



Order 2020-1-16

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

Issued by the Department of Transportation
on the 29th day of January, 2020

Served: January 29, 2020

U.S.-HAVANA PUBLIC CHARTER AUTHORIZATIONS

DOCKET DOT-OST-2020-0011

ORDER TO SHOW CAUSE

Summary

By this Order, the U.S. Department of Transportation (the Department) tentatively institutes new procedures to distribute the available round-trip public charter flights between the United States and José Martí International Airport (HAV) in Havana, Cuba. The Department also proposes to grant an initial allocation of charters to Swift Air, LLC (Swift Air) and Caribbean Sun Airlines, Inc. d/b/a World Atlantic Airlines (World Atlantic) for their currently authorized U.S.-Havana public charter flights. The remaining charters for the initial charter year would be maintained in a charter pool for distribution on a first-come, first-served basis to interested carriers.

Background

By letter dated January 7, 2020, Secretary of State Michael R. Pompeo wrote to Secretary of Transportation Elaine L. Chao, stating that:

To strengthen the impact of the Administration's policy of applying economic pressure on the Cuban regime to respect human rights and fundamental freedoms for all in Cuba and to cease its unconscionable support for the illegitimate and totalitarian regime of former President Maduro in Venezuela, and in the foreign-policy interests of the United States, I respectfully request that the Department of Transportation suspend until further notice all public charter flights between the United States and all airports in Cuba except José Martí International Airport (HAV) in Havana. I further request that the Department of Transportation, in the foreign-policy interest of the United States, cap charter flights to José Martí International Airport at an appropriate level consistent with the policy objectives identified above.¹

¹ The full text of the letter is attached as an Appendix to this Order.

By Notice dated January 10, 2020, the Department (1) suspended the authority granted to all public charter operators that authorizes public charter flights between any point in the United States and any point in Cuba, except José Martí International Airport (HAV) in Havana;² and (2) established a limit on the number of authorized public charter flights between the United States and José Martí International Airport (HAV) in Havana.

With respect to Havana, the Department found that an appropriate level for the public charter cap would be one corresponding to current levels of service, based on public charter prospectuses accepted for calendar year 2019. For that year, the Department accepted public charter prospectuses for Havana proposals totaling approximately 3,600 round-trip flights. Accordingly, in the Notice, the Department established a limit on the number of authorized public charter flights at Havana to that level for the initial charter year. The Department also stated its intention to subsequently propose a regulatory framework and allocation procedures by which carriers may apply to conduct public charter flights between the United States and Havana.

Tentative Decision

The Department has tentatively decided to establish an allocation regime utilizing a combination of advance allotments for incumbent carriers and a first-come, first-served charter pool for the remainder of the available charters. Under this arrangement, the Department would limit the number of public charters between the United States and Havana to 3,600 round-trip flights for the initial charter year beginning the first day of the month following a final order in this matter.³

Our recent experience with Havana public charters persuades us that a carrier selection-type allocation proceeding is not necessary for the initial charter year and may not be necessary in future years. Instead, we believe that a simplified allocation process is appropriate for this market.⁴ We believe that this approach will meet the public interest objectives of our action with as little procedural burden on applicants as possible.

The Department has decided to cap Havana public charters at current levels, based on public charter prospectuses accepted for calendar year 2019. We tentatively believe that an advance allotment regime, with a reporting requirement as to flights actually performed, combined with a first-come, first-served approach for the remaining public charter flights would be well suited for the circumstances presented here. As we have done in other restricted charter regimes, we specifically reserve the right to modify our approach and to adopt appropriate procedures as necessary to make timely allocation decisions.

² The suspension of public charter flights to points other than Havana is effective March 10, 2020 -- 60 days after the date of the Notice.

³ We anticipate issuance of a Final Order in February 2020, and for planning purposes, we have assumed in this Order that March 1, 2020, would serve as the beginning of the initial charter year. Should that timeframe change, we would accordingly shift the interim action dates discussed in this Order.

