

3 Issues Buttigieg's DOT Will Tackle In The Biden Years

By **Linda Chiem**

Law360 (February 19, 2021, 7:31 PM EST) -- The U.S. Department of Transportation will prioritize building for climate resiliency and expanding electric vehicle, rail and transit initiatives as the Biden administration prepares to roll out new legislation and regulations to shore up the country's aging infrastructure.

Expectations are high as President Joe Biden and Transportation Secretary Pete Buttigieg seek to build momentum for the president's Build Back Better proposal, which is aimed at spurring economic recovery from the coronavirus pandemic by investing big in transportation, water, telecommunications, energy and other infrastructure.

"Modernizing our infrastructure is one of the few issues that enjoys broad bipartisan support, so both sides can work together to comprehensively address this glaring issue," said Lori Esposito Murray, president of the nonprofit business research group The Conference Board's Committee for Economic Development, which issued a Thursday report calling for infrastructure to be placed at the top of the U.S. policy agenda.

"The large number of areas that fall under the infrastructure rubric demonstrates its importance to our economy," she said. "A sharp focus on its role and key issues can lead the nation toward faster economic growth and job creation, environmental protection, equality of opportunity, shared prosperity and eventual public savings."

Here, Law360 examines a few transportation and infrastructure initiatives the U.S. Department of Transportation will focus on in the coming years.

Building for Climate Resiliency

Modernizing and upgrading infrastructure to withstand additional pressure from weather events linked to climate change, such as storms, floods, extreme heat, wildfires and sea level rise, are at the top of the administration's priority list, and experts say climate concerns will define the contours of Biden's forthcoming Build Back Better infrastructure proposal.

"It's going to be a broadly defined infrastructure proposal that links transportation and climate in a way they've never been linked before and will cover an array of items such as broadband, school repair and grid hardening, so it's comprehensive in nature," said Phil Recht, a Mayer Brown LLP partner and former

chief counsel and deputy administrator for the DOT's National Highway Traffic Safety Administration during the Clinton administration. "What sets it apart from the conventional transportation infrastructure programs that are enacted every 10 years or so is its emphasis on climate."

To make good on those climate goals for roads, highways, bridges, airports, water systems, electricity grids, universal broadband and more, the administration has been reassessing rules and regulations that stand in the way.

The White House on Thursday withdrew draft guidance issued by the Trump administration that would have narrowed how federal agencies consider climate change impacts in their National Environmental Policy Act reviews of energy, infrastructure and other projects.

In another move, the DOT on Wednesday tweaked some of the criteria for states, localities and project developers applying for the next round of the Infrastructure for Rebuilding America, or INFRA, discretionary grant program. The INFRA program, which has approximately \$889 million available to dole out in fiscal year 2021, funds transportation projects of national and regional significance.

For the first time, the DOT said it will prioritize projects that address climate change and environmental justice. Projects will be evaluated on whether they were planned as part of a comprehensive strategy addressing climate change or reductions in greenhouse gas emissions.

Additionally, racial equity will be considered as a selection criterion "to the extent that project sponsors have completed equity-focused community outreach, and projects are designed to benefit underserved communities," the DOT said.

Boosting Transit and Rail Projects

Biden, who got the nickname "Amtrak Joe" for his years commuting between Delaware and Washington, D.C., via Amtrak, and Buttigieg are both fervent supporters of passenger rail and have made it clear they want to expand high-speed rail service in the U.S.

The country's global competitiveness is at stake as other countries such as China outpace the U.S. when it comes to investing in high-speed rail, according to Biden. In a recent Oval Office meeting with a group of senators, the president said that "if we don't get moving, they're going to eat our lunch."

And Buttigieg is also on board, saying in a recent tweet, "We shouldn't limit our imagination to just tinkering around the edges. It's time to go big and build first-rate infrastructure, including investments in high-speed rail."

"It's a big part of [Biden's] persona — his connection to the rail — and it is a beautiful thing for public transit proponents to see because he gets why it's important," Shayna M. van Hoften, chair of Hanson Bridgett LLP's public transit and transportation practice group, told Law360. "By picking Secretary Buttigieg, he's picked somebody who understands bus systems, and they will create a DOT that has really broad geographic regional diversity that is important to transit."

