ASSESSING OBAMA'S PROPOSED NATIONAL INFRASTRUCTURE BANK: A MODEL FOR JOB CREATION, OR ANOTHER PUBLIC-PRIVATE DISAPPOINTMENT?

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I. *Introduction*

In his 2010 Labor Day speech to a crowd of Milwaukee middle-class Americans, President Obama postulated, "a job is about more than a paycheck, as important as that is. A job is about waking up every day with a sense of purpose, and going to bed each night fulfilled. A job is about meeting your responsibilities to yourself, to your family, to your community."[1] The employment crisis facing America's economy today cannot be overstated. The current unemployment rate is 8.8 percent[2], and the fraction of Americans living in poverty rose to 14.3 percent from 13.2 percent in 2008—"the highest since 1994."[3] Even considering recent increases in job creation, it may take "nearly eight years to return to the pre-recession unemployment rate of 5 percent, set in December 2007."[4] Clearly, economic recovery will not be lasting until this issue is addressed.

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[1] *Obama's Labor Day Speech 2010: President Assails GOP, Promotes Job Creation Program*, AP/HUFFINGTON POST (Sep. 6, 2010), a*vailable at* http://www.huffingtonpost.com/2010/09/06/obama-promotes-job-creati_n_706652.html.

[2] "Labor Force Statistics from the Current Population Survey, U.S. BUREAU OF LAB. STAT., *available at* http://www.bls.gov/cps/ (last visited Mar. 31, 2011).

[3] Press Release, U.S. Census Bureau, Income, Poverty and Health Insurance Coverage in the United States: 2009 (Sept. 16, 2010), *available at* http://www.census.gov/newsroom/releases/archives/income_wealth/cb10-144.html.

[4] "February's Jobs Report," N.Y. TIMES (Mar. 4, 2011), *available at* http://www.nytimes.com/2011/03/05/opinion/05sat2.html?_r=1.

The Obama administration supports legislative initiatives that would create a National Infrastructure Bank.[5] The three most important policy problems that this legislation seeks to address are: (1) ameliorating the employment crisis, (2) improving the infrastructure of the U.S. through renewable energy and other means, and (3) removing local politics from infrastructure project selection. Rep. DeLauro (D-CT) proposed H.R. 2521, the "National Infrastructure Development Bank Act of 2009," which would create a bank to fund "infrastructure project[s]," a defined term which means "energy, environmental, telecommunications, or transportation infrastructure project[s]."[6]

Infrastructure development is a common avenue for job creation during a recession and is ripe for reform. While the United States spends around two percent of its GDP on infrastructure, "China and India are spending 9 percent and 5 percent of GDP, respectively."[7] Developed countries spend an average of three percent of GDP, while developing countries spend six percent.[8] European countries spend an average of five percent of GDP on

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[5] It is unclear exactly what kinds of jobs the infrastructure bank would create; presumably, the majority of these jobs would be temporary or seasonal construction jobs. Typically, these jobs are seasonally adjusted out of the Labor Department's monthly unemployment rate. The issue of whether the proposed legislation will really affect the U.S. unemployment rate is addressed below. Regardless of the unemployment rate, however, the legislation's goal is job creation, which includes both permanent and temporary jobs, the latter of which would theoretically stimulate the economy, leading to an decreased unemployment rate in the long-term.

[6] H.R. 2521, 111th Cong. (2009).

[7] This difference in spending does not necessarily mean that China and India are more "dedicated" to infrastructure development than the U.S. This difference could signal the fact that China and India are behind on infrastructure development and need to spend more. Nevertheless, the U.S. has shifted approximately 75% of U.S. infrastructure spending to state and local governments, a trend that economists argue should be revised to accommodate for interstate infrastructure development. *See* Robert L. Reid, *The Infrastructure Crisis*, AM. SOC'Y OF CIV. ENG'R., Jan. 2008, *available at* http://pubs.asce.org/magazines/CEMag/2008/Issue_01-08/article1.htm.

[8] Jessica Milano, "Building America's 21st Century Infrastructure," PROGRESSIVE POL'Y INST., Jan. 15, 2009, *available at* http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=450020&subsecID=900194&contentID=254788#endnotes.

infrastructure.[9] In 2010, the U.K.'s Chancellor of the Exchequer George Osborne proposed cutting infrastructure spending from 3.5 percent down to 1.1 percent of GDP, a proposal that, according to lobbyist John Cridland of the Confederation of British Industry, would be "short-sighted in the extreme," given the U.K.'s poor infrastructure compared with national standards.[10]

This note examines the merits of a government-run infrastructure bank, as well as the risks it would impose on the broader economy. This note argues that, on balance, an infrastructure bank will successfully create jobs and could be an important step towards alleviating the current crisis. Section one outlines the basic structure and function of the proposed infrastructure bank. Section two analyzes weaknesses in the proposed legislation and proposes changes to make the bank more economically and politically palatable. Section three compares the infrastructure bank proposal to the "public-private investment programs" ("PPIPs") that formed a part of the initial financial stimulus in 2009. It also points out weaknesses in the PPIPs that legislators should avoid in forming the infrastructure bank, itself a public-private cooperative measure. Section four compares the potential infrastructure bank with the Build America bond program. Finally, section five compares the proposed infrastructure bank to the European Bank for Reconstruction and Development ("EBRD") and concludes by discussing areas for further research regarding this omnibus piece of banking and infrastructure legislation.

II. The National Infrastructure Development Bank

Legislative and executive proposals calling for an infrastructure bank have not been uniform. In 2007, Senators Dodd (D-CT) and Hagel (R-NE) introduced the original bill creating an infrastructure bank.[11] Representative Keith Ellison (D-MN) introduced a companion bill, H.R. 3401, with similar terms, but neither of these

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[9] *The Cracks are Showing*, THE ECONOMIST, Jun. 26, 2008, *available at* http://www.economist.com/node/11636517.

[10] Andrew Hankinson, *CBI fears cuts in infrastructure spending*, BUILDING.CO.UK, Sep. 9, 2010, *available at* http://www.building.co.uk/sectors/infrastructure/cbi-fears-cuts-in-infrastructure-spending/5005301.article.

[11] S. 1926, 110th Cong. (2007-2008).

bills came up for decision and were cleared from the record.[12] Rep. DeLauro (D-CT) proposed the newest legislation on the issue in 2009.[13] President Obama's administration has called upon Congress to charter an infrastructure bank as part of a six-year plan to renew and expand the nation's roads, railways and runways by investing billions in government money.[14] The Obama administration advocated for an initial government "up-front investment" of $50 billion to jump-start job creation and lay the foundation for the bank.[15] The infrastructure bank would endeavor to alter the current system of project finance, which relies heavily on earmarks and local political lobbying; under the new legislation, projects would be approved on merit and performance.[16] Once approved, the infrastructure bank would directly make low-interest loans to state governments and institutional investors to finance the proposed developments.[17]

A. The Structure of the Infrastructure Bank

As originally proposed in 2007, the infrastructure bank would be organized as an "independent establishment of the Federal Government."[18] This is a defined term in the United States Code, referring to "(1) an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent

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[12] H.R. 3401, 110th Cong. (2007-2008).
[13] See H.R. 2521.
[14] Press Release, The White House, President Obama to Announce Plan to Renew and Expand America's Roads, Railways and Runways (Sep. 6, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/09/06/president-obama-announce-plan-renew-and-expand-america-s-roads-railways-.
[15] *Id*.
[16] *Id*. ("This marks an important departure from the federal government's traditional way of spending on infrastructure through earmarks and formula-based grants that are allocated more by geography and politics than demonstrated value. Instead, the Bank will base its investment decisions on clear analytical measures of performance, competing projects against each other to determine which will produce the greatest return for American taxpayers.").
[17] H.R. 2521, *supra* note 6.
[18] S. 1926, *supra* note 11, § 101.

