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Surface Transportation: Reauthorization of TEA-21

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CONTENTS

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SUMMARY

On May 31, 2005 the extension legislation that is currently providing for authorization of federal highway, highway safety, and transit programs will expire. Most observers thought that the reauthorization process, that was supposed to have been completed by October 1, 2003, would have long since been accomplished. Reauthorization, however, has become captive to two interrelated issues, money and how that money will be distributed among the states.

The 108th Congress came to a close with a surface transportation Conference Committee in place, however, conferees were unable to reach agreement either among themselves or with the Bush Administration as to how large the six-year reauthorization package would be in dollar terms. Simply put, many Members of Congress were asking for more in total program spending then the Administration, worried about the deficit, was willing to support. The Conference was also unable to agree on a solution to the long standing donor-donee state funding distribution question, with donor states continuing to insist on a 95% return on fuel tax revenues and donee states insisting that increased funding for donor states not come at their expense.

In addition to money issues, Congress will likely be faced with a number of other potentially difficult questions as part of the expected reauthorization debate. These include the creation of a new consolidated safety program, enhanced environmental streamlining regulations, changes in clean air conformity regulations, funding for transit new starts, expanded reliance on innovative financing and tolls, and spending on congressional high priority projects (earmarks).

The Administration had publically stated its intent to hold highway and transit spending to levels consistent with those it supported in the last Congress. In its FY2006 budget proposal, however, the Administration suggested it would accept a modest increase in total spending to a level comparable to what was discussed in Conference Committee in the 108th Congress, $284 billion over six years.

Legislation has now been introduced in the House, H.R. 3, the Transportation Equity Act: A Legacy for Users (TEA-LU), that reauthorizes surface transportation programs for six years at the $284 billion level. Committee mark-up of this legislation occurred on March 2. Senate legislation is likely to be introduced in March. Several Members of Congress in both the House and the Senate, however, are continuing to support higher levels of spending. As a result, it remains unclear whether, or how, a compromise on reauthorizing legislation can be reached before May 31, 2005.

It is likely that most of the legislative provisions considered in the 108th Congress will be reintroduced early in the 109th Congress. H.R. 3, for example, is very similar to House legislation in the last Congress. This Issue Brief does not discuss these provisions in detail. Rather, a detailed description of the legislation under consideration at the end of the last congressional session can be found in: CRS Report RL32226. *Highway and Transit Program Reauthorization Legislation in the 2nd Session, 108th Congress.* For a historical discussion of surface transportation program issues at the start of the current reauthorization process, see CRS Report RL31665, *Highway and Transit Program Reauthorization.*

Most Recent Developments

All federal surface transportation programs continue to operate as a result of legislation that extends provisions of the Transportation Equity Act for the 21st Century (TEA-21, P.L. 105-178 and P.L. 105-206) until May 31, 2005. The 108th Congress was unable to complete a conference on competing House and Senate reauthorization proposals prior to adjournment. The leadership of the House Committee on Transportation and Infrastructure introduced legislation on February 9, 2005, the Transportation Equity Act: A Legacy for Users (TEA-LU)(H.R. 3) reauthorizing surface transportation programs through FY2009. Mark-up of this bill in full committee occurred on March 2, 2005. Floor consideration of the bill is now scheduled for March 9 and 10.

Background and Analysis

Federal surface transportation programs are a major component of national spending on transportation capital infrastructure. According to a recent Government Accountability Office (GAO) report, for example, 46% of all U.S. highway capital spending in FY2002 was attributable to federal funding. Likewise, it is the availability of federal transit funding that has provided the possibility of bus and rail transit projects in many communities during the last few decades.

Structurally, surface transportation legislation normally consists of at least five separate titles which can be viewed as the principal programs and their funding mechanism; highways, highway safety, transit, research, and funding. Additional titles are sometimes included in reauthorization legislation. It should be pointed out that the term program has multiple meanings in a discussion of federal surface transportation policy. The larger federal highway program, for example, consists of a number of separate programs such as the surface transportation program (STP). Funds in the various programs are distributed on the basis of formulas (known as apportioned programs in highway parlance) and on a discretionary basis (also referred to as the allocated programs in the highway program).

