

## Key Questions About Move To Privatize Air Traffic Control

By **Linda Chiem**

*Law360, New York (June 6, 2017, 9:37 PM EDT)* -- President Donald Trump's full-throated backing of efforts to spin off air traffic control functions from the Federal Aviation Administration into a nonprofit, nongovernmental organization is an opening salvo in what's likely to be a pitched political battle over revamping a central component of the nation's air travel system.

The White House on Monday laid out a list of principles for reforming the nation's air traffic control system, a serious boost for Republican-led efforts to advance a big-ticket proposal to overhaul the administration of the nation's complex system for directing when aircraft take off and land, as well as what routes they fly in U.S.-controlled airspace.

While there has been widespread industry agreement that the current air traffic control system must be modernized from relying on World War II-era radar to one that relies on satellites, there hasn't been much consensus on whether the federal government or private industry can be more effective in ensuring the transition is done safely and effectively.

"The administration's support for ATC privatization is undoubtedly a shot in the arm for an idea that lost legislative momentum last year," said Kenneth P. Quinn, global chair of Baker McKenzie's aviation practice. "The president's active support guarantees a reinvigorated debate, but the political hurdles and complexities of the issues remain difficult to overcome."

Here are several key questions that Congress will have to answer when it tackles negotiations on ATC reform.

### **Who Would Be in Control?**

Supporters of spinning off air traffic control functions from the FAA contend the agency is mired in bureaucracy and hamstrung by the federal appropriations process, which has slowed the FAA's progress in implementing its own air traffic control modernization effort called NextGen. Stakeholders agree that the current air traffic control system is safe, but it could be far more efficient and make better use of new technology, experts say.

Under the White House blueprint unveiled Monday, which borrowed heavily from the proposed Aviation Innovation, Reform and Reauthorization Act introduced by Rep. Bill Shuster, R-Pa., in 2016, the nation's air traffic control system would no longer be federally funded and controlled but would instead be moved into a separate, autonomous nonprofit organization, the president said.

The new nonprofit entity would have an initial 13-member oversight board made up of individuals nominated by major domestic airlines, airports, general aviation, labor unions and the U.S. Department of Transportation. And there would be a three-year transition period between federal and private control, the White House said.

The 13-member board would be constituted for at least the transition period, plus the first year of operation. After that, decisions about board constitution and members' terms should be left to the discretion of the board. But once the initial board members are nominated, no group should have an exclusive right to name successor board members, the White House said.

The idea behind the proposed governance structure is to ensure board members have fiduciary responsibility solely to the new ATC entity and be free of any financial conflict of interest. Experts say it's also aimed at quieting critics that have long argued the biggest commercial airlines would wield too much influence over any such privatized ATC entity.

"As I understand it, it would give certain interests a role initially, but then over time nobody would be guaranteed a particular number of seats or a particular role," said Venable LLP partner Jim Burnley, the secretary of transportation from 1987 to 1989. "A reform of this size and significance is hard and inherently controversial, and a lot of interests will be affected one way or the other, so to have any administration step up and support it is a major step forward."

### **Who's Going to Pay for It?**

The White House said the new ATC entity should be financially self-sufficient through the collection of user fees that cover both its costs of operations and recapitalization. The White House said all users of the air traffic control system "should pay their fair share" with exceptions for national security users such as U.S. Department of Defense aircraft; defense-contracted flights; foreign military aircraft and diplomatic users — including noncommercial U.S. government and foreign sovereign state aircraft; and public safety users.

"The only entities that would not have to pay in are the federal entities using the system, so they say everyone should contribute something to use the system, but then they carve out themselves," Jack Schenendorf, of counsel with Covington & Burling LLP, told Law360. "That will need to be looked at."

Such user fees could effectively be passed on to travelers, similar to the current passenger fee system used by the FAA. The user-fee model is one used by some independently operated air traffic control systems in other countries, including NavCanada.

"Important aviation stakeholders, particularly business and general aviation, have expressed legitimate concerns about the structure and control of this proposed nongovernmental entity and its reliance on user fees subject only to U.S. DOT review for reasonableness," Quinn said. "We need to hear them out and be sensitive to their concerns."

Those general aviation interests, represented by groups that include the Aircraft Owners and Pilots Association, the National Business Aviation Association, and others, are wary of Trump's support of ATC reform. They've stood up against what they view as the privatization of ATC, saying they're concerned the new controlling entity would limit general aviation access to airports and slap them with a host of new fees and taxes, among other concerns.

“The general aviation community has very real and long-standing concerns, which include but are not limited to user fees. These concerns are based on our operating experiences in these foreign systems and the impact they have had on general aviation,” the groups said in a joint letter to the Trump administration Monday.

“We respectfully request that you provide ample opportunity for all stakeholders and citizens to carefully review, analyze and debate any proposed legislation changing the governance and funding for air traffic control,” they added.

### **What’s the Legislative Vehicle?**

The White House’s list of principles are targets the administration would like to see lawmakers hit when they negotiate legislation to enact air traffic control reform. Experts say it’s unlikely that a stand-alone ATC reform bill would be the way to go, and the proposal would probably be tacked onto a larger, high-priority package.

Lawmakers have a full plate. They’re already looking to overcome their repeated failures to negotiate substantive, long-term changes to aviation programs by tackling what could be the first major FAA reauthorization bill since the FAA Modernization and Reform Act of 2012. That 2012 bill only came after 23 short-term authorization extensions, and itself was followed by more extensions that included last year’s FAA reauthorization bill, which was primarily a funding patch to keep the FAA running until the end of this September.

With that deadline fast approaching, experts say potential legislative vehicles to advance any ATC reform could be the FAA reauthorization bill, which is a must-pass piece of legislation this year, or Trump’s highly touted but still unseen \$1 trillion infrastructure investment package — or even a tax reform bill.

“It seems the clearest path for passage would be combining it with other legislation and challenging the House and Senate to vote against it,” David Whitestone, chair of Holland & Knight LLP’s government section, told Law360. “I don’t know that it could be done by the time the current FAA bill expires [in September], however. The question is: Does the Congress embark on a short-term authorization and do another yearlong authorization? The House and Senate committees are probably beginning to think through how they structure this.”

Schenendorf agreed that there are a lot of legislative options, but any ATC reform would need to have buy-in from both Democrats and Republicans to make it work.

“My instincts are this is so big and so important that if Congress were able to put it together, and it has to be done right, they really could move the ATC out of the FAA,” he said.

### **What Does This Mean for Trump’s Infrastructure Plan?**

Industry stakeholders eagerly anticipating a comprehensive infrastructure investment package, which the Trump administration has teased is imminent, say the ATC principles square with Trump’s favored private investment approach.

Trump’s new infrastructure plan is said to include \$200 billion in direct federal funds, which will be used to leverage \$1 trillion in infrastructure investment over the next decade.

To move ahead with the ATC plan though, the administration would need to iron out the thorny details of the proposal and build a broader legislative consensus, which are “two skills it has yet to master,” Quinn said.

“Looking forward, ATC privatization provides a small glimpse into the administration’s playbook for infrastructure investment — free critical infrastructure from hurdles of bureaucracy, streamline and incentivize private investment, and encourage quicker innovation,” Quinn said. “It’s really the only way to go to address our huge and critical infrastructure needs.”

--Editing by Philip Shea and Aaron Pelc.

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