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February 2, 2009

Congressional Research Service

Report RL34675

Surface Transportation Reauthorization: Selected Highway and Transit Issues in Brief

Robert S. Kirk, Resources, Science, and Industry Division

September 18, 2008

Abstract. This report provides an overview of selected major issues that are expected to be debated during the upcoming reauthorization of the federal government's highway and transit programs and activities. Following some introductory remarks, the report is divided into two parts: a section on highway issues followed by a section on transit issues.

Order Code RL34675

CRS Report for Congress

Surface Transportation Reauthorization: Selected Highway and Transit Issues in Brief

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Prepared for Members and Committees of Congress

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Surface Transportation Reauthorization: Selected Highway and Transit Issues in Brief

Summary

SAFETEA-LU, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (P.L. 109-59; 119 Stat 1144) authorization of federal highway and transit programs expires at the close of FY2009. Consequently, the 111th Congress is expected to take up surface transportation legislation during the first session of the new Congress.

Both highway (Title 23 U.S.C.) and mass transportation (Title 49 U.S.C. Chapter 53) programs are financed by revenues drawn from the Highway Trust Fund (HTF). Roughly 20% of the transit program is also funded from the U.S. Treasury's general fund. The authorization of expenditures from the HTF also ends on September 30, 2009. The Highway Account of the HTF, however, was rapidly approaching insolvency in September 2008, more than a year before the end of the SAFETEA-LU authorization. Congress responded quickly and passed P.L. 110-318, providing an $8.017 billion transfer from the Treasury's general fund to the Highway Account to continue federal highway programs and activities.

This infusion of funds highlights the seriousness of the problems of the trust fund financing mechanism, which has supported much of the nation's surface transportation spending for more than five decades. The sufficiency problem has called into question the assumption of ever-growing spending in surface transportation authorization bills, as well as the reliability of fuel tax-dependent funding. Given this, finding an answer to the funding dilemma is a central issue that Congress faces. Suggestions for treating the HTF shortfall include increasing existing taxes, implementing a new vehicle miles traveled (VMT) tax, reducing the highway program's size, emphasizing private sector initiatives, and devolving most of the federal-aid highway program's responsibilities to the states. The outcome of many other authorization issues will be influenced by how the long-term trust fund sufficiency issue is dealt with.

Within the context of the federal highway program there are a number of issues likely to be addressed by Congress, including the recurring debate on the appropriate state rate-of-return on each state's highway users transportation tax payments to the HTF (commonly referred to as the donor-donee state issue); proposed changes in highway programs, their funding formulas, and project eligibility requirements; the degree of flexibility to be given states to move federal funds among programs; proposed increases in highway bridge funding and inspection; the role of project earmarking; and the consideration of some new programs, such as for freight corridors.

Issues of federal aid to mass transit include the appropriate overall level of funding both within the context of needs and in comparison with federal spending on highways; the degree of support for transit from Treasury general fund revenues; private participation in transit; the use of federal funds for operating costs; and the issue of modifying existing programs or creating new programs to serve currently unserved or under-served areas or populations.

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Division abbreviations: RSI = Resources, Science, and Industry Division; KSG = Knowledge Services Group; ALD = American Law Division.

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Introduction

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (P.L. 109-59; 119 Stat 1144) authorization of federal highway and transit programs ends at the close of FY2009. Both highway (Title 23 U.S.C.) and transit (Title 49 U.S.C.) programs are financed by revenues drawn from the Highway Trust Fund (HTF). Roughly 20% of the transit program is also funded from the U.S. Treasury's general fund. The authorization of expenditures from the HTF also ends on September 30, 2009.[1]

This CRS report provides a brief overview of selected major issues that are expected to be debated during the upcoming reauthorization of the federal government's highway and transit programs and activities.[2] Following some introductory remarks, the report is divided into two parts: a section on highway issues followed by a section on transit issues.

