Agency Comments on S. 1072 and H.R. 3550, as Passed
[in general, ordered by Senate Provision]

Clarification of Definitions of "Indian" and "Indian tribes" (section 3 of S. 1072): Section 3 of S. 1072 revises the current definitions of "Indian reservation road" and "public authority," which make use of the terms "Indians" and "Indian tribe." Without any qualification, such terms could be deemed racial classifications subject to strict scrutiny rather than political classifications subject to rational basis review. In order to avoid raising potential equal protection problems by using racial classifications, we suggest that (1) "(as defined in title 25 (25 U.S.C. 450b(d))" be inserted following "Indians" where the term first appears in proposed 23 U.S.C. 101(a)(13)(A); and (2) "(as defined in title 25 (25 U.S.C. 450b(e))" be inserted following "Indian tribe" in proposed 23 U.S.C. 101(a)(25).

National Surface Transportation System Study (section 1202(b) of S. 1072): Section 1202(b)(2)(K) of S. 1072 requires the DOT Secretary to study the surface transportation system in the U.S. and to generate a report that addresses "a range of policy and legislative alternatives for addressing future needs for the surface transportation system." To the extent that this section requires the Secretary to make legislative recommendation to Congress, it violates the Recommendations Clause of the Constitution, which vests discretion in the President to recommend to Congress only "such measures as he shall judge necessary and expedient." U.S. Const. art. II, sec. 3. Accordingly, we recommend adding language clarifying that the Secretary has discretion to make such recommendations as he or she deems appropriate, as in section 4104(b)(3) of the bill.

TIFIA Amendments (section 1303 of S. 1072): Section 1303(f) of S. 1072 includes language authorizing the DOT Secretary to collect fees to cover administrative costs. We support the intent of the Senate language, but believe that it needs to be amended to specify that the fees will be paid into the TIFIA program (not financing) account. Otherwise, under the Federal Credit Reform Act of 1990, as amended, all fees must be paid to the financing account to reduce the subsidy cost of the loans or guarantees. In addition, we are concerned that the language in section 1303(f) is too broad in its authority, as it allows the Department to charge and spend the fees without further appropriation. We would be pleased to offer drafting clarifications to make the fees available through appropriations.

Wagering Tax Repeal (section 1308 of S. 1072): Section 1308 of S. 1072 would repeal chapter 35 of the Internal Revenue Code of 1986, which imposes a small tax on wagers accepted by legal gambling businesses, subject to certain exceptions, and a tax four times greater on illegal gambling businesses. We oppose this repeal. The provision and its predecessors have existed since the early 1950's and have proved to be a valuable tool in fighting illegal gambling businesses, which are the single most important source of revenue for organized crime syndicates operating throughout the nation.

Mitigation in Closed Basins (section 1505 of S. 1072): On May 19 the Senate amended section 1505(c) of S. 1072 to address "Mitigation in closed basins." This provision

would have an adverse impact on the Emergency Relief (ER) program (23 USC 125) as currently administered by the Federal Highway Administration. It would appear that this amendment would permit ER funds to be used to prevent, rather than respond to, an emergency. This is a significant departure from the clearly stated purpose of the ER program. Such work to prevent disasters could equal or even exceed the annual amount authorized for the ER program under current law. The use of limited ER funds for such projects will negatively affect the Federal Government's ability to respond to damage to highway facilities or the interruption of highway services due to natural disasters around the Nation. Additionally, this section would appear to divert limited ER funds to non-highway work; to build flood-control dams. Thus, not only could this section hinder the Federal Government's ability to respond to emergency situations, this preventive work would appear to have limited benefit to the transportation system. It is our view that other, more appropriate funding sources should be identified for non-highway projects to prevent or otherwise avoid or minimize the consequences of natural disasters.

Transportation Project Development Process (section 1511 of S. 1072; section 6002 of H.R. 3550):

> **NOTE:** Section 1511(a) of S. 1072 would insert a new section 326 (Transportation Project Development Process) into title 23, U.S.C., and Title VI of H.R. 3550 would insert a new chapter 52 into title 49, U.S.C. The discussion below refers to these and related provisions of titles 23 and 49 to simplify references to the new provisions. Also, the letter to the conferees enclosing this document states our concerns about the prescriptive process established by these sections and our preference for the Administration's proposed approach.

Solicitation of views from other agencies: Proposed 23 U.S.C. 326(f)(3) requires that the lead agency, before determining purpose and need for a project, first solicit views of cooperating agencies and the public. Proposed 49 U.S.C. 5252(d)(1) in H.R. 3550 is similar to the Senate provision, except that it requires solicitation of views from the participating agencies (instead of cooperating agencies) and the public. It remains unclear in both bills what DOT would be providing to cooperating/participating agencies and the public when soliciting comment. It will be very difficult to provide meaningful input to the purpose and need statement if basic geographic, environmental and transportation data and information do not accompany the proposed statement.

Prompt issue identification and dispute resolution: Proposed 23 U.S.C. 326(h) and proposed 49 U.S.C. 5252(g) limit agencies to issues related to permits or approvals and not review. EPA's authority under CAA §309 is procedural and do not result in a permit or approval. We request that the Senate recognize agencies' review authorities so that issues may be elevated promptly.

Assumption of responsibilities for certain programs and projects: Section 1207 of H.R. 3550 would allow the DOT Secretary to establish a pilot program for up to 5 States to assume responsibilities for environmental reviews, consultation or decision-making for

certain projects. We prefer the Administration's broader pilot program in section 1801 of its proposal.

Parks, Recreation Areas, Wildlife Refuges, and Historic Sites (section 1514 of S. 1072): In this area, we support allowing States to provide Federal-aid funds to a State historic preservation office, tribal historic preservation office, or to the Advisory Council on Historic Preservation (ACHP) to expedite the Section 106 review process, as proposed in section 1604 of the Administration bill. This operates as an acknowledgement of the additional effort that will be required as these parties transition to implementing a provision that allows for Section 106 outcomes to satisfy the requirements of Section 4(f).

