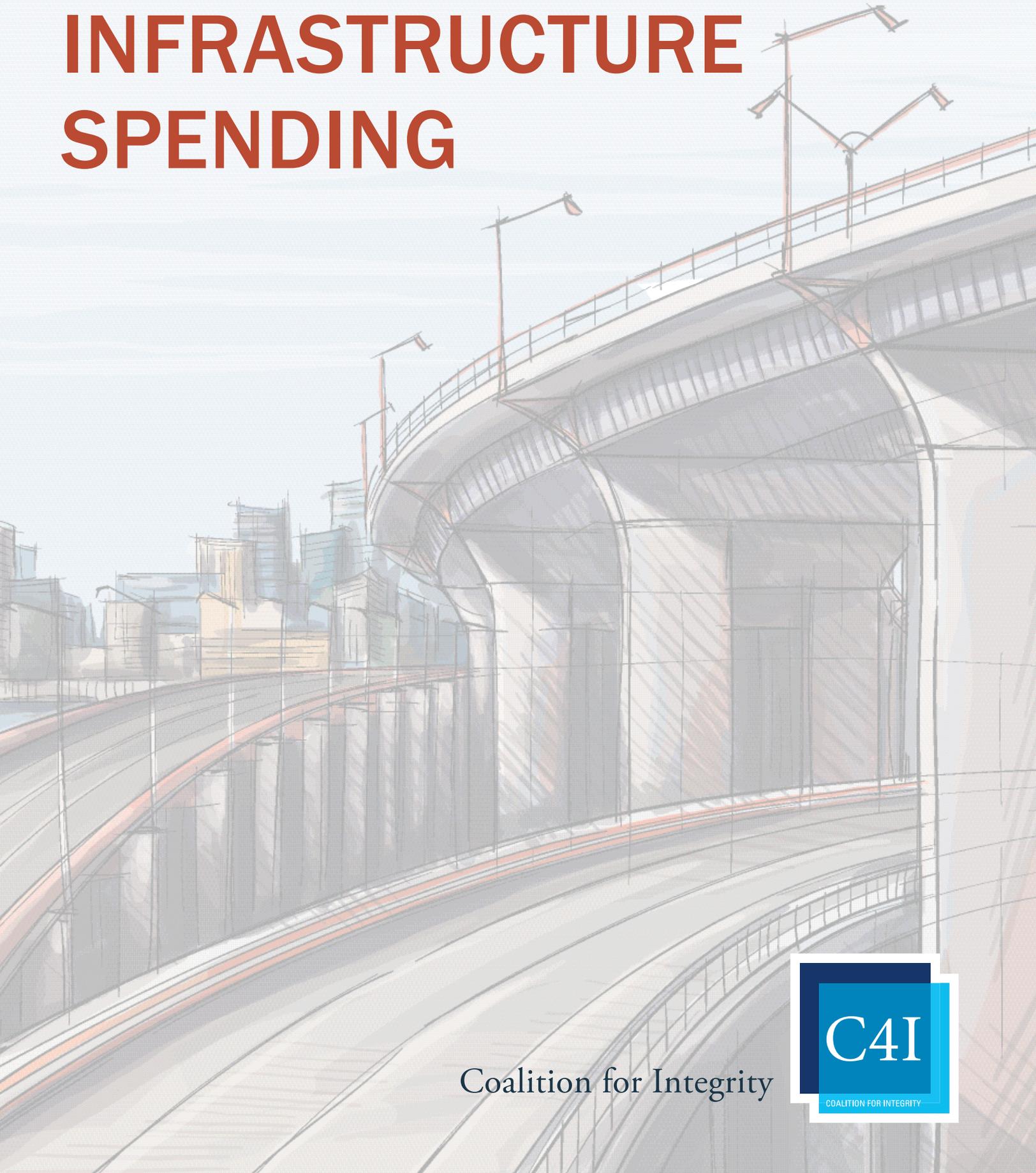


OVERSIGHT OF INFRASTRUCTURE SPENDING



Coalition for Integrity





The Coalition for Integrity is a non-profit, non-partisan 501(c)(3) organization. We work in coalition with a wide range of individuals and organizations to combat corruption and promote integrity in the public and private sectors. www.coalitionforintegrity.org.

Every effort has been made to verify the accuracy of the information contained in this report.

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OVERSIGHT OF INFRASTRUCTURE SPENDING

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I. Introduction and Executive Summary

In the coming weeks, and following years of debate and deliberation, Congress is expected to pass major infrastructure legislation. Democrats are currently pursuing a “dual track” approach to infrastructure legislation. The first track is a \$1 trillion infrastructure package, which focuses on surface infrastructure and broadband projects (including \$550 billion in funding for new projects), passed the Senate on August 10, 2021 and is set for a House vote by end of September.¹ The second track involves a \$3.5 trillion federal budget that includes tax benefits, child care, education, healthcare, and climate change projects.²

Because of the scope, complexity, and cost of infrastructure legislation, clear and robust oversight provisions are critical to ensure that infrastructure projects are carried out in a faithful and fiscally responsible manner. Without such oversight, infrastructure projects at the federal, state and local level risk falling victim to waste, fraud and other abuses. Numerous infrastructure projects across the country within the past several decades illustrate this risk, and make clear that any meaningful legislation concerning infrastructure must allocate resources and consideration for oversight measures, preferably by multiple actors and agencies. While this robust oversight is likely to come at a significant financial cost, there is evidence to suggest that this cost is outweighed by the financial gains realized by strategic investment in inspectors general, recovery boards and other oversight mechanisms.³ For example, the Special Inspector General for the Troubled Assets Relief Program (SIGTARP), charged with overseeing the stimulus in response to the 2008 financial crisis at a cost of \$23 million, was able to recover \$11 billion in taxpayer dollars over the course of a decade of work. Furthermore, the costs associated with effective oversight are likely to be outweighed—both in magnitude and

1 See, e.g., *Senate Passes \$1 Trillion Infrastructure Bill, Handing Biden a Bipartisan Win*, N.Y. Times (Aug. 10, 2021), <https://www.nytimes.com/2021/08/10/us/politics/infrastructure-bill-passes.html> (last accessed Sep. 7, 2021); *The Infrastructure Plan: What's In and What's Out*, The N.Y. Times: The Upshot (July 28, 2021), <https://www.nytimes.com/interactive/2021/07/28/upshot/infrastructure-breakdown.html> (last accessed July 30, 2021).

2 See, e.g., *Senate Passes \$3.5 Trillion Budget Plan, Advancing Safety Net Expansion*, N.Y. Times (Aug. 11, 2021), <https://www.nytimes.com/2021/08/11/us/politics/senate-budget-plan.html> (Sep. 7, 2021).

3 See “Oversight is Better than Hindsight: Anti-Corruption Recommendations for the CARES Act,” Coalition for Integrity (2020), available at: https://www.coalitionforintegrity.org/wp-content/uploads/2020/06/C4I_Oversight_062820_FINAL-3_compressed.pdf

principle—by the costs of fraud, waste and other abuses. As one example, the California Bullet Train—an effort to develop a high-speed railway connecting Los Angeles and San Francisco—was plagued by conflicts of interest and fluctuating cost estimates that could have been detected with more faithful and robust oversight. Without this oversight, tens of millions of dollars were expended on a project that, to date, has failed to deliver to California a high-speed railway connecting its two largest cities.

This report provides recommendations to help prevent and detect corruption, waste and abuse in any such forthcoming infrastructure legislation (including the proposed \$1 trillion surface infrastructure bill and the \$3.5 trillion “human infrastructure” budget). As discussed more fully below, our recommendations fall into four broad categories: increasing public transparency in infrastructure spending, oversight, enforcement, and contracts involving infrastructure bill funds. Our recommendations are also informed by lessons learned from past infrastructure projects, namely the importance of (1) a transparent and well-informed bidding process, (2) real-time review of infrastructure projects, (3) the involvement of individuals with specialized expertise on infrastructure projects and (4) sufficient funding for robust oversight measures.

The discussion below is divided into four sections, followed by appendices. Section I defines the relevant types of corruption and provides an overview of the corruption schemes that frequently present in infrastructure projects. Section II describes statutory precedents, as well as other sources, that we drew on to form recommendations for mitigating these corruption risks. Section III discusses anticorruption measures in H.R. 3684, the \$1 trillion infrastructure bill. Section IV more fully outlines a set of proposed recommendations to inform anticipated publications on this topic by the Coalition for Integrity. This report is also supported by appendices outlining the recent history of U.S. infrastructure legislation, and case studies that illustrate how corruption, waste and abuse have arisen within infrastructure projects.

II. Overview of Corruption in U.S. Infrastructure Projects

A. Types of Corruption

Corruption can be understood as “the misuse of power for private gain either at one’s own instigation or in response to inducement.”⁴ Corrupt schemes in infrastructure projects fall into four major categories: bribery schemes, fraud schemes, collusion schemes, and coercion schemes.

Bribery schemes generally involve “payments made in order to gain an advantage or to avoid a disadvantage.”⁵ Examples of common bribery schemes in infrastructure projects include kickbacks, bribery of government officials involved in the bid selection process, and bribery to obtain approval of change orders or government benefits for incomplete work.⁶

Fraud schemes tend to involve theft by deceit.⁷ For instance, procurement officials may strategically leak information to preferred bidders. Procurement officials, contractors, or subcontractors may misappropriate project assets. Contractors may make unapproved deviations from bidding documents or technical specifications; falsify documentation or otherwise conceal deliberate failures to adhere to contract terms; include unnecessary or inappropriate line items in invoices; misrepresent how much construction material was used, time spent, who performed the contract work (*e.g.*, in order to be in compliance with contract goals for the involvement of minority- or women-owned business), or the distribution of employee labor; or substitute planned materials for cheaper products.⁸

4 M. Sohail & S. Cavill, *Accountability to Prevent Corruption in Construction Projects*, 134 JOURNAL OF CONSTRUCTION ENGINEERING & MGMT. 729, 730 (2008).

5 *Id.*

6 TRANSPARENCY INT’L USA, *PROCUREMENT MONITORING GUIDE: A TOOL FOR CIVIL SOCIETY* 14 (2012), <https://coalitionforintegrity.org/?download=530>.

7 See Sohail & Cavill, *supra* note 4, at 730.

8 *Id.*; see also Jim H. Crumpacker, *Is Your Construction Project a Victim of Crime?*, 71 PUBLIC ROADS No. 4 (2008), <https://www.fhwa.dot.gov/publications/publicroads/08jan/01.cfm>; *Are They Really Meeting ALL the Contract Goals*, U.S. Dep’t of

Procurement supervisors or auditors may cut corners and make misrepresentations in their evaluations or reporting.⁹ Consultants may manipulate assessments, feasibility studies, bid documents, or project designs to benefit particular parties or to increase potential corrupt earnings.¹⁰

Collusion schemes typically implicate agreements between two or more parties to achieve an improper purpose—in the infrastructure context, usually to prevent competition or otherwise secure an unfair advantage.¹¹ Three types of collusion are particularly common in the infrastructure context. First, collusion schemes may involve agreements between contractors. In bid-rigging schemes, for instance, contractors cooperate with one another to drive up the bid price.¹² “Bid rotation” schemes are agreements between contractors to take turns submitting the lowest bid.¹³ Contractors may also agree to withhold bids or to submit bids that are intentionally too high to create the illusion of competition.¹⁴ Second, collusion can occur between procurement officials and contractors. In agreement with a favored bidder, procurement officials may skew the bid evaluation criteria, provide inadequate information to other bidders, apply biased bid selection criteria, reject the lowest bidder, alter the bidding timeline, limit circulation of the bid notice, exclude qualified bidders, alter or destroy bids after receipt, or tailor the bid specifications to the favored bidder.¹⁵ Third, collusion may occur between contractors and subcontractors.¹⁶ A contractor may agree to hire a competitor as a subcontractor as a reward for withholding a bid or deliberately submitting a losing bid.¹⁷

Transp. Off. of Inspector Gen., https://www.oig.dot.gov/sites/default/files/files/OIG_DBE%20card.pdf (describing Disadvantaged Business Enterprise Fraud).

9 TRANSPARENCY INT’L USA, *supra* note 6, at 15.

10 Sohail & Cavill, *supra* note 4, at 732.

11 *Id.*

12 See Crumpacker, *supra* note 8.

13 TRANSPARENCY INT’L USA, *supra* note 6, at 18.

14 *Id.*

15 *Id.*

16 *Id.* at 17.

17 *Id.* at 18.

Finally, **coercion schemes** often involve the use of intimidation to improperly influence another’s actions.¹⁸ As with other types of corruption, coercion can affect the bidding process or aspects of the project approval process by improperly influencing persons who make or influence bid awards or other project decisions.¹⁹

B. Corruption within Infrastructure

Different types of infrastructure projects present special risks and opportunities for corruption. Large infrastructure projects, or “megaprojects,” share the following key risk factors:²⁰ (1) Complexity: The complexity and size of infrastructure projects make bribes, inflated invoices, unnecessary or inappropriate line items, and misappropriation of funds easier to conceal.²¹ (2) Uniqueness: Each construction project is unique, “making comparisons difficult and providing opportunities to inflate costs and conceal bribes.”²² (3) Many parties: Because megaprojects involve complex transaction chains and the interplay of many small-scale contractors, monitoring individual actors is resource intensive. (4) Opacity: Corrupt contractors or subcontractors can easily take advantage of a lack of transparency into work quality or the materials used.²³ (5) Bureaucracy: Layers of bureaucracy—including licensing and permitting—in federal, state, or local government each provide an opportunity for bribery and other forms of corruption.²⁴

Corruption in infrastructure projects has harmful effects at several levels of society. For example, at the federal level, corruption may lead to the misuse of federal funds that Congress appropriates directly for use in state or local projects or through appropriations to state or local governments, leading to waste and ultimately diverting

18 *Id.* at 19.

19 *Id.*

20 See generally Sohail & Cavill, *supra* note 4, at 731–32.

21 Peter Matthews, This is why construction is so corrupt, *WORLD ECON. F.* (Feb. 4, 2016), <https://www.weforum.org/agenda/2016/02/why-is-the-construction-industry-so-corrupt-and-what-can-we-do-about-it>.

22 *Id.*

23 Sohail & Cavill, *supra* note 4, at 733.

24 Matthews, *supra* note 21.

money away from citizens. Similarly, corruption also may involve the misuse of state or local government resources, as well as the deliberate failure to fulfill the terms of a contract with the state government or local municipalities. Further, corruption may also involve the deception of oversight boards and other regulatory authorities and lead to the diversion of funds to less efficient firms. Ultimately, corruption directly affects citizens by undermining the delivery of promised services, lowering the quality and safety of public infrastructure, and imposing additional costs that may be passed on to taxpayers.²⁵

III. Overview of Recommendation Sources

In considering recommendations to mitigate corruption in infrastructure projects, as set forth below in Section IV, we reviewed past infrastructure and stimulus bills; reports issued by government agencies and private organizations; and publicly-available information on case studies involving corruption in infrastructure. From these materials, we found most informative certain provisions of the American Recovery and Reinvestment Act of 2009 (“Recovery Act”)²⁶ and the Coronavirus Aid, Relief, and Economic Security Act of 2020 (“CARES Act”),²⁷ as well as reports issued by the Government Accountability Office (“GAO”). The corruption risks that materialized in the case studies that we reviewed were not entirely unforeseeable in light of the framework that we developed by reviewing statutes and reports, and thus these case studies further informed and validated our proposed recommendations.

The Recovery Act provisions were particularly helpful in light of the broad similarities between the economic shock of the 2008 financial crisis (the motivating force behind the Recovery Act stimulus package) and the economic fallout of the coronavirus

25 See Sohail & Cavill, *supra* note 20, at 730; see also, e.g., Reuters Staff, *Major “Big Dig” Contractor Faces Federal Charges*, Reuters (June 21, 2008), <https://jp.reuters.com/article/instant-article/idUSN2139434320080621> (discussing charges against contractor that lied about faulty work on a section of a Boston tunnel construction project that collapsed and killed a woman); *infra* Appendix VI.

26 Pub. L. No. 111-5 (2009).

27 Pub. L. No. 116-136, § 15010(g)(1)(A) (2020).

pandemic;²⁸ the fact that the Recovery Act contained substantial and wide-ranging infrastructure appropriations (\$48.1 billion) in response to the economic crisis;²⁹ and the Recovery Act's recognized success in mitigating corruption risks, which were amplified in light of the fast pace at which funds were disbursed.³⁰ Numerous federal officials have reported on the Recovery Act's success in mitigating fraud, waste, and abuse in connection with infrastructure and other federal funds,³¹ and the Recovery Act has served as a model for subsequent infrastructure bills.³² In particular, the CARES Act, while not an infrastructure stimulus, drew on the Recovery Act's generally-applicable oversight provisions to combat waste, fraud and abuse.³³ Accordingly, we, too, looked primarily to the Recovery Act and CARES Act (as well as subsequent pandemic relief legislation, such as the American Rescue Plan Act of 2021 ("ARPA")) for measures that

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- 28 See, e.g., Recovery Act § 3(a) (listing, among the Recovery Act's purposes, "promot[ing] economic recovery" and "assist[ing] those most impacted by the recession"); see also *Can We Compare the COVID-19 and 2008 Crises?*, Atlantic Council (May 5, 2020), <https://www.atlanticcouncil.org/blogs/new-atlanticist/can-we-compare-the-covid-19-and-2008-crises> (listing uncertainty, collapse, and reactions (i.e., "monetary and fiscal policies") as three similarities between the Great Recession and COVID-19 pandemic, while also describing differences between the two crises).
- 29 See *infra* Appendix I, § A.4.(b).
- 30 See, e.g., *The CARES Act: Using Lessons of the Recovery Act to Effectively Manage the Largest Federal Stimulus Package to Date*, KPMG (June 2020), <https://institutes.kpmg.us/content/dam/institutes/en/government/pdfs/2020/cares-oversight-paper.pdf> (hereinafter "KPMG CARES Act Report"); Danny Werfel, *Fighting fraud in the CARES Act — Rebuild the 'ROC,'* The Hill (Apr. 22, 2020 10:30 A.M. EDT), <https://thehill.com/opinion/technology/493877-fighting-fraud-in-the-cares-act-rebuild-the-roc>; Jory Heckman, *Recovery Board's Roadmap Would Suit Pandemic Oversight Panel Just Fine, Experts Say*, FEDERAL NEWS NETWORK (Apr. 9, 2020 12:21 P.M.), <https://federalnewsnetwork.com/agency-oversight/2020/04/recovery-boards-roadmap-would-suit-pandemic-oversight-panel-just-fine-experts-say>.
- 31 *Recovery Act: Funding Used for Transportation Infrastructure Projects, but Some Requirements Proved Challenging*, U.S. Gov. Accountability Off. 18 (June 2011), <https://www.gao.gov/products/gao-11-600> ("According to the Chairman of the Recovery Accountability and Transparency Board, there has been an extremely low level of fraud involving Recovery Act funds.") (citing Statement of the Honorable Earl E. Devaney, Chairman, Recovery Accountability and Transparency Board, Testimony before the Committee on Oversight and Government Reform, U.S. House of Representatives, June 14, 2011); Transparency and Federal Management IT Systems: Hearing on H.R. 2146 Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Governmental Reform, at 4 (2011) (statement of Vivek Kundra, U.S. Chief Information Officer, Administrator for E-Government and Information Technology Office of Management and Budget) (testifying that "the Recovery Act has had an unprecedented low level of fraud, with less than 0.6% of all awards experiencing any waste, fraud, or abuse"); Gregory Korte, *Five Years Since Stimulus: Many Fraud Cases, Few Losses*, USA TODAY (Feb. 16, 2014 11:03 A.M.), <https://www.usatoday.com/story/news/politics/2014/02/16/recovery-act-stimulus-fraud-convictions/5400705/> (quoting Recovery Board Chairwoman Kathleen Tighe as stating that "[w]e have not seen the level of fraud that I think many people feared"); *The Economic Impact of the American Recovery and Reinvestment Act: Five Years Later*, Exec. Off. of the President, Council of Econ. Advisers 10 (Feb. 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/erp_2014_chapter_3.pdf ("Reported instances of waste, fraud, and abuse remain low—at less than 1 percent of all grant awards.").
- 32 See, e.g., KPMG CARES Act Report, *supra* note 30, at 1 ("For the next 10 years [after the enactment of the Recovery Act], the Office of Management and Budget (OMB) and Congress built on the legacy of [the Recovery Act's] groundbreaking transparency and accountability, passing legislation, including the Digital Accountability and Transparency Act (DATA Act) of 2014 and the Grant Reporting Efficiency and Agreements Transparency (GREAT) Act of 2019." (footnotes omitted)); *The Legacy of the Recovery Act*, U.S. Gov. Accountability Off., WATCHBLOG (Feb 21, 2019), <https://blog.gao.gov/2019/02/21/the-legacy-of-the-recovery-act> (stating that the Recovery Act "paved the way for legislation that changed the standards for the transparency of government spending," such as the DATA Act).
- 33 See, e.g., KPMG CARES Act Report, *supra* note 30, at 10 (listing CARES Act oversight provisions that "build[] on the precedent of strong oversight employed with [the Recovery Act]").

would mitigate the risk of corruption in funds appropriated as part of any forthcoming infrastructure bill.

