

## **I-95 Corridor Coalition VMT-Based Charge – Review of State Legal Issues**

### **I. Overview**

This memorandum summarizes issues of state law that relate to the implementation of a vehicle miles traveled (VMT)-based system of user charges. The information below was drawn from legal counsel representing transportation agencies within the I-95 Corridor.<sup>1</sup> Respondents were asked a series of questions related to a hypothetical VMT-based system, which would charge motorists for the use of all highways within participating states.

*Note: For purposes of this memo the general term “VMT charges” is used (instead of “VMT fees” in recognition of the special legal and administrative distinctions among “taxes”, “fees” and “tolls”*

While state laws, constitutions, and policies are necessarily unique, all of the states agreed that a new VMT-based system would be affected by the following core issues:

- Characterization of VMT as taxes, fees, or tolls;
- Limitations on use of revenues;
- Rate setting;
- Transition from fuel taxes to VMT;
- Multistate collection and redistribution;
- Delegation of program administration;
- Enforcement and penalties; and
- Data sharing and privacy.

### **II. Background Information**

The survey and this report are part of a larger study sponsored by the I-95 Corridor Coalition (the “VMT Study”) to assess the feasibility of VMT-based charges. The VMT Study assumes that VMT-based charges will eventually replace fuel taxes as the primary source of state motor vehicle revenues on all or most of the roads and streets within their jurisdiction. However, it is unlikely that a complete changeover from the current system can be accomplished all at once, and thus the survey also asked questions related to transitioning to VMT-based charges and operating a VMT-based system in addition to the current fuel tax regime.<sup>2</sup>

The VMT Study has focused on the administrative, institutional and legal issues that are raised when a group of states (and other transportation agencies) cooperating with each other in implementing a VMT-based system of road charges – as well as individual state issues. Thus, the survey also addressed issues related to inter-jurisdictional enforcement and interstate cooperation. The survey sought to identify legal issues that might impact

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<sup>1</sup> Oregon was included as well, due to its experience with VMT. Oregon has sponsored a long-term study.

<sup>2</sup> A copy of the survey is attached as Exhibit A.

the structure and administration of a new VMT-based system of charges including some or all of the states along the I-95 Corridor by sampling a representative group of states. The respondents to the survey were asked to provide input on a broad range of technical and administrative issues, including the basis of the VMT-based charge, how rates may be established, where and how charges could be collected and enforced, and how states and other organizations collecting VMT fees might distribute and apply revenues generated by the new system and issues of inter-jurisdictional charging and enforcement.

Any effort to implement VMT-based charges will be affected by existing state and federal laws and regulations, and may be subject to local laws and regulations in certain instances, whether the new system's scope is limited to a single state or broadened to include several states. Experience gained from existing state tax, fees, and toll regimes could help shape the new VMT-based system, as these programs have established precedents for dedicating transportation revenue streams and dealing with restrictions on how those revenues may be applied. National programs like the cooperative enforcement regime established to ensure collection of the Heavy Vehicle Use Tax could likewise provide a helpful model for multi-state enforcement efforts. Nevertheless, it must be recognized that a mandatory VMT-based charge applied over an entire highway network has never been used in the United States, and implementing such a system will raise new and perhaps novel legal issues at both at all government and jurisdictional levels.

### **III. Discussion**

The intent of this analysis is to provide a description of the issues likely to be encountered at the state level based on survey responses. It should be noted that the survey made clear that the responses would not necessarily reflect the official views of the agencies represented by those participating in the survey – and therefore the individual state responses are considered confidential. Moreover, the time given for responses was rather short. Hence, this report should not be regarded as a definitive legal analysis of the issues involved. Rather, this report is meant to provide a preliminary identification of key issues based on the unofficial views of the transportation-agency legal counsels who responded to the survey.

The survey included 21 questions, which were presented in multiple choice and yes/no format for responders' convenience. Opportunities for additional comments were also provided at many points in the survey questionnaire. Eight completed questionnaires were returned. These were judged to provide an adequate sample and have been analyzed for both common perspectives and range of variation.

From the responses, it is apparent that both similarities and remarkable differences exist as to the legal issues that states might face in implementing a VMT-based system of charges.<sup>3</sup> This report is focused on the issues, opportunities and problems that should be considered based on the responses received.

