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COMMENTARY

The Plan for the Future of American Infrastructure

A Look Into the Opaque Crystal Ball for Infrastructure Initiatives in the First 100 Days of the Trump Administration

President Donald J. Trump's "America's Infrastructure First" plan is one of the Trump Administration's priorities during his first 100 days in office. Throughout the campaign, President Trump heralded his plan to build and restore highways, tunnels, airports, bridges, and water systems across America and promised a $1 trillion investment in the infrastructure sector over a 10-year period. Leaders from both parties acknowledge the nation's deteriorating infrastructure, and there have been expressions of support from both sides of the aisle for some sort of development and construction program. Aside from the overall proposed sticker price of $1 trillion, there are scant details about the structure of the plan or the sources of the funding needed to achieve an investment of that size. Senior policy advisors to the Trump campaign published a report contrasting the Trump and Clinton infrastructure plans and providing potential mechanisms to address the funding requirements. These advisors advocated for the reduction or removal of administrative and regulatory requirements to ease construction and the use of tax credits to attract equity investment.

Statements made by President Trump during the campaign and by the White House in the early weeks of the Administration provide a glimpse at how the Administration might proceed. President Trump's "Contract with the American Voter," a campaign document issued in October 2016, outlines a 100-day action plan. The document mentions contemplated new legislation, styled as the American Energy and Infrastructure Act, but does not dive deeply into its details. Upon President Trump's inauguration, the White House website was updated with "An America First Energy Plan," outlining in broad themes the President's energy policies. President Trump also has issued several infrastructure-related Executive Orders and Presidential Memoranda. This *Commentary* will provide some background to the major infrastructure issues needing attention and will explore the possible methods by which the Trump Administration may implement its expansive infrastructure plan.

Elements of Contract with the American Voter

The Contract with the American Voter issued by the Trump campaign contains many references to infrastructure that hint at the Administration's plan, and the White House already has been acting on some of these items. One of the key components of the

Contract involves “lift[ing] the Obama-Clinton roadblocks and allow[ing] vital energy infrastructure projects, like the Keystone Pipeline, to move forward.” The Keystone Pipeline would transport crude oil between Canada, Montana, and North Dakota. In 2012, the State Department denied permit approval to the project as not being in the national interest.

On January 24, 2017, President Trump issued a Presidential Memorandum inviting the project sponsor to resubmit its application to the State Department and directing the State Department, the Army, and the Department of the Interior to act on the application in an expedited manner. Given the high-profile nature of this project, it is likely to encounter further challenges from its opponents despite that presidential encouragement.

Further complications arise when considering a project like the Dakota Access Pipeline, another high-profile energy infrastructure project, which is located completely within the United States and, therefore, not subject to approval by the Secretary of State or the President. On January 24, 2017, President Trump issued a Presidential Memorandum directing the Army to take action on the Dakota Access Pipeline. On February 7, 2017, the Army notified Congress that it will grant an easement for the Dakota Access Pipeline. President Trump and his Administration are trying to revive the Dakota Pipeline and Keystone Pipeline through the use of executive action, but the future of these pipelines may be decided in the courts.

The Contract with the American Voter also states that the Trump Administration will “cancel billions in payments to U.N. climate change programs and use the money to fix America’s water and environmental infrastructure.” The cancellation of these payments would most likely result from a withdrawal from the United Nations Framework Convention on Climate Change, and such a withdrawal is viewed as unlikely.

Finally, the Contract with the American Voter makes reference to the American Energy and Infrastructure Act as one of the legislative measures that President Trump will pursue in the first 100 days of his Administration. In describing the planned legislation, the Contract provides that it will “leverage public–private partnerships, and private investments through tax incentives, to spur $1 trillion in infrastructure investment over ten years. It is revenue neutral.” Consistent with this theme, the America First Energy Plan advocates “tak[ing] advantage of the estimated $50 trillion in untapped shale, oil, and natural gas reserves” and using “the revenues from energy production to rebuild our roads, schools, bridges and public infrastructure.” Possible elements of this infrastructure plan are described in more detail below. Note that there has been no public announcement suggesting that the proposed Trump Administration infrastructure plan will be limited or focused in scope to any specific asset class.

General Infrastructure Lay of the Land

There seems to be no disagreement that America’s infrastructure is lacking based on many criteria. The United States ranks ninth in road investments as a percent of GDP and 12th on the Global Competitiveness Index in infrastructure. An investigation by *USA Today* “identified almost 2,000 additional water systems spanning all 50 states where testing has shown excessive levels of lead contamination over the past four years.” The American Society for Civil Engineers has identified various pressing projects in America: repairing bridges and airports, dams and levees, seaports and waterways, and mass transit and freight rail. On January 24, 2017, the *Kansas City Star* and *McClatchy DC Bureau* reported on a list of approximately 50 infrastructure projects at an estimated cost of $137.5 billion that had been provided to the National Governor’s Association by the Trump transition team.

