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Toward the Future of Federal Surface Transportation Funding: An Overview of the House and Senate Reauthorization Bills

Last week, the US Senate and House of Representatives each began consideration of bills proposed by their respective members that would reauthorize spending limits for the federal government's surface transportation programs: Senate Bill S.1813, entitled Moving Ahead for Progress in the 21st Century ("MAP-21") and House Bill H.R.7, called The American Energy & Infrastructure Jobs Act (the "AEIJA"). Below we summarize the principal similarities and differences between the two proposals, focusing on federal highway programs.

Background and Current Status

Reauthorization of funding for federal surface transportation programs is necessary because the existing reauthorization act, SAFETEA-LU[1], expired in September 2009. Congress has since granted eight separate extensions to the act, the most recent one due to expire on March 31, 2012. Federal dollars provided from the Highway Trust Fund (the "HTF") are critical to state and local government transportation infrastructure spending and the job creation that accompanies it. Thus, there is motivation by all stakeholders, including key legislators on both sides of the political aisle, to develop a more permanent framework pursuant to a new reauthorization act.

Few would disagree that a longer reauthorization period would provide more certainty for project-planning by states, local governments and the private sector and, therefore, would be more likely to spur greater infrastructure investment. However, a longer extension also would require an up-front commitment to additional federal appropriations, which is politically controversial given both parties' current focus on deficit reduction.

MAP-21, originally introduced in November 2011, proposes a two-year extension of transportation funding at or about current levels at a total cost of approximately $109 billion. The Senate has invoked cloture on the bill,

[1] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1248 (2005).

meaning that debate will be limited to 30 hours with no possibility of a filibuster. MAP-21 also has the support of the Obama administration.[2]

The AEIJA, originally introduced on January 31, 2012, proposes a five-year extension with a total cost of $260 billion. On February 14th, the House Republican leadership elected to divide it into three separate bills: (a) a transportation bill (H.R. 7), which contains the transportation elements of the AEIJA as it was introduced in January; (b) an energy bill (H.R. 3408), which provides, among other things, for additional leases of federal land for oil shale development projects and for additional onshore and offshore oil and gas drilling leases (including in the Arctic National Wildlife Refuge); and (c) a bill (H.R. 3813) providing, among other things, for additional contributions by federal employees to their federal pension plans.[3] The House passed H.R. 3408 on February 16th by a vote of 237-187.[4]

While there are material substantive differences between the two bills, they have comparable underlying purposes, namely, to streamline and consolidate existing federal transportation programs, reduce bureaucratic inefficiency, increase spending flexibility for states and local governments and better leverage existing infrastructure resources by encouraging greater participation by the private sector in transportation funding, in particular through an expansion of the Transportation Infrastructure Finance and Innovation Act ("TIFIA") program.

Sources of Funding and Shortfall

SAFETEA-LU and its predecessors have relied on the HTF for appropriations. The HTF is funded primarily with revenue from gas taxes, which have not been raised since 1993. In recent years, as a result of reductions in travel due to recessionary economic conditions and improvements in vehicle fuel efficiency, the HTF has faced shortfalls, prompting Congress on multiple occasions to authorize supplemental funding from other sources so that federal transportation dollars could continue flowing to the states.

The bills would each continue to rely primarily on the HTF, but there would be an estimated $13 billion funding gap in the case of MAP-21 and at least a $50 billion funding gap in the case of the AEIJA. While MAP-21 does not specify how the gap would be filled, the AEIJA proposes recourse to the leasing revenues provided for under H.R.

[2] Keith Laing, *White House backs $109B Senate transportation bill*, THE HILL (Feb. 9, 2012, 5:47 p.m.), http://thehill.com/blogs/transportation-report/highways-bridges-and-roads/209875-white-house-backs-109b-senate-transportation-bill. The Obama administration indicated its opposition to the AEIJA in a statement of policy issued on February 14th. *See* Executive Office of the President, *Statement of Administration Policy, H.R. 7 – American Energy and Infrastructure Jobs Act of 2012*, WHITE HOUSE (Feb. 14, 2012), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr7r_20120214.pdf

[3] Ashley Halsey III, *House Republicans split up transportation bill, promise full debate*, WASH. POST (Feb. 14, 2012), http://www.washingtonpost.com/local/commuting/house-republicans-split-up-transportation-bill-promise-full-debate/2012/02/14/gIQA2VhFER_story.html.

