
Infrastructure Recovery – Stimulus Investments in the Transportation Sector

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On February 17, 2008, President Obama signed the American Recovery and Reinvestment Act of 2009¹ (the “Act”). The purposes of the \$787 billion Act include preserving and creating jobs; promoting economic recovery and assisting those most impacted by the recession; investing in economic efficiency, infrastructure and environmental protection; and stabilizing state and local government budgets. The Act includes significant grants and other assistance for airport, mass transit, highway, rail, transportation security, and other infrastructure projects.

Airport and Aviation Infrastructure

The Act appropriated a total of \$1.3 billion available through September 30, 2010, to improve airport infrastructure under the Federal Aviation Administration’s (“FAA”) Airport Improvement Program (“AIP”) and Facilities and Equipment (“F&E”) programs. The Act allocates \$1.1 billion in discretionary AIP funds for eligible airport projects that enhance capacity, safety, and security at airports, including runway and taxiway construction, airfield lighting, weather observation stations, and land. Eligibility requirements will likely be similar to those under AIP, except that grants under the Act are not subject to the obligation limitations imposed in AIP. The grants are unique in that there is 100% federal contribution, however there is limited chance for amendments to grants to address project-cost overruns. The act prohibits reobligations to projects after September 30, 2010, therefore, after that time sponsors are completely responsible for cost overruns.²

States and airport authorities that are interested should identify projects that meet sponsorship and project eligibility requirements under the AIP. The FAA must develop application and eligibility criteria by mid-April, and will give priority to projects with a projected completion date before February 17, 2011, and that only supplement planned project expenditures. The FAA must award at least 50 percent of the initial grants by

1 P.L. 110-5.

2 *Federal Aviation Administration, Airport Grant Funding Under the American Recovery and Reinvestment Act (ARRA) of 2009: Questions & Answers* (March 16, 2009), available at http://www.faa.gov/airports_airtraffic/airports/aip/arra.

June 17, 2009, and the remaining grants by February 17, 2010. On March 12, 2009, Secretary of Transportation Ray LaHood announced that Pittsburgh International and Allegheny County airports will be the first recipients of the funding allocations in the amount of \$12 million.

Under the F&E program, \$200 million will be available to upgrade power systems, air traffic control systems and towers, and navigational facilities and equipment.³ As with additional AIP monies, application and eligibility requirements must be published by April 18, 2009, and the FAA will give priority to projects with a projected completion date before February 17, 2011.

The Act also allocates \$150 million to the NASA for aeronautics, which includes research and development for the Next Generation Air Transport System (“NextGen”) to modernize the current air traffic control system. NextGen has attracted widespread industry support because the new technology “will accommodate two to three times the current traffic levels by shifting from 40-year old ground-based, human-centric communications, navigation and surveillance systems to satellite-based, cockpit-enabled air traffic management.”⁴ The FAA estimates that a failure to implement NextGen will result in a \$22 billion loss to the U.S. economy by 2022, and a more than \$40 billion loss by 2033.⁵

Mass Transit Infrastructure

The Act provides additional appropriations and discretionary grants to states and mass transit agencies for improvements to mass transit infrastructure. It includes \$6.9 billion, to be available through September 30, 2010, for eligible capital projects within an approved State Transportation Improvement Plan (“STIP”), including the purchase of buses and equipment, crime prevention equipment, and capital investments to new and existing fixed guideway systems. An additional \$750 million will be apportioned to states and mass transit agencies by formula⁶ to modernize existing fixed guideway systems (e.g., purchasing or rehabilitating rolling stock, track, equipment and facilities) under 49 U.S.C. Chapter 53. The Federal Transit Administration (“FTA”) published apportionment tables on March 5, 2009.⁷ Up to 50 percent of funds awarded to a state that have not been obligated to a project within 180 days after apportionment, and all funds not obligated to a project within one year after apportionment, will be withdrawn from the state and redistributed to states that have had no funds withdrawn (the “Use it or Lose It Provisions”).

