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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

A Road Map To Long-Term Highway Funding Legislation

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Paul J. Epstein

With the specter of insolvency again looming over the federal Highway Trust Fund along with the August congressional recess, on July 30, Congress passed the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 ("the act")[1], which extended the HTF's authority to provide transportation funding to the states — for yet another time — through Oct. 29, 2015.

This further patch is the third such short-term extension, following similar extensions in July 2014 and May 2015,[2] since the expiration of the most recent reauthorization bill, the Moving Ahead for Progress in the 21st Century Act ("MAP-21"),[3] which was enacted in July 2012 and was originally due to expire in September 2014. President Obama signed the bill on July 31.[4]

While the enactment of the act itself means little for the future of long-term federal transportation funding, other than a further three-month delay, activity in Congress leading up to its passage, and comments from key congressional leaders about its next steps, provide a reason for optimism for a deal following Labor Day.

The introduction of the act came amid a flurry of activity in the Senate on a long-term bill, which was also passed by the Senate on July 30, the first such multiyear legislation to be passed by any full chamber of Congress since MAP-21.[5] The proposed Developing a Reliable and Innovative Vision for the Economy ("DRIVE") Act is a six-year reauthorization bill, but it contains only three years of appropriated funds.[6] It was introduced by Sens. Mitch McConnell, R-Ky., and Barbara Boxer, D-Calif., and received strong bipartisan support in the upper chamber.

Below, we summarize the key elements of the act and highlight certain material provisions of the DRIVE Act in the form passed by the Senate, including updates to the Transportation Infrastructure Finance and Innovation Act ("TIFIA") program and the Water Infrastructure Finance and Innovation Act ("WIFIA") and interstate tolling pilot programs.

Surface Transportation and Veterans Health Care Choice Improvement Act

The principal elements of the act that relate to transportation funding[7] are as follows:

- Extension of highway programs: The act continues at current funding levels, until Oct. 29, 2015, existing federal highway programs authorized under MAP-21 and which were continued pursuant to the July 2014 and May 2015 extensions. These programs include, inter alia, an extension of the TIFIA program.

- Extension of other programs: The act continues certain other programs funded from the HTF until Oct. 29, 2015, including highway safety, transit and motor carrier safety programs.

- Authorization of expenditures: The act reauthorizes the spending authority of the HTF to fund such transportation and other programs until Oct. 30, 2015. The relevant appropriations are calculated based on 2014 levels, which were maintained pursuant to the July 2014 and May 2015 extensions, extending such appropriations until the end of the federal government's 2015 fiscal year on Oct. 1, 2015, and on a pro rata basis for October.

- Funding of the HTF: Pursuant to the act, funding for the extension would come from direct transfers and budgetary offsets, including, but not limited to, the following, with estimated revenue increases over the 2015-2025 period noted parenthetically, as applicable[8]:

Transfer from the general fund of the U.S. Treasury to the highway account of the HTF in an amount equal to $6.1 billion and to the mass transit account of the HTF in an amount equal to $2 billion.

Modification of certain mortgage reporting requirements by lenders, which is expected to increase revenue by reducing the risk of inaccurate reporting ($1.8 billion).

Requiring consistency between estate tax value and income tax basis of inherited assets, and related reporting obligations ($1.5 billion).

“Clarification” that the IRS has six years to reassess taxpayers that significantly overstate their income tax basis in connection with a sale and thereby understate their income ($1.2 billion).

Extending by two years the period during which certain fees collected by the Transportation Security Administration are deposited into the U.S. Department of the Treasury's general fund ($3.2 billion).

Changing the filing due dates of certain tax returns for partnerships and corporations, which, by improving the information flow to investors, is contemplated to result in improved accuracy of returns and an increase in revenues ($285 million).

DRIVE Act

Given that the DRIVE Act, which was in excess of 1,000 pages, was finalized only days prior to the August congressional recess, and contained provisions that were objectionable to some members of the House of Representatives, notably because it provided for the reauthorization of the Export-Import Bank, the House declined to review it before recessing.[9] However, there were clear indications by its leadership that the House was committed to working hard on a long-term bill once it reconvenes[10] and, based on comments from Sens. McConnell and James Inhofe, R-Okla., who, as chairman of the Senate Environment and Public Works Committee, is closely involved in transportation matters, the DRIVE Act — or a portion of it — is likely to be the starting point for those discussions.[11]

Below we describe some significant elements of the DRIVE Act, along with some of the material budgetary offsets that the Senate has proposed to pay for them.[12] Whether such offsets will carry the day is not clear, as several of them were the subject of scrutiny by legislators on both sides of the political spectrum.[13] The specifics of the offsets are likely to be the most difficult hurdle to overcome in structuring a long-term bill that is acceptable to both houses of Congress.