In doing so, we did not write on a blank slate. Rather, we were able to use reports issued by government entities such as the GAO, the President’s Council on Economic Advisors, Offices of Inspectors General, and Congressional Committees, as well as private organizations such as the World Economic Forum, Transparency International, and the IBM Center for the Business of Government. In particular, we found GAO reports, which Congress mandated as part of the Recovery Act, to be especially useful in assessing the effectiveness of that statute in mitigating corruption in infrastructure funds, and in forming our recommendations.³⁴

Finally, we sought to draw lessons and obtain perspective from publicly-available information on a diverse array of case studies involving corruption in domestic infrastructure projects. These case studies, which are described more fully in the Appendices, are as follows:

- ▶ BVU OptiNet (Appendix II). Misuse of public funds, bid-rigging, and procurement violations, among other forms of misconduct, in connection with Recovery Act funds appropriated to expand broadband access in Virginia.
- ▶ Schneider Electric (Appendix III). Kickbacks, bribery, and the submission of false bidding information by a Schneider Electric project manager in connection with federal Energy Savings Performance Contracts.
- ▶ Hurricane Katrina (Appendix IV). Waste, fraud, and abuse by contractors in connection with Hurricane Katrina disaster-relief funds, and particularly federal contracts.
- ▶ California Bullet Train (Appendix V). Waste of Recovery Act funds intended for California’s high-speed rail initiative.

³⁴ See, e.g., Recovery Act, Title IV, § 901 (mandating bi-monthly GAO reviews and reports on the use of Recovery Act funds by selected states and localities).

- ▶ Central Artery Project (“The Big Dig”) (Appendix VI). Waste, fraud, and abuse of federal and state funds in connection with a Boston highway project.
- ▶ Tatanka Contracting (Appendix VII). Bribery of a tribal agency director related to a construction of an elderly home on tribal land in South Dakota.

Although these case studies show that corruption can occur even where generally effective anti-corruption measures are in place—for example, two of these examples involved funds subject to the Recovery Act—they also demonstrate the need for such measures in order to mitigate the various risks that give rise to corruption. We therefore reference these case studies in our recommendations below where appropriate, to highlight the specific risks that can lead to corruption where risk mitigation measures are ineffective or absent.

IV. Anticorruption Measures in H.R. 3684

On August 10, 2021, the Senate passed H.R. 3684, a \$1 trillion infrastructure bill focused on surface infrastructure and broadband projects (including \$550 million in funding for new projects). This infrastructure bill incorporates several measures to combat corruption, fraud, and abuse including:

- ▶ A requirement that federal agencies award grants on a “competitive basis” but typically does not specify what a “competitive” process should entail.³⁵
- ▶ A requirement for certain grant programs that the responsible federal agencies provide Congress with reports on the implementation of the grant programs with varying levels of detail.³⁶

35 See, e.g., H.R. 3684, § 11109(b)(1)(D)(iv) (State or metropolitan planning organization in charge of allocating Surface Transportation Block Grants to develop “a competitive process to allow eligible entities to submit projects for funding”); § 21201 (Secretary of Transportation to provide grants under the National Infrastructure Projects Assistance Program “on a competitive basis”).

36 See, e.g., H.R. 3684, § 11110 (a)(13) (before providing grant under the Nationally Significant Freight and Highway Projects Program, Secretary of Transportation to provide Congress a report describing proposed grants, including “an evaluation and justification for the project” and “a description of the amount of proposed grant award”); § 11132(a) (before providing grant under the Rural Surface Transportation Grant Program, Secretary of Transportation to submit to Congress a list of all eligible applications, each application proposed to be selected for a grant, including justification for the selection, and proposed grant

- ▶ For certain grant programs, a requirement that federal agencies publish on a public website reports on the implementation of the grant programs with varying levels of detail.³⁷
- ▶ A requirement for certain grant programs that the Comptroller General of the United States to conduct an assessment of the application and funding process.³⁸
- ▶ Funding for certain oversight functions.³⁹

V. Proposed Recommendations

The following are recommendations that Congress, the Administration, policymakers, and other stakeholders, including inspectors general, should consider when formulating anticorruption measures for governmental entities.⁴⁰ As noted above, these recommendations are informed by lessons learned from the Recovery Act, pandemic relief legislation, GAO Reports, and other statutes and analyses, as well as our case study analyses of the successes and failures of recent U.S. infrastructure projects.

Guided by these sources, and as noted above, we have categorized our recommendations into four groups: recommendations increasing public transparency in infrastructure

amounts); § 21201 (before publishing selection of projects to receive grants under the National Infrastructure Project Assistance Program, Secretary of Transportation to submit to Congress, among other things, a list of all project applications reviewed, rating assigned to each project, evaluation and justification for each project for which Secretary will provide a grant).

- 37 See, e.g., H.R. 3684, § 11118(a) (Secretary of Transportation to make available on the website of the Department of Transportation an annual report listing each eligible report for which a grant has been provided); § 21201 (60 days after grants are announced, Secretary of Transportation to publish on the website of the Department of Transportation a report that includes a list of all project applications reviewed, rating assigned, and description of each project for which a grant has been provided under the program); § 21205 (Secretary of Transportation to publish on the website of the Department of Transportation a monthly report that includes, for each application received, among other things, type of eligible entity that submitted the application, location of potential project, and brief description of assistance requested).
- 38 See, e.g., H.R. 3684, § 11110 (a)(15)(for the Nationally Significant Freight and Highway Projects Program, Comptroller General to submit to Congress a report describing the process by which each project was selected, factors that went into the selection of each project, and the justification for the selection of each project based on any criteria established the Secretary); § 11118(a) (for the Bridge Investment Program, Comptroller General to submit to Congress a report describing the adequacy and fairness of process under which each eligible project that received a grant was selected and the justification and criteria used for the selection of each eligible project).
- 39 See, e.g., H.R. 3684, §§ 22101–06 (allowing Secretary of Transportation to withhold up to 0.5% to 2% from amount appropriated for costs of project management oversight of funds); § 22107 (authorizing \$26.5M to \$28.5M per year to Amtrak’s Office of Inspector General).
- 40 CARES Act, § 15010(b); see also *infra* Section IV.B.1 (discussing inspectors general oversight).

spending (Sections A); recommendations relating to oversight (Sections B–D); recommendations relating to enforcement (Section E); and recommendations relating to contracts involving infrastructure bill funds (Section F). The recommended measures are intended to mitigate the risk of waste, fraud, and abuse with respect to funds appropriated as part of an infrastructure bill. These recommendations may be incorporated in subsequent legislation to provide additional oversight to infrastructure spending, or to the extent possible, considered when interpreting provisions in H.R. 3684. Below, and where relevant, we have identified where our proposed recommendations relate to provisions of H.R. 3684.

A. Public Transparency—Federal, State and Recipient Level and Encouraging Community Engagement

1. Mandate the creation of a public website to track infrastructure spending.

H.R. 3684 requires federal agencies to publish on a public website (usually the website of the federal agency) reports on the implementation of certain grant programs, such as the Nationally Significant Freight and Highway Projects Program⁴¹ and the National Infrastructure Project Assistance Program.⁴² Congress should supplement these provisions by mandating the creation of a comprehensive public website to track projects that use federal infrastructure funds, similar to the mandate found in the Recovery Act.⁴³ We encourage that similar websites be created and made available to the public at the state and local level. In addition to providing the general public with information needed to hold officials accountable, a public website gives disappointed bidders and other competitors insight into bidding outcomes, which leads to more efficient bidding practices in the future and also affords informed parties who have an incentive to spot fraud (*i.e.*, competitors) the necessary information to raise concerns. This website could also include other information to help combat potential corruption, fraud, and

41 H.R. 3684, § 11110(a)(15).

42 H.R. 3684, § 21201.

43 Recovery Act, § 1526.

abuse, such as beneficial ownership of companies receiving federal contracts in excess of \$500,000, a requirement under the National Defense Authorization Act.⁴⁴

The Recovery Act owes much of its success in deterring corruption, fraud, and abuse to Recovery.gov, which provided detailed information to the public on the use of covered federal funds.⁴⁵ The website included information on Recovery Act-funded contracts awarded by the federal government, the process used for contract awards, including competitiveness, and a summary of contracts over \$500,000.⁴⁶ The Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, like the Recovery Act, also required the creation of a public-facing website (pandemic.oversight.gov).⁴⁷ The CARES Act further mandated the creation of the Pandemic Response Accountability Committee (“PRAC”) to promote transparency and conduct oversight of covered funds, in order to prevent and detect fraud, waste, abuse, and mismanagement.⁴⁸ A very beneficial aspect of a website or portal is to increase the usefulness of data that is already in the public domain but fragmented and difficult to access.

As discussed in greater detail in Section IV.B.1 below, Congress should consider expanding the PRAC’s oversight responsibilities to extend to funds allocated as part of the forthcoming infrastructure legislation, or alternatively create a new committee to achieve a similar purpose.⁴⁹ The PRAC (or a new committee) could then be tasked with, among other things, the creation of a similar, user-friendly website that aggregates detailed data on infrastructure contracts awarded by the federal government, the competitiveness of bidding processes, the procedures for evaluating and awarding contracts, and a summary of contracts above a threshold amount.

44 Additional information on the Coalition’s prior recommendations related to beneficial ownership and the NDAA can be found at <https://www.coalitionforintegrity.org/wp-content/uploads/2021/03/Anti-Corruption-Recommendations-for-the-Biden-Administration-Online-.pdf>.

45 See, e.g., Jonathan Cohn, *Wanted: More Fraud, Abuse in Government Spending*, THE NEW REPUBLIC (Oct. 4, 2010), <https://newrepublic.com/article/78149/stimulus-recovery-spending-waste-fraud>; see also *supra* note 29 & sources cited therein.

46 Recovery Act, § 1526(4).

47 CARES Act, § 15010(g)(1)(A).

48 CARES Act, § 15010(b).

49 See Section IV.B.1, *infra*. If it determines that the PRAC would be overburdened by an expansion of its mandate, Congress should create a distinct committee charged specifically with oversight of the infrastructure funds. See *id.*

2. Create opportunities for community interaction and participation in infrastructure discourse

Transparency is an important principle for holding agencies accountable, helping stakeholders assess infrastructure spending and reducing mismanagement, inefficiency, and corruption. In addition, prioritizing transparency in the consideration of infrastructure projects provides opportunities for community engagement and, as a result, input for such projects. As an example, public hearings relating to the design, cost, and timeline for infrastructure projects creates space for informed discourse and debate. These types of hearings can help to ensure that the contemplated projects are responsive to the needs of the community, and help to educate the community on the considerations for such projects. These and similar opportunities to engage the general public on forthcoming infrastructure projects bring the added benefits of instilling a culture of accountability for contractors and others responsible for the execution of the projects, as well as surfacing potential issues early in the process to avoid potential disruptions (such as protests and litigation) later in a project's life cycle.⁵⁰

3. Implement quarterly reporting requirements for infrastructure funding recipients.

H.R. 3684 appropriates infrastructure funding to responsible federal agencies, which in turn allocate the funds to eligible recipients, such as states, localities, Tribal governments, and public authorities. Although the infrastructure bill requires the responsible federal agencies to provide Congress with reports on the implementation of certain grant program, more robust reporting obligations from the funding recipients should be considered. To that effect, agencies should require recipients of infrastructure funds from an agency to file quarterly reports with that agency, which shall in turn post information from these reports on a public-facing website such as the one described in Section IV.A.1, *supra*.⁵¹ Congress adopted this approach in Section 1512 of the Recovery Act, which required recipients of Recovery Act funds to file quarterly reports that included: (1) the total amount of funds received from the agency; (2) the amount

50 See G20 Compendium of Good Practices for Promoting Integrity and Transparency in Infrastructure Development, available at: <https://www.oecd.org/g20/summits/osaka/G20-Compendium-of-Good-Practices-in-Infrastructure-Development.pdf>

51 Recovery Act, § 1512.

of funds that were expended or obligated to projects or activities; (3) a “detailed list” of all such projects and activities, including, for each project or activity: its name, description, completion status, the number of jobs created and retained, and for state and local infrastructure investments, the purpose, total cost, rationale for Recovery Act funding, and a state/local agency point-of-contact; and (4) “[d]etailed information on any subcontracts or subgrants awarded by the recipient.”⁵² In addition, Section 1512 mandated that compliance with reporting obligations be a condition to receiving funds under the Act, while at the same time requiring federal agencies to “provide for user-friendly means for recipients of covered funds to meet the [reporting] requirements.”⁵³ Most notably for purposes of public transparency, Section 1512 required that, no later than 30 days from the end of each quarter (which was 20 days after the fund recipients’ reporting deadline), the agency must make the information in the recipient reports “publicly available by posting the information on a website.”⁵⁴ These “[t]ransparency requirements served as a deterrent which contributed to low rates of fraud, waste, and abuse of [Recovery Act] funds,”⁵⁵ as well as a guide to government officials when considering how best to prevent corruption in future infrastructure projects.⁵⁶

Accordingly, we recommend that agencies adopt the Recovery Act’s Section 1512 reporting requirements..

52 Recovery Act, § 1512(c). In a similar vein, section 1201(c) of the Recovery Act required each State that received a grant to report to the overseeing agency, on a quarterly and then annual basis, among other things, (A) the amount of Federal funds they received; (B) the number of projects that have been put out to bid under the appropriation and the amount of Federal funds associated with such projects; (C) the number of projects for which contracts have been awarded under the appropriation and the amount of Federal funds associated with such contracts; (D)-(E) the number of projects for which work has begun or been completed under such contracts and the amount of Federal funds associated with such contracts; and (F) the number of jobs created or sustained by the appropriated funds.

53 Recovery Act, § 1512(f), (g).

54 Recovery Act, § 1512(c), (d). In addition to these requirements, Congress also required the Congressional Budget Office and GAO to comment on the jobs data contained in the recipient reports. For additional information on the success and challenges of the initial rounds of § 1512 reporting, see Recovery Act: Status of States’ and Localities’ Use of Funds and Efforts to Ensure Accountability, Gov’t Accountability Off. 36–37, 118–20 (Dec. 2009), <https://www.gao.gov/new.items/d10231.pdf>; Recovery Act: Funds Continue to Provide Fiscal Relief to States and Localities, While Accountability and Reporting Challenges Need to be Fully Addressed, Gov’t Accountability Off. 109–115 (Sep. 2009), <https://www.gao.gov/assets/300/295645.pdf>.

55 Francisca M. Rojas, Recovery Act Transparency: Learning from States’ Experience, IBM Ctr. for the Bus. of Gov’t 6 (2012), <https://www.businessofgovernment.org/report/recovery-act-transparency-learning-states-experiences>.

56 For example, the Hurricane Sandy Rebuilding Task Force recommended continued adherence to transparency measures—including “public facing financial and performance updates”—that were based on the Recovery Act. Hurricane Sandy Rebuilding Strategy: Stronger Communities, A Resilient Region, Hurricane Sandy Rebuilding Task Force 153–55 (Aug. 2013), *available at* <https://rucore.libraries.rutgers.edu/rutgers-lib/43470/PDF/1/play>.

4. Require conflict-of-interest disclosures from state officials.

Transparency into state officials' potential economic or personal interests in infrastructure transactions can deter wrongdoing and improve detection when misconduct occurs. In states where it is not already a requirement, governors should consider requiring state and local government officials involved in infrastructure projects or in infrastructure spending initiatives to file annual conflict of interest disclosures with the state's secretary of state or with the relevant state ethics agency. Such disclosure provisions should explicitly apply to members of government-owned independent entities, such as municipal authorities.⁵⁷

In 2014, then-Virginia Governor Terry McAuliffe issued an ethics disclosure executive order that could serve as a model for the type of disclosures necessary to deter and detect corruption.⁵⁸ The executive order required state government officials or employees involved in policy, contracts, procurements, audits, licensure, inspection, investigation, or investment to file annual statements of economic interests with the secretary of the commonwealth.⁵⁹ In April 2018, current Virginia Governor Ralph Northam issued a near-identical ethics disclosure executive order.

