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# Client Alert

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## INFRASTRUCTURE PROVISIONS IN THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

President Barack Obama signed the *American Recovery and Reinvestment Act of 2009* (the “Recovery Act” or the “Act”) into law on Tuesday, February 17.<sup>1</sup> The Act includes nearly \$50 billion in new transportation investments. This memo describes some key provisions of the Recovery Act covering investments in transportation infrastructure, highlighting potential opportunities for public private partnerships.

### High Speed Rail

Federal Transportation Secretary Ray LaHood has indicated that high-speed rail “is the transformational issue for this administration when it comes to transportation.”<sup>2</sup> Congress has funded this priority: the Recovery Act includes \$8 billion in capital assistance for high speed rail (HSR) corridors and intercity passenger rail service, including projects that reduce congestion or facilitate ridership growth.<sup>3</sup> In allocating these funds, the Secretary of Transportation is directed to give priority to projects that develop intercity high speed rail services.

<sup>1</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, H.R. 1, S.1 (Feb. 17, 2009) (citations herein are to the enrolled text of H.R. 1 available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=fh1enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=fh1enr.txt.pdf))

<sup>2</sup> Neal Pierce, Editorial, “High-speed Rail, Obama’s Signature Issue,” *Denver Post*, March 7, 2009.

<sup>3</sup> H.R. 1, 94.

The Recovery Act includes an expedited timeframe for the deployment of HSR appropriated funds. Within 60 days of enactment, the Secretary is to submit a strategic plan to the House and Senate Committees on Appropriations describing how the Secretary will deploy funds.<sup>4</sup> The Secretary is further directed to issue interim guidance to applicants covering grant terms, conditions, and procedures by June 17, 2009.<sup>5</sup>

It is expected that Recovery Act grants will be awarded based on criteria that will include:

- Readiness: placing a relative emphasis on projects that can focus on aspects of implementation rather than planning
- Environmental clearance
- Improved travel time
- Transportation benefits & other benefits: energy efficiency, reduced emissions, and mitigating congestion
- Job creation or preservation benefits
- Minimizing or mitigating project risk
- Funding: while legislation does not require local match, state or other matching funds establishes local support for the project and any cost overruns

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

For further information about this Client Alert, please contact:

Allan T. Marks  
+1-213-892-4376  
amarks@milbank.com

Edwin F. Feo  
+1-213-892-4417  
efeo@milbank.com

Jonathan J. Green  
+1-212-530-5056  
jgreen@milbank.com

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The Act's appropriation for High Speed Rail dovetails with a December 16, 2008 Federal Railroad Administration Notice Requesting Expressions of Interest in Implementing a High-Speed Intercity Passenger Rail Corridor for potential projects to finance, design, construction, operate and maintain an improved HSR intercity passenger system.<sup>6</sup> The Department is actively seeking input from businesses, investors and financiers. Expressions of interest are due by September 14, 2009.

The Federal Department of Transportation has already designated ten eligible HSR corridors, including the "California Corridor" connecting the San Francisco Bay Area, Sacramento, Los Angeles, the Central Valley and San Diego.<sup>7</sup> California is perhaps the State farthest along in developing and building a true high-speed train project, thanks in large measure to the establishment of the California High Speed Rail Authority ("HSRA") and nearly \$10 billion in initial bond funding for high speed rail approved by California voters in November 2008. Representatives from the HSRA are actively courting federal officials for a significant portion of stimulus's HSR funds.

In addition, President Obama's proposed 2010 budget proposes an additional \$5 billion for a five year high speed rail state grant program.<sup>8</sup> Like the Recovery Act's HSR grants,

it is expected that these funds will be awarded to projects based on assessments of proposed projects readiness, environmental clearance, and perceived public benefits.

Furthermore, the proposed 2010 Federal Budget also calls for the establishment of National Infrastructure Bank.<sup>9</sup> While details on the proposed National Infrastructure Bank are short, the Budget proposes to establish a National Infrastructure Bank "to deliver financial resources to priority infrastructure projects of significant national or regional economic benefit."<sup>10</sup> The Bank is to be capitalized with \$5 billion initially and \$25.2 billion through 2019.<sup>11</sup>

Although these federal investments are significant, the implementation of high speed rail projects will require considerable private investment and contributions from states. Innovative project structures that leverage federal funds will be best positioned to benefit from the recent federal developments.

