

I-95 Corridor Coalition VMT-Based Charge – Review of Federal Legal Issues

I. Overview

This memorandum summarizes issues of federal law that relate to the implementation of a vehicle miles traveled (VMT)-based system of user charges. There are several key areas where federal laws, regulations and policies might impact development and implementation of such a system, including the following:

- The U.S. Constitution prohibits certain actions by States that impact interstate commerce. However, direct user fees, including those based on mileage, have been upheld by the Supreme Court. New VMT-based fee systems could be structured to comply with Constitutional requirements.
- Congress has the authority to impose a VMT-based tax. Creating and administering a federal VMT tax system would require interactions with millions of users, rather than the several thousand taxpayers currently subject to fuel tax collections.
- The Federal Highway Administration (FHWA) has relied on states to assist in implementation and enforcement of highway programs, using grant conditions and other incentive programs to encourage cooperation. The federal government may be able to rely on states to assist in implementing a VMT system.
- Federal privacy laws, including the Freedom of Information Act (FOIA), the Privacy Act of 1974, and the Driver Privacy Protection Act, provide extensive protection for individuals. These laws would prohibit disclosure of personal information collected in connection with a new VMT system, subject to certain exceptions.

II. Background Information

The I-95 Corridor Coalition (the Coalition) is an alliance of transportation agencies, toll authorities, and related organizations, including public safety, from the State of Maine to the State of Florida. In the spring of 2009, the Coalition embarked upon a program to address the current surface transportation program funding crisis by exploring alternatives to the gas tax as the primary funding mechanism.

In May of 2009, the Coalition convened a workshop involving a group of experts to discuss how the Coalition could best contribute to a national effort in this area. Following the recommendations of the National Surface Transportation Policy and Revenue Commission, and the work of other organizations including the FHWA, the Oregon Department of Transportation (Oregon DOT), and the Transportation Research Board (TRB), the workshop produced a set of

recommendations regarding the issues that a multi-state pilot program for a VMT-based fee system should address.

The Coalition has launched a project to identify the institutional and administrative requirements of a multi-state VMT-based fee system. This memo will consider the federal laws and regulations that might impact such a system, and analyze ways in which a federal VMT-based fee or tax system might be enacted and collected.

There are certain specific federal legal issues relating to use of VMT fees on federal aid facilities. For example, under current federal highway law, interstate commerce issues have been invoked with regard to weight distance taxes on trucks. There may also be federal law implications associated with how the fee is characterized and on whom it is assessed.

The issue of using fueling stations and/or state entities to collect federal taxes, along with the potential for new IRS-to-individual vehicle relationships, raises a series of federal issues, (audit, evasion, enforcement) in addition to implying a potential significant change in the structure regarding transportation taxation.

III. Discussion

A. It is unlikely that VMT-based charges would violate the Commerce Clause of the United States Constitution

VMT-based fees directly impact drivers and vehicles that frequently move between states and participate in the flow of goods and services among the states (as well as other countries. Under the Commerce Clause (Article I, Section 8 of the U.S. Constitution), Congress has been granted the power to regulate commerce “with foreign Nations, and among the several States, and with the Indian Tribes.” This express delegation of authority to Congress has been interpreted to also limit the states’ power to pass laws affecting interstate or foreign commerce (the so-called “dormant Commerce Clause”). The Supreme Court has found that Congress must consent expressly and affirmatively to state or local actions imposing substantial burdens on interstate or foreign commerce.¹ Absent such consent, the subject state or local actions are unconstitutional.² However, when a state or local statute “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”³

¹ *South Central Timber Development v. Wunnicke*, 467 U.S. 82, 91-92 (1984).

² *Id.*

³ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted).