5. Require conflict-of-interest disclosures from fund recipients and others “downstream.”

In addition to requiring conflict-of-interest disclosures from state officials, state Governors should consider requiring infrastructure fund recipients, contractors, and subcontractors to disclose any potential conflicts of interests. As part of the CARES Act, for example, Congress required businesses that received emergency relief funds to first submit a certification—executed by the business's CEO and CFO—confirming that they were in compliance with the Act's conflict-of-interest prohibition, which barred

57 Such municipalities authorities are common, for example, in the context of broadband infrastructure projects. See Appendix II (discussing the role of the independent municipal Bristol Virginia Utilities Authority in the OptiNet infrastructure project).

58 Exec. Order No. 33, Designation of Executive Branch Officers and Employees Required to File Financial Disclosure Statements (Nov. 14, 2014) (modified on Apr. 24, 2015).

59 Exec. Order No. 33, Designation of Executive Branch Officers and Employees Required to File Financial Disclosure Statements (Nov. 14, 2014) (modified on Apr. 24, 2015). *Id.* In April 2018, current Virginia Governor Ralph Northam issued a near-identical ethics disclosure executive order. See Exec. Order No. 8, Designation of Executive Branch Officers and Employees Required to File Financial Disclosure Statements (Apr. 25, 2018).

companies controlled by members of Congress, other senior government officials, and the family members of such individuals from receiving funds under the Act.⁶⁰

6. Require certifications from responsible state and local officials.

With respect to infrastructure funds made available to state or local governments, Congress should require the responsible chief executive (*e.g.*, the governor or mayor) to certify—before receiving any funds—that the planned “infrastructure investment has received the full review and vetting required by law and that the chief executive accepts responsibility that the infrastructure investment is an appropriate use of taxpayer dollars.”⁶¹ In particular, this certification should include “a description of the investment, the estimated total cost, and the amount of covered funds to be used,” and it should be “posted on a website and linked to the website” recommended in Section IV.A.1, *supra*.⁶²

Congress adopted this approach, which fosters public accountability and transparency from state and local officials, in the Recovery Act.⁶³ The GAO reported that this certification requirement can lead to delays in infrastructure projects, where state and local officials request funding before completing a state-level certification process.⁶⁴ Thus, we further recommend that states, in anticipation of receiving funds from a future infrastructure bill, establish a certification process that state and local governments can complete quickly when seeking infrastructure funds. Such a process should draw on the state’s certification process for the Recovery Act and thus could, for example, include the state’s issuance of certification guidance and standardized forms for funding recipients who require certifications under the statute.⁶⁵

60 CARES Act, § 4019.

61 Recovery Act, § 1511.

62 Recovery Act, § 1511; see also, *e.g.*, Certification Under Section 1511 of the American Recovery and Reinvestment Act, Del. Dep’t of Transp. (June 12, 2009), https://www.transportation.gov/sites/dot.gov/files/ARRAcerts/1511/1511_Certification_061209_DE.pdf.

63 Recovery Act, § 1511.

64 Recovery Act: Project Selection and Starts are Influenced by Certain Federal Requirements and Other Factors, Gov’t Accountability Off. 20 (Feb. 2010), <https://www.gao.gov/new.items/d10383.pdf>.

65 See, *e.g.*, American Recovery and Reinvestment Act (ARRA): Tx. Educ. Agency (TEA) Monitoring of Area Requirements, Tx. Educ. Agency 9–12, 14, 16 (Apr. 14, 2011), https://www.esc1.net/cms/lib/TX21000366/Centricity/Domain/54/Tab_IV_-_1._ARRA_Presentation_4-12-11.pdf.

B. Oversight Measures—Federal Level

1. Formalize collaboration amongst inspectors general.

While single-agency oversight (*e.g.*, by the Department of Transportation (“DOT”) Inspector General) of infrastructure spending is ordinarily sufficient for legislation focused on surface transportation, infrastructure legislation is likely to fund a variety of projects under the jurisdiction of several departments and agencies. In that respect, the expected legislation, although not a “stimulus,” will more closely resemble the Recovery and CARES Acts than it will the three most recent infrastructure authorizations, which focused on surface transportation. As it did in the Recovery and CARES Acts, Congress should facilitate necessary collaboration among inspectors general by assigning oversight responsibility to, and providing adequate funding for, a committee comprising the inspectors general of the agencies and departments that will be responsible for administering the funds.

The utility of such an interagency oversight committee is not limited to the context of stimulus spending. Indeed, in 2011, Congress extended funding for the Recovery Accountability and Transparency Board (the “Recovery” Board) in order “to develop and test information technology resources and oversight mechanisms to enhance transparency of and detect and remediate waste, fraud, and abuse in Federal spending” generally.⁶⁶ In 2013, Congress further extended the Recovery Board’s funding and oversight responsibilities until 2015, so that the Board could oversee any funds related to the impact of Hurricane Sandy.⁶⁷ When the Recovery Board’s term finally expired in 2015, the GAO observed that over 50 inspectors general and agencies had requested assistance from the Recovery Board’s data analytics function (the Recovery Operations Center, or “ROC”), and recommended that the analytics function be preserved for a longer term.⁶⁸ In short, while agency heads and inspectors general can and should, at a minimum, collaborate informally (*e.g.*, as they have done in the context of the Affordable

66 Pub. L. No. 112-84, 125 Stat. 786, 920 (Dec. 23, 2011).

67 Pub. L. No. 113-2, 127 Stat. 14, 18 (Jan. 29, 2013).

68 *Preserving Capabilities of Recovery Operations Center Could Help Sustain Oversight of Federal Expenditures* 23, U.S. Gov’t Accountability off. (2015), <https://www.gao.gov/assets/gao-15-814.pdf>.

Care Act and certain foreign aid bills), there are proven benefits to empowering a formalized central entity to oversee large scale federal spending by multiple agencies.

One candidate for such an oversight entity already exists in the form of the PRAC. While the PRAC, like the Recovery Board, was originally created for the purpose of overseeing stimulus funds, the PRAC may be well situated to assume responsibility over future infrastructure spending. In particular, the PRAC already has experience overseeing large scale federal spending (it currently oversees over \$5 trillion in pandemic relief funding);⁶⁹ its membership already includes many of the inspectors general likely to oversee infrastructure funds;⁷⁰ and the forthcoming “human infrastructure” legislation is expected to include funds already being overseen by the PRAC.⁷¹ For that reason, Congress should consider expanding the PRAC’s mandate to include oversight of future infrastructure spending.⁷² Furthermore, because the PRAC’s expertise in overseeing aid to individuals and small businesses may be different from the expertise required for oversight of large-scale infrastructure projects, Congress should accompany any expansion of the PRAC’s mandate with appropriations sufficient to allow the PRAC to make necessary investments in hiring and training. Alternatively, Congress could create, and adequately fund, a distinct committee charged specifically with oversight of infrastructure spending. In either event, it is imperative that an existing or new committee charged with overseeing infrastructure spending be staffed with infrastructure procurement and contracting professionals who have a range of functional expertise and experiences with mega-projects (and their various stages).

69 <https://www.pandemicoversight.gov> (last visited July 15, 2021). In particular, the PRAC oversees \$2.1 trillion in CARES Act spending, \$1.9 trillion in ARPA spending, \$900 billion under the Coronavirus Response and Relief Supplemental Appropriations Act (2021), \$483 billion under the Paycheck Protection Program and Health Care Enhancement Act, \$15.4 billion under the Families First Coronavirus Response Act, and \$7.8 billion under the Coronavirus Preparedness and Response Supplemental Appropriations Act (2021). *Id.*

70 The Committee’s members, include, among others, the inspectors general of the Departments of Homeland Security, Housing and Urban Development, Interior, and Transportation. See *PRAC Members*, <https://www.pandemicoversight.gov/our-mission/prac-members> (last visited July 15, 2021).

71 *Democrats Propose \$3.5 Trillion Budget to Advance with Infrastructure Deal*, N.Y. Times (July 13, 2021), <https://www.nytimes.com/2021/07/13/us/politics/infrastructure-deal-budget.html> (last accessed July 15, 2021) (reporting that the bipartisan infrastructure framework is expected to extend “funds already approved in Mr. Biden’s pandemic relief law”).

72 See *infra* Section IV.B.1.

2. Provide adequate funding for oversight and enforcement functions.

Robust oversight and enforcement measures cannot succeed without adequate funding. Recognizing the importance of adequate funding, H.R. 3684 allocates a small percentage of the appropriations to the Office of Inspector General of each federal agency charged with overseeing the funds. Additionally, any future infrastructure bill should include sufficient appropriations for the PRAC (or a new inspectors general committee), as well as for law enforcement. The amount of funding will depend on various factors, including the scope and complexity of infrastructure spending provisions. As a benchmark, the Recovery Act, which provided more than \$800 billion in stimulus funds,⁷³ provided \$84 million to the Recovery Board⁷⁴. In addition, shortly after passing the Recovery Act, Congress appropriated a total of \$500 million over the span of two years to the Department of Justice (including sub-agencies such as the FBI) and other agencies for the purpose of investigating and prosecuting misconduct “involving Federal assistance programs and financial institutions.”⁷⁵

Robust funding could also support more creative approaches to oversight, such as the creation accountability committees to help ensure that a diverse and comprehensive set of stakeholders are able to help ensure that infrastructure projects are being executed in an efficient and responsible manner. To the extent accountability are considered on a federal, state, or local level, we would encourage representation from government, private industry and civil society, to ensure that a range of views, perspectives and experiences are incorporated into the oversight process.

With respect to the pandemic response, Congress has already appropriated \$120 million to the PRAC and an additional \$86 million for individual inspectors general offices.⁷⁶ In addition, Congress has appropriated money to the Department of Justice and other

73 *Estimated Impact of the American Recovery and Reinvestment Act on Employment and Economic Output from October 2011 through December 2011*, Congressional Budget Off. 1 (Feb. 2012), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/02-22-ARRA.pdf>.

74 Recovery Act, Tit. V, 123 Stat. 115, 150.

75 Fraud Enforcement and Recovery Act of 2009 (“FERA”), Pub. L. No. 111-21, § 3 (2009).

76 ARPA, § 4003, Pub. L. No. 117-2 (\$40 million); CARES Act, § 15004, 134 Stat. 281, 533 (\$80 million); see *American Rescue Plan Provides \$200 Million for Pandemic Oversight Efforts*, Good Jobs First (Mar. 18, 2021), <https://www.goodjobsfirst.org/blog/american-rescue-plan-provides-200-million-pandemic-oversight-efforts> (last accessed July 15, 2021).

law enforcement agencies for the specific purpose of funding their pandemic response, including \$20 million to the FBI, \$3 million to U.S. Attorney’s Offices, \$2 million to the DOJ Office of Inspector General, and \$2 million to the DOJ’s general administration account for “justice information sharing technology.”⁷⁷ However, if Congress is to expand the mandate of the PRAC or create a new committee to cover infrastructure spending, additional funding will be needed for both the committee and individual inspectors general and agencies.

3. Conduct up-front risk assessments.

To guard against the heightened corruption risks that accompany what likely will be the accelerated disbursement of funds in response to the ongoing economic shock of the pandemic, each oversight agency should begin assessing risks as soon as an infrastructure bill is signed, and continue to assess and reassess risks as programs are being carried out.⁷⁸ This approach was used first in the Recovery Act context, and again with respect to Hurricane Sandy relief.⁷⁹

In particular, the DOT OIG used a three-phase risk assessment process for both Recovery Act and Hurricane Sandy funds: first, identifying existing program risks based on past reports; second, assessing what DOT was doing to address those risks; and third, conducting audit work.⁸⁰ Likewise, the Department of Energy (DOE) began its own up-front risk assessment process when it realized that its grant budget would increase from a typical allotment of \$60 billion annually to over \$100 billion under the Recovery Act.⁸¹ Like DOT, DOE began by looking at its prior work to identify persistent implementation issues, then drafted a report summarizing these issues, and ultimately drew upon this report (as well as additional risk assessments that it conducted) when

77 CARES Act, Tit. II, 134 Stat. 281, 512.

78 *Recovery Act: Grant Implementation Experiences Offer Lessons for Accountability and Transparency*, U.S. Gov. Accountability Off. 22 (Jan. 2014), <https://www.gao.gov/assets/670/660353.pdf> (“GAO Report on Recovery Act Grant Implementation”) (“Shortly after the Recovery Act was signed, DOE’s OIG reviewed the challenges the agency would need to address to effectively manage the unprecedented level of funding and to meet the goals of the Recovery Act.”).

79 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 22–23.

80 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 22–23.

81 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 23.

conducting audits.⁸² The Department of Housing and Urban Development (HUD) also conducted up-front risk assessments, in addition to “capacity reviews for programs that field offices had identified as having known issues.”⁸³ The goal of these capacity reviews was to enable the HUD field offices to actively address and resolve known issues *before* Recovery Act funds were distributed to programs.⁸⁴

Thus, given the fast pace at which infrastructure funds may be disbursed, agencies should consider adopting an up-front risk assessment process that begins before any funds are actually distributed. Because the specific form and timing of these up-front assessments may vary depending on agency-specific factors, including the amount of funds allocated to the agency and the level of risk inherent in programs overseen by the agency, we recommend that agencies be given flexibility to tailor the assessment process to the agency’s specific needs.

4. Provide “real time” oversight of federally-funded programs.

In addition to the “up front” risk assessment process described above, “real time” oversight is important to provide an ongoing assessment of infrastructure projects.

Rather than adopt the “traditional” approach of reviewing a program after it has been implemented, Congress should implement a mechanism that allows for review of infrastructure programs as they are being carried out, consistent with the practice used in the Recovery Act context, in order to address quickly any problems that arise in the implementation of the program, including any potential cost overruns.⁸⁵ The ability to address problems early on is particularly important when, as was the case in the Recovery Act—and as will likely be the case in a future infrastructure bill—large amounts of funds are appropriated quickly. To address the heightened risks of corruption and waste posed by such an expenditure of funds, the Recovery Act tasked the GAO with conducting bimonthly reviews and preparing reports on the use of Recovery

82 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 23.

83 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 23.

84 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 23–24.

85 See GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 24.

Act funds by a selected group of states and localities.⁸⁶ In furtherance of this ongoing oversight role, the Recovery Act also required that any contract awarded using Recovery Act funds provide that the GAO be authorized to examine records of the contractor, subcontractor, or relevant state or local agency if such records “directly pertain to, and involve transactions relating to, the contract.”⁸⁷ Of course, the ability of the GAO and other oversight entities to monitor the use of funds in real time was also facilitated by the ongoing reporting requirements discussed above.⁸⁸

Thus, Congress should consider again mandating contract provisions that would permit the GAO to conduct reviews of States’ infrastructure spending and prepare reports on a periodic basis. In addition, the GAO and other oversight entities should review information provided pursuant to ongoing reporting requirements as they continue to assess risks and challenges with respect to infrastructure spending. Finally, to the maximum extent possible, the GAO and oversight entities should engage independent experts to provide technical oversight over the funded infrastructure projects.

C. Oversight Measures—State Level

1. Encourage state and local audit organizations to audit proactively.

Similar to our recommendation above regarding up-front risk assessments at the federal level, we recommend that state oversight entities also take a proactive approach. In particular, state auditors should consider conducting earlier audits of state programs receiving infrastructure funds in order to identify risks and inform their work going forward.⁸⁹ As the GAO noted in its 2014 Report on Recovery Act Grant Implementation, the California State Auditor successfully employed this approach by conducting “readiness reviews” that highlighted known vulnerabilities in programs

86 Recovery Act, § 901(a)(1); see also GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 24.

87 Recovery Act, § 902(a)(1).

88 See GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 24–25.

89 See GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 24.

receiving Recovery Act funds, and again used this approach as it prepared to audit the implementation of the Affordable Care Act in California.⁹⁰

In addition to up-front auditing, state and local auditors should communicate findings from their audits as early as possible. Following the enactment of the Recovery Act, the GAO recommended that the Office of Management and Budget (“OMB”) adjust the so-called “Single Audit” process prescribed in the Single Audit Act of 1984⁹¹ and related OMB guidance⁹² to provide for review of the design of internal controls *before* significant Recovery Act expenditures in 2010.⁹³ Toward that end, OMB implemented a project that encouraged State auditors to identify and communicate significant deficiencies and weaknesses in internal controls for selected Recovery Act programs 3 months sooner than the 9-month time frame required by the existing Single Audit process.⁹⁴ This adjusted timeframe allowed program management officials at audited agencies to expedite corrective actions and mitigate the risk of improper Recovery Act expenditures.⁹⁵ Congress should draw on these lessons from the Recovery Act context and consider adjusting the standard Single Audit timeline as part of an infrastructure bill, in order to facilitate the early communication and correction of risks relating to infrastructure spending.

Finally, state and local audit agencies should communicate their findings early, and on a rolling basis, through informal emails and alerts. The Denver City Auditor’s Office successfully adopted this approach when auditing compliance with Recovery Act

90 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 24.

91 Single Audit Act Amendments of 1996, Pub. L. No. 104–156 (1996). Non-federal entities, such as states, local governments, and nonprofit entities, that expend \$750,000 or more of federal assistance in one year is required by law to have a Single Audit performed. A Single Audit is conducted by an independent auditor and reviews whether the financial statements are presented fairly and accurately, whether a non-federal entity has adequate internal controls in place, and whether it is generally in compliance with program requirements. The process is referred to as a “Single Audit,” because it consolidates multiple individual audits of non-federal entities required for each federal award into a single audit. See *Single Audit*, Dep’t Health & Human Services, <https://www.hhs.gov/about/agencies/asfr/data-act-program-management-office/single-audit/index.html>; *Federal Law Audit Requirements*, National Council of Nonprofits, <https://www.councilofnonprofits.org/nonprofit-audit-guide/federal-law-audit-requirements>.

92 See Office of Federal Financial Management Single Audit, Off. of Management and Budget, https://obamawhitehouse.archives.gov/omb/financial_fin_single_audit (collecting guidance).

93 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 26.

94 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 26.

95 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 26; see also *Recovery Act: States’ and Localities’ Use of Funds and Actions Needed to Address Implementation Challenges and Bolster Accountability*, U.S. Gov. Accountability Off. 22 (May 2010), <https://www.gao.gov/assets/310/304678.pdf>.

requirements by using a “tiered notification process.”⁹⁶ Under this process, the City auditor would first notify the appropriate city department informally by email (or similar means) of potential issues it was finding during an ongoing audit.⁹⁷ The city auditor then would revisit these issues later, and if they were not addressed, would more formally communicate any substantive issue on a real-time basis through an “audit alert”—typically a brief document that went to the affected city departments and the Mayor’s work group overseeing Recovery Act implementation.⁹⁸ If the issues persisted, the city auditor would consider issuing a public alert or full public audit report. This tiered escalation process allowed the city auditor to raise issues without having to conduct a full audit, which in turn allowed city officials to quickly address the identified problems.⁹⁹ We recommend that state and local officials consider adopting a similar model that allows for early communication of audit findings in connection with any infrastructure bill.