### Highways

The Act provides \$27.5 billion as supplemental formula grants to states, with funds available through September 30, 2010.<sup>12</sup> The federal share payable on account for any project is up to 100 percent of a project's costs, although states may elect to provide their own funds for part of a project's costs.<sup>13</sup>

The Recovery Act is designed to put people to work quickly and therefore includes a number of

incentives for states to use appropriated funds expeditiously. Under the Act, states must obligate half their funds within 120 days or else uncommitted funds are redistributed to other states.<sup>14</sup> Additionally, any funds unobligated after a year are to be redistributed to other states.<sup>15</sup> Furthermore, the Act specifies that priority be given for projects with projected completion within three years and that are located in economically distressed areas.

The Act does not dispense with existing requirements for federal-aid highway projects. Therefore, recipients will be required to comply with the National Environmental Policy Act (NEPA), the Davis-Bacon prevailing wage requirement, the Disadvantaged Business Enterprise (DBE) program, and the Buy American program.

Appropriated funds for "highway improvements" can be used for a variety of projects, including highway and bridge improvements, transit capital projects, freight and intercity passenger rail, port infrastructure, and environmental mitigation. Thus states have tremendous latitude in how they will spend the federal money. States may leverage the additional Recovery Act funds into public private partnerships. However, only projects that are "shovel ready" are to receive stimulus dollars.

A number of states have already announced how they plan to use their Recovery Act dollars. Some states, such as Maryland, are taking a "fix-it-first" approach, using the influx of federal funds to pay for repairs, upgrades, and improvements to already existing infrastructure. Kansas, by contrast, is spending its

<sup>6</sup> Notice Requesting Expressions of Interest in Implementing a High-Speed Intercity Passenger Rail Corridor, 73 Fed. Reg. 76443 (Dec. 16, 2008).

<sup>7</sup> *Id.*

<sup>8</sup> Office of Mgmt. & Budget, Budget Overview 2010, *A New Era of Responsibility: Renewing America's Promise*, at 19, 91, available at <http://www.gpoaccess.gov/usbudget/fy10/pdf/fy10-newera.pdf> (the full 2010 budget will be released later in the spring).

<sup>9</sup> *Id.* at 91.

<sup>10</sup> *Id.* at 19.

<sup>11</sup> *Id.* at 130.

<sup>12</sup> H.R. 1, 92.

<sup>13</sup> *Id.* at 93.

<sup>14</sup> *Id.* at 92.

<sup>15</sup> *Id.*

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its Recovery Act funds on a few new transportation projects.<sup>16</sup>

Although the Recovery Act's spending on highways is significant, it will not replace the need for additional private sector investments. In many states, the additional federal funds simply makeup for reduced state commitments to highways. In today's fiscal climate there simply aren't enough dollars to go around for needed transportation projects, and state and local fiscal constraints remain severe, due to lower tax revenues and limited public debt capacity.

### Discretionary Surface Transportation Program

The Act also appropriates \$1.5 billion for the Department of Transportation's discretionary surface transportation grants program.<sup>17</sup> Funds under this program are to be distributed by the Secretary of Transportation on a competitive basis for surface transportation projects that "will have a significant impact on the Nation, a metropolitan area, or a region."<sup>18</sup>

Funds under this program, are generally for use on longer-range projects. Eligible projects include highway, bridge, transit, rail and port projects. The Secretary is directed to ensure equitable geographic distribution of funds and an appropriate balance between

urban and rural projects, with priority given to projects that need additional federal funds in order to complete overall financing and that can be completed within three years.

Of key significance to private developers of transportation infrastructure, the Act provides that the Secretary of Transportation may allocate up to \$200 million of additional funding towards the Transportation Infrastructure Finance and Innovation Act (TIFIA) credit assistance program.<sup>19</sup> The TIFIA Federal credit program provides eligible transportation projects of national or regional significance secured (direct) loans, loan guarantees, or standby lines of credit. Under the program, DOT may award credit assistance to state departments of transportation, transit operators, special authorities, local governments, and private entities. Currently, the TIFIA credit program interest rate on a thirty-five year loan is below 3.63 percent.<sup>20</sup> In addition, TIFIA loans offer advantages of partial subordination and long tenors.

