



June 20, 2019

To: Legislative and Communications Committee

From: Darrell E. Johnson, Chief Executive Officer

Subject: Federal Legislative Status Report

Overview

A support position is recommended on legislation regarding sales tax revenues from aviation fuel. Summaries of a pending rulemaking on vehicle emissions and a statutory rescission are provided. Updates on the appropriations process, potential infrastructure legislation, and a hearing on state-owned transportation assets are also provided.

Recommendation

Adopt a SUPPORT position on H.R. 2939 (Napolitano, D-El Monte), which would protect local sales tax dollars from being directed to airports.

Discussion

H.R. 2939 (Napolitano, D-El Monte): State and Local General Sales Tax Protection Act

H.R. 2939 would clarify an aviation fuel tax issue that could divert millions of dollars in voter-approved transportation funds. The bill addresses a Federal Aviation Administration (FAA) rulemaking on December 8, 2014 (79 FR 66282) reinterpreting its longstanding policy concerning the use of tax revenues generated at airports. Specifically, the rulemaking loosened restrictions on the use of local taxes on aviation fuel enacted after December 30, 1987, in a way that directs state and local general sales tax revenue from the sale of aviation fuel to aviation programs, noise mitigation, and airport operating costs.

This reinterpretation directly conflicts with Congressional intent. The conference report to the 1987 FAA amendments specifically stated that the requirement that local taxes on aviation fuel must be spent on airports "is intended to apply to fuel taxes only, and not to other taxes imposed by local governments, or to state

taxes.” State and local tax officials have long relied upon this understanding in holding that the restrictions only apply to fuel taxes, not general sales taxes.

The rulemaking also presents constitutional issues because it supplants state and local decision-making with a federal mandate that overrides the express will of voters who have chosen to enact sales tax measures for a dedicated purpose. If FAA’s rulemaking is enforced, agencies across the country, including the Orange County Transportation Authority (OCTA), would see funding diverted from local sales tax measures for voter-approved infrastructure investments. This precedent could lead to increased voter distrust in enacting these measures, reducing the likelihood for success for future self-help measures.

On May 17, 2019, FAA sent a letter to the California Department of Finance (DOF) stating that DOF’s compliance plan submitted in December 2017, pursuant to the rulemaking, was nonresponsive, and requested specific information about sales tax revenue collected from aviation fuel for each local jurisdiction, within 30 days. FAA noted that failure to comply with these requirements could lead to potential enforcement actions, including withholding federal assistance. The letter has been included as Attachment A. As of the writing of this staff report, OCTA has not received any correspondence from the FAA pertaining to the compliance plan OCTA submitted.

Shortly after FAA’s letter to DOF, Representative Grace Napolitano (D-El Monte) introduced HR 2939, identical legislation to what she and Representative Alan Lowenthal (D-Garden Grove) have sponsored multiple times over the last three years. The legislation would clarify that general sales taxes, including locally approved sales tax measures, are not subject to the FAA’s rules requiring that the funds be reinvested in airports, affirming the original intent of Congress, thereby protecting future infrastructure funding. A coalition consisting of the Self-Help Counties Coalition (SHCC), DOF, California Department of Transportation, the League of Cities, among others, have worked closely over the last few years to pass such legislation. While it has not yet been successful, FAA’s letter to DOF indicates enforcement actions may be imminent and clarification is needed.

HR 2939 has eight co-sponsors, including Representative Harley Rouda (D-Newport Beach) and Representative Alan Lowenthal, and is being supported by SHCC and its various member agencies, including the Riverside County Transportation Commission, San Bernardino County Transportation Authority, Los Angeles County Metropolitan Transportation Authority, and the San Diego Association of Governments, among others. A SUPPORT position is consistent with previous positions and OCTA’s 2019-20 Federal Legislative Platform principle to, “Oppose legislation and regulations that would divert revenues generated by locally-approved sales taxes to programs and projects that are not

included in the sales tax ordinance.” The text of H.R. 2939 is included as Attachment B.

Pending Rulemaking on Passenger Vehicle Emissions

On August 24, 2018, the National Highway Traffic Safety Administration (NHTSA) and the Environmental Protection Agency (EPA) issued a joint proposed rule entitled, “The Safer Affordable Fuel Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks.” The SAFE Vehicles Rule, as it is more commonly called, would amend federal fuel efficiency standards for passenger vehicles for model years 2021 to 2026. In 2012, the NHTSA and the EPA issued proposed tailpipe emissions standards that would increase each year through model year 2025. By statute, tailpipe emissions regulations are only valid for five years. The previous administration conducted a midterm review in January 2017 in an attempt to finalize the more stringent tailpipe standards, but the current administration conducted its own review and found that the 2012 standards were not feasible, thus initiating this rulemaking process. The SAFE Vehicles Rule would freeze fuel economy standards for new cars at 2020 levels through model year 2026 rather than continuing the proposed annual increases. The NHTSA and the EPA argue that higher fuel economy standards have diminishing returns, unnecessarily increasing the cost of a vehicle.

