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States Take More Active Role in Surface Transportation Funding

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Fiscal constraints on state budgets coupled with continued uncertainty with respect to future levels of federal surface transportation funding have led states to diversify the funding sources for their transportation projects. We summarize below the recent legislative proposals made by states to address this funding gap, as well as the current status of federal support for infrastructure projects, including those structured as public-private partnerships (P3s).

I. Introduction

In the United States, the responsibility for surface transportation expenditures is divided among the federal, state and local governments. State and local governments are each responsible for approximately 50% of the investments in the nation's transportation system. Federal funding support is a critical component of such expenditures, although the degree of reliance on federal funds varies by state. Based on information provided by the Federal Highway Administration compiled between 2001 and 2012, the range of federal funding as a percentage of state transportation budgets is between 35% and 98% depending on the state.¹

Such reliance demonstrates the importance to states of the continued availability of federal transportation dollars provided through the Highway Trust Fund (the "*HTF*"). In previous client publications, we have focused on the funding shortfall in the HTF and possible short and long-term fixes proposed at the federal level, including proposed Congressional legislation, to fill the gap.² In this client alert, our focus is on states and, in particular, their efforts to mitigate the risks posed by the prospect of more limited federal transportation funding. We begin with an update on the status of the federal efforts and then turn to states' efforts.

II. Federal Surface Transportation Funding Status

The most recent reauthorization bill authorizing federal funding for US surface transportation is the Moving Ahead for Progress in the 21st Century Act ("*MAP-21*"). MAP-21 was signed into law by President Obama in July 2012 and was extended until May 31, 2015 by the passage in July 2014 of the Highway and Transportation Funding Act of

2014 (the “HTFA”).

The passage of the HTFA was important because it extended, on a *pro rata* basis, until the end of May 2015, the federal transportation funding programs established (or continued) by MAP-21. It also avoided the insolvency of the HTF, which was due to run dry by the end of August of last year. The HTF suffers from an ever-increasing shortfall, stemming principally from the fact that it is funded with federal motor vehicle fuel taxes that have been fixed at 18.4 cents per gallon since 1993. The funding gap has been compounded by continued declines in gas and diesel consumption as a result of greater fuel efficiency and the increased viability of alternative fuels.

The Congressional Budget Office has estimated that HTF revenues will be insufficient to cover its outlays by an average of approximately \$16 billion per year between 2015 and 2024.³ Neither of the long term transportation bills that were introduced last year (i.e. the GROW America Act and the MAP-21 Reauthorization Act) addressed the systemic underfunding of the HTF,⁴ and such underfunding was not addressed at all by the HTFA, which maintained funding at current levels. It is possible that Congress will attempt to tackle the issue this year in connection with a long-term transportation bill or a further extension of MAP-21, but doing so will require a fundamental change in federal surface transportation funding methodology.

Given the current political environment in Washington, it seems unlikely that legislation enacted during the current session of Congress will implement any major structural change with respect to the HTF. Certain House Democrats have proposed an increase in the federal gas tax, but despite the current low cost of fuel, there is far from a Congressional consensus on such plan, which also lacks support from the White House, which would prefer to fill the gap with tax payments on repatriated corporate earnings.⁵ At least for now, Congressional consensus is likely to be reached only with an agreement to continue funding the HTF with fuel taxes at current levels, with any additional funds coming from other sources.