The majority of funding in the overall surface transportation bill, and the vast majority of highway funding, goes to the so-called "core" highway programs. These five programs: interstate maintenance (IM), national highway system (NHS), surface transportation system (STP), bridge and bridge maintenance, and congestion, mitigation, and air quality (CMAQ) are all apportioned programs. A sixth program, the minimum guarantee, is sometimes referred to as a core program and has become the largest single highway program in dollar terms. Most remaining highway funding goes to the allocated programs, such as federal lands highways, which are ostensibly under the control of the Federal Highway Administration (FHWA), but in recent practice have been largely earmarked.

The structures of the highway safety, research, and transit programs also include a mix of formula and discretionary programs. In the transit program, for example, about half of all funding is distributed directly to transit operators by the urbanized area formula program and the non-urbanized area formula program. Each of the major programs also includes planning, environmental, and other elements that can be major subjects of discussion during reauthorization debates.

Surface Transportation Finance

Federal funding for surface transportation is closely linked to the revenue stream provided by the highway trust fund. The trust fund is in fact two separate accounts - highways and mass transit. The primary revenue sources for these accounts are the 18.4 cent per gallon tax on gasoline and a 24.4 cent per gallon tax on diesel fuel. Although there are other sources of revenue for the trust fund, these fuel taxes provide about 90% of the income to the funds. Of these amounts, the transit account receives 2.86 cents per gallon and 0.1 cent per gallon is reserved for an unrelated leaking underground storage tank (LUST) fund. Over the almost 50 year life of the trust fund there have been several increases in the level of taxation. The last increase in the fuel tax occurred in 1993 (these funds were not actually deposited into the trust fund initially, but were deposited in the Treasury general funds for deficit reduction purposes until 1996).

For almost 50 years the trust fund has been a reliable source of funding for surface transportation. In FY2004, for example, the highway account received tax revenues of $31 billion, while the mass transit account received $5 billion. For most of its history the trust funds have collected more then has been expended. This situation has been changing in the last few years. The FY2004 limitation on obligations was set at $33.6 billion and the FHWA total appropriation was $34.5 billion, both amounts of which are higher then the revenues collected for the fiscal year. For a number of reasons, however, the trust fund's unexpended balance remains substantial, but is declining. There is some uncertainty at the moment about the long term outlook for the financial health of the trust fund. This is in spite of the fact that the American Jobs Creation Act of 2004 (P.L. 108-357), passed in the closing days of the 108th Congress, provided the trust fund with additional future income by changing elements of federal gasohol taxation. These changes could provide the trust fund with an additional $4 billion per year starting in FY2005. Although a clearer picture of the future of the trust fund emerged when both Treasury and the Congressional Budget Office (CBO) released their projections in late January and early February 2005, there are still concerns about its ability to fully fund surface transportation programs at the proposed $284 billion level..

Both the House and Senate passed reauthorization legislation in the 2nd Session of the 108th Congress and a Conference Committee was formed. The Conference Committee, Congressional Leadership, especially in the House, and the Administration were unable to reach agreement about total program funding for the next reauthorization period. This was largely because some Members of Congress backed a level of project funding larger then the Bush Administration was willing to support. Part of the Administration's objection related to the above debate about the future health of the trust funds vis-a-vis the Administration's adamant objection to raising fuel taxes either now or in the future. Some Members of Congress, on the other hand, had identified a number of mechanisms, including the now adopted gasohol changes, other tax changes, and rescissions that they felt would support a larger program. The gasohol changes by themselves, however, would not have been sufficient to fund the program size desired by many Members. Congress must now begin the process of considering reauthorization anew, with all of these financing issues still largely unresolved.

The Legislative Backdrop

Federal highway, highway safety, and transit programs are subject to periodic reauthorization. The most recent authorization, TEA-21, provided funds for the period FY1998 - FY2003. Since October 1, 2003 all federal surface transportation programs have continued to operate on the basis of short term extension legislation. The most recent of six extensions to date (P.L. 108-310) keeps the programs in operation until May 31, 2005.

Although there have been numerous short term reauthorizations in the history of these programs, there is a consensus in the surface transportation community that long-term reauthorizations, such as that afforded by TEA-21, better accommodates the long term planning needs and construction horizons associated with the provision of highway and transit infrastructure. The current situation, reauthorization by extension, has created a great deal of uncertainty about the likelihood of future funding in the highway and transit community. Highway and transit interests at the state and local level, and in the private sector, can be expected to exert considerable pressure on Congress to adopt reauthorization legislation early in the 109th Congress.

