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[New Opportunities for U.S. Airport P3 Projects Arising from COVID-19: Baker McKenzie]

In Brief

The sharp decline in passenger air travel caused by the COVID-19 pandemic has placed airports across the United States under severe financial pressure. As airports struggle to meet operational expenses with substantially lower revenue, capital financing for infrastructure projects could be particularly hard-hit.

These challenges may lead U.S. airports to turn to private investment for needed infrastructure improvements, including through the privatization of airport management and operations. Recent developments suggest that airport privatization and other public-private partnerships ("**P3**" or "**PPP**") spending could fill the financial gap and drive airport infrastructure spending.

Recent Changes to U.S. Law May Amplify Interest in Airport Privatization

The main sources of U.S. airport capital financing have been greatly impacted by the COVID-19 pandemic. Those sources include: (1) Passenger Facility Charges ("**PFCs**"), capped by statute at USD 4.50 per enplaned passenger[1]; (2) operating revenue from tenant leases and aircraft landing fees; (3) tax-exempt bonds; (4) state and local grants; and (5) federal Airport Improvement Program (AIP) grants.

U.S. airports have suffered significant financial hits from the drop in PFC revenue, and will likely continue to lose revenue from landing fees and leases as airlines adjust their schedules in the near- to medium-term. Meanwhile, many state and local governments now face significant fiscal challenges due the loss of taxpayer revenue as a result of the economic climate, which could also impact the municipal bond market. AIP funding is fixed by statute at USD 3.35 billion annually, which may prove insufficient to accommodate rising demand from airports as other funding sources dry up.

Yet, these challenges present new opportunities for airport P3 infrastructure projects in the United States, including airfield/airside development as well as new terminals and facilities. Recent changes to U.S. law intended to promote airport privatization, as well as the success of high-profile P3 projects at major airports, could cause airport sponsors and private investors to take a fresh look at the role of public-private initiatives.

Although airport privatization is widespread in Europe, it has not taken off in the United States. Seventy-five percent of air passengers in Europe and 66 percent of air passengers in Latin America and the Caribbean traveled through privately operated airports in 2018, [according to Airports Council International]. In North America, only one percent of air passengers traveled through privately operated airports.

The FAA's [Airport Investment Partnership Program] ("AIPP"), a program intended to generate access to private capital for airport improvement and development costs, could help narrow the gap by laying the groundwork for more P3 projects in the United States. Recognizing the potential benefits from privatization, Congress authorized the FAA to establish the Airport Privatization Pilot Program ("APPP") in 1996, which limited participation in the program to five airports.

In an effort to stimulate airport privatization, Congress substantially modified the APPP in the 2018 FAA Reauthorization Act, and renamed the program the AIPP. The Act made several changes to the program: (1) participation in the program is no longer limited to ten airports; (2) the FAA has less discretion in granting exemptions to airport sponsors and private purchasers; (3) the FAA may fund grants of up to $750,000 for predevelopment planning costs related to preparing a privatization application; and (4) perhaps most importantly, the program allows for "partial privatization," in which the airport sponsor has an interest in the entity that purchases or leases the airport. The AIPP has seen only limited use in the United States, most notably at San Juan Airport, which is now run by a private operator under a 40-year lease. Other initiatives to privatize airports, including St. Louis Lambert International Airport International Airport, have stalled in recent months.

The authorization of partial privatization could make participation in the AIPP significantly more attractive to airport sponsors. Partial privatization arrangements are used at major airports outside the United States, such as Paris' Charles De Gaulle Airport. Under a partial privatization, the airport sponsor may remain involved in managing the private airport operator (e.g., through board representation), which may alleviate concerns arising from privatization. The recent failure of the effort to privatize St. Louis' airport suggests that full privatization may face greater political obstacles.[2]

The Future of Airport P3 Projects

Aside from privatization under the AIPP, we may also see greater interest in P3 projects at airports due to a lack of funding from other sources. Recent airport P3 success stories, such as LaGuardia's Terminal B, may generate interest at other airports.

Although private investment may grow, the types of projects undertaken at airports could change dramatically in the post-COVID-19 world. The emphasis on social distancing could lead airports to favor parking and car rental facilities over mass transit, for instance. Cargo facilities could also draw interest as passenger airlines turn to cargo to make up for lost passenger revenue. Meanwhile, infrastructure developments intended to accommodate rising passenger traffic may be less desirable until airport authorities and investors can observe longer-term trends in air travel caused by the pandemic.

Looking forward, investors should also keep a close eye on Congressional legislation to boost infrastructure funding. Although the CARES Act did not allocate revenue for major airport infrastructure projects, Congress could include infrastructure funding in the next COVID-19 relief bill or in other legislation arising from the pandemic.

The INVEST in America Act, recently passed by U.S. House Democrats, would allocate several billion dollars annually to airports over the next five years. The Act would grant airport sponsors $3 billion in funding in 2021, which would increase in $250 million increments each year, up to $4 billion in 2025. Twelve percent of the funds would be set aside for: (a) cargo airports; (b) general aviation, reliever, and nonprimary commercial service airports; and (c) airport emission reduction projects, airport resiliency projects, and airport noise compatibility and mitigation projects. Following the set-asides, the funds would be allocated proportionately across all commercial service airports based on each airport's share of total passenger enplanements (based on calendar year 2019 unless a later year has more total enplanements). Funds can be used on any development project at an airport directly and substantially related to air transportation, as well as on eligible projects under the AIP grant program and projects eligible for financing using PFCs, among other uses.

It remains to be seen whether infrastructure funding will be included in bipartisan legislation and what role the legislation will assign to private investors.

Looking Forward

As the threat of COVID-19 diminishes and as we gain more clarity on the future of air travel, rising interest in airport P3 projects in the United States may be among the long-term unexpected benefits of the pandemic. Private investors could fill an important role in helping U.S. airports recover from the greatest crisis in passenger air travel. Airport sponsors and investors should consider new ways to finance capital projects, including through airport privatization, and should monitor the legal and regulatory framework for further changes intended to promote spending.

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[1] 49 U.S.C. § 40117(b)(4).

[2] There are ongoing efforts in St. Louis to put an airport privatization plan before the city's voters, potentially on the November 2020 ballot. It remains to be seen whether such a plan will be passed and whether investors will be attracted to the project despite opposition from elected officials.

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