

Private-Sector Perspectives

Geoffrey Yarema, Nossaman, Guthner, Knox & Elliott

When we think about life after TEA-21, it is important to remember that the real responsibility for developing projects and plans of finance in the United States does not fall on the federal government. Rather, it falls on the 50 state departments of transportation, dozens of regional transit agencies, and the numerous turnpike authorities around the country. Consequently, the extent to which the post-TEA-21 future embraces innovative finance and innovative project delivery relies primarily on three things. First is the willingness of state legislators to empower transportation officials with new and different authority. Second are the decisions of transportation officials to step up and assume leadership roles, learn from the experiences of those who have gone before them, and blaze new trails. And third, of course, is the private sector's evolving acceptance of new risks and responsibilities. Still, the federal role remains key, and as TEA-21 reauthorization marches ever closer, many are already hard at work on forging the next agenda—an agenda that should involve a unified team embracing AASHTO, ARTBA, and the other major stakeholders in transportation.

I would like to lay out a few items that may be worth discussing under that agenda. They are not in any order of preference.

First, we need to reauthorize the SIB program. We need to expand it so that all 50 states may allocate a portion of their existing federal funding to capitalize their banks, if they choose to do so. Federal highway and transit funds should be kept within separate accounts. And no state should be penalized for not

choosing to create a SIB. The benefits of the SIB program were in the process of being proven, with 39 states participating, before a legislative setback that arose from an unrelated issue on Davis-Bacon. We need to break that logjam.

Second, we need to refine tax law to enable more public-private ventures and permit more private investment and risk-taking in combination with tax-exempt financing. In my view, private investment in roads and transit systems does not entail the kind of abuse that Congress intended to curb through limitations on private access to the tax-exempt capital markets. New flexibility would be useful.

We have tried a couple of times. There was the Highway Infrastructure and Cost Savings Act that Senator Chafee championed; this provision was included in a tax bill that both the House and the Senate passed but that the President later vetoed for reasons that had nothing to do with this particular provision. Another example is a bill Senator Lott currently has in the hopper that would permit a second advance refunding of tax-exempt debt for certain projects. These are both examples of legislative actions that could help maximize the role of the private sector in tax-exempt-financed projects.

Third is FHWA's current effort to promulgate a design/build contract rule, as mandated by Congress under TEA-21. We need to allow the states as much flexibility as possible to procure services in the manner their own legislatures authorize. As people who know our work can say, design/build is a critical building block for many of the projects that use innovative

financing. We look forward to seeing the new rule in the near future.

Fourth is continued federal encouragement of value pricing for all modes. We have certainly seen a history of federal encouragement as value pricing relates to toll roads, but it can apply to transit systems and intermodal facilities as well. Value pricing is not a matter of "if" but rather of "when," and it will continue to require federal leadership.

Fifth, people who are involved in TIFIA and people who attended this conference know that TIFIA is a great new tool. Many people worked very hard to enact it into law. The U.S. Department of Transportation staff and advisors have done a spectacular job of implementing the program. It is not too early to be working toward this program's reauthorization. Toward this end, it is incumbent on all of us to make sure that as many strong applications as possible are submitted over the next couple of years.

Sixth, TEA-21 included provisions on environmental streamlining, and implementation efforts are ongoing in the 50 states. I think it is fair to say that one of the biggest problems with innovative financing and innovative project delivery is the time it takes to get a record of decision, or ROD—time that has little to do with the actual environmental work leading up to the approval process. There are a number of things we can do legislatively here, not the least of which is the simple enactment of a statute of limitations on National Environmental Policy Act challenges—something we have tried hard (though unsuccessfully) to do for 5 to 7 years.

Finally, another tool that has received a lot of attention, and justly so, is the GARVEE. Some technical amendments will likely be appropriate come reauthorization time.

That provides but an overview of the items that may well appear on the agenda as we move toward reauthorization of TEA-21.