⁴ See e.g., Japan Charter Authorizations (Orders 92-6-32, and 92-9-21, and subsequent undocketed Notices); and U.S.-China Charter Authorizations (Notice dated July 24, 2019, Docket DOT-OST-1998-20).

Under the Department's proposed advance allotment regime, carriers with demonstrated past performance in the U.S.-Havana public charter market would be assured that their programs could continue to the benefit of the travelling public. Experience has shown that carriers currently operating significant numbers of Havana charters are the carriers most likely to be in a position to operate charters in the forthcoming year. Advance allotment of public charters to these carriers would provide a substantial measure of assurance that the service needs of the U.S.-Havana public charter market would be met and that these limited charter rights would be used effectively. Advance allotment would also facilitate effective planning by the carriers and public charter operators most likely to use the charters.

To ensure that some flights are available each charter year on a first-come, first-served basis, as we have done in the past, we propose to limit the total number of flights that would be subject to advance allotment to 75 percent of the total available flights. This would guarantee that all interested carriers would retain an opportunity to participate in the U.S.-Havana public charter market during each charter year.⁵

Tentative Initial Allocation for 2020 / 2021 Charter Year

Consistent with our goal of maintaining current levels of service, the Department has tentatively decided to grant an initial allocation to the carriers that have already been authorized to provide Havana public charter flights by virtue of the public charter prospectuses that have already been filed with, and accepted by, the Department. We specifically propose to allocate charters to Swift Air and World Atlantic for their currently authorized 2020 and January 2021, Havana public charter flights (see chart below).⁶ The schedules that have been filed in public charter prospectuses with the Department are generally consistent with prior year charter programs, and we tentatively find that it is in the public interest to allow those programs to continue.

We will require Swift Air and World Atlantic to confirm to the Department within seven calendar days after the issue date of this order the flights that they intend to operate for the previously-accepted charter programs listed below, as well as any flights that they do not intend to operate, which would be returned to the charter pool.⁷

⁵ Consistent with past practice, any charter allocations made under the regime proposed here would be made to direct air carriers and not to public charter operators.

⁶ The Department intends to limit this initial allocation to only those flights that are already included in the respective public charter prospectus as identified by their specifically proposed flight dates, the U.S. departure/arrival point, proposed combination of direct carrier and public charter operator, and proposed aircraft type. In other words, a carrier could not transfer a public charter flight from one public charter operator to a different public charter operator, or between U.S. cities, without express Department permission to do so.

⁷ This notification should be filed in Docket DOT-OST-2020-0011 and sent by email to Brett.Kruger@dot.gov. This notification should include the information required for future applications as discussed below. For any changes to the schedules already on file, we would expect to receive the corresponding prospectus amendment from the respective public charter operator.

2020-2021 Proposed Initial Havana Allocations			
Carrier	Public Charter Operator (and DOT assigned "PC #")	U.S. Points	Flight Date Range
Swift Air	Aerocuba (PC-19-018)	Miami	January - March 2020
	Cubazul (PC-19-036)	Miami & Fort Myers	January - April 2020
	HavanaAir (PC-18-239 & 19-150)	Miami & Tampa	January 2020 - January 2021
	Xael Charters (PC-19-016)	Miami	January - December 2020
World Atlantic	Anmart Superior Travel (PC-19-147)	Miami & Tampa	January - December 2020

Advance Allotment Regime

Beginning in the 2021/2022 charter year, the Department proposes that an initial allotment for U.S.-Havana public charters would be allocated based on the average number of charters operated during the past two years. Under our proposed arrangement, carriers would automatically qualify for incumbent status and, thus, advance allotments, if they operate an average number of round-trip charters equaling at least five percent of the cap in the two preceding consecutive base years. Similarly, incumbent carriers would lose their advance allotments if they do not maintain an average service level of five percent of the Havana public charter cap during the latest two consecutive base years. (They would, of course, be eligible for ad hoc distributions from the pool on a first-come, first-served basis.)

In order to distribute the flights as far in advance of the beginning of the charter year as possible, we have tentatively decided that the two-year average will be based on the years ended August 31, or six months after the beginning of the charter year.