Funding issues aside, there are a number of additional issues that could serve to make an early resolution of the reauthorization debate difficult. After funding the most important issue is the distribution of that funding among the states and localities. The most controversial part of this debate is the so-called donor/donee problem which is addressed in more detail in the following section.

Environmental issues were viewed as a potential stumbling block when reauthorization consideration began. This is largely due to the Administration's strong support for environmental streamlining which seeks to reduce the time that any particular infrastructure project must spend in review prior to construction. This issue is also discussed in more detail in a later section of this issue brief.

Another issue likely to receive attention is the number and distribution of earmarks, known as high priority projects, in highway legislation. These congressionally earmarked projects have risen in number and in dollar value in each of the last three reauthorization cycles. There were almost 3,000 designated high priority projects in the House bill passed last year, with Senate requests for these projects still unknown in number and in cost (the Senate normally adds its projects during Conference). The House Transportation and Infrastructure Committee sent a dear colleague letter to all House Members of the 109th Congress asking that they make their project request known to the Committee in mid-February.

The Administration has suggested that it would like to revisit the issue of innovative financing and tolls as part of the legislative debate in this session. Although the Administration has not released any detailed proposals, it has stated its interest in seeing greater use of these methodologies in the future provision of infrastructure. The Administration released a report in January 2005 stating the case for innovative finance. It has not, however, turned this information into specific legislative proposals.

House Reauthorization Legislation, H.R. 3.

On February 9, 2005 the leadership of the House Committee on Transportation and Infrastructure introduced its reauthorization vehicle for the 109th Congress. The Transportation Equity Act: A Legacy for Users (H.R. 3) closely follows the provisions of legislation that the House passed in the 108th Congress, H.R. 3550. The House has posited an ambitious schedule for H.R. 3 consideration, with mark up occurring on March 2 and floor consideration scheduled for the following week. As introduced the bill provides $284 billion in spending for the period FY2004 - FY2009 (with FY2004 already complete, this bill in reality provide five years worth of funding). This is the same amount that was discussed during the uncompleted conference committee proceedings in the 108th Congress. It is also the same amount that the Bush Administration has identified as an acceptable level of funding in its FY2006 budget submission.

The bill as introduced, however, is incomplete. The minimum guarantee program which largely determines the actual distribution of highway funds to the states is absent. Detailed information identifying earmarks is was absent from the bill prior to Committee mark-up, although total funding for this activity remains at the same level considered last year. The bill does contain a so-called "reopener" provision that allows Congress to revisit the issue of total funding authorizations provided during the life of the bill. The Bush Administration objected to this item last year and stated at the time that it would veto any bill that contained such a provision. There is no reason to believe that its objections to this section have changed. Although there is little debate over most of the policy provisions of H.R. 3 it remains to be seen whether overall funding and distribution issues that prevented the final passage of last year's legislation can be overcome before the current program extension expires on May 31, 2005.

Equity Issues: The Donor-Donee Question

Historically, transportation policy battle lines have often formed along regional rather than partisan alignments. The regional character of transportation policy is evident in the debate over the equity of distribution of federal highway aid among the states. Since 1982 Congress has included legislative provisions in every surface transportation reauthorization act to remedy these perceived funding distribution concerns through a variety of minimum guarantee provisions. For many years, some states (mostly Southern as well as some Mid-Western and Western States) have complained that they receive significantly less federal highway aid than their highway users pay in federal highway taxes to the highway trust fund (HTF). These states, referred to as donor states, have pressed for legislative remedies that would assure them a higher share rate-of-return, most recently 95%, on their tax payments to the Treasury. Donee states, states that receive more federal highway aid than they pay in federal highway taxes, have not opposed equity provisions per se but have opposed any reduction in their existing shares.