III. Recent Federal Initiatives Supporting P3s

The Obama Administration has acknowledged the importance of closing the funding gap in the HTF and, over the last few years, has been focused on preserving the HTF’s health and increasing the certainty states need to include infrastructure procurements in their long-term planning programs. The Administration’s proposed FY 2016 budget, released on February 3rd (the “*Proposed Budget*”) contains legislative proposals and other initiatives intended to increase transportation infrastructure investment and, in particular, private investment in public infrastructure through public-private partnerships (“P3s”).⁶ The following elements are notable:

- *Long-Term Transportation Reauthorization.* Building on the GROW America Act (which set forth a \$302 billion, four-year funding plan), the Proposed Budget includes a \$478 billion, six-year transportation reauthorization proposal. This proposal would increase federal surface transportation funding from the current level of approximately \$55 billion per year to nearly \$80 billion per year. Like GROW America, such proposal is designed to maintain the solvency of the HTF with increases in funding over current levels, with the increases being funded by corporate tax payments on accumulated overseas earnings.⁷
- *National Infrastructure Bank.* The President first indicated his support for a National Infrastructure Bank (the “NIB”) during his 2008 campaign and has continued to press for the creation of the bank during his presidency.⁸ The NIB would be a federal agency that, similar to the Transportation Infrastructure Finance and Innovation Act (“TIFIA”) program, would provide low-cost, long-term loans on flexible terms. However, unlike TIFIA, the NIB would have an independent board comprised of infrastructure sector stakeholders and would have a mandate that extends to sectors

other than transportation, such as energy, water, education or telecommunications. By providing such loans to private borrowers, the NIB would lower the cost of capital for developers of P3 projects, which could incentivize private investment in projects, such as those in the water sector, that to date have not frequently been procured on a P3 basis.

- *Qualified Public Infrastructure Bonds.* Similar to the existing Private Activity Bonds (“PABs”) program, the Qualified Public Infrastructure Bond (“QPIBs”) program would enable states to issue tax exempt bonds, the proceeds of which could be on-lent to private entities and applied to project costs. According to the Administration’s fact sheet, QPIBs would expand the scope of the “private activities” funded with tax exempt bonds beyond highway and surface freight transfer facilities to include, among others, airports, ports, mass transit, solid waste disposal, sewer, and water facilities. In addition, unlike PABs, QPIBs would have no expiration date or issuance caps, and interest payable thereon would not be subject to the alternative minimum tax. If the QPIB program were established, the broader scope and increased flexibility of these instruments (particularly given their tax exempt nature) would likely increase the interest of private sector sponsors in tax-exempt municipal bond debt as a funding source for P3 projects.
- *AFF Bonds.* The AFF Bond program, which, like the NIB, was included in previous Obama Administration budgets, would offer tax credits to state and local government issuers issuing taxable bonds equal to 28% of their interest costs.⁹
- *Efficiency in Permitting.* The Proposed Budget would expand the Federal Infrastructure Project Permitting Dashboard (the “Dashboard”), which was established by Executive Order in 2012 and has been accompanied by efforts to streamline the federal permitting and environmental review processes. The Dashboard is a publicly available source of schedules and metrics for major infrastructure projects, which makes it possible for agencies and interested stakeholders to track permitting processes online.
- *Water Finance Center and Rural Opportunity Investment Initiative.* These two initiatives, which will be established within the US Environmental Protection Agency and the US Department of Agriculture, respectively, would support P3s by identifying opportunities for private investment (and for provision of technical assistance) in water projects generally and in rural projects in the water, energy, and broadband sectors. A similar office established last year within the US Department of Transportation, the Build America Transportation Investment Center (the “BATIC”), provides technical assistance to state and local governments regarding transportation P3 matters.¹⁰

IV. States’ Parallel Efforts

By contributing approximately 40% of all surface transportation expenditures, states shoulder a significant burden in funding US highway and transit infrastructure. This arrangement has proved problematic in recent years as the recession weakened state budgets, federal funding levels remained flat and uncertainty persisted with respect to future federal allocations. As a result, states’ traditional revenue sources have been unable to support their transportation investment needs. In response, states are pursuing a variety of measures to raise revenues to fund infrastructure investments. Such efforts have multiplied over the last two years as states’ fiscal health has worsened.

