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Getting to There from Here: What the Trump Administration's Infrastructure Program Might Look Like

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Few presidents have focused on infrastructure policy more visibly or earlier in their administrations than President Donald J. Trump. In his Inaugural Address, President Trump twice promised renewal of the nation's infrastructure,[1] and in the short time since taking office he has issued at least three Presidential Memoranda[2] and one Executive Order[3] relevant to infrastructure development in the United States. Underlining the importance of infrastructure investment to President Trump, his administration has already drawn up a list of fifty major infrastructure projects—costing approximately $137.5 billion—for direct federal investment.[4]

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No one should be surprised by the Trump administration's quick action on infrastructure.

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Building "new roads, and highways, and bridges, and airports, and tunnels, and railways all across our wonderful nation"—as President Trump declared in his Inaugural Address[5]—stands at the center of his electoral strategy and populist narrative. A major infrastructure initiative could reinforce the alignment of working-class Democrats and independents who backed President Trump's campaign with a Republican Party that appears eager to tackle the fact that "America's infrastructure has fallen into disrepair and decay."[6] Whether President Trump fixes our nation's infrastructure will thus become a key test for his administration in the political arena. The stakes for the Trump administration could not be

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higher: As a measure of his promise to shake up government in Washington, infrastructure renewal will receive continuous and energetic attention from his team during his term in office. If President Trump succeeds as the country's "master builder," he will join the club of other "great builder" presidents, such as Lincoln (the First Transcontinental Railroad), Roosevelt (the Panama Canal) and Eisenhower (the Interstate Highway System). If he fails, the electoral costs to him in 2018 and 2020 could be severe.

So what exactly will the Trump administration's infrastructure program look like and how can President Trump promote more private investment in the nation's infrastructure—a measure widely expected to be a cornerstone of his administration's infrastructure policy?

Emerging Themes

Although the Trump administration has not yet produced an infrastructure bill for Congress, it is already possible to discern from campaign white papers, public comments, and a series of just-issued Executive Orders at least four themes that will characterize the Trump administration's infrastructure policy over the next four years.

"Super Enforcement" of Buy America

The Trump administration will likely enforce with great vigor all federal "Buy America" statutes and revise their implementing regulations to expand their scope. As President Trump said of his administration in his Inaugural Address, "We will follow two simple rules: Buy American and Hire American."[7] The strongest indication so far that President Trump will adhere to this motto is his "Presidential Memorandum Regarding Construction of American Pipelines"—issued only four days following his Inauguration.[8] In the memorandum, President Trump announces a strict Buy American policy for construction and repair of any pipeline in the United States. Specifically, the memorandum directs the Secretary of Commerce to "develop a plan under which all new pipelines, as well as retrofitted, repaired, or expanded pipelines, including portions of pipelines inside the borders of the United States, use materials and equipment produced in the United States, to the maximum extent permitted by law."[9] To remove any doubt that the policy should be taken both literally and seriously, the memorandum makes clear that past techniques for bypassing Buy American requirements will not be allowed.[10] A robust Buy American policy for pipelines almost certainly previews the Trump administration's posture on Buy American across all classes of infrastructure. It is doubtful, moreover, that a robust Buy American initiative will be later weakened by the Trump administration, not least because the initiative supports the President's goal of reviving the U.S. steel industry in Ohio, Pennsylvania, Michigan, and Wisconsin—the so-called "Brexit states" that tipped the election in his favor.

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Expediting Project Approvals

The Trump administration also will likely pursue reforms of federal infrastructure planning and environmental permitting procedures in order to expedite the approval of large-scale infrastructure projects. A leading indicator of the Trump administration's outlook in this regard is the President's January 24, 2017, Executive Order, "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects."[11] According to the Executive Order's preamble, "[t]oo often, infrastructure projects in the United States have been routinely and excessively delayed by agency processes and procures; these delays have increased project cost and blocked the American people from the full benefits of increased infrastructure investments, which are important to allowing Americans to compete and win on the world economic stage."[12] In the Executive Order, President Trump directs the Chairman of the White House Council on Environmental Quality (CEQ) to establish procedures for fast-tracking environmental approvals of infrastructure projects designated as "high priority," based on their "importance to the general welfare, value to the Nation, environmental benefits and such other factors as the Chairman deems relevant."[13] Given the Trump administration's stance on permitting and environmental approvals, it is quite possible that the administration will seek to amend, pursuant to an infrastructure bill presented to Congress, the National Environmental Policy Act, the Clean Water Act, the National Historic Preservation Act, and other statutes that impact the delivery of major infrastructure projects in order to codify procedural reforms developed by CEQ.

