

**February 21, 2012**

**Highway Authorization - Update**

Despite the best intentions of the House and Senate leadership to conduct the floor debates of their respective highway program bills and clear them for conference before the President's Day Recess – both chambers suffered setbacks in bringing legislation up for full debate and both will return to the topic after February 27<sup>th</sup>.

Numerous amendments have been proposed to the legislative vehicles (300+ in the House, 100+ in the Senate), raising complex policy issues outside the scope of transportation, and promising a grueling and long series of votes if all amendments are considered. Leadership in both Chambers is trying to limit non-germane amendments as well as the overall number of amendments to be considered.

A listing of many amendments of concern follows later in this email and can also be found [here](#). A more detailed discussion of the current follows below (I can give an even more exhaustive description if you want to give me a call (202-659-4620 ext.14 or cell: 202-270-8655)

The short story is: Congress is in recess and the members are largely back in their home districts. This is a great opportunity to register any concerns or suggestions you want to offer your elected representatives. When they return to Washington next week it is possible that action on highway legislation will move either very quickly, or will quickly bog down. A number of amendments which would significantly impact the toll industry may be considered. We strongly urge you to contact your congressional delegations and ask them to REJECT the following amendments as soon as possible:

## **Background**

Both measures, S. 1813 and HR7, are broadly similar, significantly reducing the number of categorical programs, expanding TIFIA funding and generally maintaining the funding levels seen under SAFTEA-LU.

The major differences are:

S.1813 provides funding only through 2013 and would leave the Highway Trust Fund essentially empty. The Senate measure is silent on the topic of tolling (barring amendments that may be considered).

H.R.7 would provide 5 years of funding and would preserve the Highway Trust Fund's financial footings, but does so by shifting mass transit expenditures into the general fund. This has been characterized as defunding mass transit which isn't correct, though it would remove the dedicated revenue stream from the Federal fuel tax and would force transit to compete for future funds along with all other federal general revenue funded programs. The House bill has several provisions relating to tolling, mainstreaming the consideration of tolling for new interstate construction though it would maintain existing restrictions on converting "free" Interstate roads to tolled facilities.

Both House and Senate packages rely on complicated funding schemes to make up for the difference in what fuel taxes alone can support. These include tax code adjustments and tighter tax enforcement, revenues from oil and gas leases in environmentally sensitive areas, revenues derived from strongly contested oil pipelines, etc.

The main Congressional focus now is to reach approval of the respective House and Senate measures (if possible) to allow a conference committee to be convened. Though there are striking differences in the duration and financial "pay-fors" in each package – it is argued that until the two sides can begin negotiating there is no telling what agreements might be arrived at.

A further complication is the impending expiration of the most recent SAFTEA-LU extension, which continues the current highway program through the end of March, 2012.

**Senate Amendments to S.1813, Moving Ahead for Progress in the 21st Century (MAP-21).**

**Senate: Hutchison #1568** amending 23 U.S.C. 129 preventing any federal funds from being used to approve new tolling on existing federal--aid highways (excepting HOV lanes).

Note: **Recommend Rejection:** this language would be very harmful to tolling since it would prohibit the conversion of **any** existing highway that has received Federal funding.

SA 1568. Mrs. HUTCHISON submitted an amendment intended to be proposed by her to the bill S. 1813, to reauthorize Federal-aid highway and highway safety construction programs, and for other purposes; which was ordered to lie on the table; as follows:

At the end of subtitle E of title I, add the following:

SEC. 1511. FREEDOM FROM TOLLS.

(a) IN GENERAL.—Section 129 of title 23, United States Code, is amended by adding at the end the following:

“(d) EXCEPTION FOR EXISTING HIGHWAY SEGMENTS.—

“(1) IN GENERAL.—Except as provided in paragraph (2), none of the funds made available to carry out this title shall be used to approve or otherwise authorize the imposition of any toll on any segment of highway located on the Federal-aid system—

“(A) the construction of which has been completed as of the date of enactment of this subsection;

“(B) that, as of the date of enactment of this subsection, is not tolled;

“(C) that was constructed with Federal assistance provided under this title; and

“(D) that is in actual operation as of the date of enactment of this subsection.