A. Traditional Revenue Sources

Traditionally, states, like the federal government, have relied on a motor vehicle fuel tax (the “State Gas Tax”) to fund transportation investments. This tax is typically an excise tax, that is, a fixed sum per gallon, rather than a percentage of the price of the fuel sold. In recent years, like federal gas tax revenues, State Gas Tax revenues have decreased dramatically due to reduced driving habits, increased fuel economy standards and the fact that many states have neither indexed their State Gas Tax to inflation nor sufficiently raised the State Gas Tax rate to offset inflation. Nationwide, State Gas Tax revenue fell by \$10 billion, or 19%, during the period from 2002 to 2012.¹¹

Another staple of states' transportation funding toolkit is the motor vehicle tax, which is applied at the point of sale for automobiles (the "*State Motor Vehicle Tax*"). Like the State Gas Tax, the effectiveness of this tax as a revenue source has declined in recent years. Nationwide, State Motor Vehicle Tax revenues dropped by \$8 billion, or 21%, from 2002 to 2012. A significant factor in the decline is reduced rates of car ownership due to the rise of car-sharing services, increased utilization of telecommuting and renewed interest in public transit options, coupled with the uneven economic recovery.¹²

In addition, states have long relied on access to low-cost borrowing to fund transportation infrastructure projects in the form of municipal bonds. Typically these instruments are either general obligation bonds, which are backed by the full faith and credit of the relevant state, or revenue bonds, which are backed by the revenue from one or more projects. Income from such municipal bonds is also frequently tax-exempt.

B. New Revenue Sources

In order to make up for the shortfall in federal transportation revenues, states have taken various actions to increase their own transportation revenues. In addition to new issuances of municipal bonds, several states have implemented or are currently considering legislative measures, in particular increases to the State Gas Tax or the State Motor Vehicle Tax, and indexing the State Gas Tax to inflation.¹³ According to a recent report of the American Road and Transportation Builders Association, as of February 2015, 90 transportation funding bills are pending in 23 states (with two such bills having been passed in 2015, in North Dakota and Iowa).¹⁴

In addition to those mentioned above, the following other measures have been implemented or are being considered by multiple states:

- Increasing the state general sales tax and dedicating a portion of the revenues to transportation projects, or adding a new sales tax on purchases of specific services (e.g., oil changes and auto repairs) to fund such projects.
- In particular for transit projects, increasing the income tax in the relevant geographic area and dedicating the new revenues to transit system construction costs (a measure referred to "value capture financing").
- Increasing other taxes, such as those on rental cars, cigarettes and hotels, and dedicating the new revenues to transportation projects.
- Imposing a "lockbox" on funds in the state's transportation fund so that they cannot be allocated elsewhere, or reallocating amounts in other state funds (e.g., general fund) or from other sources (e.g., lottery proceeds or Internet sales tax revenues) to fund transportation projects.
- Increasing user fees, including fees relating to vehicle ownership (e.g., registration, licensing, vehicle inspection or emission inspection) and increasing and/or indexing transit fares or existing tolls.
- Imposing a road user fee for drivers of alternative fuel vehicles or a sales tax on the purchase of such fuels.
- Structuring alternative revenue sources related to road use (e.g., highway billboard leases, cell tower construction contracts or advertisements at other facilities, including toll plazas and rest areas).

C. Vehicle Miles Traveled Tax

As an alternate policy response to declining revenues from traditional sources, several states are considering a fee that attempts to capture the cost of each motorist's individual use of the roads: a vehicle miles traveled tax ("*VMT*"). As the name suggests, a VMT charges drivers a fixed amount per mile driven, thus unlinking transportation revenues from fuel consumption. A VMT is designed to produce a steady stream of revenues while avoiding a conflict with the state's other

policy priorities, such as reducing fossil fuel consumption through heightened vehicle fuel economy standards. In addition, a VMT provides states with greater flexibility than a State Gas Tax by permitting them to tailor the assessment of taxes to address additional policy goals, such as congestion pricing and variation in rates based on vehicle or user characteristics.¹⁵

While at least 13 states have considered legislative measures that proposed the establishment or study of a VMT (see Table 1 below), only Oregon has moved forward with implementation. Below is a summary of significant state efforts in this area.