Idling Reduction Facilities in Interstate Rights-of-Way (section 1608 of S.1072): We support the provisions in section 1608 of S.1072 that provide an exemption to 23 USC 111 and allow idle reduction facilities to be put in place within the ROW of Interstate highways. Without this provision, the benefits of idle reduction to the trucking industry and to the environment through energy and air pollution reduction will be lost on the most heavily traveled roads in the country. The House bill has no comparable provision, and the Administration urges the conferees to adopt the Senate provision.

Addition to CMAQ Eligible Projects (section 1612 of S.1072): We support section 1612(c) of S. 1072, which creates a new voluntary provision to allow CMAQ funding for and promote the adoption of diesel engine retrofit and anti-idling equipment for highway construction equipment, but the provision must be amended to specify that these activities may receive emission reduction credit under the transportation conformity process. This section creates a voluntary program to reduce emissions from highway construction equipment in Clean Air Act non-attainment and maintenance areas. The program promotes the adoption of anti-idling equipment, diesel engine retrofits, and other strategies determined appropriate by EPA and DOT. We support implementation of these strategies because of the substantial emission reductions that could occur through more rapid deployment of these technologies. Moreover, these control strategies are important tools for State and local governments as they work to meet the new NAAQS requirements for ozone and PM 2.5.

CMAQ Evaluation and Assessment Program (section 1614 of S.1072): This provision would require the Secretary to evaluate a representative sample of CMAQ-funded projects but provides no funding for the assessment program. Without dedicated funding, FHWA cannot ensure that such an evaluation program can be accomplished with the necessary rigor to firmly document the benefits of the CMAQ program. The recommendation by the National Academy of Sciences assumed such rigor, and the Administration believes it necessary. A new paragraph should be added after paragraph (3) of the Senate bill, as provided in the Administration proposal, as follows:

> "(4) FUNDING.--Before making apportionments under section 104(b)(2) of this title for a fiscal year, the Secretary shall deduct 0.5 percent from the

amount to be apportioned for such fiscal year for the purpose of carrying out the requirements of this subsection.".

Conformity--SIP's (section 1615 of S.1072): Section 1615 of S.1072 establishes that states would only include consultation procedures in their implementation plan, rather than the entire conformity regulation. The House bill does not address this provision. We support this provision, which is similar to the Administration bill, and encourage the conferees to adopt the Senate provision. This provision streamlines the conformity SIP process, eliminates burden from state agencies and makes conformity rule changes available to all areas without the need for the state to revise its SIP.

Substitution of Transportation Control Measures in Approved SIPs (section 1617 of S. 1072; section 1824 of H.R. 3550): Both sections allow areas to make changes to TCMs in approved SIPs without the need for a SIP revision as long as the substitute measure provides equivalent emission reductions and is implemented no later than the date on which the emissions reductions are necessary for the SIP to achieve its purpose (e.g., attainment of the relevant NAAQS).

We support the Senate provision. However, there is inconsistency in the Senate provision concerning whether substituted TCMs can be implemented without going through the SIP revision first. To address this inconsistency, we recommend that proposed section 176 (c)(8)(D)(ii) be deleted and that section 176(c)(8)(B)) be revised to read as follows:

"(B) ADOPTION.--

"(i) Concurrence by the metropolitan planning organization, State air pollution control agency and the Administrator as required by paragraph (A)(v) shall constitute adoption of the substitute and additional control measures.

"(ii) Once adopted, the substitute or additional control measures become, by operation of law, part of the state implementation plan and become federally enforceable.

"(iii) Within 90 days of its concurrence, the State shall submit the substitute or additional measures to the Administrator for incorporation in the codification of the applicable implementation plan. Notwithstanding any other provision of this Act, no additional State process shall be necessary to support submission of such revision of the applicable plan.".

This provision clarifies that a substitute TCM can proceed before it is added to the SIP. It also ensures that the State keeps an up-to-date list of the TCMs that must be implemented so that the regulated community and the public can review the list and have access to the complete SIP and TCMs that are included in that SIP. To further clarify that a substitute TCM could actually proceed before it is added to the SIP, we would insert the following after the word "paragraph" in proposed section 176(c)(8)(C): ", and the funding or

approval of such a control measure,". The language in the House bill is similar to the Senate's but does not require early consultation with the state air agency and EPA on the selection of substitute TCMs as the Senate bill does. Therefore, we prefer the Senate's language, with the changes noted.

Suspension and Debarment Mandatory Enforcement Policy (section 1802(c) of S. 1072): The Administration recommends deletion of proposed 49 U.S.C. 307(a) from the provision being added to title 49 by section 1802(c) of S. 1072 with respect to the suspension and debarment of contractors indicted or found guilty of committing fraud on DOT-funded highway and transit projects. The Administration will continue to work with Congress in developing legislation that reinforces the importance of a strong suspension and debarment program by utilizing the mechanisms available under current law and regulations.

Contracting with Indian Tribes (section 1806(c) of S. 1072; section 1118(a) of H.R. 3550): Both sections propose changes that negatively affect the participation, funding, and oversight role of the Bureau of Indian Affairs (BIA) in the Indian Reservation Road Program. Section 1806 of S. 1072 would allow some tribes to deal directly with the DOT Secretary and complicate the coordination of transportation needs and improvements with the other services and activities occurring on the reservation. Unlike S. 1072, Section 1118 of H.R. 3550 does not authorize the DOT Secretary to contract with Indian tribes under the Indian Self-determination and Education Assistance Act. Both bills would make it harder for the BIA to carry out its trust responsibilities to tribes and ensure the safety of more than 24,000 miles of Federally owned Indian Reservation Roads. Both bills would in some cases deny funding to the BIA and thus prohibit the BIA from carrying out its administrative and oversight roles on Indian Reservation road projects. Over the long term, less BIA administrative funding would reduce the BIA role in advocating and supporting tribal participation in other Federal-aid transportation programs such as Scenic Byways, Emergency Relief, and Transportation Enhancements. While we encourage and support tribal participation in the Indian Reservation Road Program, program provisions must continue to fund and allow both Secretarial and BIA stewardship and oversight.

