



US high-speed rail update

Since late 2008, the United States has taken the first step towards a national program for high-speed rail by adopting legislation that mandates and partially funds a national rail program. This briefing summarizes this legislation, its current implementation and likely next steps that will shape the growth of high-speed rail in the US over the next several years.

Historic increase of interest in high-speed rail

For decades, the United States has neither legislated for nor funded high-speed passenger rail on a national basis. This legacy of inattention has hobbled efforts to develop a true national “high-speed”, or even just “higher-speed”, rail network.¹

High-speed rail is now attracting significant public and private sector attention. At the recent USA Rail conference in Chicago (sponsored in part by our firm), senior industry participants ranging from the Federal Railroad Administration (FRA) to high-speed rail executives from across the world focused on the potential for high-speed rail in the United States given the recent enactment of funding legislation, further anticipated government action and private sector interest. At the same time, participants identified threshold matters that must be addressed for high-speed rail’s potential in the United States to be realized.

New legislation and the High-Speed Rail Intercity Passenger Rail Program

Two recently enacted statutes together constitute a first step towards a national program for high-speed rail

in the United States – the Passenger Rail Investment and Improvement Act (PRIIA), signed on October 16, 2008, and the American Recovery and Reinvestment Act (ARRA), signed on February 17, 2009 and popularly known as the “Stimulus Act”. The PRIIA establishes new high-speed rail programs and identifies corridors while the ARRA builds upon the PRIIA by providing \$8bn in funds for implementing high-speed rail projects. The PRIIA and the ARRA have notably expanded the authority of the FRA, which traditionally has focused on rail safety, to allocate these funds as part of its new responsibility for actively managing national rail policy and investment.²

As required under the PRIIA and ARRA, in April 2009 the US Department of Transportation issued a policy blueprint titled *Vision for High-Speed Rail in America*.³ The FRA then published draft guidelines for the initial initiative under this blueprint, the High-Speed Intercity Passenger Rail Program (HSIPR).⁴ Under these guidelines:

- ARRA funds are to be distributed to intercity rail projects through the PRIIA programs. Among such projects the ARRA favors high-speed rail projects⁵ that

² See the preliminary national rail plan dated October 15, 2009 at www.fra.dot.gov/Downloads/RailPlanPrelim10-15.pdf, page 1 (“[t]he new scope and direction provided by [recent legislation]... has made FRA’s participatory role in rail transportation projects comparable to that of other modal administrations in the Department [of Transportation]”).

³ Available at www.fra.dot.gov/US/content/31 as the “High-Speed Rail Strategic Plan”.

⁴ Interim Program Guidance, High-Speed Intercity Passenger Rail Program, 74 Fed. Reg. 109 (June 23, 2009).

⁵ High-speed rail is defined as any intercity service that is reasonably expected to reach speeds of at least 110mph.

¹ Only five rail corridors operate above 79mph, with none achieving top speeds above 150mph: United States General Accounting Office, *High speed passenger rail: future development will depend on addressing financial and other challenges and establishing a clear federal role* (March 2009) (the GAO report), page 8.

are located on one of the PRIIA's federally designated corridors; and

- eligible applicants for ARRA funds include states, interstate compacts, public agencies and Amtrak, the government-owned national passenger rail company.

The guidelines create four separate funding "tracks". The \$8bn in ARRA funds will be allocated under tracks one and two, which distinguish, respectively, between short-term (eg two years) individual projects and longer-term corridor development programs. Less than \$100m of additional non-ARRA funds are available for tracks three and four, which fund planning activities and certain track one-eligible projects.

In October 2009 the FRA announced that it had received 45 high-speed rail applications under the HSIPR from nearly half the states, requesting approximately \$50bn.⁶

In effect, a national funding competition is under way, with the FRA assessing criteria such as "shovel-readiness", as well as whether there is any need for the passage of legislation (typically at the state or local level). State candidates such as our client the Florida Department of Transportation, whom we are advising on the implementation of its high-speed rail program, that can demonstrate these criteria have been fulfilled (especially in Florida's case, given the state's recent passage of HB 1B, a bill supporting the creation of a high-speed commuter rail network) are considered to be in a strong position to receive funds.

Given the overwhelming interest in the program, the FRA is still reviewing the applications and expects to make its funding allocation decisions in the first part of 2010.

Next steps for high-speed rail

Looking beyond the HSIPR, the *Vision for High-Speed Rail* anticipates three additional short-term milestones.

- *Establishment of a National Rail Plan.* As required by the PRIIA, the FRA released a preliminary national rail plan

in October 2009.⁷ Although the preliminary plan does not contain specific proposals, it emphasizes the need to invest in high-speed rail along with other intercity passenger rail and freight rail services. It outlines an ongoing outreach process through mid-2010 that will lead to a final, more detailed national rail plan intended to guide future federal rail policy.

- *Federal budgets for the 2010 fiscal year and the future.* On December 16, 2009, President Obama signed into law legislation approving \$2.5bn of new high-speed rail funding, which significantly exceeded the \$1bn annual appropriation originally sought by President Obama.⁸ Future annual appropriations such as this, made outside dedicated transportation legislation, are uncertain, although notably President Obama has advocated a five-year, \$5bn grant program (and Congress has demonstrated at least a short-term interest in exceeding this target).
- *Surface transportation program reauthorization.* Federal funding for transportation (including rail), which in the United States is typically expended through state and local authorities and not directly by the federal government, is periodically authorized on a multi-year basis. The most recent authorization expired on September 30, 2009. Although funding has been extended on an interim basis through February 28, 2010 (with a second proposed extension through September 30, 2010 awaiting consideration in the Senate), federal funding for future projects beyond the ARRA will need to be included in new legislation that is expected to be developed over the next 12 to 18 months.

