Here We Go Again: Upcoming FAA Reauthorization is Likely to Reinvigorate Debate over the Privatization of Air Traffic Control Services

The FAA’s current authorizing legislation expires in September, and Capitol Hill is once again abuzz over various proposals to reform the agency through a long-term reauthorization bill. Last year, House Transportation and Infrastructure Chairman Bill Shuster’s (R-Pa.) effort to transfer air traffic control services from the FAA to an independent, non-profit entity fizzled out after substantial opposition to such reform in the Senate, as well as from the House Committee on Ways and Means. With just a few short months remaining before the FAA’s authorization expires, Chairman Shuster recently introduced an updated proposal, the 21st Century Aviation Innovation, Reform, and Reauthorization (AIRR) Act, which purports to better address the concerns of general aviation and small, rural communities.

While many members and stakeholders continue to express concern over the privatization of air traffic control services, The President has largely endorsed the animating principles of the 21st Century AIRR Act. On June 5, 2017, the President released a set of Principles for Reforming the U.S. Air Traffic Control System. These Principles reaffirm the FAA’s primary mission as a safety regulator and suggest that moving air traffic control services to a new entity will allow the National Aviation System to keep pace with industry change, more readily accommodate unmanned aircraft and commercial space-bound vehicles, and accelerate the implementation of Next Generation (NextGen) technology. The Principles call for a new entity that would maintain open access for all airspace users, including rural communities and general aviation users, and be financially self-sufficient through collection of user fees.

Chairman Shuster’s proposal does not adopt all of the President’s Principles, nor does it address other issues of particular interest to airports. The 21st Century AIRR Act, for example, does not specifically address whether the National
While Details Still Unclear, Recent Executive Orders May Affect Airports Practice

In the early days of his new administration, the President signed numerous executive orders, many of which have been under the media spotlight. There are several orders that have received less attention, and while in their early stages of implementation, may in time have significant effects on the practice of airport law.

First, on January 24, 2017 the President signed Executive Order 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects (EO 13766), which intends to streamline and expedite agency environmental review processes and procedures, particularly for projects which are considered to be “high priority” for the Nation. EO 13766 charges the Chairman of the White House Council on Environmental Quality to determine—at the request of a Governor or head of any executive department or agency—if an infrastructure project qualifies as “high priority.” To date, there has been no guidance released on how the executive branch will implement EO 13766 and no apparent designation of any projects as “high priority.” However, the language of EO 13766 singles out public health or safety, or State, local, or tribal governments or communities; (2) create serious inconsistency; (3) materially alter the budget impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues. Commentators have been skeptical about the implementation of EO 13766 and no apparent designation of any projects as “high priority.” To date, there has been no guidance released on how the executive branch will implement EO 13766 and no apparent designation of any projects as “high priority.”

Second, Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs (EO 13771)—which was signed by the President on January 30, 2017—mandates that for every one new regulation promulgated, federal agencies must identify two prior regulations for elimination. Recent guidance states that only “significant regulatory actions” are subject to EO 13771 and references an earlier Executive Order that defines “significant regulatory actions” as those expected to: (1) have an annual effect on the economy of $100 million or more or adversely affect the economy, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create serious inconsistency; (3) materially alter the budget impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues. Commentators have been skeptical about the implementation of EO 13771, and it is presently the subject of litigation in the United States District Court for the District of Columbia, where a group of plaintiffs allege that EO 13771 is unconstitutional and a violation of the Administrative Procedure Act. The District Court recently rejected the Government’s request to dismiss the case on procedural grounds. It is unclear what effect EO 13771 may have on airports practice, especially pending the outcome of litigation, but it has the potential to significantly limit FAA’s ability to implement new regulations.
Third, on March 13, 2017, the President signed Executive Order 13781, Comprehensive Plan for Reorganizing the Executive Branch (EO 13781), which aims to further improve the efficiency, effectiveness, and accountability of the executive branch. EO 13781 proposes a multi-step process with the end goal of eliminating or reducing federal government functions. First, the head of each agency must submit a proposed plan to reorganize the agency, if appropriate, within 180 days of March 13, 2017. Second, EO 13781 provides the public with the opportunity to suggest improvements in organization and function of the executive branch. The responsibility to determine whether to restructure or eliminate unnecessary agencies falls on the Director of the Office of Management and Budget, who must provide a proposed plan within 180 days after the closing date for the submission of suggestions. While no final decisions have been made, EO 13781 could impact airports practice if the function and structure of the FAA is reorganized, reduced, or reallocated to other entities (e.g., private businesses or other public entities). EO 13781 should also be considered in the context of recent staffing departures and reassignments at the agency, which have represented a significant loss of institutional knowledge over the past 18 months.