Surface Transportation Environment and Planning Cooperative Research Program (section 2101 of S. 1072; section 5203 of H.R. 3550): We support creation of a new surface transportation environment and planning cooperative research program. We prefer the Senate bill (section 2101 of S. 1072) because it allows the Secretary maximum flexibility to carry out the new program. The final bill, however, must include specific authority for the new program to seek and receive additional funds to be a truly cooperative effort. Surface Transportation Research funds, as envisioned by the Administration, would be "seed" money to leverage investments, cooperation and commitment to effectively carry out research on the complex relationships between transportation activities and the environment. The new research program will not be successful unless the administering organization can seek and accept additional funds.

Section 2101(a) of S. 1072 revises 23 U.S.C. 508 (Surface Transportation Research Technology Deployment and Strategic Planning) to provide a role for a Research and Technology Coordinating Committee that includes formulation of recommendations relevant to research priorities, project selection and deployment strategies that the DOT Secretary is directed to respond to. Section 2101(a) would also add a new section 509 to title 23, U.S.C. This section would establish a highway research program, and would direct the Secretary to submit a report to the Senate Committee on Environment and Public Works, and the House Committee on Transportation and Infrastructure generated by the Transportation Research Board of the National Academy of Sciences. The report would contain strategies for implementation of the program, including "recommendations for the way in which implementation of the results of the program under this section should be conducted, coordinated, and supported in future years." *See* new section 509(e)(2)(D), (e)(4). To the extent that either of these provisions requires the Secretary to make legislative recommendation to Congress, it violates the Recommendations Clause of the Constitution, which vests discretion in the President to recommend to Congress only "such measures as he shall judge necessary and expedient." U.S. Const. art. II, sec. 3. Accordingly, we recommend adding language clarifying that the Secretary has discretion to make such recommendations as he or she deems appropriate, as in section 4104(b)(3) of the bill.

Study of Data Collection and Statistical Analysis Efforts (Section 2102 of S. 1072): Section 2102 of S. 1072 would direct the Bureau of Transportation Statistics (Bureau) to establish statistical standards for DOT, and to conduct a study of ways in which transportation statistics may be used for national security purposes. *See* section 2102(b)(1), (3). In addition, section 2102(c) would direct the Secretary to provide a grant to the Transportation Research Board of the National Academy of Sciences (Board) to study the Department's use of transportation statistics, and to recommend ways in which the Department could use such statistics more efficiently. The Board's study must in turn be provided to the Secretary and various congressional committees. *See* section 2102(c)(5): Moreover, section 2102(c)(6) provides that "[t]he Bureau shall, to the maximum extent practicable, implement any recommendations made with respect to the results of the study under this subsection," and section 2102(c)(7) directs the Comptroller General to conduct a review of the study, after which: "If the Comptroller General of the United States determines that the Bureau failed to conduct the study under this subsection, the Bureau shall be ineligible to receive funds from the Highway Trust Fund until such time as the Bureau conducts the study under this subsection."

These provisions raise two serious constitutional concerns. First, insofar as section 2102(c)(6) of the bill would require the Bureau to implement the policy recommendations of the Board, it would vest private persons not appointed in conformity with the Appointments Clause of Article 11 of the Constitution with "significant governmental authority," and subject executive officials to their direction. *See Buckley v. Valeo,* 424 U.S. 1, 126 (1976); *Edmond v. United* States, 520 U.S. 651, 662 (1997); U.S. Const. art. 11, § 2, cl. 2. The Transportation Research Board is a private, non-profit entity, as is the National Academy of Sciences of which it is a part. Allowing the Board to direct the efforts of the Department with respect to the manner in which it uses transportation data

in setting policy therefore vests executive power in private actors not been appointed by the President, the courts of law, or the head of a Department, in violation of the Appointments Clause. Thus, we recommend that the bill be amended to make clear that the Board's recommendations are advisory, or to provide for appointment of the Board's members in accordance with the Appointments Clause. For example, section 2102(c)(6) could be rephrased to read: "The Bureau may, as deemed appropriate, implement any recommendations made with respect to the results of the study under this subsection." Absent such an amendment, the provision should be stricken from the bill.

Second, section 2102(c)(7) would allow the Comptroller General, a congressional rather than executive officer, to exercise the power of withholding money already appropriated by Congress, based on his own determination that the Executive Branch has not faithfully executed its responsibilities to conduct the study prescribed by subsection (c), and without compliance with the constitutionally prescribed procedures for bicameral passage and presentment of legislation. *See* U.S. Const. art. 1, § 7, cl. 2. Injecting a congressional officer into the exercise of executive power in this manner would violate the separation of legislative and executive powers established by the Constitution. *See generally Bowsher v. Synar,* 478 U.S. 714, 721-34 (1986); *INS v. Chadha,* 462 U.S. 919, 944-59 (1983). As the Court explained in *Bowsher,* 478 U.S. at 722, "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." Thus, we recommend that this provision be deleted from the bill.

We also note, however, that an ambiguity in the drafting of section 2102(c)(7) makes it somewhat unclear whether it is intended to apply to the Bureau's study under section 2102(b) or to the Board's study under section 2102(c). Section 2102(c)(7) provides in full (emphasis added):

> "(B) NONCOMPLIANCE.-If the Comptroller General of the United States determines that the Bureau failed to conduct the study *under this subsection,* the Bureau shall be ineligible to receive funds from the Highway Trust Fund until such time as the Bureau conducts the study under this subsection.". (emphasis added)

It thus appears that the references to the "Bureau" in subsection (c)(7) are intended to refer to the "Board," as the Board is the entity charged with conducting a study *under subsection* (c). *See* Section 2102(c)(l)-(3). Section 2102(b)(3) of the bill would require the Bureau to conduct a *separate* study related to possible national security uses of transportation statistics. But since the latter study is prescribed by *subsection (b)* of section 2102, presumably it is not "the study under *this subsection"* referred to in *subsection* (c) of section 2102. It is also possible that Congress intended (a) to direct the Comptroller General to withhold funding to the *Bureau* if the *Board* failed to do its study, or (b) to cut off funding to the *Bureau* for its failure to complete the study of possible national security uses of transportation statistics (in which case the phrase "in this subsection" should read "in subsection (b)"). But Congress should modify the bill to make its intentions clear, and in any event the constitutional problem with this section

remains the same: Congress may not vest in the Comptroller General the right to withhold money that has already been appropriated by Congress.