Of these milestones, the surface transportation program reauthorization is particularly critical because it will determine the magnitude and terms of federal funding for years to come. The Congressional committee responsible for drafting this legislation has indicated that successor legislation should include a robust high-speed rail program, with a draft allocation of \$50bn for designated corridors over a six-year period. However, the length of

⁶ See the statement from FRA administrator Joseph C Szabo (October 6, 2009) at www.fra.dot.gov/us/content/2301. The FRA has also received funding request applications for a further \$7bn of corridor planning and smaller-scale projects.

⁷ Available at www.fra.dot.gov/Downloads/RailPlanPrelim10-15.pdf.

⁸ Press release, The White House, *Bills signed by the president today, 12/16/09* (December 16, 2009), available at www.whitehouse.gov/the-press-office/bills-signed-president-today-121609; *Factbox – Highlights of \$447 billion US spending bill*, Reuters, December 13, 2009, available at www.reuters.com/article/idUSN1019300920091213.

the interim period before new legislation is enacted, the availability of funds during this interim period and the extent of actual federal funds for high-speed rail projects in the new legislation remain to be seen. The uncertainty over the federal government's future transportation funding commitments remains high because legislative negotiations have been significantly affected by current economic pressures, including job stimulus and budget deficit concerns.

In addition to federal funding efforts, state-level funding initiatives are expected to play a significant role in the next few years by leveraging federal funds with local monies. Most notably, in what could become a model for other states, in 2008 voters in California authorized a dedicated \$9.95bn bond issue to fund high-speed rail.⁹

Challenges ahead

Despite increased resources, implementation of high-speed rail in the United States faces significant challenges.¹⁰ These challenges were highlighted at the USA Rail conference, at which participants concluded that three key areas must be focused on for the United States to develop a successful high-speed rail program.

- *Pathfinder projects.* Delivery of successful, high-profile proof-of-concept projects through a public-private partnership model is essential to giving confidence to the public and for demonstrating to government agencies how these projects can be achieved.
- *Establishing dependable funding sources.* The expected farebox revenues from the proposed high-speed rail projects across the United States would not be sufficient to repay the required level of capital expenditures in the near to medium term. Consequently, significant public funding sources for subsidies will be needed to get the projects off the ground. As illustrated by the \$50bn in high-speed rail applications submitted for the ARRA's \$8bn in available funds and as acknowledged by the FRA administrator at the conference, existing public funding is insufficient relative to the expected capital

expenditure requirements.¹¹ Even following allocation of the \$8bn in ARRA funds in early 2010, progress in developing a national high-speed rail network will remain incremental until the new transportation legislation is passed with a significant, multi-year funding commitment specifying a definitive amount and method for allocation. Projects will also require additional support from state and local governments, which may prove difficult in the current fiscal environment without dedicated funding sources similar to California's initiative.

- *Standardization.* Relative to other high-speed rail markets, the regional and industry-level diversity of the US rail market presents significant technical and procedural hurdles to establishing an integrated, inter-operable high-speed rail network. New standards must be agreed, maintained and enforced to facilitate the development of such a network.

In addition, at least three other significant challenges exist.

- *Uncertain role for the private sector.* The private sector may be discouraged by uncertainty over the allocation of financial and, in particular, ridership risk – especially if ridership will be driven by required development of ancillary rail networks such as regional commuter rail.¹² This uncertainty will remain until the national rail plan, the new transportation act and the relevant implementing regulations are all in place in a form that reflects an acknowledgement by government that private sector participation must be fostered just as it was for high-speed rail projects undertaken in other countries.
- *Right-of-way acquisition.* To upgrade existing rail services, right-of-ways must be expanded or acquired in densely populated regions. Given the experience in other countries – such as the UK with its analogous High Speed 1 project linking the Channel Tunnel to London – these efforts can be expected to raise significant political and financial hurdles.

⁹ California's Proposition 1A, Safe, Reliable High-speed Train Bond Act, approved in November 2008.

¹⁰ The FRA's current outreach program for developing the final national rail plan is intended to identify, and to discuss the methods for overcoming, such challenges.

¹¹ A full build-out of a US high-speed rail network will require investment well in excess of the \$50bn in initial applications received to date. Notably, an earlier pre-application process for the ARRA's high-speed rail funds drew 278 submissions, evidencing prospective funding exceeding \$102bn. See *FRA receives 278 pre-applications for high-speed passenger rail funding* (July 16, 2009) at www.dot.gov/affairs/2009/dot10609.htm.

¹² This risk was highlighted by the General Accountability Office, a non-partisan research arm of the federal government. See the GAO report.

- *Relationship with freight rail.* The United States benefits from a robust freight rail system that often operates over the same lines as, and at times in priority to, passenger rail.¹³ The success of high-speed rail will require extensive coordination between passenger and freight rail, including by adding new track and negotiating agreements to prioritize passenger service on shared track.

For further information please contact

Kent Rowey
T +1 212 284 4952
E kent.rowey@freshfields.com

Dolly Mirchandani
T +1 212 277 4072
E dolly.mirchandani@freshfields.com

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales with registered number OC334789. It is regulated by the Solicitors Regulation Authority. For regulatory information please refer to www.freshfields.com/support/legalnotice. Any reference to a partner means a member, or a consultant or employee with equivalent standing and qualifications, of Freshfields Bruckhaus Deringer LLP or any of its affiliated firms or entities.

¹³ For example, “[o]f the more than 21,000 miles over which Amtrak operates, about 97 percent are owned by freight railroads.” *Vision for High-Speed Rail*, page 21.