“(2) EXCEPTIONS.—

“(A) NUMBER OF TOLL LANES.—Paragraph (1) shall not apply to any segment of highway on the Federal-aid system described in that paragraph that, as of the date on which a toll is imposed on the segment, will have the same number of nontoll lanes as were in existence prior to that date.

“(B) HIGH-OCCUPANCY VEHICLE LANES.—A high-occupancy vehicle lane that is converted to a toll lane shall not be subject to this subsection, and shall not be considered to be a nontoll lane for purposes of determining whether a highway will have fewer nontoll lanes than prior to the date of imposition of the toll, if—

“(i) high-occupancy vehicles occupied by the number of passengers specified by the entity operating the toll lane may use the toll lane without paying a toll, unless otherwise specified by the appropriate county, town, municipal or other local government entity, or public toll road or transit authority; or

“(ii) each high-occupancy vehicle lane that was converted to a toll lane was constructed as a temporary lane to be replaced by a toll lane under a plan approved by the appropriate county, town, municipal or other local government entity, or public toll road or transit authority.”.

(b) INTERSTATE SYSTEM RECONSTRUCTION AND REHABILITATION PILOT PROGRAM.—Section 1216(b)(2) of the Transportation Equity Act for the 21st Century (23 U.S.C. 129 note; 112 Stat. 212) is amended by striking “3 facilities” and inserting “2 facilities”.

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**Senate: Bingaman #1514** to amend section 1105 of the bill (“Apportionment”) to take highways that have been privatized out of the lane---miles and VMT calculations for formula apportionment. –

Note: **Recommend Rejection:** this language, coupled with an amendment already added to the Senate bill extending amortization and depreciation of a concession project to 45 years, appears to specifically target potential concessioned projects, making them less attractive as investments. This amendment would deduct privatized mileage from the calculations used to determine a state’s apportionment from the HTF, reducing the funds they would otherwise receive.

SA 1514. Mr. BINGAMAN submitted an amendment intended to be proposed by him to the bill S. 1813, to reauthorize Federal-aid highway and highway safety construction programs, and for other purposes; which was ordered to lie on the table; as follows:

On page 45, between lines 16 and 17, insert the following:

“(C) FURTHER ADJUSTMENT FOR PRIVATIZED HIGHWAYS.—

“(i) DEFINITION OF PRIVATIZED HIGHWAY.—In this subparagraph, the term ‘privatized highway’ means a highway subject to an agreement giving a private entity—

“(I) control over the operation of the highway; and

“(II) ownership over the toll revenues collected from the operation of the highway.

“(ii) ADJUSTMENT.—After making the adjustments to the apportionment of a State under subparagraphs (A) and (B), the Secretary shall further adjust the amount to be apportioned to the State by reducing the apportionment by an amount equal to the product obtained by multiplying—

“(I) the amount to be apportioned to the State, as so adjusted under those subparagraphs; and

“(II) the percentage described in clause (iii).

“(iii) PERCENTAGE.—The percentage referred to in clause (ii) is the percentage equal to the sum obtained by adding—

“(I) the product obtained by multiplying—

“(aa) 1/2; and

“(bb) the proportion that—

“(AA) the total number of privatized lane miles of National Highway System routes in a State; bears to

“(BB) the total number of all lane miles of National Highway System routes in the State; and

“(II) the product obtained by multiplying—

“(aa) 1/2; and

“(bb) the proportion that—

“(AA) the total number of vehicle miles traveled on privatized lanes on National Highway System routes in the State; bears to

“(BB) the total number of vehicle miles traveled on all lanes on National Highway System routes in the State.”.