Table 1: States Considering a VMT Tax ¹⁶	
•	Arizona
•	California
•	Colorado
•	Hawaii
•	Indiana
•	Massachusetts
•	Mississippi
•	Oregon
•	Texas
•	Virginia
•	Washington
•	West Virginia
•	Wisconsin

- *Oregon.* In 2006, Oregon initiated its road user fee pilot program to test the viability of a VMT. The program collected mileage data and user fees from approximately 300 volunteers at the gas pump (where they were also refunded any State Gas Taxes that may have otherwise applied). The program raised concerns, typical among VMT efforts¹⁷, with respect to implementation costs, compliance complexity and impositions on privacy. However, a second pilot program in 2013 was deemed to have adequately addressed these issues by designing an open system to allow evolution of technologies, providing public and private sector choices for mileage reporting and protecting personally identifiable information by law.¹⁸

Oregon’s VMT is expected to go live as an opt-in alternative to its State Gas Tax on July 1, 2015. The initial program will be limited to 5,000 cars and light-duty commercial vehicles weighing less than 10,000 pounds. At an initial rate of 1.5 cents per mile, revenues are expected to approximate what would otherwise be collected under Oregon’s 30 cents per gallon State Gas Tax. Such rate may be adjusted upward in the future.¹⁹

- *Washington.* In 2012, the Washington state legislature enacted a measure that authorized funding for a steering committee to study the feasibility of transitioning from the State Gas Tax to a VMT. The results of the study were positive and the steering committee is expected to develop a pilot program for submission to the legislature in 2015. The pilot program will likely involve approximately 2,000 participants and test several different payment options, including (i) an annual permit, (ii) odometer readings, (iii) retrofitting existing vehicles with onboard GPS units and (iv) a smartphone app.²⁰

- *California.* In September 2014, California passed legislation ordering the California Transportation Commission to create a Road Usage Charge Technical Advisory Committee. The committee has been tasked with developing a VMT pilot program that could potentially replace the current State Gas Tax. The legislation requires that the state transportation agency implement the pilot program by January 2017.²¹

D. P3 Procurements

Many states recognize the value of P3s as a viable option for project delivery and as an alternate source of funding. Depending on the particular arrangements between the state and the private sector participants, which are reflected in the applicable public-private partnership agreement, risks relating to the development, financing, construction, operation and maintenance of the relevant project may be transferred to the private sector. For appropriate projects, the risk transfer to the private sector can, in addition to capital access, result in accelerated project delivery, lifecycle cost reductions and revenue increases, among other benefits.

Approximately 35 states and Puerto Rico have passed laws authorizing P3s for transportation purposes. The legislative map is dynamic, with certain states considering new P3 legislation and others discussing the expansion of existing legislation to cover additional project sectors and to provide greater discretion to procurement authorities.²²

Over the past few years, some of the more noteworthy P3 procurements have been implemented by states that have recently enacted or expanded their P3 legislation, in particular the following:

- Ohio, which enacted P3 legislation in 2011, reached commercial close in December 2014 on the approximately \$430 million Portsmouth ByPass Project, a 16-mile, four-lane, limited-access highway around the City of Portsmouth, which is expected to eliminate congestion and improve travel times. An investor consortium comprised of ACS Infrastructure Development, Infrared Capital Partners, Star America Fund and Dragados USA, among others, have partnered with the state to design, build, finance, operate and maintain the highway over a 35-year concession term. Financial close is expected during Q1 2015. Ohio is considering several other projects for delivery as P3s, in particular the replacement of the Brent Spence Bridge, which connects Ohio and Kentucky.
- Pennsylvania, which enacted P3 legislation in 2012, recently reached commercial and financial close on an approximately \$900 million contract with an investor consortium comprising Plenary Group, The Walsh Group and Granite Construction Company, to design, replace and maintain 558 bridges in the state for the next 25 years. This project, the Rapid Bridge Replacement Project, is particularly notable because it bundled multiple projects together in a single procurement, which created economies of scale that the state believes will reduce taxpayer costs by approximately 30 percent.²³ By increasing scale, the state also made the project more attractive to private investors. The state expects the project to be completed in one quarter of the time it would have taken for the Pennsylvania Department of Transportation to complete it.²⁴ Pennsylvania also recently initiated a P3 procurement for the development of compressed natural gas (CNG) fueling stations, used principally by transit buses, at more than 35 public transit facilities around the state.²⁵
- Maryland, which expressly authorized P3s in legislation enacted in 2013, has solicited bids for the procurement the Purple Line project, a proposed 16-mile light rail line connecting destinations, including the University of Maryland, College Park, across two counties adjacent to Washington, DC that are served by separate DC Metro subway lines. Bids for the Purple Line project are currently due in mid-August 2015. Maryland is also considering a light rail line, the Red Line, which would run east-west through the center of Baltimore City, and other road and transit projects for procurement as P3s.

States frequently utilize federal credit assistance programs in connection with P3 projects, in particular long-term financing from the US Department of Transportation through the Transportation Infrastructure Finance and Innovation Act (TIFIA) program and authorization of tax-exempt PABs. To facilitate the financing of P3 projects by private sector entities, states have recently taken the lead in arranging these funding sources by filing letters of interest and/or initial applications and managing the initial stages of the process with USDOT until a preferred bidder is selected. TIFIA and PABs are frequently utilized concurrently, although certain recent projects, including the Rapid Bridge Replacement Project and the I-69 and East End Crossing Projects in Indiana, were debt financed with PABs alone.

E. Congestion Pricing and Demand Management

In addition to closing the funding gap, another critical issue for states is managing demand on their highways. Despite the overall decrease in nationwide vehicle-miles traveled over the past decade²⁶, many urban and sub-urban areas have seen

an increase in motor vehicle traffic.²⁷ This has led states to seek better ways to manage traffic in congested areas while concurrently making investments to increasing capacity.

Tolling is a mechanism that can be used to accomplish both objectives. By imposing fees on users, in particular during peak travel periods, tolls can encourage users to use alternate routes, reduce their overall miles travelled (through carpooling or otherwise) and shift to alternate modes of travel such as light rail or bus rapid transit. While, as noted above, some states have proposed increases to existing tolls in order to generate revenue, others have approved projects involving the implementation of new tolls. Because federal regulations limit the ability of states to toll existing interstate highways²⁸, new tolls have been added to interstates as “managed lanes,” involving either the conversion of existing High Occupancy Vehicle (HOV) lanes into High Occupancy Toll (HOT) lanes or the expansion of a highway to include HOT lanes. In addition, in order to better manage demand, the tolls are frequently priced dynamically such that they vary based on location, type of roadway, time of day or other criteria established by the relevant governmental authority.

Because of the revenue source that tolls provide, states have frequently elected to procure managed lanes projects as P3s. There are several recent examples of such successful procurements, including (i) the I-77 project in North Carolina, which reached commercial close in 2014, (ii) the I-4 Ultimate project in Florida, which closed in 2014, (iii) the US-36 project in Colorado, which closed in 2014, (iv) the North Tarrant Express 3A/3B project in Texas, which closed in 2013 and (v) the I-95 Express Lanes project in Virginia, which closed in 2012.

V. Conclusion

The Obama Administration envisions the federal government playing a more active role in US surface transportation, by increasing federal funding support to states through the HTF and in fostering partnerships between states and private investors through P3s. Currently, however, there is no Congressional consensus on such an increase, let alone how it would be funded.²⁹

Given the continued uncertainty regarding federal transportation funding, what we may see, at least for the duration of this Administration, is an increase in technical support to states and other stakeholders provided by federal agencies, but without an increase in federal funding. Under those circumstances, states seem likely to continue their development of new revenue-raising tools and to increase private sector involvement in transportation projects through P3s, in addition to relying on their traditional funding sources.