Although the federal-aid highway program provides federal money for highways and highway bridges, the money itself is normally under the control of the states. The state departments of transportation (state DOTs), within the federal

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[1] In the House of Representatives, programmatic and funding distribution issues are under the jurisdiction of the Committee on Transportation and Infrastructure, but tax and HTF issues are under the jurisdiction of the Committee on Ways and Means. In the Senate, most programmatic and funding distribution issues are under the jurisdiction of the Committee on Environment and Public Works for highways and other aspects of Title 23, but are under the Committee on Banking, Housing, and Urban Affairs for transit. Tax and HTF issues, in the Senate, are under the jurisdiction of the Committee on Finance. In the Senate, most safety issues are under the jurisdiction of either the Committee on Environment and Public Works or the Committee on Commerce, Science, and Transportation.

[2] Much of this discussion has been drawn from the following sources. *Refocus. Reform. Renew. A New Transportation Approach for America*, Department of Transportation (Washington, 2008), 73 p. *Financing Transportation in the 21st Century: a Report of the Intergovernmental Forum on Transportation Finance*, the National Academy of Public Administration (Washington, 2008), 95 p. *Transportation for Tomorrow*: *Report of the National Surface Transportation Policy and Revenue Study Commission*, (Washington, the Commission, 2008), 68p. *The Transportation Challenge: Moving the U.S. Economy*, (Washington, National Chamber Foundation, 2008), 116 p. *ARTBA Recommendations for SAFETEA-LU Reauthorization* (Washington, American Road & Transportation Builders Association, 2007), 72 p.

programmatic framework, determine, for the most part, which projects and activities are funded with the federal funds. Most of the federal-aid highway program money provided to the state DOTs is apportioned to them through several large "core" formula-driven programs. There are also a number of much smaller discretionary programs, but their funding has often been earmarked in recent years. Unlike the federal-aid highway programs, Federal Transit Administration (FTA) funding for major transit systems does not pass through the states, but is apportioned to the local transit authority or other controlling local entity. Reauthorization bills generally build off the existing programmatic structure. There is a point of view that sees the division of federal transportation efforts into programs that pursue national goals or are mode specific as creating a programmatic structure that constrains the ability of states and metropolitan areas to adopt innovative policies to solve transportation problems such as traffic congestion.

Major Highway Reauthorization Issues

The Department of Transportation has estimated that the average annual investment on bridges and highways by all levels of government, needs to increase 12.2% or more annually over 2004-2024, to maintain existing highways and bridges at their current condition and level of performance.[3] Under current revenue sources, the Highway Account of the HTF is projected to have insufficient resources to fund even the current authorized levels, let alone an expanded highway program.[4] Because of an unexpected decline in gas tax revenues and an increase in outlays during the summer of 2008, the Highway Account was expected to approach insolvency in September 2008. The Secretary of Transportation on September 5, 2008 announced a mechanism to restrict Highway Account outlays to prevent the near-term insolvency and also called on Congress to pass pending legislation to transfer roughly $8 billion from the Treasury general fund to the Highway Account. Congress quickly passed P.L. 110-318 to provide the requested funds. This transfer is intended to keep the Highway Account solvent through the end of FY2009, when the current authorization expires. The outcome of virtually all of the reauthorization issues, discussed below, will depend on how the long-term trust fund sufficiency issue is dealt with.

Treatment of the Highway Account Shortfall

There are a variety of approaches that may be considered during the reauthorization debate to assure the sustainability of the Highway Account.

[3] U.S. Dept. of Transportation, *2006 Status of the Nation's Highways, Bridges, and Transit: Conditions and Performance, Report to Congress*, (Washington, Dept. of Transportation), 2006. See highlights at [http://wwwcf.fhwa.dot.gov/policy/2006cpr/hilights.htm].

[4] The HTF is composed of two accounts, the Highway Account, which funds the programs and activities of the Federal Highway Administration and the Mass Transit Account, which funds most of the programs and activities of the Federal Transit Administration.

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- Raise the rates of existing taxes that support the trust fund (fuel taxes provide about 90% of the revenues and were last raised in 1993). Raising the gas tax is seen as difficult and probably unlikely in the current economic and political environment.