[4] Katarzyna Klimasinka, *Keystone Pipeline Bill Passes House, Lacks Match in Senate*, BLOOMBERG (Feb. 17, 2012), http://www.bloomberg.com/news/2012-02-17/keystone-pipeline-advances-as-house-passes-oil-drilling-bill-1-.html.

3408 and the termination of the Mass Transit Account within the HTF.[5] These proposals have encountered resistance from members of both parties because of sensitivities relating to additional drilling and uncertainty associated with ending the use of gas tax funds to pay for mass transit programs.[6]

Consolidation of Existing Transportation Programs

A principal feature of both bills is the consolidation of existing federal highway programs into a smaller number of core programs with the goal of minimizing cost and increasing efficiency. Each bill also would eliminate earmarks prescribing expenditures. Federal funds would be apportioned to states by formula, rather than by agency discretion as under a number of existing programs, based on factors specific to each program. These proposed changes would increase the predictability of funding and the flexibility of state and local agencies in allocating apportioned amounts to projects.

National Highway System

Both bills would preserve the existing National Highway System ("NHS") program and eliminate the Interstate Maintenance Program and the Bridge Program, with MAP-21 renaming the program the National Highway Performance Program. The largest amount of federal dollars would continue to flow to states under this program, with approximately $20.6 billion expected to be apportioned under MAP-21 and $17.5 billion under the AEIJA, in each case on an annual basis.

In addition, states' accountability for their performance in improving highway conditions would be increased. Each bill would require states to develop a risk-based asset management plan intended to achieve certain national performance goals, including the improvement of infrastructure condition, safety, mobility and freight movement. Having a plan in place that has been approved by the US Department of Transportation ("USDOT") would be a condition to a state's expenditure of funds apportioned to it under the program.

Surface Transportation Program

Both bills would also preserve the existing Surface Transportation Program (the "STP"), although MAP-21 would rename it the Transportation Mobility Program (the "TMP") and expand the scope of potential projects to be funded thereunder. Approximately $10.5 billion annually is expected to be apportioned to this program under each of MAP-21 and the AEIJA. Pursuant to each bill, 50 percent of the apportioned funds would be sub-allocated

[5] The Mass Transit Account would be renamed the Alternative Transportation Account, which would be funded with a one-time contribution of $40 billion and serve as the funding source for the transit, CMAQ, ferry boat, research and development and territorial highway programs. A portion of the $40 billion would be funded with the savings that result from federal employees' additional pension fund contributions pursuant to H.R. 3813.

[6] *House Republicans push off transportation, Keystone bill amid bipartisan grumbling*, FOX NEWS (Feb. 15, 2012), http://www.foxnews.com/politics/2012/02/15/house-republicans-push-off-transportation-keystone-bill-amid-bipartisan/.

to geographic areas in each state based on its population, with the remaining 50 percent being eligible for expenses anywhere in the state.

Highway Safety Improvement Program

Each bill would preserve the existing Highway Safety Improvement Program (the "HSIP"), which has been linked to reductions in road fatalities, with approximately $2.5 billion annually expected to be apportioned to it under each of MAP-21 and the AEIJA. However, modifications have been proposed to increase states' flexibility in expending funds under the program as well as their accountability for such outlays. In particular, the definition of "highway safety improvement project" would be expanded such that the funds apportioned pursuant to the HSIP could be used to improve safety for a broader set of road users, including both motorists and non-motorized users. As under SAFETEA-LU, each state would be required to have in place a highway safety improvement program and develop a strategic highway safety plan that identifies and analyzes highway safety problems and opportunities. However, each state would be required periodically to update its safety plan and, in connection therewith, to establish a safety data system – interoperable with such systems in other states – that collects and maintains safety records for all of its public roads, including identification of hazardous locations.