establishment; and (2) the Government Accountability Office."[19] Under Rep. DeLauro's proposal, however, the infrastructure bank would be established as a "wholly owned Government corporation subject to chapter 91 of title 31, United States Code (commonly known as the 'Government Corporation Control Act')."[20] Thus, the infrastructure bank would be structurally similar to the Federal Deposit Insurance Corporation ("FDIC") but wholly owned by the Government.[21] The FDIC is a "mixed-ownership Government corporation" and not wholly government-owned.[22] A five-member Board of Directors, each of whom are appointed by the President and confirmed by the advice and consent of the Senate, would lead the Bank.[23] The executive officers, according to DeLauro's bill, would have experience in areas such as transportation, environmental energy and telecommunications infrastructure, economic and workforce development, public health and private or public finance.[24] Directors would serve a term of six years.[25] The Board would be required to submit to Congress annual reports regarding financing and updates on its projects, and the Comptroller General would submit an evaluation of the infrastructure bank to Congress within five years of its enactment.[26] Finally, the infrastructure bank would expire fifteen years after the statute's enactment.[27]

B. The Function and Powers of the Infrastructure Bank

1. Powers of the Infrastructure Bank

Senator DeLauro introduced the problems with America's infrastructure by citing authority from the American Society of Civil Engineers which states that "the current condition of the infrastructure in the United States earns a grade point average of D, and an estimated $2.2 billion investment is needed over the next five

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[19] 5 U.S.C.A. § 104 (2006).
[20] H.R. 2521, *supra* note 6, § 4(a).
[21] 31 U.S.C.A. § 9101.
[22] 31 U.S.C. § 91
[23] H.R. 2521, *supra* note 6, § 5a.
[24] H.R. 2521, *supra* note 6.
[25] *Id.* at § 6.
[26] *Id.* at § 10, §15.
[27] *Id.* at § 17.

years to meet adequate conditions."[28] Relying on this evaluation, the White House proposed that the Bank should finance the rebuilding and maintenance of 150,000 miles of roads, 4,000 miles of railway and 150 miles of runways, in addition to implementing an air traffic system known as NextGen to "reduce travel time and delays."[29,30] The infrastructure bank's powers would be substantial: it could "make senior and subordinated loans," "issue and sell debt securities," "issue public benefit bonds," "make agreements" and "exercise all other lawful powers which are necessary or appropriate to carry out . . . the purposes of the bank."[31] The Bank's constitutionality rests on the fact that all projects financed and loans made to investors are backed by the full faith and credit of the United States Government.[32]

2. Project Selection

The Board would be responsible for project selection. Under Sen. Dodd's version of the legislation, investors would bring infrastructure projects with a potential investment of at least $75 million via a "project sponsor" and, once approved, would receive federal loans from the Bank using a sliding scale method depending on the location and cost of the project.[33] Under Sen. DeLauro's bill, eligibility for project assistance would be determined by criteria developed by the Board. The text of the legislation delineates "factors" for the Board to consider in evaluating project proposals.

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[28] *Id.* at § 2.
[29] Press Release, The White House, *supra* note 14.
[30] The Next Generation Air Traffic System ("NextGen") is an umbrella term coined by the Federal Aviation Administration ("FAA") that would reform the National Airspace System ("NAS"). NextGen aims to transform the currently ground-based system of air traffic control to a satellite-based system. The goal of this program would be to reduce carbon emissions while also reducing delays in air traffic. *See* What is NextGen?, http://www.faa.gov/nextgen/why_nextgen_matters/what/.
[31] H.R. 2521, *supra* note 6, at § 5.
[32] This provision of the legislation ensures the Bank's compliance with Article 1, Section 9 of the Constitution, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." *See* H.R. 2521, *supra* note 6, § 12.
[33] S. 1926, *supra* note 11, § 301.

These factors include the "economic, environmental, social benefits, and costs of each project . . . prioritizing projects that contribute to economic growth, lead to job creation, and are of regional or national significance."[34] In addition to these general factors, the Board considers specific criteria depending on the type of project that is proposed.[35] For example, the Board of Directors examines "transportation infrastructure projects" for the following characteristics: "(1) Job creation . . . ; (2) [r]eduction in carbon emissions; (3) [r]eduction in surface and air traffic congestion; (4) [s]mart growth in urban areas; (5) [p]overty and inequality reduction through targeted training and employment opportunities for low-income workers; (6) [u]se of smart tolling . . .; and (7) [p]ublic health benefits."[36]

3. Economic Advantages of An Infrastructure Bank

By developing a joint public-private investment strategy, the infrastructure bank employs an economic model ideal for raising the large pools of capital necessary to finance modern construction projects.[37] Henry J. Hatch, a director of the American Society of Civil Engineers, criticizes the current scheme, comprised of a fragmented group of actors—"public- and private-sector, local, state and federal" —where pressure from the public to Congress to keep rates down impedes innovation.[38] Moreover, Stephen E. Flynn, a senior fellow for national security studies at the Council on Foreign Relations, urges that "government at all levels could work better with the private sector" to restore the U.S. infrastructure.[39] Supporters tout the Bank as an entity with the "in-house capability to originate infrastructure loans and …fund itself through the international capital markets," much as the World Bank operates.[40] With a global demand for debt today, creating the infrastructure bank would effectively

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[34] H.R. 2521, *supra* note 6, § 10.
[35] *Id.*
[36] *Id.*
[37] Reid, *supra* note 7.
[38] *Id.*
[39] *Id.*
[40] Bernard L. Schwartz, *Redressing America's Public Infrastructure Deficit*, NEW AM. FDTN. (2008), *available at* http://www.newamerica.net/publications/policy/redressing_america_s_public_infrastructure_deficit.

attract institutional investors through its infrastructure bonds.[41] The Bank would be able to use objective terms for applications, conduct regional projects across state lines, improve project selection, and "negotiate with state sponsors."[42] The Bank, as Obama announced, would treat infrastructure development as a long-term investment and would have the capability of issuing bonds of up to 50 years maturity.[43]

C. How Infrastructure Projects Work

1. How Projects Are Financed Today

Currently, infrastructure projects are financed in a variety of ways depending on the particular industry at issue. State governments are responsible for the development of most infrastructure projects today.[44] To finance a new construction or maintenance project, states obtain funding from a variety of sources. However, three sources predominate in the funding of infrastructure projects. The main source of funding for new projects is state and local sales and property taxes.[45] States also issue municipal bonds[46] and receive federal grants.[47] Once states raise sufficient capital to undertake a

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[41] Min Zeng, *Record Sales, Yields Mark Treasury's Year*, WALL ST. J., Sep. 30, 2010, *available at* http://online.wsj.com/article/SB1000142405274870448300457552373225387610 8.html?KEYWORDS=global+demand+debt.

[42] Felix Rohatyn, *The Case for an Infrastructure Bank*, WALL ST. J., Sep. 15, 2010, *available at* http://online.wsj.com/article/SB10001424052748703376504575491643198373362.html.

[43] *Id.*

[44] Note, however, that particular industries, such as the railroad and power industries, are up to 85-90% privately owned. In these special cases, private owners finance construction and maintenance themselves through loans from financial institutions, grants from the federal government, and other payment sources. *See* Reid, *supra* note 7.

