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Rebuilding Infrastructure in America
Infrastructure Update

Recently, we described the announcement of President Trump's $1.5 trillion infrastructure plan (the "Plan"). Today, we report on what has developed since the ambitious proposal was unveiled.

The Plan

As we reported previously, the Plan would result in $1.5 trillion in new infrastructure investment by leveraging $200 billion over 10 years in federal spending. The remainder of the funding would be derived from a combination of state and local government funding and private capital through P3 projects. To facilitate the projects, permitting would be eased through amendments to National Environmental Policy Act ("NEPA") and other regulatory schemes that many credit with dramatically slowing down, if not effectively killing, infrastructure projects. Eligible projects would include ports, roads, waterways and airports. On the latter, the Plan would allow for the privatization of airports and facilities attendant to terminals, such as restaurants and shopping malls. State laws would also be relaxed to permit greater use of tolling on interstate highways and the use of rights-of-way for commercial purposes.

How Has It Been Received?

On its face, the Plan was applauded for its vision and ambition. If enacted, it would be a historic disrupter in the way that infrastructure projects are funded and administered in the United States. In the days that followed the Plan's release, some of the enthusiasm waned as reality set in. The biggest concerns being those related to funding, the lowering of environmental standards and timing.

Funding

Many on both sides of the political aisle question the source of the funding necessary to execute the Plan. Regarding the $200 billion ante from the federal government, the money would have to be appropriated by Congress. Having just enacted the historic Tax Cuts and Jobs law, there is concern about adding to the federal deficit. Perhaps sensing that, on the same day that the Plan was announced, the Administration released its FY2019 budget proposal for the entire government. Contained therein was a cut of almost $4 billion in

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the Department of Transportation's discretionary budget. It may be that is a down payment on the federal funding portion of the Plan. Additionally, the President has signaled that he may be in support of an increase of the federal gas tax, which has not been raised since 1993 and is used to support the federal Highway Trust Fund that pays for national transportation projects, such as roads, bridges, and mass transit. Others were quick to support the idea, including the U.S. Chamber of Commerce and many Democrats. Republican members of Congress and conservative groups were not as supportive. But raising the tax from its current 18.4 cents per gallon by 25 cents is estimated to deposit an additional $394 billion over ten years into the trust fund. Like so many issues facing the country today, Americans are evenly split about whether the tax should be increased. The increase is a wild card for the Plan; with an increase, issues surrounding the funding dilemma would be eased.

There are many in Congress on both sides of the aisle who are concerned about the cost-shifting elements of the Plan. They point out that many of the states with the greatest infrastructure needs are also the ones that are least likely to be able to come up with the matching incentive funds. As the House Transportation & Infrastructure Chairman remarked about this, "It's hard to do." To be sure, that will be a sentiment echoed by many after hearing from their Governors and transportation departments back home.

Not all states, however, will complain. Transportation Secretary Elaine Chao recently praised Florida Governor Rick Scott and his transportation team for its innovative I-4 Ultimate Improvement Project, which will transform Florida's important I-4 corridor that connects the West and East coasts in central Florida. The $2.3 billion project is funded by $1 billion in private financing by the concessionaire, I-4 Mobility Partners, and a combination of federal, state and other private money. More recently, Secretary Chao testified before the Senate Environment and Public Works Committee where she affirmed the Administration's commitment to the Plan, emphasizing that "it's designed to change how infrastructure is built, financed and maintained in communities across the country." She reiterated that the Plan's guiding principles are: (i) use federal dollars as seed money to incentivize infrastructure investment; (ii) provide for the needs of rural America; (iii) streamline permitting to speed up project delivery; and (iv) reduce unnecessary and overly burdensome regulations.

Permitting

Critical to the success of the Plan are those elements that would facilitate the permitting of projects. In addition to streamlining the NEPA process, the Plan would place a two-year limit on the duration of environmental reviews and put in place a 150-day statutory limit for challenges to permitting by outside groups. These proposals were universally panned by Democrats who would almost certainly filibuster any legislative proposals introduced in the Senate. This doesn't mean that the regulatory process will not be eased; there is much that the Administration can do unilaterally through rulemaking and the Congress could well agree to minor changes. But the sweeping changes sought by the Administration face an almost insurmountable hurdle.

Timing

This being an election year, Congress is likely to conclude its business by early to mid-September. Considering the entire month of August is dedicated to the summer recess, that leaves less than 5 months remaining in 2018 for Congress to act. That may appear to be sufficient time for it to act on the Plan, but considering the number of days that Congress will actually be in session and the fact that it must deal with government funding issues still for FY2018 and then turn its attention to FY2019 funding, there is little time to undertake a comprehensive and dynamic legislative effort such as the Plan. Some Republican Senators, including Majority Whip John Cornyn and Republican Conference Chair John Thune have indicated that there isn't enough time to get the Plan through this year. On the House side, there is more optimism. Chairman Shuster has said that he envisions a bill to emerge in the House "closer to the summer."

It may well be that the Plan will not be adopted this year, but that doesn't mean that work will not begin in earnest in Congress and in the Administration. An example of this lies in the recently enacted two-year budget deal. Included in that deal was at least $10 billion for conventional infrastructure projects such as roads and bridges, with possibly more in the works. And there could well be more. The funding would be included in the Omnibus Appropriations bill (the "Omnibus") that Congress is hoping to pass by March 23rd. It would be used to legislate projects in the manner that Congress has traditionally employed to designate and fund public works projects. Republican leaders of the Appropriations Committees say that any funding in the Omnibus will be a down payment once the Plan is enacted.

Conclusion

All of this means that there is a short-term and longer term path to increased infrastructure spending. Interested parties should engage immediately to identify those projects that will be funded through the Omnibus and sow the seed for more ambitious projects, such as privatizations and P3 projects, that will be the focus of the Plan in whatever form it is adopted.