The SAFE Vehicles Rule also proposes to rescind California’s ability to set its own, more stringent fuel standards. The Clean Air Act generally preempts the state regulation of motor vehicles, but given California’s unique air quality issues, the state has been granted a preemption waiver since 1967. The SAFE Vehicles Rule argues that this waiver should not be allowed because California’s higher fuel economy standards essentially push the rest of the country to adopt standards above and beyond what is required by federal law. In addition, the proposed rule argues that California’s fuel emissions standards are disproportionately focused on reducing greenhouse gas emissions instead of addressing more localized air quality issues, which violates the original intent of preemption waivers.

By invalidating the waiver, California would be unable to enforce its more stringent vehicle emissions standards, potentially creating hurdles in achieving federal air quality standards, state greenhouse gas emission reduction requirements, and zero-emission vehicle targets. While other states also follow California’s fuel economy standards, the air quality issues facing California are more severe than many other states. Roughly 95 percent of the state’s population would be affected should the waiver be rescinded, and multiple counties currently fail to meet federal air quality standards for all six different types of air pollutants. According to the California Association of Councils of

Governments (CALCOG), rescinding the waiver threatens over 2,000 transportation projects, totaling more than \$130 billion in investment, with project delivery delays or a loss of funding. Federal law allows for a one-year grace period for a failure to achieve air quality standards, although the EPA Administrator has regulatory discretion in the application of the grace period.

The rescinding of the waiver also invalidates the air quality emissions model developed by the Air Resources Board (ARB). ARB estimates that it will take at least two years to update the model and, without it, OCTA would not be able to amend the Federal Transportation Improvement Program (FTIP) to make project changes or process federal grants. OCTA amends the FTIP on a nearly monthly basis, with multiple projects in each amendment. Without the ability to amend the FTIP, OCTA cannot effectively leverage Measure M2 sales tax dollars to deliver transportation improvements in Orange County. OCTA receives tens of millions of dollars in federal transportation funding each year that could not be processed should the waiver be withdrawn. Even if OCTA were to be awarded competitive federal funds, the FTIP could not be amended to assign the funds to the project without a valid air quality model in place.

There is still significant uncertainty about the final language and how the state will respond. It is anticipated that the final rule could be published in August of this year. If the rule takes effect after the beginning of the next fiscal year starts on October 1st, OCTA's entire allotment of formula funding for the next fiscal year could be at risk, depending on the timing of a potential grace period. In addition, further amendments are expected as the rule is finalized, making it difficult to comprehensively assess the full impact of the rule until the final language is made available. CALCOG is coordinating a statewide letter to Secretary of Transportation Elaine Chao in hopes of avoiding the potentially harmful consequences that could result from the rule, and OCTA staff is working with CALCOG, the Southern California Association of Governments, and other stakeholders on how to most effectively engage federal agency partners and the Congressional delegation in resolving these issues. Unless an agreement can be reached before the rule is finalized, California's Attorney General and the ARB have warned of a legal challenge to any determination that limits the state's long-standing authority to set more stringent standards, and there is yet more uncertainty regarding how litigation may impact OCTA's planning activities. OCTA staff will continue to explore all potential solutions and keep the OCTA Board of Directors updated as the situation continues to develop.

Statutory Rescission of Transportation Funding

The Highway Trust Fund's long-term structural deficit continues to increase fiscal pressure on federal transportation programs. The Fixing America's Surface Transportation (FAST) Act did not authorize new revenue, instead

opting for short-term budgetary fixes. In addition to transferring \$70 billion from Treasury's General Fund, the FAST Act also included a rescission of \$7.569 billion in unobligated federal transportation funds. While funds are scheduled to be rescinded on July 1, 2020, the rescission will be assessed according to unobligated program balances on September 30, 2019. The rescission is distributed according to a state's share of unobligated balances in comparison to the total amount of unobligated federal transportation funds.

There is significant uncertainty about California's share of unobligated balances in relation to the unobligated balances of other states, making it difficult to determine the exact impact of the rescission. OCTA has been working with its transportation partners across California to obligate as much federal transportation funding as possible before September 30, 2019. In an effort to avoid the consequences of the rescission, leaders from the Transportation and Infrastructure Committee, notably the Chairs and Ranking Members of both the full committee and two subcommittees, wrote a letter requesting the repeal of the rescission. The letter, included as Attachment B, notes that the rescission will impact all 50 states, although the distribution of the rescission will vary depending on each state's unobligated balances. The letter also notes that the rescission will significantly limit the flexibility of states to deliver transportation improvements. Staff is working with transportation stakeholders on reaching an adequate solution, and further updates will be provided to the Board of Directors (Board) as necessary.

Appropriations Process Update

On June 4, 2019, the House Appropriations Committee approved the transportation funding bill for federal fiscal year 2020 by a vote of 29 to 21. The Transportation, and Housing and Urban Development (THUD) subcommittee would receive \$75.8 billion in discretionary funding, an increase of \$4.7 billion over the enacted level and \$17.3 billion over the President's budget request. Budgetary resources for the Department of Transportation were \$167 million above the enacted level. Similar to recent funding bills, many transportation programs are either at or slightly above levels authorized by the FAST Act.

