



MAP 21: Tolling Rights Expand Under Surface Transportation Reauthorization

07.11.2012 | By **Fredric W. Kessler**

This E-Alert, the third in our four-part series (read parts one, two, and four), focuses on the changes to federal law regarding tolling of federal-aid highways.

On June 29, 2012 Congress passed a compromise measure to reauthorize transportation funding through the end of 2014. A bipartisan and bicameral measure, the new bill contains meaningful reforms that, although marred by some missed opportunities, collectively represent a significant improvement in federal surface transportation law.

In our series of E-alerts on MAP-21, we elucidate four topics important to transportation financing and development of large transportation projects: (1) TIFIA, (2) environmental streamlining, (3) tolling and (4) public-private partnerships.

Under prior law, with few exceptions, tolling was prohibited on Interstate highways and many other federal-aid highways. The bill expands the exceptions, in recognition of the fact that federal fuel tax revenues are stagnant and new revenue sources are imperative to meet the growing funding gap in surface transportation. This expansion is tempered, however, by the fact that Congress has curtailed the existing toll pilot programs. Nevertheless, under the new law, tolls will play an increasingly important role in transportation financing.

Government sponsors of large transportation projects will have new toll revenue options at their disposal. They will need to develop strategies to take advantage of this new array of tolling opportunities, including use of toll concessions, as well as availability payment public-private partnerships that use tolls to reimburse public sponsors for all or a portion of the payments.

Meaningful Reform:

- **New Capacity Tolling.** The bill includes new capacity tolling provisions that change existing law by significantly expanding the scope of permitted tolling on the Interstate System, with the caveat that the number of toll-free non-HOV lanes may not decrease as a result of the construction of such new capacity. The bill also authorizes new capacity tolling on highways, bridges or tunnels that are not on the Interstate System, again with the caveat that the number of toll-free lanes does not decrease.

Specifically, the bill authorizes federal participation in projects for the:

- initial construction of a toll highway, bridge, or tunnel or approach to the highway, bridge or tunnel;
 - initial construction of one or more lanes or other improvements that increase capacity of a highway, bridge, or tunnel (other than a highway on the Interstate System) and conversion of that highway, bridge, or tunnel to a tolled facility, *if the number of toll-free lanes, excluding auxiliary lanes, after the construction is not less than the number of toll-free lanes, excluding auxiliary lanes, before the construction;*
 - initial construction of one or more lanes or other improvements that increase the capacity of a highway, bridge, or tunnel on the Interstate System and conversion of that highway, bridge, or tunnel to a tolled facility, *if the number of toll-free non-HOV lanes, excluding auxiliary lanes, after such construction is not less than the number of toll-free non-HOV lanes, excluding auxiliary lanes, before such construction;*
 - reconstruction, resurfacing, restoration, rehabilitation, or replacement of a toll highway, bridge, or tunnel or approach thereto;
 - reconstruction or replacement of a toll-free bridge or tunnel and conversion of the bridge or tunnel to a toll facility;
 - reconstruction of a toll-free Federal-aid highway (other than a highway on the Interstate System) and conversion of the highway to a toll facility;
 - reconstruction, restoration, or rehabilitation of a highway on the Interstate System if the number of toll-free non-HOV lanes, excluding auxiliary lanes, after reconstruction, restoration, or rehabilitation is not less than the number of toll-free non-HOV lanes, excluding auxiliary lanes, before reconstruction, restoration or rehabilitation;
 - conversion of a high occupancy vehicle lane on a highway, bridge, or tunnel to a toll facility; and
 - preliminary studies to determine the feasibility of a toll facility for which Federal participation is authorized under this paragraph.
- **Self-Executing.** The bill removes the requirement that the government sponsor and FHWA execute a tolling agreement; the bill codifies the substantive requirements, making the provision self-executing.
 - **Existing Toll Pilot Program.** The bill make it unnecessary to extend or expand the Interstate System Construction Toll Pilot Program, which will continue to run until its 2015 expiration date under SAFETEA-LU.
 - **HOV Lanes.** The bill changes existing law to allow the conversion of HOV lanes to tolled lanes as part of the reconstruction, restoration or rehabilitation of a highway on the Interstate System. The bill further authorizes the conversion of HOV lanes on a non-Interstate facility to a toll facility.
 - **HOV Speed Restoration.** The bill modifies existing law to impose program sanctions for an agency's failure to bring an HOV facility into compliance within 180 days using the authorized measures specified. This change to existing law establishes firm federal policy on taking affirmative action to maintain reasonable speeds in HOV lanes. This reform in turn should facilitate conversion of HOV lanes to HOT lanes.

Missed Opportunities:

- **Existing Toll Pilot Programs.** The bill fails to address existing toll pilot programs, which means that Congress passed on an opportunity to preserve tolling in a small set of appropriate situations not covered by the bill's amendments. As a result of the bill's failure to reauthorize the existing 15-project Express Lanes Demonstration Program, FHWA's authority to approve Express Lanes projects expired on June 30, 2012. Furthermore,

participation in both the Value Pricing Pilot Program and the Interstate System Reconstruction and Rehabilitation Pilot Program will continue to be limited – to 15 and three slots, respectively. Currently, there is only one vacancy in the Value Pricing Pilot Program and all three of the Interstate System Reconstruction and Rehabilitation Pilot Program slots are filled.

- **HOV Lanes.** Despite the improvements to existing law related to the conversion of HOV lanes to tolled lanes noted above, the bill expressly bars tolling of HOV vehicles in converted lanes on the Interstate System.
- **Low-Emission Vehicle Exemption.** Instead of allowing the exemption of low-emission and energy efficient vehicles from high occupancy requirements and from HOT lane tolling expire, the bill extends the exemption through 2017.
- **Toll Discontinuation Authority.** The bill grants the Secretary the authority to order the discontinuation of tolls should a public authority not comply with the limitations on the use of toll revenues, until such time that an agreement is reached to achieve compliance. The threat of exercise of this authority by the Secretary could conceivably undermine toll revenue financing for projects, although we believe credit markets will accept the risk.

Read part 1: MAP-21: Surface Transportation Reauthorization Ushers in Significant Changes to TIFIA

Read part 2: MAP-21 Creates Potential to Accelerate Project Delivery

Read part 4: MAP-21: Treatment of Public-Private Partnerships Under Surface Transportation Reauthorization