2. Provide adequate funding to support state agency oversight.

State and local oversight bodies, no less than their federal counterparts, require adequate funding in order to function effectively. Although such funding can and should come in large part from state budgets (and ultimately state taxpayers), federal funding is also warranted in light of the additional strains brought on by an accelerated increase in infrastructure projects and reporting requirements, not to mention the economic strains of the pandemic itself.

These kinds of strains negatively impacted state oversight offices in the wake of the 2008 Financial Crisis. Because the Recovery Act did not include any funding for these state oversight bodies, several states reported significant declines in the number of management and oversight staff, even as the workloads of state oversight offices increased.¹⁰⁰ In particular, according to the GAO, the California State Auditor cited the lack of federal

96 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 27.

97 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 27.

98 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 27.

99 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 27.

100 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 31–32.

funding for state and local oversight as a “challenge to ensuring accountability in the implementation of the Recovery Act.”¹⁰¹ Similarly, the Massachusetts State Auditor had to furlough staff for 6 days in 2009, and the Massachusetts Recovery and Reinvestment Office had to reallocate funds from its central administration account to the Attorney General, State Auditor, and OIG offices to ensure that oversight of Recovery Act funds would take place.¹⁰² The Colorado State Auditor similarly reported that its state oversight capacity was limited during Recovery Act implementation.¹⁰³

Thus, in order to support the effectiveness of state oversight functions and ultimately mitigate the risk of corruption in federally-funded state and local infrastructure projects, we recommend that Congress appropriate funds for such functions.

D. Oversight Measures - Federal, State and Recipient Levels

1. Mandate the maintenance of effective internal controls.

Federal agencies and state governments should be required to maintain effective internal controls. These agencies, in turn, should require recipients of infrastructure funds to maintain effective internal controls, and should consider the presence and demonstrated effectiveness of such controls in determining whether and how to award infrastructure funds.

In terms of implementation, the Federal Acquisition Regulation (“FAR”) offers a useful starting point: it provides that federal contracting officers “should establish internal controls or procedures” for “flexible or variable” features of certain types of contracts, for example, by providing for the review of time records.¹⁰⁴ The FAR further provides that such controls should be established “prior to the commencement of contract performance.”¹⁰⁵ While we agree with these provisions, the Recovery Act

101 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 32.

102 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 31.

103 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 32.

104 FAR Pt. 542.7003.

105 *Id.*

context demonstrates that other entities can also play a significant role in ensuring the maintenance of proper internal controls.

In particular, OMB issued guidance stating that federal agencies should consider, when assessing risks for individual programs that receive Recovery Act funding, whether a recipient’s “existing internal controls [are] sufficient to mitigate the risk of waste, fraud, and abuse adequately.”¹⁰⁶ OMB later issued detailed guidance on internal controls specifically for “major programs with expenditures of [Recovery Act] awards.”¹⁰⁷ This guidance described specific compliance requirements that are subject to internal controls, the objective of the internal control for each such requirement, and specific characteristics of the internal control—as well as audit objectives and procedures to test the internal control.¹⁰⁸ The GAO subsequently recognized that “effective internal controls over the use of Recovery Act funds are critical to help allow effective and efficient use of resources, compliance with laws and regulations, and in achieving accountability over Recovery Act programs.”¹⁰⁹

OMB should likewise consider issuing detailed guidance for maintaining and testing internal controls with respect to the forthcoming infrastructure bill. OMB should also consider further strengthening its guidance to require an evaluation of the bidders’ internal controls as part of the procurement process, such that only bidders who have a credible set of internal controls receive infrastructure funding. In addition, agencies and state governments should revisit and draw upon their own past experience assessing internal controls of Recovery Act recipients. For example, the GAO found that the DOE’s

106 Memorandum of Peter R. Orszag, Director of OMB, RE: Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009, at 5 (Feb. 18, 2009).

107 OMB Circulation A-133: Compliance Supplement Addendum #1, Off. of Mgmt. & Budget (June 30, 2019), https://www.whitehouse.gov/wp-content/uploads/2020/12/2020-Compliance-Supplement-Addendum_Final.pdf; see also Standards for Internal Control in the Federal Government (GAO-14-704G), Gov’t Accountability Off. (September 2014), <https://www.gao.gov/assets/670/665712.pdf>.

108 OMB Circulation A-133: Compliance Supplement Addendum #1, Off. of Mgmt. & Budget (June 30, 2019), https://www.whitehouse.gov/wp-content/uploads/2020/12/2020-Compliance-Supplement-Addendum_Final.pdf

109 Recovery Act: Funds Continue to Provide Fiscal Relief to States and Localities, While Accountability and Reporting Challenges Need to be Fully Addressed, Gov’t Accountability Off. 115 (Sep. 2009), <https://www.gao.gov/assets/300/295645.pdf>. By contrast, the absence of effective internal controls can open the door to corruption in infrastructure projects. For example, with more effective internal controls, former Schneider Electric project manager, Bhaskar Patel, may have had more difficulty allegedly carrying out improper instructions from his superiors to “do whatever he could” to obtain bids and boost profits (Schneider Electric has denied any wrongdoing). Man gets probation after admitting to \$2.5m in kickbacks, AP (June 22, 2020), <https://apnews.com/3fd057580e6d04b9afe313e373975b83>.

approach in assessing internal controls of Recovery Act fund recipients was effective.¹¹⁰ Specifically, the DOE requested program and project-level operating plans detailing risk mitigation strategies, internal controls, performance measures, and methods for the collection and reporting of data.¹¹¹ The DOE should renew these measures with respect to infrastructure funds. In short, a funding recipient’s internal controls are the first line of defense in mitigating corruption of infrastructure funds, and thus we recommend that federal agencies and state governments overseeing infrastructure spending (1) require companies to maintain effective internal controls, and (2) put in place auditing and testing procedures to ensure the same.

E. Enforcement—Federal & State Level

1. Authorize agencies to terminate infrastructure funding and seek reimbursement in the event of fraud.

Congress should expressly authorize federal agencies to terminate infrastructure funding for, and seek reimbursement from, a funding recipient that makes a “false or fraudulent statement or related act in connection with” the relevant infrastructure program.¹¹² Congress previously included a similar provision in Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”) (2005), which authorized the Secretary of Transportation to “terminate financial assistance...and seek reimbursement directly, or by offsetting amounts,...if the Secretary determines that a recipient of...financial assistance [under the statute] has made a false or fraudulent statement or related act in connection with a Federal transit program.”¹¹³

Although federal agencies can avail themselves of existing contractual remedies even without a statutory termination and reimbursement clause, and may obtain restitution in a criminal proceeding, an express termination and reimbursement clause like

110 GAO Report on Recovery Act Grant Implementation, *supra* note 78, at 23.

111 *Special Report on The American Recovery and Reinvestment Act at the Department of Energy* (OAS-RA-09-01) (March 2009) at 3.

112 SAFETEA-LU, § 3023(j).

113 SAFETEA-LU, § 3023(j).

the one in SAFETEA-LU further empowers agency heads to combat fraud and false statements in connection with the programs that they oversee. This power, for example, could have benefited the federal agencies overseeing the Energy Savings Performance Contracts awarded to Schneider Electric after one of its project managers admitted to submitting false bidding information in an attempt to cover up bribery and kickbacks in the subcontractor bidding process (*see* Appendix III). Likewise, the Department of Commerce, National Telecommunications and Information Administration, or IRS could have sought reimbursement from BVU OptiNet in connection with the false statements made by the company's CEO and CFO (*see* Appendix II). Ultimately, neither of the agencies or departments in these instances sought reimbursement.

A termination and reimbursement provision, unlike in SAFETEA-LU, would not apply to a single agency head such as the Secretary of Transportation, but rather would empower each agency head in connection with infrastructure programs under that agency's oversight. In addition, Congress could consider authorizing the PRAC (or a newly-created centralized oversight committee) to terminate financial assistance and seek reimbursement on behalf of an agency head. Provisions such as these will serve to deter fraud or false statements in connection with infrastructure programs, and prevent recipients who receive funds from benefiting from such misconduct.

2. Protect whistleblowers.

An infrastructure bill should contain provisions that protect whistleblowers who come forward with information relating to the misuse of federal funds or other non-compliance. Such provisions should, at a minimum, allow whistleblowers to come forward anonymously; prohibit the leaking of the whistleblower's identity; prohibit retaliation against the whistleblower; and set out investigative steps to be taken in the event of a retaliation allegation, consistent with the approach taken in Section 1553 of the Recovery Act.¹¹⁴ In addition, inspectors general should ensure that federal employees with oversight responsibilities relevant to infrastructure are adequately trained on whistleblower provisions, and that protected funding recipients and state

¹¹⁴ Recovery Act, § 1553.

employees are notified of such protections as well. To achieve these goals, inspectors general should adopt the best practices developed by the Council of Inspectors General on Integrity and Efficiency, Whistleblower Protection Coordinators (“WPCs”), and the Office of Special Counsel (“OSC”) working groups.¹¹⁵

In short, protecting whistleblowers is both an ethical and investigative imperative. In order to encourage whistleblower complaints, Congress should include whistleblower protections as part of an infrastructure bill.

3. Create interagency task forces to investigate corruption and enforce laws prohibiting infrastructure-related fraud and other misconduct.

Federal and state governments should create interagency task forces to investigate and prosecute corruption in connection with infrastructure funds. The federal government has already recognized the importance of cross-agency coordination in the context of a pandemic relief funds by establishing the PRAC to spearhead oversight of pandemic response funds. Interagency task forces should supplement any centralized inspectors general committee (whether the PRAC or a newly-created committee, *see supra* Section IV.B.1.).

Whereas an inspectors general committee focuses on oversight, interagency task forces often focus on enforcement. For example, shortly after Congress established an interagency oversight board in the Recovery Act (*i.e.*, the Recovery Board), the President established the Financial Fraud Enforcement Task Force—not only to investigate and prosecute fraud that contributed to the Financial Crisis, but also to focus on “the potential for fraudulent schemes that aim to misuse the public’s unprecedented investment in economic recovery.”¹¹⁶ This task force included the Recovery Act Fraud Working Group, which was “responsible for coordinating a national strategy to draw on all the resources and expertise of the Department of Justice” and various other agencies “to ensure that taxpayer funds are safeguarded from fraud and abuse and that the Recovery Act effort

115 See *Whistleblowing Works: How Inspectors General Respond to and Protect Whistleblowers*, Report of the Council of the Inspectors General on Integrity and Efficiency (2019).

116 Rob Adkins, *The Financial Fraud Enforcement Task Force*, U.S. Attorneys’ Bulletin 1 (Sep. 2010), <https://www.justice.gov/sites/default/files/usao/legacy/2010/10/05/usab5805.pdf>.

is conducted in an open, competitive, and non-discriminatory manner.”¹¹⁷ States set up similar task forces to combat Recovery Act fraud.¹¹⁸

In September 2010, less than a year after the creation of the Financial Fraud Enforcement Task Force, the Task Force’s Executive Director reported on the “many successes [it had] already achieved,” including the “largest mortgage fraud sweep in history, with more than 1,500 criminal mortgage fraud defendants, nearly 400 civil fraud defendants, and an estimated aggregate loss figure exceeding \$3 billion.”¹¹⁹ Other task forces have proved useful as well. For example, the Hurricane Katrina Fraud Task Force (see Appendix I) coordinated hundreds of prosecutions in connection with various hurricane fraud-related crimes.¹²⁰ Likewise, the Federal Highway Administration (FHWA) formed the Federal Task Force on the Boston Central Artery/Tunnel Project (see Appendix VI), which made 34 recommendations, each of which the FHWA ultimately adopted.¹²¹ The Guardians Project Task Force (see Appendix I), which coordinates efforts among several agencies to promote disclosure of public corruption in projects receiving federal funds in South Dakota’s Native American communities, has been successful as well. Since 2013, the project has led to over 100 felony convictions for crimes connected to corruption, more than \$15 million in restitution, and \$3.5 million in fines.¹²² Even where formal “task forces” are not formed, interagency cooperation remains critical to investigating and prosecuting corruption in infrastructure projects, as evidenced by the

117 Rob Adkins, The Financial Fraud Enforcement Task Force, U.S. Attorneys’ Bulletin 16 (Sep. 2010), <https://www.justice.gov/sites/default/files/usao/legacy/2010/10/05/usab5805.pdf>.

118 Recovery Act: Grant Implementation Experiences Offer Lessons for Accountability and Transparency, Gov’t Accountability Off. 22 (Jan. 2014), <https://www.gao.gov/assets/670/660353.pdf> (discussing Massachusetts’s Stimulus Oversight and Prevention (STOP) Fraud Task Force); *id.* at 24 (noting California Governor’s Recovery Act Task Force).

119 Rob Adkins, The Financial Fraud Enforcement Task Force, U.S. Attorneys’ Bulletin 3 (Sep. 2010), <https://www.justice.gov/sites/default/files/usao/legacy/2010/10/05/usab5805.pdf>.

120 Second Year Report to the Attorney General, Hurricane Katrina Fraud Task Force, Dep’t of Justice (Sep. 2007), <https://www.justice.gov/sites/default/files/criminal-disasters/legacy/2012/07/30/09-04-07AG2ndyrprogrpt.pdf>.

121 Statement of D.J. Gribbin, Chief Counsel, Federal Highway Administration, before the House Committee on Government Reform (Apr. 22, 2005), <https://www.transportation.gov/testimony/issues-concerning-boston-central-arterytunnel-cat-project>; see also Review of Project Oversight and Costs, Federal Task Report on the Boston Central Artery Tunnel Project (Mar. 31, 2000), <https://www.fhwa.dot.gov/reports/REPORT3A.pdf> (“Big Dig Task Force Report”). Note that, in the absence of a specialized federal interagency board committed to the Big Dig, and given the primary role of the State in managing the Big Dig project, the Federal Task Force on the Boston Central Artery Tunnel Project provided exclusively an *oversight* function and thus did not conduct any enforcement activities. See Big Dig Task Force Report at 1. Nevertheless, we have noted this task force as an example of the utility of interagency task forces with respect to corruption in infrastructure generally.

122 See Press Release, The Guardians Project provides grant administration training to Montana communities (Nov. 13, 2018), <https://www.justice.gov/usao-mt/pr/guardians-project-provides-grant-administration-training-montana-communities>.

Schneider Electric¹²³ and Cleveland Housing Network¹²⁴ cases described in Appendices III and IV, respectively.

Accordingly, based on the foregoing, we recommend that the federal government form a task force to coordinate efforts to investigate and prosecute fraud with respect to funds disbursed under an infrastructure bill, and we encourage state governors to convene similar task forces as well. We further recommend that, even without the direct involvement of a formal task force, investigators, prosecutors, and other federal and state officials should work closely across agencies to marshal resources in a manner that most effectively deters corruption in infrastructure spending.¹²⁵

F. Bidding and contract provisions

1. Mandate a competitive acquisition process to the maximum extent possible.

As then-Director of the OMB Peter Orszag observed while issuing Recovery Act guidance in 2009, competition—“the cornerstone of our acquisition system”—“curbs fraud” and “promotes accountability for results.”¹²⁶ It is therefore important that Congress foster

123 The prosecution and investigation of former Schneider Electric project manager Bhaskar Patel was the result of the collaborative investigative efforts of the VA Office of Inspector General, the GSA Office of Inspector General, the Naval Criminal Investigative Service, the USDA Office of Inspector General, and the Coast Guard Investigative Service. See Press Release, Florida Man Pleads Guilty to Accepting \$2.5 Million in Bribes and Kickbacks (Aug. 6, 2018), <https://www.justice.gov/usao-vt/pr/florida-man-pleads-guilty-accepting-25-million-bribes-and-kickbacks-0>.

124 The bribery and kickbacks charges in the Cleveland Housing Network case were the result of an investigation led by the FBI, HUD-OIG, U.S. EPA, Ohio EPA, Ohio Bureau of Criminal Investigation, Ohio Department of Health – Environmental Compliance Program and the Cleveland Division of Police. See Press Release, Charges Filed Regarding Cash Bribes and Kickbacks between Contractors and Cleveland Housing Network official, as well as Improper Lead Abatement (June 2, 2016), <https://www.justice.gov/usao-ndoh/pr/charges-filed-regarding-cash-bribes-and-kickbacks-between-contractors-and-cleveland>.

125 Though the focus of these recommendations is on the U.S. context, initiatives that have been implemented internationally are also worthy of consideration. Groups such as the World Economic Forum and Transparency International have highlighted several measures that mitigate the risk of corruption in infrastructure projects globally, including (1) the utilization of new technologies to increase transparency and oversight; (2) the strengthening of anti-corruption values and culture by empowering whistleblowers, the media, and society at large to expose corruption; (3) the encouragement of collective industry action and pooling of resources in a manner that increases private bargaining power to resist extortion attempts; and (4) the implementation of adequate enforcement mechanisms for detecting and deterring corruption. See TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION BAROMETER MIDDLE EAST & NORTH AFRICA 2019: CITIZENS’ VIEWS AND EXPERIENCES OF CORRUPTION 5–6 (2019), https://images.transparencycdn.org/images/2019_GCB_MENA_Report_EN.pdf; Isabel Cane, *Is This the Way to Finally Beat Corruption?*, WORLD ECONOMIC FORUM (Aug. 29, 2018), <https://www.weforum.org/agenda/2018/08/is-this-the-way-to-finally-beat-corruption>; WORLD ECONOMIC FORUM, PARTNERING AGAINST CORRUPTION INITIATIVE—INFRASTRUCTURE & URBAN DEVELOPMENT 6, 19–21 (2016), http://www3.weforum.org/docs/WEF_PACI_IU_Report_2016.pdf.

126 Memorandum of Peter R. Orszag, Director of OMB, RE: Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009, at 39 (Feb. 18, 2009).

competition in any future infrastructure bill. Although H.R. 3684 requires federal agencies to award grants on a “competitive basis,” it typically does not specify what a “competitive” process should entail. To do so, Congress should look to Section 1554 of the Recovery Act as a model.

Section 1554 of the Recovery Act mandated that, “to the maximum extent possible,” contracts “be awarded as fixed-price contracts through the use of competitive procedures.”¹²⁷ In addition, the Recovery Act required that a summary of any contract involving Recovery Act funds that is *not* awarded using competitive procedures and is not fixed price shall be posted in a special section of the public-facing Recovery.gov website.¹²⁸ A similar transparency requirement, which could be implemented by way of a new public-facing website modeled after Recovery.gov (see Section IV.A.1 below), would further encourage the use of competitive procedures, and should be adopted in any future infrastructure bill.