Congestion Mitigation and Air Quality Improvement Program

The Congestion Mitigation and Air Quality Improvement ("CMAQ") program is designed to help states to comply with the Clean Air Act by, among other things, reducing traffic congestion and improving air quality on the nations' highways. Both bills would retain the CMAQ program, with approximately $3.3 billion annually expected to be apportioned to it under MAP-21 compared to $2 billion under the AEIJA. Each bill would encourage the construction of high-occupancy vehicle ("HOV") lanes by limiting the use of CMAQ funds for projects benefiting single occupancy vehicles. While the AEIJA would not make any structural changes to the program, MAP-21 would bifurcate apportionments thereunder into two groups, one directed to typical CMAQ projects, the other to a "reserved" fund (containing an amount equal to 10 percent of the STP funds apportioned to states for fiscal year 2009) to be applied to certain non-infrastructure projects relating to programs – such as the Transportation Enhancement Program – that would be eliminated under the bill.

Freight Programs

Each bill calls for the development by USDOT of a new national freight framework in order to improve the flow of goods throughout the United States and reduce highway congestion and emissions. Among other things, USDOT is required to develop a five-year strategic plan (the AEIJA refers to a National Freight Policy) specifying guidelines and strategies for improving the performance of freight transportation infrastructure. MAP-21 would set aside $2 billion annually to this program and states would be required to set performance targets for freight movement based on measures established by USDOT. The AEIJA would only "encourage" such activities to be undertaken by states.

TIFIA and Public-Private Partnerships

TIFIA

The TIFIA program fosters public-private partnerships in transportation infrastructure by providing direct loans, loan guarantees and lines of credit to surface transportation projects on favorable terms. Recognizing the increased demand for credit assistance for transportation funding and the important role TIFIA has played in the successful consummation of transportation projects, each bill seeks to increase TIFIA's allocated funds (and hence profile) in order to attract additional private investment.

Each bill would expand the appropriated funds available to borrowers under TIFIA on an annual basis from $122 million to $1 billion. According to the Federal Highway Administration (the "FHWA"), $1 billion in program loans, if fully utilized, has the potential to support up to $30 billion in transportation infrastructure investment.[7] In addition, the maximum percentage of eligible project costs that can be paid with TIFIA funds would be increased from 33 percent to 49 percent, which would provide increased funding flexibility for project sponsors.

Each bill would modify the application process from competitive to rolling, such that TIFIA dollars would be available year-round, and successful applicants would be able to elect to receive funding during the following fiscal year should commitments no longer be available for the then-existing fiscal year. Provisions have been added that would permit applicants to enter into "master credit agreements" to fund a group of related transportation projects, thus extending TIFIA's benefits to projects that may not be able to meet the applicable eligibility criteria individually. For example, a state could use a profitable toll road with a dedicated revenue stream to fund improvements that would not generate their own revenues.

In addition, under MAP-21, TIFIA credit assistance to rural infrastructure projects would benefit from loans at lower rates than projects in large metropolitan areas.

State Infrastructure Banks

MAP-21 would not effect any changes to existing regulations governing state infrastructure banks, which can provide long-term, below market-interest rate loans to transportation projects at the state and local levels. However, the AEIJA would incentivize states to create and capitalize such banks by increasing the percentage of federal highway dollars a state can dedicate to a state infrastructure bank from 10 to 15 percent. Moreover, under the AEIJA, states would receive an additional apportionment of funds that can only be used to fund such banks, with $750,000 being authorized for such purpose for each of fiscal years 2013 through 2016.

[7] *TIFIA Credit Program: An Introduction*, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., http://www.fhwa.dot.gov/ipd/fact_sheets/tifia_introduction.htm (last visited Feb. 21, 2012).

