appropriate conditions, cannot provide guarantees comparable to a surety bond under Part 212, even though we recognize that a security agreement under Part 380, in contrast to a security agreement under Part 212, need not include a performance guarantee. However, the substitution of a letter of credit in this context is untested. Therefore, while we find that it is in the public interest to grant Delta’s request for an exemption from this requirement (subject to the conditions set forth below), we limit Delta’s exemption authority to a period of one year,¹ and the Department will monitor Delta’s implementation of this exemption to ensure that the performance guarantee essential to a surety bond under Part 212 remains a viable part of the substitute agreement.

In order for a standby letter of credit to qualify as a security agreement under Part 212, it must be equivalent to a surety bond provided thereunder. Given our experience under Part 380, we believe that the structure of any permissible letter of credit under Part 212 should similarly follow the pattern imposed by Part 380 to ensure equivalence. For example, as noted above, a letter of credit under Part 380 must include a clear statement that, in the event that the agreement does not otherwise provide protection to charter participants comparable to that provided under a Part 380 bond, the bank shall assume, for the benefit of charter participants, all liabilities it would have if it entered into such a bond. Moreover, we note that, to be comparable to a surety bond of unlimited amount, the total amount of advance payments accepted by Delta for air charter transportation cannot exceed the face value of its standby letter of credit. In its application, Delta has agreed to abide by such an essential limitation.

In addition, as we have consistently emphasized, it is critical that customers and passengers be aware of the risks and protections they may or may not have when purchasing charter services. Accordingly, a copy of any such letter of credit, the form of which otherwise complies with this order, must be made available to charter customers at a time when the customer may still walk away from the charter without penalty.

As presently drafted, the proposed letter of credit attached to Delta’s application does not demonstrate that it provides protection comparable to a surety bond under Part 212. Accordingly, the exemption granted here will become effective only after Delta has consulted with the Department’s Special Authorities Division regarding the changes that are necessary

¹ Delta’s request for a five-year exemption is denied. However, at the conclusion of one year, the Department would be willing to consider extending the exemption for a longer period, consistent with Department practice, should Delta’s experience under this exemption warrant such an extension. Delta will be free to request such an extension at the end of the one-year exemption period.

to bring the letter of credit into compliance with this order, has submitted a revised letter of credit to the Department for review, and has received notice from the Department that the substitute language so complies.

Delta's request for an exemption from the advance payment provisions of Part 212 raises more complex issues that require further review by the Department. We intend to address this request shortly in a separate order.

ACCORDINGLY:

1. We grant Delta an exemption from 14 CFR 212.8(c) for one year, to allow it to use a standby letter of credit ("Letter of Credit"), in lieu of a surety bond, to secure the advance payments of charter customers' funds and the performance of return carriage for round-trip charter operations where the outbound portion has been completed, provided that:
 - a. The Letter of Credit shall provide recourse to charter customers for all monies paid to the air carrier for charter services provided under 14 CFR Part 212 and/or 14 CFR Part 380;
 - b. The Letter of Credit must include a statement that, "in the event that the agreement does not otherwise provide protection to charter customers and/or participants comparable to that provided under a surety bond as provided in Appendix A to 14 CFR Part 212, the bank shall assume, for the benefit of charter customers and participants, all liabilities it would have if it entered into such a bond";
 - c. Delta may not collect advance payments from charter customers such that the total of such payments would exceed the face amount of the Letter of Credit;
 - d. Each charter customer must receive notice that a Letter of Credit is being used to provide financial protection and, upon request, be provided with a copy of the Letter of Credit prior to the execution of their charter contract, or in the alternative, must be given reasonable opportunity to cancel a charter contract without penalty after receipt of a copy of the Letter of Credit;
 - e. Any Letter of Credit that furnishes a lesser degree of protection than would be provided by a bond under 14 CFR 212.8(c) shall be invalid to that extent, and instead, the bank, the carrier, the charter customer and charter participants shall each have the same rights and liabilities as provided under a bond as provided in Appendix A to 14 CFR Part 212, including the protections afforded charter customers in the event of the carrier's bankruptcy;
 - f. Delta must submit to the Department's Special Authorities Division copies of letters of credit it wishes to use under this exemption to confirm that their terms meet the requirements set forth by this order; and

- g. Semi-annually, beginning six months after the effective date of this order and continuing to and including twelve months after the effective date, Delta must provide the Department with monthly information for each of the preceding six months listing (i) the amount of any advance payments Delta is holding for charter flights to be performed by Delta under Part 212, and (ii) the amount of any advance payments Delta is holding for any charters to be performed by Delta under Part 380 (including Public Charters where Delta has agreed to substitute its own security arrangement to provide financial protection for any charter participant advance payments for such Public Charters pursuant to 14 CFR 380.34a). Each of the two semi-annual submissions shall be accompanied by a certificate signed by a Delta financial officer verifying the accuracy of the report.
2. Delta shall provide written notice to the Department of all lawsuits filed by any Charterer against Delta where the Charterer is seeking a refund of an advance payment made by the Charterer to Delta for the operation of one or more charter flights that Delta has failed to perform, and such advance payments were secured by a Letter of Credit under the terms of this exemption. Delta shall also provide the Department with a copy of any judgments entered in such lawsuits.
3. The exemption granted by paragraph 1, above, will become effective at such time as the Department issues a notification to Delta that Delta's Letter of Credit meets the requirements set forth in this order.
4. We defer action on Delta's request for an exemption from the advance payment requirement of 14 CFR 212.3(e), to be addressed by separate order.
5. In all other respects, Delta's request is hereby denied.
6. We will serve a copy of this order on Delta Air Lines, Inc., and Kenneth A. Moninski.

By:

MICHAEL W. REYNOLDS
Acting Assistant Secretary for Aviation
and International Affairs

(SEAL)

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