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<sup>3</sup> We understand that additional responses may be forthcoming, and will be built into the final report for this project.

## **A. Establishment and Characterization of VMT-Based Charges**

Vehicles are currently subject to a variety of taxes and fees, e.g. state registration fees, taxes on fuel (which may or may not vary with the actual price of the fuel), and other charges associated with the use of motor vehicles. States also impose tolls and fees to support specific transportation facilities through tolling. Taxes, fees, and tolls are treated differently from state to state. Each category of charge is subject to different requirements regarding authority to impose, limitations on use of revenues, rate setting, and administrative discretion. Taxes generally have well-established collection and enforcement provisions that address evasion and fraud. Toll and fees do not often benefit from such strong provisions. Toll enforcement and fraud provisions are highly variable from state to state, and often are not enforceable across state boundaries without a multi-state agreement. Thus, there is a substantial body of law that can be drawn upon when considering the establishment and characterization of VMT-based charges; the size of the applicable body of law will vary depending on their classification as taxes, tolls or fees..

Respondents were asked to comment on the likely impact of characterization of the VMT-based charge as a toll, fee, or tax, and to provide insight as to which strategy would be the best approach for the purpose of implementing a new VMT-based system. There was general agreement that the least flexible characterization was a tax. However, all states agreed that in order to impose VMT-based charges new enabling legislation would be required, regardless of whether the new charges were characterized as taxes, tolls or fees.

They also indicated that treatment would similarly be affected by the intended uses for the net proceeds of the VMT-based charge, e.g. dedicated transportation systems congestion management, general revenue, and/or attainment of policy objectives (such as encouraging the use of particular fuels, operation of cleaner vehicles, etc.).

### **1. VMT-Based Taxes**

Taxation power is vested in the legislative bodies. Taxes and tax rates are set by the legislature, but can apply to a broader range of activities than fees. In addition, tax revenues may be subject to fewer restrictions on use, unless revenues produced by a tax is dedicated to particular purposes. It is true that motor vehicle taxes are often dedicated to transportation purposes, but this is usually the result of specific statutory constraints. In some states, there are state constitutional provisions regarding the use of fuel taxes.

As a tax, VMT-based charges would require authorizing legislation, and in some cases constitutional amendments. Respondents noted that taxes are subject to strict construction, so the authorizing language would need to be very precise. This would reduce the flexibility and discretion regarding charges or variations in tax rates.

State fuel taxes have generally been imposed as a combination of excise and sales taxes. According to the IRS, excise taxes apply to both sales of goods (e.g., fuel taxes) and to

certain activities (e.g. heavy vehicle use taxes and taxes on wagering). Irrespective of how they are characterized, the U.S. Supreme Court has upheld a characterization of state fuel taxes as a payment required for the use of facilities which the state provides at its discretion. Hence, the state may properly seek compensation for the use of such facilities.<sup>4</sup>

Several respondents noted the political resistance to tax increases. This is one of the chief concerns related to the fuel tax system – Legislative inertia and political considerations undermine efforts to raise taxes to a level consistent with the maintenance and new investment needs of the transportation system. Nevertheless, a number of states have been able to raise fuel tax rates even in the current economic climate.

## **2. VMT-Based Tolls**

The authority to impose tolls on a particular facility, highway or system of highways is also based on authorizing legislation. Tolls are collected pursuant to the state's power of taxation, or pursuant to separate authority granted to the operator of a specific transportation facility, subject to state oversight. The maximum level of a toll is sometimes restricted to produce revenues sufficient to repay the costs of construction, repair and produce a reasonable return on investment.<sup>5</sup> Toll revenues may also serve the purpose of absorbing costs of related transportation facilities.<sup>6</sup> Toll facility financing models may vary. For instance, The Port Authority of New York & New Jersey is permitted to consolidate revenues from all its businesses and issue debt against the consolidated revenue stream for investment in transportation and trade facilities in the Metropolitan New York-New Jersey region. Often, implementation of toll adjustments by public authorities are subject to a public hearing process required by statute or agency policy. In some cases, where transportation facilities are operated by a private entity under agreement with a governmental agency, tolls may be adjusted within certain ranges spelled out in that agreement.

