ALLEN & OVERY

What's next for U.S. infrastructure policy?

Key legislative developments to watch in 2021.

The need for renewed, large-scale investment in America's aging infrastructure is undisputed. However, in recent years, well thought-out reforms from both sides of the political aisle have too often fallen victim to legislative gridlock.

Perhaps it was inevitable that, so long as full employment and strong economic growth persisted, infrastructure policy advocates could not build enough legislative momentum and urgency to enact genuinely innovative new measures. Yet in 2020, this settled landscape has been upended. Will the economic fallout from the Covid-19 pandemic be the impetus that is needed to spur meaningful legislative action in support of large-scale infrastructure solutions, similar to what was seen in the Great Depression of the 1930s? If so, will those solutions make smart use of the abundant private capital that investors are eager to deploy in the sector?

In this article, we examine a selection of the federal legislative proposals which are currently under discussion, with a focus on those which may present opportunities to deploy private capital in infrastructure. While it seems unlikely that we will see meaningful movement before November's election, a look at both Presidential candidates' platforms, as well as legislative proposals from both sides of the aisle, may give some indication of what to expect in 2021.

Furthermore, we argue that reforms which "crowd in" private capital to bridge America's USD2 trillion infrastructure gap[1] are more economically and politically sustainable than the traditional forms of government support for infrastructure, and hence, are exactly what legislators should be focusing on in the current environment.

Presidential election 2020: Comparing the Trump and Biden infrastructure proposals

In the lead-up to November, both President Trump and Democratic nominee Joe Biden have promised to significantly increase infrastructure spending.

Although not yet formally announced, President Trump's plan will reportedly include USD1tn in infrastructure spending over the next ten years, including USD810 billion for highways and transit, and the remaining USD190bn for rural broadband, 5G cell services, and other non-transportation infrastructure.[2] While the plan is currently light on detail, we anticipate (based on past announcements and legislative attempts) that spending will be largely focused on road infrastructure, possibly with an emphasis on rural areas, and will give state and local leaders significant discretion as to how grant money is distributed. Such funding may be accompanied by legislative or executive actions to further streamline the permitting and public consultation process, thus reducing "red tape" and allowing major projects more flexibility in meeting environmental requirements, following on from President Trump's recent Executive Order limiting public review of federal infrastructure projects under the National Environmental Protection Act (NEPA).[3]

In contrast, the cornerstone of Biden's infrastructure platform has been a commitment to "Build Back Better" and use clean energy and sustainable infrastructure to create new middle-class jobs and achieve net zero carbon emissions by 2050. These overarching goals will be supported by a "USD2tn accelerated investment" in clean energy and infrastructure, to be deployed over Biden's first term as President.[4] While Biden's position statement does not describe the investment mechanisms in detail, it hints at various opportunities for private investment. For example, it calls for:

– the development of innovative financing mechanisms that leverage private sector dollars to maximize investment;

– partnerships with the private sector to modernize the nation's electricity grids and to install a national charging network for electric vehicles; and

– a new USD40bn, ten-year Transformational Projects Fund for transportation, water and energy projects (such as port upgrades and new tunnels) which are "too large and complex to be funded through existing infrastructure programs". While the delivery mode is not specified, it is reasonable to expect that, as with recent mega-projects, the private sector will play a key role in financing and delivering any such transformational projects.

On the other hand, Biden's plan also contemplates a large amount of traditional, direct funding to be provided to state and local governments (for example, USD50bn to kick-start road repair over the first year of his Administration) and promises to appropriate more funds to "stabilize" the Highway Trust Fund.

The Moving Forward Act – A sign of things to come?

The Biden campaign platform is only one part of the Democratic Party's suite of infrastructure initiatives, of which the most tangible is the USD1.5tn "Moving Forward Act" which was passed by the House on July 1, 2020. This legislation incorporates aspects of the "Green New Deal" agenda and includes USD494bn for a five-year reauthorization of federal funding for surface transportation, to replace the existing Fixing America's Surface Transportation (FAST) Act which expires on September 30, 2020.[5]

The Moving Forward Act is unlikely to receive serious consideration by the current, Republican-controlled Senate. However, it does provide a detailed road map of what infrastructure policy could look like post-November if Democrats see success at the ballot box.