[45] Edward J. Sullivan & Ida Lester, *The Role of the Comprehensive Plan in Infrastructure Financing*, 37 URBAN LAWYER 53, 56 (2005)

[46] Patrick Manchester, Note, *Be Kind to Your Foreign Investor Friends,* 98 GEO. L. J. 1823, 1824 (2010).

[47] *Investing in Infrastructure: Hearing Before the S. Comm. on Fin.*, 101th Cong. (2008) (statement of Peter R. Orszag, Director, Congressional Budget Office) (noting that of the $400 billion that the United States spends on infrastructure each year, $60 billion is spent by the federal government).

project, they contract with private construction firms and developers to carry out the projects.

2. How Projects Would Work Under the Infrastructure Bank

A federal infrastructure bank would directly affect the financing of infrastructure projects, and indirectly affect their implementation through its influence over project selection. Public sponsors, as the qualified applicants for funding from the infrastructure bank, would present their proposals to the bank.[48] If the bank selects a sponsor's project, the bank would assist the sponsor in financing its project through a variety of measures, including "direct subsidies, direct loan guarantees, long-term tax-credit general purpose bonds, and long-term tax-credit infrastructure project specific bonds."[49]

Such financing schemes would be an alternative to the current system of state taxes and the issuance of municipal bonds by states, which often do not generate enough capital to finance the large-scale infrastructure projects that are needed. The high-quality bonds that the infrastructure bank would offer are designed to attract investors in capital markets, including banks, insurance companies, pension funds and central banks.[50] The bank could also "spur renewable development by offering low-interest loans to private developer partners so as to fund projects at a lower rate than a conventional bank might offer."[51] Thus, the infrastructure bank could provide a greater variety of funding resources to state and local governments, which are in great need of subsidies for infrastructure projects.

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[48] *See* S. 1926, *supra* note 11, § 3 (defining "public sponsor" as "a state or local government, an Indian tribe…a public transit agency, public housing agency, a public infrastructure agency, or a consortium of those entities, including a public entity that has partnered with a private nonprofit or for-profit entity").

[49] Stephen J. McBrady, *Funding America's Infrastructure Needs: Public-Private Partnerships May Help Close Infrastructure Gap*, CONSTR. BRIEFINGS, Mar. 2009.

[50] H.R. 2521, *supra* note 6, § 2 (12)

[51] Christopher P. Riti, Comment, *Three Sheets to the Wind: The Renewable Energy Production Tax Credit, Congressional Political Posturing, and an Unsustainable Energy Policy*, 27 PACE ENV. L. R. 783, 812 (2010).

III. Critiques of the National Infrastructure Reinvestment Bank

The infrastructure bank is not without critics. The strongest of these criticisms include: (1) legal objections, including potential problems with calling the entity a "bank;" and (2) policy objections, including concerns about (i) job creation; (ii) improvement of the national infrastructure; (iii) conflicts of interest; (iv) moral hazard; (v) federalism concerns, and (vi) financing concerns. I will address each of these criticisms in turn and establish that none of these criticisms are fatal to the infrastructure bank.

A. Legal Objections

The first criticism of the infrastructure bank is that the entity is not legally a bank. Indeed, the infrastructure bank is not a bank (except in name), and there is no indication that Congress intends the infrastructure bank to be regulated as a bank. A bank is distinguishable from other economic entities in three central respects: "(1) by its *legal form*; (2) by the *services* it offers; and (3) by its *economic function* in society."[52] First, financial entities have the form ascribed to them by Congress. Here, Congress's legislation would charter this entity in the legal form of a bank, regardless of the fact that it does not function as a bank. Second, the services that an entity offers also bear on whether it is a bank. The Bank Holding Company Act ("BHCA"), for example, defines a "bank" for its purposes as either "(A) An insured bank as defined in section 3(h) of the Federal Deposit Insurance Company Act ("FDICA");" or "(B) An institution . . . which both—(i) accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and (ii) is engaged in the business of making commercial loans."[53] Because the infrastructure bank would not make demand deposits, and its commercial loan structure would be particularized to institutional investors interested in infrastructure development, the bank would not perform the core services traditionally associated with banks. Finally, because the bank does

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[52] RICHARD S. CARNELL ET AL., THE LAW OF BANKING AND FINANCIAL INSTITUTIONS 35 (4th ed. 2009).
[53] 12 U.S.C.A. § 1841(c) (2010).

not accept deposits, it does not perform the essential economic function of a traditional bank, that of a financial intermediary.[54]

Some critics argue that the infrastructure bank should not be called a bank because it is more analogous to a "non-bank financial institution." These entities were originally private institutions that skirted the BHCA by only making commercial loans and not issuing demand deposits.[55] The Senate Banking Committee in 1999 closed the so-called "nonbank bank loophole" with the Gramm-Leach Bliley Act, citing concerns that nonbank banks could fail, "resulting in loss to the FDIC, the Federal Reserve System, and the nonbank bank's depositors and creditors."[56] The infrastructure bank would not be subject to the same risk as other non-bank financial institutions because Congress would give the infrastructure bank the full faith and credit of the United States. Additionally, the principal customers of the bank would be large institutional investors, making it unlikely that anyone would be misled by the entity's legal status. In sum, Congress's characterization of this independent agency under the Treasury as an "infrastructure bank" is its own to make and the concern about calling it a 'bank' is unwarranted.

B. Policy Objections

1. Job Creation

The principal aim of the infrastructure bank is to stimulate job creation. This goal is especially necessary in the infrastructure sector, as 1.9 million "construction jobs [were] lost in the recession."[57] As of December 2010, the unemployment rate in the construction industry was 20.7%.[58]

First, some might argue that because the infrastructure bank would principally provide temporary jobs, the bank would have no effect on the unemployment rate, which "seasonally adjust[s]," or factors out, these jobs from the unemployment rate calculus.[59] This

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[54] Carnell, *supra* note 51, at 35-36.
[55] Carnell, *supra* note 51, at 439.
[56] Carnell, *supra* note 51, at 482-84.
[57] Turner, *supra* note 4, at 1.
[58] "About the Construction Sector," BUREAU OF LABOR STATISTICS, http://www.bls.gov/iag/tgs/iag23.htm.
[59] The Bureau of Labor Statistics describes this adjustment, citing trends that "unemployment is higher in January and February when it is cold in

argument technically holds merit insofar as the unemployment rate would not be directly affected by a temporary job influx. However, the unemployment rate is a term of art, and this argument does not address the fact that the construction industry's specific unemployment rate would be directly affected by the legislation.[60] The unemployment rate among construction workers is 20.3 percent, compared with the current U.S. average of 8.8 percent, so even seasonal work would help to place currently unemployed constructions workers in paying jobs.[61] In addition, an increase in seasonal construction jobs could indirectly increase the employment rate by stabilizing the economy.[62]

The job growth projected by the creation of an infrastructure bank will likely be realized on a long-term basis. An unnamed senior administration official said that the plan "shouldn't be seen as a stimulus plan for creating jobs immediately."[63] If the measure will not create jobs immediately, the administration needs to formulate and distribute a long-term plan for job creation, as well as show that the Bank can achieve immediate investment by private parties. The administration should coordinate any information it distributes

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many parts of the country and work in agriculture, construction, and other seasonal industries is curtailed." *How the Government Measures Unemployment,* U.S. DEP'T OF LABOR, *available at* http://www.bls.gov/cps/cps_htgm.htm#concepts.

