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## TACKLING THE INFRASTRUCTURE DEFICIT: USING PRIVATE DOLLARS FOR PUBLIC PROJECTS

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**O**n December 1st, conferees from the United States Senate and House of Representatives reached an agreement<sup>1</sup> on a \$305 billion, five-year transportation funding bill known as the FAST Act. The agreement, or “conference report”, was sent back to both chambers of Congress for an up or down vote, where it was quickly approved, making it the first long-term surface transportation infrastructure funding bill since 2005. The agreement came just in time, as current funding authorization would have expired only days later. President Obama signed the measure into law on Friday December 4<sup>th</sup> 2015.

Domestic surface transportation infrastructure funding, or lack thereof, in the United States has become a significantly detrimental, yet largely ignored issue. In 2013, the World Economic Forum ranked the United States 25th in the world for Infrastructure quality.<sup>2</sup>

Adding insult to injury, the American Society of Civil Engineers (ASCE) has assessed U.S. infrastructure with a grade of D+.<sup>3</sup> Evidence of the United States' dilapidated infrastructure can be seen all around, from the recent I-10 bridge collapse in California<sup>4</sup> to the Washington state bridge collapse in 2013.<sup>5</sup>

Over time, the issue has transformed from one of prestige to one of safety. It is not only important to build new highway systems, ports, and rail networks but it is also important to consistently upgrade the ones already in use. This keeps the country well connected and provides efficient and cost effective transport of goods, personnel, and services.

The FAST Act,<sup>6</sup> referred to above, has been hailed as a much-needed comprehensive piece of infrastructure legislation. Among other things, it calls for spending \$205 billion on highways and \$48 billion on transit projects, streamlines the funding and approval process, and creates a new grant program to use for development projects. While this seems to be a step in the right direction, the bill does not address the fundamental flaw in the surface infrastructure funding program, namely the mismatch between receipts and obligations to and from the Highway Trust Fund, and finding a credible long-term infrastructure funding source to re-align the mismatch.

The Highway Trust Fund is the primary mechanism through which the federal government contributes to domestic highway projects. The fund is financed by a per gallon excise tax imposed on the sale of gasoline and diesel fuel. The tax has been held at a constant rate since 1993 at 18.4 cents a gallon for gasoline and 24.4 cents on diesel fuel. The problem is that while the tax collects about \$34 billion annually, the actual maintenance costs are upwards of \$50 billion.<sup>7</sup> This creates a shortfall of \$16 billion (a number expected to grow significantly in future years), leaving no room for new projects, and little room for necessary maintenance and repairs. In recent years the funding shortfall has been bandaged by a series of unrelated provisions, but no long-term solutions have made it through Congress. The most recent five-year highway bill, passed in December 2015, was no exception.

In addition to the gas tax, which takes care of highways, surface transportation infrastructure viewed more broadly is funded by numerous public and private sector entities. In the 2014 fiscal year, the public sector alone spent \$279 billion<sup>8</sup> on transportation infrastructure. According to ACSE an overhaul of current infrastructure, including the restoration of bridges, rail roads, and roads requires an investment of \$3.6 trillion by 2020.<sup>9</sup> If current levels of spending and funding were to continue, this would lead to a shortfall of approximately \$2 trillion.

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## I. TOWARD A WIN-WIN SOLUTION

Though seemingly unrelated, a pilot program known as the EB-5 Investor Visa program, created in The Immigration Act of 1990, may be the key to unlocking additional infrastructure investment. The program is intended to draw overseas investment into the U.S. in exchange for conditional permanent residency to international citizens and their families who invest either \$500,000 in a Targeted Employment Area (TEA), or \$1 million in a non-TEA, and employ at least 10 U.S citizens or permanent residents.<sup>10</sup> The residency is made permanent after a re-evaluation period of two years.

According to Invest in the USA, \$7.35 billion entered the United States economy through this program in the four-year period spanning 2010 to 2014. Additionally, EB-5 investments were credited with creating 120,000 domestic jobs since inception.<sup>11</sup> Demonstrating its value and potential, investments through the program surged in 2008 when the financial crisis led to a drop in domestic lending.<sup>12</sup>

The EB-5 pilot program is operating under a short-term extension, and will expire unless re-authorized prior to the 11th of December 2015. The most notable changes expected in the re-authorization are the Senate Judiciary Committee's proposals to increase minimum investments to \$800,000 and \$1.2 million in TEA and non-TEA respectively, several measures to combat fraud, and more stringent applicant screening for criminal involvement.<sup>13</sup>

Many countries around the world have some kind of Investor Visa program, including in the Europe and the Middle East. Potential investors are subjected to a thorough vetting process to ensure financial stability, and security background checks in order to be eligible for the program. Furthermore, a biannual re-evaluation process ensures that investors are meeting all the requirements of the program before permanent residency is granted. Investor visas have become an increasingly important tool for governments looking to raise large amounts of alternate funding and supplement spending. The program's best feature is that EB-5 development projects are completed at no cost to the United States government.

A wide variety of investments are made through the EB-5 program - it is not limited to infrastructure projects. In fact, one flaw in the program as currently constituted is the barrier to entry for investments in public infrastructure. The law requires invested capital be placed "at risk", but neglects to define the precise degree of risk necessary for the investment to move forward. The general guideline is that the capital must be committed without the explicit guarantee of a return. Since the government backs public infrastructure projects, like those eligible for Highway Trust Fund dollars (or similar state projects), there is really no risk of losing invested capital. This creates a strange dichotomy where the projects most in need of alternative funding are the only ones ineligible to receive it.

For example, when a group of EB-5 applicants were given the green light to invest in the Seattle 520 Bridge Replacement Project by purchasing Washington State bonds, it appeared to be a win-win situation. The state gets its bridge and the investors gain lawful entry to the United States. Unfortunately, the project was unable to proceed when it was determined that the general obligation bonds did not meet the risk threshold. General obligation bonds are secured by state revenues, and despite the short maturation of the bonds in question being initially interpreted as risk; EB-5 regulations prohibit the guarantee of fund reimbursement.

At a time when lawmakers are debating mechanisms to fund domestic infrastructure while simultaneously managing a huge budget deficit, the EB-5 investor program may be a very effective solution that creates jobs, all at no cost to American citizens. In addition to reauthorizing the program, Congress may want to consider modifying the program by allowing more access to public infrastructure projects and increasing the program's visa allocation.

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