Key aspects of the Moving Forward Act include:[6]

– Huge investment in broadband infrastructure – the Moving Forward Act would appropriate USD80bn to fund new broadband infrastructure projects, which are to be competitively bid out on a nationwide basis, including by way of public-private partnerships. Given that Federal infrastructure spending has historically been dominated by transportation projects, this commitment to digital infrastructure is a significant change in focus. We discuss this emerging trend (along with the growth in Federal support for smart cities and other data-driven infrastructure) in more detail below.

– Additional USD37.5bn for airports[7] – these funds will be invested over the next five years, primarily through the Federal Aviation Administration's (FAA) Airport Improvement Program (AIP). The bulk of funding is available for a wide range of eligible uses, including capital projects (such as new terminal developments and upgrades), operating expenses, debt service payments and Covid-related items (such as rent waivers to concessionaires and sub-lessees experiencing economic hardship, and upgrades to protective health equipment).

  The Moving Forward Act also gives the FAA increased authority to offer AIP grants to support "innovative financing techniques" which are being pursued by sponsors of non-hub airports.[8] In addition to the existing "pilot" purpose of information gathering, the Moving Forward Act would allow FAA support for "innovative financing techniques" to be rolled out more broadly to reduce total project costs and expedite completion timelines. While the U.S. Government is still prohibited from guaranteeing airport debt, AIP grants could be used by airport sponsors to pay interest on airport debt, pay for commercial bond insurance and other credit enhancements, and for any other techniques approved by the U.S. Transportation Secretary. While it is early days, we see this scope expansion as a positive sign for airport investors. In particular, it shows that Democratic legislators recognize the need to modernize U.S. airport funding and attract more diverse funding sources to a sector that is still heavily reliant on government support (as compared to the typical funding mix for airports in other OECD countries).

– Triple funding for Amtrak – the Moving Forward Act provides for USD29.3bn of grants over five years. This includes USD19bn of Passenger Rail Improvement, Modernization and Expansion (PRIME) grants, of which at least 40% are earmarked for projects named in the Northeast Corridor capital investment plan.[9] This would likely include the stalled Hudson Tunnel component of the Gateway project in New York and New Jersey, which has previously been mentioned as a candidate for P3 style procurement. Aside from the Northeast Corridor, the Moving Forward Act also proposes to reinstate high-speed rail funding that was originally pledged by the Obama Administration but was cancelled by the Trump Administration – for example, the previously awarded USD929million grant to help fund California's high-speed rail network.

While the Moving Forward Act stipulates that Federal funding may cover up to 90% of the total project costs for eligible rail projects, past experience indicates that Federal grants are more likely to be deployed as only one part of a multi-source funding strategy. In view of their highly specialized and capital-intensive nature, many of the rail projects in the current pipeline would be excellent candidates for P3 procurement or other private sector involvement. The use of private capital under a P3 model (rather than relying on direct government funding for most or all project costs) would also allow the U.S. Government to "leverage up" its contributions and use its finite budgetary resources to effectively support a larger number of projects.

– Streamlining of TIFIA program[10] – the Moving Forward Act aims to provide a clearer, expedited process for approving TIFIA loans of up to USD100mn for highly creditworthy projects. Projects seeking up to USD150mn in federal debt and other senior debt would also be able to qualify for TIFIA loans based on one rather than two credit ratings (thus increasing the existing USD75mn threshold). If passed, these changes may reduce the lead time and transaction costs associated with smaller TIFIA loans. However, most TIFIA loans are larger than USD150mn and therefore would not qualify for these new benefits.

Moreover, the Moving Forward Act arguably misses a chance to more fundamentally reform the TIFIA program. For example, it does not include Rep. Steve Cohen's (D-TN) proposal to allow TIFIA loans to fund commercial and residential projects forming part of a transit-oriented development. This proposal, which also received support from the Republican-controlled Senate in 2019, would have encouraged more private sector investment in "smarter" development and "walkable communities" along transit corridors. In our view, this is just one (good) example of how TIFIA could be reimagined as a tool for shaping new, more sustainable urban growth patterns rather than simply servicing what has already been built.

