

A Temporary Detour For Highway Transportation Funding

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Facing the imminent bankruptcy of the federal Highway Trust Fund (HTF) and the specter of delays and reductions in payments from the HTF to the states, the U.S. Congress on July 31 passed the Highway and Transportation Funding Act of 2014, which extended federal surface transportation programs and funding through May 2015. We summarize below the key elements of the act.

Introduction

Late in the evening of July 31, following a seesaw exchange of bills between the House of Representatives and the Senate, U.S. Congressional approval was achieved on a bill that reauthorizes, on a temporary basis, funding of the federal Highway Trust Fund, which is the primary source of funding for state projects that improve and maintain transportation infrastructure.[1]



Paul J. Epstein

The passage of the bill, titled the Highway and Transportation Funding Act of 2014 (the Act), temporarily staves off the insolvency of the HTF, which was due to run dry by the end of August, through an extension of funding until May 31, 2015, and avoids delays and reductions in payments from the HTF to the states, which were due to take effect as early as Aug. 1.[2] It also effectively postpones the ongoing and frequently contentious debate within Congress regarding the future shape of federal surface transportation funding until after this year's November elections, and possibly until a new Congress is sworn into office in 2015.

A copy of the Act may be found by clicking [here](#).

Elements of the Act

The principal elements of the Act are as follows:

- **Extension of Federal-Aid Highway Programs.** The Act continues, until May 31, 2015, existing federal highway programs authorized under 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 due to expire on Sept. 30. Such extension includes, inter alia, an extension of the Transportation Infrastructure Finance and Innovation Act (TIFIA) program.

- **Extension of Other Programs.** The Act continues certain other programs funded from the HTF until May 31, 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 May 31, 2015. The relevant appropriations are calculated pro rata based on 2014 levels at a ratio of 243/365. With respect to TIFIA, for example, based on its 2014 budget authority of \$1 billion, its prorated appropriation through May 2015 would be approximately \$665.8 million.

- **Funding of the HTF.** One of the principal hurdles to the passage of long-term funding legislation is congressional agreement on the source of federal appropriations. The negotiations on the temporary extension yielded multiple proposals.[4] Pursuant to the Act, such funding would come from certain direct transfers and budgetary offsets as follows:
 - Transfer from the General Fund of the U.S. Treasury to the HTF in an amount equal to approximately \$9.8 billion.

 - Transfer from the Leaking Underground Storage Tank Trust Fund to the HTF in an amount equal to \$1 billion.

 - Changes in the Internal Revenue Code to permit single-employer defined benefit pension plans to use higher interest rates when calculating their future liabilities. Using higher interest rates would reduce the minimum contributions that employers are required to make to such plans. According to estimates prepared by the Congressional Budget Office, this would likely have two principal effects: first, a reduction in net direct spending by the Pension Benefit Guaranty Corp. of approximately \$1.2 billion over the 2014-2024 period; and second, an increase in revenue over the same period of approximately \$5.2 billion, primarily due to the payment of corporate income tax on amounts that would have been deductible had they been contributed by employers to such pension plans.[5]

 - A one-year extension of the expiry date of the U.S. Treasury's right to collect certain customs user fees from Sept. 30, 2023, to Sept. 30, 2024.[6] The expected revenue increase from this extension is estimated by the CBO to be approximately \$3.5 billion.[7]

Importance of a Long-Term Bill

With the passage of the Act, attention will turn to the passage of a long-term transportation bill. A more permanent solution would facilitate the planning of new transportation infrastructure projects by state and local governments by ensuring the predictability of federal funding over multiple budget cycles.

The reaction of the states to the impending insolvency of the HTF reflects such importance. Federal funding is critical for the states, nearly half of which received at least one-third of their highway and transit funding from the federal government in 2011.[7]

Missouri, Arkansas and Rhode Island are among the states that rely heavily on federal transportation dollars. In January, Missouri's highway and transportation commission voted to refrain from adding any new projects to the state's five-year transportation improvement program. In April, Arkansas deferred 10 projects with a total cost of approximately \$60 million, and was not certain that sufficient funding would be available to pay contractors for approximately \$750 million in existing projects. Rhode Island suspended nearly all of its new highway projects to ensure that existing projects could be funded.[8]

With the HTF's insolvency looming, organizations that represent state and local officials urged Congress to remedy the immediate crisis and commit to pass a long-term agreement. Similar views were expressed by transportation industry and other stakeholders.[9]

Funding predictability is also important for other stakeholders, including private entities contemplating investments through public-private partnerships (P3s) or otherwise. The absence of long-term funding for the states would result in fewer procured projects (and, therefore, fewer infrastructure improvements) and fewer jobs. Because most P3 projects are funded at least in part with federal dollars, either directly or through the states, fewer P3 projects are likely to be procured.