Tolls are generally imposed with regard to specific facilities to cover their costs. However, toll roads may also be used to raise revenue for state agencies and, when operated by private entities, to provide a reasonable return on private investment. Because of their limited scope, toll facilities are sometimes avoidable through use of an alternative untolled route. If VMT-based charges were to be superimposed as tolls on all or certain roads in a state with existing toll facilities, the charges would have to account for the current toll facilities financing concerns, including bond covenant requirements and the impact on the state's overall credit and debt limitations

## **3. VMT-Based Fees**

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<sup>4</sup> IRS, *Excise Tax* (April 20, 2010) at <http://www.irs.gov/businesses/small/article/0,,id=99517,00.html>

<sup>5</sup> *Geiger v. President of Perkiomen & R. Turnpike Road*, 167 Pa. 582, 31 A 918 (1895).

<sup>6</sup> *Automobile Club of New York, Inc. v. Port Authority of New York and New Jersey*, 887 F.2d 417 (2d Cir. 1989), *cert. denied*, 495 U.S. 930, 110 S.Ct. 2168 (1990).

“Fees” are an exercise of states’ police power to regulate certain activities. Fees are generally limited in scope and fee-revenue must be used for specific purposes. In some states, fees may be set and modified by executive agencies through administrative processes. In others, fees are treated more like taxes and the power over charges related to motor vehicle use is reserved for the legislature. Generally fees cover the costs associated with a given activity, and their revenues must be used to support that activity. Depending on state law, fees may be limited to covering the costs associated with their purpose – in contrast to taxes and tolls, which may be used to raise revenue without such limitations.

The degree of administrative discretion a state agency may have to establish a VMT-based fee and modify if over time may vary sharply from state to state. Federal agencies can be given wide discretion by Congress to reasonably administer the programs they are charged with implementing. In many states, the courts have held that giving an administrative agency overly broad discretion constitutes an “unconstitutional delegation of legislative authority.” These restraints are not the same in every state, and will need to be addressed on a state by state basis.

Respondents noted that regardless of characterization and form of enactment, the charges and the rate setting would be subject to the standard tests of uniformity of application, due process and equal protection. Most states indicated that specific legislation would be advisable even when enabling legislation is not strictly necessary. Such legislation could, for example, avoid difficult litigation regarding the scope of administrative authority to impose a VMT-based charge, or regarding uses of future revenues. Some states -- in dealing with comparable issues -- have found it prudent to pass explicit legislation to avoid controversy or to explicitly clarify the authority under which they are operating. Many issues could be avoided with appropriate legislative drafting.

## **B. Use of Revenues**

A key issue regarding a VMT-based charge system relates to the potential use of revenues – and how these uses relate to the current sources and flow of revenues that support state transportation programs.

Respondents indicated that the current statutes and/or administrative practice place limits on the use of motor fuel taxes and that these restrictions would probably be applicable to VMT-based charges as well. In several states, fuel tax revenues are dedicated and deposited in a state trust fund with limitations on diversion to other uses.

Several respondents expressed concerns about the application of federal requirements that may be applicable should VMT-based charges be treated as a tolls and be collected on federal-aid highways. If this were the case, it might violate federal law to collect the charge on some federal-aid highways and require a tolling agreement under 23 U.S.C. §129 on others. Under a §129 agreement, net revenues may be used only for title 23, U.S.C., eligible purposes (most highway and many transit projects would be eligible for federal funding under title 23). However, restrictions would apply only if the charge

were treated as a toll under federal law. That issue is discussed further in the federal law paper prepared as part of the VMT Study.

Some state toll projects are governed by statutory provisions requiring that tolls be removed from a facility after the debt incurred to pay for construction is retired. This type of provision would need to be avoided in a VMT-based fee structure.