In addition, it may be time to consider a more radical widening of TIFIA eligibility to include other mega-projects such as ports and airports, as suggested by various lawmakers including Senators Tammy Duckworth (D-IL) and David Perdue (R-GA) in their bipartisan "TIFIA for Airports Act" bill introduced in the Senate in 2018 and more recently introduced in the House by Reps. John Garamendi (D-CA), Adam Schiff (D-CA) and Conor Lamb (D-PA) in July of this year. Since major port and airport projects typically require billions of dollars in upfront capital investment, the average TIFIA loan size of USD430mn[11] is unlikely to "crowd out" private capital sources. Instead, it may be the critical final piece of the capital structure which gets billions of dollars of private investment over the line.

Highway Funding – Déjà vu all over again?

While it is clear that America's roads and bridges are suffering from under-investment, none of the initiatives proposed by the Presidential campaigns or under the Moving Forward Act convincingly address the underlying structural causes of the shortfall in the Highway Trust Fund – namely, the failure to escalate the gas tax with inflation, and declining fuel use as vehicles become more efficient. The appropriation of general revenue to plug this gap is (absent additional deficit spending) essentially a "zero sum game", in that it reduces the finite amount of taxpayer resources available for other purposes. Indeed, since 2008, Congress has transferred about USD141bn in general revenues to the Highway Trust Fund, and this figure looks set to increase over the next five years.[12]

While raising the gas tax may be one way to sustainably address the shortfall in transportation funding, there are other, more innovative options which are worthy of lawmakers' consideration.

One strategy, which is currently the subject of various pilot projects, is to replace the gas tax with a mileage-based charge (often referred to as "vehicle miles travelled" or "VMT"[13]). As the U.S. gradually moves away from conventional combustion engines in favor of electric vehicles, hydrogen-fueled vehicles and other new technologies, a VMT-based user charge may be a more accurate and equitable way of collecting funds for highway maintenance and repair. While the Moving Forward Act does not definitively favor this strategy over others, it does at least increase support for VMT pilot programs, by doubling funding for existing state-level pilot programs and also establishing a new five-year national pilot program.[14]

Another strategy, which would be particularly welcomed by the infrastructure investor community, would be to incentivize state and local agencies to undertake more P3s and similar DBFOM-style arrangements for roads, bridges and related infrastructure. This approach has already gained significant traction at the state level, with recent successful P3 projects under the relevant state Departments of Transportation – for example, the I 395 Express Lanes and the Capital Beltway HOT Lanes (both in Virginia), the I-77 Express Lanes (in North Carolina) and the Central-70 Project in Colorado.

However, some states are significantly behind others in taking up the mantle of transportation P3s, and there is room for Federal dollars to further promote this approach as a broader way forward. This could be in the form of expansion of available federal funding under existing programs such as TIFIA, or through new incentive programs that set aside dedicated additional funding for States that elect to use P3 structures or other innovative financing methods such as "value capture" (a method of funding infrastructure by monetizing the resulting increase in surrounding property values). Although not appropriate for every project, we see these innovative financing strategies as generally offering greater economic sustainability and more impact on a dollar-for-dollar basis, as compared to a strategy where Federal, State and local governments are required to directly fund the entire cost of a project.

Broadband and Smart Infrastructure – is "BIFIA" the new TIFIA?

While Federal infrastructure funding has historically focused on transport projects, there are signs that budget allocations are finally catching up to the 21st century economy, in which information flows are just as important to productivity as physical flows of people and goods. The Covid-19 pandemic – and in particular the rapid transition to remote working and schooling – has accelerated this shift. Access to digital infrastructure is now not only an economic driver but an essential component of social welfare and equal opportunity.