We intend to provide updates to this client alert with respect to (i) the reauthorization or further extension of federal surface transportation funding and (ii) the efforts of states to develop and implement the alternate financing methods described above.

Special thanks to Shearman & Sterling Associate Justin Glick for his contributions to this client publication.

¹ See Transportation for America, *The End of the Road? The Looming Fiscal Disaster for Transportation*, at 8 (2014), <http://t4america.org/wp-content/uploads/2014/04/Fiscal-Cliff-Report.pdf>. Other estimates suggest that the federal contributions to states may be a somewhat smaller, but still significant, percentage of their transportation expenditures. The Pew Charitable Trusts, *Intergovernmental Challenges in Surface Transportation Funding* (Sept. 24, 2014), <http://www.pewtrusts.org/~media/Assets/2014/09/SurfaceTransportationIntergovernmentalChallengesFunding.pdf?a=en> (calculating own-source revenue applied to US surface transportation funding between 2007 and 2011, with federal revenues in the range of 15% to 55%).

² See Shearman & Sterling LLP, *Federal Surface Transportation Reauthorization: The Road Ahead* (May 12, 2014), <http://www.shearman.com/~media/Files/NewsInsights/Publications/2014/05/Federal-Surface-Transportation-Reauth>

[orization-The-Road-Ahead--PDF-051214.pdf](#) (hereinafter S&S May 2014 Client Alert); Shearman & Sterling LLP, *Federal Surface Transportation Funding: A Temporary Detour* (Aug. 4, 2014), <http://www.shearman.com/~/media/Files/NewsInsights/Publications/2014/08/Federal-Surface-Transportation-Reauthorization-A-Temporary-Detour-PDF-080414.pdf>.

³ CONG. BUDGET OFF., THE HIGHWAY TRUST FUND AND THE TREATMENT OF SURFACE TRANSPORTATION PROGRAMS IN THE FEDERAL BUDGET at 1, Table 1 (June 2014), <http://www.cbo.gov/sites/default/files/45416-TransportationScoring.pdf>.

⁴ For more information concerning the GROW America Act and the MAP-21 Reauthorization Act, see S&S May 2014 Client Alert, *supra* note 2.

⁵ See Keith Laing, *GOP chairman, Foxx to hold Twitter town hall on transport funding*, THE HILL (Feb. 9, 2015, 12:47 p.m.), <http://thehill.com/policy/transportation/232171-gop-chairman-foxx-to-hold-twitter-town-hall-on-transport-funding> (noting opposition of Transportation Secretary Anthony Foxx to federal gas tax increase and view of House Transportation Committee Chairman Bill Shuster that Congress is unlikely to pass such an increase in 2015); Keith Laing, *House Dem would nearly double gas tax*, THE HILL (Feb. 5, 2015, 2:01 p.m.), <http://thehill.com/policy/transportation/231740-house-dem-moves-to-double-gas-tax> (describing proposed bill to increase federal gas tax by 15 cents per gallon over three years and opposition to such proposal); Keith Laing, *Obama proposes \$478B transportation bill*, THE HILL (Feb. 2, 2015, 12:10 p.m.), <http://thehill.com/policy/transportation/231448-obama-proposes-478b-transportation-bill> (describing Administration's proposal for repatriation of overseas corporate earnings and opposition thereto); Timothy Cama, *Drill and drive? GOP seeks solution for highway cash*, THE HILL (Feb. 1, 2015, 7:30 a.m.) (describing Republican opposition to gas tax increase and proposal to use oil and gas drilling revenue to fund the HTF shortfall); Jim Watts, *Boxer, Paul to Introduce Bill to Use Tax Repatriation For HTF*, BOND BUYER (Jan. 29, 2015, 2:47 p.m.), <http://www.bondbuyer.com/news/washington-infrastructure/boxer-rand-to-introduce-bill-to-use-tax-repatriation-for-h tf-1069976-1.html> (describing bipartisan proposal to apply a portion of voluntarily repatriated foreign earnings to fund the HTF).