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**Senate: SA 1725.** Mr. LAUTENBERG submitted an amendment intended to be proposed by him to the bill S. 1813, to reauthorize Federal-aid highway and highway safety construction programs, and for other purposes;

**Note: Recommend Rejection:** This amendment mirrors free-standing legislation offered in the House and Senate. It would re-establish Federal oversight and approval of toll rates on bridges and tunnels on the Federal-aid highway system. US DOT would define “just & reasonable” and establish a public appeals process. This could create a serious impediment for toll bridge and tunnel operators.

Senate: SA 1725. Mr. LAUTENBERG submitted an amendment intended to be proposed by him to the bill S. 1813, to reauthorize Federal-aid highway and highway safety construction programs, and for other purposes; which was ordered to lie on the table; as follows:

At the appropriate place, insert the following:

SEC. III. REVIEW AND REGULATION OF TOLLS.

(a) IN GENERAL.—Section 135 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (33 U.S.C. 508; Public Law 100–17; 101 Stat. 174) is amended to read as follows:

“SEC. 135. REVIEW AND REGULATION OF TOLLS.

“(a) IN GENERAL.—Tolls for passage or transit over any bridge constructed under the Act of March 23, 1906 (33 U.S.C. 491 et seq.) (commonly known as the ‘Bridge Act of 1906’), the General Bridge Act of 1946 (33 U.S.C. 525 et seq.), or the International Bridge Act of 1972 (33 U.S.C. 535 et seq.), and over or through any bridge or tunnel constructed on a Federal-aid highway (as defined in section 101(a) of title 23, United States Code) under any other provision of law, shall be—

“(1) just and reasonable; and

“(2) subject to review and regulation by the Secretary, upon complaint or the initiative of the Secretary, including with respect to increases in the amount of tolls.

“(b) REGULATIONS.—The Secretary shall promulgate such regulations as are necessary to carry out this section, including regulations that—

“(1) (A) define the term ‘just and reasonable’ for purposes of this section;

(B) establish a process to determine whether tolls are just and reasonable for purposes of this section; and

(C) prescribe, when appropriate, the just and reasonable rates of tolls to be charged under this section;

“(2) establish a process for the filing of an administrative complaint to challenge a determination described in paragraph (1)(B);

“(3) authorize the Secretary, or a designated administrative law judge—

“(A) to consider a complaint from any person aggrieved by a toll increase on any bridge or tunnel described in subsection (a); and

“(B) to conduct an investigation and, if appropriate, hold a formal hearing on such a complaint; and

“(4) authorize a person who submitted a complaint described in paragraph (3)(A) to challenge the final administrative determination of the Secretary or administrative law judge on the complaint, after issuance of that determination, in the appropriate United States district court in accordance with subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).”.

(b) CONFORMING AMENDMENT.—The table of contents for the Surface Transportation and Uniform Relocation Assistance Act of 1987 (23 U.S.C. 101 note; Public Law 100–17) is amended by striking the item relating to section 135 and inserting the following:

“Sec. 135. Review and regulation of tolls.”.

. II “Sec. 135. Review and regulation of tolls.”.

#### SEC. II. STUDY ON USE OF TOLLS BY INTERSTATE AUTHORITIES.

As soon as practicable after the date of enactment of this Act, the Comptroller General shall conduct, and submit to the appropriate committees of Congress a report on the results of, a study—

(1) to evaluate the use of tolls by interstate authorities to maintain and improve surface transportation facilities; and

(2) to make recommendations to increase transparency and accountability of the funding decisions by those authorities.

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### Senate: S.A. 1670 – Kirk-Carper Amendment

Note: **Recommend Support:** This amendment would preserve and expand opportunities for toll conversion of existing Interstate highways, preserve and expand the value pricing program, and extend the current Express Lane program for two years.

An amendment by Senators Mark Kirk (IL) and Tom Carper (DE) may be offered during the pending Senate floor debate. The Kirk-Carper amendment would preserve and expand the Interstate System Construction Toll and Interstate Reconstruction & Rehabilitation Pilot programs established in current law, as well as the Value Pricing Pilot and Express Lanes Demonstration programs.