Regardless of who is successful at the polls in November, we can expect Federal funding for broadband to increase dramatically. If reelected, President Trump has promised to spend USD190bn on non-transportation infrastructure, with a primary focus on rural broadband and 5G cell services. Under the Moving Forward Act, the House Democrats have allocated USD80bn to fund the competitive procurement of new broadband infrastructure to under-served areas. The Democratic proposal contains a few interesting features, as follows:

- It would establish the Broadband Infrastructure Financial Innovation (BIFIA) program as the primary vehicle for at least USD5bn in funding to be distributed.[15] This program appears to be modelled on the existing TIFIA program and would be run by the National Telecommunications and Information Administration (NTIA). Financial assistance would be provided in the form of secured loans, lines of credit and loan guarantees for eligible projects.
- Public-private partnerships (P3s) are expressly authorized as a permissible delivery method under the BIFIA program. Federal credit instruments provided under the BIFIA program may be repayable from revenue sources including end user fees, payments owed to the private proponent under the relevant P3 concession agreement or other dedicated revenue sources, which indicates some flexibility to structure a broadband P3 on either an availability or a demand basis, and as either a retail or wholesale enterprise.
- Further, the project eligibility criteria seem to have been drafted with a view to encouraging private investment. In order to qualify for BIFIA funding, a project must: (a) foster partnerships that will attract private and public investment for the project, (b) enable the project to proceed at an earlier date than the project would otherwise be able to proceed or reduce the lifecycle costs (including debt service costs) of the project, and (c) reduce the Federal contribution for the project.[16] Other eligibility criteria resemble the existing TIFIA program – for example, a requirement for Federal loans and other senior debt in relation to the project to have two investment grade credit ratings.
- In addition, the Moving Forward Act expressly prohibits State governments from enforcing laws that inhibit public-private partnerships from delivering broadband service.[17] We interpret this prohibition as being intended to foster a competitive marketplace for broadband development rather than allowing State governments to monopolize procurement or favor incumbent providers. Again, this is a good sign for private investors who are eager to commit to broadband projects on a scaled-up, nationwide basis.

Looking beyond the Moving Forward Act, there are a number of other recent (proposed or enacted) Federal initiatives that aim to increase investment in "smart" digital infrastructure.

The U.S. DOT's "Smart City Challenge" is an excellent recent example of a program that leveraged a relatively modest USD40mn in Federal seed funding to crowd in up to USD500mn of additional private and public funds for smart city and advanced transport technologies in the successful city (Columbus, Ohio) and four finalist cities (Pittsburgh, San Francisco, Denver and Portland). As part of the large budget allocations for transport and digitalization under both President Trump's proposals and the Democrats' Moving Forward Act, Federal agencies such as the Department of Transportation and the Department of Energy have a once-in-a-generation opportunity to replicate and scale up these initial successes. Regardless of the election outcome in November, we would urge Federal agencies to continue to encourage private investment in smart city projects by deploying P3 procurement models, innovation contests and fiscal incentives (such as tax abatements), rather than attempting the impossible task of meeting ever-expanding modernization needs via direct public funding.

Looking further into the future, pilot funding under the Moving Forward Act [18] and other instruments suggests that the Federal Government will also continue to support the rollout of electric vehicle (EV) charging stations and ultimately, fuel networks for hydrogen-powered vehicles. Private sector companies such as Tesla Motors and Enel X have been at the forefront of such infrastructure development to date, and we hope and expect that any future government involvement in the sector will be designed to facilitate rather than compete with such private sector innovators.

Conclusion – Bringing U.S. infrastructure funding into the 21st Century

In the first two decades of the 21st century, there has been a steep decline in traditional sources of funding for U.S. infrastructure (such as the gas tax which funds the Highway Trust Fund) and mounting stress on municipal, state and federal budgets. As a result, vital projects are now dependent on temporary and politically-contingent "top up" funding (for example, the current FAST Act reauthorization process) and it is difficult to formulate a long-term strategic pipeline.

On the other hand, during the same period, the amount of private capital which is available for alternative asset classes and "impact investing" has skyrocketed. For example, it is estimated that the U.S. market for sustainable and responsible investing grew 18-fold between 1995 and 2018, and now accounts for approximately USD12tn of assets under management (amounting to 26% of all U.S. domiciled assets under professional management). In addition to traditional long-tenor transportation projects, private investors have more recently shown a strong appetite to deploy their capital to develop "core plus" infrastructure in the social, education and digital sectors (which is also an emerging priority for Federal, State and local agencies alike).