Many states have likewise created restrictions on the use of transportation-related revenues. For general registration fees and taxes, states may have statutes or regulations in place that require distribution among various regions and jurisdictions within their boundaries to ensure equal access to transportation. Additionally, some states limit the use of revenues generated from user-fee facilities (e.g. toll roads) to the “corridor” or jurisdiction where the facility is located. Depending on existing structures, VMT-based revenues may be subject to re-distribution to political subdivisions and geographical limitations. Complying with the existing requirements could increase the level of personal travel information gathered and retained by government agencies. The privacy and related concerns that may be raised by these types of requirements are addressed below. Several respondents indicated that any new fees would have to be reconciled with current revenue sources. Revenue use – regarding continuing their existing functions would likely be a key policy issue

### **C. Rate-Setting**

Whether a state wishes to use a flat rate throughout its boundaries, or vary its rates to further public policy objectives (e.g. transportation, environment, energy, security, etc), over time rates may need to increase to keep pace with the costs associated with operating, maintaining, and adding to the highway system. As discussed above, characterization of the VMT-based charge as a tax, toll, or fee will make a difference in many contexts, including the rate setting process. Taxes would need to be set and increased by the legislature. Although taxes could presumably be crafted to increase over time, it is unlikely that such an approach would be politically viable. Unlike taxes, and depending on a state’s statutory framework, toll and / or fee rate setting may be delegable to an administrative agency. However, some respondents indicated that changes in the toll or fee rate structure might require legislative approval and processes for public input. Respondents to the survey indicated that the setting of rates depended on a number of different parameters. Those mentioned include:

- Specific program objectives;
- Current authority allocation;
- Rate structure;
- Revenue dedication and use; and
- Potential for federal regulation.

There was considerable uncertainty about the viability of rate setting tied to environmental factors, such as emissions of air pollutants. There was also a general consensus that setting rates according to vehicle type, road classification, time of day

(congestion), facility segment or type, and income would raise legal issues regardless of how charges will be characterized.

#### **D. Transition Away From the Fuel Tax**

If it were decided that VMT-based fees should replace existing motor fuel taxes, moving to VMT-based charges may involve a transition period involving an overlap of existing fuel and vehicle-related taxes, fees and tolls with establishment of the VMT-based system. A key issue is whether the VMT-based charge is a *supplement* to fuel taxes, a total *replacement* for fuel taxes and/or for other fees.

States will need to consider whether they have authority to continue collecting current tolls and fuel taxes once a VMT-based system is in place. Most respondents indicated that existing tolls and other taxes could be continued following implementation of the VMT-based system. Several respondents noted that continuation of this power would be subject to the legislature's discretion in crafting the VMT authorizing legislation.

#### **E. Multistate Collection and Redistribution**

Implementation of a VMT-based system on a regional basis would raise issues of federal law. These issues range in scope from federal aid grant conditions, to federal regulations on interstate travel and commerce.

##### **1. Interstate Commerce**

The Commerce Clause of the Constitution places a general restriction on state actions that might impact the right to interstate travel (such as collecting fees on out of state drivers) and therefore requires congressional consent for states to regulate commerce across state lines. This consent could be necessary in order to establish a multistate cooperative VMT-based system. Legislative authority to enter into multi-state agreements currently exists for certain limited purposes, such as the E-ZPass® electronic toll collection system.<sup>7</sup>

The Compacts Clause of the Constitution requires that Congressional consent be given to states entering into compacts with each other. Many types of agreements between states fall under this provision, and Congressional consent is often provided within the body of authorizing legislation that requires states to agree to operate jointly. The Compacts Clause is discussed in greater detail in the federal issues white paper. Typically, if an interstate compact is required, parallel state legislation authorizing the state to enter into an interstate compact will also have to be enacted. Hence, the survey asked whether the

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<sup>7</sup> The E-ZPass system is a method of toll payment. Accounts established by local toll agencies ("home agencies") are valid for transactions in other jurisdictions by virtue of reciprocity agreements of the E-ZPass® Group, by which the home agency guarantees the toll payment for accounts that are validated daily by that agency.

respondents felt that, in view of applicable law in their state, an interstate compact would be required and whether authorizing state legislation would be required.

One respondent felt that Congressional consent would probably be necessary – or advisable – if the VMT-based system involved centralized collection and distribution among a group of states. While the respondents generally agreed that an interstate compact would require state legislation, most doubted that an interstate compact would be required.

