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How The FAA Reauthorization Law Supports Airport Leasing

By **John Schmidt** (October 29, 2018, 2:43 PM EDT)

John Schmidt

Provisions in the Federal Aviation Administration reauthorization recently passed by Congress and signed into law by President Donald Trump significantly enhance the ability of U.S. public entities to obtain the operational and financial benefits of private airport management by leasing airports to private airport operators.

Over the past three decades, starting with the British government's spinoff of all of its major airports to a newly created private entity in 1987, the shift of airport operations from public entities to private operators has become widespread throughout the world. Following the United Kingdom, Australia leased all of its major airports to private operators starting in the 1990s. In the years since, most of the major European and Latin American airports have undergone similar shifts from public to private management. And the movement continues; for example, Japanese Prime Minister Shinzo Abe has announced the systematic shift to private operators of all of the major Japanese airports, starting with the 2015 lease of Osaka (Kansai and Itami) to a French/Japanese consortium.

The United States has been a global outlier by not participating in the widespread movement to private airport management. Back in 1996, Congress added to the FAA law a "Pilot Privatization Program" designed to allow a limited number of U.S. airports to be leased to private operators with FAA approval. The law made any such lease subject to a variety of terms to assure continued fulfillment of all public airport purposes. It also required approval of the transaction by 65 percent of the airlines at the airport, with at least 65 percent of the traffic, if any proceeds were to be received by the public entity and used for non-airport purposes.

In 2008, Chicago came close to a successful lease of Midway Airport in a transaction that had the support of the airlines at Midway, as well as the unanimous approval of the Chicago City Council. That lease fell through, however, when the late 2008 collapse of the financial markets left the winning bidder (a consortium led by the airport-operating subsidiary of the Vancouver Airport Authority) unable to make a required $2.5 billion upfront payment.

In 2013, the Commonwealth of Puerto Rico did succeed in initiating the lease of the San Juan Airport by the Puerto Rico Ports Authority to a private team consisting of ASUR (a major private Mexican airport operator) and Highstar Capital. The San Juan airport lease has since been widely acclaimed for improving passenger amenities and facilities at the airport, stabilizing and reducing fees for the airlines and

financially benefiting the Puerto Rico Ports Authority.

But while the proposed Midway lease and the successful lease in San Juan showed that a lease transaction was possible under the 1996 law, the law still contained significant limitations that inhibited U.S. public entities from carrying out airport lease transactions. The new law, passed with strong support by both Congress and the Trump administration, makes significant changes that reduce those inhibitions.

No Limits on Number of Airports That Can Be Leased

First, the new law eliminates completely the limits on the number of U.S. airports that can be leased.

Under the existing law, only 10 U.S. airports in total could be leased and only one of those could be a "hub" — defined as an airport with 1 percent or more of U.S. passenger traffic, which describes roughly the 30 largest U.S. airports. The numerical limits went back to a time when the shift of airports to private management was new as a global phenomenon and had not happened at all in the United States; the limits reflected and conveyed to the world a general skepticism about such transactions.

With the widespread global movement in the years since 1996 and the success of the San Juan Airport lease as a U.S. example, the limits and the negative message they conveyed had become dysfunctional. They also had a practical impact. Chicago held the one hub airport "slot" under the FAA program for six years from an initial application in 2007 to a final decision to forego a possible Midway Airport lease in 2013. For that entire six-year period, none of the country's other 30 largest airports could pursue a lease transaction. That numerical limit is now gone, eliminating its practical consequence and replacing its message of limitation with one of openness to airport leasing by as many U.S. airport owners as may elect to pursue the option of private management.

A Public Entity May Retain Interest in A Private Operator

Second, the new law provides that a public entity may retain an interest in the private entity that takes over airport operation under an airport lease.

In the 2013 San Juan airport lease, the Puerto Rico Ports Authority retained a limited share of future airport revenues from the airport following the lease. The 1996 FAA law, on the other hand, did not permit a U.S. public entity leasing an airport to retain a full-scale interest in the private airport lessee.

In contrast, many major airports around the world have shifted to structures of private management through entities in which the government retains a substantial interest. For example, Fraport AG, the very successful publicly traded entity that operates the Frankfurt Airport as well as other airports in Eastern Europe and Latin America, has a majority of its shares owned by state and local German government entities. Aeroports de Paris, which operates Charles de Gaulle and Orly Airports as well as other airports in the Middle East, Asia and Africa, is 51 percent owned by the French government, although Emanuel Macron (who led the leasing of the Nice and Lyons airports as finance minister in the prior socialist government) has announced his intent to sell the government's interest and reinvest the proceeds in an economic development corporation.