Furthermore, the specific “competitive procedures” referenced in the infrastructure statute should be applied in light of the FAR. Pursuant to the FAR, competitive procedures typically must include full and open competition, the public announcement of bid invitations, and sealed bidding.¹²⁹ In addition, the FAR includes special pre-award and post-award publication requirements for certain Recovery Act contracts exceeding \$25,000 and \$500,000, respectively, providing added transparency that agency officials should consider extending to any forthcoming infrastructure bill.¹³⁰

127 Recovery Act, § 1554; see *also*, e.g., CARES Act § 3301 (providing that the HHS Secretary “shall, to the maximum extent practicable, use competitive procedures when entering into transactions to carry out projects under this subsection [related to the pandemic] for purposes of a public health emergency”); Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”), Pub. L. No. 109-59, § 3025(a), 119 Stat. 1144, 1618 (2005) (requiring fund recipients under federal highway Act to “conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary [of Transportation]”). For further discussion of the “fixed-price” component of the Recovery Act’s requirement, see Rec. A.2IV.F.2 below.

128 Recovery Act, §§ 1526, 1554.

129 See FAR Pt. 6; see *also* Memorandum of Peter R. Orszag, Director of OMB, RE: Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009, at 39 (Feb. 18, 2009) (citing FAR Pt. 6).

130 FAR Pts. 5.704–05. Note that the statutory authority to revise the FAR is vested jointly in procurement officials in the Department of Defense, General Services Administration, and National Aeronautics and Space Administration. See Acquisition Regulations, U.S. Gen. Servs. Admin. (last accessed September 21, 2020), <https://www.gsa.gov/policy-regulations/policy/acquisition-policy/acquisition-regulations>.

In addition to the lessons learned from the Recovery Act, we would encourage the consideration of other measures to help ensure a fair and competitive bidding and contracting process. Several countries have had success incorporating outside monitors into the bidding process to bring an additional level of oversight. For example, Australia has implemented “probity advisers” and “probity officers” empowered to both participate in the procurement discussion and investigate any concerns that arise.¹³¹ The participation of experienced external parties lends important credibility to the bidding and contracting process which will ultimately benefit infrastructure projects as a whole.

Finally, OMB should consider providing additional guidance to agencies overseeing infrastructure contracts. Drawing on Recovery Act precedent, this guidance should include a direction to agencies to “review their internal policies with a goal towards promoting competition to the maximum extent practicable,” and to consider the “appropriateness of limited competitions among existing high-performance projects” in appropriate circumstances.¹³² In addition, “agencies might lower the dollar thresholds at which higher level review is required when a noncompetitive acquisition strategy is contemplated.”¹³³ At the state and local government level, relevant personnel should be provided with adequate training and resources in the area of project planning and cost estimation, so that they are well-positioned to review contractor bids and make informed, competitive selections.

2. Encourage responsible bidding and contracting through value-for-money framework.

To the extent possible, agencies should encourage an approach to contracting that values conservative bidding and places a premium on value-for-money solutions to infrastructure projects. While there are several available definitions for “value for

131 “Procurement Integrity (Probity),” The Institute of Internal Auditors Australia (April 2020), *available at*: [https://iia.org.au/sf_docs/default-source/technical-resources/2018-whitepapers/iia-whitepaper_procurement-integrity-\(probity\).pdf?sfvrsn=2](https://iia.org.au/sf_docs/default-source/technical-resources/2018-whitepapers/iia-whitepaper_procurement-integrity-(probity).pdf?sfvrsn=2).

132 Memorandum of Peter R. Orszag, Director of OMB, RE: Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009, at 32 (Feb. 18, 2009).

133 Memorandum of Peter R. Orszag, Director of OMB, RE: Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009, at 39 (Feb. 18, 2009).

money” in the procurement context,¹³⁴ we would encourage agencies to consider a general framework in which the cost, technical solution(s) and personnel are considered in connection with bids for infrastructure projects. A value-for-money approach ultimately encourages thoughtful and responsible bidding, and discourages “low ball” bidding in which contractors seek to secure contracts by offering an unrealistically low bid, only to reveal the actual cost of the project after the contract has been awarded and the work has been undertaken. We would encourage public awareness of the “value for money” approach so that recipients of the federal funds aren’t pressured by the single data point that they did not award to the lowest bidder.

134 Examples include “Value for Money State of the Practice,” U.S. Dep’t of Transportation, Federal Highway Administration (Dec. 2011), *available at* https://www.fhwa.dot.gov/ipd/pdfs/p3/vfm_state_of_the_practice.pdf; “Value for Money: Guidance Note on Procurement,” Asian Development Bank (June 2018), *available at* <https://www.adb.org/sites/default/files/procurement-value-money.pdf>.

I. Appendix I—Historical Context

A. Infrastructure Overview

1. Since the Federal-Aid to Highway Act of 1956, which authorized the interstate highway system, the federal government has become “increasingly influential” in infrastructure policy at the state level.¹³⁵
2. Congress typically authorizes federal funding for transportation-related infrastructure in multi-year acts—the most recent of which, the Fixing America’s Surface Transportation Act of 2015 (“FAST Act”), will expire on September 30, 2020.¹³⁶
3. As a general matter, recent legislation relating to infrastructure explicitly contemplates oversight and potential enforcement of corruption and related misconduct in connection with the receipt of federal funds.
4. We review four pieces of infrastructure legislation since 2005 below. In doing so, we place particular emphasis on the Recovery Act (2009), due its broad scope across different infrastructure programs, the speed at which it appropriated funds in response to an economic shock (the 2008 Financial Crisis), its well-documented success in mitigating corruption, and its legacy in shaping future infrastructure legislation.
 - a) Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”), Pub. L. 109-59 (2005)

135 Robert Jay Dilger, Congressional Research Serv., *Federalism Issues in Surface Transportation Policy: Past and Present 1* (2011).

136 See *id.*; Congressional Research Service, *Funding and Financing Highways and Public Transportation at i* (May 11, 2020), <https://fas.org/sgp/crs/misc/R45350.pdf>.

- 1) In 2005, Congress enacted the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2005: A Legacy for Users (“SAFETEA-LU”), Pub. L. No. 109-59. The Act allocated approximately \$286 billion in funding for highways and mass transit.¹³⁷
- 2) SAFETEA-LU has several notable anticorruption provisions:
 - (i) *Oversight.* Section 1904(a), amending 23 U.S.C. § 106(g), “establish[es] an oversight program to monitor the effective and efficient use of funds” allocated to highways under the Act. The Act also requires the Secretary of Transportation to “periodically evaluate the practices of States for estimating project costs, awarding contracts,” “reducing project costs,” and “monitoring sub-recipient use of federal funds.” In turn, states are responsible for determining that sub-recipients of SAFETEA-LU funding have “sufficient accounting controls to properly manage” federal funds
 - (ii) *Enforcement.* The Act authorizes the Secretary of Transportation to terminate financial assistance and seek reimbursement after determining that a recipient has “made a false or fraudulent statement or related act in connection with a Federal transit program.”

137 Robert Jay Dilger, Congressional Research Service, Federalism Issues in Surface Transportation Policy: Past and Present (Apr. 20, 2011), https://www.everycrsreport.com/files/20110420_R40431_f1c0c391a9bf12df97e481d981fe64c828a869ce.pdf.

(iii.) *Guidance.* Section 3025(a) requires federal funding recipients to “conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary [of Transportation.” In addition, recipients are to perform audits of contracts and subcontracts “in compliance with ‘Federal Acquisition Regulation’ cost principles.” Federal Acquisition Regulation (“FAR”) cost principles define “allowable” costs, excluding the costs of gifts, entertainment, costs of membership in social clubs, and the cost of idle facilities.¹³⁸ FAR also includes detailed guidance on the use of professional and consultant services and recommends requiring and maintaining detailed invoices, trip reports, and meeting minutes to ensure compliance with federal law.¹³⁹

b) American Recovery and Reinvestment Act of 2009 (“Recovery Act”), Pub. L. 111–5 (2009)

1) In the wake of the 2008 Financial Crisis, Congress enacted the Recovery Act, an \$831 billion stimulus package, \$48.1 billion of which was appropriated for infrastructure projects. This \$48.1 billion included \$27.5 billion for highways and bridges, \$8.4 billion for transit systems, \$8 billion for rail, \$1.5 billion for surface transportation projects, \$1.3 billion for

138 See General Servs. Admin., Federal Acquisition Regulation, Contract Cost Principles and Procedures §§ 31.205-13, 31.205-14, 31.205-17 <https://www.acquisition.gov/content/part-31-contract-cost-principles-and-procedures#id1617MD0DOMZ>.

139 See *id.* at § 31.205-33.

airports, and \$100 million for shipyards, among other infrastructure projects.

- 2) The Recovery Act was largely successful in mitigating the risk of fraud, waste, and abuse in infrastructure projects, due to the various transparency and oversight provisions contained in the statute, as well as the aggressive enforcement of these provisions and other laws designed to prevent fraud, waste, an abuse.
- 3) Transparency
 - (i) *Reporting Requirements.* Under Section 1201(c), grant recipients must report on a quarterly and then annual basis, among other things, (A) the amount of Federal funds they received; (B) the number of projects that have been put out to bid under the appropriation and the amount of Federal funds associated with such projects; (C) the number of projects for which contracts have been awarded under the appropriation and the amount of Federal funds associated with such contracts; (D)-(E) the number of projects for which work has begun or been completed under such contracts and the amount of Federal funds associated with such contracts; and (F) the number of jobs created or sustained by the appropriated funds.¹⁴⁰
 - (ii) Under Section 1512, recipients of grant funds from a federal agency must also report to

140 Recovery Act, § 1201(c).

that agency, on a quarterly basis, (1) the total amount of funds received from that agency; (2) the amount of funds received that were expended or obligated to projects or activities; and (3) a detailed list of all projects or activities for which funds were expended or obligated, including, “for infrastructure investments made by State and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds made available under this Act, and name of the person to contact at the agency if there are concerns with the infrastructure investment.”¹⁴¹

- (iii) *Certification Requirements.* The Recovery Act also contains several certification requirements, including, for example, Sections 1201(a) and (b), which require the governor of a state receiving highway funds to certify that infrastructure investments were reviewed and vetted as required by law. In addition, Section 1607 further requires the Governors to certify within 45 days that the State will request and use funds provided by the Recovery Act to create jobs and promote economic health.¹⁴²
- (iv) *Public Access to Reported Data.* The Recovery Act directed the establishment of a “user-friendly, public-facing website to foster greater

141 Recovery Act, § 1512.

142 Recovery Act, § 1201(a)–(b), 1607.

accountability and transparency in the use of covered funds,” which came to be known as Recovery.gov.¹⁴³ The Act specifically required that the website provide “accountability information, including findings from audits, inspectors general, and the Government Accountability Office”; “detailed data on contracts awarded by the Federal Government that expend covered funds, including information about the competitiveness of the contracting process, information about the process that was used for the award of contracts, and for contracts over \$500,000 a summary of the contract”; and “printable reports on covered funds obligated by month to each State and congressional district,” among other information.

- (v) *Whistleblower Protections.* Section 1553 protects employees of recipients of covered funds against retaliation for whistleblowing and outlines the procedures for investigating complaints of retaliation.¹⁴⁴

4) Oversight

- (i) *Interagency Board.* The Recovery Act established the Recovery Board, comprised of various inspectors general, which maintained the Recovery.gov website and took a leading

143 Recovery Act, § 1526(a).

144 Recovery Act, § 1553.

role in the oversight of Recovery Act funds more generally.¹⁴⁵

- (ii) *Numerous Oversight Entities.* The Recovery Act tasked various other entities and individuals with oversight roles, including: the Congressional Budget Office, Council of Economic Advisers, Government Accountability Office, inspectors general, the Office of Management and Budget, Recovery Implementation Office, and Recovery Independent Advisory Panel; federal agencies; inspectors general; state governors, state auditors, and state government agencies; and recipients of Recovery Act funds themselves, including local governments, universities, and other research institutions, non-profit organizations, and private companies.¹⁴⁶
- (iii) *Public Oversight.* As a result of Recovery.gov, the public itself also played an important oversight role.¹⁴⁷ Together, the sheer number of entities and individuals focused on how funds were being spent helped reduce the chances of corruption slipping through the cracks, and served as a powerful deterrent.¹⁴⁸

145 Recovery Act, §§ 1521–1530.

146 *Recovery Act: Grant Implementation Experiences Offer Lessons for Accountability and Transparency*, U.S. Gov. Accountability Off. 11–12 (Jan. 2014), <https://www.gao.gov/products/gao-14-219>

147 Jory Heckman, *Recovery Board's Roadmap Would Suit Pandemic Oversight Panel Just Fine, Experts Say*, FEDERAL NEWS NETWORK (Apr. 9, 2020 12:21 P.M.), <https://federalnewsnetwork.com/agency-oversight/2020/04/recovery-boards-roadmap-would-suit-pandemic-oversight-panel-just-fine-experts-say> (quoting Chairman Devaney as stating that, “[e]ssentially, we created a million IGs”).

148 See, e.g., Jonathan Cohn, *Wanted: More Fraud, Abuse in Government Spending*, THE NEW REPUBLIC (Oct. 4, 2010), <https://newrepublic.com/article/78149/stimulus-recovery-spending-waste-fraud>.

(iv) *Adequate resourcing.* The Recovery Act provided over \$416 million in funding for offices of inspectors general of more than 28 agencies,¹⁴⁹ with each office’s funds ranging from between \$1 million to \$48.25 million.¹⁵⁰ However, the Recovery Act did *not* provide such funds to states and localities, which thus “relied on their existing budgets and human capital resources (in some cases, supplemented by a small percentage of administrative funds) to carry out their additional oversight activities.”¹⁵¹ With states’ oversight capacity already strained by attrition due to fiscal constraints, oversight problems at the state level were “further exacerbated by increased workloads resulting from implementation of new or expanded grant programs funded by the Recovery Act.”¹⁵² This led several states to report that they lacked adequate resources to conduct audits of Recovery Act projects.¹⁵³ Thus, although it appears that the Recovery Act generally succeeded in centralizing its oversight focus at the federal level, future legislation should consider providing more resources at the state level so that state audit functions can work effectively.

149 Christopher C. Burris, Michael E. Paulhus & Louisa B. Childs, *Converging Events Signal A Changing Landscape in False Claims Act and Whistle-Blower Litigation and Investigations*, Fed. Law. 63 (Nov./Dec. 2009).

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

5) Enforcement

- (i) *Aggressive prosecutions.* Although reported instances of fraud and other unlawful conduct with respect to Recovery Act funds were relatively low, that was, according to Chairwoman Tighe, in part due to aggressive prosecutions where such conduct did occur.¹⁵⁴
- (ii) *Justice Department Initiative.* The Antitrust Division of the Department of Justice launched an “initiative to help protect recovery funds from fraud, waste and abuse” to, among other things, “ensure that those who abuse the [procurement, grant and program funding] processes are prosecuted to the fullest extent of the law.”¹⁵⁵
- (iii) *Expansion of existing anti-fraud laws.* Shortly after Congress passed the Recovery Act, Congress enacted the Fraud Enforcement and Recovery Act of 2009 (“FERA”), which, *inter alia*, amended 18 U.S.C. § 1031 (Major fraud against the United States) to cover fraud with respect to stimulus funds, including Recovery Act funds.¹⁵⁶ Notably, under FERA, Congress appropriated approximately \$500 million for DOJ to hire additional prosecutors and for the

154 Gregory Korte, *Five Years Since Stimulus: Many Fraud Cases, Few Losses*, USA TODAY (Feb. 16, 2014 11:03 A.M.), <https://www.usatoday.com/story/news/politics/2014/02/16/recovery-act-stimulus-fraud-convictions/5400705>.

155 Press Release, *Antitrust Division Announces Initiative to Help Protect Recovery Funds from Fraud, Waste and Abuse*, Dep’t of Justice (May 12, 2009).

156 Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, 1218 (2009).

FBI, DOJ, and other law enforcement agencies to hire other staff.¹⁵⁷

c. Moving Ahead for Progress in the 21st Century Act (2012), Pub. L. No. 112-141 (“MAP-21”)

1) *Oversight.* Section 1503 of the Act required the Secretary of Transportation to submit a report evaluating the efficacy of oversight programs established by SAFETEA-LU (see 18 U.S.C. § 106(g)) to the House Committee on Transportation and Infrastructure and Senate Committee on Environment and Public Works. MAP-21 simplified the project approval process for large capital investments in rail and bus transportation by “reduc[ing] the number of federal FTA approvals for more expensive projects from four to three, and for less expensive projects [costing \$300 million or less] from three to two.”¹⁵⁸

2) *Transparency.* Section 1503 further required the Secretary to “compile and make available on the public website of the Department of Transportation” expenditure data for federal funds awarded under MAP-21, organized by project and state, in a manner that “can be searched and downloaded by users.”

d) Fixing America’s Surface Transportation Act of 2015, Pub. L. No. 114–94 (“FAST Act”)

1) *Oversight.* Section 3012 of the FAST Act required the Secretary of Transportation’s oversight of projects

157 FERA, § 3.

158 William J. Mallett, Reauthorization of the Federal Public Transportation Program, Congressional Research Service (Jan. 23, 2020) at 9, https://www.everycrsreport.com/files/20200123_R46191_36bb42bc73161f06158dec061ab2f75fe09e598e.pdf

using FAST Act funds to “begin during the project development phase of a project,” unless cost savings demanded otherwise. The FAST Act limited the Secretary to reviewing projects for compliance with their project management plans once per quarter — but authorized additional review when “the recipient requires more frequent oversight because the recipient has failed to meet the requirements of such plan.”

II. Appendix II—BVU OptiNet Case Study

A. Introduction

1. In 1999, Bristol City Council and Bristol Virginia Utilities Authority (BVU), a municipal utility board, approved a fiber-optic network construction project that promised to bring high-speed internet to rural southwest Virginia.¹⁵⁹ Over the next two years, the scope of the project expanded to include not only connecting municipal functions, such as public schools and fire departments, but also providing high-speed internet to residents of rural southwest Virginia.¹⁶⁰
2. The bundle of internet, phone, and cable services delivered by BVU's fiber-optic network was branded "OptiNet."¹⁶¹ Construction began in 2002, funded by a combination of state and federal grants—among them, a \$1.6 million grant from the U.S. Department of Commerce.¹⁶² Between 2002 and 2005, BVU spent over \$43 million on the construction project.¹⁶³ In 2010, BVU became an independent, state-owned authority whose decisions were not subject to City Council approval.¹⁶⁴ Instead, BVU's decision-making was accountable only to its Board of Directors.¹⁶⁵
3. As part of the 2009 Recovery Act, the National Telecommunications and Information Administration (NTIA) awarded \$2.2 billion in

159 See CHARLES M. DAVIDSON & MICHAEL J. SANTORELLI, ADVANCED COMM'NS LAW & POLICY INST., UNDERSTANDING THE DEBATE OVER GOVERNMENT-OWNED BROADBAND NETWORKS 56 (2014), <http://comms.nyls.edu/ACLP/ACLP-Government-Owned-Broadband-Networks-FINAL-June-2014.pdf>.