Reauthorization of Existing Highway Programs

In addition to reauthorizing the existing federal-aid highway programs established under MAP-21, including the formula-based structure for apportionment of funds pursuant to those programs, the DRIVE Act would increase the amount of federal dollars apportioned to the states for each fiscal year it is in effect. The "core" highway program structure, which was also established pursuant to MAP-21, would also be maintained with the following programs: the National Highway Performance Program; the Highway Safety Improvement Program; the Surface Transportation Program; and the Congestion Mitigation and Air Quality Improvement Program.

TIFIA Program

The TIFIA program would be reauthorized with apportioned funds of $500 million per year over the six-year reauthorization period, which, according to estimates of theU.S. Department of Transportation, would enable the extension of up to $5 billion in TIFIA loans annually.[14] This would be a reduction from apportionments of $750 million in 2013 and $1 billion in 2013 and 2014 under MAP-21, respectively, but still would be substantially higher than the $122 million limit prior to MAP-21.

The DRIVE Act would also facilitate the extension of loans to small, rural projects that may previously have been unavailable by expanding the scope of the "eligible project costs" for TIFIA loans to explicitly include the capitalization of rural projects funded through loans to a state infrastructure bank.

WIFIA Program

The DRIVE Act would remove the limitation prohibiting projects funded under the WIFIA pilot program from being financed with tax-exempt obligations. If this provision is ultimately included in a long-term bill, it would permit public authorities to issue tax-exempt bonds, including in the case of projects involving private investors or private activity bonds ("PABs"), alongside WIFIA loans, in the same way that such tax-exempt issuances frequently accompany TIFIA loans in a project's capital structure. This would be a welcome change for project sponsors investing in water projects through public-private partnerships, or P3s, as the prohibition on the concurrent use of PABs has been highlighted by both stakeholders and rating agencies as one of the pilot program's principal deficiencies.[15]

Interstate Tolling Pilot Program

Under existing federal law, states have two avenues to apply new tolls to existing toll-free interstate highways: first, under the Interstate Highway Reconstruction and Rehabilitation Program (the "tolling pilot program"), which permits up to three interstates (each located in a different state) to be tolled for reconstruction purposes where tolls are necessary for the improvements or the maintenance of the facility; and second, pursuant to MAP-21 (as extended), which permits the tolling of new lanes on interstates and other highways (e.g., pursuant to "HOT" or "managed" toll lanes) if the number of nontolled lanes is not reduced.

The DRIVE Act would modify the tolling pilot program by: (1) extending the program's term to 10 years following enactment, (2) increasing the eligibility requirements for states' participation in the program and (3) more precisely defining the application process by states and the related decision-making process by the Department of Transportation. In particular, the updated provision would set time limits for the solicitation of, and entry into, the relevant reconstruction or rehabilitation contract, which, if not met, would result in the project from being excluded from the program. In this way, the DRIVE Act facilitates the redesignation of slots under the program to allow qualifying projects to proceed where existing approved projects have not progressed.[16]

Focus on Bridge Maintenance and Repair

The recent I-10 bridge collapse in California has brought renewed attention to the nation's bridge infrastructure deficiencies.[17] The DRIVE Act would significantly increase funds earmarked for the maintenance and repair of bridges, in particular those off of the national highway system, which do not have a dedicated funding stream under MAP-21. In addition, by allocating additional amounts to the interstate system and national highway system, DRIVE Act funds could also be applied to bridge maintenance costs on those highways.

Freight Funding

The DRIVE Act would create a new multibillion-dollar per year freight program with the goal of enhancing the safety, efficiency and reliability of the transportation of consumer goods and products and thereby reducing costs and improving business performance. The total amount allocated to this program would increase from $1.5 billion in 2016 to $2.5 billion in 2021. Funds would be apportioned to states by formula, as under the other existing programs described above.