[60] There are four principal types of unemployment: seasonal, frictional, structural and cyclical. The Government is seeking to combat cyclical unemployment, which occurs in recessions, where the overall job pool is reduced. The administration would thus provide seasonal employment to meet this need. Robert Trumble & Timothy D. Tran, *The Impact of the Government Response to Unemployment on Compensation, Benefits, and HR Management*, 15 No. 5, HR ADVISOR: LEGAL & PRAC. GUIDANCE 3 (2010).

[61] "Economic News Release," U.S. BUREAU OF LAB. STAT., *available at* http://www.bls.gov/news.release/empsit.t13.htm (last visited Mar. 31, 2011).

[62] For a suggestion that the Obama administration could reduce unemployment through spending in infrastructure to create more public sector jobs, *see ih*. *See also* Frank C. Morris, Jr., *Vice President Biden's Middle Class Task Force—Supplemental Material*, CURRENT DEV. IN EMP. L.: THE OBAMA YEARS (ALI-ABA Course of Study), Jul. 22-24, 2010 (explaining that infrastructure jobs are "needed immediately to tackle unemployment.").

[63] Gary Fields, "*Obama in Infrastructure Push*," WALL ST. J., Sep. 7, 2010, *available at* http://online.wsj.com/article/SB10001424052748703713504575475400690920676.html.

regarding the Bank's immediate efficacy. For example, Labor Secretary Hilda Solis claimed that the infrastructure plan "will put people back to work immediately."[64]

Some interested parties have expressed concern about the effect of an infrastructure bank on local jobs. If the infrastructure bank issues its own high-quality bonds, the state municipal bond market may suffer.[65] Rep. DeLauro's proposed bill emphasizes job creation as a factor for project selection, and thus prioritizes such projects.[66] In times of economic recession, legislators rely on infrastructure to stimulate economic growth.[67] Thus, if the infrastructure bank can function effectively as a public-private partnership, it will likely bolster long-term job creation.[68]

2. Improving Infrastructure

The infrastructure industry declared an "infrastructure crisis" in 2008, after the collapse of the I-35W Minneapolis bridge.[69] This disaster was a wake-up call to the public and industry alike, and resulted in a number of studies related to the underdeveloped state of infrastructure in the U.S. today.[70] The infrastructure bank aims to select the projects it will finance by considering job creation, reduction in carbon emissions, reduction in surface and air traffic congestion, smart growth in urban areas, poverty and inequality reduction, use of smart tolling, and public health benefits.[71] The infrastructure bank could serve as an entity to finance the development of high-speed railways and other innovative infrastructure

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[64] *Id.*
[65] Generally, stakeholders support the creation of a National Infrastructure Bank, but differ on its implementation. The GAO has expressed no position of its own. *See generally* GAO-10-728, Report to the Ranking Member, Committee on Transportation and Infrastructure, House of Representatives, Jun. 30, 2010.
[66] *See* H.R. 2521, 111th Cong. (2009-2010).
[67] Alan Blinder & Mark Zandi, HOW THE GREAT RECESSION WAS BROUGHT TO AN END 7 (Moody's Analytics Special Report Jul. 27, 2010) (finding that every $1 spend on infrastructure yields $1.57 in economic growth, and that transit investments generate 19% more jobs than investments in other sectors).
[68] *See generally* Fields, *supra* note 63.
[69] Reid, *supra* note 7.
[70] *See* text accompanying note 27.
[71] H.R. 2521 § 10(c)(1).

projects.[72] If the legislation's proposed financing structures can attract a sufficient number of private investors, a federal infrastructure bank would succeed in creating large-scale interstate projects that would improve American infrastructure.

3. Conflicts of Interest

Some scholars fear the possibility of "regulatory capture" if an infrastructure bank is created: the process by which an agency of the federal government becomes captured, or controlled, by the institution it is supposed to regulate. For example, under Richard Posner's view, "regulation is not about the public interest at all, but is a process by which interest groups seek to promote their (private) interest . . . ."[73] Indeed, the potential for conflicts of interest between the Board of the infrastructure bank and the institutional investors it lends to is real. Of course, the current system of infrastructure project selection at the local level is also prone to conflicts of interest. This vulnerability is present at all levels in the political process.

Critics also emphasize the potential for conflicts because the infrastructure bank would be a public-private partnership. The differing organizational structures of public and private institutions "make it likely that conflicts of interest exist."[74] Creating "quasi-public, nonprofit development corporations" raises issues of accountability and oversight.[75] While public-private partnerships are meritorious in terms of efficiency gains, the partnerships carry the danger of losing sight of what is public and what is private.[76]

If adequately protected against conflicts of interest, the infrastructure bank could meet the current need for infrastructure development. Senator DeLauro's bill does contain a provision requiring that a "director of the Board may not participate in any review or decision affecting a project under consideration for

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[72] Joshua D. Prok, *High-speed rail: Planning and Financing the Next Fifty Years of American Mobility,* 36 TRANSP. L. J. 47, 73 (2009).
[73] Richard A. Posner, *Theories of Economic Regulation,* 5 BELL J. ECON. & MGMT. SCI. 335, 341 (1974).
[74] Peter V. Schaeffer & Scott Loveridge, *Toward and Understanding of Types of Public-Private Cooperation*, 26 PUB. PERFORMANCE & MGMT. REV. 2, 169, 185 (2002).
[75] Norman Krumholz, *Equitable Approaches to Local Economic Development*, 27 POL'Y STUD. J. 83, 84 (1999).
[76] *See Id.*

assistance under this Act if the director has or is affiliated with a person who has an interest in such project."[77] Of course, this provision does not remove indirect conflicts of interest, or the inherent risk of conflict that is associated with public-private ventures. The bill does contain reporting requirements to Congress, but only annual reporting, which might not be adequate.[78] It is Congress's responsebility to structure the legislation of the infrastructure bank such that inherent conflicts of interest do not "prevent mutually beneficial cooperation;" to that end, Congress should take steps to limit the economic risk to both the infrastructure bank (by imposing capital requirements on investment proposals) and institutional investors (by ensuring the full faith and credit of the infrastructure bank).[79]

4. Moral Hazard

Related to concerns about conflicts of interest is the risk of moral hazard. Here, the concern is that an infrastructure bank, which is backed by the full faith and credit of the U.S. Government just like federal deposit insurance, will make institutional investors more willing to invest in otherwise risky infrastructure projects.[80] Glassman argues that "[w]hen people expect regulations to protect them, they lose the incentive to protect themselves."[81] This danger is present with an infrastructure bank that would match investors' inputs and grant low-interest loans for projects. Due to their similar structure, an infrastructure bank could have similar problems of moral hazard as the FDIC.[82] Proponents of proactive government involvement point to Ben Bernanke's statement that if you allow systemic risk in big firms to build up unchecked, "they'll bring down

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[77] H.R. 2521, 111th Cong. (2009-2010).
[78] *See Id.* (requiring annual reports to the Board).
[79] Schaeffer, *supra* note 55, at 185.
[80] *See* James K. Glassman, *The Hazard of Moral Hazard*, COMMENT. MAG. (2009), *available at* http://www.commentarymagazine.com/viewarticle.cfm/the-hazard-of-moral-hazard-15220; R. Mark Williamson, *Regulatory Theory and Deposit Insurance Reform*, 42 CLEV. ST. L. REV. 105, 120 (1994) (calling the risk of moral hazard in federal deposit insurance a "real economic cost" which must be maintained and managed by the FDIC).
[81] *Id*
[82] *See* David A. Moss, *Risk, Responsibility and the Role of Government*, 56 DRAKE L. REV. 541, 550 (2008) (explaining that because of limited liability, "deposit insurance shifts risk onto a public entity, not a private party.").

the whole system."[83] Congress must take steps to ensure that, despite the full faith and credit backing the infrastructure bank, institutional investors are required to have some "skin in the game," and contribute a significant amount of their own capital.