160 *Id.*

161 See *United States v. Pomrenke*, 198 F. Supp. 3d 648, 657 (W.D. Va. 2016).

162 CHRISTOPHER MITCHELL, BENTON INST. FOR BROADBAND & SOC'Y, BROADBAND AT THE SPEED OF LIGHT 5–6 (2012).

163 *Id.* at 6.

164 See DAVIDSON AND SANTORELLI, *supra* note 159, at 57.

165 Auditor of Public Accounts, Commonwealth of Virginia, Review of Bristol Virginia Utilities Authority 18 (Oct. 2016), <http://www.apa.virginia.gov/reports/BVUA2016-web.pdf>.

broadband stimulus funding to states, municipalities, and both public and private-sector entities.¹⁶⁶ Under this program, BVU was awarded an additional \$22.7 million in federal funds between 2011 and 2014 to further expand broadband access into eight underserved counties in Appalachian Virginia.¹⁶⁷

4. BVU's subsequent efforts to expand broadband access, however, were plagued by "misuse of public funds, evasion of employment taxes, failure to report employee income to the [IRS], bid-rigging, procurement violations, and State and Local Government Conflict of Interest Act violations."¹⁶⁸ After a September 16, 2013 meeting of BVU's Board of Directors, during which the Board discussed CEO Rosenbalm's receipt of gifts from vendors and other instances of misconduct, a board member contacted law enforcement "independently, and without support of the Board of Directors."¹⁶⁹ In November 2013, the FBI and IRS began investigating alleged misconduct at BVU, resulting in at least nine corruption-related charges against BVU employees and eight guilty pleas.¹⁷⁰
5. In August 2018, BVU OptiNet was sold at a substantial loss to a local internet service provider, with government entities recouping only a fraction of their investment.¹⁷¹

166 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-823, RECOVERY ACT: BROADBAND STIMULUS AWARDS AND RISKS TO OVERSIGHT (2011).

167 Nat'l Telecomm. & Info. Admin., Fact Sheet: Southwest Virginia Middle Mile Project (July 2010), <https://www.ntia.doc.gov/legacy/broadbandgrants/applications/factsheets/4506FS.pdf>; see also Review of BVU Authority, *supra* note 165, at 8.

168 See Review of BVU Authority, *supra* note 165, at 8.

169 U.S. Attorney's Office, Western District of Virginia, *Former General Counsel for BVU Pleads Guilty* (Apr. 7, 2016), <https://www.justice.gov/usao-wdva/pr/former-general-counsel-bvu-pleads-guilty>.

170 See *United States v. Pomrenke*, 198 F. Supp. 3d 648, 654 (W.D. Va. 2016).

171 See David McGee, *Sunset, BVU OptiNet Deal Finalized*, BRISTOL HERALD COURIER (Aug. 2, 2018), https://www.heraldcourier.com/news/sunset-bvu-optinet-deal-finalized/article_8b746332-2ee1-5565-b52f-8678020c9277.html.

B. Background

1. Grant Restrictions and Applicable Policies

- a) The NTIA Broadband Stimulus funds required BVU to “account for any program income directly generated by [the grant-funded fiber network] during the funding period.”¹⁷² Permissible uses of funds included: (1) reinvesting in project facilities, (2) paying costs of compliance with Department of Transportation regulations, (3) paying operating expenses, or (4) matching funds.¹⁷³
- b) In February 2009, BVU adopted a “BVU Code of Business Conduct and Ethics Policy.”¹⁷⁴ This internal policy prohibited BVU personnel and people with whom personnel have “a close personal relationship” from accepting anything of value in excess of \$500 from vendors or customers.¹⁷⁵ In addition, personnel and those close to them were prohibited from “accept[ing] travel or lodging unless previously approved by the President.”¹⁷⁶ If offered money or gifts in conflict with the BVU Code of Business Conduct and Ethics, BVU personnel were required to “report it to [a] supervisor in writing with a copy to General Counsel.”¹⁷⁷

2. Misconduct

- a) Bribery Schemes

172 See Review of BVU Authority, *supra* note 165, at 25.

173 *Id.*

174 *United States v. Pomrenke*, 198 F. Supp. 3d 648, 687 (W.D. Va. 2016).

175 *Id.*

176 *Id.*

177 *Id.*

- (1) BVU management solicited gifts and payments from vendors in exchange for receiving contracts, including almost \$28,000 in holiday celebration expenses and tickets to University of Kentucky basketball games.¹⁷⁸ Such behavior was widespread among BVU’s management. For instance, BVU executives—including its general counsel— and board members solicited “payment of hotel expenses, limousine services, meals and tickets to a Dallas Cowboys football game” from one vendor in exchange for awarding it a \$4.5 million contract.¹⁷⁹
- (2) Burke Powers & Harty Insurance Agency (“BPH”) provided BVU with “worker’s compensation, automobile liability, property, general liability, and umbrella insurance coverage.”¹⁸⁰ BPH twice provided BVU management officials with Cincinnati Reds baseball tickets valued at over \$500 in order to “maintain good will and keep BVU’s business.”¹⁸¹

b) Coercion Scheme

- (1) In 2000, BVU hired construction company ETI to work as a subcontractor connecting Lebanon and Abingdon, VA with fiber optic cable.¹⁸² In 2009, ETI received a contract to perform “installation and

178 Dep’t of Justice, *Former CEO of Bristol Virginia Utilities Authority Pleads Guilty*, U.S. ATTORNEY’S OFFICE WESTERN DISTRICT OF VIRGINIA (July 21, 2015), <https://www.justice.gov/usao-wdva/pr/former-ceo-bristol-virginia-utilities-authority-pleads-guilty>.

179 Dep’t of Justice, *Former General Counsel for BVU Pleads Guilty*, U.S. ATTORNEY’S OFFICE WESTERN DISTRICT OF VIRGINIA (Apr. 7, 2016), <https://www.justice.gov/usao-wdva/pr/former-general-counsel-bvu-pleads-guilty>.

180 See *United States v. Pomrenke*, 198 F. Supp. 3d 648, 667 (W.D. Va. 2016).

181 *Id.*

182 *Id.* at 680.

maintenance” contracts on BVU OptiNet “without competitive bidding.”¹⁸³

(2) BVU’s Vice President and its Chief Financial Officer “solicit[ed] a \$15,000 contribution for an employee Christmas party from ETI” when BVU’s business comprised “30% to 35% of ETI’s revenue.” Loss of BVU’s business “would have jeopardized ETI financially,” and “ETI was working on a major federally funded project and routinely submitting invoices to BVU that had to be signed by [BVU’s CFO].”¹⁸⁴

c) Fraud Schemes: Unreported Payments, Misuse of Assets, and Falsified Invoices

1) BVU failed to report income received by BVU employees by compensating employees with gift cards, interest-free loans, country club memberships, and cash bonuses.¹⁸⁵ Since at least 2003, BVU provided employees with cash and gift cards for accomplishments including “service and safety awards, exceptional customer service, [meeting] business sales incentives, . . . volunteer service,” as well as for retirement, birthday, and holiday gifts. BVU management distributed these rewards and gifts at their discretion, without reference to any formal policy and without routing the bonuses through the payroll department.¹⁸⁶ This practice

183 *Id.* at 682.

184 *Id.* at 694–95.

185 Dep’t of Justice, *Former CEO of Bristol Virginia Utilities Authority Pleads Guilty*, U.S. ATTORNEY’S OFFICE WESTERN DISTRICT OF VIRGINIA (July 21, 2015), <https://www.justice.gov/usao-wdva/pr/former-ceo-bristol-virginia-utilities-authority-pleads-guilty>.

186 See Review of BVU Authority, *supra* note 165, at 86–87.

of using external funding to purchase cash and gift cards continued even after the utility was awarded broadband stimulus funds, leading to nearly \$42,000 in unreported cash and gift card payments between 2010 and 2013.¹⁸⁷

- 2) BVU also used government funds to pay for employee memberships at the Country Club of Bristol—as well as for the memberships of employee family members.¹⁸⁸ Employees also charged personal travel expenses to BVU credit cards, including one employee’s family trip to Hawaii.¹⁸⁹
- 3) Because “there were no policies or practices in place at BVU to ensure that meals purchased locally by BVU employees with BVU funds were included on the employees’ W-2 forms,” BVU submitted false W-2s.¹⁹⁰
- 4) While working with ETI between 2009 and 2013, BVU employees asked ETI to falsify invoices—one for \$144,000—and underwrite golf tournaments for BVU employees, guests, and vendors.¹⁹¹

C. Investigations and Prosecutions

1. Wes Rosenbalm, CEO of BVU between 2003 and 2014, pleaded guilty to conspiracy to defraud the IRS and conspiracy to commit Federal Program Fraud in July 2015. As part of his plea agreement, Rosenbalm admitted to “soliciting [and] using others to solicit gifts and monetary

187 *Id.* at 87.

188 See *United States v. Pomrenke*, 198 F. Supp. 3d 648, 667 (W.D. Va. 2016).

189 See *id.* at 665 (describing one employee’s rental car and hotel charges incurred in Hawaii).

190 *Id.* at 663.

191 *Id.* at 682–83.

payments from a variety of vendors that did business with BVU while BVU was receiving federal grant funds.”¹⁹²

2. Stacey Pomrenke, BVU’s Chief Financial Officer, was convicted of conspiracy to commit tax fraud, three counts of making false statements to the Social Security Administration, two counts of extortion, program bribery, wire fraud, and six counts of honest services fraud.¹⁹³
3. Seven other top BVU officials, including its president, two vice presidents, general counsel, and two former chairs of its Board of Directors pleaded guilty to “public corruption or related charges.”¹⁹⁴

III. Appendix III—Schneider Electric Case Study

A. Introduction

1. Between 2010 and 2016, federal agencies awarded Schneider Electric Buildings America, Inc. (“Schneider Electric”) numerous Energy Savings Performance Contracts (“ESPCs”), collectively worth over \$200 million.
2. Schneider obtained these contracts, however, based on subcontracts that one of its Senior Project Managers, Bhaskar Patel, had selected in return for kickbacks and bribes. In addition, in at least one instance, Patel falsified bidding information to cover his tracks.
3. After a local Vermont subcontractor who lost out on a bid reported Patel to authorities, several agency inspectors general launched an

192 Dep’t of Justice, *Former CEO of Bristol Virginia Utilities Authority Pleads Guilty*, U.S. ATTORNEY’S OFFICE WESTERN DISTRICT OF VIRGINIA (July 21, 2015), <https://www.justice.gov/usao-wdva/pr/former-ceo-bristol-virginia-utilities-authority-pleads-guilty>.

193 See *Pomrenke*, 198 F. Supp. 3d at 654–55.

194 See *id.* at 654.

investigation into his conduct. Patel was ultimately charged with kickbacks and bribery offenses in a two-count information, pleaded guilty, and was recently sentenced to a term of three years' probation in addition to a forfeiture judgment of over \$2.5 million.

B. Background

1. DOE Energy Savings Performance Contracts

- a) In 1992, Congress enacted the Energy Policy Act,¹⁹⁵ which authorized the ESPC program as a way to provide agencies with a quick and cost-effective way to finance energy-saving technologies. ESPCs are agreements between federal agencies and energy service companies (“ESCOs”). Under an ESPC, the company assumes the capital costs of installing energy and water conservation equipment and renewable energy systems.
- b) In addition, the company guarantees the agency a fixed amount of energy cost savings throughout the life of the contract and is paid directly from those cost savings; the agency retains the remainder of the energy cost savings for itself.¹⁹⁶
- c) In July 1998, Acting OMB Director Jacob Lew sent a memorandum to federal agency heads urging them “[t]o increase Federal Use of [ESPCs] in order to improve Federal energy management.”¹⁹⁷ The same year, the U.S. Department of Energy (“DOE”) began issuing so-called

195 Pub. L. No. 102-462, 106 Stat. 2776 (1992).

196 *Super Energy Savings Performance Contracts*, Fed. Energy Management Program 1 (Aug. 1999), <https://www.nrel.gov/docs/fy99osti/26766.pdf>.

197 Memorandum from Acting Director Lew to Heads of Exec. Depts. & Establishments at 1 (July 25, 1998), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/1995-1998/m98-13.pdf>.

indefinite-delivery, indefinite quantity (“IDIQ”)¹⁹⁸ ESPCs to “significantly reduce energy and operating costs and make progress toward meeting federal sustainability goals.”¹⁹⁹

- d) Under an ESPC IDIQ, the company (*i.e.*, the ESCO) is “separately awarded one or more task orders by a federal agency following a project proposal or Investment Grade Audit . . . by the ESCO and a business negotiation between the ESCO and the federal contracting agency.”²⁰⁰ The task order “relates to a specific ESPC project of the type contemplated by the IDIQ.”²⁰¹ In addition, “[t]he ESCO typically executes multiple subcontracts under the task order and under the original IDIQ with various specialized companies subcontracted to execute a partial project.”²⁰²

- e) According to the Office of Energy Efficiency and Renewable Energy, the DOE has awarded 425 ESPCs since the inception of the program in 1998. The program has resulted in approximately \$7.46 billion in investments in federal energy efficiency and renewable energy improvements. In turn, these improvements have resulted in approximately 610 trillion Btu in life cycle energy savings and approximately \$17.2 billion in cumulative energy cost savings for the federal government.²⁰³

198 “An [IDIQ] contract is a type of contract that provides for an indefinite quantity of supplies or services during a fixed period of time.” *General FAQs*, U.S. Navy (May 3, 2007), https://web.archive.org/web/20070503035308/http://www.seaport.navy.mil/main/home/faq_general.html#idiq.

199 *Energy Savings Performance Contracts for Federal Agencies*, U.S. Dep’t of Energy, Off. of Energy Efficiency & Renewable Energy (last accessed June 2, 2020), <https://www.energy.gov/eere/femp/energy-savings-performance-contracts-federal-agencies>.

200 Information at 1, *United States v. Patel*, No. 5:18-cr-90-1 (GWC) (D. Vt. July 19, 2018), ECF No. 1.

201 *Id.*

202 *Id.*

203 *Energy Savings Performance Contracts for Federal Agencies*, U.S. Dep’t of Energy, Off. of Energy Efficiency & Renewable Energy (last accessed June 2, 2020), <https://www.energy.gov/eere/femp/energy-savings-performance-contracts-federal-agencies>.

2. Schneider Electric ESPCs

- a) In 2008, the DOE awarded IDIQ ESPCs to sixteen energy savings companies, including, on December 18, 2008, Schneider Electric.²⁰⁴
- b) In the ensuing years, Schneider Electric executed several additional ESPCs with the federal government under the original 2008 contract. For each of these ESPCs, which took the form of task orders, Schneider Electric secured up-front financing from a lender and negotiated a payment schedule with the federal agency. The agencies agreed to pay back Schneider Electric or its assignee if and only if the work performed under the ESPC resulted in energy savings to the agency.²⁰⁵
- c) On June 14, 2010, Schneider Electric hired Bhaskar Patel as a Senior Project Manager tasked with negotiating subcontract agreements between Schneider Electric and various subcontractors for the ESPCs the federal agencies awarded to Schneider Electric. Schneider Electric also authorized Patel to recommend subcontractors for the selection of an ESPC award and, post-selection, to oversee and manage subcontractors.²⁰⁶
- d) From December 2010 until April 2016, Patel negotiated, managed, and oversaw subcontracts between Schneider Electric and subcontractors for projects in connection with ESPC awards from federal agencies. These awards included

204 Information at 2, *United States v. Patel*, No. 5:18-cr-90-1 (GWC) (D. Vt. July 19, 2018), ECF No. 1.

205 *Id.*

206 *Id.*

numerous task orders that were collectively worth \$250 million:

- (1) December 2010 (\$70 million task order from the U.S. Coast Guard, Civil Engineering Unit Cleveland);
 - (2) May 2013 (\$24.7 million task order from the U.S. Department of Agriculture, Agriculture Research Service)
 - (3) September 2013 (\$12.6 million task order from the GSA);
 - (4) February 2014 (\$21.8 million task order from the GSA); and
 - (5) February 2016 (\$114.3 million task order from the U.S. Navy).
- e) In addition, Patel negotiated a subcontract in connection with a November 2015 Investment Grade Audit proposal for a \$42.4 million task order from the VA. As a result of a criminal investigation into Patel, however, this task order was never awarded.²⁰⁷

C. Investigation and Prosecution of Patel

1. In mid-2016, law enforcement received information that Patel had altered and falsified a bid document submitted to Schneider Electric by a Vermont subcontractor in connection with a VA task order. That subcontractor was bidding for work on an ESPC at the Vermont Medical Center (a VA facility). After Patel recommended a different

207 *Id.* at 3–8.

subcontractor to work on Schneider’s ESPC project, he falsified the losing local bid to cover his tracks.²⁰⁸

2. Subsequently, law enforcement uncovered a wide-ranging scheme to defraud the federal government whereby Patel solicited and accepted kickbacks from subcontractors in return for awarding them a piece of Schneider’s ESPCs. The VA Office of Inspector General, GSA Office of Inspector General, Naval Criminal Investigative Service, USDA Office of Inspector General, and Coast Guard Investigative Service jointly conducted the investigation.²⁰⁹
3. On July 19, 2018, the U.S. Attorney for the District of Vermont filed a two-count information charging Patel with soliciting and accepting over \$2.5 million in bribes and kickbacks associated with ESPCs between June 2011 and April 2016.²¹⁰
4. The government alleged that Patel directed the subcontractors to pay him by check, often diverting funds through his adult son and daughter, and insisting on a bogus reference notation.²¹¹
5. On August 6, 2018, Patel pleaded guilty to both counts in the information and agreed to forfeit the \$2.5 million that he had accepted in bribes and kickbacks.²¹² He was sentenced to probation on June 19, 2020.²¹³
6. In addition, on May 29, 2019, the Virgin Islands U.S. Attorney’s Office filed an information charging Reinaldo Cruz Taura, the President of RCT Mechanical Engineering, with providing \$1.2 million in kickbacks

208 *Florida Man Pleads Guilty to Accepting \$2.5 Million in Bribes and Kickbacks*, Dep’t of Justice (Aug. 6, 2018), <https://www.justice.gov/usao-vt/pr/florida-man-pleads-guilty-accepting-25-million-bribes-and-kickbacks-0>

209 *Id.*

210 Information at 12–14, *United States v. Patel*, No. 5:18-cr-90-1 (GWC) (D. Vt. July 19, 2018), ECF No. 1.

211 *Id.* at 3; *Florida Man Pleads Guilty to Accepting \$2.5 Million in Bribes and Kickbacks*, Dep’t of Justice (Aug. 6, 2018), <https://www.justice.gov/usao-vt/pr/florida-man-pleads-guilty-accepting-25-million-bribes-and-kickbacks-0>.

