



NEW YORK  
CITY BAR

**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO  
THE TRUMP ADMINISTRATION REGARDING  
NATIONAL INFRASTRUCTURE**

**EXECUTIVE SUMMARY**

- Require Quantitative and Qualitative Assessments as a Condition to Federal Funding
- Support the Creation of “Bankable” Revenue Streams through Availability Payments and Similar Programs
- Leverage, Improve and Accelerate Existing Federal Programs to Support Innovative Infrastructure Projects

**INTRODUCTION**

Members of the New York City Bar Association's Transportation Committee, Construction Law Committee and Project Finance Committee include lawyers representing a broad cross-section of participants in the infrastructure market, including federal, state and local public agencies, economic development institutions, public transit authorities, private equity investors, project sponsors and developers, lenders, construction and engineering firms and project operators. Our members have years of experience advising clients on all aspects of project development and implementation, utilizing both public and private investment.

The critical need for substantial investment to upgrade America's aging infrastructure has been well documented in recent years. In March 2013, the American Society of Civil Engineers issued a report giving America's infrastructure a D+ grade and estimating that the United States needed \$3.6 trillion in new infrastructure spending by the year 2020, but that current levels of spending would leave a shortfall of \$1.6 trillion.<sup>1</sup> Similarly, the Center for an Urban Future issued a lengthy report in March 2014 which estimated a minimum cost of \$47.3 billion to repair and replace existing infrastructure in New York City alone.<sup>2</sup>

We welcome the Administration's strong commitment to infrastructure investment as a catalyst for economic growth and its stated ambition of mobilizing a trillion dollars of new investment in infrastructure. We take it as self-evident that achieving this goal will require a significantly increased commitment of both public and private investment. In these

---

<sup>1</sup> Available at <http://www.infrastructurereportcard.org/a/documents/2013-Report-Card.pdf> (all websites last visited Feb. 21, 2017).

<sup>2</sup> “Caution Ahead: Overdue Investments for New York's Aging Infrastructure”, Center for an Urban Future, March 2014, available at <https://nycfuture.org/pdf/Caution-Ahead.pdf>.

recommendations, we do not propose to wade into the debate about the appropriate amount and specific forms of public investment – these are complex political questions that are beyond the scope of our discussion. Yet, each type of financing option entails fundamental considerations in order to be successful.

There are ways to maximize both direct-funding and indirect-funding programs that already exist, as we explain below. There has been a greater desire, however, frequently stated both by members of the Administration and among members of Congress from both parties, to mobilize increased amounts of private sector investment in America’s infrastructure.<sup>3</sup> Increased public investment, whether through appropriations or tax exemptions/credits, is necessary but not alone sufficient to mobilize increased private sector investment. In order to further motivate private-sector investment, infrastructure projects must be designed to address the legitimate expectations of market participants in terms of risk allocation and investment returns, and the legal and regulatory framework in which infrastructure transactions operate must allow for this.

In her Senate confirmation hearings, then Transportation Secretary-designate Elaine Chao acknowledged the existing legal and regulatory impediments to public-private partnerships (“P3s”), and the need to remove them. Our recommendations below identify some of these impediments, and suggest practical steps that can be taken by the Federal government to help overcome them. Our recommendations are based on practical lessons learned from our members’ years of experience representing clients on the successful implementation of infrastructure projects, many involving innovative combinations of public and private sector investment. If the Administration finds our thoughts to be helpful, we would be pleased to provide requested additional assistance.

## **1. Require Quantitative and Qualitative Assessments as a Condition to Federal Funding**

### **a. Condition and Demand Analyses as Foundation for Planning to Generate Specific Projects**

Whether the federal government invests directly in federal-level infrastructure projects, or provides subsidies to state and local governments for locally financed and delivered infrastructure projects (whether grants or tax exemptions), the same underlying principles should apply. The initial focus should extend farther back into program-planning analyses, rather than

---

<sup>3</sup> In November 2013, Sens. Mark Warner (D-Va.) and Roy Blunt (R-Mo.) announced a bipartisan proposal to create a national infrastructure funding bank which would have sought to use \$10 billion in initial funding to generate as much as \$300 billion in new transportation projects, according to estimates circulated by Sen. Warner’s office. Though the infrastructure funding bill was co-sponsored by Sens. Lindsey Graham (R-S.C.), Kirsten Gillibrand (D-N.Y.), Dean Heller (R-Nev.), Amy Klobuchar (D-Minn.), Roger Wicker (R-Miss.), Claire McCaskill (D-Mo.), and Mark Kirk (R-Ill.), the proposed legislation was not adopted by Congress.