States generally have plenary power to assess taxes on their citizens and on activities that occur within their borders⁴ However, states may not infringe on a power reserved for the federal government, such as the right to regulate interstate and international commerce,⁵ or the conduct of foreign affairs. Today states collect vehicle registration fees and license fees from vehicles and drivers that are resident in their states and states collect fuel taxes from all vehicles that purchase fuel in the state. States also collect apportioned registration fees on heavy vehicles on behalf of other states, and distribute apportioned registration fees through the International Registration Plan (IRP). State designated toll agencies collect tolls from all vehicles using their facilities. VMT-based charges can be collected in a number of different ways. These systems have been found constitutional in a series of decisions by the Supreme Court, which recognize the interests that states have in raising revenue needed to fund the construction and operation of transportation facilities and the authority that states have to levy taxes for raising revenue. A key element of these decisions is that out-of-state users are not discriminated against.

Unlike fuel taxes, which are tied to purchases of a commodity, VMT-based charges are directly tied to the use of the transportation system itself. However, a fair reading of these cases would indicate that VMT-based charges would be treated no differently than tolls, fees and taxes already in use across the country. This is discussed in detail below. The Supreme Court has consistently held that “where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation.”⁶ This ruling has been found by the Supreme Court to apply to toll roads.⁷ The amount of the charges and the method of collection are left to the states’ discretion, so long as they are “reasonable and are fixed according to some uniform, fair, and practical standard.”⁸ However, states may do so only so long as those taxes do not infringe on a power reserved for the federal government, such as the right to regulate interstate and international commerce,^{9,10}

The court has supported user fees to finance transportation infrastructure facilities, and upheld the use of mileage-based taxes assessed against motorists engaged in interstate travel. In *Interstate Busses v. Blodgett*,¹¹ the court held that a state system applying a mileage-based tax to

⁴ *Dominion Land & Title Corp. v. Department of Revenue*, 320 S. 2d 815 (Fla. 1975); *Ames Volkswagen, Ltd., v. State Tax Commission*, 47 N.Y. 2d 345 (1979); *Belas v. Kiga*, 135 Wash. 2d 913 (1998).

⁵ U.S. Const. Art. I, §8.

⁶ *Hendrick v. Maryland*, 235 U.S. 610 (1915).

⁷ See footnote 17, *infra*

⁸ *Id.*

⁹ U.S. Const. Art. I, §8.

¹⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹¹ *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245 (1928).

interstate travelers, and a separate non-mileage based tax to intrastate travelers was permissible, so long as the net burden on each was roughly equivalent.

To date, no state has imposed a mandatory system of VMT-based charges on general purpose traffic, so there is no legal authority that directly addresses the matter. However, courts have analyzed the balance between state powers to impose and enforce user fees to fund transportation and the attendant burdens on interstate commerce in many contexts. For example, in *Evansville-Vanderburgh Airport Authority District*,¹² the Supreme Court analyzed whether a \$1.00 charge per enplaning commercial airline passenger imposed by the Evansville-Vanderburgh Airport Authority District to help defray the costs of airport construction, improvement, equipment and maintenance at the Dress Memorial Airport in Evansville, Indiana violated the Commerce Clause.¹³ The Court first cited established precedent sustaining taxes ““designed to make [interstate] commerce bear a fair share of the cost of the local government whose protection it enjoys.””¹⁴ As further cited by the Court:

““Where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce.””¹⁵

Relying on this precedent, the Court found it settled ““that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike.””¹⁶

Turning to the reasonableness of the passenger fee, the Court looked to prior cases regarding highway tolls for guidance.¹⁷ In particular, the Court focused on its prior holding in *Capitol*

¹² *Evansville-Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc. et al.*, 405 U.S. 707 (1972)

¹³ A similar fee imposed by the State of New Hampshire was also analyzed.

¹⁴ *Id.* at 712 (quoting *Freeman v. Hewitt*, 329 U.S. 249, 253 (1946)).

¹⁵ *Id.* at 712-13 (quoting *Hendrick v. Maryland*, 235 U.S. 610, 624 (1915)).

