

# **Bond Case Briefs**

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## **Transportation & Infrastructure: What to Expect from the Biden Administration & 117th Congress: Mintz, Levin**

With Democratic majorities in the U.S. House and U.S. Senate, Congress and President Biden's new administration are working to quickly advance proposals to provide for economic relief as the nation continues to reel from the now nearly one-year pandemic. One area of emerging bipartisan focus is a long-sought measure to address the nation's crumbling and outdated infrastructure, which could be paired with a required surface transportation reauthorization bill. The face of the Administration on this effort will likely be Secretary of Transportation, Pete Buttigieg, the former South Bend, Indiana, mayor, who the full Senate confirmed yesterday by a vote of 86-13. It's worth noting that Secretary Buttigieg is the first Senate-confirmed openly LGBTQ Cabinet Member in American history. Some of the key issues we are watching on transportation and infrastructure are discussed below. We will be providing additional updates on these and other issues in this space in the near future.

### **Surface Transportation Reauthorization**

The most recent surface transportation bill, the [Fixing America's Surface Transportation \(FAST\) Act](#), was set to expire on September 30, 2020, having been signed into law by President Obama in 2015. Although the previous 116th Congress had taken steps toward enacting a new five-year surface transportation bill, those efforts stalled, leaving Congress to approve a one-year extension. The original authorization for the FAST Act provided \$305 billion over fiscal years 2016 through 2020 for highway, highway and motor vehicle safety, public transportation, motor carrier safety, hazardous materials safety, rail, and research, technology, and statistics programs. Despite the challenges of the previous congress in passing a new surface transportation bill, it is generally a bipartisan issue and with unified control of government by the Democrats we anticipate that we will see a new surface transportation bill approved well before the current extension expires on September 30, 2021. Whether that is as a stand-alone bill or as part of a larger infrastructure package will be determined in the coming months, but this debate will no doubt involve the usual partisan disagreements over funding levels.

Traditionally, reauthorizing the [Highway Trust Fund \(HTF\)](#) serves as the must-pass lynch-pin of a larger surface transportation bill. Ordinarily, various Senate committees will produce legislative titles, based on their jurisdiction, to a larger surface transportation package. The Environment & Public Works Committee contributes a legislative title that largely addresses transportation infrastructure and policy; the Commerce Committee produces a title on regulatory and innovation transportation policy, including for rail, automobiles, and commercial vehicles; and the Banking Committee traditionally contributes a title on public transit. The Finance Committee has jurisdiction over the HTF itself and produces the revenue portion of the bill. In the House, the process is largely the same, but the Transportation & Infrastructure Committee has jurisdiction over a significant majority of the surface transportation bill.

### **Highway Trust Fund (HTF)**

With increasingly fuel efficient automobiles and no increase in the gas tax since 1993, the primary

source of funding for repair and maintenance of roads and bridges, the HTF is on the verge of becoming insolvent as soon as this year but no later than 2022 unless Congress acts. Proceeds from the HTF routinely fall short of the nation's transportation infrastructure needs, and the pandemic could exacerbate this shortfall as Americans are driving less than they were pre-pandemic.

Over the past decade, the general treasury has kept the HTF afloat with infusions of funds, but there is a growing reluctance to continue this practice. There are various proposals to remedy this situation, including a federal fuel usage fee as part of the price of wholesale transportation fuels collected at the terminal rack. The fee would be phased in at five cents per year over four years, indexed to both inflation and improvements in fuel efficiency, and have a five percent annual cap.

House Transportation & Infrastructure Committee Chairman Peter DeFazio (D-OR) has previously proposed a national vehicle miles traveled (VMT) pilot program, which would allow taxpayers to opt in and then provide a refund for the estimated gas tax they would have paid. The concept of VMT is supported by many House Republicans, including Transportation & Infrastructure Committee Ranking Member Sam Graves (R-MO), as well as Secretary Buttigieg.