Transit Funding

Total public transportation funding would increase by approximately $2.7 billion over MAP-21 levels and by 2021 federal funds available to the bus and bus facilities program would be $815 million, which is approximately 90 percent greater than current levels. The DRIVE Act would also provide an additional $772 million in grants from the Federal Transit Administration for the revitalization of urban areas that depend on public transportation to improve mobility and reduce congestion (so-called urbanized area formula grants).

Competitive Grants for Major Projects

The DRIVE Act would establish a major projects program which would award competitive grants to states and certain other governmental entities to fund major projects of high importance to a community, a region or the nation. Each such grant would be at least $50 million, subject to certain exceptions for rural projects.

Increased Transparency

The proposed legislation includes provisions intended to increase the transparency of the selection and funding of transportation projects by states. In particular, the Department of Transportation would publish quarterly reports on its website detailing the availability and use of funds in the HTF, including project-specific data. This is an important element of governmental outreach, and could facilitate the acceptance of such projects by the public and other stakeholders.

Significant Offsets

The DRIVE Act contains a lengthy list of budgetary offsets, which would be applied to cover the deficiency in the HTF for three years. These offsets include, inter alia, the following:

- Federal Reserve dividend rate: The Federal Reserve banks have paid a dividend of 6 percent to its member banks (which have invested capital in the reserve banks) since the Federal Reserve was created in the early 20th century. The DRIVE Act proposes to reduce this dividend rate to 1.5 percent for large banks (i.e. banks with over $1 billion in consolidated assets), which would be estimated to result in an offset of $16.3 billion.[18]

- Crude oil sales: The DRIVE Act would call for the secretary of the U.S. Department of Energy to draw down and sell 101 million barrels of crude oil from the Strategic Petroleum Reserve between 2018 and 2025, the proceeds of which would be deposited into the Department of the Treasury's general fund. Such sales are projected to create an offset of $9 billion.

- Indexing of customs user fees: By indexing certain customs user fees to inflation, the DRIVE Act is projected to create an offset of $4 billion.

- In addition to the above, the DRIVE Act includes: (1) similar tax-related offsets to those contained in the act described above; and (2) a similar, but larger, offset relating to TSA fees, with the DRIVE Act's TSA offset raising $3.5 billion, rather than $3.2 billion under the act.

Road Ahead

There appears to be momentum to get long-term transportation legislation over the finish line this fall. Given the short, two-month extension — August will be lost due to the congressional recess — we expect considerable attention to be given to a long-term transportation bill in September in order to avoid the crunch that limited discussions on the DRIVE Act in the run-up to the act's enactment. Stakeholders are hopeful for bipartisan consensus resulting in the first long-term transportation bill in a decade. Whether Congress is successful will hinge most significantly on the ability of its members to reach a compromise on the appropriate funding mechanism.

The Senate has effectively placed the ball in the court of the House of Representatives with the passage of the DRIVE Act. House Republican leadership supports a long-term bill, but prefers to fund a significant portion of the deficiency in the HTF through tax reform.[19] Some senators, notably Sen. Charles Schumer, D-N.Y., have expressed a willingness to consider corporate tax modifications as a source of transportation dollars. Although Sen. McConnell is not averse to considering tax reform, he does not wish to link it to the transport bill.[20]

Any long-term legislation will also require the support of the White House. The Obama administration seems unlikely to support the DRIVE Act in its current form, as U.S. Transportation Secretary Anthony Foxx has referred to its "glaring problems," without being more specific.[21] In addition, President Obama's GROW AMERICA Act, which would significantly increase funding for highways, bridges and transit over four years, remains pending in the House of Representatives, and both the White House and Transportation Secretary Foxx have lobbied strongly for it since the middle of last year.[22] Notably, the

GROW AMERICA Act includes corporate tax reform as an offset that would be used to fund the HTF.[23]

—By Paul J. Epstein, Shearman & Sterling LLP

Paul Epstein is counsel in Shearman & Sterling's project development and finance group in the firm's New York office.

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[1] The act passed the Senate 91-4 on July 30, which followed its approval by the House of Representatives by 385-34 on July 29. Keith Laing, Senate sends three-month highway bill to Obama, The Hill (July 30, 2015, 2:14 p.m.), http://thehill.com/policy/transportation/249818-senate-sends-three-month-highway-bill-to-obama; Keith Laing, House passes three-month highway bill, The Hill (July 29, 2015, 5:34 p.m.),http://thehill.com/policy/transportation/249685-house-approves-three-month-highway-bill.