In September, or approximately six months before the beginning of the next charter year, we would issue a notice inviting applications for advance allotments and requiring the carriers to advise us within 14 days as to the number of U.S.-Havana public charter flights operated during the previous two years, and advising the number of public charter flights they plan to use in the coming charter year. Provided that the total advance allotment does not exceed 75 percent of the total available public charter flights for the charter year, the Department would then issue its advance allotment based on the average number of public charters operated during the past two years.⁸

The Department proposes to limit incumbent status to carriers that do not have access to the Havana market through scheduled service.⁹ In other limited charter regimes, the Department has sought to maximize opportunities for carriers to enter a market on a charter basis, and we

⁸ If the incumbents' operations would justify allotment of more than 75 percent of the total available public charter flights, we would reduce all their allotments pro rata.

⁹ Under the terms of the Memorandum of Understanding (MOU) between the United States and Cuba, signed February 16, 2016, U.S. carriers may operate up to twenty (20) daily combination or all-cargo scheduled round-trip frequencies between the United States and Havana, Cuba. *See* Docket DOT-OST-2016-0021.

tentatively believe that is the approach to follow here. Thus, while we will not restrict scheduled carriers from seeking charter allocations from the charter pool, we propose that a carrier holding a U.S.-Havana scheduled frequency allocation would not be considered an incumbent for the purposes of obtaining an advance allotment in future charter years.

Charter Pool and Proposed Application Procedures

The charters not distributed to incumbents in advance would be placed in a charter pool for distribution on a first-come, first-served basis under procedures similar to those used in other limited charter markets.¹⁰ Accordingly, the Department proposes the following charter pool allocation procedures:

1. Applications must identify the public charter operator; the date of each flight; the city-pair markets; the type of aircraft to be used; and a statement affirming that the carrier has firm plans to use the charter(s). A copy of the charter contract would also be required. Applicants may request confidentiality under Rule 12 of our procedural regulations (14 CFR § 302.12);
2. Applications must be filed in Docket DOT-OST-2020-0011;¹¹
3. Applications may be filed no earlier than six months in advance of the proposed flight, and carriers may apply to operate up to twenty (20) flights each month from the pool;
4. Applications to operate more than twenty (20) public charter flights in a given month may be considered after the applicant completes polling of interested parties;
5. Carriers receiving a public charter allocation shall, in writing, return any flight(s) that they will not use to the U.S. Air Carrier Licensing/Special Authorities Division;¹² and
6. Each carrier granted a charter allocation must report, in writing, to the U.S. Air Carrier Licensing/Special Authorities Division, on its operations for the preceding month by the tenth day of each month.¹³

¹⁰ See e.g., Notice dated July 24, 2019, regarding U.S.-China Charter Authorizations, Docket DOT-OST-1998-20; and Notice dated December 10, 2019, regarding Japan Charter Authorizations, Docket DOT-OST-1998-20.

¹¹ Applications should also be sent by email to Brett.Kruger@dot.gov or by fax to (202) 366-3694.

¹² This notification must be received within two business days of the carrier's determination that an allocated flight or flights will not operate, and the notification should also be filed in Docket DOT-OST-2020-0011.

¹³ The monthly reports must also be filed in Docket DOT-OST-2020-0011 and would contain the same information as required above for applications for flights from the charter pool.

If the charter allocation is approved, we will provide the carrier with a Notice acknowledging its authority to perform the proposed charter.¹⁴ The respective public charter operators will then be free to submit the necessary public charter prospectus for review under the Department's normal procedures.

Use-or-Lose Condition

In addition to the reporting requirements tentatively established above, the Department also tentatively believes that we should take steps to prevent carriers from warehousing public charter allocations without plans to use them. In this regard, the Department tentatively adopts a "use-or-lose" condition on U.S.-Havana public charter flight allocations, similar to conditions utilized in past charter allocation regimes. Under this condition, all public charter allocations (or portions thereof) would be subject to forfeiture if the carriers have no plans to use the allocated charters and such flights would be returned to the charter pool.