A reliable stream of reimbursements is particularly important in the case of P3 projects procured under an availability payment structure, in which one of the principal risks weighed by investors is the ability of the states to fund contracted milestone and availability payments over a long-term concession period.

The lack of long-term federal transportation funding also runs counter to efforts of both the federal and state governments to encourage private investment in public infrastructure. On July 17, the Obama administration launched the Build America Investment Initiative, the purpose of which is to increase infrastructure investment and economic growth by fostering collaboration between state and local governments and private sector investors, expand the market for P3s and increase the use of federal credit programs.[10]

This initiative includes the creation, within the U.S. Department of Transportation, of the Build America Transportation Investment Center, which is intended to be a one-stop shop for state and local governments, developers, investors and other stakeholders regarding P3 matters. A principal task undertaken by the center will be to share best practices from states that have embraced private investment strategies for transportation projects with those states that have not yet done so.[11] Concurrently, the Build America Interagency Group was established to help stakeholders to address barriers to private investment and partnerships in sectors other than transportation, including municipal water, ports, harbors, broadband and the electrical grid.[12]

At the state level, the West Coast Infrastructure Exchange (WCX), a regional P3 initiative, was established in 2012 among the states of California, Oregon, Washington and the Canadian Province of

British Columbia. The WCX views itself as a “translation point between public sector projects and private capital,” and one of its principal goals is to provide support and technical assistance to procurement agencies so that they can develop the skills and capacity to deliver innovative infrastructure projects consistently and connect projects with private capital. The group is targeting pilot projects for 2015 using a “design-build-financing-maintain” (or DBFM) model, a long-term performance based procurement model that has been used more frequently over the past few years in the toll road sector and in social infrastructure.[13] In June, Maryland Gov. Martin O’Malley proposed a similar initiative, the Mid-Atlantic Infrastructure Exchange (MAX), for the national capital and mid-Atlantic regions.[14]

Existing Long-Term Legislation

Two bills containing long-term transportation reauthorization proposals are currently pending before Congress. The MAP-21 Reauthorization Act, which proposes to reauthorize existing programs under MAP-21 at existing levels for an additional six years at a total cost of \$265 billion, was introduced in the Senate by Sens. Barbara Boxer, D-Calif., David Vitter, R-La., Tom Carper, D-Del., and John Barrasso, R-Wyo. on May 12 and was approved by the Senate Environment and Public Works Committee (the EPW committee) on May 15.[15]

The EPW committee, however, left the determination of funding sources to the Senate Finance Committee, which has not yet indicated how it intends to proceed. One change from MAP-21’s 2014 appropriations, agreed in a manager’s amendment to the bill, is to lower the budget authority for the TIFIA program from \$1 billion to \$750 million per year, redirecting such funds to a highway research program.[16]

The Grow America Act, which is supported by the Obama administration and would increase funding for highways, bridges, transit and rail systems at a total cost of \$302 billion over four years, was introduced in the House of Representatives by Rep. Eleanor Holmes Norton, D-D.C., on June 12.[17] The long-term bill ultimately agreed to will likely reflect one of those two approaches.

The timing for resumption of bipartisan discussions regarding such a bill is unclear given the eight-month extension under the Act. One of the amendments proposed by the Senate, which was sponsored by Boxer and Carper along with Sen. Bob Corker, R-Tenn., and was supported by many transportation industry stakeholder organizations, would have limited the extension until Dec. 19 so that a long-term solution would be developed by the current Congress. But the House rejected this amendment and another that had been passed by the Senate, which, with a month-long congressional recess beginning Aug. 1, effectively forced the Senate to pass the Act in its original form.[18] It is expected that President Obama will sign the Act into law despite his advocacy for the passage of the Grow America Act.[19]

—By Paul J. Epstein, Shearman & Sterling LLP

Paul Epstein is a counsel in Shearman & Sterling's New York office.