- Increase the use of tolling and public-private partnerships (PPPs) to decrease reliance on the Highway Account for the funding of highway projects. Most observers in the transportation community, however, think that tolling and PPPs can only provide from 5% to 10% of estimated system needs. Also, most PPP proposals rely, in part, on federal funds and tax-exempt financing, both of which impose a cost on the federal budget. Allowing widespread tolling of the heretofore mostly "free" federal Interstate Highway System could also become a major issue.

- Replace or supplement the existing federal highway tax and fee structure with a more direct user fee such as a vehicle miles traveled tax (VMT). This tax would, through the use of global positioning system technology, charge road users for each mile they drive. Most see this as not being a near-term solution due to organizational, privacy, and fee evasion issues. VMT may also be viewed by some citizens as a national toll on any vehicle movement on any road.

- Establish freight related taxes or fees such as a freight waybill tax, container fee, or terminal facility charge. These revenues could be used to address freight bottlenecks.

- Reduce the highway program's size, restricting it to programs that fulfill clear national needs, such as the Interstate Maintenance program or the Federal Lands Highways program, and devolve any other highway program responsibilities to the states.

- Increase the funding that supports innovative financing such as State Infrastructure Bank (SIB) programs or establish a national infrastructure bank program to leverage federal grant funds. Some have also proposed the use of tax credit bonds to fund infrastructure projects. However, others argue that such mechanisms are ultimately more expensive than direct spending.

- Authorize an annual general fund contribution for highway programs, thereby reducing their dependence on the Highway Account. Some express concern that this would weaken the historic link between the revenue derived from taxes and fees paid by highway users and spending on the nation's highways and bridges.

- Some argue that Customs duties, which are deposited in the general fund, should be made available for port-of-entry infrastructure.

Rate-of-Return Issues (the Donor-Donee State Debate)

States seek a high rate-of-return on their highway users' tax and fee contributions to the Highway Account.[5] Since the 1980s, guaranteeing a minimum rate-of-return has been a major point of debate during each reauthorization cycle. The current program is the Equity Bonus program (EB), and is designed to even out the rate-of-return on program spending across all states to more equitably reflect each state's highway users' transportation tax contributions to the Highway Account. For FY2009, all states are guaranteed a 92% return on payments to the Highway Account for programs listed in the EB program. The provisions also included a guaranteed overall increase for all states over the previous reauthorization bill and a number of "hold-harmless" provisions that were intended to mitigate the impact on certain donee states of the shift in funding to the donor states under the bill. Fulfilling all of these requirements is done by providing a spending overlay across all of the programs listed in the EB program in a way that gives spending increases to all states but larger increases to the donor states. This is very expensive. The EB program is the largest formula program in SAFETEA-LU ($41 billion over five years). A number of policy issues are expected to surface.

- Although the Equity Bonus mechanism could be retained, other means of assuring an equitable distribution could be considered and devised.

- An increase in the guaranteed rate-of-return percentage above the 92% level could be considered.

- Expanding the scope of the equity provisions to include all federal-aid highway programs could be proposed.

- The "hold harmless" provisions that protect certain donee states from losing share could be retained, modified, or eliminated.

- To reduce the cost of the Equity Bonus apportionments needed to bring all donor states up to the minimum rate-of-return, the core program formulas could be modified to be more heavily weighted by a state's share of the total tax and fee contributions to the Highway Account.

- The reauthorization bill could forgo an equity provision altogether and allow the program formulas to determine the distribution of highway funds to the states.

State Maintenance of Effort

Historically, federal funding was provided to supplement state spending on highways, not to substitute for it. A Government Accountability Office (GAO) study

[5] States that receive more than they contribute to the Highway Account are referred to as donee states. States that receive less than they contribute are referred to as donor states.

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found evidence that since the mid-1990s, states, as a whole, have failed to maintain a financial level of effort proportional to federal spending increases.[6] Some in the transportation community believe that reauthorization should include a provision that would make any authorized increase in a state's federal highway spending contingent on the state demonstrating that it is maintaining its capital investment spending on highways and is not substituting federal for state funding.