5. Federalism Objections

Another concern among critics of the infrastructure bank is that the entity would undermine states' prerogatives to manage infrastructure projects in their own jurisdictions. Today, infrastructure projects are currently selected primarily via earmarks. The Office of Management and Budget ("OMB") defines earmarks as:

> [F]unds provided by the Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.[84]

Congress issues annual transportation bills that contain appropriations to specific districts. Between 1982 and 2005, Congressional earmarking of "transportation reauthorization bills" increased from 10 to 6,371.[85] Critics argue that this system is flawed because it does not fairly appropriate funds among the states.[86] Thus, while the infrastructure bank may impede separation of powers

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[83] Transcript, *At Forum, Bernanke Defends Fed's Aggressive Moves*, PBS, Jul. 27, 2009, *available at* http://www.pbs.org/newshour/bb/business/july-dec09/bernanke_07-27.html.

[84] *Guidance to Agencies on Definition of Earmarks*, OFF. MGMT. & BUDGET, http://earmarks.omb.gov/earmarks-public/earmarks_definition. html.

[85] Nicholas J. Farber, *Avoiding the Pitfalls of Public-Private Partnerships: Issues to be Aware of When Transferring Transportation Projects*, 35 TRANSP. L. J. 25, 31 (2008) (stating that "[m]ost of the $286 million in the 2005 transportation bill was earmarked to pet projects in chosen Congressional Districts, which left states without the funds to maintain the existing transportation infrastructure.").

[86] *See id.* at 28 (describing how funds are often given to pet projects).

insofar as the infrastructure bank, rather than Congress, will distribute funds between states, the current system arguably undermines federalism more than an infrastructure bank, by treating sovereign states unequally in the appropriations process. Moreover, the infrastructure bank would still leave the implementation of infrastructure projects up to the states and institutional investors, which is unchanged from the current system.

Aside from the early banks of the United States in the 19th century, there have not been any commercial banks owned by the federal government.[87] A normative federalism argument has also been made that the project selection, appropriations, and implementation processes of infrastructure development should be wholly administered by the states.[88] One model of this structure is the "state bond bank," which is similar to the infrastructure bank, except that in the former case, the state pledges to repay principal and interest to the investor.[89] State bond banks, however, are generally not backed by the full faith and credit of the state, making these bond banks riskier than an infrastructure bank, as well as less diversified because the infrastructure bank would have several financing powers other than issuing bonds.[90]

Aside from these specialized bond banks, the only state-run bank in existence today is the Bank of North Dakota ("N.D. Bank")—although more states are considering chartering such banks.[91] Although many economic conservatives and libertarians disparage the idea of a state-run bank as creeping socialism, the N.D.

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[87] Instead of entering the banking business, in 1913 the U.S. Government established the Federal Reserve System to regulate private banks. *See* Carnell, *supra* note 51, at 12.

[88] For an argument that a national infrastructure bank would solve underinvestment in infrastructure, if it allows significant local discretion in how infrastructure dollars are spent, *see* George E. Peterson, *Financing the Nation's Infrastructure Requirements, in* PERSPECTIVES ON URBAN INFRASTRUCTURE 110, 118 (Royce Hanson 1984) (criticizing federal assistance grants to local infrastructure for being "ill-suited to the long-term needs" of states).

[89] Michel Noel, *Building Sub-national Debt Markets in Developing and Transition Countries*, WORLD BK. 36 (1999).

[90] *See id.* ("Although most bond banks are self-supporting operations which do not receive direct state appropriations or the state's full faith and credit backing, many are secured by a moral obligation.").

[91] For information about this bank, *see* Bank of North Dakota, http://www.banknd.nd.gov/.

Bank earned record profits last year.[92] Whether or not the Bank's model is transferable on a national scale, however, is debatable. Its initial charter was passed in 1819 in an aim to stimulate state ownership of "grain elevators, flour mills, packing and cold storage houses and credit banks operating at cost."[93] The Bank's creation was precipitated by the agrarian populists' movement to "free farmers and small businessmen from the clutches of out-of-state bankers and railroad men" by providing alternative sources of credit.[94] Thus, unlike the early Banks of the Republic founded by the pro-central government Federalists, the Bank of North Dakota was founded by interest groups seeking to pull business away from the federal government. Today, the N.D. Bank functions as a central bank, much like the early Banks of the United States.[95] Thus, the low-risk economic role of the N.D. Bank, combined with a smaller base of depositors, has allowed it to survive the current financial crisis better than larger national banks. With the proposed infrastructure banks, the economic mission would be broader, and capital requirements higher; still, the success of the Bank of North Dakota provides evidence that a government owned and operated bank may be a positive element in job creation legislation when its scope is properly limited.

6. Financing

One of the strongest concerns about the infrastructure bank is the way it would be financed. As an initial matter, the Obama administration, according to an unnamed "senior administration official," proposed eliminating the manufacturing tax deduction and the depletion accounting for gas and oil companies over ten years as a way to finance the project.[96] In addition, the Bank would borrow

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[92] *See Bank of North Dakota: America's only "Socialist" Bank is Thriving During Downturn*, AP/HUFFINGTON POST, Feb. 16, 2010, http://www.huffingtonpost.com/2010/02/16/bank-of-north-dakotasocia_n_463522.html.

[93] Rozanne Enerson Junker, *The Bank of North Dakota: An Experiment in State Ownership*, *in* 21 THE W. HIST. Q. 365, 365 (Lynne Pierson Doti, ed., 1990) (book review).

[94] Ellen Brown, *Escape from Pottersville: The North Dakota Model for Capitalizing Community Banks*, THE WEB OF DEBT, Jan. 3, 2010, http://www.webofdebt.com/articles/pottersville.php.

[95] *See id.*

[96] REUTERS, *supra* note 61.

$60 billion of federal funds to invest in infrastructure over ten years, and the House of Representatives Transportation Committee has proposed a $500 billion, six-year bill for highways, rail and transportation, which is "nearly double" the last authorization.[97] Professor Peter Morici of the University of Maryland School of Business criticizes the project for merely moving the source of infrastructure spending from bond markets to the Bank, rather than increasing spending.[98] Morici's argument does not address the efficiency gains that are enjoyed by routing bonds through the Bank: namely, a centralized, uniform system for project selection, capital asset management and universal standards for project implementation. Given the infrastructure bank's potential scope, it should be more adequately capitalized to hedge against the risk that institutional investors drop out of a project.[99] Samuel Staley of the Reason Foundation argues that the bank should create a "revolving" fund in which revenues from previous loans are used to underwrite future investments, an idea that might mitigate the "riskiness" concern, at least where projects are financed through the infrastructure bank's loans (rather than their long-term bond program).[100] Thus, in order to appease critics and create a successful bank, the administration should focus on developing a long-term financial plan for its long-term policy plan.

IV. The Infrastructure Bank and PPIPs

A natural point of comparison can be drawn between the proposed infrastructure bank and the public-private investment programs, or PPIPs, which formed a large part of the 2009 stimulus plan. Both of these initiatives are portions of the Obama administration's financial stimulus plan, involving partnerships

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[97] *Id.* These numbers, much higher than the traditional transportation bills passed annually by Congress, will probably not be the dollar amounts approved if the legislation passes.