New high-speed passenger rail projects are being developed in states like California, Florida and Texas, but a national network is still a way off. The Biden administration is keen to get other major transit projects going by pulling a Trump-era policy requiring state and local governments to front most of the costs of their major transit projects before qualifying for federal funding. It's a move that could help

jump-start construction on major transit projects that the previous administration had shunned or sidelined in favor of traditional highways and roads upgrades or rural transportation projects.

"There may never have been a president who is more supportive of passenger rail, both inter- and intra-city, than Joe Biden. He envisions a modernized, high-speed, electric rail network between cities and an electric transit system for every U.S. city of 100,000 or larger," said Paul A. Hemmersbaugh, chair of DLA Piper's transportation regulatory and litigation group.

"While this could be the moment for transformational change in transportation and mobility in the U.S., centered on combating climate change and the use of 'clean' electric power, huge investments over an extended period would be needed to create an integrated electric passenger rail and transit system on the scale and scope that seems to be envisioned," Hemmersbaugh said.

Public transportation has also been rocked by losses in ridership, fare revenue and state and local tax revenue during the coronavirus pandemic, according to Hanson Bridgett's van Hoften, who said there already was a "massive need for infrastructure funding and transit capital support before, [but] now it's a totally different ballgame."

Public transportation is expected to see at least \$20 billion in emergency funding from Biden's COVID-19 relief package, the American Rescue Plan, which lawmakers are still fine-tuning to pass through a budget reconciliation bill. However, that amount is roughly half of the \$39.3 billion that the American Public Transportation Association has said would be needed just to keep transit systems afloat and operational.

"If public funding in a major stimulus bill is insufficient to meet emergency operational shortfalls, how much appetite is Congress likely to have for much larger long-term capital expenditures for creation of new transit systems and expansion and overhaul of existing systems?" Hemmersbaugh asked.

Cecelia Bonifay, chair of Akerman LLP's land use and development practice, told Law360 that there is still excitement and optimism surrounding increased investment in transportation infrastructure and a "renewed emphasis in terms of regional groups, transportation authorities and businesses starting to talk about this to try to put it on the front burner."

"Transit is fundamental for people to be able to access jobs, and in many places, transit doesn't have a dedicated funding source," she said. "[Industry groups, agencies and businesses are] looking at the projects we have, what our funding needs are for the local or state share, really being much more focused. It can't just all be on the government. You've got to have buy-in from the business community as well."

Accelerating Momentum for Fuel-Efficient and Electric Vehicles

Another top priority will be curbing vehicle emissions, which means the DOT's National Highway Traffic Safety Administration, which regulates vehicle safety, will play a big role alongside the U.S. Environmental Protection Agency and the California Air Resources Board, which regulate vehicle emissions.

The Biden administration is already working to restore or strengthen the stricter Obama-era Corporate Average Fuel Economy, or CAFE, and greenhouse gas emissions standards that were rolled back by the Trump administration, as well as to reinstate California's authority to set tougher emissions standards.

"Increased stringency of CAFE and GHG emissions standards and increased penalties for violations and corresponding increased value of electric-vehicle credits will likely accelerate the transition to electric vehicles and other environmentally cleaner alternatives to the internal combustion engine," said Hemmersbaugh, a former chief counsel at NHTSA.

Biden and Buttigieg plan to accelerate electric vehicle initiatives, including adding some 500,000 electric vehicle charging stations in the U.S. and adopting zero-emissions buses. Automakers are already investing billions in developing battery- or hydrogen-fueled vehicles. Just last month, General Motors was the first of the big U.S. automakers to announce a plan to sell only zero-emissions cars and trucks by 2035. Ford Motor Co. announced Wednesday that it will "go all-in" on electric passenger vehicles in Europe, saying 100% of its passenger vehicles in Europe will be zero-emissions capable, all-electric or plug-in hybrid by mid-2026 before ultimately moving to all-electric by 2030.

So there are strong indications that companies "believe electric and alternative fuel vehicles are the future, and that future is coming fast," according to Hemmersbaugh.

"The confluence of private investment and momentum, growing public acceptance of EVs and an executive branch that prioritizes addressing climate change and requires it as an input and consideration in nearly every significant government action or decision makes broader production and use of electric vehicles one of the most likely major transportation changes in the coming years," he said.

"That momentum also may make new or expanded electric vehicle-related policies more likely to be enacted and implemented. Possible measures could include transition of all federal vehicles to electric or other alternative fuel, renewed or revised credits for purchasers of EVs, and EV-related loans and grants for [research and development] and significant projects," Hemmersbaugh said.

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