

# Infrastructure Policy Developments in Year One of the Trump Administration

Contributing Counsel

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Despite campaign promises of a \$1 trillion infrastructure investment plan during the first 100 days of the Trump administration, no infrastructure bill materialized in 2017. While President Donald Trump continues to state that infrastructure is a 2018 priority, there is uncertainty as to when a bill will be proposed and what it will propose.

Rather than large-scale policy changes, the White House and Department of Transportation (USDOT) took incremental steps to promote infrastructure development, issuing executive orders to streamline permitting processes and implementing statutes enacted during the Obama administration.

## 2018 Budget Infrastructure Initiative

On May 23, 2017, the Trump administration released a fact sheet outlining infrastructure-related goals in its fiscal year 2018 budget proposal, which include: streamlining environmental permitting; reducing federal regulatory requirements; expanding funding for the popular Transportation Infrastructure Finance and Innovation Act (TIFIA) federal credit program to \$1 billion annually for 10 years (up from the current average annual amount of \$287 million authorized through fiscal year 2020); funding the Water Infrastructure Finance and Innovation Act (WIFIA) federal credit program; removing the \$15 billion cap on private activity bonds (PABs); relaxing current restrictions on tolling on interstate highways; and encouraging the use of public-private partnerships (P3s).

Of the priorities articulated by the Trump administration, only permitting and regulatory reform received meaningful attention from the White House in 2017. Congress, for its part, did not advance infrastructure funding. To the contrary, it placed investment levels in potential jeopardy through tax reform measures that cut federal tax revenues that help fund grants to municipal transit programs, such as New York City's subway and bus system, and reduced deductions for state and local

taxes, which could increase the economic burden felt by taxpayers in jurisdictions that apply state and local taxes to transportation investments.

## Executive Orders

The White House issued two infrastructure-related executive orders in 2017, each directing action to streamline federal environmental permitting for infrastructure projects.

### Executive Order 13766 (Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects).

The White House issued the order on January 24, 2017, just days after the inauguration. The order declares the executive branch's objective to expedite environmental reviews and approvals for infrastructure projects, especially high-priority projects such as improvements to the U.S. electric grid, telecommunications systems, critical port facilities, airports, pipelines, bridges and highways.

The order directs the chairman of the White House Council on Environmental Quality (CEQ) to coordinate with permitting officers at the lead permitting agency for each high-priority infrastructure project to establish specific expedited procedures and deadlines for the project. The order requires lead federal agencies to report permitting delays to the CEQ chairman and submit action plans to address such delays.

**Executive Order 13807 (Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure).** Issued on August 15, 2017, the order expands on the directives of Executive Order 13766

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and uses existing frameworks under two Obama-era statutes — the GPRA Modernization Act of 2010 and the Fixing America’s Surface Transportation (FAST) Act — to advance efforts to streamline environmental permitting. The order calls on the director of the Office of Management and Budget (in consultation with the Federal Permitting Improvement Steering Council, an interagency panel established pursuant to the FAST Act) to establish goals and milestones, called “CAP goals,” to modernize infrastructure permitting. The goals must be established by February 15, 2018, and are intended to provide measurable steps to shorten the time frame for federal environmental reviews and authorization decisions for new major infrastructure projects to approximately two years from the current four to seven.

The order also requires the CEQ to develop a list of actions it will take to enhance and modernize the federal environmental permitting process. On September 14, 2017, [the CEQ released the list](#), which highlights revisions to National Environmental Policy Act procedures that the CEQ expects to undertake in coordination with lead permitting officers at federal agencies.

### **USDOT Actions**

In 2017, the Federal Transit Administration (FTA) and the Federal Highway Administration (FHWA) issued two significant regulatory actions.

### **Private Investment Project Procedures**

On July 31, 2017, the FTA issued a notice of proposed rulemaking regarding the establishment of private investment project procedures (PIPP), a program to promote greater private investment and innovation in the rail transit sector. Under the PIPP, public- or private-sector sponsors of capital projects that would receive federal financial assistance could request

modifications or waivers to specified FTA regulations, procedures or guidance that would impede the sponsor’s ability to structure a P3. Federal statutory requirements themselves cannot be waived, nor can the regulations of any agency other than the FTA. Waivers and modifications will be at the discretion of the FTA administrator, and the application and requested modification must each satisfy specified requirements. The PIPP closely resembles an FHWA program, SEP-15, that commenced in 2004 to promote P3s for road, bridge and tunnel projects.

While the PIPP is meant to facilitate P3s, certain requirements described in the notice may have unintended consequences that make the framework more challenging to utilize. For example, one prerequisite to applying under the PIPP is evidence of committed financing for the project; however, sponsors and bidders would likely want to incorporate the FTA’s feedback on the PIPP application before financial bids are finalized.

The PIPP is an outgrowth of another Obama-era statute, the Moving Ahead for Progress in the 21st Century Act, which directed the FTA to identify provisions, and their implementing regulations and practices, that impeded the use of P3s and private investment in rail transit projects. The FTA has received approximately 20 (mostly supportive) comments in response to the notice of proposed rulemaking for the PIPP. There is no public timeline for the FTA to respond or issue the final rulemaking.

### **Interstate System Reconstruction and Rehabilitation Pilot Program**

On October 20, 2017, the FHWA solicited applications for candidate projects for the Interstate System Reconstruction and Rehabilitation Pilot Program (ISRRPP). Under the program, the FHWA may permit up to three states to collect tolls on a facility in the interstate highway system in order to fund reconstruction

or rehabilitation of interstate highway corridors. Applications are due February 20, 2018, and the selected states will have three years to satisfy the necessary conditions to commence tolling.

The ISRRPP was first introduced in 1998, and while several states have been awarded provisional approval, none have succeeded in satisfying the criteria to initiate tolling. The primary obstacle has been obtaining state legislative approval, as tolling is a hot political issue in most jurisdictions. To address this issue, the FAST Act in 2015 added state authorization of tolling as a condition to provisional approval. The 2017 solicitation for applications is the first open call for pilot projects since 1998, and it reflects the FHWA’s attempt to make the program work under the amended rules.

P3 developers and investors should note that ISRRPP slots can be structured as P3s, although the ISRRPP’s selection criteria require applicant states to give preference to public toll agencies that have the ability to build, operate and maintain a toll expressway system that meets the criteria for the interstate system.

### **Conclusion**

The Trump administration’s early efforts to promote U.S. infrastructure are focused on regulatory reform and have yet to address infrastructure funding or financing. Administration officials have suggested that an infrastructure plan may be released before or shortly after President Trump’s January 30, 2018, State of the Union Address. It remains to be seen whether the infrastructure plan or bill, when released, will carry forward ideas reflected in the administration’s fiscal year 2018 budget proposal to expand investments in infrastructure or will be limited to advancing the goal of streamlining environmental permitting and other deregulatory efforts.