Promoting Projects, Not Ideology

The Trump administration likely will pursue a project-driven infrastructure program that values action over ideological signaling. The fact that the President has invited re-submissions of applications to advance the Keystone XL pipeline and identified fifty other major projects for federal support—all before publishing a position paper on infrastructure—strongly suggests that pragmatism will govern the Trump administration's approach on historically challenging issues relating to infrastructure, such as revenue sources, project selection, and funding allocations.[14] This approach will likely manifest itself initially and most clearly in the Trump administration's dealings with Congress on a new infrastructure bill: All funding measures appear, at present, to be on the table, including liberalizing the use of user fees, corporate tax reform, and linking the federal gas tax to inflation, although majorities in Congress may ultimately oppose such measures.

Promoting Private Investment In Infrastructure

The Trump administration almost certainly will promote investment of private capital in the nation's infrastructure by endorsing the use of public-private partnerships (P3s) for large-scale projects. Although the Trump administration has taken no official action yet in this regard, comments by cabinet nominees and a white paper[15] issued by the Trump campaign in October 2016 clearly indicate that President Trump's headline infrastructure investment of $1 trillion may be accomplished in part by leveraging private equity investments. For example, at her confirmation hearing, U.S. Transportation Secretary Elaine Chao indicated that, while plans are still being developed, the Trump administration wishes to advance a "bold new vision" for funding transportation infrastructure "in order to take full advantage of the estimated trillions in capital that equity firms, pension funds, and endowments can invest."[16] Similarly, according to the campaign white paper, to pay for large-scale infrastructure projects, the Trump administration will encourage the private sector to invest as equity $167 billion of the proposed $1 trillion in public works by offering private investors an 82 percent equity tax credit in return, while funding direct federal spending from a one-time tax on repatriated corporate profits pursuant to federal corporate tax reform.[17] Although economists have criticized the campaign white paper as misconceived,[18] its authors clearly appreciate that the United States has not availed itself of private infrastructure investment to the same extent as other countries.[19] Whether the Trump administration ultimately pursues enactment of an equity tax credit as described in the white paper or taps private equity capital by other means, the President clearly has opened the door to policy innovations that support participation by private capital in developing the nation's infrastructure.

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Accelerating Private Investment

With respect to expanding opportunities for private infrastructure investment, the Trump administration should consider pursuing at least three initiatives that would deliver the "biggest bang for the buck."

Asset Recycling Initiative

First, the Trump administration should consider instituting a program of incentives for states and local governments to "unlock" value currently trapped in government enterprises that could be re-deployed as investment in new projects—a process known as "asset recycling." Such incentives could be based on models already adopted or being studied by national governments around the world. Notable among these is the "Asset Recycling Initiative" launched by the Australian National Government in 2013.[20] Under the program, the Australian government has agreed to pay a significant, one-time bonus to any Australian state that leases or sells legacy infrastructure if the proceeds from the transaction are reinvested in greenfield projects.[21] The Canadian national government may adopt a similar program.[22] Since its enactment, the Australian initiative has generated significant private sector funding for new Australian infrastructure.[23] If adapted to the United States, the program could advance President Trump's vision of leveraging private capital for infrastructure renewal, while limiting the federal government's fiscal exposure (thereby addressing the concerns of "fiscal hawks" in Congress). Such a program would have the additional virtue of making available funds for subsidies for new assets that do not "pay for themselves" (e.g., transit services, freeways, public schools, courthouses, and libraries), while heightening accountability and transparency in the delivery of infrastructure services to the general public. If the Trump administration wishes to launch such a program without new legislation, it could take the simple administrative step of revising Executive Order 12803—a George H.W. Bush-era directive that constitutes a *de facto* tax on P3s. Issued in 1991, Executive Order 12803 requires that, in the event any state or locality sells or leases an asset previously built with federal assistance, such state and locality must return to the U.S. Treasury the amount of such federal assistance invested in such asset (net of depreciaiton).[24] Revising Executive Order 12803 to permit the federal government to waive the return of the federal investment in any asset in the event of its sale or lease, provided that proceeds are timely reinvested in infrastructure, could function as an alternative form of bonus payment and greatly enhance incentives for states and localities to "divest to invest."