- The Interstate Reconstruction & Rehabilitation Pilot program allows three projects to reconstruct Interstate highway segments and return them to service as tolled highways.

Two project “slots” are held by Virginia and Missouri, the final slot seems to have been recently awarded to North Carolina. No projects have received final approval for converting an existing Interstate highway to a tolled facility. The Kirk-Carper amendment would increase the number of “slots” from three to ten.

- The Interstate System Construction Toll Pilot Program creates three project slots for newly constructed Interstate highway segments that could be financed through tolling. The Kirk-Carper amendment would remove the numerical limit on projects – making it available to all states.
- The Value Pricing Pilot Program is currently limited to fifteen projects. The Kirk-Carper amendment would remove the numerical limit on projects – making it available to all states.
- The Express Lanes Demonstration program would be extended by 2 years (through 2013)

**IBTTA supports this amendment for several reasons:**

- The Senate measure (MAP-21) is otherwise silent on tolling.
- The amendment preserves and improves existing law, providing a boost to the consideration of toll financing as part of Interstate highway activities. Numerous states have shown interest in participating in the Interstate Reconstruction Pilot Program and expanding available slots would address current and future interest in participating.
- The Value Pricing and Express Lane programs have been seen active participation and interest, extending them is a worthwhile investment.

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**An as yet unnumbered amendment which may be offered by Sen. Schumer (NY)**

Note: **Neutral:** This amendment reflects compromise language offered by IBTTA, ATI and the Ez-Pass group to the House T&I Committee as an alternative to their initial interest in a US DOT issued rulemaking and enforcement of national interoperability within 3 years. Current House language is very mild – calling for national interoperability within 2 years but establishing no mechanisms for enforcement. Some IBTTA members are supportive of having a formal timetable established to inspire the industry to move towards this goal. Other members are concerned that the language below is vague and may lead to unintended consequences. If offered, the amendment language may differ from what is presented.

At the appropriate place, insert the following:

SEC. II . INTEROPERABILITY OF ELECTRONIC TOLL COLLECTION SYSTEMS.

(a) DEFINITIONS.—In this section:

(1) DEMONSTRATION PROGRAM AREA.—The term “demonstration program area” means the toll transportation facilities that are affiliated with the E-ZPass Interagency Group or located in States through which Interstate Highway 95 passes.

(2) ELECTRONIC TOLL COLLECTION.—the term “electronic toll collection” means the collection of tolls based on the identification and classification of vehicles through electronic systems.

(b) DEMONSTRATION PROGRAM.—Not later than 5 years after the date of the enactment of this Act, the operator of any electronic toll collection facility in the demonstration program area shall implement policies and procedures to enable customers with accounts in good standing with any other electronic toll collection system to electronically pass through its toll facilities within the demonstration program area.

(c) INTEROPERABLE ELECTRONIC TOLL COLLECTION SYSTEM.—Not later than 10 years after the date of the enactment of this Act, the operators of all toll transportation facilities located on highways constructed or maintained with financial assistance from the Highway Trust Fund shall jointly implement a comprehensive interoperable electronic toll collection system that—

(1) promotes interstate commerce;

(2) enhances public safety;

(3) improves mobility; and

(4) protects the environment.

## House amendments to H.R.7

### HOUSE: #224 Version 1 Canseco (TX)

Note: **Recommend Rejection:** this amendment is similar to Senate amendment 1568 above. It would be very harmful to tolling since it would prohibit the conversion of **any** existing highway on the Federal-aid system.

Would prohibit tolling existing segments of any highway in the federal-aid highway system, unless the highway is currently tolled or after imposing a toll the highway has the same number of non-toll lanes as existed before the toll was imposed.

