

Airport Law Alert – FAA Reauthorization Becomes Law

10.08.18

On October 5, 2018, the President signed H.R. 302 into law as the FAA Reauthorization Act of 2018. This represents the first long-term reauthorization of FAA and AIP since 2012; the agency has been operating under interim- and short-term extensions for some time. In addition to the general reauthorization, the Act contains a number of changes to existing law that will have an effect on airport sponsors. This Alert provides detailed discussions of the most significant of those changes, including those concerning the Airport Improvement Program, Passenger Facility Charges, non-aeronautical development on airports, drones/unmanned aerial systems, and noise issues. A longer list of changes of interest to airport sponsors appears on the end of this Alert.

This Alert is not intended to be a comprehensive summary of all of the provisions that may be of interest to airports and their lawyers, but serves to highlight the provisions that most directly affect airports.

For more information on any of the provisions mentioned in this Alert, and to determine how it will affect a particular airport, please contact the attorney with whom you usually work or those noted at the end of each topical summary.

AIRPORT IMPROVEMENT PROGRAM

Section 111 of the Act appropriates \$3.35 billion per year through fiscal year 2023 for the Airport Improvement Program, which represents no change from current levels. While the certainty of these AIP funds for the next five years is welcome, the lack of any increase is disappointing for airport sponsors.

Beyond the funding levels, the Act makes several other notable changes to the AIP. Section 132 mandates that medium and large hub airports maintain an area for nursing mothers to feed their infants in each passenger terminal building. Section 138 permits closed-circuit television systems in public areas to be eligible for AIP grants. Section 151 opens the door for certain airports to receive increased AIP entitlement funds: if an airport's CY 2012 enplanements were at least 10,000, Section 151 directs FAA to apportion entitlement funds based on CY 2012 enplanements, even if those enplanements later fall below 10,000, as long as the airport maintains scheduled service for FYs 2018 through 2021. It also also provides an annual entitlement of \$600,000 for each airport with annual passenger enplanements between 8,000 and 10,000.

For more information about the changes to AIP, please contact Katie van Heuven or Steven Osit.

PASSENGER FACILITY CHARGES

Despite considerable pressure from the airport industry groups to do so, Congress did not raise the cap on Passenger Facility Charges in the Act, and those PFCs remain capped at \$4.50 per passenger. This is doubly disappointing for airport sponsors not only because there is no lifting of the cap but because the five-year length of the Act means a revisiting of the cap is not likely to occur until 2023 at the earliest. The Act does take two important steps in reducing the regulatory burdens on the sponsor's ability to impose PFCs. First, Section 121 eliminates the "significant contribution" test, whereby airport sponsors were previously required to make a special showing to assess a \$4.00 or \$4.50 PFC. Under the Act, sponsors no longer need to make such a showing in order to receive PFC authorization from FAA at the \$4.00 or \$4.50 per passenger level. Second, that Section expands a previously existing pilot program to permit all airports (not just nonhub airports) to use a streamlined notice and 30-day waiting period process for imposing PFCs instead of securing affirmative FAA approval. While airports would have preferred an increase in the cap, these other regulatory reforms should allow for some relief in funding projects with PFCs.



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For more information about PFC issues, please contact Dave Bannard, Eric Pilsk, or Peter Kirsch.

NON-AERONAUTICAL DEVELOPMENT

Many airports have battled FAA in recent years on the agency's authority to regulate non-aeronautical development on airport property. In a win for airports, Section 163 of the Act takes two significant steps to limit FAA's authority over non-aeronautical development. First, the Act explicitly limits FAA's authority to "directly or indirectly regulate" non-aeronautical property transactions at an airport, except: (1) to ensure the safe and efficient operation of aircraft, or the safety of people and property on the ground, (2) to ensure the receipt of fair market value for the use or disposal of property, or (3) where the property was itself purchased with AIP grants or is subject to the Surplus Property Act. The Act also limits FAA's authority to review and approve ALP amendments to only those amendments that "materially impact" safety and efficiency for aircraft operations, or that "adversely affect the value of prior Federal investments to a significant extent." This is an important restriction because FAA's position in some Airports District Offices has been that an ALP amendment and FAA approval is required for any non-aeronautical development (even on property which has been released from grant obligations), which often triggers environmental review and slows development efforts.