Other Proposed Enhancements

MAP-21 would increase the size of grants available for transportation projects of "national and regional significance" that meet applicable eligibility requirements. These are high-cost projects that can generate economic benefits, reduce congestion, increase speed, reliability and movement of people or freight and improve safety and, although dependent on federal funding for completion, are required to have other dependable financial sources. The bill would allocate $1 billion for fiscal year 2013, with subsequent years being subject to appropriation. The grants, which would be awarded based on competitive application, could support up to 50 percent of the total costs of a project. Additional federal dollars could be used to cover up to an additional 30 percent of project costs.

The AEIJA would permit states to toll a highway, bridge or tunnel on the Interstate Highway System (the "IHS") that has been constructed (or reconstructed, rehabilitated or increased in capacity) using federal dollars, which to date has been prohibited. The bill would also provide states with further flexibility to toll certain non-IHS roadways, including the conversion of HOV lanes to a tolled facility.

In addition, pursuant to the AEIJA, USDOT would be required to provide best practices with respect to how public agencies can work with the private sector in the development, financing, construction and operation of transportation facilities and, within 18 months after enactment, would be required to develop standard forms of model contracts for public-private partnerships in this area.

Project Delivery

Federally-funded highway projects generally take several years to complete. One of the principal reasons for delay is the lengthy environmental review process required under the National Environmental Policy Act of 1969 ("NEPA"), during which no project development activity has been permitted. Both MAP-21 and the AEIJA include provisions intended to accelerate project delivery and reduce the costs of transportation projects, in particular, through actions to be taken by USDOT and streamlining the NEPA review process.

Under MAP-21, USDOT would be required to establish a clearinghouse for collecting best practices for expediting project delivery and reducing costs from planning through construction. The bill also directs USDOT to engage stakeholders, disseminate information and provide technical assistance in order to improve delivery time.

In addition, each bill would allow for certain pre-construction project development activities to be undertaken by states prior to the completion of NEPA review:

- *Acquisitions of real property interests*. Such acquisitions would be subject to the condition, among others, that no adverse environmental impact would result.
- *Construction-related activities*. Such activities may include (a) contracting with a construction manager or general contractor to provide advice as to scheduling, work sequencing, cost engineering, constructability, cost estimates and risk identification and (b) the issuance of notices to proceed with respect to preliminary design and the carrying out of such design activities. However, a construction contract cannot be awarded until the NEPA review process has been completed.

Both bills seek to accelerate project delivery through streamlining the NEPA review process. Each would expand the types of projects that can be undertaken based on a determination of a categorical exclusion ("CE"), which involves only a limited environmental review, rather than undergoing a more time-consuming environmental assessment ("EA") or environmental impact statement ("EIS"). The difference in timing for the completion of a CE review compared to an EIS review can be multiple years. Examples of the types of projects that would qualify for CE status are projects within an existing right-of-way, highway modernization projects (e.g., resurfacing, rehabilitation, addition of lanes), highway safety projects and bridge rehabilitation projects.

Each bill would continue to permit states to elect to assume responsibility for CE reviews, and the AEIJA would also allow states to carry out EA and EIS legal sufficiency reviews with oversight by the FHWA. In an effort to address concerns of participating states as to liability exposure, MAP-21 would authorize states to use TMP funding for litigation costs associated with their undertaking of such reviews.

Each bill also would add certain process efficiencies, including permitting multiple agencies to review projects concurrently and coordinate on timelines for completion of review and overcoming barriers to approval, and permitting lead agencies to set deadlines for action by other participating agencies. The AEIJA would impose a general deadline for completion of the environmental review process of no later than 270 days after the date on which notice of the initiation of the project is published in the Federal Register.

Conclusion

As MAP-21 and the AEIJA have just reached the floors of the Senate and House, it is too early to tell how the legislative process will unfold and whether either of these bills will ultimately form the basis for new transportation legislation or another proposal will emerge. However, it makes sense for all public and private sector stakeholders to be aware of the principal features of the two bills as the discussions continue and SAFETEA-LU's March 31st expiry date approaches.

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

Robert N. Freedman	Patricia G. Hammes	Paul J. Epstein
New York	New York	New York
+1.212..848.4340	+1.212..848.8269	+1.212..848.5266
robert.freedman@shearman.com	phammes@shearman.com	paul.epstein@shearman.com