EYES ON WASHINGTON

February 13, 2018

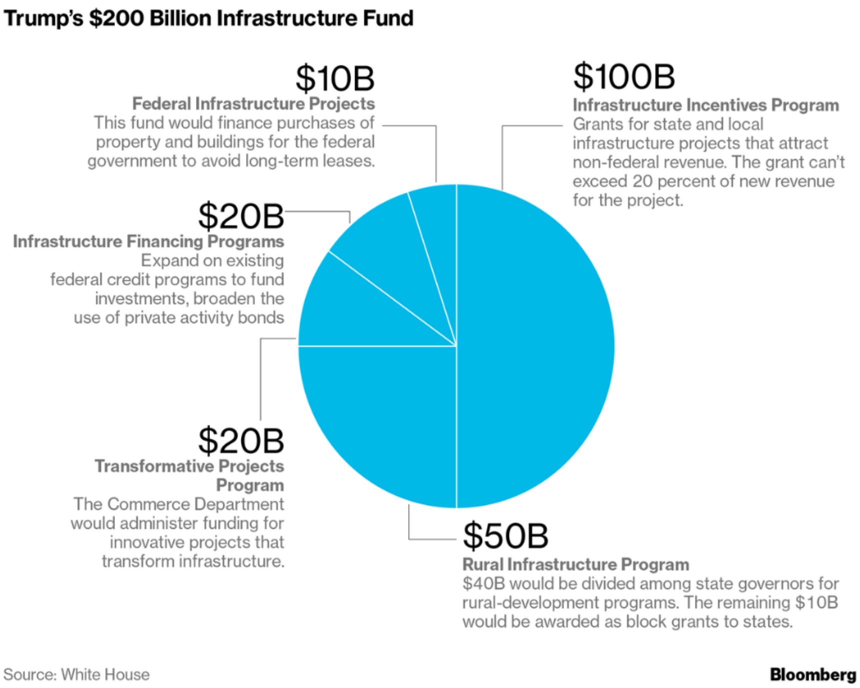
By Lauri A. Hettinger | Michael K. Friedberg | Paolo Mastrangelo

Rich Gold
Practice Group Leader
Public Policy & Regulation Group
202.457.7143
rich.gold@hklaw.com

Legislative Outline for Rebuilding Infrastructure

On February 12, 2018, the White House unveiled its 55-page proposal for infrastructure investment, the *Legislative Outline for Rebuilding Infrastructure*. The sweeping proposal seeks to inject funding into several key areas and priorities. Broadly, the proposal outlines $200 billion in overall funding, as depicted below in Figure 1.

Figure 1



As Figure 1 depicts, the Administration will seek to target Federal money to projects with significant funding contributions from States, local governments, private entities, and other non-Federal sources and offers recommendations for project streamlining. It does not, however, include any new revenue to pay for the $200 billion of new Federal spending.

Without identification of funding sources, it is doubtful that Congress will be able to pass infrastructure legislation. Congressional committees have

Find us on Facebook and Twitter

Holland & Knight's Public Policy & Regulation Group is now on Facebook and Twitter! Join the conversation by clicking the icons below, and spread the word.

started to hold hearings on infrastructure including several on water infrastructure and the Water Resources Development Act (WRDA), the legislation that authorizes U.S. Army Corps of Engineers policy and projects. There is a possibility that several of the water related policy provisions could be included in WRDA legislation that the House Transportation and Infrastructure and Senate Environment and Public Works Committees are hopeful to pass this year.

Infrastructure Incentives Program Funding

Funding:

A total of $100 billion for a new incentive (competitive) grants program. This money would be distributed primarily between U.S. Department of Transportation (DOT), Army Corps of Engineers (Corps), and the U.S. Environmental Protection Agency (EPA) —and then other Federal agencies could ask DOT, the Corps, and EPA for funding.

The amount of an incentive grant would be capped at 20 percent and could be combined with a Federal loan or a private activity bond (PAB). Each State cannot receive more than 10 percent of the total amount available under the Incentives Program.

Applicability:

The proposal says the program "would provide support to wide-ranging classes of assets, including the following governmental infrastructure: surface transportation and airports, passenger rail, ports and waterways, flood control, water supply, hydropower, water resources, drinking water facilities, wastewater facilities, stormwater facilities, and Brownfield and Superfund sites."

Program:

Each lead Federal agency would solicit applications after the enactment of the Incentives Program and every six months thereafter, and each agency will determine the content, format and timing of the applications. Potential project sponsors could apply to its lead Federal agency for a grant, which will be judged primarily on how much new non-Federal revenue can be brought to the table. State/local sponsors who enacted a tax increase for infrastructure in the three years before February 2018 would get some credit for those revenues on a sliding scale which was not described in the proposal. The agencies "would calculate each application score by multiplying the weighted score from the evaluation criteria by the percentage of non-Federal revenues (out of total revenues) that would be used to fund the project or program of projects."