Many Republicans, including Senate Minority Leader Mitch McConnell (R-KY), have strongly objected to an increase in the gas tax in the past, so we will be watching to see how they react to any proposals from Democrats to raise the tax. President Biden has not stated whether he supports an increase in the gas tax, but has described the HTF as being "grossly underfunded."

## **Autonomous Vehicles**

Although we have seen continued moves in the automotive market toward Autonomous Vehicles (AVs), and many transportation policy leaders support for AV technology as a potentially revolutionary economic and cultural development, Congress has yet to pass legislation aimed at AV regulatory policy. The closest they have come to success with AV legislation was two congresses ago when the House of Representatives approved by voice vote the [SELF DRIVE Act](#), while the Senate Commerce Committee unanimously approved the [AV START Act](#). With broad bipartisan support there was hope throughout the 116th Congress that there would be final enacted legislation; however, finding consensus on moving forward has proven difficult. Secretary Buttigieg has spoken favorably about advancing AV technology, and we anticipate that the Administration and Congress will again seek to enact AV legislation this congress. An AV bill could emerge as a standalone or as provisions in the automobile safety portion of a Commerce title to a surface transportation bill.

During the Obama Administration the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) issued the first-ever federal guidance on AVs in September 2016 ([AV Policy](#)) focused on integrating AVs into American roadways. The Trump Administration followed up with [AV Policy 2.0](#) in 2017, [AV Policy 3.0](#) in 2018, and [AV Policy 4.0](#) in 2020. With federal guidance to date being entirely voluntary, 32 states have now approved their own AV policies, creating a patchwork of policies nationwide. Last January, NHTSA issued a rule revising existing federal motor vehicle safety standards (FMVSS) to exempt AVs that do not carry passengers from crashworthiness standards. The rule further amended certain FMVSS to conform with AV features, such as the lack of a steering wheel or front row seating without passenger and driver designations. It's unclear whether the Biden Administration will continue such a regulatory trend, but as AV technology continues to see more widespread acceptance by consumers, we could well see a greater sense of urgency for Congress to codify a regulatory structure for AVs in statute.

## **Municipal Bonds**

While Democratic control of the House and Senate makes this highly unlikely, we'll be watching

closely for any proposals to end the tax-exempt status of municipal bonds, which finance 75% of the nation's infrastructure projects, including highways, ports, bridges, airports, public utilities, and water and sewer facilities.

Supporters of advance refunding (AR) bonds will be looking for opportunities to revive this option, which allows a bond issuance to be paid off with another lower-interest bond issuance. This practice was terminated by language in the [2017 Tax Cuts and Jobs Act](#). In the 116th Congress, Sens. Roger Wicker (R-MS) and Debbie Stabenow (D-MI) [introduced legislation](#) to reinstate advanced refunding. [Similar legislation](#) was introduced in the House by Reps. Ruppertsberger (D-MD) and Stivers (R-OH), who serve as co-chairs of the Congressional Municipal Finance Caucus. Proponents of AR will be pushing for reintroduction of these bills in the 117th Congress.

There were two other bond measures introduced in the 116th Congress that did not see final passage, but which supporters will be pushing to see reintroduced in the 117th Congress. The [Municipal Bond Market Support Act](#) was introduced by Reps. Sewell (D-AL) and Reed (R-NY) and would make a permanent modification to the small borrower exception (BQ) raising the maximum from \$10 to \$30 million and applying the maximum at the borrower level. The [American Infrastructure Bonds Act](#), was introduced by Sens. Wicker (R-MS) and Bennet (D-CO) and would have reinstated direct pay municipal bonds, add non-profit eligibility and require a governmental issuer.

### **Biden Proposal for Public Transit Agencies**

Just ahead of his inauguration as the nation's 46th president, Mr. Biden unveiled a \$1.9 trillion "[American Rescue Plan](#)" providing emergency COVID-relief and economic stimulus measures. While much of the proposal is related to health care and vaccinations, there are proposals directly related to transportation, including \$20 billion in relief for the hardest hit public transit agencies.

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