In recent years, TIFIA loans have played a significant role in the financial viability of P3 projects like the South Bay Expressway in California and the Pocahontas Parkway in Virginia. The TIFIA program provides a way to leverage government dollars with private sector investment. The ability to receive low-cost credit enhancement significantly improves the likelihood that PPP projects can tap private sector investment. Loan guarantees for surface transportation PPP projects may be particularly helpful. If successful, the program may be expanded. Innovative financing strategies will be crucial to maximizing scarce capital.

### Public Transportation

The Recovery Act provides \$8.4 billion for public transportation.<sup>21</sup> Of this, \$6.9 billion is directed for formula capital grants (principally bus and equipment purchases), \$750 million for fixed guideway (rail) modernization, and \$750 million for light rail and commuter rail projects.<sup>22</sup> As with the highway appropriations, public transportation funds under the Act may be used to pay for up to 100 percent of a project's costs and recipients must comply with existing federal law requirements, including NEPA and Davis-Bacon.

The Act provides that the \$6.9 billion in formula capital grants are to be disbursed to the states through September 30, 2010 in accordance with the Federal Transit Administration's formula. Specifically, 80 percent of the funds will be dispersed according to the Urbanized Formula, 10 percent according to the Rural Formula, and the remaining 10 percent according to the Growing States and High Density Formula.

The \$750 million for fixed guideway modernization is to remain available until September 30, 2010. These funds are available for capital projects to modernize or improve existing rail lines, including the purchase and rehabilitation of public transit rolling stock, track, equipment and facilities. Fifty percent of the funds must be obligated by the recipient states within 180 days after apportionment, and 100 percent of the funds must be obligated by the recipient states within one year from apportionment, with any funds that are not obligated or spent by the appropriate deadlines to be recaptured and reprogrammed.

<sup>16</sup> Michael Cooper, "Stimulus Spurs Roads Projects, Big and Small," *New York Times*, March 3, 2009.

<sup>17</sup> *Id.* at 89.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 90.

<sup>20</sup> For a thirty-five year loan, as of March 20, 2009, as posted on the TIFIA website, <http://tifa.fhwa.dot.gov/>.

<sup>21</sup> H.R. 1, 95.

<sup>22</sup> H.R. 1, 96-97.

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Notably, funds appropriated for light and commuter rail do not have the “use it or lose it requirement” of the fixed guideway and transit capital assistance programs.

However, the Act provides that projects that are under construction or which funds can be obligated quickly should be given priority.

### Aviation System

The Act provides \$1.3 billion for aviation transportation systems, with \$1.1 billion for Airport Improvement Grants-in-Aid and \$200 million for the Federal Aviation Administration’s Facilities and Equipment programs.<sup>23</sup> Funds under both programs are to be distributed as grants, for a federal share of up to 100 percent of costs. Facilities and equipment funds are directed towards improvements to power systems, air traffic control centers and towers, radar facilities, and navigation and landing equipment.

Notably, the Grants-in-Aid for Airports are not subject to apportionment. However, the Secretary is directed to give priority to projects that (1) can be completed within two years and (2) “serve to supplement and not supplant” planned expenditures. In keeping with the overall goal to inject federal money into the economy quickly, the Secretary is directed to award \$600 million in airport improvement grants by June 17, 2009.<sup>24</sup>

These federal investments in the aviation system will not address the growing capital needs of the nation’s aging airports. The modernization of Los Angeles International Airport alone is expected to cost between \$5 and \$8 billion,<sup>25</sup> and the estimated price-tag

for the modernization of O’Hare International Airport climbs to over \$13 billion.<sup>26</sup> As with highways and transit projects, significant private investment will be required.