Devolution to the States

As far back as the 1980s, there have been some that have argued that the federal program could be greatly reduced in size, and most of the current federal responsibilities could be "returned" to the states. In tandem with this reduction of the federal program would be a reduction in the federal gas tax. The states would accordingly be free to raise their state gas taxes or find some other means to make up for the federal reduction.

The combination of the current constrained budget environment, the pervasive use of funding flexibility among highway programs, and the demands for a higher minimum guarantee under the Equity Bonus program, in the view of some observers, makes the federal-aid highway program little more than a passthrough of funding from highway users through the federal treasury to the states. In the view of these observers, this significantly weakens the argument for a federal highway program and strengthens the arguments for devolution.

Programmatic Structure

The federal-aid highway program has always been a partnership with the State DOTs. States have a great deal of control over the selection, planning, construction, and oversight of federally funded highway projects. Within this context, a number of programmatic issues could arise.

- Program scope and intent, as well as the make-up of program funding formulas, may be reexamined. Some programs could be consolidated, modified, or eliminated.

- Historically, the states have argued for increased flexibility for using federal funds by transferring funds across the federal highway programs. However, some in the transportation community argue that there is too much flexibility and the spending of federal funds is often on projects that have no evident national purpose. In addition, some highway supporters advocate the elimination of

[6] Government Accountability Office, *Federal-Aid Highways: Trends, Effect on State Spending, and Options for Future Program Design* (August 2004), available at [http://www.gao.gov/new.items/d04802.pdf]. Looking farther back, the report found that "states used roughly half of the increases in federal highway grants since 1982 to substitute for state and local highway funding, and that the rate of substitution increased during the 1990s."

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flexibility that allows funds transfers between the highway and mass transit programs.

- Project eligibility changes may be considered. For example, some construction interests are arguing for a broadening of project eligibility, under the Congestion Mitigation and Air Quality Improvement Act (CMAQ), that would allow more projects designed to increase road capacity to improve traffic flow in congested areas.

- Much of the federal program could be replaced by a block grant program providing block grants to the states. Some argue that if given increased flexibility, states and metropolitan areas, could be allowed to spend transportation funds as they wish and simply be held to certain performance standards.

- Congress is likely to consider some new programs or realignment of existing programs. Some, for example, have pressed for programs to improve major freight corridors and address bottlenecks. To what extent freight-specific programs might include rail facilities, which are mostly privately financed, could be an issue.

Bridge Policy

In 2007, roughly 72,000 bridges were designated by FHWA as "structurally deficient." Although there were discussions of major infrastructure spending increases following the collapse of the I-35W bridge[7] in Minneapolis, with the exception of Emergency Relief funding, no legislation has made it through both houses of Congress, other than an extra $1 billion appropriation, from the Treasury's general fund, for the federal Highway Bridge Program (HBP) that was included in the FY2008 THUD appropriations bill.[8] Issues that may arise include the following:

- Programmatic changes to the HBP as well as proposals increasing bridge spending could be incorporated in reauthorization legislation.

- The rate of repair and replacement of deficient bridges and the funding needed to support any proposed acceleration of the rate could be an issue.

- Changes in bridge inspection and inventory are likely to be proposed.

- The flexing of HBP funds to other highway programs for non bridge uses may be an issue.

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[7] The National Transportation Safety Board has yet to complete its final report on the cause of the bridge collapse.

[8] See CRS Report RL34127, *Highway Bridges: Conditions and the Federal/State Role*, by Robert S. Kirk and William J. Mallett.

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- The eligibility of HBP funds for spending on non federal-aid highway system bridges could be an issue.

- A recent GAO report found that the HBP lacks focus, performance measures and sustainability.[9] These findings could be considered during reauthorization.

Trucking Issues

Truck size and weight limits on the Interstate Highway System could be an issue. Some trucking interests, in a time of higher fuel prices and increasing congestion, argue that increasing allowable truck size and weight would increase productivity and efficiency. Rail interests oppose increases in truck size and weight, and argue that rail is the more efficient mode of transportation for heavy freight. Safety advocates also have concerns about allowing bigger and heavier trucks on the roads.