We expect that it will take some time for airports and FAA to reach an agreement on the precise impact of Section 163; however, these two changes should give airports much greater flexibility to develop non-aeronautical uses with only limited FAA regulation.

For more information about non-aeronautical development, please contact Peter Kirsch or Nick Clabbers.

NOISE

The Act contains several provisions related to airport and aircraft noise. Section 173 requires FAA to finish within one year its long-delayed evaluation of alternatives to its current noise metric and threshold, the Day Night Average Sound Level (DNL) and 65 dB limit. Section 175 requires FAA to consider using diverging departure flight paths or lateral spacing to address community noise concerns when proposing or adjusting departure procedures, if requested by the airport operator and community leaders. Sections 179 and 187 require FAA to undertake various studies about the health effects of noise on local communities, after which FAA would have to make recommendations within two years for revising land use compatibility guidelines (14 C.F.R. Part 150) to reduce noise exposure. Section 180 mandates that each FAA Regional Administrator designate an ombudsman to address public concerns about airport noise, though regional noise officers have likely already filled those positions.

For more information about these and other noise issues, please contact Peter Kirsch.

FIREFIGHTING CHEMICALS

In recent months, there has been an increasing awareness and concern regarding perfluorinated compounds (PFAS), a catchall term for certain ingredients in firefighting foams commonly used at airports. While these chemicals have been in use for decades as FAA-required elements of firefighting foam, recent research suggests that they are harmful to human health. Section 332 addresses this issue by mandating that within three years, FAA not require the use of fluorinated chemicals to meet the performance standards in Advisory Circular 150/5210-6D. Airport sponsors should still be aware of this issue, however, because, as possible past and current PFAS users, they may be liable for future regulatory requirements, potentially including remediation efforts, and claims by water system operators or individuals.

For more information about PFAS and related issues, please contact Polly Jessen.

PRIVATIZATION PILOT PROGRAM

The Act expands and makes changes to the Airport Privatization Pilot Program, which has now been retitled as the Airport Investment Partnership Program. The changes are likely the result of the lack of interest in the program, despite widespread interest in public-private partnerships in other spheres. To



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date, there are only four airports in the program, and FAA has only received twelve applications since 2001 (most of which were withdrawn). Section 160 of the Act, however, removes the previous cap of 10 airports in the program, perhaps in anticipation that other changes to the program may invite additional airports to participate. The most important of these changes is to allow privatization of a part of an airport, such as a terminal, consolidated rental car facility or parking (as opposed the entire airport). The Act also allows an airport operator to apply on behalf of multiple airports under its control in a single state (i.e., allows privatization of an airport system) and allows for a \$750,000 planning grant to the airport sponsor. In addition, Section 160 mandates that if the application is approved, the sponsor and the leaseholder/private owner shall be exempt from repayment of federal grants, return of property acquired with federal assistance, and the use of proceeds from the airport's sale or lease to be used exclusively for airport purposes (previously, FAA had discretion to grant these exemptions). These changes give airport sponsors greater flexibility in potentially privatizing all or parts of their operations and incentivize private parties to participate, though it should be noted that the Act retains the ability of airlines to object and stop a sponsor's privatization efforts.

For more information about the changes to the privatization program, please contact Peter Kirsch or Steve Kaplan.

DRONES

The Act contains more than 40 separate provisions regarding drones or unmanned aerial systems (UAS). Most address regulation of UAS in flight and do not directly concern airports, but will nonetheless have an effect on airport operations. Section 348 requires FAA to issue safety regulations to authorize commercial delivery of goods using drones (Amazon and other online retailers were strong advocates for this provision). Perhaps the biggest regulatory shift is Section 349, which concerns recreational or "hobbyist" drones and repeals the previous exemption of "model aircraft" from FAA regulations. Section 349 now requires that recreational drones meet operating requirements, mandates that operators pass FAA-imposed aeronautical knowledge testing, establishes the qualifications for community-based organizations that may develop safety guidelines (previously, those organizations were not defined), and requires airspace authorization from FAA coextensive with that required of commercial drone operators. Section 373 requires the Comptroller General to undertake a study on the regulation of UAS and the appropriate role of local governments, and Section 351 codifies the DOT's UAS Integration Pilot Program, which also endorses the concept of co-regulation between FAA and local governments.

