

MEMORANDUM

TO: AMERICAN BUS ASSOCIATION

**FROM: RICHARD P. SCHWEITZER
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DATE: March 7, 2018

RE: ENFORCING TOLLING EQUITY IN THE 2015 FAST ACT

This memo addresses provides an update on implementation of the tolling equity provision in section 1411 of the Fixing America's Surface Transportation Act, or "FAST Act," including refunds of prior toll payments and future compliance with the tolling requirements and other terms and conditions imposed by toll facilities.

I. SEC. 1411(a) OF THE FAST ACT

The tolling provision in sec. 1411(a) of the FAST Act amends 23 U.S.C. §129 by adding a new paragraph (a)(9) that states: "An over-the-road bus that serves the public shall be provided access to a toll facility under the same rates, terms and conditions as public transportation buses."

A toll facility is defined in newly designated 23 U.S.C. §129(a)(10)(E) to mean "a toll highway, bridge, or tunnel or approach to the highway, bridge, or tunnel constructed under this subsection." Subsection (a) of 23 U.S.C. §129 sets out the terms and conditions of the basic federal grants program available to public authorities for initial construction and reconstruction, resurfacing, restoration, rehabilitation or replacement of a toll highway, bridge or tunnel or approach thereto. The federal share payable for such projects may not exceed 80 percent. 23 U.S.C. §129(a)(5).

For purposes of 23 U.S.C. §129, "public authority" means "a State, interstate compact of States, or public entity designated by a State." 23 U.S.C. §129(a)(10)(D). Thus, if a State, interstate compact of States, or public entity designated by a State, has received federal funding for a toll highway, bridge or tunnel or approach thereto, the recipient of federal funds must allow an OTRB to have access to the toll facility under the same rates, terms and conditions as public transportation buses.

II. FHWA GUIDANCE

The Federal Highway Administration issued final guidance on treatment of over-the-road buses under sec. 1411 of the FAST Act. [83 Fed. Reg. 7839](#) (February 22, 2018). The guidance addressed the effective date of the provision, definitions, affected facilities, grantee obligations, availability of refunds for prior payments, and FHWA's role in enforcing the tolling equity provision.

The FHWA determined the tolling equity requirement became effective on December 4, 2015, the date of enactment of the FAST Act. All obligations under the provision run forward from that date.

The guidance adopted the following definitions for purposes of sec. 1411:

- “Over-the-road bus” is defined as a bus characterized by an elevated passenger deck located over a baggage compartment.
- “Public Transportation Bus” is a category of public transportation vehicle (as defined in 23 U.S.C. 166(f)(6)), consisting of a motor vehicle with motive power, except a trailer, designed for carrying more than 10 persons.
- “Public Transportation Vehicle” means a vehicle that (A) provides designated public transportation (as defined in section 221 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12141) or provides public school transportation (to and from public or private primary, secondary, or tertiary schools); and (B)(i) is owned or operated by a public entity; (ii) is operated under a contract with a public entity; or (iii) is operated pursuant to a license by the Secretary or a State agency to provide motorbus or school vehicle transportation services to the public.
- “Serve/Serving the Public” means provision of service to the general public, including general or special service (including charter service) on a regular and continuing basis.
- “Toll Facility” means a toll highway, bridge, or tunnel or approach to the highway, bridge, or tunnel constructed under 23 U.S.C. 129(a).

The guidance lists some 137 toll facilities (highway routes, or segments of routes, bridges and tunnels) in 30 states that are affected by the tolling equity requirements. A copy of the affected facilities is attached to this memo. But despite ABA's multiple requests in meetings, emails, and in comments to the proposed guidance, the FHWA final guidance failed to include any reference to the actual tolls charged by affected facilities for public transportation buses. Thus, we have no easy way to determine if a tolling facility offers a discount or exemption to public transportation buses.

Further, the FHWA refused to use its annual audit process for federal grantees to determine whether tolling facilities are complying with the OTRB equal access requirements.

With regard to refunds, the FHWA also declined to assist OTRB operators. The guidance stated, “If an OTRB entity believes equal access was not provided by a covered facility any time after December 4, 2015, that entity should contact the owner/operator of the facility to request a

refund. The FHWA does not own, operate, or control the HOV and toll facilities subject to the OTRB requirements.”