Earmarking Issues

Over the 50-year life of the HTF-supported federal-aid highway program, the congressional designation of numerous specific projects in highway authorization bills is a relatively recent phenomenon. Until the late 1980s, earmarks amounted to only about 1% of authorized federal-aid highway spending.[10] In SAFETEA-LU, almost $22 billion or roughly 11% of the $199.5 billion total contract authority in Title I (the highway construction title) of the bill was earmarked.

The debate over highway project earmarking at times reflects the broader pro and con arguments that apply to the discussion of the appropriateness of congressional earmarking in general. Supporters of earmarking often argue that the framers of the constitution believed that Congress, not the President (i.e., the Executive Branch), should allocate funding for the functions of the federal government and ending congressional earmarking authority would be a major transfer of power to the executive branch. Supporters also argue that Members of Congress have a better sense of their constituents' needs than Executive Branch bureaucrats. Opponents of earmarking make a number of general arguments, including that congressional earmarking undermines the intent of the programs and activities that Congress itself has authorized; many earmarks are designated for political reasons rather than for demonstrated needs; earmarking may foster corruption; many earmarks are inherently local and short-change projects of national interest; and

[9] Government Accountability Office, *Highway Bridge Program: Clearer Goals and Performance Measures Needed for a More Focused and Sustainable Program* (Washington, GAO) "GAO-08-1043." Available at [http://www.gao.gov/new.items/d081043.pdf].

[10] "In-Depth Analysis: Earmarked Highway Projects: Their History, Their Nature and Their Role in Highway Legislation," *Transportation Weekly*, April 10, 2002, 3. See also *A Primer on Lobbyists, Earmarks, and Congressional Reform*, By Ronald D. Utt, (Washington: Heritage Foundation), Backgrounder no. 1924, 2006, 21 p. For a discussion of spending earmark definition see CRS Report RL34462, *Earmark Reform: Comparison of New House and Senate Procedural Rules*, by Sandy Streeter.

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earmarks unduly enhance the role of lobbying firms in the spending process. Issues more specific to the federal-aid highway program include the following.

- Earmarking distorts the operation of the federal-aid highway program, according to a DOT report.[11] Among the report's findings are the following: that the earmarking can reduce the states' core transportation programs; many low priority, earmarked projects are being funded over higher priority, non-earmarked projects; and projects that do not meet eligibility requirements are sometimes funded.

- If a significant number of earmarks are allowed, one issue that will be considered is how the earmarks will interact with the EB distribution. The High Priority Project (HPP) earmarks in SAFETEA-LU were within the scope of the Equity Bonus and, because of this, these earmarks merely displaced formula program funds. This meant that states receiving HPP earmarks not only received no net increase in funding as a result of their HPP earmarks, but also experienced a reduction in the formula program funds that they rely on to implement their state transportation improvement plans. The issue is whether earmarking should be inside or outside the scope of the EB program. Keeping the earmarks outside the EB program, however, would dilute the impact of a rate-of-return guarantee.

- If Congress, chooses to include earmarks in the upcoming reauthorization legislation, it could require that all earmarks meet the federal-aid highway program eligibility requirements.

- Despite the growth in the number and amount of funding dedicated to highway earmarks there is no certainty that the same levels of earmarking will be allowed in the upcoming reauthorization bills. Although local officials, businesses, and interest groups who benefit directly from particular earmarks are pleased when a Member is successful in obtaining a congressional designation, and sometime even pursue such earmarks by hiring lobbyists, it does not necessarily follow that the public in general supports earmarking. The SAFETEA-LU earmarks for the so called "bridges to nowhere" received a great deal of attention in the press and were widely ridiculed.

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[11] Department of Transportation, *Review of Congressional Earmarks Within Department of Transportation Programs, "Report no. AV-2007-066,"* 2007, 1-31.

