

Transportation Regulation & Legislation: Midyear Report

By **Linda Chiem**

Law360, New York (June 22, 2017, 6:28 PM EDT) -- With about a month left before Congress takes its summer recess, transportation attorneys are keeping tabs on aviation funding legislation that may include a controversial proposal to overhaul the nation's air traffic control system as well as President Donald Trump's promised, yet still unseen infrastructure investment package.

Transportation industry stakeholders are anticipating what the White House and GOP-controlled Congress will sign off on in terms of a bill to reauthorize the Federal Aviation Administration's programs, potential new guidance or regulations for integrating automated or self-driving vehicles, and an estimated \$1 trillion infrastructure package the administration has said would heavily leverage private investment.

Here, Law360 examines the transportation-related legislation and regulation that attorneys have their eyes on for the rest of the year.

FAA Reauthorization Bill and Air Traffic Control Reform

The Federal Aviation Administration's current stopgap funding authorization expires at the end of September and both the U.S. House of Representatives and Senate this week unveiled legislation to provide long-term funding for the agency's aviation security and airport infrastructure programs, teeing up what will be robust negotiations on a compromise bill.

All eyes will be on whether the ultimate funding bill will include a highly controversial proposal — backed by the White House and some Republicans — to spin off operation and management of the nation's air traffic control system from the FAA to an independent nonprofit entity, experts say.

"This debate is not about safety — that's in the capable hands of our professional air traffic controllers, flight crews, mechanics and aerospace manufacturers," said Kenneth P. Quinn, a Baker McKenzie principal and global chair of its aviation practice. "This is about getting dedicated funding streams for long-range planning and uninterrupted service for an incredibly important, 24/7 operation, with huge capital investment needs."

House Transportation and Infrastructure Chairman Bill Shuster, R-Pa., on Wednesday revived his 2016 proposal to move the nation's air traffic control operations over to a private, nonprofit corporation. Shuster on Wednesday reintroduced his 21st Century Aviation Innovation, Reform and Reauthorization

Act, a version of a six-year FAA reauthorization containing the air traffic control spinoff provision which languished in committee last year and did not advance.

And on Thursday, Sens. John Thune, R-S.D., and Bill Nelson, D-Fla., who serve as the chairman and ranking member, respectively of the Senate Committee on Commerce, Science and Transportation, introduced their version of an FAA reauthorization bill that would fund the agency through 2021.

Earlier in June, top Democrats on the House Transportation and Infrastructure Committee repudiated Republican-led efforts to spin off air traffic control functions from the government by introducing legislation meant to give the FAA more stable funding, rejigger procurement processes and support its operation of the ATC system. The Democrats' bill, which is a stand-alone bill and not an FAA reauthorization bill, came just days after Trump backed an overhaul of the system.

The air traffic control overhaul will weigh heavily on negotiations to lock in long-term funding for the FAA. After years of short-term extensions of the agency, airlines, airports and other industry stakeholders have been eager to see Congress iron out a long-term extension that gives the industry more certainty on what airport improvement projects, security improvements and technology upgrades will get funded.

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

NHTSA Guidance on Automated and Self-Driving Cars

In mid-June, Sen. Gary Peters, D-Mich., along with Thune and Nelson, announced a list of principles for crafting potential bipartisan legislation on self-driving vehicles, specifically for exploring automated vehicle technology and addressing hurdles for testing and deployment of the technology in the U.S.

On June 13, they said any such legislation should hit a number of targets, including prioritizing safety, promoting continued innovation and reduce existing regulatory roadblocks, remaining technology neutral so as to avoid favoring some developers over others, and strengthening cybersecurity.

The latest legislative principles and the fast pace at which automakers and technology companies are developing and integrating semi-autonomous and self-driving technology into cars give more urgency to automakers' and other stakeholders' requests for more regulatory clarity from the federal government, experts say.

Given the complexity of the wireless and other technical components of automated vehicle technology in cars, lawmakers are most likely aiming to put out additional guidance or recommendations on how to go about implementation and deployment but the U.S. is still a couple of years out from binding regulation, according to Morgan Lewis & Bockius LLP partner Tim Bransford.

"I think additional guidance is going to be ongoing and evolving," Bransford said. "But to have completely autonomous navigation completely buttoned down, that would involve the DOT, the FCC and other jurisdictions."