## **2. Federal Aid Highways and State-Imposed Charges**

Current federal law restricts tolling on many types of federally funded roads, including limitations on use of toll revenues. Many states have adopted laws that mirror these restraints. It was generally acknowledged that collecting fees on the Interstate System might require federal legislation (and in some cases parallel state legislation). This by no means clear if the charge is not characterized as a toll.

If treated as tolls, it is possible that some or all of the VMT-based revenues collected on roads built with federal-aid highway funds may be used only for title 23, U.S.C. -eligible purposes. This is because tolling is generally forbidden on federal-aid highways unless it falls into one of the exceptions found in title 23 and various other provisions of the transportation laws. A table of these exceptions is attached.

No similar prohibition is found in federal law on motor vehicle taxes and fees. *The federal prohibition is specific to tolls.* Taxes and fees are generally not associated with the use of a particular road. Indeed, the charges envisioned in this study would apply to all of the roads in a particular state.

## **3. Collection of Federal VMT-Based Charges.**

Most respondents believe that collecting VMT-based charges for the federal government would not be a problem if provided for in state law. The state legal issues would not differ whether the collection of these charges were a condition of federal grants or structured as an incentive fee.

### **F. Technology standards**

In a multistate VMT-based system, the technology used to collect the fee would have to be either interoperable or uniform across state lines and between jurisdictions. Respondents indicated that mandated standardization might be considered a restraint on trade – but could probably be overcome with cooperative technical findings, state legislation and incorporation into a multistate compact or cooperative agreement. Alternatively, a federal mandate could address these issues.

### **G. Collection of VMT-Based Charges and the Delegation of Program Administration**

Determining where and how VMT-based charges will be assessed and collected will be a major technical endeavor, but not necessarily a hot-button legal issue. The respondents generally agreed that while there were no statutes that would allow an equipment mandate requiring vehicles to carry a VMT transponder, there were no constitutional barriers to such a law.<sup>8</sup> According to the survey respondents, point of collection will not be a major legal issue – collection will take place as provided for in the authorizing statute.

However, there are substantial differences about whether states could depend on private contractors to collect these charges. There are various levels of delegation across functions. Presuming that policy is established by law and contract, there appear to be a range of precedents for outsourcing collection and/or administrative functions. Many of the states within the I-95 Corridor already rely on private parties to assist in toll collection (and in at least one case to collect DMV fees). But most respondents believe that delegation authority needs to be included as part of the VMT authorizing legislation. When asked whether private collections partners should be given immunity from lawsuits, responses were mixed. Some states opposed the idea, and instead said that the private party should indemnify the state. One state indicated that offering such immunity might be necessary to attract a private partner, who would have a more substantial role in toll collection than a private contractor engaged to assist in toll collection.

## **H. Enforcement and Penalties**

Enforcement issues can arise from the failure of a vehicle owner to pay the required fee (or toll or tax), and from the failure of a collecting entity (i.e., a fueling station) to either collect the fee or submit the proceeds to the state. Depending on how the VMT authorizing statute is drafted (and whether the VMT charge adopted is a tax, toll, or fee), violations in either case could result in either civil or criminal penalties, or both. The majority of respondents thought that civil penalties would be the most appropriate method for dealing with violations, though one respondent acknowledged that after a certain threshold it might be appropriate to impose criminal liability on chronic violators.

Generally civil penalties are subject to lower standards of proof and raise fewer issues than criminal penalties. Adjudication of a civil penalty can take place before a court or administrative agency, while criminal sanctions will probably require a court proceeding. Creating an administrative procedure for dealing with violations could lower costs for responsible agencies by streamlining collections and providing an informal setting for dispute resolution. Administrative functions could be further enhanced by delegating some portion of these duties to a private party, who might act on behalf of all the VMT

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<sup>8</sup> The one exception to this consensus was a state with a constitutional guarantee that “every natural person the right to be let alone and free from governmental intrusion into the person’s private life, except as otherwise provided therein.” State statutes already require individuals to divulge personal information as a matter of course in their dealings with state agencies, e.g. providing an address and other identifying information when registering a vehicle. It may be possible to draft the equipment mandate statute in a way that would avoid violating this sort of provision.

states together. Generally the respondents agreed that VMT-based charges could be adjudicated in an administrative hearing.<sup>9</sup> The adjudication process and venue is often rooted in state legislation, and the ability to penalize out-of-state violators effectively will require agreements or compacts among states.