The Act provides \$100 million in discretionary grant programs through the new Energy Consumption and Greenhouse Emission Reductions Program for capital investments that reduce energy consumption and greenhouse gas emissions. The FTA will give priority to projects based on the total projected energy savings as a percentage of the total energy usage of the public transit agency. Mass transit agencies and States may also be eligible for \$750 million in discretionary grants to finance new fixed guideway capital projects under 49 U.S.C. § 5309(b)(2). Projects may be selected based on the results of a planning and alternatives analysis, a review of existing public transportation land use policies, cost effectiveness, the effect on local economic development, and the degree of local financial commitment. The FTA will give priority to projects currently in construction or that are able to begin construction by July 17, 2009. The FTA eligibility and apportionment information is available on the FTA’s website: <http://www.fta.gov/>.

3 The federal share for eligible F&E projects will be up to 100 percent.

4 *DayJet, NextGen Now! How the Digital Age of Aviation Will Unleash Abundance in Our National Airspace System*, (2008), available at <http://www.sustainableair.org/publications/index.html>.

5 *Federal Aviation Administration, NextGen Frequently Asked Questions* (Feb. 2009), available at <http://www.faa.gov/about/initiatives/nextgen/qanda/faq/index.cfm>.

6 80% of the funds will be available to urbanized areas; 10% to non-urbanized areas; and the remaining 10% based on the “Growing State” and “High Density State” formulas.

7 Once funds are appropriated, recipients must allocate funds to specific projects within 120 days or the FTA will withdraw half of all un-obligated funds. Any remaining un-obligated funds will be withdrawn within one year. States may request an extension if it can satisfactorily demonstrate an unworkable bidding environment or extenuating circumstances.

Highway and Surface Transportation Infrastructure


Under the Act, states, municipalities, and transit agencies may be eligible for \$1.5 billion in discretionary grants, to be available through September 30, 2011, for surface transportation improvements “that will have a significant impact on the Nation, a metropolitan area, or a region” and include highways and bridges, public transportation, passenger and freight rail, and port infrastructure.⁸ These discretionary grants expand existing funding programs under Title 23, and for mass transit systems Title 49, and range from \$20 to \$300 million (and up to 100% of total project cost). The Department of Transportation will publish eligibility criteria before May 18, 2009, and applications must be returned within 180 days thereafter. Projects will be selected by February 17, 2010. Projects with a three-year projected completion date and that require federal funding to complete an overall financing package will be given priority. Eligible projects must be included in a STIP, so interested recipients should consider a project that is already part of a STIP or coordinate with the relevant transportation authority to amend a STIP to add a desired project before applications are due.

By March 10, 2009, \$27.5 billion was appropriated to states for highway restoration, repair, and construction and for passenger and freight rail transportation and port infrastructure projects. In addition to the 2009 and 2010 federal aid to highways, an additional \$20 million will be available for transportation and technology training.⁹ Eligible State projects include construction, operational improvements, transportation planning, and carpool projects. As with discretionary grants, the Federal Highway Administration (“FHWA”) will give priority to projects that have a projected completion date of three years and that are located in economically distressed areas. Unobligated funds will be subject to 120-day and one-year Use It Or Lose it Provisions.

Build America Bonds

The Act creates two new types of tax credit bonds that can be used by state and local government issuers to finance infrastructure. Called Build America Bonds, they are taxable bonds that would otherwise be eligible to be issued as tax exempt bonds, except private activity bonds. For one type of Build America Bond (the “Tax Credit BABs”), the issuer must make an irrevocable election that will entitle the bondholder to claim a credit for 35% of the interest received on the bond. The other type of Build America Bond (the “Tax Subsidy BABs”) will also be issued with taxable interest but the issuer must make an irrevocable election for the issuer to receive a tax subsidy payment from the United States Treasury in an amount equal to 35% of the interest payments made in respect of the bonds. Subsidy payments with respect to the Tax Subsidy BABs are expected to be made contemporaneous with interest payments made by the issuer of the bonds but regulations are yet to be published by the United States Treasury. Issuers will not receive subsidy payments with respect to Tax Credit BABs and bondholders may not claim tax credits in respect of interest received on Tax Subsidy BABs.