Previous bills to establish a national infrastructure bank were introduced in the Senate in 2007 and the House in 2009, but did not progress in the legislative process. The 2007 and 2009 bills envisaged a bank modeled on the Federal Deposit Insurance Corporation and Pension Benefit Guaranty Corporation, respectively. Other countries and the European Union have established infrastructure banks or funds, and China has established the multilateral Asian Infrastructure Investment Bank, which counts among its members several major Western European economies.

focus on "shovel ready" projects. In order to assure the most efficient and effective use of any increased amount of public funds for capital projects, the administration can leverage existing federal infrastructure programs, including grant programs, to review condition assessments of current national infrastructure systems and networks of infrastructure systems, and develop corresponding need assessments for their preservation, rehabilitation, reconstruction and expansion. It should then link condition and needs assessments to economic and service-demand forecasts in order to prioritize specific projects that emerge from quantitatively-based planning processes. We believe, for example, that the build-out of a high-speed rail system between Richmond, Virginia, and Portland, Maine, the addition of new rail tunnels and the reconstruction of the current 107-year-old rail tunnels connecting Manhattan to New Jersey, would emerge from quantitative systems analyses described above as high priority projects.

b. Cost Efficiency Analysis of Public-Private Partnerships with Combined Financing and Service Delivery Packages for Specific Projects

Construction-related public infrastructure projects involve two essential elements: (1) financing and (2) service delivery.

i. *Financing*

Various types of financing exist to pay the costs of construction and operation of infrastructure (e.g., highways and bridges). On one end of the spectrum is a public owner's direct funding. More typically, the federal government will subsidize the project by providing grant funds, or by affording tax-exempt status to the borrowing of money through the issuance of bonds. These types of financing are referred to as publicly-financed design-build-operate-and-maintain (DBOM) projects, and, when involving grant funds or borrowed money, constitute an indirect type of P3.

On the other end of the spectrum, a public owner uses private investment by raising private capital to finance the initial construction, typically pursuant to the public owner's long-term conveyance of the underlying property and financed asset through a franchise/concession agreement or long-term lease. In exchange for assuming some or all of the financial risk in building and operating the new infrastructure upon completion, the private investors are entitled to all or part of the new asset's revenue stream for the duration of the franchise/concession or long-term lease, usually achieved from user fees such as tolls. This type of project is referred to as privately-financed design-build-finance-operate-and-maintain (DBFOM), and is what is more commonly known as a P3.

DBFOM projects typically attract private investors when infrastructure projects offer solid prospects of future revenue streams to offset financial risks that the private investors assume in building and operating the projects. For example, if a major airport is upgraded through a DBFOM with a 40/60% split between government and private interests, respectively, the public may be relieved of 60% of the financial risks in upgrading the airport, but the private interests may acquire a larger ownership stake in the airport than the public. Proposals for upgrading infrastructure inevitably involve a tradeoff between benefit to the public and benefit to

private interests which may have an opportunity to profit from performance of new infrastructure projects (depending on how the projects are financed and structured).

## ii. *Service Delivery*

There are different methods by which to deliver to the public the facilities and services financed. Project services can be “segmented,” *i.e.*, the public owner enters into separate contracts with different entities to provide the different services, *e.g.*, a design professional contracts to provide the design whereas a general contractor or construction manager contracts to build the chosen design. When project services are “combined,” the public owner makes integrated decisions about design, construction and long-term operations and maintenance from the initiation of a project that can, in some instances lead to a single contract with a single entity, which is thought to permit optimum efficiency.<sup>4</sup> DBFOM P3 transactions are considered “combined” service delivery methods.

## iii. *Evaluating Successful P3s Monetarily*

It is critical to identify—and avoid—underfunding in anticipation of future apportionments or bailouts. As project options have emerged from program-planning efforts, it has been standard practice to evaluate and compare options prior to authorizing projects by applying a net present-value analysis. With the availability of DBOM and DBFOM service delivery methods, both of which expressly include life-cycle operations and maintenance costs, it is possible to apply a more rigorous “Value for Money” (“VfM”) analysis. A VfM analysis compares the financial impacts of a P3 project against those from the traditional direct public-funding alternative. VfM analyses can include non-financial risk factors and the ability to establish effective project governance protocols. Such analyses must also include foregone revenues from utilized tax exemptions or incentives—or tax expenditures. (To be sure, if tax credits are offered to private interests as a means of offsetting some of the cost of new infrastructure projects, the public is initially relieved of having to pay the cost of these projects. Yet, the cost of the tax credits is nevertheless a trade-off which the public will pay through a reduction of tax revenues which would have been otherwise available to pay for government programs.)

