Trump Infrastructure Plan: Perspectives For The P3 Market

By **Lance Brasher and Joshua Nickerson** (February 27, 2018, 12:54 PM EST)

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On Feb. 12, 2018, the Trump administration released its long-awaited infrastructure plan, titled "A Legislative Outline for Rebuilding Infrastructure in America." In 50-plus pages, the plan sets forth a detailed summary of the White House's requests for legislative actions, ranging from funding initiatives to regulatory and judicial reforms to work-force skills training.

The plan seeks to stimulate at least $1.5 trillion of new infrastructure investment (by leveraging $200 billion of federal funding over 10 years) and to dramatically shorten the permitting process for infrastructure projects, to two years or less. As the baton passes to Congress to prepare an infrastructure bill, what does the administration's plan do to encourage investment in the U.S. public-private partnership market?

Positive Elements for P3s

The plan is generally supportive of P3s and includes a number of specific elements that would benefit the U.S. P3 market.

Permitting modifications

The plan has extensive and detailed recommendations for streamlining and clarifying permitting procedures that apply to infrastructure projects. Many of these recommendations seek to harmonize permitting procedures and requirements across the different classes of infrastructure assets.

The plan also proposes broad modifications to the practices and procedures under the National Environmental Policy Act that would allocate decision-making authority to a single lead permitting agency for each project ("One Agency, One Decision"), require the lead agency to complete its environmental review in 21 months and require any federal agencies issuing project permits to act on such permit applications within three months thereafter.

Expansion of scope and dollar volume for private activity bonds

The plan proposes to dedicate $6 billion to increase the funding capacity of private activity bonds, which are a widely utilized financing type in P3 transactions. The plan would widen the scope of projects that are eligible to be financed with PABs to include, inter alia, brownfield reconstruction projects, passenger railroads and other facilities that are eligible for Transportation Infrastructure Finance and Innovation Act (TIFIA) or Railroad Rehabilitation and Improvement Financing (RRIF) financing.

The plan also proposes a number of technical, yet significant, amendments to the Internal Revenue Code provisions that govern PABs, including elimination of the applicability of the alternative minimum tax to PABs and removal of state and nationwide volume caps.

Enhanced funding for other federal credit programs

The plan proposes to increase by $14 billion the budget authority made available to federal credit programs, such as RRIF, TIFIA, the Water Infrastructure Finance and Innovation Act (WIFIA) and the Department of Agriculture Rural Utilities Service credit programs (including, in the case of RRIF, budget authority to pay the credit-risk premium).

The plan also calls for amendments to the RRIF, TIFIA and WIFIA statutes to expand the list of projects eligible for financing under those programs. For instance, TIFIA-eligible projects would include a more expansive list of port, waterway and airport projects (including new passenger terminals, existing terminal renovations, runways and related facilities).

Support for P3s involving federal assets and properties

The plan proposes to clarify and simplify the requirements associated with divestment of surplus federal property and eliminate statutory and regulatory features that restrict the use of P3s with federal assets and properties. The plan also calls for authorization to divest specific federal assets, such as airports (Ronald Reagan Washington National Airport and Dulles International Airport) and electric transmission facilities (Bonneville Power Authority and the Tennessee Valley Authority).

Promotion of airport P3s

The plan includes several proposals that would benefit sponsors of airport P3 transactions. The plan would apply the streamlined passenger facility charge application procedures that apply for nonhub airports to be utilized with small-hub airports, which make up the predominant portion of the slots available in the Airport Privatization Pilot Program administered by the Federal Aviation Administration.

The plan also proposes to limit the FAA's oversight of nonaviation (i.e., landside) developments at airports. Perhaps most significantly, the plan would reduce the airline consent level needed to approve airport P3 transactions from 65 percent of airlines (based on number of carriers and landed weight) to a simple majority.

Expanded tolling of interstate highways and commercialization of interstate rest areas

Current U.S. law limits the states' rights to toll existing interstate highways and engage in commercial activities within the interstate right of way (including in rest areas). The plan proposes statutory amendments to lower these restrictions, which would potentially open the way to more brownfield P3s.