### Amtrak

Finally, the Act provides \$1.3 billion in assistance to Amtrak: \$850 million for capital grants and \$450 million for security grants.<sup>27</sup> Amtrak funds must be obligated by September 30, 2010, with priority for the capital grants to go to the repair, rehabilitation, or upgrade of railroad assets or infrastructure and projects that expand rail capacity.<sup>28</sup>

### Buy American

The Recovery Act contains a controversial “Buy American” provision.<sup>29</sup> This provision was introduced first in the House of Representatives to cover iron and steel used in public building or public works projects. Its scope was widened in the Senate to include all manufactured goods used in public buildings or public works projects, but its impact was blunted by the addition of a number of exceptions permitting waivers in certain cases.

Under the Buy American provision that was finally enacted, no Recovery Act funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are

produced in the United States.<sup>30</sup> The Buy American provision is subject to executive waiver and contains many exceptions. If the head of the Federal department or agency involved finds (1) that the Buy American provision would be inconsistent with the public interest, (2) that iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality, or that (3) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent, then the requirement can be waived.<sup>31</sup>

The Buy American provision also specifies that the Buy American requirements must be applied “in a manner consistent with U.S. obligations under international agreements.”<sup>32</sup> The conference report indicated that the conferees expect the President to rely on his authority under the Trade Agreements Act of 1979 to comply with U.S. obligations under the WTO Agreement on Government Procurement and under U.S. free trade agreements. In practice, this will likely mean that goods and services coming from Mexico or Canada under the North American Free Trade Agreement or from any of the 36 countries party to the World Trade Organization Government Procurement Agreement, including all European Union member states, will not be subject to the Recovery Act’s Buy American provision. Notable trading partners still subject to the Buy American provision include China, India, and Brazil. The White House’s Office of Management of Budget is expected to issue an interim regulation that will interpret and begin the implementation of this provision.

<sup>26</sup> City of Chicago, O’Hare Modernization Master Plan, available at [http://egov.cityofchicago.org/webportal/COCWebPortal/COC\\_EDITORIAL/20yearMasterPlanChart.pdf](http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/20yearMasterPlanChart.pdf).

<sup>27</sup> H.R. 1, 95.

<sup>28</sup> *Id.*

<sup>29</sup> See, e.g., Richard A. Epstein, “The Buy American Provisions: Another Stimulus Farce,” *Forbes.com*, [http://www.forbes.com/2009/02/23/buy-american-stimulus-opinions-columnists\\_wto\\_trade.html](http://www.forbes.com/2009/02/23/buy-american-stimulus-opinions-columnists_wto_trade.html) (Feb. 24, 2009).

<sup>30</sup> H.R. 1, 189, § 1605.

<sup>31</sup> § 1605.

<sup>32</sup> § 1605(d).

<sup>23</sup> *Id.* at 91.

<sup>24</sup> *Id.*

<sup>25</sup> Dan Weikel, “Mayor Antonio Villaraigosa Unveils Modernization Plan for LAX,” *Los Angeles Times*, Nov. 18, 2008.

OFFICES WORLDWIDE

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**Beijing**  
 Units 05-06, 15th Floor, Tower 2  
 China Central Place  
 79 Jianguo Road, Chaoyang District  
 Beijing 100025, China  
 +8610-5969-2700



**Munich**  
 Maximilianstrasse 15  
 (Maximilianhoeefe)  
 80539 Munich  
 Germany  
 +49-89-25559-3600



**Frankfurt**  
 Taunusanlage 15  
 60325 Frankfurt am Main  
 Germany  
 +49-69-71914-3400



**New York**  
 One Chase Manhattan Plaza  
 New York, NY 10005  
 +1-212-530-5000



**Hong Kong**  
 3007 Alexandra House  
 18 Chater Road  
 Central, Hong Kong  
 +852-2971-4888



**Singapore**  
 30 Raffles Place  
 #14-00 Chevron House  
 Singapore 048622  
 +65-6428-2400



**London**  
 10 Gresham Street  
 London EC2V 7JD  
 England  
 +44-20-7615-3000



**Tokyo**  
 21F Midtown Tower  
 9-7-1 Akasaka, Minato-ku  
 Tokyo 107-6221, Japan  
 +813-5410-2801



**Los Angeles**  
 601 South Figueroa Street  
 30th Floor  
 Los Angeles, CA 90017  
 +1-213.892-4000



**Washington, DC**  
 International Square Building  
 1850 K Street, NW  
 Suite 1100  
 Washington, DC 20006  
 +1-202-835-7500