Evaluation Criteria:

- The dollar value of the project or program of projects (*weighted at 10 percent*)
- Evidence supporting how the applicant will secure and commit new, non-Federal revenue to create sustainable, long-term funding for infrastructure investments (*weighted at 50 percen*t)
- Evidence supporting how the applicant will secure and commit new, non-Federal revenue for operations, maintenance and rehabilitation (*weighted at 20 percent*)
- Updates to procurement policies and project delivery approaches to improve efficiency in project delivery and operations (*weighted at 10 percent*)
- Plans to incorporate new and evolving technologies (*weighted at 5 percent*)
- Evidence supporting how the project will spur economic and social returns on investment (*weighted at 5 percent*)

Rural Infrastructure Program

Funding:

A total of $50 billion for grants to rural areas that lack the tax base or the passenger/freight throughput to utilize much financial leveraging. 80 percent of that money ($40 billion) would be given out as block grants to governors via some kind of rural population/rural road-miles formula that is not spelled out in the plan. The goal is that this block grant money would have very few Federal strings attached. The other 20 percent would go for "performance grants" selected by the Federal government.

These grants are intended for rural areas with populations of less than 50,000 and there would also be a set aside for Tribal infrastructure and territorial infrastructure.

Applicability:

The proposal says the program would support traditional transportation infrastructure as well as broadband, water and waste, power and electric and water resources. Further, the program only would apply to the specified asset classes and to other infrastructure that is essential to the operation of those assets.

Evaluation Criteria:

In addition to receiving formula funds, States could apply for rural performance grants.

- Qualification for rural performance grants will require States to:
  - Publish a comprehensive rural infrastructure investment plan.
  - Demonstrate the quality of any investments planned with rural performance funds.
  - Demonstrate how they will leverage formula funds with Federal credit programs and rewarding rural interstate projects through the infrastructure incentives program.

Transformative Projects Program

Funding:

A total of $20 billion, led by the U.S. Department of Commerce, for projects that are likely to be commercially viable, but have characteristics that otherwise deter private sector investment. The goal is to fund riskier projects that could have transformational effects if successful. Infrastructure sectors covered by this program could include, but would not be limited to transportation, clean water, drinking water, energy, commercial space, and broadband.

Eligible funding could be used for:

- Up to 30 percent of eligible costs under the demonstration track
- Up to 50 percent of eligible costs under the project planning track
- Up to 80 percent of eligible costs under the capital construction track

Evaluation Criteria:

To be determined by a Department of Commerce led committee that would be comprised by other relevant cabinet agencies.

Other Important Factors

This program is intentionally vague in details on how this would be implement. The point is to create a program that is flexible enough so the decision makers could be as creative as possible in funding innovative but risky projects.

Infrastructure Financing Programs

Funding:

A total of $20 billion to advance major, complex infrastructure projects by increasing the capacity of existing Federal credit programs and by broadening the use of private activity bonds (PABs).

- A total of $14 billion to be given to existing Federal credit programs to pay for credit subsidy authority to make new loans and loan guarantees to sponsors of infrastructure projects.
  - Expand DOT Transportation Infrastructure Finance and Innovation Act (TIFIA) Funding and Broaden Program Eligibility
    - Additional budget authority
    - Support airport and non-Federal waterways and port financing options
  - Expand Federal Railroad Administration (FRA) Railroad Rehabilitation and Improvement Financing (RRIF) and Broaden Program Eligibility.
    - Additional budget authority for RRIF subsidy costs for 10 years
    - Provide funding for RRIF credit risk premium
  - Expand Environmental Protection Agency (EPA) Water Infrastructure Finance and Innovation Act (WIFIA) Funding and Broaden Program Eligibility
    - Eliminating lending limit of $3.2 billion and provide additional budget authority to EPA for subsidy costs
    - Broadens the eligibility of the program
      - Includes non-Federal flood mitigation navigation and water supply.
      - Eliminate requirements under WIFIA for borrowers to be community water systems.
      - Authorizes Brownfield rehabilitation and cleanup of Superfund sites under WIFIA.
      - Reduces rating agency opinions from two to one for all borrowers.
      - Provides EPA authority to waive the springing lien in certain lending situations.
      - Increases the base level of administrative funding authorized to ensure EPA has sufficient funding to operate the WIFIA program.
      - Removes the restriction on the ability to reimburse costs incurred prior to loan closing under WIFIA.
      - Expands the WIFIA program to authorize eligibility for credit assistance for water system acquisitions and restructurings.
      - Expands WIFIA authorization to include Federal deauthorized water resource projects.
  - Expands U.S. Department of Agriculture Rural Utilities Service (RUS) lending programs funding
- A total of $6 billion to represent the estimated cost to the Treasury over 10 years of the lost tax revenue because of the increased issuance of PABs paying tax-exempt interest that will be issued under the more expansive PAB rules proposed in the plan.

Changes to Existing Programs

Highways

- Allow States to toll existing Interstates, as long as the toll proceeds are used for infrastructure.
- Provides flexibility for the States to commercialize Interstate rest areas.
- Increases the threshold for Federal Highways Administration (FHWA) "major project oversight" rules from $500 million to $1 billion per project. Amending the law to raise the threshold for major projects from $500 million to $1 billion would remove unnecessary oversight requirements from smaller, less complex projects that are routinely managed by FHWA and state departments of transportation.
- States would be allowed to pay the Federal government back for the Federal contribution for already completed highway projects to be relieved of Federal compliance that is attached to that project. These Federal requirements typically include "restrictions on tolling; requirements pertaining to the location

of a commercial plaza within the right-of-way of an Interstate highway; restrictions on Interstate access; and compliance with size and weight standards, highway beautification standards, and high occupancy vehicle lane operation standards."
- Allows states to do utility relocation before the National Environmental Policy Act (NEPA) process is completed.

