MAP-21: Treatment of Public-Private Partnerships Under Surface Transportation Reauthorization

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This E-Alert, the final of our four-part series (read parts one, two, and three), focuses on MAP-21's changes to federal law – and the lack of certain changes - that affect public-private partnerships.

On June 29, 2012 Congress passed the Moving Ahead for Progress in the 21st Century Act (MAP-21), a compromise measure to reauthorize transportation funding through the end of 2014. MAP-21 contains meaningful reforms that, although marred by some missed opportunities, collectively represent a significant improvement in federal surface transportation law.

In our series of E-Alerts on MAP-21, we elucidate four topics important to transportation financing and development of large transportation projects: (1) TIFIA, (2) environmental streamlining, (3) tolling and (4) public-private partnerships.

For the most part, federal law directly on the subject of public-private partnerships saw little change of significance. (Other federal laws, though not directly addressing PPPs, also affect the their viability as a project financing mechanism. Changes to the TIFIA program and to federal tolling law that will markedly improve project finance via public-private partnerships were addressed in our earlier E-Alerts.

Meaningful Reform:

- **Private Sector Participation.** MAP-21 requires the Secretary to develop policies and procedures to (1) promote public understanding of the role of private investment in public transportation projects and (2) better coordinate the public and private sectors with respect to public transportation services. To that end, the bill further requires the Secretary to identify impediments to the greater use of public-private partnerships and to address them by developing and implementing procedures similar to those used in FHWA's "SEP-15" process. The SEP-15 process

allows the Secretary to waive statutory and regulatory requirements on a case by case basis in order to increase project delivery flexibility and promote public-private partnerships.

- **Best Practices and Model Contracts.** The bill attempts to improve the use and effectiveness of public-private partnerships by directing the Secretary to develop best practices and "standard public-private partnership transaction model contracts" for the "most popular" types of PPPs for the development, financing, construction and operation of transportation facilities. States are encouraged to use those model contracts as a base template. The bill also requires the Secretary to provide technical assistance on public-private partnership practices and methods upon request of the federal-aid recipient. It remains to be seen whether the considerable differences in state law that directly affect the type, structure, terms and provisions of public-private partnership agreements will render such standard agreements less useful than envisioned. There is some concern that these provisions may presage a greater future federal regulatory role over public-private partnerships. State and local government sponsors of PPP projects will need to be vigilant for any signs of such intrusion, and persistently advocate for a supportive vs. regulatory federal role.
- **Preservation of Existing Laws Affecting Long-Term Asset Leases.** The bill preserves existing law by what it does not include – namely, the controversial "Bingaman amendments" that were part of the Senate bill, S. 1813. These amendments would have effectively deprived states of the benefits of long term leases of existing tolled transportation assets, one of the few alternatives available to generate new transportation funding. The amendments would have (1) eliminated accelerated depreciation and amortization for existing highway and related property subject to long-term leases, (2) precluded use of private activity bonds in connection with such leases, and (3) reduced a state's share of federal aid if a publicly-operated toll road is leased to a private entity.

Missed Opportunities:

- The bill makes no changes to highway transportation private activity bonds ("PABs"), leaving existing law in place. Proposals to improve and expand PABs were not addressed. These included proposals to:
  - Lift the $15 billion cap on PABs and as a result (1) render permanent the availability of highway transportation PABS for every project eligible for federal-aid under title 23 and (2) remove the allocation authority of the USDOT;
  - Permanently restore the exemption of PABs from the Alternative Minimum Tax, which increases borrowing costs and narrows the market of potential bond investors;
  - Allow PABs to be issued as capital appreciation bonds;
  - Change the limitation on use of PABs proceeds for land acquisition from 25% of PABs proceeds to 25% of total facility costs. ROW acquisition typically accounts for about 10–25 percent of total project costs and can be necessary far in advance of construction. Consequently, more than 25 percent of the proceeds of a single bond issue sold early in a project's life may be needed to help finance land acquisition; and
  - Allow use of PABs proceeds to reimburse costs previously incurred to plan and build a highway/intermodal project, prohibited under current tax law unless the project is undergoing rehabilitation. These costs can be significant. When it is ready to obtain private sector participation in financing and operating the project, the government sponsor can recapture more of these sunk costs if the private sector can access PABs for its financing. This in turn makes more money available to the government sponsor for other transportation needs.
- Forecasts of demand for PABs raise concern that the $15 billion authorized under existing law will be exhausted before the next reauthorization cycle. As availability depletes, we expect that these reforms will gain momentum.