¹⁶ *Evansville*, 405 U.S. at 714.

¹⁷ See, e.g., the following cases sustaining tolls based on a variety of measures of actual use: *Clark v. Poor*, 274 U.S. 554 (1927) (number and capacity of vehicles); *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245 (1928) (mileage within the state); *Continental Baking Co. v. Woodring*, 286 U.S. 352 (1932) (gross-ton mileage); *Hicklin v. Coney*, 290 U.S. 169 (1933) (carrying capacity); and *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72 (1939) (manufacturer's rated capacity and weight of trailers).

*Greyhound Lines v. Brice*¹⁸, where it sustained a Maryland highway toll of 2% of the fair market value of motor vehicles used in interstate commerce that was supplemental to a standard mileage charge also imposed. Rejecting an argument that the correlation between the toll and the use of the highway wasn't precise enough, the *Capitol Greyhound* Court explained:

“Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with ‘rough approximation rather than precision.’ Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government.”¹⁹

Agreeing with these principles, the *Evansville* Court held as follows:

“[W]hile state or local tolls must reflect a ‘uniform, fair and practical standard’ relating to public expenditures, it is the amount of the tax, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of use or privilege for use, ... , and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users.”²⁰
(emphasis added).

Applying this constitutional test to the \$1.00 passenger fees at issue, the Court concluded that (1) the fees did not discriminate against interstate commerce, notwithstanding that the vast majority of passengers boarding flights at the airports in question were traveling interstate, because the fees applied equally to interstate and intrastate flights; (2) the fees reflected a fair, if imperfect, approximation of the use of the airport facilities for whose benefit they were imposed; and (3) the fees were not shown to be excessive in relation to the costs incurred by the taxing authorities for, among other things, their annual bond costs.²¹

¹⁸ 339 U.S. 542 (1950).

¹⁹ *Id.* at 546-47.

²⁰ *Evansville*, 405 U.S. at 716-17.

²¹ *Id.* at 717-20. Although the federal Anti-Head Tax Act, codified at 49 U.S.C. § 1513, later nullified the decision in *Evansville*, *Evansville* remains the constitutional test when the Commerce Clause forms the basis for a challenge to local legislation. See *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 174 (1st Cir. 1989).

Thus, in considering the imposition of a VMT-based charge, the following factors pertain: First, the charge must be fair, and not so excessive as to impede the flow of interstate commerce. Second, in state and out-of-state drivers and vehicles must be charged at roughly the same level. The charging system may not have to be exactly the same, so long as it is roughly equivalent.

B. Collection of VMT-based charges simultaneously with fuel tax

The Coalition has not yet determined whether the proposed system would assess a VMT-based charge on all vehicles passing through a state, only on vehicles registered within each participating state, or only on all vehicles registered within a participating state. However, under any model, it is likely that the existing fuel tax regimen will remain in place, at least for a transitional period, and thus there may be a period when the two systems will overlap. Nothing in federal law would prevent a state from imposing dual charges, whether permanently or as part of transitioning from one system to the other.

As noted above, the Supreme Court has upheld the implementation of user fees based upon mileage within a state. In fact the system at issue in *Interstate Busses Corp. v. Blodgett* is in a way the flip side of the system proposed for the I-95 Corridor. The fee at issue was a tax of one cent for each mile of highway traversed by any motor vehicle used in interstate commerce "as an excise on the use of such highway."²² This fee was collected in addition to the state's fuel tax and other tolls, and was only assessed against vehicles engaged in interstate travel. Intrastate buses were subject to a variety of other charges, including a tax on income generated from their operation that did not apply to interstate buses. In the aggregate, the court found:

Appellant plainly does not establish discrimination by showing merely that the two statutes are different in form or adopt a different measure or method of assessment, or that it is subject to three kinds of taxes while intrastate carriers are subject only to two or to one. We cannot say from a mere inspection of the statutes that the mileage tax is a substantially greater burden on appellant's interstate business than is its correlative, the gross receipts tax, on comparable intrastate businesses. To gain the relief for which it prays appellant is under the necessity of showing that in actual practice the tax of which it complains falls with disproportionate economic weight on it.²³

This ruling makes clear that states can impose varying schemes of fees and taxes on vehicles, and can even impose different charges on intrastate and interstate vehicles, as long as the

²² 276 U.S. at 249.

