Public Policy and Law Alert

President Signs $8 Billion Highway Trust Fund Bailout Bill, Foretells Heightened Transportation Debate in Next Congress

On Monday, September 15, 2008, the President signed HR 6532, a bill to amend the Internal Revenue Code of 1986 to restore the Highway Trust Fund (HTF) balance. The bill was passed by the Senate and House, as amended, the previous week. HR 6532 transfers funds from the general Treasury to the HTF to provide for the funding of authorized federal transportation priorities through the end of FY 2009. The bill’s swift consideration and passage was prompted by a September 5 announcement by Department of Transportation (DOT) Secretary Mary Peters that the HTF would have a negative account balance by the end of September.

Bill Details

HR 6532, as signed by the President on September 15, appropriates $8.02 billion to the HTF. The bill provides for the transfer of the funds from the Treasury Department’s general fund to the HTF, specifically to replenish the HTF’s highway account. As amended, the transfer took effect upon enactment of the bill, rather than on September 30, as specified in the original House-passed bill.

Background

The HTF, originally established by the Highway Revenue Act of 1956, is a fund operated by the Treasury for the purpose of funding authorized federal surface transportation programs. Specifically, the HTF consists of two accounts – highways and mass transit. HTF revenues are generated from certain taxes, primarily the federal excise taxes on gasoline (18.4 cent per gallon) and diesel (24.4 cent per gallon) fuels. Combined, these two taxes provide about 90 percent of the income to the HTF. Of these funds, 2.86 cents per gallon are committed to the mass transit account. The last increase in the fuel tax occurred in 1993.

For most of the 52 years since its establishment, the HTF has enjoyed a reliable revenue stream from the fuel taxes. Revenues accrued from these taxes have provided sufficient funding for federal surface transportation priorities, as authorized under the six-year transportation authorization bill. However, in recent years several factors, including rising fuel prices, increased sales of hybrids and other fuel-efficient vehicles, and a dramatic escalation of construction costs, have combined to cause the outlay of funds in the HTF to exceed revenues.

Federal surface transportation programs are currently authorized by the Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users (SAFETEA-LU) (P.L. 109-59). SAFETEA-LU reauthorized federal surface transportation programs through the end of FY 2009 and provided for $286.4 billion over six years (or $244.1 billion for the five years remaining in the authorization at the time of the bill’s passage).

The HTF was already operating at a deficit when Congress passed SAFETEA-LU in the Summer of 2005. At the time of the bill’s passage, Congress estimated that there would be sufficient funds in the HTF to fund authorized programs through the end
of FY 2009. However, by this year both the Office of Management and Budget and the Congressional Budget Office agreed that cash balances in the highway account would be operating in a deficit by the end of FY 2009.

In the FY 2009 budget request, the Administration forecasted a $3.1 billion shortfall to the highway account and proposed transferring $3.2 billion from the mass transit account to the highway account to avoid such a shortfall. The request also called for $1.8 billion less in FY 2009 funds than is authorized for federal highway programs under SAFETEA-LU. About $1 billion of the reduction was a result of revenue-aligned budget authority (RABA) provisions dictating that if fuel tax revenues are lower than estimated when the law was written, then spending is supposed to be reduced. Since, according to Administration estimates, fuel tax receipts have been less than expected the past two years, RABA dictated a reduction in highway funding.

Congress rejected the Administration’s transfer proposal and instead pursued alternatives that would both provide additional funds to the highway account over the Administration’s proposal and not draw from the mass transit account, which Congress deemed critical to protect in the interest of funding future public transportation priorities. In April, the Senate Finance Committee reported out a measure, the American Infrastructure Investment and Improvement Act, that would immediately replenish the HTF with $3.4 billion from Treasury’s general fund and provide over $1.5 billion in additional funds by other means over the next 10 years (this legislation was also reported out by the committee in 2007). However, efforts to pass this measure stalled largely due to Republican opposition and concerns about separate legislation (e.g., FAA reauthorization) to which the HTF language was attached.

