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ALERT

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The GROW AMERICA Act – Paves the Way for Public-Private Partnerships and State Funding for Infrastructure Through Tolling Facilities

The GROW AMERICA Act

On April 30, 2014, the President sent a $302 billion surface transportation act to Congress, titled the Generating Renewal, Opportunity, and Work with Accelerating Mobility, Efficiency and Rebuilding of Infrastructure and Communities throughout America Act (GROW AMERICA Act or the Act). This proposal is intended to set the funding levels for the next four federal fiscal years and make other programmatic changes concerning the surface transportation program after the current law, known as MAP-21, expires at the end of September 2014. The Act also attempts to address the funding shortfall anticipated to arise this summer within the Highway Trust Fund. While the GROW AMERICA Act includes many significant policy and funding initiatives, the primary focus of this *Alert* is the proposed reversal of the historical federal opposition to tolling existing free interstate highways, tunnels and bridges. This aspect of the Act, if adopted by Congress, has the potential to unleash a host of new toll projects throughout the nation and accelerate the use of public-private partnerships (PPPs) connected to the newly tolled infrastructure.

Brief Background

Since 1956, when the Interstate Highway System was established, federal law has prohibited tolls on interstate highways, except for tolls in existence prior to 1956. Subsequently, federal law authorized the construction of new tolled lanes on existing interstate roads and the tolling of newly built non-interstate highways. Most recently, MAP-21 authorized a United States Department of Transportation (USDOT) pilot program to allow three projects to convert existing interstate highway segments into tolled facilities. The Act seeks to fundamentally alter this landscape and offer new tools to states to fund interstate highway projects.

Section 1405

Pursuant to Section 1405 of the GROW AMERICA Act, the Administration proposes several significant changes to long-standing law for interstate roads, bridges and tunnels. In particular, Section 1405 proposes to:

- Eliminate the prohibition on tolling existing free interstate highways for purposes of reconstruction;
- Create new authority for the United States Secretary of Transportation to approve state projects that would toll existing interstate highways;
- Authorize the use of tolls to impose variable tolling on existing interstate highways, bridges and tunnels for congestion management, subject to approval by the United States Secretary of Transportation;
- Authorize the use of toll revenues to improve public transportation service within the transportation corridor;
- Permit the use of toll revenues for the improved operation of the tolling facility or highway on which the toll facility is located;
- Allow the use of toll revenues for the mitigation of adverse impacts related to the tolled facility as identified under the NEPA process;
- Authorize the use of toll revenues for any eligible purpose under Title 23 or Chapter 53 of Title 49, so long as the public authority certifies that the tolled facility is being adequately maintained; and
- After October 1, 2015, require that all new toll facilities on federal-aid highways use only non-cash electronic technology for toll collection.

In sum, the Administration's bill would meaningfully change the ability of states to use toll revenues to rehabilitate and repair existing infrastructure.

Other Notable Provisions

In addition to Section 1405, the GROW AMERICA Act contains several related provisions. In particular, the Act contains revisions to the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA), including enhancing the administrative funding and providing more resources to the USDOT to assist in managing the increasingly successful program. Likewise, the Act amends the Railroad Rehabilitation and Improvement Financing Program (RRIF) in a number of respects to better approximate the successful TIFIA program and broaden the potential range of uses for this funding program. In addition, the Act would increase the cap on private activity bonds (PABs) for transportation projects from $15 billion to $19 billion.

Conclusion

While it remains unclear whether Congress will enact a multi-year transportation law in the coming months and, if so, whether any of these provisions described above will be incorporated, the Administration's proposal has significant ramifications. The projected funding shortfall in the Highway Trust Fund and the impending expiration of MAP-21 will likely stimulate a robust debate regarding these proposed changes and other major policy changes in the federal surface transportation program.

Moreover, if Section 1405 or something similar is enacted, states should be able to pursue different projects and revenues using these new tools. The market for PPPs, already sizeable and growing, will likely accelerate as states seek to capitalize on the authority to raise and access new toll revenues outside the scope of the traditional federal program.

Global Infrastructure Practice

Greenberg Traurig's (GT) Global Infrastructure Practice Group is comprised of over 120 attorneys across the nation and overseas. We have deep experience in project structuring, development and finance, PPPs, construction, financing, insurance and bonding issues, environmental law and regulation, labor law, real estate, and tax law. Our PPP team is comprised of attorneys from a wide range of disciplines, including project and public finance, construction, environmental law, government, and tax and advises both private sector and governmental clients in all aspects of the PPP process, from planning, development, procurement and financing through to design, construction and operation.

Government Law & Policy

GT's Government Law & Policy practice combines the capabilities of our federal practice in Washington D.C. with our state and local practices across the country. This integrated team works closely with clients to provide seamless representation in any forum - before the U.S. Congress and Executive agencies, as well as state and local government entities. Our strong, bipartisan team includes former elected officials, as well as former top aides and policy officials who have worked on transportation issues for representatives and senators serving on various transportation-related committees. Team members also include individuals who served in senior executive positions at federal agencies that have jurisdiction over transportation policies, regulations, programs, and funding.

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