U.S. infrastructure programs have traditionally been operated at the state and local levels, where financing solutions often include direct spending, tax-exempt debt issuance, and public–private partnerships. At the federal level, the Transportation Infrastructure Finance and Innovation Act (“TIFIA”) and Water Infrastructure Finance and Innovation Act (“WIFIA”) lending programs and Build America Bonds (“BABs”) are all federal sources of financing for infrastructure projects.

TIFIA provides three forms of assistance for transportation infrastructure financing: direct loans, loan guarantees, and standby lines of credit. Those eligible for TIFIA financing include state transportation departments, public transit operators, local governments, railroad companies, private entities, and special transportation authorities. TIFIA projects must be quite large (usually at least $50 million in capital construction costs) and have a dedicated revenue source to enable repayment of the indebtedness. TIFIA is basically a lending program that is limited to transportation projects.

Similarly, the WIFIA program intends to incentivize "water and wastewater infrastructure by providing long-term, low-cost supplemental credit assistance under customized terms to creditworthy water and wastewater projects of national and regional significance." This program facilitates the financing of projects with lower investment requirements than TIFIA (at least $20 million for larger communities and $5 million for smaller communities). It also requires a dedicated source of revenue, that the projects are creditworthy, and only up to 80 percent of the eligible project costs may be financed through the program.

BABs permit the issuance of taxable bonds instead of the usual tax-exempt bonds, providing the government issuer with access to more investors, including foreign investors, pension funds, nonprofits, and others that do not have U.S. tax liabilities. These bonds were usually offered at a higher interest rate. BABs must be made creditworthy either through strong guarantees or equity support, and they still need to be serviced through an identifiable revenue stream. Trump campaign policy advisors looked favorably on BABs but noted that "[t]hey are simply a tool, not a solution in and of themselves."

Although the United States does not have a federal public–private partnership program or comprehensive federal infrastructure agency, some federal departments have utilized or are starting to utilize public–private partnerships to finance infrastructure projects. The Federal Highway Administration has encouraged public–private partnerships, some utilizing TIFIA funds, and many of these projects have already been completed. These include HOV/HOT lane projects in Virginia and North Carolina, express lanes in California and Texas, the Port of Miami tunnel, and bridge replacements in New Jersey, New York, and Virginia, among others.

Most states have laws allowing for the financing of infrastructure projects through public–private partnerships, spending, and debt issuance. Recent state-level initiatives to raise financing for infrastructure projects include the Los Angeles County Metropolitan Transportation Authority referendum known as Measure M, which would raise sales tax by one-half cent to generate an estimated $860 million a year (in 2017 dollars) for highway and transportation infrastructure projects in the Los Angeles area. The Dulles Transit Extension in Washington, D.C., which is currently under construction, is being funded by the federal government, the Virginia state government, Dulles airport, local county governments, and through fee increases on the existing toll road leading to the airport. Another promoter of infrastructure projects procured at the state level through public–private partnerships is Florida, where the Florida Department of Transportation currently has several projects in the pipeline either in consideration (Tampa Bay Express), procurement (improvements to I-395), construction (portions of I-4 Ultimate highway), and operation (Port Miami Tunnel).

Private Sector and Comparative Experience

Unlike the United States, foreign jurisdictions such as the United Kingdom, France, Australia, Chile, Peru, Colombia, and Brazil all have a dedicated national public–private partnership program, legislation, or comprehensive federal infrastructure agency. Many Latin American countries have a dedicated agency or department that coordinates with the relevant regulatory authority (transportation or airport authority, for example), to identify potential infrastructure projects and to solicit bids for the concession or construction of such projects. Some jurisdictions even allow for the presentation of unsolicited projects (Brazil, Chile, Colombia, and Los Angeles County, for example) by prospective sponsors. A bidding process is then opened, during which multiple private sponsors submit their proposals to the agency. The agency will assess the bids, select a preferred bidder, and grant it the concession. The private sponsor works on designing, financing, building, operating, and maintaining the concession per agreement with the government and receives revenues from the user fees generated by the project. If the project does not generate user fees or if the project is not profitable, then the government may provide an availability payment, minimum guaranteed payment, or other mechanism to compensate the private sponsor.