Mass Transit

- Mandates "value capture" as a component of all new subway and light rail projects and would eliminate existing legal constraints on the use of public-private partnerships in mass transit.
  - The American Public Transportation Association (APTA) defines value capture as "instruments allow jurisdictions to collect revenue in specific areas and direct that revenue towards specific improvements." Mechanisms include: special assessment districts, tax increment financing (TIF), impact fees, joint development, and split-rate property taxes.
- The Expedited Project Delivery for Capital Investment Grants (CIG) Pilot Program, which was created in the Fixing America's Surface Transportation (FAST) Act, would be permanently codified and its Federal share is increased from 25 percent to 50 percent.
  - In this pilot program, the Federal Transit Administration (FTA) can select up to eight New Starts, Small Starts, or Core Capacity projects that are supported through public-private partnerships during the FAST Act authorization (FY 2016-2020).

Airports

- The proposal would allow small hub airports to apply for permission to levy passenger facility charges (PFCs) and relieves the paperwork that now currently only applies to non-hub airports.
- Expands the existing Federal Aviation Administration (FAA) Airport Privatization Pilot Program. The proposal removes the current cap that only allows 10 airports, including only one large hub airport. Also changes the existing requirement that 65 percent of carriers at an airport must approve privatization to a simple majority.
- Allows airports to offer incentive payments for early completion of Airport Improvement Program (AIP) projects.
- Limits FAA approval and oversight of non-aviation development activities at airports.

Rail

- Lowers the statute of limitations for challenges to the permitting of rail projects from two years to 150 days (allowed for highway and transit project in the FAST Act).

Water

- Allows "privately owned public-purpose treatment works" to utilize the Clean Water State Revolving Fund (SRF), similar to the Safe Drinking SRF.
- Provides the EPA with similar statutory authority to the former FHWA SEP-15 authority to experiment with new project delivery provisions. This will allow the EPA Administrator "to explore alternative and innovative approaches" to the overall project delivery process (contracting, compliance with environmental requirements, right-of-way acquisition, and project finance) and to develop more effective approaches to project planning, project development, finance, design, construction, maintenance, and operations." State departments of transportation and local transportation agencies have been able to utilizes SEP-15 to expedited project delivery.
- Provides "flexibility to the application of Federal requirements where the project funding is primarily non-Federal and the Federal share is minimal."

Army Corps of Engineers

- Authorizes the Corps to execute agreements with non- Federal entities to use Federal dollars for construction, repair, rehab, maintenance and operation of inland waterways.
- Establishes a pilot program that would authorize the issuance of user fees to carry out Corps projects at up to 10 sites to enable public-private partnerships under the Water Resources Reform and Development Act (WRRDA) of 2014 Water Infrastructure Public-Private Partnership Pilot Program.
- Extends the duration of a contract that the Corps can sign from 5 years to 50 years. This will allow the Corps "to enter into long term contracts that encompass the full life-cycle management of infrastructure assets in the program."
- Would allow the Corps to determine whether operation and maintenance functions at hydropower facilities on Corps projects are commercial activities and appropriate for non-Federal entities.
- Creates a streamlined deauthorization process for old WRDA projects that allows for Corps projects approaching the end of their service life and for those projects operated and maintained by non-Federal interests that do not require Federal oversight. This would relieve the Federal regulatory and statutory compliance including Section 408 review.
- Currently, a local sponsor can provide local fund to the Corps through contributed and advanced funds to — hopefully — expedite Corps projects. However, under current law, the Corps process to accept the contributed and advanced funds is limited and often takes a long time, and the Corps is unable to take the benefit of a willing sponsor to provide local funds to expedite a project. The proposal would expand the authority for the acceptance of contributed funds even if no Federal funds have been appropriated for the authorized project. And, expands the applicability of advanced funds authority to all authorized water resources studies and projects that "would increase non-Federal spending and expedite project execution."

About Our Public Policy & Regulation Practice

Holland & Knight's Public Policy & Regulation Group uses its in-depth understanding of governmental operations and political perspectives to help advance our clients' strategic objectives and solve problems. As advocates for our clients, we are committed to helping shape public policy decisions through careful, strategic positioning combined with a deep understanding of our clients' evolving needs. Our team offers depth, diversity and a bipartisan approach that adapts well to changes in the political climate.

About Holland & Knight

Holland & Knight is a global law firm with more than 1,250 lawyers in 24 U.S. offices as well as Bogotá, Mexico City and London. Holland & Knight is among the largest U.S.-based law firms, providing representation in litigation, business, real estate and governmental law. Interdisciplinary practice groups and industry-based teams provide clients with access to attorneys throughout the firm, regardless of location.