⁶ See OFF. OF MGMT. & BUDGET, FISCAL YEAR 2016 BUDGET OF THE US GOVERNMENT (Feb. 2, 2015), <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf>; The White House, *Middle Class Economics: The President's Fiscal Year 2016 Budget*, <http://www.whitehouse.gov/omb/overview>.

⁷ Nick Timiraos & John D. McKinnon, *Obama Proposes One-Time 14% Tax on Overseas Earnings Links It to Boosting Infrastructure Spending to Improve Highways*, TRANSIT, WALL ST. J. (Feb. 2, 2015, 3:41 a.m.), <http://www.wsj.com/articles/obama-proposes-one-time-14-tax-on-overseas-earnings-1422802103>.

⁸ See, e.g., Rob Feinberg, *Road bank didn't get much traction*, POLITIFACT.COM (May 7, 2012, 5:47 p.m.), <http://www.politifact.com/truth-o-meter/promises/obameter/promise/31/create-a-60-billion-bank-to-fund-roads-and-bridge/>; OFF. OF MGMT. & BUDGET, FISCAL YEAR 2015 BUDGET OF THE US GOVERNMENT, at 21 (Mar. 4, 2014), <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/budget.pdf?n=31597>.

⁹ See Naomi Jagoda & Jim Watts, *Obama Budget Adds Muni Programs, Contains 28% Cap*, BOND BUYER (Feb. 2, 2015, 5:18 p.m.), <http://bondcasebriefs.com/2015/02/03/finance-and-accounting/obama-budget-adds-muni-programs-contains-28-cap/>.

¹⁰ For more information on the BATIC, see <http://www.dot.gov/buildamerica>.

¹¹ Pew Charitable Trusts, *supra* note 1.

¹² *Id.*

¹³ For example, California, Maryland, Massachusetts, New Hampshire, Pennsylvania, Vermont, Virginia and Wyoming have all raised their respective State Gas Taxes since January 2013. Beyond simply raising rates, states such as California, Kentucky, Nebraska, North Carolina and Pennsylvania have tied their respective State Gas Taxes, at least in part, to wholesale or retail motor vehicle fuel prices, which tend to track inflation (in addition to any market-based price fluctuations). Urban Institute, *Reforming State Gas Taxes: How States Are (and Are Not) Addressing an Eroding Tax Base* (Nov. 2014), <http://www.taxpolicycenter.org/UploadedPDF/413286-reforming-state-gas-tax.pdf>; AASHTO Center for Excellence in Project Finance, *State Transportation Funding Proposals Since the Start of 2013* (Jan. 2013), http://www.transportation-finance.org/pdf/featured_documents/state%20transportation%20ofunding%20proposals%202015-1-19.pdf; Pew Charitable Trusts, *supra* note 1.