Ending "Tax Discrimination" Against Private Investment

The Trump administration also could endeavor to make private activity bonds (PABs) available for all classes of infrastructure that serve a public purpose. This could be accomplished by an Act of Congress and should be urged by the Trump administration in any forthcoming infrastructure bill. Currently, with limited exceptions, infrastructure built, owned, and operated by for-profit enterprises may not issue tax-exempt debt. In contrast, public sector entities can finance the same infrastructure on a tax-exempt basis. This has the effect of increasing the cost of debt for P3s (relative to conventional public financings) and discouraging governments from pursuing P3s, even if P3s can deliver projects with lower design, construction, and life-cycle costs. In this respect, federal tax law currently discriminates against P3s. A notable exception to such discrimination is the $15 billion of PABs "volume" authorized by IRC Section 142(a) and administered by the U.S. Department of Transportation for P3 highway and transit projects (USDOT PABs). USDOT PABs have been used for a growing number of large-scale highway and transit P3 projects, including the East End Crossing over the Ohio River near Louisville, the Eagle P3 transit line between downtown Denver and its international airport, and the Pennsylvania Rapid Bridge Replacement Project under which the private sector is replacing and maintaining 558 deficient bridges. To extend the benefit of PABs financings to other categories of infrastructure beyond transportation, the Trump administration could revive the Obama administration's 2015 proposal to enact Qualified Public Infrastructure Bonds (QPIBs). That proposal contemplated the creation of new PABs to include financing for airports, ports, mass transit, solid waste disposal, sewer and water, as well as for more surface transportation projects. Unlike USDOT PABs, however, the QPIB bond program would have no expiration date and no issuance caps, and interest on QPIBs would not be subject to the Alternative Minimum Tax. Although scoring by the Congressional Budget Office (CBO) has reportedly frustrated prior proposals to expand the availability of PABs volume beyond transportation, a growing number of stakeholders recognize that the CBO's scoring can overstate the cost of PBAs and that, in fact, the costs borne by the U.S. Treasury of additional PABs volume could be *de minimus*. It would also be important for the Trump administration to pursue legal authority to allocate such PABs for financing private acquisitions of infrastructure from governments, in addition to financing new construction, on the condition that the private partner would rehabilitate the infrastructure acquired and that the government would expend proceeds from the transaction on new infrastructure projects. PABs volume for infrastructure acquisitions would dovetail with an assest recycling initiative. Are "MAGA Bonds" for infrastructure in our future?

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Deploying the National Balance Sheet

As a further measure to advance infrastructure renewal, the Trump administration could urge Congress to make new appropriations to expand federal credit programs designed to finance infrastructure. Notable among these are the TIFIA program established by the Transportation Infrastructure Finance and Innovation Act of 1998[25] and the Railroad Rehabilitation & Improvement Financing program (RRIF) established by the Transportation Equity Act for the 21st Century[26]—both administered by the U.S. Department of Transportation. Since its inception in 1998, the TIFIA program has financed at least fifty-three projects, including seven projects during the prior fiscal year, that have received credits support totaling $2.46 billion.[27] With statutory changes enacted by Congress in 2015, the RRIF program is now capable of financing large-scale railroad projects on a non-recourse basis, which is expected to improve its attractiveness to private project sponsors. As a rule of thumb, appropriations for credit subsidy required to operate such programs can be leveraged nine times—creating a powerful multiplier effect to move projects forward. Because both programs are now operated by a single office—the Build America Bureau—which is increasingly better resourced and more experienced than its prececessor, Congress should anticipate that the rate and scale of TIFIA and RRIF lending will increase, particularly where combined with private debt and equity capital—justifying more robust appropriations of credit subsidy for these programs.

