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When is an infrastructure bank not a bank?

With much fanfare, President Obama announced on July 17th the Build America Investment Initiative (the Initiative), which includes establishment of the Build America Transportation Investment Center (the Investment Center) within the US Department of Transportation (DOT). Some commentators rushed to label the Investment Center an "infrastructure bank" but this is a clear mischaracterization of the scope of the Initiative. In this Client Briefing we review what the President's Initiative is, what it is not, and what it indicates about the state of the P3 market in the US.

What it is –

The Initiative is "a government-wide initiative to increase infrastructure investment by engaging with state and local governments and private sector investors to encourage collaboration, expand the market for public-private partnerships (P3s) and put federal credit programs to greater use."[1] Stated otherwise, this is an information sharing program designed to make P3 projects more attractive to those local and state governments that have not been actively involved in P3 using federal credit programs that are already in place but that the President considers to be underused. The Presidential Memorandum on the Initiative[2] (the Memorandum) achieves this in three ways:

- Creating the Investment Center, which the DOT promotes as a "one-stop shop" for governments, developers and investors seeking "to utilize innovative financing strategies for transportation infrastructure projects"
- Creating a federal "Interagency Working Group", headed by the Departments of Transportation and Treasury to attempt to broaden P3 projects from roads to projects relating to water supply, ports, harbors, broadband and the electric grid
- Holding an "Infrastructure Investment Summit" to be hosted by the Department of Treasury, on September 9th, 2014. The Summit will "focus on innovative financing approaches to infrastructure and highlight other resources that support project development."

In sum, the Initiative is intended to serve as a catalyst for P3 infrastructure projects that will develop with the assistance of pre-existing federal credit programs. Specifically, the Initiative will make use of the loan and guarantees available under the Transportation Infrastructure Finance and Innovation Act (TIFIA).[3] The TIFIA program provides loans, loan guarantees and lines of credit for up to 33% of transportation infrastructure P3 projects. The hope is that the Investment Center will bring exposure to these credit programs on the investor and lender side of potential P3 projects, the Interagency Working Group will spur the relevant government actors into action so they are ready and willing to move forward when approached by the private sector, and the Infrastructure Investment Summit will put the private and public sector actors in the same room, ready to pitch P3 projects. There is much merit and potential in each of these goals, but there is no new public money injected into the process, at any point.

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[1] White House Press Release of July 17, 2014.
[2] "Presidential Memorandum -- Expanding Public-Private Collaboration on Infrastructure Development and Financing," July 17, 2014.
[3] Moving Ahead for Progress in the 21st Century Act (MAP-21) , Public Law 112-141, 23 U.S.C 601-609.

What it's not –

As just noted, the Initiative does not create an infrastructure bank. In fact, the Memorandum instructing that the Initiative be created does not mention funding or potential sources of funding for the P3 projects the Initiative aims to promote. The concept of an infrastructure bank has been included in legislation authored by Congressman Delaney[4] and would be funded by unguaranteed bonds that allow dollar-for-dollar tax-free repatriation of US corporations' foreign profits. While the Delaney legislation (the Partnership to Build America Act) has attracted a rare level of bipartisan support, it is far from passage: Congressman Delaney's office expects the bill to be sent to committee in the Spring, after which there are hearings and proposed amendments. In addition, meddling with corporate tax issues is always a hot-button issue for Congress.

The President directed the implementation of the Initiative via the Memorandum. This is consistent with his second term approach of taking action by unilateral executive action when he thinks Congress is avoiding an issue, or cannot act due to political stalemate. Not insignificantly, this is the situation currently playing out between the Republican-controlled House of Representatives and the Democratic-controlled Senate with regard to competing proposals to put desperately-needed cash into the Highway Trust Fund, an infrastructure fund that was scheduled to reach insolvency in August had new funds not been injected into it at the end of July. The President's tactics may be good politics, but it is a hard way to address the lack of infrastructure funding.[5] Only Congress can appropriate funds and no Executive Order can get around that problem.[6] Absent such funding by Congress, any executive action on infrastructure will be in the same vein as the Initiative – a lot of coordinating, facilitating and conferences.

What does this say about the state of P3 in the US?

There is no national consensus on how to pay for the infrastructure desperately needed throughout the US. There are some existing Federal programs – such as TIFIA – and the President is right to try to leverage those programs to do more, and to expand them beyond just the transportation arena. However, much of the innovative P3 efforts have been those of a handful of states that have actively promoted P3 funding for major road projects. Well structured projects that are supported by robust tolling or shadow tolling payments get developed, funded and built. To expand P3 projects, the United States needs the following:

- more states to adopt the P3 format as an alternative for infrastructure projects;
- a larger Federal guarantee program to fund marginal projects (especially outside transportation); and
- a policy move away from government-based (bond) financing.

A national infrastructure bank supported by both the legislative and executive branches could do much to accomplish the above goals by making funds available for more innovative projects. Sadly, that is not what the President's Initiative does – but the Initiative is a first step.

Clifford Chance's market leading infrastructure practice is widely recognised by clients, peers and directories as offering unrivalled expertise and resources around the globe. Our multi-disciplinary team of lawyers, who advise on all aspects of transactions in the infrastructure sector, will continue to track the progress of the Partnership to Build America Act and keep our clients informed of any updates.

4 Partnership to Build America Act (H.R. 2084).
5 It may also not be risk free, as a legal matter. The US House of Representative recently voted along party lines to sue the President for acting by Executive Order in areas where it contends the Constitution envisions a sharing of power.
6 Constitution of the United States, Article I, Section 9, Clause 7 (the "Appropriations Clause") and Article I, Section 8, Clause 1 (the "Taxing and Spending Clause".)