[98] *See* Matthew Jaffe, *Another Bank?* ABC NEWS, Sep. 8, 2010 http://abcnews.go.com/Business/bank-president-obama-pushing-national-infrastructure-bank/story?id=11584294.

[99] *See* Schwartz, *supra* note 36.

[100] Samuel Staley, *A National Infrastructure Bank can Provide Important Benefits if Mission and Scope are Defined Narrowly*, Testimony before U.S. House Committee on Ways and Means, Subcommittee on Select Revenue Measures, REASON FDTN., May 13, 2010, http://reason.org/news/show/infrastructure-bank-testimony.

between the government and private sector. The PPIP uses funds from the Troubled Asset Relief Program ("TARP"), and capital held by private investors, to "buy up toxic assets in the form of real estate loans held directly on the books of banks and securities backed by loan portfolios."[101] Likewise, the infrastructure bank would match resources contributed by private investors for infrastructure development projects. The merits of public-private partnerships, the PPIP program compared with the infrastructure bank, and the weaknesses of PPIPs, will be considered in turn.

A. Introduction to Public-Private Partnerships

The definition of a public-private partnership is not uniform. The traditional definition of a public-private partnership is a relationship where resources are "pooled together to provide the delivery of a particular service," allowing parties to enjoy the efficiency gains that come from cutting costs and jointly employing public and private sectors.[102] However, this definition is probably better characterized as "public-private cooperation" which includes transactions with less interaction, for example, grant-making.[103] A true public-private partnership has a more limited function. Schaeffer and Loveridge point to the Ministry of Municipal Affairs of British Columbia's definition of a public-private partnership: "arrangements between government and private sector entities for the purpose of providing public infrastructure, community facilities and related services."[104] Thus, PPIPs would probably be characterized as public-private cooperation because the PPIPs are not providing a public "good" in the traditional sense. The infrastructure bank, however, would meet the narrower "partnership" definition. Despite this

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[101] *Treasury Unveils Public-Private Investment Program*, 28 No. 5 BANKING & FIN. SERVICES POL'Y REP. 20, 21 (2009).

[102] Oliver Yandle, *Public-Private Partnerships*, *in* A. Martin Erim, et al., *Financing Sources for Trade & Investment in Latin America*, 13 AM. UNIV. L. REV. 815, 842 (1999) (focusing on public-private investment programs in Latin America. However, its argument is universal in that it urges that these partnerships are a necessary to grow infrastructure and technology).

[103] Schaeffer, *supra* note 55, at 170.

[104] *Public-Private Partnership: A Guide for Local Government*, MINISTRY FOR MUNIC. AFF. BRITISH COLUM. 5 (1999), *available at* http://www.cd.gov.bc.ca/lgd/policy_research/library/public_private_partnerships.pdf.

difference, the analytical issues surrounding both cooperative and partnership measures are identical.

In the context of PPIPs and the proposed infrastructure bank, the public-private partnership at issue involves "resource sharing," where a private company provides services in exchange for government resources; in essence, resource sharing is a "barter arrangement."[105]

Private sector expertise is another fundamental benefit of such transactions; where the public sector owns much of the infrastructure in the United States, achieving an effective balance between ownership interest and local expertise is gained through public-private investment projects.[106] The public sector's most effective role in the partnership is to facilitate competition by setting standards for private investors to meet in competing for scarce resources; in this way, the meritorious private actors receive government subsidies and project quality increases.[107]

B. The Basic Function of PPIPs

In 2009, the Department of the Treasury devised PPIPs as a novel method to create incentives for institutional investors to purchase toxic mortgage securities owned by banks, in a measure to increase their stability after the collapse of Lehman Brothers in 2008.[108] The Obama administration committed up to $1 trillion to finance privately managed funds "dedicated to buying troubled assets."[109] Under this method, private investors partnered with the government to buy off these securities, with the government matching the investment amount of private investors.[110] The intent behind this initiative was to decrease the risk-profile of failing banks holding toxic assets that are not backed by government-sponsored institutions like Fannie Mae or Freddie Mac.[111] At the time PPIPs

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[105] Yandle, *supra* note 102, at 843.
[106] *Id.* at 844.
[107] Lucian A. Bebchuk, *Buying Troubled Assets*, 26 YALE J. ON REG. 343, 350 (2009).
[108] *Treasury Unveils Public-Private Investment Program*, *supra* note 86, at 21.
[109] Bebchuk, *supra* note 107, at 344.
[110] *Id.*
[111] Jeremiah Thomas, *TARP's Hard Line on Executive Compensation: Misaligned Incentives and Constitutional Hurdles*, 70 OH. ST. L. J. 1307, 1310 (2009).

were initiated, Jim Higgins, chief executive of Sorin Capital Management, commented, "[i]t's not only about how many assets the funds will be able to buy and the trading volume, but there's a positive psychological effect from the PPIP."[112] PPIPs had the advantage of providing investors with favorable leverage terms for normally high-risk securities, with no fees on capital committed to funds, only on money that has been invested.[113]

The structure of PPIPs was an ideal one, since the government's role was to provide capital to investors to purchase troubled assets, rather than purchasing them directly. First, the "legacy loan program" allows Banks to identify the toxic assets they need to sell, and the FDIC then determines how much funding it will guarantee, "up to a 6-to-1 debt-to-equity ratio."[114] Second, the "legacy securities program" chooses private asset managers to partner with the Treasury to purchase the "legacy securitization assets."[115] Finally, the Term-Asset Backed Securities Lending Facility ("TALF" or "legacy TALF") permits financing of legacy "residential mortgage-backed securities," ("RMBS") that were originally rated AAA.[116] The government is not in a good position to directly buy troubled assets, as many had argued it should do via an alternative "aggregator bank," because public officials lack market discipline and incentives to make good economic choices.[117] With the government playing an appropriate oversight role in such projects, the systemic risk that led to the economic crisis may be averted.[118]

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112 Liz Rappaport & Craig Karmin, "*Toxic-Asset Rescue Funds Start*," WALL ST. J., Oct. 7, 2009, at C1, *available at* http://online.wsj.com/article/SB125475553527964757.html.

113 *Id.*

114 *Treasury Unveils Public-Private Investment Program*, *supra* note 86, at 21.

115 The Banking and Financial Services Policy Report cites Treasury Secretary Timothy Geithner's opinion article in the *Wall Street Journal*, which argued that PPIPs "share[] risk with the private sector, efficiently leverag[ing] taxpayer dollars, and deploy[ing] private-sector competition to determine market prices for currently illiquid assets." *Id.*

116 William F. Stutts & Wesley C. Watts, *Of Herring & Sausage: Nordic Responses to Banking Crises as Examples for the United States*, 44 T.X. INTL. L. J. 577, 622-23 (2009).

