

US-Venezuela flight ban has far reaching consequences

05 August 2019



Carriers and agents that help customers purchase indirect flights between the US and Venezuela may fall afoul of a tough US order than bans flights between the two countries, warns Anita Mosner, a partner at Holland & Knight LLP's Washington, DC office.

The US Department of Transportation (DOT) ordered the suspension of all passenger and cargo air flights between the US and Venezuela on 15 May 2019. The action was caused by concerns expressed by several US

government agencies that the breakdown of civil society and institutions in Venezuela made it impossible to ensure the safety of civil aviation to, from and within the country. Although conditions in Venezuela had been deteriorating for many months, the worsening of conditions along with the perceived lack of cooperation from Venezuelan authorities (Venezuelan regulators allegedly stopped TSA officials from inspecting aviation facilities in the country) hastened this conclusion. The DOT action was preceded by a 1 May Federal Aviation Administration Notice to Airmen recommending US aircraft crossing Venezuelan airspace do so at altitudes of 26,000 feet or higher, citing ground-based threats to civilian aircraft.

Although certain US carriers had long ago suspended service to Venezuela due to challenges, such as fuel shortages and difficulties surrounding the repatriation of funds, Amerijet, American Airlines and Federal Express only recently stopped servicing the country, leaving two Venezuelan carriers, Avior and Transcarga, as the only carriers in the market.

The implementation of this ban reflected close coordination between DOT, the Department of Homeland Security (DHS) and the Department of State, with other agencies (such as the Department of Defence) likely involved in the consultation process. The termination was initiated by the DHS.

The exact development which triggered the suspension order was a 13 May letter from Acting Secretary of Homeland Security Kevin McAleenan to DOT Secretary Elaine Chao. In the letter, the DHS said the safety or security of passengers, aircraft, or crew is threatened and that the public interest requires flights between the two countries be immediately suspended. The agency then requested the DOT revoke all licences for air transport between the two countries. The DOT implemented this through an order removing Venezuela from all licences held by US and foreign air carriers.

While the suspension order appears to be straightforward, its implementation has raised several jurisdictional and operational concerns for airlines and their agents. The DOT has the authority to regulate “foreign air transportation,” which covers air transport between a point in the US and a point outside the US. This means the newly imposed DOT prohibition not only affects direct air service between the US and Venezuela provided by US and Venezuelan air carriers, but also would apply to connecting services operated via intermediate points as well as services provided by airlines from third countries. The DOT is therefore taking the position that no carrier may hold or sell any form of transportation between the two countries, even on an online basis and even if the service is indirect. For example, the ban affects a carrier from Trinidad that sells a ticket between Venezuela and Trinidad alongside a connecting ticket from Trinidad to Miami. Carriers are also not permitted to sell two separate online tickets between those points.

The DOT has also warned carriers and their agents that they should not take steps to facilitate interline transportation that would circumvent the ban. For example, a Venezuelan carrier cannot sell tickets from Venezuela and a third country, and then arrange to have the ticket holders fly by a charter operated by a different carrier to the US.

This position is notable. While US law does ban carriers from selling or operating services between the US and Venezuela, the order does not prohibit people from traveling between the countries.

Two Venezuelan carriers and several non-US airlines continue to serve the country. The continuation of travel within Venezuela and within the region raises both legal and practical concerns. By law, US authorities cannot prohibit a passenger from constructing their own itinerary and flying between the two countries. However, as explained below, carriers and their agents face considerable risk by continuing to meet those needs.

Although the DOT to date has not issued any written guidance on this point, it has informally indicated that it is prepared to take enforcement action against carriers that even sell or offer connecting services between the two countries or knowingly connect passengers traveling between the US and Venezuela. For example, a passenger could fly from the US to Port of Spain, and then purchase a separate ticket on a different carrier for transportation to Venezuela. A regulated party that facilitates this “do-it-yourself” travel faces significant legal exposure. Various forms of facilitation of online service might trigger this legal risk, such as issuing a single ticket or permitting a passenger to through-check their baggage on a Venezuela-intermediate point-US itinerary. Moreover, US authorities have indicated that they will initiate enforcement action against two or more carriers that knowingly sell separate itineraries between the two countries by coordinating the sale of such transportation.

It is possible US trading partners will argue that by adopting this ban, the US is exceeding the bounds of its jurisdiction by prohibiting foreign carriers from selling separate flight segments that are entirely permissible. A flight between Caracas and Port of Spain is not – from a legal standpoint – “foreign air transportation” as that service does not touch a point in the US. However, the DOT is taking the view that if two unrelated carriers take coordinated measures to “tack” together these itineraries, they would run afoul of US law. As of writing, the DOT has not issued written guidance to the aviation community concerning its interpretation and the scope of its ban, leaving consumers scrambling for options and members of the aviation community uncertain of their obligations and potential legal exposure.

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