[2] Highway and Transportation Funding Act of 2014, Pub. L No. 113-159, 128 Stat. 1840 (2014); Highway and Transportation Funding Act of 2015, Pub. L No. 114-21, 129 Stat. 218 (2015).

[3] Moving Ahead for Progress in the 21st Century Act, Pub. L No. 112-141, 126 Stat. 405-988 (2012).

[4] Jordan Fabian, Obama scolds Congress at highway bill, The Hill (July 31, 2015, 12:43 p.m.), http://thehill.com/policy/transportation/249920-obama-signs-short-term-highway-bill.

[5] Jordain Carney, Senate approves six-year highway bill, The Hill (July 30, 2015, 12:36 p.m.), http://thehill.com/policy/transportation/249785-senate-approves-six-year-highway-bill. For the full bill, see https://www.congress.gov/114/bills/hr22/BILLS-114hr22eas.pdf.

[6] Id; Siobhan Hughes and Kristina Peterson, Senate Reaches Preliminary Agreement on Highway Funding Bill, Wall Street Journal (July 21, 2015, 6:55 p.m.), http://www.wsj.com/articles/senate-reaches-preliminary-agreement-on-highway-funding-bill-1437505425.

[7] The act also includes a provision that would reduce federal taxes on liquefied natural gas (from 24.4 cents per gallon to 14.1 cents per gallon) and liquefied petroleum gas (from 18.3 cents per gallon to 13.2 cents per gallon) by structuring their related tax rates based on their "energy equivalents" (i.e., the amount of such fuel that would deliver an equivalent amount of energy as a gallon of diesel or gasoline, rather than based on volume). This provision is estimated to result in a net decrease of federal tax revenues by $54 million over 10 years. Joint Committee on Taxation, Congress of the United States, Description of the Chairman's Mark of a Proposal to Convert the Tax on Liquefied Petroleum Gas and Liquefied Natural Gas to an Energy Equivalent Basis (JCX-32-15), Feb. 9, 2015, https://www.jct.gov/publications.html?func=select&id=74.

[8] The budgetary estimates described in this paragraph are taken from estimates of similar provisions in the DRIVE Act in the form passed by the Senate, set forth in Senate Finance Committee, Highway bill —

Finance Division Summary,http://www.finance.senate.gov/download/?id=6B8C8DDB-F442-4F23-BEDB-77EFB8E20E5B. TheCongressional Budget Office estimates that the act would produce a total deficit reduction over the 2015-2025 period of $6.9 billion. Letter from Congressional Budget Office to The Honorable Paul Ryan, Chairman, Committee on Ways and Means, U.S. House of Representatives, July 28, 2015, https://www.cbo.gov/publication/50682.

[9] Keith Laing, Pelosi on highway patch: 'How can we leave doing that?', The Hill (July 31, 2015, 3:31 p.m.), http://thehill.com/policy/transportation/249835-pelosi-on-highway-patch-how-can-we-leave-doing-that; Scott Wong and Kevin Cirilli, McCarthy: House will not vote on Senate's highway funding bill, The Hill (July 27, 2015, 2:28 p.m.), http://thehill.com/policy/transportation/249290-house-gop-to-senate-were-not-taking-up-your-highway-bill.

[10] Keith Laing, Boehner 'confident' in fall prospects for long highway bill, The Hill (July 29, 2015, 3:16 p.m.), http://thehill.com/policy/transportation/249658-boehner-confident-in-fall-prospects-for-long-term-highway-bill; Hughes and Peterson, supra note 6 (reporting House Majority Leader Kevin McCarthy's statement that "[i]t's always been our intention to get to a long-term bill").

[11] Keith Laing, McConnell drives to finish long-term highway bill before recess, The Hill (July 29, 2015, 11:18 a.m.), http://thehill.com/policy/transportation/249603-mcconnell-drives-to-finish-long-term-highway-bill-before-recess (stating that Sen. McConnell predicted the Senate's passage of the long-term highway bill would pressure the House of Representatives to craft a multiyear bill of its own following the August recess); Keith Laing, GOP senator: Finishing long-term highway bill is 'important', The Hill (July 29, 2015, 11:48 a.m.), http://thehill.com/policy/transportation/249612-gop-senator-finishing-long-term-highway-bill-is-important (reporting statement of Sen. Jim Inhofe that "[e]ven though the House has gone home, they all agree that we need a good long-term bill as soon they get back").