Public Transportation Capital Investment and National Research; Commercial Driver License Working Group (section 3011, 3016, and 4224 of S. 1072): Sections 3011, 3016, and 4224 of S. 1072 as currently written, violate the Recommendations Clause of the Constitution. Section 3011(k) would amend 23 U.S.C. 5309 by adding a requirement that the Secretary annually "submit a report on funding recommendations" to various congressional committees, including recommendations of projects to be funded and proposals for allocations of amounts to finance grants for capital investment projects. Section 3016(c) would amend 23 U.S.C. 5314 by adding a requirement that the Secretary study "the actions necessary to facilitate the purchase of increased volumes of alternative fuels . . . for use in public transit vehicles," and would require that the study "recommend regulatory and legislative alternatives that will result in the increased use of alternative fuels in transit vehicles" and be submitted to the Senate Banking Committee and the House Transportation Committee. *See* proposed 5314(d)(1) and (3). Section 4224 would direct the Secretary to convene a working group to study the commercial driver's license program and to report to various congressional committees on the group's "findings and recommendations for legislative, regulatory, and enforcement changes to improve the commercial driver's license program." *See* Section 4224(c). To the extent that this section requires the Secretary to make legislative recommendation to Congress, it violates the Recommendations Clause of the Constitution, which vests discretion in the President to recommend to Congress only "such measures as he shall judge necessary and expedient." U.S. Const. art. II, sec. 3. Accordingly, we recommend adding language clarifying that the Secretary has discretion to make such recommendations as he or she deems appropriate, as in section 4104(b)(3) of the bill.

New Freedom Program (section 3012 of S. 1072; section 3018 of H.R. 3550): To increase the effectiveness of the "New Freedom" grant proposal proposed as new 49 U.S.C. 5310(a)(1) by section 3012(a) of S. 1072, we recommend that the following language be added at the end of proposed subsection (a)(1): "care, employment, and employment support services."

House employee protective arrangements: Section 3018 of H.R. 3550 would add a new subsection 5317(e)(2) to title 49, U.S.C., entitled "Employee Protective Arrangements," which provides for a special warranty to be used to certify employee protections for the New Freedom Program. Under the special warranty arrangement, the terms and conditions of the employee protections would be certified in advance and would not require a referral to the union(s) and transit authorities seeking a Federal Transit Administration (FTA) grant. Subsection 5317(e)(2), however, specifies that the warranty to be used shall be the warranty "described in Section 215.7 of title 29, Code of Federal Regulations (as in effect on the date of enactment of the Federal Public Transportation Act of 2004), that provides a fair and equitable arrangement to protect the interest of employees," By restricting the warranty to the warranty as described, the legislation would unduly restrict the Department of Labor's ability to make refinements in the warranty. In addition, the warranty as proposed is inconsistent with the handling of other

employee protections, for example, in the preceding section (section 3017) for the Job Access and Reverse Commute Program. Finally, it is inconsistent with the warranty arrangement proposed for these programs in the Senate-passed bill, S. 1072, and in the Administration proposed reauthorization bill. Subsection 5317(e)(2) should therefore be amended to read as follows:

> "(2) Employee protective arrangements - Section 5333(b) shall apply to grants under this section, except that the Secretary of Labor shall utilize, for urbanized areas with a population of less than 200,000 and for other than urbanized areas, a special warranty that provides a fair and equitable arrangement to protect the interests of employees.".

Background Checks for Foreign Motor Vehicle Drivers of Hazardous Materials (section 4246 of S. 1072): Section 4246 of S. 1072 would prohibit Mexican and Canadian Drivers from hauling hazardous materials in the United States unless they have undergone a background check similar to that required for commercial drivers licensed in the United States. This section does not specify which government agency would be responsible for administering the program. The program for drivers licensed in the United States is administered by the Transportation Security Administration (TSA) and the Federal Motor Carrier Safety Administration (FMCSA). FMCSA requires hazmat drivers to successfully complete a background check conducted by TSA. Section 4246 also does not specify whether Congress intends that the background checks be performed by the nation issuing the license or by the Federal government. If the background checks are to be conducted by the Federal Government, then a method of collecting fingerprints and other identification information would have to be implemented and considerable funding would be needed to implement the program. It is likely that the process that would be utilized for domestic drivers would not be appropriate for Canadian or Mexican truck drivers. Therefore, a new system would have to be devised. If Canada or Mexico were to conduct their own background checks, those nations would need to implement such programs.

We note that section 4246 has an effective date of April 1, 2004, which has passed, and therefore, all commercial shipments by Canadian and Mexican truckers would have to cease immediately upon the bill's enactment. It is not clear that TSA will have a program in place in the very near future. Congress may wish to revise the implementation deadline.

Unified Carrier Registration (UCR) Board of Directors (section 4265(b) of S. 1072): The General Services Administration, which administers the Federal Advisory Committee Act (FACA), objects to the exemption from FACA for the Unified Carrier Registration (UCR) Board of Directors set forth in new 49 U.S.C. 14504a(d), as added by section 4265(b) of S. 1072. The Board would function better with the balancing of interests required by the Act.

Reduction in Hazardous Material Transportation Annual Registration Fee (section 4428(g)(1) of S. 1072; section 7009(c)(2) of H.R. 3550): Section 4428(g)(1) of S. 1072

would reduce the current maximum annual registration fee specified by 49 U.S.C. 5108(g)(2)(A) from $5,000 to $2,000. The equivalent change in the House bill at section 7009(c)(2) would reduce the maximum to $3,000. If the increased expenditures (specified elsewhere in the bill) from these fee collections are enacted, DOT may be required to abandon its current "two-level fees" (that impose a lower fee on small businesses) to obtain the required funding. For this reason, we oppose this change.