Finally, on April 21, 2017, the President signed Executive Order 13788, Buy American and Hire American (EO 13788). EO 13788 does not change any existing requirements related to Buy America or Buy American programs. Instead, it orders executive branch agencies to “scrupulously monitor, enforce, and comply with Buy American Laws, to the extent they apply, and minimize the use of waivers, consistent with applicable law.” It also requires agencies to conduct reviews and assessments of their internal processes and propose means to maximize, in accordance with existing legislation, the use of materials produced in the United States. It is unclear how, if at all, EO 13788 will ultimately affect airports practice.

Talk of Infrastructure Reform Heats Up, But Particulars are Still Uncertain

One of the President’s stated priorities throughout the campaign and the first days of his administration is rebuilding America’s transportation infrastructure. In recent weeks, discussion of this priority has notably increased. Specific details about (and any implementation of) the administration’s plan, however, continue to be sparse.

In late May, the White House released a six-page Fact Sheet focused on the infrastructure aspects of the President’s 2018 budget proposal. The Fact Sheet describes an overreliance on federal funds for local infrastructure projects and overregulation on the part of the federal government. The Fact Sheet outlines four “key principles” to infrastructure reform, including targeted federal investment and reliance on the private sector to provide both services and funding through public-private partnerships. The Fact Sheet states that the 2018 budget has a target of $1 trillion of new infrastructure spending, but that the federal government will make only 20% of that investment, using it “to incentivize additional non-Federal funding, reduce the cost associated with accepting Federal dollars, and ensure Federal funds are leveraged such that the end result is at least $1 trillion in total infrastructure spending.” The Fact Sheet also outlines some goals for streamlining and reducing the environmental review process associated with federal approval of infrastructure projects.

In remarks on the topic, Secretary of Transportation Elaine Chao voiced her support for the President’s agenda, stating that the administration “hope[s] to broaden and expand participation in infrastructure funding so that more projects can be undertaken overall and so that we do not supplant existing state, local, or private funds already dedicated to infrastructure.” She has strongly endorsed the expansion of public-private partnerships and recently floated the idea of a “page limit” on environmental reviews of infrastructure projects. Then, in early June, the DOT published a notice in the Federal Register to “solicit input from…affected stakeholders to help the Department identify requirements that the Department imposes through rules, or interpretations found in policy statements or guidance, that unjustifiably delay or prevent completion of surface, maritime, and aviation transportation infrastructure projects.”

Airport P3 Projects Move Forward

With federal government policy and progress on infrastructure uncertain, several airport sponsors have moved forward with their own public-private partnerships (P3s) or outright privatization. Westchester County, NY, and St. Louis Lambert International Airport were recently approved for participation in the FAA’s privatization pilot program, and Hendry County, FL, is in the final stages of preparing a proposal for submission to the FAA. Kansas City International Airport, Lambert International Airport, and Hendry County, FL, are also considering possible P3 projects. The issue heating up, the first-ever P3 Airports Summit will be held in San Diego July 24 – 25. A limited number of complimentary registrations remain available. Please contact Peter Kirsch at pkirsch@kaplankirsch.com or Adam Giuliano at agiuliano@kaplankirsch.com for details.
There has been little movement in Congress to take up the cause of infrastructure in any substantive way. Senate Democrats introduced a $1 trillion infrastructure bill in late January, but it has thus far failed to progress. For now, there does not appear to be any immediate movement on the issue or any imminent infusion of new funds. For more information, please contact Peter Kirsch at pkirsch@kaplankirsch.com or Steven Osit at sosit@kaplankirsch.com.

**Maryland Attempts to Force Court Decision on Environmental Review**

The state of Maryland made headlines in May with an unorthodox legal strategy in a case before a federal district court. The case revolves around whether the state’s Purple Line light rail project has properly received its federal environmental approval. After several months without a district court decision, the state was concerned that continued delays would substantially increase costs, and filed a petition for a writ of mandamus with the United States Court of Appeals to compel the district judge to issue a ruling. The Court of Appeals did not rule on the petition, but the district judge issued a ruling shortly thereafter — finding that the project had not been sufficiently studied before receiving approval. While this case did not directly concern airports, there are many instances of litigation delays in airport projects, especially regarding environmental issues. The Purple Line case provides an interesting approach to moving that litigation forward, but the court’s ruling indicates that it should be used with caution. For more information, please contact Chuck Spitlunik at cspitulnik@kaplankirsch.com.

