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Weekly 

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Senate Looks at Private Activity Bonds to Fund Infrastructure

Bipartisan bills have been introduced in the Senate to expand or create programs to finance infrastructure projects with private activity bonds (PABs). Senators **John Cornyn** (R-TX) and **Mark Warner** (D-VA) introduced S. 352, the Building United States Infrastructure and Leveraging Development (BUILD) Act, which would increase the cap on PABs from \$15 billion to \$20.8 billion. State and local governments can use PABs to issue tax-exempt debt for financing qualified highway or surface freight transfer facility projects. Increasing the cap would allow state and local governments to use more P3s.



Senators **John Hoeven** (R-ND) and **Ron Wyden** (D-OR) have introduced S. 146, the Move America Act, which would allow state and local governments to issue tax-exempt “Move America Bonds” in partnership with private entities for various kinds of transportation infrastructure projects. Each state would receive a bond allocation based on its population size. The bill also would create Move America Tax Credits in which smaller states could trade in their bond allocation for federal tax credits at a 25% rate. This will allow for direct investment in a project so states can take advantage of state infrastructure banks or other infrastructure revolving funds, and expand the use of P3s on non-revenue projects.

The Joint Committee on Taxation reports that the \$8 billion in federal investment from S. 146 would be leveraged into \$226 billion worth of bond authority over the next ten years, or up to \$56 billion over ten years in tax credits.



Senate Committee Conducts Hearing on Transportation Infrastructure Funding

The U.S. Senate Commerce, Science, and Transportation Committee (Committee) conducted a hearing last week that focused on funding America’s transportation infrastructure needs. Like the recent House hearing, the focus was on how to fund or finance projects through a 20-cent increase in the gas tax, implementing a new vehicle miles traveled tax (VMT), and public-private

partnerships (P3s). Witnesses noted the 20-cent gas tax increase could generate an estimated \$340 billion for infrastructure funding over ten years. The VMT was viewed as a solution to address the reduced value of the gas tax because it reinforces a user-pays model for infrastructure, regardless of the energy source for the vehicle. The technology for the VMT would have to be tested.

P3s often are regarded as one tool in the toolbox that work well in urban areas for transportation projects, but not in rural areas. Committee members noted that rural areas of the country rely on federal investments for infrastructure. At the hearing, the American Trucking Association (ATA) raised concerns about P3s and asset recycling, calling them “fake funding” and just another way of saying “toll roads.” The ATA also noted that P3s were better suited for public buildings. This is the first criticism of P3s that has arisen in public testimony.



Army Corp to Implement P3 Pilot Program

The Army Corps of Engineers (the “Corps”) published a request for information on how it should develop the pilot program, enacted in the Water Resources Reform and Development Act (WRDA) in 2014. Under WRDA, the Corps was directed to identify up to 15 projects for a pilot test of public-private partnerships. Under the law, the P3 projects must be greater than \$50 million, have non-federal sponsor support, include some

combination of design, build, finance, operation and maintenance, accelerate the delivery, and generate revenue or leverage non-federal funding sources.

The Corps notes that the known challenges to the use of P3s include the inability to collect, retain and reinvest fees and commit to future appropriations. Federal agencies also may lack the authority to use P3s. A vital concern for the Corps is how to develop P3 programs despite having little expertise in either commercial work or P3s. The Corps also questions the ability to evaluate investment information.

In 2014, SFAA and NASBP pursued a bonding requirement for the construction portion of any P3. At the time, the Corps told us that not all the pilot projects would involve construction. They were looking at their backlog of projects for flood, hurricane and storm damage mitigation and some dredging projects. The Corps also noted that the new WRDA law for this pilot project already states that federal laws apply. Any provision of federal law that would apply to the Secretary of the Army if the Secretary were carrying out the project would apply to a non-federal applicant carrying out a project under this pilot program.

Florida Governor Takes Aim at Local Occupational Licenses

HB3 was introduced with the blessing of new Florida Governor **Ron DeSantis** to preempt all local government occupational licensing. All existing local government regulation of businesses will expire on July 1, 2021, and the State expressly preempts the licensing and regulation of professions and occupations and supersedes any local government regulation. There is a process under which local governments can readopt regulations and promulgate new occupational licensing requirements. Local governments must demonstrate that occupational licensing:



There is a process under which local governments can readopt regulations and promulgate new occupational licensing requirements. Local governments must demonstrate that occupational licensing:

- Is necessary for public health, safety and welfare from significant and discernible harm or damage
- Does not restrict entry in the business or the availability of the business's service to the public
- Is the least restrictive and most cost-effective regulatory scheme

Local governments also must prepare a statement of the estimated regulatory costs and a determination that the costs imposed could not be reduced by the adoption of a less costly regulatory method. All new or readopted local government occupational licensing regulation would have a two-year sunset or expiration date.

In particular, the bill specifies that local government may not require licenses for specialty contractors for the following trades: painting, flooring, cabinetry, interior remodeling, driveway or tennis court installation, and decorative stone, tile, marble, granite, or terrazzo installation, plastering, and stuccoing.

SFAA Leads Claims Seminar for Veteran Affairs Department

Robert Duke, SFAA General Counsel, **Scott Olson** of Markel, **Rachel Walsh** of Liberty and **Jonathan Bondy** of Chiesa Shahanian & Giantomasi recently provided surety claims training to legal staff of the U.S. Department of Veterans Affairs (the VA). The training provided the basics of surety underwriting and surety considerations in handling a termination for default. The objective of the training was to enhance understanding of the steps a surety undertakes after a termination for default and the reasons for such steps. A key takeaway of the training was that early and frequent communication between the obligee and the surety is effective in mitigating a loss, facilitating a takeover and perhaps even avoiding a termination for default entirely.



The feedback regarding the training was extremely positive. A senior trial attorney for the VA stated,

"Your insight and perspective on how a surety analyzes a claim and what matters to you will indelibly assist VA attorneys on better assisting our clients with construction disputes and terminations."

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