For both types of Build America Bonds, (i) the issuer must comply with other rules and regulations relating to issuing tax exempt bonds, including arbitrage, private use restrictions, etc. and (ii) the issue date must be before January 1, 2011. Tax Credit BABs may be issued for new money or a refunding and may be used for working capital purposes as well as capital expenditures. The credits can be used against regular as well as alternative minimum tax. Tax Subsidy BABs may not be issued for refundings and 100% of the sale proceeds must be used for costs of issuance (not in excess of 2%), a reasonably required debt service reserve and capital expenditures, but not for working capital purposes.

 8 Smaller grants are available for projects in smaller cities or regions whose projects would not meet the minimum grant amount requirements.

9 The federal share for these projects is 100%.

There is no cap on the amount of Build America Bonds that may be issued.

Rail Infrastructure

The Act appropriates an additional \$8.0 billion in discretionary grants and other instruments, to be available through September 30, 2012, to states for high-speed rail corridor, intercity passenger rail service, and congestion-reduction projects under the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA").¹⁰ Projects that support the development of intercity high-speed rail service will be given priority. The Federal Rail Administration ("FRA") must provide interim application guidance by June 17, 2009. The final application rules will include separate instructions for high-speed rail corridor programs, intercity passenger rail service grants, and congestion grants.¹¹

The Act also allocates an additional \$1.3 billion to Amtrak under PRIIA, \$450 million of which is only available for capital security grants. The FRA must allocate all funds by March 19, 2009, and all projects must be completed by February 17, 2011. The FRA will give priority for non-security related projects that repair, rehabilitate, or upgrade railroad infrastructure, or that expand passenger rail capacity. Amtrak cannot use these funds to subsidize its operating costs.

Fuels

The Act provides \$300 million for the federal government to "acquir[e] motor vehicles with higher fuel economy." This includes hybrid, electric, and plug-in hybrid vehicles. However, the General Services Administration ("GSA") must submit a plan to the House and Senate Appropriations committees by June 17, 2009, regarding how the funds will be expended. After the initial report, the GSA must report to the committees on a quarterly basis.

Security

The Act allocates an additional \$300 million to the Transportation Security Administration for capital security grants, of which \$150 million is directed towards public transportation and rail security under the Implementing Recommendations of the 9/11 Commission Act of 2007, and \$150 million is available for port security under 46 U.S.C. § 70107.

Aircraft Ownership Tax Benefits

The Act extends for 2009 the option to claim an additional 50% first-year bonus depreciation amount, in addition to regular accelerated depreciation, for property having a depreciation period of 20 years or less, including aircraft used for qualified business purposes. This benefit does not apply to property that is predominantly used outside the United States, but there are exceptions for aircraft registered with the FAA and used to and from the United States.

Conclusion

The Act provides over \$48.0 billion for states and local governments to improve airport, mass transit, highway and surface transportation, and rail infrastructure. When taken together with other amounts appropriated for energy, transmission, water, the environment, housing and urban development, schools, government facilities and defense, over \$130 billion is appropriated under the Act for infrastructure-related



¹⁰ The federal share of any project may be up to 100%.

¹¹ Eligible projects do not have to be included in a state rail plan under 49 U.S.C. Chapter 227.

investment. This investment will provide substantial opportunities for private entities, developers, financial institutions, technology providers, and others—to participate in the development and implementation of infrastructure projects.

Clients should be mindful, however, that the Act is a stimulus package designed principally to address significant job loss and the severe recession that began at the end of 2007 and appears likely to continue at least throughout 2009. While the choices for expenditures could prove to be instructive, they should not be viewed as representing the Obama administration's or Congress' transportation infrastructure policy, including, but not limited to a policy on public private partnerships or other strategies, as they relate to transportation infrastructure. The Obama administration has released its proposed 2010 budget, and a surface transportation bill will need to be enacted to replace expiring legislation during the course of 2009, to address a myriad of other issues related to transportation infrastructure policy, strategy and investment.

Pillsbury attorneys are available to provide assistance to those interested in more information and advice on participating in the opportunities created by the Act.

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