The basic donor state argument is a relatively straightforward call for equity or fairness. Donor state advocates generally contend that for too many years they have been subsidizing the repair and improvement of donee state infrastructure, especially the older highway infrastructure in the Northeast. Most also argue that they are more road dependent and do not benefit from federal transit spending to the same degree as some donee states. Southern and western donor states also argue that they are fast growth areas, relative to most donee states, and that, consequently, their needs are as great or greater. Finally, they argue that with the completion of the Interstate Highway System there is no valid rationale for the donor-donee disparity. Donee state advocates argue that fairness should not be separated from needs. They assert that the age of their highway infrastructure, especially in the Northeast, the high cost of working on heavily congested urban roads, and the limited financial resources in large sparsely populated western states justify their donee status. They also argue that there are needs that are inherently federal rather than state and that a national highway network cannot be based solely on state or regional boundaries. Donee states also argue that mid-western and southern states spend less local and state money on highways than donee states, and chide them for pleading for federal funds when they are unwilling to ante up their own resources.

The 109th Congress faces a difficult policy problem in resolving the seemingly contradictory goals of meeting donor state demands for a higher rate-of-return and donee state demands to be held harmless at a time when the HTF revenue base is insufficient to easily fund both goals. Part of the problem is that a bill that simply reduces the shares of donee states to increase the shares of donor states may have difficulty overcoming a filibuster by donee states in the Senate. To construct a minimum guarantee (MG) mechanism that can overcome this obstacle, previous reauthorization bills included "hold harmless" provisions that maintained certain base shares for all states. This meant that part of the process of bringing donor state shares up to the MG percentage required increasing the overall federal highway program size, usually by a significant amount (since donee state funding could not be reduced). In other words, providing equity remedies that keep both donor and donee states reasonably content has been accomplished by giving more money to all states but giving even more to donor states to bring their shares up to a designated per cent share, currently 90.5%. Providing equity in this way is very expensive in dollar terms, the minimum guarantee program under TEA21, in fact, became the largest highway program.

In a broader sense, the debate over equity remedies has implications for a number of overarching issues. An equity guarantee of a 95% rate of return could, in the minds of some, leave little room for addressing other or additional transportation needs that are uniquely federal, such as the Federal Lands Highway program or the Interstate Maintenance program. Also, the role of the federal government vis-a-vis the states comes into question as the minimum guarantee approaches 100%. At what point does the federal role become so limited that converting the Federal aid highway program to a revenue sharing or a block grant program make sense? Another controversial issue is whether the MG should be broadened, as some states have proposed, to include Federal Transit Administration programs.

H.R. 3, as introduced, did not include any legislative language in its Minimum Guarantee section (Section 1104) and states that the language is "to be supplied." According to press reports, Transportation and Infrastructure Committee Chairman Young has indicated that the bill's Minimum Guarantee Program will achieve a guaranteed rate of return of 92% (a 1.5% increase over both the existing guarantee and the version of TEA-LU that was passed by the House in the last Congress). **(CRS contacts: Robert Kirk and John Fischer)**

Traffic Safety and Research

A part of the debate over surface transportation program reauthorization is reauthorization of federal funding for various programs affecting traffic or highway safety.

The debate will consider the amount of funding, program purposes, the structure of, and eligibility needed for these activities. Relevant programs are administered by the FHWA, the National Highway Traffic Safety Administration (NHTSA), and the Federal Motor Carrier Safety Administration (FMCSA). Various interest groups and many Members of Congress seek additional funding to improve highway infrastructure and operations affecting safety. They also seek funding to increase seat-belt use rates, reduce alcohol- and drug-impaired driving, strengthen commercial driver licensing, and improve the federal/state partnership affecting truck and bus safety. Competition for funds is intense among various safety programs. Key challenges will be finding additional funds to increase federal support for safety-oriented activities, and evaluating the costs and benefits of changes in federal policy. Decisionmakers also face the difficult challenge of balancing funds used to achieve safety objectives against funds needed to meet other surface transportation objectives, such as reducing congestion and repairing aging infrastructure.

More specifically, Congress is considering how to allocate billions of dollars each year of federal-highway categorical grants to improve the design, throughput, and overall performance and safety of the highway infrastructure. At issue are the amount (if any) of set-asides for different safety-oriented programs and whether a separate categorical grant for safety is needed. Based on the legislation considered during the 108th Congress, it appears likely that a new separate grant for safety may be authorized, with particular emphasis on funds to enhance safety at grade crossings and reduce road hazards. The set aside for highway safety infrastructure projects now specified as part of the Surface Transportation Program (STP) may be eliminated and a new Safe Routes to School program is likely to be established. Congress is also considering the nature and purposes of a strategic plan that may be mandated to help guide safety investments.