²³ 276 U.S. at 251.

aggregate burdens are similar and do not create a disproportionate burden or otherwise impede interstate commerce.

C. Issues related to federal implementation of a VMT-based charge

The Coalition is not only exploring state level implementation of a VMT-based charge, but also the kinds of issues that arise from a federal VMT-based charge. Congress has broad taxing authority under the Constitution, which it may use to accomplish the purposes of its delegated powers.²⁴ It is beyond the scope of this study to broadly review the legal issues involved in imposing and implementing a federal VMT-based charge. The myriad of issues associated with such a system are being examined thoroughly in other studies. Here, we review several issues that might arise at the intersection of state and federal law. In our survey of state counsel, we looked at a broad range of state law issues related to state VMT implementation at a local or regional level. Many of those issues apply to both federal and state systems, and so will be further developed in the memo describing the survey results. Collection of a VMT fee would differ drastically from the current fuel taxes, which are levied against diesel and gasoline at the initial point of distribution, limiting its incidence to oil companies, brokers, and terminal operators. Nationally the taxes involve less than 900 taxpayers for gasoline receipts and fewer than 2000 for diesel. State fuel tax collection is somewhat more complex, in part because states cannot levy their taxes until the fuel enters their jurisdiction. However, even states have developed mechanisms that result in far fewer collection points than would be the case with a VMT based fee system.

VMT fee collection would open up a new system of collection with millions of points of contact between the federal government and the highway users. Modern technology would make such a system possible, and there are a number of different collection methods under consideration, which could somewhat simplify the process. Nevertheless, the cost of such a program could be greatly reduced if the federal government could work with states that also are using VMT-based charges to provide a unified collections mechanism. In administering this system, the federal government may find that it can achieve greater efficiency in its collections by relying on the states to collect the federal charge simultaneously with the state charges.

Currently, the federal government has its own apparatus for collecting motor fuel and related taxes. However, we have not found any constitutional impediment to the federal government working with states in a cooperative fashion to jointly collect state and federal charges, whether characterized as taxes or fees. We should note that this discussion is speculative, as we were not able to obtain an indication from the Internal Revenue Service whether they would have any interest in creating a unified collection system.

²⁴ *Taylor v. Robertson*, 16 F. Supp. 801 (1936).

Congress has already chosen to implement national highway programs in cooperation with state governments. However, the Supreme Court has interpreted the Tenth Amendment to prohibit the federal government from compelling state governments to enforce federal laws. In *New York v United States*, the court held that Congress cannot directly compel states to enforce federal regulations.²⁵ Thus, Congress has used its “spending power” to establish conditions on federal grants or to provide incentives of various kinds to induce the states to achieve national policy goals. Congress can also preempt inconsistent state law and regulations when asserting its authority under the Commerce Clause or other authority spelled out in the Constitution. There are many examples of Congress using grant conditions in federal transportation programs. States can lose grant funding or face reallocation for failure to comply with requirements related to vehicle size and weight,²⁶ commercial vehicle registration,²⁷ highway beautification,²⁸ and various safety programs (e.g. national drinking age,²⁹ open container laws,³⁰ seatbelt and motorcycle helmet requirements³¹). The federal government offers a reward to states for compliance and may penalize them for non-compliance with federal requirements. The statutory framework for these programs usually provides an apportionment of funds that will be made available to compliant states, and a penalty provision that denies funding to non-compliant states.