## c. Evaluation within the Context of a Broad Cost-Benefit Model

It would be helpful to perform the quantitative program and cost efficiency evaluations described above in the context of broader quantitative and qualitative analyses that take the following into consideration:

- **Economic contributions from completed projects.** Construction projects not only provide direct employment opportunities during construction, but they also support employment and economic growth upon completion and over their useful

---

<sup>4</sup> John Miller, “Life Cycle Delivery of Public Infrastructure: Precedents and Opportunities for the Commonwealth” (Boston: Pioneer Institute 2008), White Paper, No. 44, p. 9, Figure 6, available for download at [http://pioneerinstitute.org/better\\_government/life-cycle-delivery-of-public-infrastructure/](http://pioneerinstitute.org/better_government/life-cycle-delivery-of-public-infrastructure/).

lives. Investment decision criteria need to include the costs and benefits that accrue to the various affected economies—national, state and local.

- **Technological innovations.** P3 projects can also leverage improvements in technology such as modern materials, smart technologies, autonomous vehicle developments, modern tunneling capabilities, safety enhancements and security considerations.
- **Environmental impacts.** P3 project design can minimize deleterious environmental impacts while promoting increased efficiencies in future energy consumption; certain P3 projects themselves can produce efficient sources of energy or promote the development of energy-efficient technologies.

## **2. Support the Creation of “Bankable” Revenue Streams through Availability Payments and Similar Programs**

In order to stimulate privately-financed infrastructure projects, it is important to recognize that private sector investors must earn a market-based return on their investments, and therefore will only invest in projects that generate quality revenue streams. As a result, private sector investment in infrastructure has historically been limited to those areas where tolls or other user fees have been prevalent, such as toll roads, airports, seaports, rail, power plants, pipelines and to some extent water and wastewater treatment. Even in these areas, public resistance to tolls and other user fees has limited the ability of the private sector to invest. Many other types of infrastructure projects, including some of the most sorely needed types, such as road, bridge or sewer rehabilitation, are not traditionally revenue-generating and have, as a result, attracted little private investment.

It is our experience that once robust revenue streams are available, the private sector can conceive of quality infrastructure projects and can obtain private sector financing to construct, operate and maintain them. “Availability payments,” where the governmental partner provides a revenue stream through periodic payments over time, linked to the private sector partner’s satisfactory provision of infrastructure meeting contractually-agreed construction and operating standards, are a method of creating quality revenue streams for infrastructure projects that have been utilized with considerable success to foster P3s. Under an “availability payment” P3 transaction, the private-sector partner can often be induced to assume most of the (or even the entire) risk and burden of financing construction and operations while the public sector partner’s obligation to make payments is not only deferred over a period of time but more importantly is conditional on the private sector partner’s satisfactory delivery and ongoing operations and maintenance of the infrastructure itself. This structure not only enables the private sector to finance construction (and creates proper incentives for the private sector partner to take operating costs over the entire contract’s life into account when designing the project), but it also presents a very desirable allocation of risk and reward from the perspective of the public sector partner.

### **3. Leverage, Improve and Accelerate Existing Federal Funding Programs to Support Innovative Infrastructure Projects**

The most rapid deployment of public funds would likely be achieved by continuing the tax-exemption bond debt, Build-America-Bonds (or similar programs) and federal grant programs such as the TIGER Discretionary Grant Program for Innovation and Project Delivery Transportation and loan programs such as the Infrastructure Finance and Innovation Act (TIFIA) loan program. These programs should therefore be enhanced and expanded for most rapid effect, regardless of whether additional programs such as a tax credit for infrastructure investments or a “National Infrastructure Fund” or “National Infrastructure Bank” are contemplated.

We recommend some ideas to enhance these types of programs in a cost-neutral manner.

#### **a. Streamline the Environmental Review Process**

The bold scale of the new administration’s proposed investment plan warrants the adoption of special approaches to expedite project realization and achieve reasonable completion timelines tied to adequate funding arrangements. A DBFOM VfM analysis can help support and document these objectives.

In that regard, accelerated environmental review that does not shortcut regulatory imperatives is vital. Allowing certain project activities to proceed while environmental review is underway, such as advanced project engineering and design, may provide an important means of speeding project completion, especially where safety and security considerations may be paramount.

The National Environmental Policy Act ("NEPA") review process is designed to serve as an expedited check to ensure that critical environmental issues are not overlooked. At times, however, it has become vulnerable to misuse by those seeking to block or alter a project because their positions were not adopted during the initial planning process, thereby impeding prompt starts and reasonable completion of worthy projects.

