One Firm Worldwide℠

WHITE PAPER

March 2019

The "Great Rebuilding of America's Crumbling Infrastructure"

From the start of his presidential campaign, President Donald J. Trump made America's "crumbling infrastructure" one of his top priorities, promising a $1 trillion investment in the infrastructure sector over a ten-year period. During the first two years of President Trump's presidency, little was done to further this priority. However, an infrastructure bill may soon be on the horizon. Leaders from both political parties have publicly expressed support for passing an infrastructure bill. However, despite their common interest in revitalizing America's infrastructure, the parties are divided on how to successfully implement a $1 trillion infrastructure project. This Whitepaper will provide a brief background on American infrastructure funding mechanisms, a comparative evaluation of private investment in infrastructure, and the possible methods Congress and the Trump administration could use to implement the proposed $1 trillion infrastructure plan.

TABLE OF CONTENTS

Most Americans agree that America's infrastructure is deteriorating and outdated. In its 2017 report, the American Society for Civil Engineers ("ASCE") gave America's infrastructure a score of a "D+" on its second consecutive report. According to the ASCE, the poor infrastructure in the United States costs Americans thousands of dollars per year.

From the start of his presidential campaign, President Donald J. Trump made America's "crumbling infrastructure" one of his top priorities, promising a $1 trillion investment in the infrastructure sector over a ten-year period. During the first two years of President Trump's presidency, little was done to further this priority. However, an infrastructure bill may soon be on the horizon. In this year's State of the Union address, President Trump noted America's deteriorating infrastructure and emphatically expressed the "necessity" in passing an infrastructure bill. President Trump called on the members of Congress to unite and pass a bipartisan infrastructure bill with the hope of investing in "cutting-edge industries of the future."

On March 11, 2019, President Trump unveiled his fiscal 2020 budget request. In an attempt to reaffirm his priority on infrastructure, the budget request allocated $1 billion towards Better Utilizing Investments to Leverage Development ("BUILD") Transportation Grants, $2 billion in Infrastructure for Rebuilding America ("INFRA") Grants, $300 million in "competitive" highway/bridge grants, and $200 billion in federal spending on additional infrastructure projects. Although an "Infrastructure Initiative" fact sheet accompanied the budget request, it did not provide specific details for an infrastructure bill, perhaps in an attempt to delegate the task to Congress. Leaders from both political parties have publicly expressed support for passing an infrastructure bill to revitalize America's highways, airports, bridges, and transit and water systems and to invest in new technology, such as creating a 5G network and advancing artificial intelligence. However, despite their common interest in revitalizing America's infrastructure, the parties are divided on *how* to successfully implement a $1 trillion infrastructure project. This *Whitepaper* will provide a brief background on American infrastructure funding mechanisms, a comparative evaluation of private investment in infrastructure, and the possible methods Congress and the Trump administration could use to implement the proposed $1 trillion infrastructure plan.

FUNDING INFRASTRUCTURE IN AMERICA

Federal Government

Recently, the federal government has transitioned to playing a "secondary" role in funding infrastructure projects. One way the federal government assists in funding infrastructure projects is by providing grants, such as the BUILD Transportation Grants and the INFRA Grants. However, these grants are limited in scope and amount and do not provide a viable long-term solution to the deteriorating infrastructure in America. In addition to providing grants, the federal government also assists state and local governments with obtaining the means to fund large infrastructure projects. For example, the federal government implemented the Transportation Infrastructure Finance and Innovation Act ("TIFIA") and the Water Infrastructure Finance and Innovation Act ("WIFIA") to assist state and local governments and private investors in obtaining financing for qualified projects.

From 2009 to 2010, the federal government also offered Build America Bonds ("BABs"). BABs were taxable bonds used to attract investors who do not have U.S. tax liability, such as pension funds and nonprofits. Recently, some members of Congress and President Trump's administration have discussed possibly renewing BABs in a new infrastructure bill.

Another source of federal revenue is the Highway Trust Fund (the "Fund"). The Fund is capitalized primarily by a federal tax on gasoline and diesel fuel. It is divided into two accounts: the Highway Account and the Mass Transit Account. The Highway Account distributes approximately 85 percent of the Fund's dollars to roadway infrastructure while the remaining 15 percent is distributed via the Mass Transit Account for "transit projects, such as rail, buses, and streetcars." Although spending has continually increased, the federal tax on gasoline has not changed since 1993. Without increased revenue, the Fund is expected to expire by 2022 unless Congress introduces a bill increasing revenue for the Fund.

According to his campaign website, President Trump's main infrastructure priority is rural America, especially areas where Americans are without broadband access. In response, the United States Department of Agriculture is offering "600 million in loans and grants to help build broadband infrastructure in rural America." The National Telecommunications and Information Administration is also streamlining permit requests for broadband infrastructure to incentivize private investors to apply for federal assistance.

State and Local Government

State and local governments also play an important role in obtaining financing for large infrastructure projects. State and local governments may issue private activity bonds ("PABs") to investors of certain infrastructure projects. These types of bonds are especially appealing to investors with U.S. tax liabilities because the interest earned on PABs is tax-exempt so long as the bond is a qualified bond. Because of this benefit, the eligibility requirements are strict. The associated project must serve some public benefit and cannot be used to finance airplanes, health club facilities, gambling facilities, stadiums, golf courses, oil refineries, or liquor stores. Additionally, the Internal Revenue Code currently limits the total amount of PABs to $15 billion. Currently, only $5 billion in PABs remain under the statutory limit.