This whole range of ownership structures in which public entities can retain interests of all kinds in an airport lessee has now been opened up to U.S. public entities by the new law.

Exemption From Repaying Prior Federal Grants

Third, the new law provides that an airport lease transaction approved by the FAA will automatically obtain exemption from the requirement that the airport owner repay prior federal government grants to the airport.

The 1996 law gave the FAA the right to give such an exemption from required repayment of federal grants, and the FAA did so in the San Juan lease transaction. Since that law explicitly requires the airport to continue to fulfill all of its public purposes, a return of prior federal grants would have no policy justification. It would also make little sense since the law specifically allows a leased airport to continue to receive FAA grants in the same manner as a publicly operated airport.

But the discretionary nature of the FAA authority under the old law — reinforced by some congressional suggestions that grant repayment ought sometimes to be required — created an uncertainty in the planning of any lease transaction. That uncertainty is now gone and replaced with an explicit requirement that the grant repayment exemption be given to any approved transaction.

Grants for Studying Airport Leases

Fourth, the new law provides for the FAA to make grants of up to $750,000 to U.S. airports to study the possibility of an airport lease.

U.S. airports are owned and operated on a decentralized basis by an enormous number of varied state and local government entities. For example, over half of the 30 largest U.S. airports are owned and operated by cities and counties; the remainder are operated either by states or by special purpose authorities with state and city representation.

This decentralized pattern contrasts sharply with the rest of the world, where airports are typically operated by national governments. Local U.S. entities do not generally have resources to study and make decisions regarding possible airport leases like those made by the British government in the 1980s, the Brazilian government a decade ago or the current Japanese government.

The cost and diversion of time and effort has been a significant inhibiting factor that can now be offset with FAA funding for the explicit purpose of studying lease possibilities.

New Program Name

Finally, the new law changes the name of the FAA program to the “Airport Investment Partnership Program.”

It is no longer called a “pilot” program, with the implication that it may or may not be something that the FAA will make available on an ongoing basis. Leasing has now been recognized as a permanent option available to public entities operating U.S. airports to consider and adopt as they see fit.

The program is also no longer characterized as involving “privatization” — a word that is often confusing because it may connote the sale of government assets or operations. Under the FAA’s Airport Investment Partnership Program, a U.S. public entity cannot sell its commercial airport. But it can obtain a partner under a lease that complies with the wide range of FAA requirements, as well as others imposed by the local government, to assure its continued operation in the public interest.

One provision of the 1996 law that has not changed is the requirement that any lease transaction in which the public entity will use any portion of the proceeds for non-airport purposes must have the approval of 65 percent of the airlines and airlines with 65 percent of the traffic at the airport. That requirement of airline approval is unusual in the global airport world, and at one time it was widely viewed as an almost insurmountable barrier to a major U.S. airport lease. But the support of the airlines at Midway for the proposed 2008 lease of Midway Airport showed that it is possible to carry out airport lease transactions in which the airlines clearly benefit, together with the traveling public and the public entities involved, and that was confirmed by the successful lease of the San Juan Airport with airline support in 2013.

The new law reflects that positive shift in the attitude of airlines and others in the U.S. aviation industry toward private airport management and recognition of the benefits that a private operator's experience, skills and focus on quality can bring to an airport. The requirement of airline approval, and other specific requirements under the FAA program such as the continued recognition of all existing labor agreements, will continue to give to U.S. airport leases a distinctive character.

But beyond the specific elements described above, the new law may be most significant as a strong statement by Congress, supported by the Trump administration, that the use of airport leasing to shift airport management to private operators can be a positive option for U.S. public entities and their airports as it has proved to be elsewhere in the world.

By passing the new law and putting to rest the negative limits of the 1996 law, as well as allowing the use of a broad range of management structures, assuring necessary legal exemptions and giving local entities the resources to study leasing possibilities, Congress is opening the United States to the global world of private airport management, which can bring large benefits not only to individual airports and their public owners but also to the American aviation system as a whole.

John R. Schmidt is a partner at Mayer Brown LLP.

Disclosure: The author's firm represented the City of Chicago in the proposed lease of Midway Airport and the Commonwealth of Puerto Rico in the lease of the San Juan Airport discussed in this article.