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- ¹⁴ American Road & Transportation Builders Association, Transportation Investment Advocacy Center, *State Funding Initiatives Report* (Feb. 2015), <http://www.transportationinvestment.org>.
- ¹⁵ National Conference of State Legislatures, *On the Move: State Strategies for 21st Century Transportation Solutions* (July 2012), <http://www.ncsl.org/documents/transportation/on-the-move.pdf>.
- ¹⁶ National Conference of State Legislatures, *supra* note 15; AASHTO Center for Excellence in Project Finance, *supra* note 13.
- ¹⁷ National Conference of State Legislatures, *supra* note 15, at 13-14 (noting also other public policy concerns, such as public acceptance and equity across income classes, and regulatory considerations, including whether a VMT would comply with federal laws limiting tolling on interstate highways).
- ¹⁸ Oregon Department of Transportation, *Road Usage Charging in Oregon* (Aug. 2014), http://www.catc.ca.gov/meetings/Joint%20Meetings/Ore_Road_Usage_Charge.pdf.
- ¹⁹ *Frequently Asked Questions*, OREGO, <http://www.myorego.org/frequently-asked-questions/> (last visited March 6, 2015).
- ²⁰ Washington State Department of Transportation Steering Committee, *Just the Facts on Road Usage Charges* (Dec. 2014), <https://waroadusagecharge.files.wordpress.com/2014/05/just-the-facts-on-ruc-dec-2014.pdf>.
- ²¹ *VC Section 3090 Road Usage Charge Technical Advisory Committee*, CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, <http://www.dmv.ca.gov/portal/dmv/detail/pubs/vctop/vc/d2/c7/3090> (last visited March 6, 2015).
- ²² See Jaime Rall, James B. Reed, Nicholas J. Farber, at the direction of the National Conference of State Legislatures, *Public-Private Partnerships for Transportation: A Toolkit for Legislators* (Oct. 2010), <http://www.ncsl.org/documents/transportation/PPPTOOLKIT.pdf>; Jaime Rall, *Public-Private Partnerships for Transportation: A Toolkit for Legislators, February 2014 Updates and Corrections*, <http://www.ncsl.org/documents/transportation/NCSL-PPPTOOLKIT-update-Feb2014.pdf>; American Subcontractors Association, *Public-Private Partnership Laws in the States, Including Surety Bond Requirements* (Nov. 1, 2014), <http://www.asaonline.com/eweb/upload/Public-Private%20Partnerships%20in%20the%20States%20with%20an%20Evaluation%20of%20Surety%20Bond%20Requirements%202014.pdf>.
- ²³ Peter Jackson, *PennDOT to award bulk bridge-building contracts*, WASH. TIMES (Sept. 22, 2014), <http://www.washingtontimes.com/news/2014/sep/22/private-team-to-replace-558-state-bridges/#>! (citing statement of Pennsylvania secretary of transportation); Jan Murphy, *PennDOT awards three-year, \$899 million contract to take care of bridges*, PENNLIVE.COM (Oct. 24, 2014, 2:28 p.m.), http://www.pennlive.com/politics/index.ssf/2014/10/team_awarded_multi-year_contra.html.
- ²⁴ Murphy, *supra* note 23.
- ²⁵ *Pa. P3 board approves CNG project for public transit fueling*, METRO MAGAZINE (Oct. 2, 2014), <http://www.metro-magazine.com/accessibility/news/292533/pa-p3-board-approves-cng-project-for-public-transit-fueling>.
- ²⁶ *State Smart Transportation Initiative, Per Capita VMT Drops for Ninth Straight Year; DOTs Taking Notice* (Feb. 2014), <http://www.ssti.us/2014/02/vmt-drops-ninth-year-dots-taking-notice/>.
- ²⁷ Texas A&M Transportation Institute, *TTI's 2012 Urban Mobility Report* (Dec. 2012), <http://d2dtl5nnpfror.cloudfront.net/tti.tamu.edu/documents/mobility-report-2012.pdf>.
- ²⁸ Under current federal law, tolling of existing toll-free Interstates has been prohibited except the following: (i) a pilot program that permits up to three Interstates to be tolled for reconstruction purposes; and (ii) MAP-21, which permits tolling of new lanes (on Interstates and other highways) if the number of non-tolled lanes is not reduced.

²⁹ While certain lawmakers have suggested increasing the federal gas tax, others have proposed eliminating the tax entirely and shifting responsibility for infrastructure funding to state and local governments. Keith Laing, *GOP senator: Gas tax hike must be offset*, THE HILL (Feb. 25, 2015, 11:25 a.m.), <http://thehill.com/policy/transportation/233794-gop-senator-gas-tax-hike-must-be-offset>.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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