And lastly, public-private partnerships ("P3s"), use "private capital to finance and build major public infrastructure projects." P3s are becoming increasingly popular partially due to need and political restrictions on obtaining government grants. Although the federal government does not have a P3 program, thirty-three states have some sort of P3-enabling legislation, and almost half of the states, including Florida, Georgia, Illinois, Ohio, and Washington, have "broad" enabling legislation promoting P3s. Traditionally, P3s were used for transportation projects, but more recently, P3s are being used for different types of projects such as courthouses and university facilities. Some reports also predict an increase in P3s in the health care industry to renovate publicly-owned hospitals.

THE FUTURE OF AMERICA'S "CRUMBLING" INFRASTRUCTURE

With respect to America's infrastructure, the ASCE scored seven out of 16 categories as a "D" or lower, and no single category received a score above a "C+." There is no question that America's infrastructure is in desperate need of rehabilitation and modernization. However, the question remains as to how America will rebuild its crumbling infrastructure. With a divided Congress, both parties will have to work in a bipartisan manner and compromise to pass an infrastructure bill before August 2019, after which time, representatives will shift focus to campaigning.

Proposed Piecemeal Infrastructure Legislation

On January 16, 2019, the Move America Act was introduced in the Senate. The bill creates bonds and credits for qualifying projects such as airports, ports, transit, roads, bridges, and freight. The Move America Bonds allow states to issue tax-exempt bonds for P3s while the Move America Credits allow smaller states the "ability to trade in some or all of their bond allocation for federal tax credits at a 25 percent rate"; this credit is available for "direct investment in a project." The Move America Act is currently assigned to the Senate Finance Committee.

On February 6, 2019, the Revitalizing American Priorities for Infrastructure Development Act ("RAPID") was introduced to the Senate. The RAPID Act streamlines the application process of TIFIA loans by raising the "threshold for securing multiple credit rating opinions" from $75 million to $150 million. The RAPID Act would also increase transparency by creating an online system with status updates for projects waiting to receive TIFIA assistance. Currently, the RAPID act is assigned to the Senate Environment and Public Works Committee.

After not generating any traction in January 2018, two senators reintroduced the Building United States Infrastructure and Leveraging Development ("BUILD") Act to the Senate on February 6, 2019. The BUILD Act increases the statutory cap on PABs from $15 billion to $20.8 billion for highway and freight improvement projects. Senator John Cornyn III, one of the co-sponsors for the BUILD Act, says the BUILD Act will "help finance improvement projects through [P3s], resulting in minimal cost to taxpayers with maximum impact on America's roads, bridges, and rails."

Much-Needed Revenue

To adequately capitalize the Fund and consequentially increase revenue for infrastructure projects, many senators suggest raising the federal gasoline tax and implementing a vehicle-miles-traveled ("VMT") tax. The new VMT tax was proposed as a result of the increasing number of electric vehicles. However, a VMT tax will require monitoring of the number of miles driven and will likely raise significant privacy concerns. Moreover, some representatives think the VMT tax is inherently unfair (e.g., truck driver versus electric vehicle commuter and the impact each has on the environment). Also, the U.S. House Transportation and Infrastructure Committee Chairman Peter DeFazio suggested increasing "the cap on the passenger facility charges assessed by airports." However, a Republican majority Senate will likely hesitate to increase taxes, and instead will likely focus on creating incentives for private investment.

According to Ray H. LaHood, the former transportation secretary for the Obama administration, "private investors are willing to invest in U.S. infrastructure projects." LaHood says the federal government can incentivize private investment by being a "reliable funding partner." Incentivizing private investment and P3s should be a top priority to make available the funds necessary to complete infrastructure plans. Incentives can include streamlining the federal permit process similar to the process in the Netherlands, increasing the cap of tax-exempt bonds, and creating innovative financing. Also implementing a "fair risk-return framework" similar to Singapore with realistic and reasonable distribution of risk to private partners will likely harvest more P3s. However, the growing distrust toward large, private corporations and the tax breaks associated with investing in these projects may not pass muster with the Democrat majority in the House of Representatives.

LOOKING AHEAD

In its meeting on February 7, 2019, the U.S. House Transportation and Infrastructure Committee said it needed a "signal" from President Trump's administration on what to include in an infrastructure bill. A few weeks later, President Trump released his budget request for 2020, allocating billions in infrastructure spending. Although the budget request is not sufficient to entirely fund President Trump's $1.5 trillion infrastructure plan, it is the starting point for negotiations.

Congress' recent legislative proposals are a step in the right direction. However, despite Congressional efforts, there is speculation that President Trump may be unwilling to work with Democrats without receiving funding for a border wall. This may cause delays in passing an infrastructure bill because Democrats will likely hold firm on not approving funding for the border wall. Another impediment may stem from Senate Minority Leader Chuck Schumer's demand for an infrastructure bill to address climate change because the Republican Senate will likely oppose climate change measures.

In any event, after two years of President Trump's administration, the infrastructure bill is still an enigma. Neither President Trump nor Congress have a clear proposal for the infrastructure plan. But one thing is for certain: rehabilitating America's crumbling infrastructure is a no longer an option—it is a necessity.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Richard P. Puttré
Miami
+1.305.714.9704
rputtre@jonesday.com

Brian L. Sedlak
Chicago
+1.312.269.4334
brianlsedlak@jonesday.com

Michelle Hogan
Miami
+1.305.714.9707
mhogan@jonesday.com