Tolls and Federal Highway Funding Consequences

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Issue
Discuss whether Connecticut will lose federal highway funding if it opts to toll federal-aid highways in Connecticut.

Summary
A common question raised in the debate on tolling in Connecticut is whether the state will lose future federal highway funding, or be required to repay funding it previously received, if it opts to impose tolls. In short, the answer depends on whether the tolling complies with federal law. Federal law generally prohibits states from imposing tolls on federal-aid highways but provides exceptions for tolling implemented under an authorized federal tolling program.

If Connecticut opts to implement tolling and it does so under an authorized federal tolling program, it appears that the state will not lose or have to repay its federal highway funding. Connecticut’s lack of tolls has not affected the amount of federal highway formula program funding it receives (called an “apportionment”) since 2012, when Congress eliminated federal-aid highway mileage as a factor in the program distribution formulas. Additionally, imposing tolls would not violate the 1983 toll removal agreement between the Connecticut Department of Transportation (ConnDOT) and the U.S. Department of Transportation (USDOT), and would therefore not require repayment of federal funds received under the agreement.
On the other hand, if Connecticut opts to implement tolling and does so in a manner that violates federal law, it may face federal funding penalties. However, according to information provided to us by the Federal Highway Administration (FHWA), it is unclear how much the penalty would be or if there would be one at all.

**Exceptions to Federal Tolling Prohibition**

Since the establishment of the federal-aid highway program, federal law has generally prohibited states from tolling on federal-aid highways (23 U.S.C. § 301). But Congress has relaxed this prohibition over time by authorizing several tolling programs and exempting such tolling from the prohibition.

Currently, federal law allows states to impose tolls on federal-aid highways under four tolling programs: the general tolling program, the High Occupancy Vehicle (HOV)/High Occupancy Toll (HOT) Lanes program, and two pilot programs (the Interstate System Reconstruction and Rehabilitation Pilot Program and Value Pricing Pilot (VPP) Program). Table 1 provides descriptions of each program.

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<th>Program</th>
<th>Description</th>
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<td>General Tolling Program (known as “Section 129”)</td>
<td>Generally allows states to implement tolling on (1) new highways, (2) new lanes on existing highways, (3) reconstructed non-interstate highways, and (4) new or reconstructed bridges and tunnels</td>
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<td>(23 U.S.C. § 129(a))</td>
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<td>HOV/HOT Lanes Program (known as “Section 166”)</td>
<td>Allows states to charge tolls to vehicles that do not meet established occupancy requirements in order for them to use the HOV lane</td>
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<td>(23 U.S.C.A. § 166(a)(4))</td>
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<td>Interstate System Reconstruction and Rehabilitation Pilot Program (P.L. 105-178, § 1216(b))</td>
<td>Allows the conversion of a limited number of existing and currently toll-free interstate highways to toll facilities in order to fund reconstruction or restoration that would not be possible without toll revenue</td>
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<td>VPP Program (P.L. 102-240, § 1012)</td>
<td>Allows a limited number of states to toll on existing toll-free highways, as long as value pricing (or “congestion pricing”) is used to manage traffic congestion</td>
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Connecticut currently holds one of the slots in the VPP program, and most of the recent discussion on implementing tolling in Connecticut has focused on tolling under this exception. To date, ConnDOT has commissioned several studies assessing the feasibility of tolling under this program, including studies on congestion pricing options for the I-95 corridor and the I-84 corridor. For more information on the VPP program, see OLR 2015-R-0048 and ConnDOT’s “CT Congestion Relief Study” website. For more details on all the federal tolling programs, see “Current Laws on Tolling Existing and New Facilities on Federal Interstate Highways,” prepared by CDM Smith for ConnDOT.

**Tolling Under a Federal Tolling Program**

A common question raised in the debate on tolling in Connecticut is whether the state, if it opts to toll, would (1) lose a portion of its annual federal highway funding because of the decrease in toll-free road mileage or (2) be required to repay federal funding it had previously received as a result of the 1983 toll removal agreement between the USDOT and ConnDOT.

Generally speaking, imposing tolls as allowed under a federal tolling program does not affect a state’s annual federal highway aid apportionment. This is largely due to a 2012 change in the federal highway programs distribution formulas, which are no longer based on federal-aid highway mileage (see below: Annual Highway Apportionment). Additionally, Connecticut fulfilled the terms of the 1983 agreement when it completed the removal of tolls from the Connecticut Turnpike in 1985. Thus, it appears that Connecticut will not lose or have to repay its funding if it imposes tolls under a federal tolling program and in compliance with the applicable laws and regulations.

**Annual Highway Apportionment**

Since 2012, when Congress eliminated federal-aid highway mileage as a factor in federal transportation program distribution formulas, Connecticut’s lack of tolls has not been a factor in the amount of funding it receives under highway formula programs. (According to the Congressional Research Service (CRS), 92% of current federal highway funding is distributed through formula programs.)