The survey asked whether VMT-based charges could be collected for mileage driven in another state. The answers were somewhat mixed, but at least some of the respondents felt that their states could not impose charges for out-of-state VMT. A state could impose VMT-based charges on out-of-state drivers. Most respondents did indicate that it would be difficult to directly enforce penalties on their residents for failing to pay a VMT-based charge to another state. However, if that other state imposed a penalty pursuant to its law, full faith and credit would allow that judgment to be enforced in any other state. Several respondents indicated that reciprocal enforcement agreements would greatly facilitate this process.

## **I. Data Sharing and Privacy**

Privacy is a major concern for any government agency that must collect and maintain information on individuals. A VMT-based system would necessarily require information on individual vehicles and their usage, and may raise concern that government agencies are monitoring individual travel patterns. Depending on how states apply VMT-based charges, e.g. flat costs applied evenly for each mile traveled, or some variable system based on time of day or proximity to urban centers, data may need to be aggregated with even more information on vehicle usage. Many states already have privacy laws that would protect private information from release, although some respondents noted that liberal open records laws may counteract the privacy statutes, depending on how the VMT-based charge is characterized and the nature of the information.

Some agencies take the position that users of public roads do not have a reasonable expectation of privacy, arguing that an expectation of anonymous activity of public roads is not substantiated. The privacy issue will certainly be an issue that needs to be addressed effectively, but can be managed. An important distinction needs to be drawn between “privacy” and “security” of data. Methods of data aggregation and communication can be managed in system designs and business models. Limits on data archives and uses beyond fee collection can also effectively address concerns that data are protected and limited in use.

As further described in the federal issues memo, there are federal statutes that prohibit release of certain types of data related to motor vehicle records. Generally these statutes are limited to dealing with records maintained by federal agencies, but in many cases

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<sup>9</sup> One respondent noted that, if the act at issue was characterized as a violation of the state’s traffic laws that adjudication would need to be pursued before the traffic courts of the state. Of course, state legislatures will have some discretion as to characterization of these violations, e.g. the failure to pay would not necessarily be a traffic violation but could instead be seen as a tax violation.

States have enacted similar statutes (e.g. state-level public records statutes often contain privacy protections similar to those available at the federal level).<sup>10</sup>

Methods of data aggregation and communication can be managed in system designs and business models. Limits on data archives and uses beyond fee collection can also effectively address concerns that data are protected and limited in use.

It is hard to estimate how these privacy issues will play out, but it is very likely that any new VMT authorizing legislation will need to include extensive privacy protections in order to be politically feasible. It is possible that privacy protections in existing toll collections systems can provide a model for the new VMT-based system.

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<sup>10</sup> The federal Driver's Privacy Protection Act ("DPPA") regulates the disclosure and resale of personal information contained in motor vehicle records. The prohibition extends to persons, including government agencies, who have obtained the information from the state. Violations of the DPPA are punishable by criminal and civil penalties and the statute provides a civil cause of action. 8 U.S.C. §§ 2723-2724

#### **IV. Conclusion / Next Steps**

In summary, we offer the following observations on state legal issues related to implementation of a new VMT-based system:

- None of the responses suggested that a state-wide VMT-based system of charges would create insurmountable state constitutional or other legal issues.
- All felt that authorizing legislation would be required or highly desirable for implementing a VMT-based system of charges, even during a transitional phase or on a trial or pilot basis.
- Authorizing legislation will need to be carefully drafted to address issues related to use of VMT-based revenues, rate setting, characterization of VMT-based charges, enforcement provisions and adjudication processes and mechanisms.
- None of the respondents saw particularly difficult legal issues associated with a multi-state system, though many indicated that an interstate compact could facilitate implementation.
- Privacy issues dealt primarily with the sharing of data for enforcement purposes and the protection of personal information from use for non-governmental information. Most of the respondents felt that existing state privacy laws were adequate, especially in combination with federal privacy laws applicable to motor vehicle users. In a few cases additional strengthening or clarification was recommended.