In addition, the charters allocated in the 2020/2021 charter year initial allocation and subsequent years' advance allotment would be subject to forfeiture if less than 40 percent are used or committed for use by contract during the first six months of the charter year. As of the end of the sixth charter month, the remaining charter allotments exceeding the number equal to the number of those already operated or committed in the preceding six months would be forfeited and placed in the charter pool.

Conclusion

Based on the above discussion, we tentatively believe that this approach will balance the Department of State's foreign-policy goal of limiting public charter flights at Havana to an appropriate level, provide the Department with an effective framework to manage the cap, while also relieving carriers of unnecessary regulatory burden to the extent possible. Should experience demonstrate that the needs of competing interests are not being met, we would be prepared to reconsider whether these procedures continue to be in the public interest.

We will afford interested parties 14 calendar days from the date of this order to file any objections to our proposed regulatory framework and procedures. Answers to objections will be due seven calendar days thereafter.

ACCORDINGLY,

1. The Department tentatively establishes the regulatory framework and allocation procedures for U.S.-Havana public charter flights, as discussed in the text of this order;

¹⁴ An allocation of a charter flight would not relieve any party from other regulatory responsibilities to obtain licenses or authority from the Department. Parties are further reminded that a number of significant limitations and requirements remain in place concerning air transportation between Cuba and the United States. Nothing in the Department's award of authority will relieve any party from complying with all applicable regulations and requirements of other U.S. agencies and with all applicable laws of the United States.

2. The Department tentatively allocates to Swift Air, LLC, and Caribbean Sun Airlines, Inc. d/b/a World Atlantic Airlines, an initial allotment of public charter flights for the 2020/2021 charter year for their currently authorized U.S.-Havana services,¹⁵ subject to the condition that the carrier shall advise the Department within seven (7) calendar days after the issue date of this order of the number of those flights that they intend to actually operate, as well as those flights that they do not intend to operate, which would be returned to the charter pool;¹⁶

3. The Department tentatively concludes that the initial allocation in ordering paragraph 2 above, and any advance allotment granted in future charter years as discussed in the text of this order, should be subject to the following condition:

- a. Where fewer than 40 percent of a carrier's allocated charters have been used or been committed for use by firm contracts during the first six months of the charter year, the remaining charter allotments exceeding the number equal to the number of those already operated or committed in the preceding six months would be forfeited and placed in the charter pool;

4. The Department tentatively establishes a U.S.-Havana public charter pool subject to the following application and allocation procedures:

- a. Applications must identify the public charter operator; the date of each one-way flight; the city-pair markets; the type of aircraft to be used; and a statement affirming that the carrier has firm plans to use the charters. A copy of the charter contract would also be required;
- b. Applications must be filed in Docket DOT-OST-2020-0011;¹⁷
- c. Applications may be filed no earlier than six months in advance of the proposed flight, and carriers may apply to operate up to twenty (20) flights each month from the pool; and
- d. Applications to operate more than twenty (20) public charter flights in a given month may be considered after the applicant completes polling of interested parties;

5. Carriers receiving a public charter allocation, whether tentatively allocated above, through an advance allotment, or from the charter pool, shall, in writing, return any flight(s) that they will not use to the U.S. Air Carrier Licensing/Special Authorities Division, and shall file this same information in Docket DOT-OST-2020-0011, within two business days of the carrier's determination that an allocated flight or flights will not operate;

¹⁵ As of the issue date of this Order, the Department has accepted public charter prospectuses totaling 2,654 round-trip U.S.-Havana public charter flights between March 1, 2020, and January 31, 2021 -- 2,299 of the flights are proposed to be operated by Swift Air, and 355 are proposed to be operated by World Atlantic.

¹⁶ See footnote 7, above.

¹⁷ Applications should also be sent by email to Brett.Kruger@dot.gov or by fax to (202) 366-3694.