212 *Florida Man Pleads Guilty to Accepting \$2.5 Million in Bribes and Kickbacks*, Dep’t of Justice (Aug. 6, 2018), <https://www.justice.gov/usao-vt/pr/florida-man-pleads-guilty-accepting-25-million-bribes-and-kickbacks-0>.

213 Third Amended Procedural and Scheduling Order, *United States v. Patel*, No. 5:18-cr-90-1 (GWC), ECF No. 36.

to “B.P.” (presumably Patel) in connection with ESPC subcontracts for maintenance work on Coast Guard facilities and a federal courthouse in Puerto Rico.²¹⁴ Taura pleaded guilty on October 13, 2019.²¹⁵ He was sentenced to eight months of incarceration and two years of supervised release on July 2, 2020, and received a fine of \$10,000.²¹⁶

D. Civil and Criminal Settlements with Schneider Electric

1. On December 16, 2020, Schneider Electric entered into a non-prosecution agreement (NPA) with the United States Attorney’s Office for the District of Vermont (D. Vt. USAO).²¹⁷ As part of the criminal resolution, Schneider admitted to defrauding the government through design costs incurred by the ESPCs funded by the Department of the Navy, General Services Administration, and Department of Agriculture, through a process of “burying” or “hiding” the costs.²¹⁸
2. Schneider Electric received partial cooperation credit for voluntarily disclosing, among others, the findings of its internal investigation and additional wrongdoing previously unknown to the government.²¹⁹ The NPA states that Schneider Electric also engaged in various remedial measures and terminated employees responsible for misconduct.²²⁰ The NPA has a three-year term during which Schneider Electric agreed

214 Information, *United States v. Taura*, No. 3:19-cr-34 (RAM) (RM) (D.V.I. May 29, 2019), ECF No. 1; see also Judi Shimel, *Federal Kickback Case Ties USVI to Vermont Case*, The St. Croix Source (June 11, 2019), <https://stcroixsource.com/2019/06/11/federal-kickback-case-ties-usvi-to-vermont-case/>.

215 Order, *United States v. Taura*, No. 3:19-cr-34 (RAM) (RM) (D.V.I. May 29, 2019), ECF No. 80.

216 Minute Entry of Sentencing Proceedings Held Before Judge Molloy, *United States v. Taura*, No. 3:19-cr-34 (RAM) (RM) (D.V.I. July 7, 2020, 2020), ECF No. 82.

217 Non-prosecution agreement, Schneider Electric Building Americas Inc. (Dec. 16, 2020), <https://www.justice.gov/usao-vt/press-release/file/1345511/download>.

218 Press Release, Government Contractor Admits Scheme to Inflate Costs on Federal Projects and Pays \$11 Million to Resolve Criminal and Civil Probes (Dec. 21, 2020), <https://www.justice.gov/opa/pr/government-contractor-admits-scheme-inflate-costs-federal-projects-and-pays-11-million>.

219 Non-prosecution Agreement, Schneider Electric Building Americas Inc., at 3 (Dec. 16, 2020), <https://www.justice.gov/usao-vt/press-release/file/1345511/download>.

220 *Id.* at 3–4.

to submit reports to the government regarding its annual compliance reviews, and provides for \$1,630,700 in criminal forfeiture.²²¹

3. In a separate civil settlement with the DOJ Civil Division and D. Vt. USAO (on behalf of the Department of the Navy, the Department of Homeland Security, the General Services Administration, the Department of Agriculture, and the Department of Veterans Affairs), Schneider Electric agreed to pay \$9.3 million “to resolve False Claims Act and Anti-Kickback Act liability for Patel’s kickback scheme and for including inflated estimates and improper costs in proposals, and overcharging federal agencies, under the eight ESPCs.”²²²

221 *Id.* at 4–5.

222 Press Release, *Government Contractor Admits Scheme to Inflate Costs on Federal Projects and Pays \$11 Million to Resolve Criminal and Civil Probes* (Dec. 21, 2020), <https://www.justice.gov/opa/pr/government-contractor-admits-scheme-inflate-costs-federal-projects-and-pays-11-million>; see also Settlement Agreement, Schneider Buildings Americas Inc. (Dec. 17, 2020), <https://www.justice.gov/opa/press-release/file/1347446/download>.

IV. Appendix IV—Hurricane Katrina Case Study

A. Introduction

1. Hurricane Katrina made landfall off the coast of Louisiana on August 29, 2005. At the time of landfall it was a Category 3 storm with wind speeds up to 120 miles per hour. An estimated 1,200 people died as a direct result of the storm, making it the third deadliest hurricane to make landfall in the U.S. It caused an estimated \$108 billion in property damage, which makes it the costliest storm on record.²²³ In addition, approximately 1 million people in the Gulf Coast region were ultimately displaced.²²⁴
2. Federal and state governments were roundly criticized for their failure to adequately respond to the hurricane and address the need for relief in the immediate aftermath. These failures spurred two congressional investigations that resulted in robust findings regarding the inadequacy of the government's response.
3. In addition, federal investigations into the awarding of contracts related to disaster relief and clean-up efforts in the aftermath of Katrina revealed widespread waste, fraud, and abuse, as well as incidents of public corruption and bribery.

223 *The Deadliest, Costliest, and Most Intense United States Tropical Cyclones from 1851 to 2010*. NOAA. August 2011. <https://www.nhc.noaa.gov/pdf/nws-nhc-6.pdf>

224 Appleton, Michael. "Hurricane Katrina: Facts, Affected Areas, and Lives Lost." *History.com*. August 9, 2019. <https://www.history.com/topics/natural-disasters-and-environment/hurricane-katrina>.

B. Background

1. FEMA relied heavily on private contractors to provide relief and recovery services in the weeks, months, and years following Hurricane Katrina.
2. Full and open competition for contracts was the exception, not the rule. Nearly \$10.1 billion was awarded in 1,237 contracts valued at \$500,000 or more, and only 30% were awarded with full and open competition. The aftermath of Katrina provided a compelling justification to award noncompetitive contracts, but that as the emergency receded, the percentage of contract dollars awarded without full and open competition actually increased rather than declined.²²⁵
3. Contract mismanagement was widespread. Mistakes were made at virtually every step of the contracting process: from pre-contract planning through contract award and oversight. Compounding this problem, there were not enough trained procurement professionals within FEMA to oversee contract spending in the Gulf Coast.
4. In February 2006, GAO reported that neither FEMA nor the Army Corps of Engineers had adequate contingency contracts in place before Hurricane Katrina. According to GAO, the failure to “explicitly consider the need for and management of the contractor community” played a major role in the mismanagement of the relief effort. A month later, GAO released another assessment of federal contract management and oversight after Hurricane Katrina. This report found that the Katrina response efforts suffered from inadequate planning and preparation to anticipate requirements for needed goods and services; a lack of clearly communicated responsibilities across agencies and jurisdictions; and

225 Waste, Fraud, and Abuse in Hurricane Katrina Contracts, House Committee on Government Reform—Minority Staff, Special Investigations Div. 2 (August 2006).

insufficient numbers and inadequate deployment of personnel to provide for effective contractor oversight.

5. The GAO also found examples of waste. It found that FEMA incurred unnecessary costs because the agency failed to define its requirements. In one instance, FEMA spent \$3 million for 4,000 camp beds that were never used; in another, it paid \$10 million to renovate a military barracks that was used as temporary housing by only six occupants. In addition to failing to define its requirements, the lack of procurement professionals providing oversight over the use of funds and contract awards also allowed this waste to occur.
6. In the wake of numerous corruption prosecutions and investigations, the Department of Justice established the National Center for Disaster Fraud in 2005.²²⁶ The agency is headquartered in Baton Rouge, Louisiana, and coordinates efforts across agencies to improve “the detection, prevention, investigation and prosecution of fraud related to natural and man-made disasters.”²²⁷

C. Investigations and Prosecutions

1. A year after the hurricane, a committee of the House of Representatives on Government Reform commenced an investigation regarding allegations of waste, fraud, and abuse in the awarding and management of these contracts. As part of the committee’s fact finding, the investigation analyzed reports by the Defense Contract Audit Agency, the Government Accountability Office, and several inspectors general.
2. As for inadequate contract oversight, the investigation found that there was a lack of contract officials which hampered appropriate oversight.

226 National Center for Disaster Fraud, U.S. Dep’t of Justice, www.justice.gov/disaster-fraud (last visited June 22, 2021).

227 Report to Congressional Requesters, Disaster Assistance: FEMA Should Take Additional Actions to Strengthen Fraud Risk Management for Public Assistance Emergency Work Grants, Gov’t Accountability Off., at 18 n.19 (Sept, 2020).

For example, FEMA had only 36 procurement professionals, far short of the minimum of 172 that experts have recommended for the agency.

3. The costs to taxpayers were significant. This report identified 19 Katrina contracts collectively worth \$8.75 billion that were plagued by waste, fraud, abuse, or mismanagement. Reports from the Government Accountability Office, Pentagon auditors, agency inspectors general, or other government investigators linked each of these 19 contracts to major problems in administration or performance.
4. The same investigation and report by the House Committee on Government Reform found that there were 1,395 cases of reported criminal activity, including procurement fraud and abuse, under investigation at the time.
5. The 2007 Hurricane Katrina Fraud Task Force Report to the U.S. Attorney General identified numerous instances of fraud and abuse. For example, the Report summarized a conspiracy involving a dozen individuals in which false debris load slips were created and submitted, totaling more than \$700,000. As of the report's publication, more than 768 individuals had been federally charged with hurricane-related fraud, many of those involving procurement fraud and public corruption.

6. *Additional Prosecutions*

- a) In 2020, the United States intervened in a whistleblower lawsuit against AECOM, a California-based architecture and engineering firm, and certain other disaster relief applicants.²²⁸ The Department of Justice alleged in the lawsuit that the defendants “violated the False Claims Act by submitting false claims to [FEMA] for the repair or

228 Press Release, United States Joins Lawsuit against AECOM Alleging False Claims in Connection with Hurricane Disaster Relief (June 3, 2020), <https://www.justice.gov/opa/pr/united-states-joins-lawsuit-against-aecom-alleging-false-claims-connection-hurricane-disaster>.

replacement of certain facilities damaged by Hurricane Katrina.” AECOM and its affiliates received more than \$300 million from FEMA to serve as technical assistance contractors in FEMA’s disaster response efforts in the aftermath of Katrina.²²⁹

- b) One of the recipients of the FEMA relief named in the lawsuit—Xavier University of Louisiana—agreed to pay the United States to resolve matters involving its alleged role in “in the submission of false and misleading repair estimates prepared by AECOM on its behalf.”²³⁰
- c) As of the writing of this memo, the case remains in discovery. The trial is set for December 2022.²³¹

229 Press Release, Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2020), <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020>.

230 Press Release, *supra* note 228.

231 *United States ex rel. Romero v. AECOM, Inc.*, No. 16-cv-15092 (E.D. La.), Dkt. 134.

V. Appendix V—California Bullet Train Case Study

A. Introduction

1. The California High-Speed Rail Authority (the “Authority”) is a publicly funded rail system currently under construction. It is projected to connect Anaheim Regional Transportation Intermodal Center in Anaheim and Union Station in Los Angeles with the Salesforce Transit Center in San Francisco. In addition, future extensions are planned to connect stations in San Diego and Sacramento to the network.
2. On February 12, 2019, Governor Newsom announced that, while work would continue on the 171-mile Central Valley segment from Bakersfield to Merced, construction on the remaining parts of the system would be indefinitely suspended, citing delays, high costs, and lack of transparency.
3. In June 2019, the deputy chief operating officer for the Authority was suspended after approving a multi-million dollar contract for a company in which he had heavily invested.

B. Background

1. In 2008, California voters approved Proposition 1A, which enacted a new law authorizing construction of the high-speed rail system and authorizing the issuance of \$9 billion in bonds to fund planning, design, and construction.
2. In February 2009, Congress approved the passenger rail program in the Recovery Act of 2009, which appropriated \$8 billion for grants to

states to develop high-speed and intercity passenger rail services.²³² On October 2, 2009, Governor Arnold Schwarzenegger revealed California’s official application for federal funding, seeking \$4.73 billion in federal funding pursuant to the Recovery Act.²³³ And on January 27, 2010, the White House announced that the federal government would award California \$2.344 billion for its high-speed rail initiative.²³⁴

3. Additional federal funds were appropriated in the next few years, despite the fact that none of the environmental analysis or financing plans were complete.
4. Since the project’s inception, it has been plagued by fluctuating cost estimates.
 - a) In 2008, the Authority released a 2008 Business Plan, which estimated that Phase 1 of the system would cost \$32.8–\$33.6 billion.²³⁵
 - b) In 2018, the rail authority revised the estimated cost of Phase 1 to \$63.2–\$98.1 billion.²³⁶
 - 1) Three factors contributed to the higher estimates: “Net design refinements/scope changes,” “contingencies,” and “escalation.”²³⁷

232 DAVID RANDALL PETERMAN, CONGRESSIONAL RESEARCH SERVICE, THE HIGH-SPEED INTERCITY PASSENGER RAIL (HSIPR) GRANT PROGRAM: OVERVIEW 1 (2016), <https://fas.org/sgp/crs/misc/R44654.pdf>.

233 See Gov. Arnold Schwarzenegger, Letter to Sec. Raymond H. LaHood (Oct. 2, 2009), https://www.hsr.ca.gov/docs/about/funding_finance/federal_stimulus/ARRA_Cover_Letter.pdf.

234 Press Release, The White House, Fact Sheet: High Speed Intercity Passenger Rail Program (January 27, 2010), <https://web.archive.org/web/20110228222916/http://www.whitehouse.gov/the-press-office/fact-sheet-high-speed-intercity-passenger-rail-program-california>.

235 U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, CALIFORNIA’S HIGH-SPEED RAIL PLAN 6 (2011), https://books.google.com/books?id=fcNGAQAAMAAJ&pg=PR11&lpg=PR11&dq=california+high+speed+train+%2233.6+billion%22&source=bl&ots=9g-SttWlI-&sig=ACfU3U1UK2vXhZvqPi3DJmMv4j_oJ9ZB0w&hl=en&sa=X&ved=2ahUKewikvoqlm_rpAhXORDA BHarpBu8Q6AEwAnoECAoQAQ#v=onepage&q=ca.

236 CALIFORNIA HIGH-SPEED RAIL AUTHORITY, 2018 BUSINESS PLAN 36 (2018), https://www.hsr.ca.gov/docs/about/business_plans/2018_BusinessPlan.pdf.

237 *Id.* at 33–34.

5. Pursuant to California Law AB 3034, the Authority established the California High-Speed Rail Peer Review Group to independently evaluate the Authority’s funding plans. The Peer Review Group has eight members with various areas of expertise established by the statute and “shall evaluate the authority’s funding plans and prepare its independent judgment as to the feasibility and reasonableness of the plans, appropriateness of assumptions, analyses, and estimates, and any other observations or evaluations it deems necessary.”²³⁸
6. In 2018, the California State Auditor issued a report noting “a potential conflict of interest” in the Authority’s oversight structure. The Authority “placed portions of its oversight of contracts into the hands of outside consultants, for whom the State’s best interests may not be the highest priority. In addition, [the Contract Management Support Unit (“CMSU”)]—which is staffed by consultants rather than Authority employees—has performed only weak and inconsistent oversight.”²³⁹
 - a) “[A]lthough an Authority employee heads CMSU, the [Rail Delivery Partner (“RDP”)] consultants fill its seven positions.” In fact, Authority contract managers for the regional planning contracts directed the Auditor’s questions to RDP consultants “and were generally unable to provide documentation related to contract management that did not originate from the RDP consultants.”²⁴⁰
 - b) “As a result, the RDP consultants have become the de facto contract management body, working closely with contractors with insufficient Authority oversight.”²⁴¹

238 Cal Pub. Util. Code § 185035; see also generally CALIFORNIA HIGH-SPEED RAIL PEER REVIEW GROUP, <https://www.cahsrprg.com> (last visited June 12, 2020); *California High-Speed Rail Auth. v. Superior Court*, 228 Cal. App. 4th 676, 689–90 (2014).

239 CALIFORNIA STATE AUDITOR, CALIFORNIA HIGH-SPEED RAIL AUTHORITY: ITS FLAWED DECISION MAKING AND POOR CONTRACT MANAGEMENT HAVE CONTRIBUTED TO BILLIONS IN COST OVERRUNS AND DELAYS IN THE SYSTEM’S CONSTRUCTION 2–3, 41 (2018), <https://www.bsa.ca.gov/pdfs/reports/2018-108.pdf>.

240 *Id.* at 41.

241 *Id.*

7. Throughout the project, consultants assured the State there was no reason to hire in-house engineers and rail experts because the consultants could handle that work and consequently save taxpayer dollars.
 - a) As a result, “these consultants manage[d] nearly every aspect of the job.”²⁴² For instance, they “manag[ed] program implementation, strategy development and policy formulation; and provid[ed] the staffing and resources necessary for program and headquarters project management.”²⁴³
8. On May 16, 2019, the Federal Railroad Administration (“FRA”) announced it would terminate an agreement with the CHSRA and “deobligate the \$928,620,000 in funding under the agreement.”²⁴⁴
9. In June 2019, Roy Hill, a top consultant and deputy chief operating officer for the Authority, was suspended after the Fair Political Practices Commission (“FPPC”) reviewed his approval of a multi-million dollar contract for a company in which he had heavily invested.²⁴⁵
10. Another rail board member, Ernest Camacho, is president and CEO of Pacifica Services, a business that performs engineering, construction management, and environmental work. In 2019, Pacifica entered into an agreement to become a subcontractor on a light-rail project being conducted by Tutor Perini. Further, Tutor Perini is the lead contractor on the first phase of the high-speed rail in the Valley. “So a member of

242 Ralph Vartabedian, *How California’s Faltering High-Speed Rail Project Was ‘Captured’ by Costly Consultants*, L.A. TIMES, Apr. 26, 2019, <https://www.latimes.com/local/california/la-me-california-high-speed-rail-consultants-20190426-story.html>.