The Trump administration in February indicated it was re-evaluating the September 2016 federal

policy put out by President Barack Obama's administration offering broad federal guidance on how auto manufacturers, technology giants, artificial intelligence developers and other companies should go about testing and deploying their automated car technologies for mainstream America. That set of guidelines, released by the DOT's National Highway Traffic Safety Administration, sought to establish a rigorous safety protocol for carmakers and technology companies to meet, while also seeking to expand the U.S. Department of Transportation's regulatory reach into car design and performance standards.

DHS Immigration Ban and Laptop Ban

Commercial airlines and airport operators are also keenly watching what happens with the Trump administration's revised executive order seeking to block entry into the U.S. of nationals from the six Muslim-majority countries of Iran, Libya, Somalia, Sudan, Syria and Yemen for 90 days. That revised travel ban has since been blocked by district courts — decisions affirmed by both the Fourth and Ninth circuits and which have prompted the administration to appeal to the U.S. Supreme Court.

In addition, they are also wary of the potential expansion to as many as 71 airports worldwide of the U.S. Department of Homeland Security's ban on laptops and large electronics in carry-on luggage aboard U.S.-bound flights. Experts say that laptop ban exposes airlines and airport operators to new safety and compliance risks and has raised more questions about the Trump administration's changing coterie of border security regulations. But it also comes at a time when commercial airlines have been raked over the coals for their passenger-facing policies related to overbooking, seat assignments, baggage handling and more.

An expanded laptop ban will no doubt would create additional challenges for airlines and airport security screeners.

"The airlines are going to have a lot of unhappy passengers who have gotten very used to doing work and watching movies on their laptops," Condon & Forsyth LLP partner Bart Banino said.

U.S. Department of Homeland Security Secretary John F. Kelly recently told members of the House Homeland Security Committee that the agency is keeping all options on the table with regard to improving aviation security, including expanding existing restrictions on large personal electronics in the passenger cabin and working with airlines and foreign partners to raise the bar on their minimum aviation security standards, but especially for U.S.-bound flights.

Experts say the impact of extending the laptop ban to as many as 71 airports globally would be significant — especially when the current ban applies to 10 airports — underscoring President Donald Trump's zeal for heightening restrictions for U.S.-bound travelers coming from regions of the world the administration views as terrorist hotbeds. And it creates other potential risks and liabilities for airlines and airport operators, according to experts, such as the risk of fire if more laptops and lithium ion batteries are packed into the cargo holds of commercial planes.

Trump's \$1T Infrastructure Proposal

One of Trump's biggest campaign promises was his pledge to work with Congress on a sprawling \$1 trillion, 10-year infrastructure investment proposal staked on tax incentives and private investment to stimulate jobs and rebuild highways, bridges and airports.

U.S. Transportation Secretary Elaine L. Chao in May indicated that the president's infrastructure plan

was "weeks away" from being unveiled and was expected to include \$200 billion in direct federal spending to attract the administration's promised \$1 trillion in investments.

Experts have told Law360 that Trump's zeal to bolster American jobs and his selection of Chao to help direct the effort bodes well for discussions on increasing investment in infrastructure — an issue that has largely attracted bipartisan support but has not yet taken center stage as the Trump administration continues to press some of its other priorities such as health care reform and tax overhaul.

"I'm hoping the administration provides us with more information on its broader infrastructure plan," Quinn said. "I believe we need to unleash private investment to help rebuild American infrastructure, without ballooning the budget with trillion dollars of more debt."

Details are scarce and questions still remain as to how the administration will find ways to pay for such a proposal, given Congress' repeated refusals to provide long-term infrastructure funding. The gridlock issue has long been finding a mechanism for replenishing the federal Highway Trust Fund that pays for surface transportation projects. The fast-draining fund receives money from a federal fuel tax of 18.4 cents per gallon on gasoline and 24.4 cents per gallon on diesel fuel and related excise taxes.

But the tax has not been raised since 1993, and its ability to fund highway infrastructure repairs and upgrades has shrunk over time, leaving a hole of approximately \$15 billion each year that needs to be filled by other means. And lawmakers continually have to stave off the fund's insolvency with offsets, bailouts and general fund infusions.

--Editing by Katherine Rautenberg and Kelly Duncan.