

TRANSPORTATION LEGISLATION ALERT

NEW INFRASTRUCTURE SPENDING AS ECONOMIC STIMULUS UNDER OBAMA

The political landscape is promising for increased spending on infrastructure as a means to boost the economy, ease congestion, rebuild our cities, improve our air quality, facilitate freight movement, enhance mobility for transit-dependent persons and encourage economic development. President-elect Barack Obama has repeatedly stated that he supports infrastructure spending through economic stimulus legislation and other means. The Democratic Party's increased majority in the House of Representatives with a minimal gain of 20 seats (255-175 and 5 undetermined) and in the Senate of seven seats (56-39, 2 Independents, 2 undetermined) makes it more likely that the Congress and the president can move their joint priorities of increasing federal spending for infrastructure.

THE ECONOMIC STIMULUS PACKAGE

Democrats have promoted stimulus spending as part of a program to create jobs. During his campaign, President-elect Obama proposed over \$120 billion in stimulus spending—including \$10 billion in direct aid to states and local governments to compensate for revenue losses stemming from the wave of home foreclosures—in order that state and local governments not postpone planned infrastructure investment. Prior to the election, the House and Senate attempted to move economic stimulus legislation. The House passed *The Job Creation and Unemployment Act* (H.R. 7110), a \$60 billion bill funding infrastructure projects that could be under contract within 120 days. It included \$12.8 billion for highway projects, \$3.6 billion for transit capital assistance grants, \$1 billion for transit energy assistance, \$5 billion for water infrastructure, \$600 million for airports and \$500 million for passenger rail. The Senate introduced its own bill, but fell eight votes short of the 60 votes needed to bring the bill to a final vote.

President-elect Obama called for prompt congressional action on economic stimulus legislation during his first press conference on November 7. While Senate Majority Leader Harry Reid (D-NV) and Senate Appropriations Committee Chair Robert Byrd (D-WV) introduced a new \$100.3 billion economic recovery package on November 17 that included transportation funding, the fate of this legislation is unclear in light of opposition from Senate Republicans and concerns from President Bush. In any event, Congress will likely consider additional stimulus measures in the new year, when Democrats will have expanded majorities in both legislative chambers and a more receptive president in the White House.

FISCAL YEAR 2009 APPROPRIATIONS

Congress could also fund additional surface transportation projects early in 2009 through the appropriations process. Congress was unable to enact most of the fiscal year 2009 appropriations bills to fund the federal government by the October 1 start of fiscal year 2009 and passed a continuing resolution to fund the federal government through March 6, 2009, largely at fiscal year 2008 funding levels. Congress could provide additional funding for some government agencies, such as the Department of Transportation, when it considers the fiscal year 2009 appropriations bills in the new year. This could serve as a vehicle for the economic stimulus legislation, or in addition to it.

REAUTHORIZATION OF THE SURFACE TRANSPORTATION BILL

Congress must reauthorize the *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)*, which expires on October 1, 2009. While this perhaps represents the most significant opportunity to increase transportation and infrastructure funding in the 111th Congress, the challenges facing policymakers are daunting. Some industry advocates argue that transportation spending should be increased over 60 percent from the \$286.4 billion authorized for fiscal years 2004 through 2009. The National Surface Transportation Policy and Revenue Study Commission recommended an investment of at least \$225 billion annually for the next 50 years to return the present system to a good state of repair and create a more advanced transportation system.

A number of proposals are under consideration to provide additional funding for transportation investment:

- **Increase existing fuel taxes.** The fuel tax likely will be an essential component of surface transportation finance for the foreseeable future. During the early months of 2008, escalating gas prices made increasing the tax or indexing it to inflation politically unviable. However, the Energy Information Administration is projecting that gas prices will average \$2.37 per gallon in 2009, down from a peak of \$4.11 in July in 2008. The falling prices offer the possibility that Congress may have the support necessary to raise the gas tax, assuming they can tie the tax to public benefits.
- **Infrastructure Bank.** President-elect Obama has stated that he supports proposals to create a federal infrastructure reinvestment bank to supplement resources for a range of infrastructure projects. The bank would invest \$60 billion over 10 years in projects that are expected to generate \$35 billion annually in new economic activity. Senate Banking Chairman Christopher Dodd (D-CT), introduced *The National Infrastructure Bank Act* (S. 1926) and House Financial Services Committee Chairman Barney Frank (D-MA) was a co-sponsor of the House companion (H.R. 3401). House Majority Leader Nancy Pelosi (D-CA) also has expressed support for an infrastructure bank.
- **Toll Roads, High Occupancy Toll Lanes and Other Congestion Pricing Programs.** Policymakers may eliminate prohibitions on tolling the interstate highway system to fund new capacity or on implementing congestion pricing in metropolitan areas and may establish other programs to encourage revenue generation mechanisms. At the same time, Congress may address eligible uses of toll revenues.
- **Public/Private Partnerships.** Congress will consider the role of public private partnerships in the design, construction, financing and maintenance of transportation projects. Legislators recognize that there is a role for private sector funding and innovative contracting involving infrastructure, but they likely will require more oversight over projects, particularly projects that involve the sale of a transportation facility. This oversight may include increased transparency regarding the terms of a concession agreement, rules regarding maintenance of the facility, caps on the rate of toll increases, and limitations on non-compete provisions.
- **Innovative Financing.** Congress may ease the restrictions on Transportation Infrastructure Finance and Innovation Act (TIFIA) and Private Activity Bond financing, so that more projects are eligible for the financing. Congress could increase the percentage of eligible project costs that receive TIFIA financing beyond the 33 percent cap in current law. With regard to Private Activity Bonds, it could expand the cap on financing beyond the current \$15 billion.
- **Container or Other Freight-related Fees.** Congress is also considering container fees and customs fees as a means of raising revenues to pay for infrastructure in freight corridors. Bills were introduced in the 110th Congress that would have imposed fees on shipments received at U.S. ports to fund infrastructure traveling through freight corridors. These fees would provide resources to the small number of states with ports that have the greatest freight traffic; however, they are controversial because some believe the fees will drive port shipments to Canada, where they will be trucked or moved by rail into the United States. This could result in infrastructure improvements in areas removed from the ports.

Congress will consider other major policies, including—

- how to identify and fund national priorities
- how to address the issue of “donor” states and the transfer of funding to states that contribute less gas tax revenue to the highway trust fund than they receive in federal funding

- whether or not to move away from block grant funding and establish performance standards
- whether or not to establish consolidated programs for highway and transit investment such as the metropolitan mobility program
- how to improve “project delivery” and streamline environmental review to expedite project delivery and reduce costs.

FEDERAL AVIATION ADMINISTRATION REAUTHORIZATION

A temporary reauthorization of federal aviation programs will expire in March, requiring Congress to work on legislation early in 2009. The House Transportation and Infrastructure Committee likely will move a bill in early 2009 that is based on the \$68 billion that it passed in 2007. The bill (H.R. 2881) authorized four years of funding—including \$3.7 billion over 10 years for increased contract authority for the airport improvement program that funds airport infrastructure—and increased the cap on passenger facility charges that an airport can assess on airline passengers to pay for airport improvements.

CLIMATE CHANGE

Congress likely will consider climate change legislation in the 111th Congress that will provide funding for public transportation and clean vehicles. Climate change proposals in the House and Senate in the 110th Congress established cap-and-trade programs that would have provided funding to state and local governments and transit agencies for projects and programs that increased energy efficiency and reduced pollution. Projects would include rail and bus systems, expanded public transportation service, transit operating assistance, intelligent transportation system technologies and programs to promote smart growth and land management.

Legislation in the Senate, introduced by Sens. Joseph Lieberman (D-CT) and John Warner (R-VA) and titled *The America's Climate Security Act* (S. 3036), included two programs that would have provided funding for “green” infrastructure. The first program set aside three to four percent of the proceeds from cap-and-trade credits for public transportation (an estimated \$171 billion through 2050). The second allocated two to three percent for the Energy Efficiency Block Grant Program (an estimated \$136 billion through 2050). The block grant program was authorized in the Energy and Security Act of 2007; however, Congress has not appropriated funding for it. The grants could be used to reduce energy use and fossil fuel emissions and improve energy efficiency in the transportation and building sectors. Under the program, larger cities (population over 35,000) and counties (population over 200,000) would be eligible for direct grants. Cities and counties that do not receive direct funding would be eligible to receive state funds (60 percent required pass-through) and funding under a competitive program awarded by the Department of Energy (DOE). In June, the Senate failed to invoke cloture on climate change legislation (48-36) and failed to bring the bill to a final vote.