Congress is likely to consider legislation that would strengthen the enforcement powers of the FMCSA, authorize a dedicated grant program to improve state commercial driver licensing (CDL) efforts, establish a Medical Review Board to provide advice on driver physical qualification standards, and continue funding for various state and federal commercial vehicle information systems and networks. The issues that are likely to be debated include the amount of funding for core FMCSA activities and for the Motor Carrier Safety Assistance Program (the federal/state enforcement partnership consisting primarily of roadside inspections and various audits); the scope, nature, and funding amount for a "share the road" education and enforcement program; and whether to establish a working group to help guide the CDL program. Also, Congress is likely to consider the pros and cons of requiring NHTSA to issue a variety of new regulations to improve vehicle safety.

As part of the reauthorization process, Congress is addressing how much money should be authorized for the core research, development, and technology deployment activities conducted or supported by the FHWA, and which objectives should receive emphasis or dedicated funding. Also, the reauthorization statute is likely to include a specific funding amount for the Local Technical Assistance Program, the National Highway Institute, and the University Transportation Research (or Centers) Program, as well as the Intelligent Transportation Systems program. **(CRS contact: Paul Rothberg)**

Conformity of Transportation Plans and State Implementation Plans (SIPs)

Under the Clean Air Act, areas that have not attained one or more of the six National Ambient Air Quality Standards must develop State Implementation Plans (SIPs) demonstrating how they will reach attainment. As of April 2004, at least 124 areas with a combined population of 159 million people were subject to the SIP requirements. Section 176 of the Clean Air Act prohibits federal agencies from funding projects in these areas unless they "conform" to the SIPs. An area's Transportation Improvement Program (TIP), which identifies major highway and transit projects an area will undertake, must demonstrate conformity each time it is revised (i.e., at least every two years). To do so, it must show that the projects to be undertaken will not lead to an increase in emissions that would delay attainment of air quality standards. Highway and transit projects cannot receive federal funds unless they can make this demonstration.

Transportation planners and highway builders in a number of areas have expressed concern that conformity requirements could lead to the temporary suspension of funding for major projects, as happened in the late 1990s in Atlanta. Many have argued that the conformity requirements need to be made more flexible. As currently written, for example, the Clean Air Act provides no authority for waivers of conformity, and only a limited set of exempt projects (mostly safety-related or replacement and repair of existing transit facilities) can be funded in areas where conformity has lapsed. In addition, many have raised concerns about a mismatch between the SIP, TIP, and long range transportation planning cycles, and have called for less frequent, but better coordinated demonstrations of conformity. **(CRS contact: Jim McCarthy)**

Environmental Issues

During the reauthorization process, environmental issues garnered significant attention from both Members of Congress and interested stakeholders (e.g., state transportation agencies, transportation construction organizations, and environmental groups). This attention was due to both the impact that surface transportation projects can have on the environment and the impact that compliance with environmental requirements can have on project delivery. As a result of this concern, both bills previously introduced in the House and the Senate during the 108th Congress included a variety of environmental provisions. Generally, those provisions would have done one of the following: authorize funding to eliminate, control, mitigate, or minimize regulated environmental impacts associated with a surface transportation programs or projects; or specify procedures required to be undertaken to expedite compliance with certain environmental requirements. With regard to the latter, both bills included provisions that would have changed the procedures DOT would be required to follow to comply with the Clean Air Act and the National Environmental Policy Act (NEPA). (For information on these issues, see CRS Report RL32454, *Environmental Provisions in Surface Transportation Reauthorization Legislation Proposed During the 108th Congress* and CRS Report RL32032, *Streamlining Environmental Reviews of Highway and Transit Projects: Analysis of Legislative Proposals in the 108th Congress*.)

