

Financial Accommodations for Airport Tenants in Response to COVID-19

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Airport sponsors and their legal counsel have been forced by the COVID-19 pandemic to exercise judgment and make tough decisions regarding the financial accommodations they will offer their commercial aeronautical tenants to help them weather the current storm. In many ways, these decisions have mirrored the difficult decisions employers have had to make to pare down their workforces in order to survive in the wake of this public health emergency and the resultant economic downturn. Airport sponsors are highly motivated to support their valued commercial tenants and to negotiate mutually beneficial financial terms (including rent abatement). But federally-obligated airports must also balance their regulatory obligations to maintain an economically self-sustaining airport and to treat similarly situated tenants equally.

Buchalter's airport regulatory attorneys have developed the following best practices airport sponsors should consider as they navigate the growing tidal wave of negotiations with commercial aeronautical tenants.

The Airport's Financial Interests Must Come First

Grant Assurance 24 requires airport sponsors to maintain a fee and rental structure for the facilities and services at the airport that will make the airport "as self-sustaining as possible under the circumstances." It can be tempting during these difficult times for an airport sponsor to negotiate sweetheart deals or give sweeping deferrals or abatements to favored tenants, including businesses that may have gone from thriving sources of airport revenue to potential bankruptcy candidates. As set forth in [recent guidance from the FAA](#), "A primary goal of the statutory sustainability principle is to keep the airport solvent to ensure that the airport can remain open and operate safely." Although airports should work reasonably and cooperatively with their tenants to mitigate the effects of the economic downturn on all airport constituents, airport sponsors are legally obligated to prioritize the airport's financial interests.

Document Everything

It is well accepted in the legal community that there will be an increase in litigation over the next several years as a result of business deals and contractual relationships that have soured during this economic downturn. Airports are no different. In fact, airport sponsors are faced with the added pressure of satisfying the FAA while maintaining good business relationships and honoring their contracts. Now is the time for airport sponsors to implement strict communication and documentation practices so that airport tenants do not receive mixed messages (or promises) in response to requests for financial accommodations, and so that the airport is prepared to respond to any FAA compliance inquiries or investigations. Every financial decision that is made at this time

should be supported by the sponsor's well-documented finding that the decision is aimed to increase or preserve the financial viability of the airport.

Rent Abatement/Adjustment Should be Based on Actual Change in Value of the Leasehold Interest

The FAA's [guidance](#) for airport sponsors considering COVID-19 accommodations specifically states airport sponsors can abate or renegotiate rent (including "minimum annual guarantees") in order to address changed circumstances due to COVID-19. There are three keys to doing this correctly: (1) comply with Grant Assurance 22 (economic nondiscrimination); (2) comply with Grant Assurance 24 (ensure the airport is as self-sustaining as possible); and (3) any solution must be reasonably tied to the actual change in circumstances. These three considerations are addressed below.

- (1) Grant Assurance 22 requires the sponsor to "make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport." In the context of rent abatement/adjustment, this means the financial relief offered to any particular tenant should be consistent with relief offered to similarly situated tenants. Thus, airports considering rent abatements/adjustments should balance the financial implications of offering the same relief to other similarly situated tenants.
- (2) As explained above, the first and foremost consideration should be the financial needs of the airport, including long term and short term budget considerations. Sponsors should also consider how any CARES Act funds could alter this analysis – [see here for our recent article on that topic](#).
- (3) The FAA has identified several factors to balance when making a decision to offer reasonable financial accommodations to an airport tenant:
 - a. The business situation of the tenant;
 - b. The changes circumstances created by the public health emergency (for example, if the underlying basis for the existing rent has temporarily declined or materially changed due to COVID-19);
 - c. The desirability of having solvent tenants that can resume normal operations when the emergency ends;
 - d. The availability of other governmental or insurance relief that such entities have or may receive;
 - e. An appropriate term for such relief; and

- f. Possible subsequent conditions that, if triggered, would end the abatement. (The FAA has explained that “such a condition could be the receipt of other governmental forms of relief, insurance recovery, if any, or an end to the emergency.”)

Rent/Fee Deferral

The good news is that the FAA has clarified that “deferral of rental payments and or fees, if adequately justified, is not likely to violate FAA’s grant assurances.” The bad news is that bond restrictions and other obligations may limit or complicate this process. Sponsors should take care to plan the length and scope of any rent deferral. The FAA has cautioned: “If a deferral exceeds an annual reporting period, interest should be charged based on Treasury note interest rates beginning the date of the deferral and reported on FAA Form 127. The deferred rent amount should be reported in the fiscal year when the rent would have been due but for the deferral. In the event that the rent payment is deferred and not abated, the deferred rent amount should be reported as unpaid invoices (accounts receivables) which would be reflected in the amount of revenue reported on the FAA Form 127. Neither airports nor the FAA have the legal authority, however, to allow air carriers to defer the remittance of collected Passenger Facility Charge (PFC) revenues.”

Build Consensus if Possible

Finally, sponsors should consider how certain financial accommodations may result in shifting costs between various classes of airport tenants and users. Indeed, the [FAA has noted](#) that “where sponsors have residual lease arrangements with aeronautical users, the reduction of rent for certain non-aeronautical entities may shift costs to the aeronautical users such as airlines.” In such situations, sponsors should work to build consensus among all affected businesses and individuals.



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