[12] See Senate Committee on Environment and Public Works, Press Release, DRIVE Act Modernizes America's Infrastructure Transportation System, July 21, 2105,http://www.epw.senate.gov/public/index.cfm/press-releases-republican?ID=DFAF66C0-D453-42C3-AB84-A90BBD326E44.

[13] Jordain Carney, Senator: Highway bill is 'generational theft', The Hill (July 28, 2015, 6:10 p.m.), http://thehill.com/blogs/floor-action/senate/249546-gop-senator-highway-bill-is-generational-theft; Keith Laing, House Dems slam 'outrageous' Senate highway offsets, The Hill (July 23, 2015, 4:36 p.m.), http://thehill.com/policy/transportation/249007-house-dems-slam-outrageous-senate-highway-offsets.

[14] See Fact Sheet, The Transportation Infrastructure Finance and Innovation Act, http://www.fhwa.dot.gov/ipd/fact_sheets/tifia.aspx (stating that "[e]ach dollar put into TIFIA can provide approximately $10 in loans and support up to $30 in infrastructure investment").

[15] Press Release, Fitch: Full-Spectrum Funding Needed for U.S. Water Projects (June 2, 2014, 3:44 p.m.), http://www.reuters.com/article/2014/06/02/ny-fitch-ratings-wrrda-idUSnBw026506a+100+BSW20140602 (stating that "the ban on the use of tax-exempt bond proceeds for projects receiving [WIFIA] support will limit the reach of the program" and "[a]ccess to the full spectrum of funding options would improve project economics and could enlarge the number of projects under consideration within the WIFIA program"); Jim Watts, Groups Want Congress to Overturn Ban on Use of Bonds with WIFIA Program, Bond Buyer (May 28, 2014, 1:39 p.m.), http://www.bondbuyer.com/issues/123_102/groups-want-congress-to-overturn-ban-on-use-of-bonds-with-wifia-program-1062860-1.html.

[16] Bill Cramer, Drive Act brings ‘significant change’ to tolling pilot program, International Bridge, Tunnel and Turnpike Association, July 20, 2015, http://ibtta.org/blog/drive-act-brings-%E2%80%98significant-change%E2%80%99-tolling-pilot-program.

[17] Brett Kelman, Colin Atagi, Jesse Marx and Sammy Roth, Collapsed California bridge earned 'A' rating just last year, Desert Sun (Palm Springs, Calif.) (July 21, 2015, 6:14 a.m.) (reporting the following question of Sen. Boxer: “How many more bridges have to collapse before we come together and pass a six-year, robust transportation bill?”),http://www.usatoday.com/story/news/nation/2015/07/20/collapsed--10-bridge-given-rating-just-last-year/30428515/; Jeff Horseman, Transportation: I-10 bridge collapse exposes funding gaps, Press Enterprise (July 21, 2015, 11:38 p.m.),http://www.pe.com/articles/bridge-773910-funding-transportation.html.

[18] Kate Davidson, Proposal Would Use Some Fed Bank Dividends for Highway Funding, Wall Street Journal (July 21, 2015, 6:36 p.m.), http://www.wsj.com/articles/proposal-would-use-some-fed-bank-dividends-for-highway-funding-1437518194.

[19] Wong and Cirilli, supra note 9.

[20] Alexander Bolton, McConnell rules out linking highway bill to overseas tax reform, The Hill (Aug. 6, 2015, 1:45 p.m.), http://thehill.com/policy/transportation/250441-mcconnell-rules-out-linking-highway-bill-to-overseas-tax-reform.

[21] Bernie Becker, Foxx: ‘Glaring problems’ with Senate highway bill, The Hill (July 24, 2015, 11:41 a.m.), http://thehill.com/policy/transportation/249093-foxx-glaring-problems-with-senate-highway-bill.

[22] Keith Laing, Obama sends Congress $302B transportation bill, The Hill (April 29, 2014, 12:16 p.m.), http://thehill.com/policy/transportation/204675-obama-sends-congress-302b-transportation-bill.

[23] See GROW AMERICA: An Overview, http://www.transportation.gov/grow-america/fact-sheets/overview.