Standard of Judicial Review for Hazardous Material Rulemakings (section 4445 of S.1072; section 7024 of H.R. 3550): We request deletion of the last sentence of proposed 49 U.S.C. 5127(c) ("Findings of fact by the Secretary, if supported by substantial evidence, are conclusive.") in both S. 1072 (section 4445(a)(2)) and H.R. 3550 (section 7024(a)). Although proposed by the Administration, the "arbitrary and capricious" standard of the Administrative Procedure Act is appropriate for the informal rulemakings at issue.

Clarification of Exemption From Explosives Regulations (sections 4423 and 4463 of S. 1072): Section 4423 of S. 1072 adopts the Administration's proposal for clarifying the coverage of the hazardous material transportation statute, but could raise concerns about the applicability of chapter 40 of title 18, United States Code, to the non-transportation activities of regulated entities. We request that the Manager's Report on the conference include the following about adoption of section 4423:

> "This section would amend subsection 5103(b)(1)(A) to add that persons who prepare, accept, or reject hazardous materials for transportation in commerce, persons who are responsible for the safety of transporting hazardous materials in commerce, persons who certify compliance with any requirement issued under chapter 51, persons who misrepresent whether they are engaged in a function listed under 5103(b)(1)(A), and persons who tamper with hazardous materials while in transportation in commerce, are subject to the Hazardous Materials Regulations. These additional provisions would apply to government contractors, but not to government entities, because they are not included in the definition of when a government entity is a 'person' in 5102(9). To the extent that these new categories of persons may include a person other than a freight forwarder, broker, or agent, Chapter 40 of Title 18 applies to such other person. The categories amending sections 5103(b)(1)(A) are in no way intended to displace the regulatory and criminal provisions in Chapter 40 of Title 18."

Similarly, section 4463 of S. 1072 adopts a clarification from the Administration's proposal but in an overly broad form that (1) may hinder criminal enforcement actions relating to the improper use of explosives, including noncommercial transportation, and (2) is inconsistent with the Administration proposal. We urge the conferees to revise section 845(a)(1) as follows:

> "(1) aspects of the transportation of explosive materials via railroad, water, highway, or air that pertain to safety, including security, if that aspect is regulated by the Department of Transportation or the Department of Homeland Security.".

The current statutory scheme is clear--an otherwise prohibited individual is subject to criminal enforcement provisions unless that individual is engaged in an aspect of the commercial transportation of explosives that is governed by regulations issued by DOT, and which pertain to safety. Further, the current scheme appropriately retains criminal liability for transportation offenses involving explosives.

Although DOT and DHS have issued regulations governing many prohibited persons, the revision in section 4463 would extend that exception to include aspects of transportation that are merely "subject to the authority of the Department of Transportation and Homeland Security," effectively dropping the requirement that the aspect of transportation being regulated pertain to safety. Such a change could increase the number of otherwise prohibited persons who would be permitted to transport explosives in commerce, even though these individuals may not be subject to regulations that protect public safety and national security.

Certain activities that occur prior to transportation should be subject to the prohibitions in chapter 40 of title 18, even when "pre-transportation" functions are also performed at the same facility. Moreover, DOT does not have authority to regulate the noncommercial transportation of explosives but, in some respects, DHS does. The "subject to the authority" language in section 4463 could jeopardize prosecution of a transportation offense under circumstances where DHS has authority to regulate, but has not, or a non-transportation activity at a facility where "pre-transportation" functions (subject to DOT's authority) also take place.

Recreational Boating Safety (Subtitle E of Title IV of S. 1072): Subtitle E of Title IV of S. 1072 would reauthorize funding, with certain changes, for the Recreational Boating Safety (RBS) program administered by the United States Coast Guard. H.R. 3550 contains no corresponding provisions.

The RBS program is an essential element of the Coast Guard's Maritime Safety mission, and loss of funding for this important program would severely compromise the Coast Guard's boating safety efforts. Grants provided under this program not only promote boating safety education programs, but are also an important source of funding for state and local "first responder" agencies on our Nation's waters. Reauthorization of funding for this program is included in the "Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004" because funds for the RBS Program traditionally have been derived from Federal excise taxes on motorboat fuels that are transferred from the Highway Trust Fund to the ARTF. These motorboat fuel taxes, as well as other user-fee based revenues, also support other important programs administered by the U.S. Fish and Wildlife Service. We support provisions in both the House and Senate bills that would allow an additional share of Federal gasoline taxes on motorboat fuels to be used for these programs.

We encourage the conferees to adopt Subtitle E of Title IV of S. 1072 with the changes set forth below.

Section 4563: This section as drafted contains two errors that would adversely affect the Coast Guard's coordination of the national RBS program. First, "a minimum of" in paragraph (2) is inserted incorrectly. Second, the dollar amounts specified in section 4563 are based on the part-year funding provided in early temporary extensions of TEA-21, and should be revised. In addition, the language in subsection (a) of section 13106 needs to be revised to reflect the changes to 16 U.S.C. 777c that are being made in section 4523 of the bill.

We also recommend amending 46 U.S.C. 13106(a)(2), which authorizes the Coast Guard to withhold a portion of the State RBS grant funds to cover the costs of administration of the grant program, to remove the "floor" of one percent. With the additional funding provided for the States, it may not be necessary for the Coast Guard to retain a full one percent each year for administrative costs.