Public–private partnerships in infrastructure projects have seen a boom worldwide. Fundraising for infrastructure projects in the third quarter of 2016 reached an all-time high with Brookfield Infrastructure Fund III raising $14 billion and Global Infrastructure Partners expecting to raise $15.75 billion by year-end. These numbers demonstrate the strong appetite for equity investment in infrastructure projects currently available for deployment in this space.

Most Likely Path Forward

The Trump Administration's infrastructure plan is supposed to be revenue neutral and result in up to $1 trillion dollars of infrastructure projects over a 10-year period. According to available information, the plan will rely primarily on private investment and will include tax incentives to make investment and financing more attractive. Elaine Chao, the new Secretary of Transportation, in her confirmation hearings confirmed this approach when she stated, "The government does not have the resources to address all the infrastructure needs within our country." She stated further that "there is a significant difference between traditional program funding and other innovative financing tools, such as public–private participants." The infrastructure plan would provide a tax credit equal to 82 percent of the equity required for a given project, effectively lowering the cost of financing the project by approximately 18 to 20 percent. From a fiscal revenue perspective, the cost of the tax credits would theoretically be recuperated from the incremental tax revenues arising from project construction through additional wages and contractor profits, making the plan revenue neutral. A further possibility set forth by the Trump Administration is to encourage investment of private capital, which would be a tax break for offshore capital repatriated to the United States. Companies paying the 10 percent tax on repatriation of overseas retained earnings could use the tax credit on infrastructure equity investment to offset their tax liability on bringing money back into the United States, thereby converting a tax liability into an equity investment in an infrastructure project. The plan could be applied whether the facility is operated by a governmental agency, a private player, or through a public–private partnership.

The Trump Administration's infrastructure plan would not be the first tax credit program to spur development and construction of large capital-intensive assets. The Federal Renewable Energy Production Tax Credit ("PTC") is an inflation-adjusted tax credit for electricity generated by qualified energy resources and typically allocated by the sponsor to an unrelated tax credit investor during the taxable year. The PTC has encouraged infrastructure development in energy, particularly in wind, geothermal energy, and other technologies, and has been extended numerous times. An investment tax credit ("ITC") was utilized in the solar energy industry and resulted in a large increase in domestic energy production. The New Market Tax Credit ("NMTC") was designed to increase the flow of capital to businesses and low-income communities by providing a tax incentive to private investors. Between 2003 and 2014, $38 billion in direct NMTC investments were made in businesses, and these investments leveraged nearly $75 billion in total capital investment to businesses and revitalization projects in communities with high rates of poverty and unemployment. Also during that period, it is reported that the NMTC generated about 750,000 jobs, at a cost to the federal government of less than $20,000 per job. It is unclear whether the Trump infrastructure plan would incorporate or integrate these existing tax credit programs into an overarching infrastructure plan.

The plan will likely focus on new projects that generate a revenue stream large enough to attract private investors. The contemplated tax incentive could make borderline projects more attractive to investors. These projects would most likely generate users fees that could be utilized to compensate private investors and will likely fall along the lines of traditional public–private partnerships. An issue arises, however, when assets are not projected or designed to generate user fees or produce profits. Those projects would require alternative means to compensate private investors, such as a minimum guaranteed payment or financing through debt, such as the BABs program.

Critics of the infrastructure plan focus on how difficult it will be to implement and the amount of government spending likely needed for a successful result. It is mathematically challenging to arrive at a solution in which no government spending is required in connection with a $1 trillion construction program. Filling the funding gap could entail either raising taxes or increasing the deficit, both of which will face fierce resistance from a Republican Congress. On the other side of the aisle, critics have focused on the fact that the infrastructure plan could simply be a tax break for the wealthy. Critics further emphasize that the infrastructure plan will incentivize only those projects that are high profile and profitable as opposed to other projects that might be more pressing but less profitable. To that end, Democrats have recently proposed an alternative infrastructure plan that would rely primarily on the federal government for funding.

Stay Tuned as the Clouds Dissipate and the Crystal Ball Begins to Clear

Much is still unknown about the Trump Administration's infrastructure plan. The Administration's focus on private investment to boost infrastructure projects is promising as potentially promoting an increased use of public–private partnerships in the United States. Still to be seen, however, is whether the proposed infrastructure plan is feasible and whether the plan will attract private investors to lower-profile, but more pressing, infrastructure projects. Stay tuned for the second installment of this *Commentary*, which we hope will provide clarity to the cloudy landscape as more details emerge from President Trump's Administration. In any event, after no clear proposals for the infrastructure plan emerged during January, this "First 100 Day Priority" will likely slip due to the focus on immigration reform and confirmation of cabinet selections and the Administration's recent Supreme Court nominee.

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