With the right legislative and policy reforms, this private capital could be used to its full potential, to ease the pressure on federal and state taxpayer dollars and allow long-awaited upgrades to roads, schools, airports, wastewater systems, mass transit and broadband networks to be completed on the massive scale that the United States' aging infrastructure desperately needs. However, unless and until such reforms are implemented, U.S. infrastructure funding remains caught in somewhat of an anachronism, in which the mechanisms for sourcing capital and procuring projects have not kept pace with recent structural shifts in the economy.

While the necessary reform agenda has proved too onerous in the past, the events of the past six months have ushered in a new sense of necessity, and perhaps even innovation. Proposals in all areas of government that have previously been considered "too expensive" or "too transformative" are being revisited in pursuit of the national economic recovery, and – as people as diverse as President Trump and Alexandra Ocasio-Cortez would attest – infrastructure is well-placed to play a critical role in any such strategy. Watch this space.

---

1. The American Society of Civil Engineers estimates that, assuming no significant policy changes, the U.S. will underinvest in infrastructure by over USD2tn between 2016 and 2025: https://www.asce.org/uploadedFiles/Issues_and_Advocacy/Infrastructure/Content_Pieces/changing-infrastructure-equation-report.pdf
2. Reports that the plan is under final preparation by the Federal Department of Transportation have been circulating for some weeks, having originally been reported by Bloomberg on June 15, 2020: https://www.bloomberg.com/news/articles/2020-06-16/trump-team-weighs-1-trillion-for-infrastructure-to-spur-economy
3. Executive Order 13927 issued on June 4, 2020.
4. As stated on Biden's campaign website (https://joebiden.com/clean-energy/). Another section of Biden's campaign website (https://joebiden.com/infrastructure-plan/) earmarks USD1.3tn for infrastructure over a ten-year period (as part of the "Biden Plan to Invest in Middle Class Competitiveness") and it is not clear if this figure overlaps with, or is separate to, the USD2tn figure.
5. This FAST Act reauthorization measure was originally introduced and passed by the House in a narrower form in early June 2020 (as the "Invest in America Act"), before being subsumed into the broader Moving Forward Act.
6. A section-by-section summary of the Moving Forward Act is available here: https://transportation.house.gov/imo/media/doc/Section%20by%20Section%20HR%202%20The%20Moving%20Forward%20Act%20FINAL.pdf
7. Moving Forward Act, Division E.
8. Moving Forward Act, Section 10105 (amending Section 47135 of Title 49 of the U.S. Code).
9. Moving Forward Act, Section 9102. The Northeast Corridor Capital Investment Plan (released in April 2016) identified $23.8 billion in capital funding required over five years: https://nec-commission.com/app/uploads/2018/04/Northeast-Corridor-Five-Year-Capital-Plan.pdf
10. Moving Forward Act, Section 7001.
11. Congressional Research Service, "The Transportation Infrastructure Finance and Innovation Act (TIFIA) Program" (R45516, February 15, 2019). Available online: https://crsreports.congress.gov/
12. https://www.reuters.com/article/us-usa-trump/trump-team-prepares-1-trillion-infrastructure-plan-to-spur-economy-idUSKBN23N0D7
13. The Moving Forward Act (sec. 5401-5402) does increase support for VMT pilot programs, by doubling funding for existing state-level pilot programs and also establishing a new five-year national VMT pilot program.
14. Moving Forward Act, Section 5401 et. seq.
15. Moving Forward Act, Sections 31321 et. seq.
16. Moving Forward Act, Section 31322.
17. Moving Forward Act, Section 31401.
18. Moving Forward Act, Section 33331 et. seq.
19. As reported by the U.S. SIF: The Forum for Sustainable and Responsible Investment in its 2018 trend report – executive summary here: https://www.ussif.org/files/Trends/Trends%202018%20executive%20summary%20FINAL.pdf

Key contacts

Jillian Ashley
Partner – New York
Tel +1 212 610 6477
jillian.ashley@allenovery.com

Isabelle Whitehead
Associate – New York
Tel +1 212 756 1103
isabelle.whitehead@allenovery.com

U.S.
CS2009_CDD-61129