Accordingly, the text of section 4563 should be revised to read as follows:

"Section 13106 of title 46, United States Code, is amended--

"(a) in paragraph (1) of subsection (a) by striking `section 4(b) of section 4 of the Act of August 9, 1950 (16 U.S.C. 777c(b))' and inserting `subsections (a)(2) and (e) of section 4 of the Act of August 9, 1950 (16 U.S.C. 777c)';

"(b) in paragraph (2) of subsection (a) by striking `not less than one percent and'; and

"(c) in subsection (c)--

"(1) by striking `Secretary of Transportation under paragraphs (2) and (3) of section (4)(b) of section 4 of the Act of August 9, 1950 (16 U.S.C. 777c(b))' and inserting `Secretary under subsections (a)(2) and (e) of section 4 of the Act of August 9, 1950 (16 U.S.C. 777c)';

"(2) by striking `$3,750,001' and inserting `not more than 5 percent';

"(3) by striking `$1,500,001' and inserting `a minimum of $2,000,000'; and

"(4) by striking `until expended.' in the third sentence and inserting `during the two succeeding fiscal years. Any amount that is unexpended or unobligated at the end of the three-year period during which it is available shall be withdrawn by the Secretary and allocated to the States in addition to any other amounts available for allocation in the fiscal year in which they are withdrawn or the following fiscal year.'".

The Coast Guard also recommends the addition of a new Section 4502 establishing an effective date for the amendments made in Subtitle E. If the bill is enacted this fiscal year, the amendments should apply to funds appropriated after September 30, 2003.

Section 5102(c)(12) of S. 1072: The amendment to section 9503(b)(4) should refer to "section 5001 of this Act" rather than "section 5101 of this Act".

Section 5411 of S. 1072: The Coast Guard is concerned about the amendments in section 5411 of S. 1072 that rewrite 26 U.S.C. 9504 to "eliminate" the Aquatic Resources Trust Fund and change the Sport Fish Restoration Account to Sport Fish Restoration Trust Fund. "Aquatic Resources" is more representative of the nature of the several programs funded through the Trust Fund.

In addition, the American League of Anglers and Boaters (ALAB), a coalition of more than 30 organizations representing beneficiaries of the several programs supported through the Aquatic Resources Trust Fund, proposed a gradual drawdown (through FY08) of the existing balance in the Boat Safety Account. There has been no discretionary appropriation from the Boat Safety Account since FY98, and it is preferable to return these user fees to the States for programs to benefit the boaters who paid them.

Substitute language for section 5411 that reflects the original ALAB proposal for reauthorization of the Aquatic Resources Trust Fund in 26 U.S.C. 9504, with drawdown of the Boat Safety Account, follows. If this language is adopted, subsection (b) of section 4522 in S. 1072 should be deleted. However, if the trust fund change is enacted, references to the Aquatic Resources Trust Fund in other sections of titles 6, 16, 26, and 46, United States Code, must also be revised to reflect the new name.

SEC. 5411. TRANSFERS FROM THE TRUST FUND FOR MOTORBOAT FUEL TAXES.

(a) IN GENERAL— Paragraph (3) of section 9503(c) of the Internal Revenue Code of 1986 (26 U.S.C. 9503(c)) (relating to transfers from Trust Fund for motorboat fuel taxes), as redesignated by section 5002 of this Act, is amended--

(1) by striking so much of that paragraph as precedes subparagraph (C) and inserting the following:

`(3) Transfers from the trust fund for motorboat fuel taxes—

`(A) Transfer to land and water conservation fund—

`(i) IN GENERAL— The Secretary shall pay from time to time from the Highway Trust Fund into the land and water conservation fund provided for in title I of the Land and Water Conservation Fund Act of 1965 amounts (as determined by him) equivalent to the motorboat fuel taxes received on or after October 1, 2003, and before October 1, 2009.

`(ii) LIMITATION- The aggregate amount transferred under this subparagraph during any fiscal year shall not exceed $1,000,000.

`(B) EXCESS FUNDS TRANSFERRED TO SPORT FISH RESTORATION ACCOUNT- Any amounts received in the Highway Trust Fund—

`(i) which are attributable to motorboat fuel taxes, and

`(ii) which are not transferred from the Highway Trust Fund under subparagraph (A),

shall be transferred by the Secretary from the Highway Trust Fund into the Sport Fish Restoration Account in the Aquatic Resources Trust Fund.'; and

(2) By striking subparagraph (C) and redesignating subparagraphs (D) and (E) as subparagraphs (C) and (D), respectively.

(b) EXPENDITURES FROM THE BOAT SAFETY ACCOUNT.

Section 9504(c) of the Internal Revenue Code of 1986 (26 U.S.C. 9504(c)) is amended to read as follows:

`(c) EXPENDITURES FROM BOAT SAFETY ACCOUNT— Amounts in the Boat Safety Account on the date of enactment of this Act, and amounts thereafter credited to the Account under section 9602(b), shall be available, without further appropriation, in the following amounts:

`(1) In fiscal year 2004, $28,155,000 shall be distributed—

`(A) under section 4 of the Act entitled `An Act to provide that the United States shall aid the States in fish restoration and management projects, and for other purposes,' approved August 9, 1950 (16 U.S.C. 777c) in the following manner:

`(i) $11,200,000 to be added to funds available under subsection (a)(2) of that section,

`(ii) $1,245,000 to be added to funds available under subsection (a)(3) of that section,

`(iii) $1,245,000 to be added to funds available under subsection (a)(4) of that section,

`(iv) $1,245,000 to be added to funds available under subsection (a)(5) of that section, and

`(v) $12,800,000 to be added to funds available under subsection (b) of that section, and

`(B) under section 14 of that Act (16 U.S.C. 777m), $420,000, to be added to funds available under subsection (a)(1) of that section.

`(2) In fiscal year 2005, $22,419,000 shall be distributed—

`(A) under section 4 of that Act (16 U.S.C. 777c) in the following manner:

`(i) $8,075,000 to be added to funds available under subsection (a)(2) of that section,

`(ii) $713,000 to be added to funds available under subsection (a)(3) of that section,
`(iii) $713,000 to be added to funds available under subsection (a)(4) of that section,
`(iv) $713,000 to be added to funds available under subsection (a)(5) of that section, and
`(v) $11,925,000 to be added to funds available under subsection (b) of that Act, and

`(B) under section 14 of that Act (16 U.S.C. 777m), $280,000 to be added to funds available under subsection (a)(1) of that section.

