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How Obama's Highway Toll Bill Would Affect PPP Activity

Law360, New York (May 01, 2014, 1:14 PM ET) -- In a major policy shift with potentially large implications for U.S. infrastructure public-private partnership activity, the Obama administration has proposed to change federal law to give U.S. states broad authority to put tolls on existing interstate highways to provide funding for transportation purposes. The administration's proposal is contained in a proposed $302 billion new surface transportation bill sent to Congress. The current federal surface transportation funding bill, known as "MAP 21," expires in September.

Under current federal law that dates back to the creation of the Interstate Highway System in 1956, tolls are permitted only on grandfathered toll roads that were incorporated into the new system in 1956 (such as the corridor of toll roads from New York to Chicago) and, under later amendments, on newly built toll roads, tolled lanes added to existing roads for congestion relief, or converted high-occupancy vehicle lanes. In addition, a narrow pilot program has allowed the U.S. Department of Transportation to authorize tolls on up to three existing highways for reconstruction purposes.

Putting tolls on the existing free lanes of the 50,000 miles of the interstate system could provide massive transportation revenues of more than $50 billion annually at toll levels comparable to existing tolled facilities.

The administration's proposal would allow toll revenue from existing highways to be used for reconstruction of the tolled highway itself, or for other components of the state highway system. It would also allow toll revenues to be used to improve public transit services within the same transportation corridor as the tolled facility or, more generally, for any other purposes eligible for federal transportation funding under the statute.

While the proposal would not require that toll revenues be used for PPP projects, the tolls could support concession projects to reconstruct existing roads, with all or part of the revenue risk shifted to private operators, or to support availability payment or other PPP agreements with private operators to build or rebuild and operate other facilities.

If enacted, the new flexibility would combine with and support the increasingly widespread use by U.S. states of PPP structures for U.S. transportation projects, particularly in the highway sector.

At the outset of the Obama administration, incoming Transportation Secretary Ray LaHood made a public comment about the possibility of interstate tolling, or some other mileage-based revenue system, to replace or supplement the gas tax. This comment was immediately repudiated by the White House.

The shift in administration thinking arises now in the context of a proposal for surface transportation funding that, even at the $302 billion level, is widely viewed as inadequate to meet U.S. needs; and with a significant part of that proposed $302 billion coming from revenue sources other than the Highway Trust Fund, this shift will be highly controversial.

At a minimum, by making its proposal at this time, the administration has opened up public discussion of the interstate tolling issue in a new way.

The proposed bill also has other provisions that reflect the Obama administration's support for U.S. PPP activity. These include:

(1) A $4 billion increase in the authorized level of tax-exempt "private-activity bonds" for qualified highway, mass transit or surface freight transfer projects that have significant amounts of private sector investment. Transportation funding legislation adopted in 2005 provided a national PABS authorization of $15 billion. With private sector sponsors increasingly using PABS to finance PPP projects and increased receptivity from the capital markets, an increase in this authorization will ensure continued availability of this financing incentive.

(2) Amending the Transportation Infrastructure Finance and Innovation Act program to increase administrative funding to allow the program to increase staffing and pay for other necessary resources to manage and oversee its rapidly growing portfolio. TIFIA's expanded portfolio is a direct result of the increase in funding made available pursuant to "MAP-21," the most recently adopted, multiyear transportation funding legislation enacted by Congress in 2012.

(3) Amendments to the RRIF (Railroad Rehabilitation and Improvement Financing) Program that enhance flexibility of the Federal Railroad Administration in reviewing and approving loan applications and improve access to the program, particularly for smaller borrowers. These amendments will make the RRIF program similar to the TIFIA program, which as noted above has been highly successful at attracting a range of project types.

(4) Reauthorizing for an additional four years the very successful — and increasingly oversubscribed — Transportation Investment Generating Economic Recovery Grant program. Consistent with the existing TIGER authorization, the secretary of USDOT would be authorized to award these funds on a competitive basis and select merit-based projects that make a significant impact on the nation, a metropolitan area or a region.

(5) In addition, a new competitive grant program called Fixing and Accelerating Surface Transportation (or "FAST") would be authorized. Modeled after the Department of Education’s Race to the Top program, this program would award funding to a state, Native American tribe or metropolitan planning organization to incentivize the adoption of innovative strategies and best practices in transportation planning and financing.

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