**FAA Continues to Face Resistance in Implementing NextGen Flight Patterns**

The FAA continues to work towards implementation of its NextGen flight patterns, an effort to improve efficiency in its so-called “Metroplexes.” While the FAA considers implementation of NextGen at Metroplexes to be in varying stages of completion, the agency continues to face significant resistance from community groups in the form of political and legislative pressure and litigation across the country. In general, residents have complained that the changes in flight patterns have considerably increased aircraft overflight noise in their communities without warning.

For example, in Washington, DC, one of the first Metroplexes to be considered complete, community groups have sued the FAA alleging that the federal environmental approval was obtained without sufficient public involvement, and the Governor of Maryland has formally requested that the FAA revert to pre-NextGen flight patterns. The U.S. Court of Appeals recently heard arguments in a case brought by the City of Phoenix, alleging that the FAA improperly failed to account for historical considerations or provide opportunities for community input before announcing its change in flight patterns. A similar lawsuit is pending in Southern California. Howard County, Maryland, has weighed whether to sue the FAA, and residents of Boulder, Colorado, have complained about changes to the flight patterns at Denver International Airport some 35 miles away.

For its part, the FAA is making attempts to engage the public following some of its high-profile struggles. In the two Metroplexes currently in the design phase (Cleveland-Detroit and Denver), the FAA has made a concerted effort to reach out to the public, promising to exceed the requirements that would ordinarily apply under NEPA or the National Historic Preservation Act. These initiatives include holding a series of community meetings, soliciting a wide variety of public comments, and reviewing those comments prior to issuing a final decision on implementation. For more information, please contact John Putnam at jputnam@kaplankirsch.com.

**Political Climate Leaves DOT, FAA in Uncertain Position**

The uneven political landscape in Washington has had an effect on many federal agencies, and DOT and FAA are no exception, especially in the context of agency staffing. While the President recently nominated Stephen G. Bradbury, a former George W. Bush Department of Justice official, to be the DOT General Counsel, many other upper and lower-level positions remain vacant. For example, the post of the FAA chief counsel is vacant, as is the Associate Administrator for Airports, which has been empty following the departure of Eddie Angeles in January 2017. Administrator Huerta’s term runs through January 2018, and it is possible—perhaps even likely—that the Associate Administrator position will not be filled until that time. Symptomatic of the agency’s difficulties with staffing is the Part 16 enforcement and compliance process. As noted below, the FAA has issued only one Part 16 decision in the last six months while previously averaging ten to twelve per year. With upwards of several dozen cases possibly pending, the agency is well behind its normal pace. For more information, please contact Steven Osit at sosit@kaplankirsch.com or Peter Kirsch at sosit@kaplankirsch.com.
FAA Reaches Landmark Settlement Agreement with City of Santa Monica

On January 28, 2017, the City of Santa Monica (City) and the FAA announced an historic settlement agreement that resolves litigation and controversy over the future of Santa Monica Airport (SMO) by, among other things, allowing the City to reduce SMO’s runway by almost one-third of its length in the immediate future and to close SMO entirely after 2028. The settlement agreement seeks to resolve decades of litigation and controversy at SMO by establishing a framework for the operation—and ultimate closure—of SMO. Most immediately, the settlement agreement resolves litigation focused on three issues:

1. **Expiration of Grant Assurances.** The City believed that its final grant agreement with the FAA expired in 2014, allowing it to close SMO. The FAA, however, contended that the City’s final grant agreement was extended to 2023 as the result of a 2003 grant amendment that increased the grant amount to reflect final construction costs. The City appealed the FAA’s decision to the U.S. Court of Appeals for the Ninth Circuit, which appeal was pending when the 2017 settlement was announced.

2. **Surplus Property Act.** The FAA took the position that the City was obligated by the terms of a 1948 Instrument of Transfer, releasing a portion of SMO from a wartime lease to keep SMO open indefinitely. The City filed a quiet title action in federal court challenging that position. The District Court dismissed the case on statute of limitations grounds. On appeal, the Ninth Circuit reversed that decision in an opinion that also cast doubt on the substance of the FAA’s position.