117 Bebchuk, *supra* note 107, at 347-48.

118 This is not to say that the government itself has an incentive against disclosing important financial information. However, with both the private and public sector subject to criticism and disclosure requirements, the potential for systemic risk should decrease. *See* Charles W. Murdock, *Why*

C. Comparison of The Infrastructure Bank With PPIPs

1. Similarities Between The Infrastructure Bank and PPIPs

The examination of PPIPs, which use the same fundamental structure as the infrastructure bank legislation proposes, is necessary in reaching the policy effectiveness of a new government-run bank. In many ways, PPIPs and the infrastructure bank ideas are similar. For example, like PPIPs, private actors under the infrastructure bank proposed by Obama would make the central economic choices. Moreover, the government, in both instances, provides efficiency gains and capital support, allowing it to play a supportive, rather than dominant role in the infrastructure development process. The means by which capital is raised is also similar; under PPIP, the Treasury "matches private investors' equity investment in each Legacy Securities Fund," just as the Infrastructure Bank would match private investors' investment in infrastructure projects.[119]

An overarching similarity for both PPIPs and the infrastructure bank is the element risk—for PPIPs, the political risk was primarily placed on private investors choosing to buy the toxic assets, while for the infrastructure bank, political risk is primarily on Congress itself, which is struggling with allegations of excessive governmental intervention in the fragile economy.[120] Another type of political risk voiced regarding PPIPs is the lack of government oversight over the transactions; in 2009, the Special Inspector General for TARP ("SIGTARP") made a set of five recommendations that would initiate Treasury oversight over the TARP program.[121] The SIGTARP specifically identified PPIPs as "inherently vulnerable to fraud, waste, and abuse."[122] As previously

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Not Tell the Truth? Deceptive Practices and the Financial Meltdown, 41 LOYOLA U. CHIC. L. J. 801 (2010).

[119] Yukako Kawata, *Davis Polk & Wardwell, The Public-Private Investment Program, in* HEDGE FUNDS 2009, at 239, 244 (PLI Corporate Law and Practice Course Handbook Series No. 18643, 2009).

[120] *Id.*

[121] *SIGTARP Calls for Better Oversight Against Fraud, Waste*, *in* 28 No. 6 BANKING & FIN. SERV. POL'Y REP. 24, 27-28 (2009).

[122] *Id.*

mentioned, the structure of the infrastructure bank presents similar risks for misuse of government resources, risks that should be addressed by Congress in its legislation. For example, at the suggestion of the SIGTARP, Congress passed legislation that would give the SIGTARP the authority to audit recipients of public money under PPIP.[123]

Another similarity between PPIPs and the infrastructure bank is the kind of economic risk that these entities entail. The SIGTARP also pointed out that PPIPs present dangers of "conflict of interest," and PPIPs also place financial risks on taxpayers "without increasing the possibility of profits."[124] With an infrastructure bank, the financial risks are less striking, as RMBS assets are not backed by the full faith and credit of the U.S., and are of substantially higher risk than the risk of government lending and issuing of long-term bonds. Still, these economic risks are similar, and should be taken into account when constructing the infrastructure bank. Another economic parallel between the infrastructure bank and PPIPs is the advantage of "price setting"—with government and private entities investing in projects and mutual dependence on the other entity contributing to the investment fund, the problems of asset valuation are ameliorated.[125] Infrastructure projects are unpredictable, although its problems of price discovery are not as pronounced as the toxic assets in the PPIPs.[126]

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[123] Joshua Ruby, *Sound and Fury, Confused Alarms, and Oversight: Congress, Delegation, and Effective Responses to Financial Crises,* 47 HARV. J. ON LEGISL. 209, 250 (2010) (citing the Public-Private Investment Program Improvement and Oversight Act of 2009, Pub. No. 111-22, § 402, 123 Stat. 1656, 1656-58 (to be codified in 12, 15, 31, 38, 42 U.S.C.)).

[124] *SIGTARP Calls for Better Oversight Against Fraud, Waste, supra* note 106, at 28.

[125] Onnig H. Dombalagian, *Requiem for the Bulge Bracket?: Revisiting Investment Bank Regulation*, 85 IN. L. J. 777, 844-45 (2010).

[126] Interview, *William C. Dudley, President of the Federal Reserve Bank of New York*, 15 FORDHAM J. OF CORP. & FIN. L. 357, 381 (Oct. 5, 2009) (commenting that private institutions purchasing toxic assets can "provide some price discovery in terms of what these assets are actually worth, which will probably help restore liquidity to the markets . . . .").

2. Differences Between The Infrastructure Bank and PPIPs

In material respects however, PPIPs and the infrastructure bank have differing elements. First, unlike the PPIPs, the infrastructure bank would have a central role in project selection and approval.[127] That being said, however, the PPIPs do have stringent criteria for being selected as "fund managers," including substantial capital requirements ($10 billion of eligible assets under management), which "narrow the pool of potential managers."[128] Despite the Bank's significant role, with the current infrastructure system built around local politics, the national infrastructure bank would actually be a step towards less political influence, and thus better infrastructure governance in the long run.[129] Second, the public-private investment funds ("PPIF") are primarily responsible for restoring the financial soundness of banks; the infrastructure bank proposed by Obama would be an investment project to stimulate growth.[130] Thus, although the starting points of the respective legislative reforms are different, their goal is identical:, namely, the elimination of systemic risk and the introduction of financial stability, leading to job creation and private sector investment in major projects.

D. Weaknesses of PPIPs

To effectively support the idea of an infrastructure bank, appropriate account must be taken of the weaknesses of PPIPs. First, a moral hazard argument has been made that the government made toxic assets *too* attractive, creating an incentive for banks to actually buy up more toxic assets, frustrating the initial intent of the legislation.[131] Since the initiation of the PPIP, Bank of America, Goldman Sachs, Morgan Stanley and Citigroup have added $3.36

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[127] H.R. 2521, 111th Cong. (2009-2010).
[128] Kawata, *supra* note 104, at 243.
[129] Press Release, *supra* note 14.
[130] George J. Mazin & Glenn R. Sarno, *Implications of the new Regulatory Environment: The U.S. Perspective*, *in* Tenth Annual Private Equity Forum, at 395, 412 (PLI Corporate Law and Practice Handbook Series No. 18819, 2009).
[131] Murdock, *supra* note 118, at 872-73.

billion of these debt-laden securities to their balance sheets.[132] While the "Legacy Securities Program" boomed, the "Legacy Loan Program" faltered, with banks unable or unwilling to sell off their bad assets, and instead buying even more.[133]

Second, private investors have expressed some reluctance to partnering with the government in fear that the latter will obstruct their business decision-making process.[134] Third, investor confidence in the real estate mortgage asset investment area is low, despite government assurances.[135] Fourth, the Treasury has "failed to put sufficient pressure on financial institutions to participate in the program."[136] Importantly, economist Paul Krugman has been particularly critical of the PPIP program, arguing that it provides a "hidden subsidy" to be split among asset managers, banks' shareholders and creditors, which will lead to asset overbidding.[137] However, other scholars argue that overbidding under PPIP will only occur if the premium over the risk-free rate is underpriced; this depends on "both the leverage and the guarantee fee."[138]

The Obama administration needs to keep the criticisms of PPIP in mind while lobbying for and drafting legislation for the proposed infrastructure bank. The Bank should strike a balance between incentivizing investments and avoiding the moral hazard problem of excessive risk-taking. While public-private integration is optimal, a healthy separation must be maintained such that private investors do not shy away from important projects for fear of government intrusion (and vice-versa). It is the Obama administration's job to make sure that the legislation is politically viable, in order to boost investor and Congressional confidence in the Bank.

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132 Christopher Condon & Jody Shenn, *No Good Deed Goes Unpunished As Banks Seek Profit (Update 1)*, BLOOMBERG (Jan. 4, 2010). http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aOU4QAVClHXI&pos=3.

133 Selina Harrison, *The Public-Private Investment Program in the United States*, FINANCIER WORLDWIDE (Mar. 2010), *available at* http://www.financierworldwide.com/article.php?id=6152 (last visited Mar. 3, 2011).