Common penalty provisions withhold funding from non-compliant states for the years they fail to comply.³² States are similarly threatened with a 10% reduction of their total federal-aid highway apportionments for non-compliance with provisions related to outdoor advertising,

²⁵ *New York v. United States*, 505 U.S. 144 (1992).

²⁶ 23 U.S.C. 127 (2009). States can lose 100% of their National Highway System (104(b)(1)) federal-aid funding if they deny interstate access to vehicles that comply with federal size and weight requirements. States can lose 10% of their apportionments under 23 U.S.C. 104 if they fail to certify, or USDOT determines that they have failed to enforce the federal size and weight restrictions included in 23 U.S.C. 127 and 49 U.S.C. 31112

²⁷ 23 U.S.C. 141 (2009).

²⁸ 23 U.S.C. 131(b) (2009). States can lose 10% of their annual apportionments under 23 U.S.C. 104 if they fail to comply with the HBA.

²⁹ States can lose 10% of their annual apportionments for NHS, congestion management and STP programs if they fail to enact a law making it illegal for anyone under 21 to publicly possess or purchase alcoholic beverages.

³⁰ 23 U.S.C. 154(c) (2009). For states that fail to enact open container laws that meet federal requirements, FHWA can reallocate up to 3% of NHS, congestion management and STP funds to safety program grants under 23 U.S.C. 402.

³¹ 23 U.S.C. 153(h) (2009). For states that fail to enact safety belt and motorcycle helmet laws that meet federal requirements, FHWA can reallocate up to 3% of NHS, congestion management and STP funds to safety program grants under 23 U.S.C. 402.

³² For example, the size and weight provisions of 23 U.S.C. §§ 127 and 141 deny non-compliant states 100% of National Highway System (“NHS”) funds, and threaten to reduce such states total apportionment by 10%, and Interstate Maintenance (“IM”) allocations by up to 25% if such states allow commercial vehicles to operate in violation of federal size and weight requirements. 23 U.S.C. § 127(a)(1); 23 U.S.C. § 141(a) (2009).

control of junkyards and the national drinking age.³³ These reductions may be coupled with reapportionments to other states, which can occur immediately or after a certain amount of time has elapsed. Other provisions simply allow the withheld funds to lapse if the state does not return to compliance in time.³⁴

In some instances, federal programs provide for a transition from milder to harsher penalties over a period of years to encourage non-compliant states to adopt legislation and to reward states that move quickly in response to new federal mandates. Other programs have spread incremental increases in penalties over a greater range, and required evidence of enforcement.³⁵

D. Using grant conditions and incentives to cooperatively collect VMT-based charges

Rather than relying exclusively on federal collection of a VMT-based charge, Congress could require the states to collect these charges as a condition of receiving transportation grants. There are virtually no limits on the scope of such conditions, even if they require states to adopt specific laws and regulatory schemes.³⁶ However, if the federal government converts to a VMT-based taxation or charging system, it is unlikely that all states will immediately follow suit. There is no reason to assume that all state legislatures will be convinced of the wisdom of such a system. If the federal government were to seek to require states to collect VMT-based charges on its behalf, states not imposing VMT-based charges would be in the position of having to adopt a collection system merely to take advantage of federal funding. This is likely to be viewed as an unfunded mandate and meet with strong opposition. Even states collecting VMT-based charges may be doing so under an entirely different legal framework than the federal charge and thus may also find it difficult to comply with such federal requirements.

Another approach might be to offer various incentives to states to collect the VMT-based charge for the federal government. Incentives can take many forms, offering additional funding to a cooperating state to collect the charge. Especially in states already committed to assessing VMT-based charges, it might make sense to conform the state system to the federal one.

³³ 23 U.S.C. §§ 131(b), 136(b), 158(a)(1) (2009).