Legislation in the House to address climate change did not advance as far as the Senate version. In October, the House Energy & Commerce Committee released a draft bill that would have allowed state, local and tribal governments to apply for funding through the National Climate Change Adaptation Fund, which would receive 50 percent of the revenue from the auction of emission allowances. Beginning in 2013, 85 percent of these funds would be designated for use by state, local and tribal governments to adapt to requirements under the Act. The bill authorized federal regulators to determine criteria under the program, which could include initiatives to reduce emissions from the transportation sector.

While it is unclear whether or not Congress will adopt new controls on greenhouse gas emissions during the economic downturn because of projected costs to businesses as well as consumers, it appears likely that the new administration will attempt to redirect policy to encourage conservation and displacement of carbon-based energy with renewables.

AN OVERVIEW OF KEY PLAYERS

Congress

Sen. Robert C. Byrd's (D-WV) announcement earlier this month of his intention to relinquish the chairmanship of the Senate Appropriations Committee has set several other changes in motion that will have an impact on the transportation sector. **Sen. Daniel Inouye (D-HI)** is expected to take over the chairmanship of the Senate Appropriations Committee, and **Sen. Jay Rockefeller (D-WV)** to take the chairmanship of the Senate Committee on Commerce, Science and Transportation.

Sen. Barbara Boxer (D-CA) will have a large voice in the 111th Congress as the returning chairwoman of the Senate Committee on Environment and Public Works, which will have jurisdiction over much of the highway bill reauthorization and climate change legislation. Other key members on that panel will include **Sen. Jim Inhofe (R-OK)** the committee's ranking Republican, **Sen. Max Baucus (D-MT)**, the chair of the Transportation and Infrastructure Subcommittee and **Sen. Johnny Isakson (R-GA)**, the Subcommittee's ranking Republican.

On the House side, **Rep. Henry Waxman (D-CA)** is challenging **Rep. John Dingell (D-MI)** for the gavel of the Committee on Energy and Commerce, which has jurisdiction over a broad range of issues include those relating to climate change. The Transportation and Infrastructure Committee will be led by **Chairman Jim Oberstar (D-MN)** and **ranking Republican John Mica (R-FL)**. The Highways and Transit Subcommittee will be led by **Chairman Pete DeFazio (D-OR)** and **ranking Republican John Duncan (R-TN)**.

Obama Administration

The Obama-Biden transition team announced on November 14 the appointments of six individuals to serve as Transportation Team Leads for the transition. The individuals are—

- **Seth Harris** – Professor, NYU Law School and counselor to Alexis Herman, U.S. Secretary of Labor in the Clinton administration
- **Mortimer Downey** – Chairman, PB Consult; former deputy secretary, U.S. Department of Transportation (longest serving in the department's history); President's Management Council, the Amtrak Board of Directors, the Partnership for a New Generation of Vehicles, and the Deputies' Committees of the National Security Council and the National Economic Council; Chair, National Science and Technology Council's Committee on Technology; Chair, President's Interagency Task Force on Coast Guard Roles and Missions and former executive director, New York MTA
- **Jane Garvey** – Executive vice president and chairman, APCO's Transportation Practice; former five-term administrator, Federal Aviation Administration; former deputy administrator, Federal Highway Administration; former director, Boston's Logan International Airport
- **Michael Huerta** – Executive vice president and group president, ACS Transportation Solutions; managing director for transportation, Salt Lake Organizing Committee for the Olympic Winter Games of 2002; chief of staff to Secretary Rodney E. Slater, U.S. Department of Transportation; associate deputy secretary of transportation under Secretary Federico Peña; executive director, Port of San Francisco
- **John Cullather** – Staff director - Coast Guard and Maritime, House Transportation and Infrastructure Committee
- **Carol Carmody** – Director of Transportation Initiatives, National Academy of Public Administration; former acting chairman, National Transportation Safety Board; U. S. representative to the Council of the International Civil Aviation Organization; deputy director of Congressional services for FAA Administrator Don Engen.

CONTACT INFORMATION

If you have questions about this alert, please contact:

Susan Lent.....202.887.4558.....slent@akingump.com.....Washington, D.C.
 Jamie Tucker.....202.887.4279.....jtucker@akingump.com.....Washington, D.C.