In July, the House introduced and passed (on July 23) its initial version of HR 6532, which was nearly identical to the version of the bill signed by the President last week. Specifically, the bill proposed transferring $8.02 billion from Treasury’s general fund to the HTF to fund authorized programs through FY 2009. Supporters of the bill cited a need for the funds to provide for authorized programs over the next fiscal year and contended that the transfer would replace the $8 billion that was transferred out of the HTF in 1998, when there was a large unspent balance and a need for funding in other federal programs. Following passage in the House, Senate Majority Leader Harry Reid (D-NV) attempted to secure Senate passage by unanimous consent prior to the August recess, but efforts were blocked by Republicans objecting to the bill.

On September 5, DOT Secretary Mary Peters announced that the highway account would be expended by September 30 if no action was taken to infuse the account with new funds. While the DOT is expecting the HTF to receive $2.7 billion in fuel tax receipts in September, new Administration estimates show that the fund faces $4.4 billion in requests for reimbursements. Secretary Peters, in a reversal of the Administration’s earlier position, called on Congress to pass its $8 billion bailout plan by September 12 to prevent states from being adversely affected. Until Peters’ announcement, the Administration had contended that “the measure would unnecessarily increase the deficit and would place any hope of future, responsible constraints on highway spending in jeopardy.”

Swift Action to Enact

Secretary Peters’ comments on the HTF and support for HR 6532 led to swift action in Congress. Directly following Peters’ statement, Democratic leaders in Congress renewed efforts to secure passage of HR 6532, setting aside other priorities. On September 9, Majority Leader Reid again attempted to seek passage in the Senate by unanimous consent, but was initially blocked by Republicans interested in offering amendments to the bill. Opponents included Sen. Judd Gregg (R-NH), the ranking member of the Senate Budget Committee, who sought to subject the funding transfer to pay-as-you-go budget rules and to reinstitute the previous version of the Harry Byrd Test, which requires a reduction in obligations from the HTF if there are insufficient funds. However, by September 10, Gregg and other opponents had relented, allowing for the Senate to pass the bill by voice vote. One amendment was attached to the bill, making the bill effective immediately following enactment, rather than on September 30. On September 11, the House agreed to the Senate amendment and passed the bill, as amended. President Bush signed the bill on September 15.

Looking Ahead

The need for immediate action to replenish the HTF is heightening an already much anticipated upcoming debate on federal transportation funding. Factors contributing to the funding shortfall this month (e.g.,
gas prices, fuel-efficient vehicles, construction costs) are unlikely to subside in the next year (or more), making it very likely that additional shortfalls will continue in the future if dramatic changes aren’t instituted to compensate for this new reality. At the same time, federal, state, and local jurisdictions have been warning (for several years) of a critical need for transportation infrastructure, modernization and replacement in the next six years (and beyond), as roads, bridges, and other infrastructure some of which was constructed more than 100 years ago, deteriorate or become obsolete. As a result, the debate on the HTF, while to be centered around the transportation re-authorization bill, is likely to transcend the debate on the transportation bill in the next Congress as Members attempt to identify all potential opportunities for funding federal transportation priorities. Examples of issues likely to be touched by concerns over the HTF include the anticipated debates on tax and energy policy.

Debate on the reauthorization of SAFETEA-LU is expected to begin in earnest at the beginning of the new Congress. Already, House and Senate transportation authorizing committees, particularly the House Transportation and Infrastructure Committee and the Senate Environment and Public Works Committee, have been holding discussions to determine federal priorities in the authorization bill. However, it’s clear that the HTF is already the number one priority for the bill, as all funding for other priorities is determinantal on finding a solution to revenue shortfalls in the HTF. Formal markup of a bill by committees is expected to begin by early Spring next year. It’s possible that a bill may see passage by the end of September 2009, when SAFETEA-LU expires. If not (or perhaps even if it is) an additional HTF bailout bill may be needed to provide for funding of federal transportation programs.