Page 129, after line 21, insert the following:

(b) IMPOSITION OF NEW TOLLS ON FEDERAL-AID SYSTEM.—Section 129 is amended by adding at the end the following:

“(d) EXCEPTION FOR EXISTING HIGHWAY SEGMENTS.—

“(1) IN GENERAL.—Except as provided in paragraph (2), none of the funds made available to carry out this title shall be used to approve or otherwise authorize the imposition of any toll on any segment of highway located on the Federal-aid system—

“(A) the construction of which has been completed as of the date of enactment of this subsection;

“(B) that, as of the date of enactment of this subsection, is not tolled;

“(C) that was constructed with Federal assistance provided under this title; and

“(D) that is in actual operation as of the date of enactment of this subsection.

“(2) EXCEPTIONS.—

“(A) NUMBER OF TOLL LANES.—Paragraph (1) shall not apply to any segment of highway on the Federal-aid system described in that paragraph that, as of the date on which a toll is imposed on the segment, will have the same number of non-toll lanes as were in existence prior to that date.

“(B) HIGH-OCCUPANCY VEHICLE LANES.— A high-occupancy vehicle lane that is converted to a toll lane shall not be subject to this subsection, and shall not be considered to be a nontoll lane for purposes of determining whether a highway will have fewer non-toll lanes than prior to the date of imposition of the toll, if—

“(i) high-occupancy vehicles occupied by the number of passengers specified by the entity operating the toll lane may use the toll lane without paying a toll, unless otherwise specified by the appropriate county, town, municipal or other local government entity, or public toll road or transit authority; or

“(ii) each high-occupancy vehicle lane that was converted to a toll lane was constructed as a temporary lane to be replaced by a toll lane under a plan approved by the appropriate county, town, municipal or other local government entity, or public toll road or transit authority.”.

Page 129, line 22, redesignate subsection (b) as subsection (c).

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**HOUSE: 222 Version 1 Grimm (NY)** Would provide clarification of the existing authority of local governments to issue or grant transportation toll, user fee or fare discount programs based on residential status.

Note: **Neutral:** this amendment would give legislative authority for providing local discounts to customers of any form of transportation authority.

Page 130, after line 2, insert the following:

(c) TOLL, USER FEE, OR FARE DISCOUNT PROGRAMS.—

(1) AUTHORITY TO PROVIDE PROGRAMS.— States, counties, municipalities, and multi-jurisdictional transportation authorities that operate or manage roads, highways, bridges, railroads, busses, ferries, or other transportation systems are authorized to establish programs that offer discounted transportation tolls, user fees, or other fares for residents of specific geographic areas in order to reduce or alleviate toll burdens imposed upon such residents.

(2) RULES OR REGULATIONS WITH RESPECT TO PROGRAMS.—States, counties, municipalities, and multi-jurisdictional transportation authorities that operate or manage roads, highways, bridges, railroads, busses, ferries, or other transportation systems are authorized to enact such rules or regulations as may be necessary to establish the programs authorized under paragraph (1).

(3) RULE OF CONSTRUCTION.—Nothing in this subsection may be construed to limit or otherwise interfere with the authority, as of the date of enactment of this Act, of States, counties, municipalities, and multi-jurisdictional transportation authorities that operate or manage roads, highways, bridges, railroads, busses, ferries, or other transportation systems.

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## #223 Version 2 Grimm (NY)

Note: **Recommend Rejection:** This amendment mirrors free-standing legislation offered in the House and Senate and the Senate Amendment 1725 noted above. It would re-establish Federal oversight and approval of toll rates on bridges and tunnels on the Federal-aid highway system. US DOT would define “just & reasonable” and establish a public appeals process. This could create a serious impediment for toll bridge and tunnel operators.

Revised Would restore the Department of Transportation's ability to determine whether tolls are just and reasonable, provide venues by which to have the determination of “just and reasonable” toll rates heard and decided, and would require DOT to promulgate rules to define "just and reasonable." Would also redefine the process for making determinations and require the Comptroller General to do a report and make recommendations for increasing the transparency and accountability of tolling authority budget practice.

