



P3 Attys Eye States' Potential If Feds End Highway Toll Ban

By Nathan Hale

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President Barack Obama's controversial proposal to lift a long-standing ban on interstate highway tolls faces an uncertain path as Congress takes on new transportation legislation, but experts say the proposal would create an alternative source of funding to help states drive much-needed infrastructure projects.

The White House's proposal, introduced April 30 in its \$302 billion surface transportation draft bill known as the Grow America Act, would shift course on the prohibition on tolls on existing highways that has stood since the Interstate Highway System's inception in 1956.

The Senate Environmental and Public Works Committee left the provision out of its version of the surface transportation bill unveiled Monday, but the issue is not likely to go away that quickly, as it presents states with a potentially lucrative, relatively stable source of funding for public-private partnerships to address safety and congestion concerns as well as their desire to generate jobs, according to attorneys.

"It will be a tremendous point of leverage for states," said Frank Rapoport, head of the public-private partnerships practice at Peckar & Abramson PC.

States such as Pennsylvania, Ohio, Florida and Texas have already made progress working with private companies to conclude deals, he noted, adding that this possibility would "further create a multitude of deal flow" with Maryland, New York and New Jersey as the next possible hot spots.

Reaching a long-term deal on a surface transportation bill is one of the major tasks facing Congress this summer, with the existing measure set to expire Sept. 30. Adding additional pressure is the expectation that the Highway Trust Fund will run out of money as soon as August.

"Unless Congress acts, up to 700,000 Americans will lose their jobs over the next year in road work, bridge building [and] transit maintenance," Transportation Secretary Anthony Foxx told the press Monday.

A tight deadline and the complications that come with an election year make it hard to predict whether lawmakers will take on controversial provisions and reach compromises or look to streamline the process, said Greenberg Traurig LLP attorney Alais L. M. Griffin, a former chief counsel for the Federal Motor Carrier Safety Administration in the Department of Transportation.

The House of Representatives has yet to act on the matter. But the Senate bill, known as Moving Ahead for Progress in the 21st Century Reauthorization, which so far addresses only highway issues, leaves out several of Obama's proposals, including the possible tolling authorizations. It takes more of a status quo approach in funding with adjustments for inflation and calls for about \$50 billion a year over six years, compared to the roughly \$75 billion per year in the White House's four-year plan.

If a compromise cannot be reached, lawmakers could possibly patch the issue with a continuing resolution to extend the current authorizations. But in his comments Monday, Foxx urged a long-term deal after 27 short-term measures from Congress in the past five years. States and local governments need the certainty of longer-term funding, something tolling could help provide, Foxx said.

He also stressed that the tolling proposal, along with other measures such as the low-interest Transportation Infrastructure Finance and Innovation Act (TIFIA) loan program, is intended as a means for states to “create more pathways for public-private partnerships,” rather than to fund the surface transportation bill. For that, the administration would count roughly evenly on continued reliance on gas taxes and “pro-growth business tax reform.”

“It’s not a free-for-all, and it’s not a way we pay for our bill,” Foxx said of the tolling, noting that governors would be enabled to apply to the U.S. Department of Transportation to toll for particular projects.

A tolling source typically provides a stable, viable, consumption-based revenue stream that is quite workable, according to George Burgess, chief operating officer of Becker & Poliakoff and co-chair of the firm's public-private partnerships practice. Burgess is a member of Florida Gov. Rick Scott's Partnership for Public Facilities and Infrastructure Act Guidelines Task Force, which is putting together a set of recommendations for a uniform P3 process for the state's law.

Unlike gas taxes, which have diminished in recent years due in part to improved automobile technology, a toll works well as a pledge in a public-private partnership project, he said. Traffic studies can be conducted to determine if tolls would provide sufficient revenue either for direct collection by the private contractor or as a revenue source for availability payments.

Potential public backlash to increased tolling is an obvious concern, although Rapoport and other attorneys said they think that if citizens see value for their payments in the form of better roads and reduced traffic congestion, then they tend to be accepting of the costs.

The trucking industry, however, presents a more definite opponent.

Commenting on the Senate's bill, American Trucking Associations Vice President of Communications Sean McNally told Law360 his organization is “pleased that the committee did not fall prey to the siren call of the tolling industry, and did not expand states' authority to toll existing interstates.”

State laws could also stand in the way, such as in Florida, where a state Department of Transportation spokesman has said that a 2012 law would continue to block tolls on existing roads that were toll-free before July 1 of that year.

Whether or not Congress votes to lift the tolling ban, there are reasons for optimism in the debate over it and other proposals, Griffin and her Greenberg Traurig colleague Jamey L. Tesler said. And despite its current differences with the president's plan, the Senate's bill also came faster and more effectively than was widely expected.

“These are long-term bills that create a long-term environment for project proponents to look at ways to succeed,” Tesler said. “It adds to the possibilities, and it can only help that conversation.”