Two additional provisions that specifically affect airports are worth mentioning. Section 383 requires FAA to test UAS hazard mitigation systems at public-use airports, which will then become eligible for AIP funding once approved. Section 384 makes it a crime to knowingly interfere or disrupt the operation of a manned aircraft with unmanned aircraft or knowingly operate an unmanned aircraft in a runway exclusion zone near an airport.

For more information about these provisions or other drone issues, please contact Eric Smith or Steven Osit.

PARTIAL LIST OF RELEVANT SECTIONS IN FAA REAUTHORIZATION ACT OF 2018

- Sec. 111 – Reauthorizes the Airport Improvement Program at \$3.35 billion per year through 2023
- Sec. 121 – Eliminates Passenger Facility Charge "significant contribution" test and expands expedited review pilot program
- Sec. 122 – Requires DOT to engage an outside research organization for an independent study of airport infrastructure financing needs
- Sec. 123 – Directs FAA to issue a final policy on intermodal access projects and Passenger Facility Charge eligibility
- Sec. 132 – Requires mothers' rooms in medium and large hub airports
- Sec. 133 – Contract tower reform, including revisions to cost-benefit analysis



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- Sec. 138 – Eligibility of CCTV projects for AIP funding
- Sec. 143 – Requires the Government Accountability Office to conduct a study on repealing revenue diversion grandfathering provision
- Sec. 144 – Requires the Government Accountability Office to conduct a study on the use of proprietary exclusive rights
- Sec. 151 – Permits certain small airports to receive AIP entitlement grants based on 2012 enplanement data
- Sec. 158 – Authorizes \$1 billion annually for supplemental discretionary grants
- Sec. 159 – Amends the Anti-Head Tax Act to prevent state or local government from collecting a tax, fee, or charge “upon any business located at a commercial service airport or operating as a permittee of such airport that is not generally imposed on sale or services by that state, political subdivision, or authority unless wholly utilized for airport or aeronautical purposes”
- Sec. 160 – Amends Privatization Pilot Program by eliminating airport cap, requiring FAA to waive grant reimbursement and take profit from operations, allow sponsor to have an interest in the purchaser, and allowing privatization of an airport system
- Sec. 163 – Non-aeronautical development land use regulatory reform
- Sec. 164 – Allows commercial service airports with 8,000 passenger boardings and receiving only seasonal service to qualify as primary
- Sec. 173 – Requires DNL alternatives study to be issued within 1 year
- Sec. 174 – Requires updates to noise exposure maps for significant changes to operations
- Sec. 175 – Requires consideration of dispersal headings on community request for RNAV departures
- Sec. 176 – Requires FAA review of community involvement practices for Metroplex
- Sec. 179 – Requires FAA study on relationship between aircraft speed and noise
- Sec. 181 – Requires FAA study and rule by March 2020 on supersonic aircraft standards, including noise, and ad hoc consideration of supersonic type certification in the interim
- Sec. 187 – Requires completion of noise exposure study within two years
- Sec. 189 – Mandates a higher education study of the impact of airport noise on community health
- Sec. 190 – Environmental mitigation pilot program
- Sec. 349 – Complete overhaul of regulation of recreational drones
- Sec. 373 – Requires Comptroller General to study role of federal, state, and local governments in regulation of UAS
- Sec. 383 – Requires FAA to test UAS hazard mitigation systems at airports, and makes approved design eligible for AIP funding
- Sec. 384 – Criminalizes certain flights of UAS near airports
- Sec. 570 – Study on whether an airport Federal credit assistance program would help
- Sec. 451 – Increases to Essential Air Service funding through 2023
- Sec. 452 – Requires Comptroller General to study EAS program for potential budgetary savings
- Sec. 455 – Includes reforms and appropriations to the Small Community Air Service Development Program

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