At the end of title II of the Rules Committee Print, insert the following:

### SEC. 17. REVIEW AND REGULATION OF TOLLS.

(a) IN GENERAL.—Section 135 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (33 U.S.C. 508; Public Law 100–17; 101 Stat. 174) is amended to read as follows:

#### “SEC. 135. REVIEW AND REGULATION OF TOLLS.

“(a) IN GENERAL.—Tolls for passage or transit over any bridge constructed under the Act of March 23, 1906 (33 U.S.C. 491 et seq.) (commonly known as the ‘Bridge Act of 1906’), the General Bridge Act of 1946 (33 U.S.C. 525 et seq.), or the International Bridge Act of 1972 (33 U.S.C. 535 et seq.), and over or through any bridge or tunnel constructed on a Federal-aid highway (as defined in section 101(a) of title 23, United States Code) under any other provision of law, shall be—

“(1) just and reasonable; and

“(2) subject to review and regulation by the Secretary, upon complaint or the initiative of the Secretary, including with respect to increases in the amount of tolls.

“(b) REGULATIONS.—The Secretary shall promulgate such regulations as are necessary to carry out this section, including regulations that—

“(1) (A) define the term ‘just and reasonable’ for purposes of this section;

“(B) establish a process to determine whether tolls are just and reasonable for purposes of this section; and

“(C) prescribe, when appropriate, the just and reasonable rates of tolls to be charged under this section;

“(2) establish a process for the filing of an administrative complaint to challenge a determination described in paragraph (1)(B);

“(3) authorize the Secretary, or a designated administrative law judge—

“(A) to consider a complaint from any person aggrieved by a toll increase on any bridge or tunnel described in subsection (a); and

“(B) to conduct an investigation and, if appropriate, hold a formal hearing on such a complaint; and

“(4) authorize a person who submitted a complaint described in paragraph (3)(A) to challenge the final administrative determination of the Secretary or administrative law judge on the complaint, after issuance of that determination, in the appropriate United States district court in accordance with subchapter II of chapter 5, and chapter 7, of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).”.

(b) STUDY ON USE OF TOLLS BY INTERSTATE AUTHORITIES.—As soon as practicable after the date of enactment of this Act, the Comptroller General shall conduct, and submit to the appropriate committees of Congress a report on the results of, a study—

(1) to evaluate the use of tolls by interstate authorities to maintain and improve surface transportation facilities; and

(2) to make recommendations to increase transparency and accountability of the funding decisions by those authorities.

(c) CONFORMING AMENDMENT.—The table of contents for the Surface Transportation and Uniform Relocation Assistance Act of 1987 (23 U.S.C. 101 note; Public Law 100–17) is amended by striking the item relating to section 135 and inserting the following:

“Sec. 135. Review and regulation of tolls.”.

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**House: #172 , Johnson, Hank (GA)** Would prevent HOV lanes from being converted to HOT lanes.

Note: **Recommend Rejection:** High Occupancy Toll (HOT) lane conversions of existing HOV lanes is a major topic of interest and activity in many metropolitan regions and within many toll agencies.

OFFERED BY MR. JOHNSON OF GEORGIA

Page 130, after line 12, insert the following (and redesignate any subsequent subsections accordingly):

(b) NO CONVERSION OF HOV TO TOLL LANES.— Section 166(c) is amended by striking paragraph (2).

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**House: #96 Ellison (MN)** Would clarify High Occupancy Vehicle conversion language and return to the current standard prioritizing the use of surplus tolling revenues for safety improvements or alternatives to single occupancy vehicle travel.

Note: **Recommend Rejection:** To the extent that High Occupancy Toll (HOT) lanes generate surplus revenues these funds should also be allowed for roadway maintenance and repairs.

OFFERED BY MR. ELLISON OF MINNESOTA

Page 120, line 21, insert “high-occupancy” before “toll”.

Page 122, line 14, insert “subject to section 166(c)(3),” before “if”.

Page 130, strike lines 13 through 17.

Page 130, line 18, strike “(c)” and insert “(b)”.