`(3) In fiscal year 2006, $17,139,000 shall be distributed—

`(A) under section 4 of that Act (16 U.S.C. 777c) in the following manner:
`(i) $6,800,000 to be added to funds available under subsection (a)(2) of that section,
`(ii) $333,000 to be added to funds available under subsection (a)(3) of that section,
`(iii) $333,000 to be added to funds available under subsection (a)(4) of that section,
`(iv) $333,000 to be added to funds available under subsection (a)(5) of that section, and
`(v) $9,200,000 to be added to funds available under subsection (b) of that section, and

`(B) under section 14 of that Act (16 U.S.C. 777m), $140,000, to be added to funds available under subsection (a)(1) of that section.

`(4) In fiscal year 2007, $12,287,000 shall be distributed—

`(A) under section 4 of that Act (16 U.S.C. 777c) in the following manner:
`(i) $5,100,000 to be added to funds available under subsection (a)(2) of that section,
`(ii) $48,000 to be added to funds available under subsection (a)(3) of that section,
`(iii) $48,000 to be added to funds available under subsection (a)(4) of that section,
`(iv) $48,000 to be added to funds available under subsection (a)(5) of that section, and
`(v) $6,900,000 to be added to funds available under subsection (b) of that section, and

`(B) under section 14 of that Act (16 U.S.C. 777m), $143,000, to be added to funds available under subsection (a)(1) of that section.

`(5) In fiscal year 2008, all remaining funds in the Account shall be distributed under section 4 of that Act (16 U.S.C. 777c) in the following manner:

`(A) 45 per cent to be added to funds available under subsection (a)(2), and
`(B) 55 percent to be added to funds available under subsection (b).'

(c) CONFORMING AMENDMENTS.

Section 9503(b)(4), as amended by section 5102 of this Act, is amended—

(1) by adding `or' at the end of subparagraph (B),
(2) by striking the comma at the end of subparagraph (C) and inserting a period, and
(3) by striking subparagraph (D).

Effective Dates for Implementation of New Tax Provisions (provisions throughout S. 1072 and H.R. 3550): The general October 1, 2004, effective date for provisions in the two bills should apply to all tax provisions (other than amendments of the Trust Fund Code) adopted from either version of the bill.

Penalties for Violation of Sections 7201, 7203, and 7206 of the Internal Revenue Code of 1986 (section 5635 of S. 1072): Section 5635 of S. 1072 would make willful failure to file a tax return punishable as a felony, would raise the terms of imprisonment for the major criminal offenses in the Internal Revenue Code, and would increase the maximum fines that can be imposed for such offenses. The Administration supports raising the offense of willful failure to file a tax return from a misdemeanor to a felony, and increasing the maximum fine levels for offenses described in sections 7201 and 7206. As an alternative to raising a single violation of section 7203 to a felony, we would also support, and recommend that Congress consider, creating a felony for a pattern of section 7203 violations, for example, willfully failing to file a tax return for two consecutive years.

Proposed section 7206(b) is ambiguous and requires clarification. It is not clear whether proposed subsection 7206(b) supersedes the court's discretion to impose a fine under new subsection 7206(a) and mandates that the court impose a fine at least in the amount of any underpayment or overpayment of tax due to fraud, or merely raises the maximum fine under subsection 7206(a) to the amount of any underpayment or overpayment, if said amount is greater than the standard maximum fine. Moreover, because violations of sections 7201, 7203 and 7206 cause similar financial harm to the Treasury, consideration should be given to making the maximum fines identical for violations of all three statutes.

Finally, we support revising the maximum terms of imprisonment for violations of section 7201, 7203, and 7206. The existing statutory penalties suggest that Congress views failure to file as the least serious of the major tax crimes (1 year), followed by false statements (3 years) and tax evasion (5 years). The proposed legislation would make false statements the least serious offense (5 years), and treat failure to file and tax evasion as equally serious offenses (10 years). Consideration should be given to making the penalty for failure to file equal to that for false statements (5 years) rather than tax evasion.

House provisions with no Senate equivalent are addressed below

Constitutional Concerns with House Provisions (sections 1202, 1304, 1401, 1807, 1808, 1813, 3010, and 5501 of H.R. 3550):

Sections 1202, 1304, 1401, 1807, 1808, 1813, 3010, and 5501 of H.R. 3550, as currently written, violate the Recommendations Clause of the Constitution. Section 1202(e) would amend 23 U.S.C. 166 by directing the Secretary to study policies concerning intelligent transportation system facilities, equipment, and services and to make "recommendations regarding any changes in Federal and state statutes, regulations, and policies necessary to ensure that national interests are served in meeting future intelligent transportation system needs" and recommendations necessary to facilitate "expedited and streamlined procurements." Section 1304(k)(1)-(2) would require the Secretary to submit a report to the Committee on Environment and Public Works in the Senate and the Committee on Transportation and Infrastructure of the House of Representatives, including certain "recommendations of projects for funding." Section 1401(f)(1) would amend 23 U.S.C. 152(a)(1) to require the Secretary to submit a report to the Committee on Environment and Public Works in the Senate and the Committee on Transportation and Infrastructure of the House of Representatives, including "recommendations for funding and program improvements" and "recommendations for future implementation of the hazard elimination program." Section 1807(a)-(c) would direct the Secretary to study the safety of highway toll facilities and to submit a report to the Committee on Environment and Public Works in the Senate and the Committee on Transportation and Infrastructure of the House of Representatives on the results of the study, "together with recommendations for improving toll facilities workplace safety." Section 1808(a) of the House version would direct the Secretary to conduct demonstration projects to study the safety, cost-effectiveness, and environmental impacts of different pavement marking systems and the effect of State bidding and procurement processes on the quality of pavement marking. Section 1808(b) would further direct the Secretary to submit a report on the results of these projects to Congress, "together with findings and recommendations on methods that will optimize the cost-benefit ratio of the use of Federal funds on pavement marking." Section 1813(a) of the House version would direct the Secretary to carry out a pilot project to assess how intelligent transportation system technology can be applied to assess user charges to support the Highway Trust fund. Section 1813(c) would further direct the Secretary to submit annual status reports on this project, "together with findings and recommendations," to various congressional committees. Section 3010(i)(1) of the House version provides that the Secretary "shall submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate a report that includes -- (A) a proposal of allocations of amounts to be available to finance grants for new fixed guideway capital projects among applicants for these amounts; . . . (C) recommendations of such projects for funding based on the evaluations and ratings and on existing commitments and anticipated funding levels for the next 3 fiscal years and for the next 10 fiscal years based on information currently available to the Secretary." Section 5501 of the House version amends 49 U.S.C. §111(d)(4)(F) to transmit a report to Congress that