3. **Leasing Issues.** In several Part 16 complaints, the FAA and SMO users challenged a variety of actions by the City regarding aeronautical leases and the City’s attempt to establish a proprietary-exclusive FBO. The Consent Decree seeks to resolve all of those matters and establish a framework to avoid future litigation. The key elements of the Consent Decree are:

   - The City may close SMO permanently after December 31, 2028, unless the City enters into a new grant agreement with the FAA before then.
   - The City may immediately reduce the operational length of SMO’s runway from 4,973 feet to 3,500 feet, after following the notice procedures in 14 C.F.R. § 157(b) and any applicable state or federal environmental laws, at the City’s expense and may use the land for compatible purposes subject to an avigation easement.
   - The FAA releases SMO from all deed restrictions, including Surplus Property Act restrictions.
   - The City must comply with Grant Assurances 19, 22, 23, 24, 25, and 30 through 2028, but the Consent Decree is silent regarding any other grant assurances that presumably no longer apply.
   - The Consent Decree also addresses a number of issues regarding aeronautical leases, the City’s ability to establish a proprietary-exclusive FBO, and other matters.

The District Court entered the Consent Decree on February 1, 2017, and the City has begun to take steps to shorten the runway and exercise its other rights under the Consent Decree. The National Business Aviation Association (NBAA) has challenged the FAA’s authority to enter into the Consent Decree in the U.S. Court of Appeals for the District of Columbia. The NBAA’s request to enjoin implementation of the Consent Decree was denied, and the case is pending before the D.C. Circuit. A decision is expected sometime in 2018. In the meantime, the City can move forward with the runway shortening and other actions permitted under the Consent Decree. For more information, please contact Eric Pilsk at epilsk@kaplankirsch.com.

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Litigation
(Listed in Reverse Chronological Order)

Court Decisions

Use Restrictions and ANCA. **Town of E. Hampton v. Friends of the E. Hampton Airport, Inc.,** No. 16-1070, 2017 U.S. LEXIS 4165 (June 26, 2017) (denying petition for certiorari in review of 2nd Circuit decision holding that Town’s use restrictions were enacted in violation of the procedural requirements of ANCA).

Grant Assurances. **Vietnam Helicopters v. Cnty. of Contra Costa,** No. 17-cv-01743-MMC, 2017 U.S. Dist. LEXIS 49728 (N.D. Cal. Mar. 31, 2017) (denying motion for temporary restraining order where plaintiff alleged airport sponsor was preparing to lease hangar in violation of Grant Assurances and where Part 16 complaint was pending).

Premises Liability. **Afoa v. Port of Seattle,** 198 Wash. App. 206 (Mar. 20, 2017) (holding that the Port had a “nondelegable duty to ensure a safe workplace” on the airfield at Seattle-Tacoma Airport, and was therefore liable for the injuries of an independent contractor’s employee).


Pending Cases

First Amendment. **McDonnell v. City & Cnty. of Denver,** No. 17-1071 (10th Cir. appellee’s brief filed Jun. 7, 2017) (appealing the district court order requiring City and County officials to “timely process a permit application” to protest Executive Order barring individuals from seven predominantly Muslim countries from entering the United States at Denver International Airport).

Subject Matter Jurisdiction. **Kaufmann v. FAA,** No. 17-3152 (6th Cir. petitioner’s brief filed May 24, 2017) (appeal of the district court decision dismissing complaint alleging FAA noncompliance with NEPA and NHPA because complaint should have been filed in the circuit court).

Airport Closure. **Natl Bus. Aviation Ass’n v. Huerta,** No. 17-1054 (D.C. Cir. motion for stay and injunction denied and motion to dismiss referred to merits panel May 4, 2017) (challenging FAA settlement agreement with the City of Santa Monica that permits closure of the airport in 2028).


Gate Allocation. **In re. Compliance with Federal Obligations by the City of Dallas, Texas,** FAA Docket No. 16-15-10 (Notice of Investigation served Aug. 7, 2015) (FAA investigation into possible grant assurance violations related to a failure to accommodate air carrier requesting gate space).