It is anticipated that environmental provisions similar to those in H.R. 3550 and S. 1072 will be included in reauthorization legislation that is reintroduced during the 109th Congress. **(CRS contact: Linda Luther)**

Transit Reauthorization Issues

The key issue in transit reauthorization is overall funding. DOT has estimated that federal assistance to transit would need to rise from its current level of $7 billion annually to $9 billion annually to maintain the current level of service in the face of rising demand for transit, and to $11 billion annually to improve on the current level of transit service. These are higher levels of spending than can be supported by the current revenues to the Mass Transit Account of the Highway Trust Fund.

The gap between available funding and requests for funding is perhaps greatest for the federal program that funds new, primarily rail, transit infrastructure, the New Starts program. The New Starts program is a discretionary program; eligible projects are evaluated by the Federal Transit Administration (FTA), which then recommends projects to Congress for funding. The New Starts program has been receiving around $1.2 billion annually. FTA notes that there are 41 projects in the latter stages of the New Starts evaluation process, with some $22 billion in federal funding requested; in other words, at current funding levels the next 20 years of New Starts funding would already be spoken for. Meanwhile, there are over 120 additional new transit projects that communities are actively considering. To extend the available funding, the Congress has directed the FTA not to provide a federal share higher than 60% for New Starts projects, and the Bush Administration has proposed reducing the federal share to 50% (the federal share is currently 80% by statute, but the actual federal share provided for current projects averages around 50%).

Most transit funding goes to large urban areas, where most of the population lives and where road congestion and air pollution leads to calls to increase transit usage. There is also a growing demand for transit service in rural areas, where population densities are low but where trip distances may be long and transportation alternatives few. Both the House and Senate reauthorization legislation in the 108th Congress proposed increasing the share of transit funding that goes to rural areas.

Although not normally viewed as a reauthorization issue in the past, transit security could be a component of the debate this session. The bombings of commuter trains in Madrid and a subway station in Moscow early in 2004 heightened concerns about the security of transit systems in America. U.S. transit systems carry nearly 10 billion passengers annually; about 60% of that is bus ridership, with the rest divided between subway, commuter rail and light rail modes. Transit systems are designed for easy access, making them vulnerable to attack. The transit community has requested $5.2 billion for capital improvements and an additional $800 million annually for operating costs to increase the security of transit systems. Issues include who should pay for transit security, how funding should be allocated among transit agencies and modes, and the allocation of federal spending between defending potential targets and eliminating potential threats. **(CRS contact: Randy Peterman)**

Recreational Trails Program (RTP)

As introduced, H.R. 3 (TEA-LU) would continue the Recreational Trails Program, initially authorized under ISTEA and expanded under TEA-21, as a state-administered, federal-aid grant program to help states develop and maintain recreational trails for motorized and non-motorized trail uses. TEA-21 authorized funding for the RTP at $50 million annually; TEA-LU would increase funding to $53 million for FY2004; $70 million for FY2005; $80 million for FY2006; $90 million for FY2007; $100 million for FY2008; and $110 million for FY2009 ($503 million total). TEA-LU would amend the program to include permitting the federal share for recreational trails projects to be determined in accordance with 23 U.S.C. §120(b); allowing recreational trails funds to be used toward the federal share of certain other federal programs; permitting pre-approval planning and environmental compliance costs be credited toward the non-federal share of a project; operating educational programs to promote safety and environmental protection as those objectives relate to the use of recreational trails; and encouraging states to enter into contracts and agreements with youth service corps for construction and maintenance of trails. **(CRS contact: Sandra L. Johnson)**

For Additional Reading

CRS Report RL32454. *Environmental Provisions in Surface Transportation Reauthorization Legislation Proposed During the 108th Congress,* by Linda Luther.

CRS Report RL31735. *Federal-Aid Highway Program: "Donor-Donee" State Issues,* by Robert S. Kirk.

CRS Report RL31665. *Highway and Transit Program Reauthorization*, John W. Fischer, Coordinator.

CRS Report RL32226. *Highway and Transit Program Reauthorization Legislation in the 2nd Session, 108th Congress,* John W. Fischer, Coordinator.

CRS Report RL32409. *Highway Program Equity Guarantee Issues*, by Robert S. Kirk.

CRS Report RL32032. *Streamlining Environmental Reviews of Highway and Transit Projects: Analysis of Legislative Proposals in the 108th Congress*, by Linda Luther.

CRS Report RL32106 *Transportation Conformity Under the Clean Air Act: In Need of Reform?* by James McCarthy.