includes "any proposed statutory changes needed to implement the findings of the Assessment under paragraph (1)." To the extent that this section requires the Secretary to make legislative recommendation to Congress, it violates the Recommendations Clause of the Constitution, which vests discretion in the President to recommend to Congress only "such measures as he shall judge necessary and expedient." U.S. Const. art. II, sec. 3. Accordingly, we recommend adding language clarifying that the Secretary has discretion to make such recommendations as he or she deems appropriate, as in section 4104(b)(3) of the bill.

Notice and Comment Requirement for FTA Non-Regulatory, Substantive Policy Statements (section 3031 of H.R. 3550): Section 3031 of H.R. 3550 adds a new paragraph (5) to 49 U.S.C. 5334(c) that requires FTA to subject non-regulatory substantive policy statements to a 60-day public review notice and comment period. This provision is unnecessary and could cause significant problems if adopted. Section 553 of title 5, U.S.C., specifies that an agency afford interested persons general notice of proposed rulemaking and an opportunity to comment before a substantive rule is promulgated. FTA understands that substantive rules are rules that grant rights, impose obligations, or produce other significant effects on private interests or effect a change in existing law or policy, and that such rules invoke the notice and comment requirements of section 553. FTA has, and will continue, to invoke section 553 notice and comment procedures when imposing any substantive requirements, including those imposed through the Federal transit assistance grant process.

Section 553 provides an exemption from the notice requirements for interpretive rules, general statements of policy or rules of agency organization, procedure or practice. FTA rules that fall into this category merely clarify or explain existing laws, regulations or policy and are instructional or informative in nature. They do not have the force and effect of law and are not accorded that weight by the courts. *American Hosp. Ass'n v. Bowen,* 834 F.2d 1037 (1987). Guidance and policy statements preserve agency flexibility in dealing with limited situations where substantive rights are not at stake. *Id.* at 1045. They are "indispensable to agency administration" and their prompt dissemination serves the public interest. Notice and comment could discourage agencies from issuing them. JEFFREY S. LUBBER, A GUIDE TO FEDERAL AGENCY RULEMAKING, at 57. Should FTA be required to provide a notice and comment period for interpretive rules or policy statements as may be intended by the House, FTA would be precluded from accommodating situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense. 834 F.2d at 1045.

Federal Transit Administration Administrative Budget (section 3034 of H.R. 3550): The Administration believes that the Federal Transit Administration's administrative budget should be sufficient to support the overall size of the transit program.

Qualifications of Substance Abuse Professionals (section 4129 of H.R. 3550): Section 4129 of H.R. 3550 would direct a DOT rulemaking to allow certain mental health counselors to qualify for duties under the Departments drug- and alcohol-testing program

despite the lack of professional credentials deemed critical by DOT to ensure that transportation employees with substance abuse problems are properly evaluated for treatment and do not return to safety-sensitive duties before they are clinically ready. This rulemaking mandate could undermine the effectiveness of efforts to prevent substance abuse in the transportation workplace and should not be included in the final conference report.

Hazardous Materials Training (section 7008 of H.R. 3550): Section 7008(2) of H.R. 3550 attempts to correct a long-standing error made in 1990 to hazardous materials authorities now found at 49 U.S.C. 5107(f) (which would be re-designated as 5107(g) by section 7008). Section 5107(f)(2) sets forth those actions of the Secretary of Transportation in chapter 51 that are not considered to be an exercise, under section 4(b)(1) of the Occupational Safety and Health Act of 1970, of statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

Based on their respective statutory authorities, both DOT and the Occupational Safety and Health Administration (OSHA) in the Department of Labor regulate hazardous materials. However, section 4(b)(1) of the Occupational Safety and Health Act of 1970 provides

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 29 U.S.C. 653(b)(1).

This provision means that, where DOT exercises its authority to prescribe or enforce standards or regulations affecting occupational safety or health in a particular area, OSHA is precluded from regulating in that same area, without exception.

However, under Section 126 of the Superfund Amendments and Reauthorization Act of 1986, OSHA issues standards to protect the health and safety of employees engaged in hazardous waste operations; in addition, the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), Public Law (Pub. L.) 101-615, gives OSHA shared jurisdiction with DOT for hazardous materials training, handling criteria, registration, and motor carrier safety.

HMTUSA has been read to mean that an action of the Secretary in the areas of hazardous materials training, handling criteria, registration, and motor carrier safety does not preclude OSHA from regulating in those same areas and has, thus, resulted in some confusion due to the overlapping jurisdictions of DOT and OSHA.

To clarify the extent of shared DOT/OSHA jurisdiction, by eliminating dual jurisdiction over handling criteria, registration, and motor carrier safety, we recommend that Section 7008 be further amended to designate the current text as subsection (a), delete the reference to 5106 (explained below) by striking "and inserting 'section 5106'" on line 19, and add a new subsection (b) at the end as follows:

"(b) Notwithstanding section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653(b)(1)), an action of the Secretary of Transportation under chapter 51 of title 49, United States Code, does not preclude the Secretary of Labor from prescribing or enforcing standards, regulations or requirements regarding--

"(1) hazardous materials employee training, or

"(2) the occupational safety or health protection of employees responding to a release of hazardous materials.".

We also recommend striking section 5106, which authorizes the Secretary to prescribe criteria for the handling of hazardous materials, from title 49. Because of the broad authority of the Secretary of Transportation, under section 5103(b), to prescribe regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce, section 5106 is unnecessary. In addition, this section has generated some confusion about the respective responsibilities of DOT, OSHA, and the Environmental Protection Agency. Therefore, it should be eliminated.