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Will President Trump’s Infrastructure Plan Address OMB Scoring?

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Article By
E. Sanderson Hoe
Justin M. Ganderson
Peter Bernard Terenzio III
Covington & Burling LLP
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During his first State of the Union address on January 30, 2018, President Trump informed the country that “it is time to rebuild our crumbling infrastructure.” He called on Congress to “produce a bill that generates at least $1.5 trillion for the new infrastructure investment we need.” And, the President suggested that “every Federal dollar should be leveraged by partnering with State and local governments and, where appropriate, tapping into private sector investment — to permanently fix the infrastructure deficit.”

The President’s full infrastructure plan has yet to be unveiled, but a leaked summary of the plan from January 22 suggests that the plan will heavily depend upon encouraging “state, local and private investment” by providing incentives in the forms of grants. Fixing *federal* infrastructure may be made difficult, however, due to the budgetary scoring rules implemented by the Office of Management & Budget (“OMB”).

OMB’s rules, as provided in OMB Circular A-11, Appendices A and B (“OMB A-11”), dictate how a project is to be “scored” in terms of budget authority, and an agency cannot enter into a project unless it has sufficient budget authority. Unless an exception exists, these rules generally require that the *entire amount* of a long-term obligation be scored up front. In other words, while a long-term infrastructure project may involve annual payments spread out over many years, OMB A-11 requires the agency to have enough budget authority in year one for the totality of those payments. As a result, potentially promising projects may never receive consideration, and agencies can be prevented from undertaking long-term infrastructure projects.

This issue has long been a subject of discussion for the American Bar Association's Privatization, Outsourcing, and Financing Transactions Committee, which in 2008 published a White Paper that explained the effect of these budget scoring rules on the American infrastructure crisis—a crisis that the President's remarks show to be ongoing.

The White Paper update identifies "two additional, alternative scoring approaches that may more accurately reflect the government's obligations in connection with long term capital and real property projects." Under the first alternative approach, OMB would adopt the method currently used to score federal credit programs, and score the net present value of project costs, as adjusted for the amount of project risk taken by the government. Under the second alternative, OMB would recognize new "safe harbors" to the budget scoring rules, which would allow certain kinds of low-risk projects to be scored on an annual basis. Such a safe harbor is currently in place for Energy Savings Performance Contracts ("ESPCs"), where the government's contracting partner guarantees that the savings achieved by increased energy efficiency will cover the full cost of the government's investment.

The update concludes by suggesting that the two alternative approaches, together with the alternatives put forward in the 2008 White Paper, "might be considered to allow the government to move forward with worthy projects."

As the White House moves forward with infrastructure reform, it should consider the effect of these OMB scoring rules on the goals sought by the reform, and the suggested approaches in these ABA white papers.