243 Ralph Vartabedian, *California’s Top Bullet Train Consultant Is Suspended Amid A State Ethics Review*, L.A. TIMES (June 4, 2019), <https://www.latimes.com/local/california/la-me-bullet-train-investigation-20190604-story.html>.

244 Press Release, The Federal Railroad Administration, Statement of Federal Railroad Administration on Termination of FY ’10 Grant Agreement with California High-Speed Rail Authority (May 16, 2019), <https://railroads.dot.gov/newsroom/statement-federal-railroad-administration-termination-fy-10-grant-agreement-california>; see also Jennifer Medina, *California v. Trump, Round 51*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/california-high-speed-rail.html>.

245 See Vartabedian, *supra* note 243.

the high-speed rail board who is supposed to oversee Tutor Perini also is under contract to Tutor Perini on a different project.”²⁴⁶

C. Investigations and Prosecutions

1. In June 2019, FPPC began investigating Roy Hill after Assemblyman Jim Patterson filed a complaint alleging a conflict of interest. The Authority suspended Hill, pending the outcome of the FPPC review and also conducted its own internal investigation.²⁴⁷ The FPPC subsequently “expanded that review into a formal investigation.”²⁴⁸ At the conclusion of the investigation, FPPC found that Roy Hill did not violate California’s laws for conflicts of interest and closed the case at the end of 2020.²⁴⁹
2. In September 2019, the FPPC also began investigating Ernest Camacho after Assemblyman Patterson filed another complaint.²⁵⁰
3. Joe Hedges, the chief operating officer of the California High-Speed Rail Authority, left the company a week after the conclusion of the firm’s internal investigation in May 2021. The investigation began as early as December 2020 when the rail authority board received an anonymous letter from a state employee. The letter alleged that “Hedges overruled employee decisions and awarded large unmerited payments

246 The Fresno Bee Editorial Board, *Questions of Unethical Dealing Hit High-Speed Rail*, THE FRESNO BEE (Oct. 7, 2019), <https://www.fresnobee.com/opinion/editorials/article235687417.html>.

247 See Vartabedian, *supra* note 306.

248 Ralph Vartabedian, *California’s Troubled Bullet Train Project Getting one of Biggest management upheavals in Years*, L.A. TIMES (July 26, 2019), <https://www.latimes.com/california/story/2019-07-26/california-high-speed-rail-authority-management-shakeup>.

249 Ralph Vartabedian, *Former consultant for California high-speed rail project is cleared of ethics violations*, L.A. TIMES (Nov. 12, 2020), <https://www.latimes.com/california/story/2020-11-12/california-bullet-train-project-ethics-violations>.

250 Ralph Vartabedian, *California High-Speed Rail Board Member Under Investigation for Potential Conflict*, L.A. TIMES (Sept. 25, 2019), <https://www.latimes.com/california/story/2019-09-24/california-bullet-train-board-member-conflict-of-interest-investigation>.

to contractors building the project.”²⁵¹ The internal investigation did not find that Hodges committed fraud.²⁵²

4. The railroad authority’s financial records also show that the company received a federal subpoena. The contents of the subpoena, and which grand jury issued it, are unknown.²⁵³

251 Ralph Vartabedian, *No. 2 executive at California bullet train agency out after long investigation*, L.A. TIMES (May 25, 2021), <https://www.latimes.com/california/story/2021-05-25/california-bullet-train-agency-executive-out-after-long-investigation>.

252 Rich Pedroncelli, *In major shakeup, No. 2 exec at California bullet train agency leaves following investigation*, KTLA5 (May 25, 2021), <https://ktla.com/news/local-news/in-major-shakeup-no-2-exec-at-california-bullet-train-agency-leaves-following-investigation/>.

253 Ralph Vartabedian, *supra* note 251.

VI. Appendix VI—The Central Artery Project / aka “The Big Dig” Case Study

A. Introduction

1. The Central Artery Project, more commonly known as “The Big Dig,” in Boston, Massachusetts, is regarded as one of the most ambitious and costly highway infrastructure projects in U.S. history.²⁵⁴ The project replaced a six-lane elevated, deteriorating section of I-93—known as the Central Artery—with an underground highway and two bridges over the Charles River. It also extended a highway connection to Boston’s international airport by going under the Boston harbor. By constructing the highway underground, approximately 300 acres of open land were created and traffic congestion was significantly reduced.²⁵⁵
2. In addition to gaining notoriety for its uniquely ambitious scale, scope, and engineering feats, the Big Dig is also well known for its mistakes and flaws, delays, allegations of mismanagement and intentional concealment of information, and even the death of one person.²⁵⁶ The project spurred various federal and state investigations, as well as criminal prosecutions. Ultimately, the project was completed eight years behind schedule and at a cost overrun of about 190%.

B. Background

1. The project was financed solely by public funds from both the state and federal government. Congress approved federal funding and the

254 “The Big Dig.” *Mass.gov*. <https://www.mass.gov/the-big-dig> Accessed 30 May 2020.

255 *Id.*

256 “What Lessons Can Be Learned from The Big Dig.” *Project Cost Solutions*. February 12, 2019. <https://projectcostsolutions.com/lessons-learned-boston-big-dig/> Accessed 28 May 2020.

scope of the project in April 1987. In 1990, Congress allocated \$755 million to the project.²⁵⁷ By 2000, the FHWA reported that \$5.8 billion had been allocated to the project, more than any other construction project of its kind.²⁵⁸ The amount of allocated federal funds by 2007 was approximately \$7.05 billion.

- a) The Big Dig has gained notoriety for its impressive cost—particularly the fact that the total cost was multiple times the original projection. The initial estimated cost for the project was \$2.56 billion. Estimates increased to \$7.74 billion in 1992, to \$10.4 billion in 1994, and, finally, to \$14.8 billion in 2007—more than five times the original estimate. In 2008, a year after the project was completed, the Boston Globe estimated that the project would ultimately cost \$22 billion (with interest) and that it wouldn't be paid for until 2038.²⁵⁹
- b) The reported reasons for the cost escalation included inflation over the span of over twenty years, the failure to assess unknown subsurface conditions, environmental and mitigation costs, and repeated increases in project scope. The Big Dig reported that about half the cost growth was caused by inflation, but according to analysis conducted by Boston University, some of the increase can be attributed to an unrealistic initial cost estimate.²⁶⁰
- c) Per this Boston University analysis, the initial cost estimate failed to properly account for certain technical aspects of the project. For example, the challenges posed by subsurface

257 "The Big Dig." *Mass.gov*. <https://www.mass.gov/the-big-dig> Accessed 30 May 2020.

258 <https://www.fhwa.dot.gov/reports/REPORT3A.pdf>

259 http://www.boston.com/news/traffic/bigdig/articles/2008/07/17/big_digs_red_ink_engulfs_state; "What Lessons Can Be Learned from The Big Dig." *Project Cost Solutions*. February 12, 2019. <https://projectcostsolutions.com/lessons-learned-boston-big-dig/> Accessed 28 May 2020.

260 Greiman, Virginia A. "The Big Dig: Learning from a MegaProject." *Ask Magazine*. Available at https://www.nasa.gov/pdf/469423main_ASK_39s_big_dig.pdf Accessed 29 May 2020.

conditions were grossly underestimated. The technical challenges of relocating miles of utility lines and associated infrastructure was also underestimated.²⁶¹ Many of the engineering problems that arose had to be solved quickly and creatively with technical and design modifications, often at very high costs.²⁶²

- d) While some costs were not properly accounted for, other costs were simply not included, thus contributing to the unrealistic initial cost estimate. Major elements of the project that were not accounted for in the original cost estimation included: certain environmental mitigation, tunnel roofing for portions of the project, rebuilding costs of the Dewey Square Tunnels, new interchanges at Logan Airport, temporary ramps, and substantial mitigation costs for Gillette World Headquarters and abutters all along the alignment.²⁶³
- e) A second reason for the cost overrun was the fact that the project incurred many unanticipated but perhaps foreseeable costs, such as the archeological discovery of historic artifacts.²⁶⁴ These discoveries created costly delays and also resulted in expenses for permits and licenses that were required to continue the project.
- f) Lastly, the project was plagued by design flaws and engineering or construction mistakes, all of which were costly to fix. Examples include: a miscalculation of a tunnel alignment; guardrails that turned out to be lethal in car

261 *Id.*

262 Flint, Anthony. "10 Years later, did the Big Dig Deliver?" *The Boston Globe*. December 29, 2015. <https://www.bostonglobe.com/magazine/2015/12/29/years-later-did-big-dig-deliver/tSb8PIMS4QJUEtsMpA7Spl/story.html> Accessed 29 May 2020.

263 Greiman, Virginia A. and Rorger Waburton. *Deconstructing the Big Dig: Best Practices for Mega Project Cost Estimating*. 2009.

264 Greiman, Virginia A. "The Big Dig: Learning from a MegaProject." *Ask Magazine*. Available at https://www.nasa.gov/pdf/469423main_ASK_39s_big_dig.pdf Accessed 29 May 2020.

accidents; lighting fixtures that cost more than \$50 million to replace; and concrete that was not properly mixed, which led to leaks. One of the most tragic events was a problem in the type of epoxy used for ceiling panels (due to the epoxy manufacturer's failure to disclose that the particular epoxy type was unsuitable for overhead application), which fell from the tunnel ceiling and killed a motorist in the summer of 2006.²⁶⁵

C. Investigations and Prosecutions

1. March 2004 Federal Task Force Report

- a) The Federal Highway Administration ("FHWA") formed a task force in February 2000 that published a review of the project's oversight and costs in March 2000. The FHWA decided to undertake its own review after it received a draft of the U.S. Department of Transportation's Office of Inspector General ("OIG") report, which pointed out that the project was experiencing significant cost increases and could need up to \$942 million more in funding. The OIG report also pointed out that the project's 1998 finance plan did not disclose significant cost information about the project, such as construction cost increases or that contract awards were exceeding budget.
- b) The formation of the task force was also prompted by the Office of the Inspector General of Massachusetts' investigation, which uncovered substandard contract

265 Flint, Anthony. "10 Years later, did the Big Dig Deliver?" *The Boston Globe*. December 29, 2015. <https://www.bostonglobe.com/magazine/2015/12/29/years-later-did-big-dig-deliver/tSb8PIMS4QJUEtsMpA7Spl/story.html> Accessed 29 May 2020.

management practices; the OIG recommended “improved FHWA oversight.”²⁶⁶

- c) The task force noted that instead of heeding the OIG report’s warnings and scrutinizing information more closely, the FHWA continued to rely on assertions from the State that future cost increases were unlikely. Based on these assertions, the FHWA approved the finance plan presented by the project in January 2000. That finance plan did not indicate a potential cost overrun. However, in February 2000, the project director informed the media of a potential \$1.4 billion cost overrun. This led to the creation of the task force that was authorized, among other things, to analyze the oversight process for the project, determine the effectiveness of reporting documents, and recommend changes to the FHWA policy or procedures

2. 2004 OIG Report

- a) The OIG was tasked with investigating the cost recovery efforts of the project and it released multiple reports on the topic. Its report in February 2004 consolidated various findings from prior reports and made further findings concerning management practices. The MTA was in turn tasked with pursuing cost recovery against the responsible management.
- b) In sum, the OIG found that the construction management consultants used “sub-standard contract management practices and that there existed systematic procedural lapses with respect to record keeping practices.” It tied certain cost

266 Brown-West, Orikaye G., *In Defense of the Big Dig: How Politics Affected the Planning, Design, and Construction of the Boston Central Artery/Tunnel Project*. Marshfield, MA. Diabono Consolidated, Inc. 2007.

increases and overruns directly to contract mismanagement. It also found that the consultants' auditors had not responded appropriately to concerns regarding management, and that when they identified systemic procedure lapses, they labeled those problems as insignificant. Thus, the consultants failed to correct the deficiencies identified by its own internal audit. The OIG recommended that MTA "evaluate [the consultant's] contract management practices for potential cost recovery action."²⁶⁷

3. In 2008, following above-referenced 2006 the collapse of ceiling panels in a tunnel that caused the death of one person, the consultants and 24 small design companies agreed to a settlement of about \$458 million to cover the tunnel collapse and other problems with the project, including construction flaws. As part of the settlement, the consultants would not face criminal charges for the death.²⁶⁸
4. This settlement was the result of various investigations that began after a breach in the wall paneling in September 2004. In the settlement agreement, the consultants acknowledged that it allowed contractors to place concrete when specifications had not been met, failed to complete required documentation noting these deficiencies, failed to have the deficiencies corrected, and failed to investigate the cause of the epoxy failures. Lastly, the consultants acknowledged that they did not meet obligations relating to contract modifications and failed to meet certain oversight obligations, which led to the delivery and use of non-specification materials.²⁶⁹

267 "The Big Dig Cost Recovery Referral." *Office of the Inspector General Commonwealth of Massachusetts*. February 2004. Available at <https://www.mass.gov/files/documents/2016/08/qz/costreco.pdf> Accessed 29 May 2020.

268 Simpson, Andrew G. "458M Big Dig Settlement Reached; Criminal Charges Dropped." *The Insurance Journal*. January 23, 2008 <https://www.insurancejournal.com/news/east/2008/01/23/86666.htm> Accessed 28 May 2020.

269 *Id.*

5. In May 2010, two managers of Aggregate Industries Ready Mix Concrete Division were sentenced to terms of probation and fined after a jury convicted them for fraud. The managers directed a scheme in which their company delivered thousands of loads of non-specification concrete to the Big Dig between 1996 and 2005, accompanied by falsified batch reports. The managers were convicted of conspiracy to commit highway project fraud, among other offenses. The total estimated loss to the government was \$5 million.²⁷⁰

270 *Two Former Dispatch Managers of Big Dig Concrete Supplier Sentenced*, U.S. Dep't of Transp., Off. of Inspector Gen. (May 27, 2010), <https://www.oig.dot.gov/library-item/29738> (last accessed May 29, 2020).

VII. Appendix VII—Guardians Project Task Force Prosecution: Tatanka Contracting Case Study

A. Introduction

1. The Sisseton-Wahpeton Oyate Sioux Tribe (the “Sioux” or “SWO”) in South Dakota charged its tribal agency, which received federal funds, with building an elderly home complex on tribal land.
2. About ten months after incorporation, Tatanka Contracting, a construction company, signed a contract with the tribal agency to perform work on the elderly home project. The contract designated Tatanka Contracting to do over \$1 million worth of earthwork for the project.
3. To receive this contract, the owners of Tatanka paid the Director of the tribal corporation, Daniel Thomas White, a bribe, which he accepted.
4. The U.S. Attorney’s Office and the FBI investigated and prosecuted Tatanka Contracting executives, as well as the director of the tribal agency. They were found guilty of various crimes connected to the bribery scheme concerning programs receiving federal funds.

B. Background

1. The Dakota Nations Development Corporation (“DNDC”) is an agency of the Sioux Tribe, a tribal government, which received federal assistance in excess of \$10,000 between October 1, 2017 and September 20, 2018. During this time, Daniel Thomas White served as a director of DNDC and oversaw DNDC’s housing and construction projects.²⁷¹

271 Press Release, Contracting Company Owner Pleads Guilty to Federal Offense and Another Business Partner Charged for Roles in Bribery Scheme (May 27, 2021), <https://www.justice.gov/usao-sd/pr/contracting-company-owner-sentenced-84-months-prison-and-another-business-partner-charge-0>.

2. 18 U.S.C. § 666 criminalizes theft or bribery in programs that receive more than \$10,000 annually in federal funds.²⁷²
3. The DNDC established the SWO Elderly Village Limited Partnership to order tax credit financing to build an elderly home on tribal land. The tribe committed nearly \$3,000,000 to this project. In 2016, “SWO’s tribal council passed a resolution authorizing DNDC to pursue low-income housing tax credits for the elderly village complex.”²⁷³
4. In December 2017, the DNDC contracted with Tatanka Contracting. Tatanka agreed to perform earth work for the elderly home on tribal lands for the price of \$1,126,679.²⁷⁴
5. To secure the contract, John Thomas German, the owner of Tatanka, paid White, the Director of DNDC, who accepted the bribe.²⁷⁵

C. Investigations and Prosecutions

1. The Guardians Project is a federal collaborative anti-corruption task force led by the U.S. Attorney’s Office.²⁷⁶ The Guardians Project Task Force works with and coordinates efforts between several participating agencies to promote citizen disclosure of public corruption, fraud, and embezzlement of federal program funds in South Dakota’s Native American communities, and to prosecute the violators.²⁷⁷
2. As part of the Guardians Project, the U.S. Attorney’s Office, aided by the FBI, investigated the owners of Tatanka Contracting.

272 See 18 U.S.C. § 666(a)-(b).

273 Press Release, *supra* note 271.

274 *Id.*

275 *Id.*

276 Press Release, Guardians Project continues fighting federal program fraud in Montana (Nov. 21, 2019), <https://www.justice.gov/usao-mt/pr/guardians-project-continues-fighting-federal-program-fraud-montana>.

277 Press Release, *supra* note 271.

3. German pleaded guilty to one count of bribery concerning programs receiving federal funds, and entered a guilty plea in 2019.²⁷⁸ German was sentenced to 84 months of imprisonment followed by 3 years of supervised release. He was also ordered to pay \$100 to the Federal Crime Victims Fund.²⁷⁹
4. White pleaded guilty to his role in the bribery scheme on August 24, 2020.²⁸⁰ White will be sentenced on September 27, 2021.²⁸¹
5. Kevin Trio, a partner of Tatanka Contracting, was charged with making material false statements to federal agents investigating the events surrounding the Sioux Tribe elderly project. He entered a guilty plea and his sentencing hearing will be held on August 2, 2021.²⁸²
6. Michael Nathan Cebulla, a former owner of Tatanka Contracting, was also charged with making material false statements to federal agents investigating the bribery scheme. Cebulla, however, entered a plea of not guilty on May 20, 2021, and is currently on bond pending trial.²⁸³

278 Press Release, U.S. Attorney's Guardians Project Results in Multiple Pleas and Sentencings for Theft, Embezzlement, Bribery & Corruption (Sept. 30, 2019), <https://www.justice.gov/usao-sd/pr/us-attorney-s-guardians-project-results-multiple-pleas-and-sentencings-theft-embezzlement>.

279 Press Release, *supra* note 271.

280 *Id.*

281 Jody Heemstra, *Former contracting company owners enter pleas in federal bribery case*, DRGNEWS.COM (June 2, 2021), <https://drgnews.com/2021/06/02/contracting-company-owner-pleads-guilty-to-federal-offense-and-another-business-partner-charged-for-roles-in-bribery-scheme/>.

282 Press Release, *supra* note 271.

283 *Id.*



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Coalition for Integrity