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[1] The bill passed the Senate on an 81 to 13 vote, which followed the approval by the House of Representatives of the same on July 15 on a vote of 367-55. Ramsey Cox, Senate sends highway bill to Obama, THE HILL (July 31, 2014, 9:16 p.m.), <http://thehill.com/blogs/floor-action/senate/214026->

senate-sends-highway-bill-to-obama; Keith Laing, Highway focus shifts to Senate, THE HILL (July 16, 2014, 10:36 p.m.), <http://thehill.com/policy/transportation/212416-highway-focus-shifts-to-senate>.

[2] Keith Laing, DOT: Infrastructure fund bankruptcy will mean 28 percent cut for states, THE HILL (July 7, 2014, 12:35 p.m.), <http://thehill.com/policy/transportation/211441-foxx-states-will-face-28-percent-cut-if-road-fund-goes-bankrupt>; U.S. Dep't of Transp., July 1 Letter from Secretary Foxx to State DOT CEOs on DOT's Cash Management Procedures for the Highway Account of the Highway Trust Fund, <http://www.dot.gov/grow-america/highway-account-cmp-letter-to-state-dots>.

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

[4] See Ramsey Cox, Senate sends highway bill back to House, THE HILL (July 29, 2014, 7:17 p.m.), <http://thehill.com/blogs/floor-action/senate/213740-senate-sends-highway-bill-back-to-house>.

[5] CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, H.R. 5021, HIGHWAY AND TRANSPORTATION FUNDING ACT OF 2014 (July 11, 2014), <http://cbo.gov/sites/default/files/cbofiles/attachments/45522-hr5021a.pdf>.

[6] The relevant fees are the (i) passenger and conveyance processing fees and (ii) merchandise processing fee, each of which was authorized under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Such amounts are collected by U.S. Customs and Border Protection.

[7] Adrienne Lu, States Hit the Brakes on Road Projects as Federal Fund Goes Broke, THE PEW CHARITABLE TRUSTS, STATELINE (July 2, 2014), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/07/02/states-hit-the-brakes-on-road-projects-as-federal-fund-goes-broke>.

[8] Id.

[9] See, e.g., Letter to The Honorable John Boehner, The Honorable Harry Reid, The Honorable Nancy Pelosi and The Honorable Mitch McConnell from state and local organizations (July 7, 2014), http://www.pbtransportationupdate.com/pdfs/legislation/big_7_transportation.pdf; Letter from industry groups to Members of the U.S. Congress (July 14, 2014), <http://www.pbtransportationupdate.com/pdfs/legislation/htf%20multi-industry%20letter.pdf>.

[10] See The White House, FACT SHEET: Building a 21st Century Infrastructure: Increasing Public and Private Collaboration with the Build America Investment Initiative (July 17, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/17/fact-sheet-building-21st-century-infrastructure-increasing-public-and-pr>.

[11] Id.

[12] Id.

[13] See generally <http://westcoastx.com/>.

[14] Press Release, Governor O'Malley to Facilitate Mid-Atlantic Regional Workgroup on Infrastructure (June 27, 2014), <http://www.governor.maryland.gov/blog/?p=10524>.

[15] For the full bill, see

http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=1e3c777c-8d48-49f0-b9b6-2e725470a1bb. For a summary, see http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=f331a434-eec7-41f2-8cc6-5bbc34c49b3d.

[16] For the manager's amendment, see http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=0c4d6173-2bee-4633-b0b0-9d24f05ab48e.

[17] For the full bill, see http://www.dot.gov/sites/dot.gov/files/docs/DOT_surface_reauth-FINAL.pdf. For a section-by-section summary, see <http://www.dot.gov/grow-america/sectional-analysis>.

[18] Keith Laing, House rejects Senate highway bill, THE HILL (July 31, 2014, 2:43 p.m.), <http://thehill.com/policy/transportation/213964-house-rejects-senate-transportation-bill>.

[19] See Cox, Senate sends highway bill to Obama, *supra* note 1.