Prior to 2012, each individual federal highway program used a separate formula to distribute funds to states, and several of these formulas took into account the number of federal-aid highway miles in a state. Tolled roads are generally not considered federal-aid highways, unless the tolling is implemented under one of the tolling exceptions. Thus, when Connecticut removed the tolls from I-95, that toll-free mileage became eligible for federal aid and was factored into the distribution
formula (see “1983 Toll Removal Agreement” below). According to a 1995 OLR report (95-R-0691), the state received approximately $10 million to $12 million each year in additional highway funding for resurfacing and restoration attributed to the newly-eligible mileage.

But since the passage of the 2012 federal transportation funding authorization bill (known as MAP-21), federal highway aid is no longer distributed under individual program formulas. Instead, each state receives an overall amount, called an “apportionment”, which is based on its apportionment in the prior year. Each state’s apportionment is then divided among core highway programs based on statutory formulas that take into account states’ performance and progress toward national goals, among other things, instead of highway mileage (23 U.S.C. § 104). (This CRS report provides a more detailed explanation of these changes.)

In a March 2018 email to the Office of Legislative Research, the FHWA wrote that the current federal-aid apportionment formula “is set in law by Congress and does not include any mechanism to provide extra funds—or take away funds—based upon the tolling status of Federal-aid highways ... [a] state’s regular Federal-aid formula apportionments are not impacted by the decision to toll or not toll a highway or bridge/tunnel facility.” The FHWA further noted that “there may be some limits as to which specific activities are eligible for Federal-aid funding on toll roads,” but that “a state would not receive a reduction in their annual Federal-aid apportionment if tolls are implemented consistent with Federal law and regulations.”

Repayment of Funds
As CDM Smith noted in the above mentioned report, it had long been assumed that, once removed, Connecticut could not re-impose tolls on I-95 without violating the terms of the 1983 toll removal agreement between ConnDOT and the USDOT. But according to CDM Smith, “such an interpretation is not appropriate.”

1983 Toll Removal Agreement. Most of I-95 in Connecticut was constructed as the Connecticut Turnpike prior to the Interstate Highway Program’s establishment, and the portion of I-95 between the Connecticut-New York border and Waterford remained tolled until 1985. But in August 1983, ConnDOT and the USDOT entered into an agreement which allowed the tolled Turnpike mileage to be factored into Connecticut’s federal highway formula funding, provided that Connecticut removed the tolls from the Turnpike by 1997. This agreement was executed in the wake of the Mianus River Bridge collapse, as Connecticut implemented a broad and extensive transportation infrastructure reconstruction and restoration program.
Repayment. If Connecticut had not fulfilled the terms of the 1983 agreement by removing the tolls, it would have been required to repay the funds it received due to the agreement. The FHWA confirmed this in a 1984 letter to ConnDOT which stated that, if Connecticut were to retain some of the tolls it had agreed to remove, it would have to execute a new agreement, repay the emergency funds it had received under the 1983 agreement, and forfeit its right to receive additional emergency funding for the Mianus River Bridge.

However, the 1983 agreement provides that “when freed of tolls, the Connecticut Turnpike toll road subject to this Agreement shall be treated the same as any other portions of the Interstate and Primary Systems which were constructed with Federal Aid.” In other words, once Connecticut fulfilled the agreement’s terms and removed the tolls (which it completed in 1985), I-95 would be treated like any other federal-aid highway. Therefore, it can toll I-95 under any tolling program that allows tolling interstate highways and for which it is eligible (e.g., the VPP program).

In an email to ConnDOT in February 2017, the FHWA concurred that (1) the agreement’s terms were fulfilled when the tolls were removed and (2) repayment of federal funds would not be required if Connecticut were to reinstate tolling under the VPP program or any other current federal tolling program.

Tolling Without Legal Authority

Federal law does not establish a specific penalty for violating the prohibition on tolling federal-aid highways. But federal regulations give the FHWA administrator general authority to take remedial action if he or she determines that a state has violated, or failed to comply with, federal laws related to highway projects. Specifically, these regulations authorize the administrator to withhold payment of federal project funds, withhold approval of further state projects, or take other actions the administrator deems appropriate, until the state achieves compliance or completes remedial action to the administrator’s satisfaction (23 C.F.R. § 1.36).

However, it is unclear what penalties the state would face if it were to impose tolls in violation of federal law because such an action seems to be unprecedented. Every state that has converted a toll-free highway to a tolled facility appears to have done so (1) under an exception to the federal tolling prohibition or (2) with permission by an act of Congress and in accordance with the terms set by the act, which typically included a one-time and limited repayment of federal funds. (Generally speaking, conversions of roads by acts of Congress happened before the expansion of federal tolling exceptions; see OLR 2009-R-0122 for more information on roads converted in this manner.)
We contacted the FHWA tolling program manager, who responded that she cannot definitively say how much a penalty would be or if there would be one at all. She noted that the FHWA would work to bring the state into compliance through whatever actions are legally available to it, which could include withholding of obligations. She also indicated that, to her knowledge, no state has placed tolls on a federal-aid highway without the legal authority to do so.

HP:tjo/cmg