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*, quoting Paul Krugman, *Geithner Plan Arithmetic,* CONSCIENCE OF A LIBERAL BLOG (Mar. 23, 2009, 10:11 AM, http://krugman.blogs.nytimes.com/2009/03/23/geithner-plan-arithmetic/.

138 Linus Wilson, A Binomial Model of Geithner's Toxic Asset Plan 44 (Nov. 30 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428666.

With a $50 billion up-front investment provided by a pending transportation bill in Congress, the administration needs to be sure that a statistically significant number of institutional investors will participate in the program.

IV. Build America Bond Program

The Build America Bond Program is a federal program that provides subsidies to state and local governments who wish to issue taxable government bonds, rather than tax-exempt bonds at a higher interest rate.[139] The bond subsidies could either take the form of a tax credit provided to the holder of the bonds,[140] or credits paid to the issuer of the bonds.[141] In addition to this basic tax credit, the American Reinvestment and Recovery Act of 2009 provided for Recovery Zone Economic Development Bonds ("RZEDBs"), which subsidize 45 percent of the interest payable to investors, "as opposed to the 35 percent credit allowed for other types of Direct Payment Build America Bonds."[142] The latter type of bonds are issuable only if the project proceeds go towards "qualified economic development purposes," which generally include infrastructure projects in impoverished areas, capital expenditures paid with respect to property in those areas, as well as job training and education.[143]

The Build America Bond Program is readily used by institutional investors looking to take advantage of a stabilized market for municipal bonds, which yield a higher-than-normal interest rate due to the federal subsidy.[144] The infrastructure bank would also issue long-term bonds, but these would be federally issued bonds, backed by the full faith and credit of the U.S. Government.[145] This makes these bonds a safer investment than state bonds, which are generally not backed by either the state or federal government's full faith and credit. Still, because of this greater

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139 *Tax Credit for Build America Bonds*, 33A AM. JUR. 2d *Federal Taxation* ¶ 15128 (2010).
140 I.R.C. § 54AA (2009).
141 I.R.C. § 6431 (2010).
142 Richard J. Miller & James A. Coniglio, *Recovery Zone Economic Development Bonds*, § 2:63*, in* STATE & LOCAL GOVT. DEBT FIN. (M. David Gelfand, ed., 2010).
143 *Id.*, citing 26 U.S.C. § 1400U-2(b)-(c).
144 Manchester, *supra* note 45.
145 H.R. 2521, 111th Cong. (2009-2010).

assurance, the infrastructure bank bonds might yield lower short-term interest rates, especially since the bonds are meant for long-term investment. At the same time, the infrastructure bank provides a more diverse investment profile, including making loans, entering into contracts, and other powers. Thus, an institutional investor may be able to diversify its portfolio by buying both state-issued bonds subsidized by the federal government, as well as the infrastructure bank's long-term investment bonds.

V. European Bank for Reconstruction and Development ("EBRD")

After the Cold War, post-communist nations were in a state of economic disarray. The EBRD was chartered in London in 1991 and was created to provide an "infusion of necessary capital into transitional countries."[146] Its principal attributes include being environmentally conscious, democratic, capitalistic, and European.[147]

Economically, the EBRD might serve as a model for the proposed infrastructure bank. First, the EBRD arose out of trying economic conditions, including a damaged infrastructure system across many formerly Soviet nations. Second, an environmental focus is also a cornerstone of the infrastructure bank's platform. The EBRD's charter contains similar goals to the infrastructure bank, including "foster[ing] productive investment, including in the service and financial sectors, and in related infrastructure . . . ."[148] This goal is principally implemented through co-financing, with the EBRD having the ultimate authority to reject project proposals if they do not meet adequate capital criteria.[149] This ultimate authority in the governing bank or lender is analogous to the way the infrastructure bank would operate. One important structural difference between the EBRD and the infrastructure bank is that the EBRD Agreement provides for loans for construction "when that infrastructure is necessary for the development of the private sector;" this clause

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[146] John Linarelli, *The European Bank for Reconstruction and Development and the Post-Cold War Era*, 16 U. PA. J. OF INTL. BUS. L. 373, 378 (1995).
[147] *Id.* at 379-81.
[148] Agreement Establishing the European Bank for Reconstruction and Development, art. 2 (iii), May 29, 1990, 29 I.L.M. 1084.
[149] Stephanie C. Guyett, *Environment and Lending: Lessons of the World Bank, Hope for the European Bank for Reconstruction and Development,* 24 N.Y.U. J. OF INT'L. L. & POL. 889, 914-15 (1992).

grants only limited lending abilities to public entities, which is not the case for the infrastructure bank, which would freely lend to states and local governments.[150] Thus, economically, the EBRD's basic structure may serve as a model for an infrastructure bank in the U.S. today.

Despite these economic similarities, the political circumstances of the EBRD's initiation were quite different than the political atmosphere in modern U.S. politics. Of course, the U.S. is not a post-Communist nation; it is the largest exporter of the capitalist model in the world. The political insecurities of regime change affected the EBRD in a way that could not affect an infrastructure bank in the U.S. In addition, a major political impetus to the formation of the EBRD was the necessity of multilateral cooperation, a policy goal that has not surfaced in connection with the infrastructure bank.[151] In this way, the post-Communist EBRD cannot be analogized to the U.S.

VI. Conclusion

The idea of an infrastructure bank is ambitious enough that political commentators say it could be as influential as the interstate highway system and the first transcontinental railway on America's infrastructure.[152] Some academics frown on infrastructure projects being the most common form of development loans because "politicians can more easily show off major construction as the fruit of their borrowing commitments."[153] The infrastructure bank could provide more than empty idealism, however. To be sure, several unanswered questions exist regarding the bank's financing, potential conflicts of interest, moral hazard, and the uncertain example of PPIPs.

Areas for further research should address additional issues involving systemic risk, and the factors that led to the 2008 economic crisis. For example, the infrastructure bank will have to avoid the

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[150] *Id.* at 916.
[151] *Id.* at 912-13.
[152] Sheryl Gay Stolberg & Mary Williams Walsh, "*Obama Offers a Transit Plan to Create Jobs*," N.Y. TIMES, Sep. 6, 2010, http://www.nytimes.com/2010/09/07/us/politics/07obama.html?_r=1&pagewanted=print.
[153] Michael J. Stepek, *The Importance of Commercial Law in the Legal Architecture of Post-Conflict "New" States*, 60 ME. L. REV. 487, 489 (2008).

pitfalls of Fannie Mae and Freddie Mac, which were major factors leading to the economic meltdown.[154] Moreover, the infrastructure bank will have to respond to the criticisms that the affect on job creation may not be immediate.

If Congress is able to address these concerns, as well as grant the Board the flexibility to deal with unforeseen issues involving the infrastructure bank, it could be an entity capable of great success in reforming the fragmented infrastructure system in the U.S. In this way, the infrastructure bank could help live up to President Obama's pledge, expressed in his 2011 State of the Union Address, to "put more Americans to work repairing crumbling roads and bridges. We'll make sure this is fully paid for, attract private investment, and pick projects based [on] what's best for the economy, not politicians."[155]

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[154] Like the PPIPs, Fannie Mae and Freddie Mac's downfall was caused by systemic risk, especially its investments in RMBS assets. While the infrastructure bank would not purchase these risky assets, the fate of these entities must be taken into account before chartering another Government corporation that would be involved in commercial transactions. Avni P. Patel, Development Article, *The Bailout of Fannie Mae and Freddie Mac*, 28 REV. BANKING & FIN. L. 21, 22 (2008).

[155] President Barack Obama, State of the Union Address (Jan. 25, 2011).