Transit P3s

The plan proposes to amend 49 U.S.C. Chapter 53 and its implementing regulations to eliminate constraints on the use of P3s in transit capital projects, and to codify the P3 pilot program administered by the Federal Transit Administration to formalize the procedures and expand the number of eligible P3 transactions. The plan also proposes statutory amendments to the Capital Investment Grants Pilot Program that would increase the federal contribution limit from 25 percent to 50 percent.

Missing Pieces

The plan does not directly address certain issues that are of keen interest to the infrastructure investment community.

Where will the $200 billion come from?

The plan outlines in detail how the $200 billion of proposed federal funding will be allocated between incentive grants, rural programs, transformative projects and other spending priorities. But it does not demonstrate where Congress will find the revenues to authorize such spending.

The Trump administration released its fiscal year 2019 budget blueprint on the same day as the plan and, as noted above, the blueprint proposes budget cuts for most federal departments and agencies, and takes aim at specific transportation funding programs, including TIGER grants and the Capital Investment Grant Program (New Starts) administered by the Federal Transit Administration. However, it is unclear what portion of these proposed discretionary spending cuts will be available to fund the initiatives outlined in the plan.

No fix for the Highway Trust Fund

The plan makes no mention of the Highway Trust Fund, which is the primary source of federal funding for roads, bridges and transit projects. The Highway Trust Fund is funded primarily by federal fuel taxes, which have not risen since 1993. Add to that increased auto fuel efficiency and the advent of electric vehicles, and the result is a "melting ice cube" effect on federal highway funding.

Lower federal highway funding levels could in theory push more states to consider P3s to make up the gap, but it seems just as likely that a state's response to less funding will be to shrink or defer capital planning, which could adversely affect the supply of projects that may be structured as P3s.

Gateway Program

The Gateway Program is a joint effort among the states of New York and New Jersey and Amtrak to, among other things, build a new rail tunnel under the Hudson River between New Jersey and New York and rehabilitate the existing tunnel, which was badly damaged during Hurricane Sandy in 2012. The current projected costs for these projects are approximately $12.9 billion.

The federal government was originally expected to pay half of these costs, in large part through New Starts grants. But the administration has recently distanced itself publicly from that funding responsibility. The plan and the administration's budget blueprint seem to further diminish federal support for the project by proposing a phaseout of New Starts grants, and by proposing a 20 percent cap on the federal government's share of costs for projects that participate in the incentive grant funding program that is proposed in the plan.

The Gateway Project has long been considered a potential P3 project, one that would dwarf all current P3s in value. The Trump administration's apparent disengagement is an unwelcome development for this critical infrastructure project.

Questions Regarding the Rural Infrastructure Program

The plan includes $50 billion set aside over 10 years to fund rural infrastructure projects. What would significantly expanded grants to rural projects mean for the P3 market?

Rural areas are generally considered less conducive to P3 projects, especially revenue risk projects. However, availability payment-based P3s have achieved success in rural areas, such as the Portsmouth Bypass P3 project in southeastern Ohio, which was facilitated by federal grant dollars made available from the Appalachian Regional Commission. The Rural Infrastructure Program could provide federal support that enhances the financial feasibility of P3 projects in rural areas.

What's Next?

The public will see an initial indication of the direction Congress may take in fashioning an infrastructure bill when U.S. Department of Transportation Secretary Elaine Chao testifies before the Senate Environment and Public Works Committee on March 1, 2018. This committee and the House Transportation and Infrastructure Committee will have a leading role in drafting the infrastructure bill.

Because bipartisan support is needed to pass the bill, it will be instructive to observe the tone and content of questions from the EPW Committee's Democratic members. The 2018 midterm elections and Democratic reactions to last year's tax reform bill make prospects for bipartisan action on infrastructure less likely.

Major infrastructure-related legislation may be more likely to succeed in 2019, particularly to address the Highway Trust Fund and federal credit program funding levels. For the P3 market, this means that attention and efforts may be best focused on states (such as Maryland and New York) and cities that are proposing ambitious P3 projects, and other states and cities that are bringing initial P3 projects to market.

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