Administrative Decisions

Acquisition of Property. **Boggs v. City of Cleveland,** FAA Docket No. 16-16-15, Order of the Director (Jan. 24, 2017) (dismissing complaint alleging Grant Assurance violations where sponsor chose not to acquire private property shown on the Airport Layout Plan).

Federal Legislation

Federal Rules, Orders, and Guidance
(Listed in Reverse Chronological Order)

Presidential Executive Orders

Buy American and Hire American, Exec. Order 13,788, 82 Fed. Reg. 18837 (Apr. 21, 2017) (requiring all executive branch agencies to "scrupulously monitor, enforce, and comply with Buy American Laws, to the extent they apply, and minimize the use of waivers, consistent with applicable law").

Comprehensive Plan for Reorganizing the Executive Branch, Exec. Order 13,781, 82 Fed. Reg. 13959 (Mar. 16, 2017) (requiring that within 180 days, "the head of each agency shall submit to the Director [of the Office of Management and Budget] a proposed plan to reorganize the agency, if appropriate, in order to improve the efficiency, effectiveness, and accountability of that agency").

Reducing Regulation and Controlling Regulatory Costs, Exec. Order 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (requiring that "whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed").


Department of Transportation and FAA

AC 150/5000-17, Critical Aircraft and Regular Use Determination (June 20, 2017).

Notice and Request for Input, Transportation Infrastructure: Notice of Review of Policy, Guidance, and Regulation, 82 Fed. Reg. 25734 (June 8, 2017) ("to solicit input from…affected stakeholders to help the Department identify requirements that the Department imposes through rules, or interpretations found in policy statements or guidance, that unjustifiably delay or prevent completion of surface, maritime, and aviation transportation infrastructure projects").

ARP SOP 5.1, CATEX Determinations (June 2, 2017).


JO 7400.2L, Procedures for Handling Airspace Matters (eff. Apr. 27, 2017).


Department of Homeland Security

Reports, Studies, Articles, and Other Publications

U.S. Department of Transportation

Key Staff Appointments (May 20, 2017) (listing recent senior political appointees to the Department).

National Transportation Noise Map (showing noise impacts from airports and highways).

U.S. Government Accountability Office


Transportation Research Board, Airport Cooperative Research Program

Legal Research Digests


Reports


Web-Only Documents


General Articles


Unmanned Aircraft Systems

Decided Cases

Taylor v. Huerta, 856 F.3d 1089 (D.C. Cir. May 19, 2017) (holding that FAA did not have authority to promulgate regulations requiring hobbyist drone owners to register with the agency, but staying enforcement pending a petition for rehearing).

Boggs v. Merideth, No. 3:16-CV-00006-TBR, 2017 U.S. Dist. LEXIS 40302 (W.D. Ken. Mar. 21, 2017) (dismissing complaint alleging the defendant shot down plaintiff’s unmanned aircraft while over defendant’s property for lack of subject matter jurisdiction and stating that tort claims were properly brought in state court).

Pending Cases

Elec. Privacy Info. Ctr. v. FAA, Case No. 16-1297 (D.C. Cir. petitioner reply brief filed May 12, 2017) (challenging FAA’s decision not to promulgate privacy-specific UAS regulations).

Reports, Studies, and Articles


Kaplan Kirsch & Rockwell, in cooperation with AAAE, publishes the Airport Law Desk Reference, a user-friendly resource guide intended to make legal authorities on airport law both accessible and understandable. The Airport Law Desk Reference highlights the black-letter law in 28 topic areas and provides a comprehensive compendium of legal authorities applicable to each topic area.

The Airport Law Desk Reference is a companion tool for the Basics of Airport Law Workshop and Legal Update and available for purchase from AAAE.

For a copy, please contact Melissa Sabatine at AAAE, melissa.sabatine@aaae.org.
KAPLAN KIRSCH & ROCKWELL’S airports practice is one of the largest and most experienced in the country. The Firm’s attorneys have counseled clients on issues associated with complex airport development and master planning projects, land use, environmental review, rates and charges, airline incentives, finance, security, safety, airport proprietors’ rights, and compliance with federal requirements. The Firm has represented clients throughout the nation in regulatory and legislative advocacy on a wide range of policy matters and in litigation related to airport operations and development. The Firm’s clients have included airport proprietors, local and state governments, airport tenants, and users and businesses affected by airport operations.

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If you have any questions or would like to learn more about the topics addressed in this Digest, please contact the attorney who normally represents you, or any of the attorneys listed below.

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