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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

DOT Budget Undermines Trump's $1T Infrastructure Promise

By **Linda Chiem**

Law360, New York (March 16, 2017, 8:07 PM EDT) -- President Donald Trump's proposed 13 percent cut in funding to the U.S. Department of Transportation guts a variety of transit and other programs, raising questions about his promise to deliver a $1 trillion infrastructure investment plan, experts say, in an opening salvo in what's likely to be a pitched political battle over road, highway and airport upgrades.

The DOT's funding would be slashed by $2.4 billion, or 13 percent, down to $16.2 billion under a 2018 budget blueprint unveiled Thursday by the White House, cutting mass transit investment and discretionary grants for local surface transportation projects, while prioritizing the development of a major freight and highways program. The proposed budget also paves the way for the controversial privatization of the nation's air traffic control system.

The proposal suggests the administration is keen to redirect already limited infrastructure funds to more nationally significant transportation upgrades that can yield the biggest bang for the government's buck, rather than local or rural projects that benefit much smaller regions, experts say. But it raises questions as to what kind of follow-through Americans will actually see on Trump's highly touted $1 trillion infrastructure investment plan, which is staked largely on private industry investment.

"He's giving with one hand and potentially taking away with another," Patty Doersch, a partner in Squire Patton Boggs LLP's transportation infrastructure and local government public policy practice, told Law360. "A $1 trillion infrastructure investment plan, whether directly funded or fostered, is fantastic. I understand this is a messaging proposal, but the message the budget is sending seems to be that local money and financing tools can take the place [of the federal government]."

Trump's budget blueprint largely nixes federal support for public transit — such as light rail, heavy rail, commuter rail, streetcar and bus rapid transit projects — that might have previously been funded through the Federal Transit Administration's New Starts program.

"Transit systems going forward would seem to be taking a big hit, but in today's world it's important to have good seamless multimodal transportation, and one mode of transportation can't solve the problems we have with congestion," Jack Schenendorf, of counsel with Covington & Burling LLP, told Law360. "Local transit projects, many of them run across state lines ... are essential to keeping the cities not being gridlock."

Trump's proposal limits that New Starts funding only to transit projects that already have full funding grant agreements in place, and there are only a few projects that actually have such agreements locked down. Future investments in new transit projects would be paid for by the localities that use and benefit from those projects, the administration said.

And experts say cutting a program like New Starts doesn't square with Trump's much-publicized pledge to invest some $1 trillion into the nation's infrastructure.

"That's inconsistent with the stated desire to promote infrastructure and job creation and the rest, so there could be some objection on the planning horizon for some of these," Venable LLP partner Fred Wagner told Law360.

"My experience with the New Starts program is that the federal government is an important partner in new transit projects nationwide — even those relying on private finance tools and significant local tax revenues," Doersch said.

Trump has also proposed eliminating funding for what's known as the Essential Air Service program, which was put in place nearly 40 years ago to provide subsidized commercial air service to rural airports. The program made sure that small communities that were served by certificated air carriers before airline deregulation in 1978 maintained a minimal level of scheduled air service.

The budget also kills federal support for Amtrak's long-distance passenger train routes, which have long been inefficient and incur the vast majority of Amtrak's operating losses, to allow Amtrak to focus on better managing its state-supported and higher-performing Northeast Corridor train services, according to the administration.

Meanwhile, a big winner is Republicans' efforts to pull the nation's air traffic control functions out from under the Federal Aviation Administration and have them run by a stand-alone entity that, theoretically, can more quickly execute a much needed modernization of the system. It's a move that some transportation stakeholders have called the "privatization" of air traffic control. But Senate appropriators and other critics have said that splitting off air traffic control from the FAA could remove the system from proper government oversight and jeopardize public safety.

"On the topic of air traffic control, the budget request makes clear that the administration has put its finger on the scale of privatization," said David Whitestone, head of Holland & Knight LLP's government section. "Past administrations have also proposed changes to programs of various sorts, and the importance of this provision will be known in time if and when this administration puts energy into pushing the proposal on Capitol Hill."

Trump's budget backs an effort by Pennsylvania's Rep. Bill Shuster, the Republican chairman of the House Transportation and Infrastructure Committee, to "initiate a multiyear reauthorization proposal to shift the air traffic control function of the Federal Aviation Administration to an independent, nongovernmental organization, making the system more efficient and innovative while maintaining safety."

"He's doing Chairman Shuster a little political favor.... It doesn't solve any of the problems with the proposal; it's still unconstitutional to delegate regulatory or ratemaking authority to a private entity, so it still ends up looking like a Rube Goldberg device that is not going to be more efficient than an integrated FAA and could involve a lot of litigation," Rep. Peter DeFazio, D-Ore., ranking member of the House Transportation and Infrastructure Committee, told Law360 Thursday.

But it’s worth noting that presidential budget submissions are opening salvos for negotiation, and funding allocations should be viewed as the administration’s policy statements, which are sure to face vigorous debate on the Hill, experts say.

“As it regards transportation investment, the budget request could be considered Act One of a two-act play as the administration develops what is expected to be a more comprehensive capital investment plan,” Whitestone said.

Lawmakers are expected to put up the biggest fight to Trump’s proposal to eliminate funding for the highly popular TIGER discretionary grant program, which supports multimodal and multijurisdictional projects that might otherwise be difficult to fund through traditional federal programs.

“I would predict there would be a lot of pushback from both sides of the aisle because that program has been very popular,” Wagner said. “I would think that program is one that actually may survive because you’ll hear from Congress that without earmark authority, TIGER grants are one of the best ways to get some purely local projects built on a smaller scale and [these] are ready to go, these aren’t 10- or 20-year horizon projects.”

If anything, the TIGER program actually falls in line with the Trump administration’s penchant for giving states, municipalities and local government control over their own projects.

“It’s a honey pot for the secretary of transportation to hand out to projects, many of which are kind of nice to do and things that are very local where one could question the needs on the national system,” Schenendorf said. “TIGER grants were a good way to do that at the localized level, but it’s hard to take a national discretionary program and explain why you’re funding bike paths or downtown pedestrian walkways that might not be as much in the federal interest.”

--Additional reporting by Michael Macagnone. Editing by Philip Shea and Bruce Goldman.