While measures to prevent the review process arrangements from becoming automatic “rubber stamps” to project approval should be included in the enabling legislation, there should be sufficient freedom to allow, in appropriate cases, project review to overlap contemporaneously with the initiation of preliminary project activities. Streamlining measures permitted in highway projects by amendments enacted by MAP21 in 2012 could be extended to transit projects. For example, as already allowed for highway projects under 23 U.S.C. §108(c)(1), transit authorities and state transportation agencies should be allowed to purchase property prior to completion of environmental reviews without affecting subsequent approvals required for the project or forfeiting federal reimbursement when the transit project is approved for federal funding after completion of the NEPA process.

There are likely a number of additional opportunities to streamline the NEPA process for certain types of infrastructure projects and the City Bar would be happy to assist the

Administration in engaging the appropriate stakeholders to evaluate and make recommendations on these opportunities.

b. Reform Federal Grant Programs to Maximize Efficiencies and Reduce Costs at State and Local Government Level

The types of infrastructure surveyed and graded by the American Society of Civil Engineers are predominantly those owned and operated by state and local governments because they represent the majority of American infrastructure.<sup>5</sup> Operationally, state and local governments are best placed to know their infrastructure and building needs to serve their jurisdictions, as well as what the related tax base can support (principal and interest on bonds comes out of the annual expense budget funded by taxes).

Much of state and local infrastructure is funded by tax-exempt debt. Tax-exemptions are indirect benefits, which historically have enjoyed bipartisan support. Continuing tax-exempt status for the debt used by states and localities can help assure a greater likelihood of success for this Administration's infrastructure program. In contrast, eliminating the tax exemption would likely reduce the amount of debt that could be issued due to the higher interest rates, which in turn would burden the localities' annual expense budgets, thereby impeding long-term capital planning and "state of good repair" activities which are crucial.

Yet, typically during discussions of federal tax reform, as is happening now, policymakers consider reducing or eliminating the tax exemption of state and local debt because the exemption represents a tax expenditure - or a cost to the federal government in terms of lost revenue. Retaining tax-exempt debt therefore prompts budget analysts to search for budget neutrality.

We believe that a source of budget neutrality is readily available to the federal Office of Management and Budget (OMB). It is in the federal interest, when it is making grant evaluations and awards, to ensure that the portion of project financing that is federally funded is spent as efficiently and as effectively as possible. Now that a menu of service delivery options exists in the industry to match project needs, we suggest that OMB look to the mechanisms in existing grant programs that require the grantees to use innovative service delivery methods and demonstrate the cost efficiency of their chosen delivery method. For instance, "Design-Build," which is a modern service-delivery methodology, is an inherently integrated part of any variety of P3 transactions. Not all states, however, have fully adopted modern service-delivery methodologies such as Design-Build.<sup>6</sup>

Upon its review of the criteria in existing grant programs requiring demonstrations of efficiency, this Administration should revise its criteria for federal grant programs supporting

---

<sup>5</sup> See Miller, *supra*; see also W. Ronald Hudson, Ralph Haas, Waheed Uddin, *Infrastructure Management: Integrating Design, Construction, Maintenance, Rehabilitation and Renovation* (New York: McGraw-Hill 1997), pp. 8-12.

<sup>6</sup> See *i.e.*, "21<sup>st</sup> Century Construction, 20<sup>th</sup> Century Construction Law: An Update", New York City Bar Association Construction Law Committee, Feb. 2014, available at <http://www2.nycbar.org/pdf/report/uploads/20072665-21stCenturyConstruction20thCenturyLawUpdated.pdf>.

infrastructure at the state and local government level. Applicants should be required, as a condition for eligibility, to quantitatively demonstrate why their chosen service delivery method is the most cost-effective, focusing on both initial costs and lifecycle costs. Increasing the efficiency of infrastructure-related grant programs in this manner would assure that under the new Administration, federal funds to support infrastructure across the country will be spent as efficiently as possible, and provide a level of "savings" to offset the tax expenditure. Meanwhile, doing so would permit states and localities to retain their flexibility in administering purely local capital projects that in the aggregate form essential components of the nation's infrastructure.

Evaluating potential infrastructure projects in accordance with the above recommendations should help solidify the success of this Administration's plans.

John S. Kiernan  
President, New York City Bar Association

Sanford E. Balick  
Chair, Transportation Committee

Ernest W. Chung  
Chair, Project Finance Committee

Virginia K. Trunkes  
Chair, Construction Law Committee

Additional Committee Contributors:

Andrew Dell'Olio  
Ronald Klempner  
Terri Matthews  
George K. Miller  
Gary L. Rubin

February 2017