The guidance did include one helpful statement on compliance. “The requirements of 23 U.S.C. 129(a) and 23 U.S.C. 301 apply to the use of Federal-aid funds for construction . . . on tolled highways, bridges, and tunnels, including the use of emergency relief funds for repairs to toll facilities . . . When Federal funds are used for allowable purposes under 23 U.S.C. 129, grantees are required to follow applicable statute, regulations, and policies. This includes equal access and treatment for OTRBs.” But the agency left enforcement of the equal access requirements up to private OTRB operators.

III. ACCESS TO REFUNDS

To the extent that affected tolling facilities have provided toll discounts or exemptions to operators of public transportation vehicles that were not available to OTRB operators since December 4, 2015, OTRB operators have a legal claim for refunds of the difference. The claim is under 42 U.S.C. § 1983, which provides that any person acting under state law shall be liable in an action at law for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States. In addition to refunds, a successful claim under § 1983 entitles the plaintiff to attorney’s fees and costs under 42 U.S.C. § 1988.

But there are several steps necessary to identify and claim the refunds. First, it is necessary to identify the tolls charged by each of the 137 tolling facilities for public transportation vehicles and OTRBs since December 4, 2015. This can be accomplished by reviewing the facilities’ websites and annual reports, making phone calls, and, if necessary, filing Freedom of Information Act-type requests to each facility under state law.

Once the facilities that have allowed more favorable tolls for public transportation vehicles are identified, demands for refunds can be made, plus interest, for tolls paid by OTRB operators since December 4, 2015. But the OTRB operators will need to identify which vehicles were subject to tolls since the effective date of the FAST Act provision, and the amounts of tolls paid, and exclude all non-OTRBs from this calculation. The requests for refunds will be for individual OTRB operators in the form of demand letters or under administrative refund procedures, if available.

If an affected toll facility refuses to grant refunds, a class action lawsuit(s) could be filed in federal court for the claimed amounts. Because toll facilities in 30 states are involved, one or more representative suits might be filed to establish the right to refunds and then use the case law as precedent to encourage other facilities to issue their own refunds.

But action should be taken soon to accomplish these goals. In most states, the statute of limitation on lawsuits is three years for this type of claim. If operators have not filed suit or at least made a demand for refunds by December 4, 2018, they will lose access to refunds for each day of delay.

V. FUTURE COMPLIANCE

Even if refunds are granted, consideration should be given to how to enforce future compliance with the tolling equity requirement. In addition to monitoring toll requirements to ensure that public transportation vehicles do not obtain some future benefit unavailable to OTRB operators, there is the need also to verify that the “terms and conditions” of access to toll facilities are the same for OTRBs and public transportation vehicles. This could include time of day or lane restrictions or other priorities given to public vehicles but not to OTRBs. Also, there is the need to ensure future federally-funded projects comply with the toll equity provision.

Because the FHWA has refused to enforce the tolling equity provision as part of its annual audit process for federally-funded facilities under 29 U.S.C. § 123(a)(3)(B), it may be worth asking Congress to amend Sec. 123 to include the tolling equity compliance as part of the annual audit process.

V. IMMEDIATE STEPS

If ABA members know of any particular discounts or exemptions applicable to public transportation vehicles on affected toll facilities, **please let ABA staff know ASAP**. For example, under Massachusetts statute the Massachusetts Bay Transportation Authority is exempt from tolls for the use of highways, bridges and tunnels in the Commonwealth. Since MBTA buses do not pay tolls, all OTRB operators are entitled to the same treatment for the use of Sec. 129 toll facilities (such as the Massachusetts Turnpike, the Ted Williams Tunnel, and the Maurice J. Tobin Bridge) on which MBTA buses provide service.

According to the 2018 Report of the White House Council of Economic Advisors, toll collections for highways, bridges and tunnels exceeded \$14 billion in 2016. If Congress approves the expanded use of public-private partnerships for infrastructure funding, as the White House has proposed, that toll revenue figure will increase dramatically in future years, and the value of the tolling equity requirement in Sec. 1411 will increase accordingly. But it is up to private OTRB operators to secure their rights under the equity requirement.