Conclusion

Still in its early days, the White House is gearing up to pursue infrastructure renewal as a high priority but only time can tell whether the desired result can be achieved. Many agree that the country's system needs an overhaul: Hopefully we can get there from here.

Endnotes

1. President Donald John Trump, Inaugural Address (Jan. 20 2017).

2. *See* Construction of American Pipelines, 82 Fed. Reg. 8659 (Jan. 30, 2017); Construction of the Dakota Access Pipeline, 82 Fed. Reg. 8661 (Jan. 30, 2017); Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8663 (Jan. 30, 2017).

3. Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 24, 2017).

4. Lynn Horsley et al., Trump team compiles infrastructure priority list, McClatchy DC Bureau (Jan. 24, 2017), http://www.mcclatchydc.com/news/politics-government/white-house/article128492164.html.

5. Trump Inaugural Address, *supra* note 1.

6. *Id*.

7. *Id*.

8. Presidential Memorandum Regarding Construction of American Pipelines (Jan. 24, 2017), https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-american-pipelines.

9. *Id*.

10. *See id*. (noting "steel or iron material or products manufactured abroad from semi-finished steel or iron from the United States are not 'produced in the United States' for purposes of [this] memorandum").

11. Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 24, 2017).

12. *Id*. at 8657.

13. *Id*.

14. *See* Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, (Jan. 24, 2017), https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-keystone-xl-pipeline.

15. *See generally* Wilbur Ross & Peter Navarro, *Trump Versus Clinton on Infrastructure* (Oct. 27, 2016), http://peternavarro.com/sitebuildercontent/sitebuilderfiles/infrastructurereport.pdf.

16. *Confirmation Hearing Before the U.S. Senate Comm. on Commerce, Science and Transportation*, 115th Cong. 2 (2017) (Statement of the Honorable Elaine L. Chao, Secretary-Designate, Department of Transportation), http://www.commerce.senate.gov/public/index.cfm/hearings?Id=2988BF25-C5F1-45BD-890D-B33125610009&Statement_id=B8B7ADD5-2420-4250-9CD8-2A91934A9584.

17. *See generally* Ross & Navarro, *supra* note 15.

18. Steven Mufson, *Economists Pan Infrastructure Plan Championed by Trump Nominees*, Wash. Post, Jan. 17, 2017, https://www.washingtonpost.com/business/economy/economists-pan-infrastructure-plan-championed-by-trump-nominees/2017/01/17/0ed1ad5e-dc5e-11e6-918c-99ede3c8cafa_story.html?utm_term=.0dc2c09b05a5.

19. Despite having the world's largest gross domestic product, the United States has attracted only 12.5 percent of the total private sector investment in transportation infrastructure in North America, Latin America, and Europe combined. Robert Poole & Austill Stuart, *Federal Barriers to Private Capital Investment in U.S. Infrastructure*, Reason Found., Jan. 26, 2017, http://reason.org/news/show/1014772.html.

20. Robert Poole, *What the U.S. Can Learn from Australia's Asset Recycling*, Reason Found., Apr. 7, 2016, http://reason.org/news/show/1014506.html.

21. *See Id*.

22. Brent Patterson, *Will Trudeau privatize via "asset recycling"?*, Council of Canadians (Apr 24, 2016, 10:26 PM), https://canadians.org/blog/will-trudeau-privatize-asset-recycling.

23. Poole, *supra* note 20.

24. *See* Infrastructure Privatization, Exec. Order No.12803, 57 Fed. Reg. 19063 (Apr. 30, 1992).

25. Transportation Infrastructure Finance and Innovation Act of 1998, 23 U.S.C. §§ 601–609, 49 C.F.R. Part 80.

26. The Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1507, 112 Stat. 107 (1998), as amended.

27. *See* U.S. Dep't of Transp., *Projects Financed by TIFIA*, https://www.transportation.gov/tifia/projects-financed (last visited Nov. 11, 2016).