6. Each carrier granted a charter allocation, whether tentatively allocated above, through an advance allotment, or from the charter pool, must report, in Docket DOT-OST-2020-0011, on its operations for the preceding month by the tenth day of each month;

7. Any charter flight allocated or tentatively allocated under the terms of this order would be subject to the Department's standard condition that the Department may amend, modify, or revoke the allocation at any time and without hearing, at its discretion;

8. The Department has tentatively decided to delegate to the Director of the Office of International Aviation the authority to administer distribution of flights from the charter pool proposed by this order and, where deemed in the public interest, to waive the procedural restrictions on the charter pool;

9. The Department directs any interested parties having objections to its tentative findings and conclusions set forth in this Order and in ordering paragraphs 1 through 8 above to file their objections, in the above-captioned docket, with the Department's Docket Section, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, S.E., Washington, DC, 20590, no later than fourteen (14) calendar days from the date of service of this Order; answers thereto shall be filed by interested parties no later than seven (7) calendar days thereafter;¹⁸

10. If timely and properly supported objections are filed, the Department will afford full consideration to the matters or issues raised by the objections, and any answers thereto, before taking further action;¹⁹ if no objections are filed, the Department will deem all further procedural steps to be waived and will proceed to enter an order finalizing our tentative allocations and procedures; and

¹⁸ The original filing should be on 8½" x 11" white paper using dark ink and be unbound without tabs, which will expedite use of our docket imaging system. In the alternative, filers are encouraged to use the electronic filing submission capability available through the Dockets/FDMS Internet site (<http://www.regulations.gov>) by following the instructions at the web site.

¹⁹ As we are providing for the filing of objections to this tentative decision, we will not entertain petitions for reconsideration of this Order.

11. The Department will serve this Order on all certificated carriers operating large aircraft; all foreign air carriers holding permits; all public charter operators with recent U.S.-Cuba operations; the Ambassador of Cuba in Washington, DC; the Federal Aviation Administration; and the U.S. Department of State.

By:

David E. Short
Deputy Assistant Secretary
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(SEAL)

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<http://www.regulations.gov>

THE SECRETARY OF STATE
WASHINGTON

January 7, 2020

The Honorable
Elaine L. Chao
Secretary of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590

Dear Madam Secretary:


The Department of Transportation's October 25, 2019, action to suspend scheduled air service to nine Cuban airports took effect on December 10, 2019, the same day the world celebrated Human Rights Day. Since then, the Cuban regime has increased its repression of the Cuban people, detaining dozens of human-rights activists and entrenching policies that restrict freedom of religion, expression, and peaceful assembly.

To strengthen the impact of the Administration's policy of applying economic pressure on the Cuban regime to respect human rights and fundamental freedoms for all in Cuba and to cease its unconscionable support for the illegitimate and totalitarian regime of former President Maduro in Venezuela, and in the foreign-policy interests of the United States, I respectfully request that the Department of Transportation suspend until further notice all public charter flights between the United States and all airports in Cuba except José Martí International Airport (HAV) in Havana. I further request that the Department of Transportation, in the foreign-policy interest of the United States, cap charter flights to José Martí International Airport at an appropriate level consistent with the policy objectives identified above.

Suspending public charter flights to these nine airports and limiting such flights to Havana would send a clear message to the Cuban government that the United States is continuing to increase economic pressure on the regime in response to its ongoing repression of the Cuban people and support for Maduro. The suspension of public charter flights to all points outside of Havana will prevent public charter operators from expanding their services to compensate for the Administration's October 25, 2019, action suspending commercial flights to those airports. Maintaining and capping public charter flights to José Martí International Airport preserves the main gateway for travel from the United States to Cuba for family visitation or other lawful purposes, while preventing public charter operators from increasing service to Havana in response to the suspension of flights to all other airports in Cuba.

The Department of Transportation's implementation of this public charter suspension measure with a 60-day advance notice would allow for the orderly wind-down of flight operations. The Department of State considers that this action would not conflict with the U.S. government's obligations under applicable international agreements.

Sincerely,



Michael R. Pompeo