Major Transit Reauthorization Issues

The Department of Transportation estimates that spending from all sources on mass transit needs to increase by about 25% annually over the next 20 years just to maintain existing transit systems at their current condition and level of performance.[12] The Mass Transit Account of the HTF is in somewhat better financial shape than the Highway Account but is also projected to go into deficit within a few years. The Federal Transit Administration (FTA) is funded 80% from the Mass Transit Account and 20% from the Treasury general fund. Historically, when the fuel tax rates have been raised, 20% of the increase has been dedicated to the Mass Transit Account of the HTF. The reauthorization outcome of the trust fund sustainability debate, discussed in the prior section, is therefore also pertinent to FTA programs and activities. Within this context, there are both funding and programmatic issues that could arise during reauthorization.[13]

Transit Funding Issues

Some of the following issues are predicated on funding availability, and others are predicated on expectation of a constrained budgetary environment.

- How much to spend overall on transit is the main issue in the upcoming reauthorization. Transportation, construction, business, and public transit interest groups argue that there needs to be a significant increase in federal investment in transit infrastructure. Others dispute this and argue that current spending trends, if continued, are sufficient. Still others argue that the federal government spends too much on transit relative to highways, given that transit receives about 16% of federal funding but only 2% of trips are made by this mode.

- The lowering of the maximum federal matching share below the current 80% is seen by some as a means of spreading constrained federal funds across more transit projects. They also contend that a larger local match would help ensure that only the most important projects are supported by state and local officials. Opponents of lowering the federal maximum share dispute this contention.

- Encouraging private participation through private development or public-private partnerships is seen by some as a way to support transit improvements with less federal financial involvement while still creating many indirect community benefits. Others, however,

[12] DOT, *2006 Conditions and Performance Report*.

[13] See CRS Report RL34127, *Public Transit Program Issues in Surface Transportation Reauthorization*, and CRS Report RL34171, *Public Transit Program Issues in Surface Transportation Reauthorization*, both by William J. Mallett.

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see the private sector as able to finance only a relatively small number of projects relative to total needs.[14]

- Encouraging more use of innovative financing is likely to be considered. As with highways, innovative finance for transit generally involves leveraging federal funds to provide for funding through lending rather than grants. State infrastructure banks and grant anticipation notes (GANs) are examples of innovative finance mechanisms.

- Given that trust fund balances in the Mass Transit Account are trending downward, some may suggest expanding the general fund portion of the FTA budget above the historical 20% as a means of increasing the available funds for transit. Another possibility is to cut program funding to lower the demands on the Mass Transit Account and thereby extend its sustainability.

- Broadening the eligibility of federal funds for transit operating costs could become an issue.

Program Structure

The budgetary environment is expected to have an impact on the scope of programmatic change. Should there be a major increase in funding, the existing structure may remain essentially the same. A funding decline or even a no-growth budget scenario could increase the likelihood of program modification. Under such a scenario, a number of changes could be considered.

- Congress could consider an across-the-board cut of all FTA programs and activities.

- Program restructuring could narrow the focus of the programs to concentrate federal efforts on the rehabilitation and expansion of transit service in densely populated areas and the most congested cities (i.e., the areas that would most efficiently utilize transit).

- On the other hand, the restructuring could simply refocus policymakers on maintaining and rehabilitating the existing systems and services. This would mean possibly reducing the role of the New Starts program.

- Congress could simply replace the program with a block grant mechanism based on transit ridership or population.

[14] General Accounting Office (now the Government Accountability Office), *Highways and Transit: Private Sector Sponsorship of and Investment in Major Projects Has Been Limited*, GAO-04-419, (Washington, DC, 2004), 52-53.

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- Congress could also add new programs to serve currently unserved or under-served populations or areas. This would be more likely if new revenue sources are found to support the Mass Transit Account.

- Congress could also consider proposals similar to the Metro Mobility Program proposed by DOT Secretary, Mary Peters. The program would provide "performance-based" transportation funding directly to metropolitan areas. Recipients would be allowed broad multi-modal flexibility in the choice of projects.[15]

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[15] U.S. Dept. of Transportation, *Refocus. Reform. Renew*, p. 24-28. *Transportation for Tomorrow*, the report of the National Surface Transportation Policy and Revenue Study Commission also argued for a more multi-modal approach coupled with performance requirements.