The bill provides \$1 billion for the competitive Better Utilizing Investments to Leverage Development (BUILD) program, which funds surface transportation projects that include multi-modal investments. The report accompanying the bill also includes language citing concerns about how the Administration has "moved away from the original intent" of the BUILD program, and the report language specifically directs BUILD grant award to multi-modal projects. The report language also cited a lack of transparency in grant award decisions for competitive highway programs, and the report notes that the House Appropriations Committee is "gravely concerned" about the Capital Investment

Grant program. While this largely aspirational language has not yet been enacted, it highlights a desire for a more transparent and efficient competitive funding process.

This draft of the THUD funding bill includes language aimed at protecting federal funding provided to the California High-Speed Rail Authority (CHSRA). Specifically, the bill prohibits the federal government from terminating any grant or cooperative agreement with the CHSRA, de-obligating funding, or requiring that the CHSRA repay funding obligated to the project. The language goes on to further prohibit federal funds awarded to CHSRA from being repurposed until any litigation pertaining to the ongoing dispute with CHSRA is resolved, and the language further states that, should litigation invalidate funding awarded to CHSRA, the funding must be redirected to high-speed rail projects. An amendment was offered in the Appropriations Committee that would have stripped this language from the bill, but it failed by a vote of 21 to 29. In addition, the bill also contained a provision that would prevent the NHTSA from finalizing the SAFE Vehicles Rule or “any other successor rule.” If enacted, either of these provisions would only be enforceable while this funding bill is providing funds for government operations, which means this language could be removed in future funding bills.

The Senate has not yet acted on its version of the THUD funding bill. Staff will continue to monitor the appropriations process and provide updates to the Board as the transportation funding bill continues to move through the legislative process.

Update on Potential Infrastructure Legislation

On May 22, 2019, the President and Congressional leaders met at the White House to discuss how to pay for the \$2 trillion infrastructure bill that was reportedly agreed upon at a previous meeting on April 30, 2019. The meeting adjourned abruptly with no productive discussion about funding for infrastructure priorities. No further details have been provided about a potential infrastructure bill. Following the meeting, Congressional leaders signaled a desire to shift the focus of infrastructure conversations to surface transportation reauthorization legislation before FAST Act’s expiration on September 30, 2020. Staff will continue to monitor any developments pertaining to infrastructure legislation and provide additional updates as necessary.

House Transportation and Infrastructure Committee Hearing: State-Owned Enterprises and Public Transit

On May 16, 2019, the House Transportation and Infrastructure Committee held a hearing entitled, "The Impacts of State-Owned Enterprises on Public Transit and Freight Rail Sectors." The hearing revolved around foreign competition, specifically the impact that the state-subsidized Chinese electric bus company, BYD, and the state-owned Chinese rail company, CRCC, is having on the transit rolling stock market, and national security safety concerns associated with such technology.

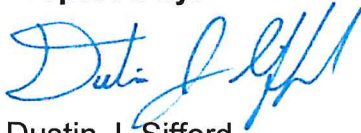
Chairman Peter DeFazio (D-OR) and Ranking Member Sam Graves (R-MO) spoke about the potential for national security threats, including concerns about cybersecurity that may arise through camera surveillance and the need to strengthen Buy America laws as a result. There was bipartisan agreement on taking a tougher stance on foreign state-owned entities. Retired Brigadier General John Adams, who is President of Guardian Six, and Scott Paul, serving as President of Alliance for American Manufacturing, highlighted the negative effect foreign state-owned entities have on American jobs. In addition, when asked by Representative Napolitano on how to bring mass transit production back to the United States, the Chief Executive Officer of the Los Angeles Metropolitan Transportation Authority suggested giving preferential treatment to mass transit manufacturers to base in the country and complete rolling stock from start to finish. As such, given the impacts on domestic manufacturers, both the House and the Senate have introduced legislation that would prevent federal transit funds from being used to procure rolling stock from companies owned, controlled, or subsidized by the Chinese government.

Summary

A support position is recommended for a bill related to sales tax revenues from aviation fuel. Summaries of a pending rulemaking and a statutory rescission are provided. Updates are also included on the appropriations process, potential infrastructure legislation, and a hearing on state-owned enterprises.

Attachments

- A. Letter from the Federal Aviation Administration to Keely M. Bosler, Director, California Department of Finance, dated May 17, 2019, re: State of California's Action Plan in Response to Federal Aviation Administration (FAA) Aviation Fuel Tax Policy
- B. H.R. 2939 (Napolitano, D-El Monte) Bill Language
- C. Letter from leaders of the Committee on Transportation and Infrastructure, U.S. House of Representatives, to the Honorable Nancy Pelosi and the Honorable Kevin McCarthy, dated May 8, 2019
- D. Potomac Partners DC, Monthly Legislative Report – May 2019

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