³⁴ For example, NHS funding denied to a state under 23 U.S.C. § 127(a) lapses and becomes permanently unavailable to the state after 3 years. 23 U.S.C. §§ 127(a)(3), 118(b)(2) (2009). The size and weight penalty under 23 U.S.C. § 141(b) is held for one year before reapportionment to other states. 23 U.S.C. § 141(b) (2009). In addition, Interstate Maintenance funds that are withheld if a state allows heavy vehicles to register without proof of payment of the federal use tax are reapportioned immediately to other states. 23 U.S.C. § 141(c) (2009).

³⁵ 23 U.S.C. § 163 (2009). – This program dealt with blood alcohol levels and increased penalties from 2% to 8% of the NHS, STP and IM funds available to a state, which would lapse and become permanently unavailable to a state 4 years after the withholding, if the state continued its non-compliance.

³⁶ See *South Dakota v. Dole*, 483 U.S. 203 (1987).

However, it must be recognized that a hard grant condition is more likely to achieve national compliance. This means that using incentives alone would require the federal government to be prepared to collect the federal VMT-based charge in states choosing not to take advantage of the incentive being offered.

Incentives need not be strictly in the form of additional payments. Such payments would have budgetary implications, making it less likely that the incentive would be large enough to encourage universal cooperation in the collection of federal VMT-based charges. One example of a non-cash incentive is an extension of the “soft match” opportunity already found in federal law.³⁷ This program allows states, under certain circumstances, to utilize toll revenues collected in lieu of dedicated local matching funds normally required by federal-aid highway grants. A new law could follow a similar approach to allow states to claim a credit for VMT fees collected. Thus, participating states could lower or even eliminate the requirement to match federal transportation grant funds.

E. Federal Privacy Law

Privacy is a major concern for any government program that requires the use of personal information. This issue is especially important when it comes to a new VMT system, which may require the use of special transponders or other tracking devices to monitor miles traveled. One of the barriers to implementation of VMT-based charges will likely stem from the necessity of a centralized database of user information. Concern over government monitoring is not new, and any legislation authorizing a new VMT system will likely include new protections for individual privacy.

Fortunately, existing laws provide substantial protection already. The federal Freedom of Information Act provides the framework for executive branch federal agencies’ record-keeping and release of individual records. The privacy protections included in this law were further strengthened by the Privacy Act of 1974, and the Computer Matching and Privacy Protection Act of 1988. Finally, motor vehicle record related information is protected by the Driver’s Privacy Protection Act (DPPA), which regulates the disclosure and resale of personal information by limiting disclosure without affirmative consent.

1. Freedom of Information Act

The Freedom of Information Act (FOIA) applies to executive branch government agencies, and provides a system for public access to government records. Agencies must publish rules and procedures for requesting documents, and are subject to penalties for hindering the process of a

³⁷ 23 U.S.C. § 120(j) (2009).

petition for information. In order to safeguard sensitive information, FOIA provides disclosure exemptions for the following nine categories:³⁸

- (1) National security information,
- (2) Agency personnel rules and practices,
- (3) Information specifically exempted from disclosure by other statute
- (4) Trade secrets,
- (5) Inter-agency or intra-agency letters and memoranda,
- (6) Personnel, medical and similar private files,
- (7) Certain law enforcement records,
- (8) Operating and condition reports related to federal oversight of financial institutions, and
- (9) Geological and geophysical information and data concerning wells.

The sixth category listed above provides protection for files containing personal information, “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”³⁹ This means that disclosures of personal information collected in the course of gathering government data is not required. It should be noted that FOIA only applies to records maintained by the federal government. State maintained records, even if they are essentially identical to the federal records, are subject to state public records acts, and not FOIA.

2. Privacy Protection Act of 1974

Following the Watergate scandal, Congress enacted the Privacy Protection Act of 1974 (the Privacy Act). Congress was concerned with curbing the illegal surveillance and investigation of individuals by federal agencies; and it was also concerned with potential abuses presented by the government’s increasing use of computers to store and retrieve personal data by means of a universal identifier — such as an individual’s social security number.⁴⁰

Broadly stated, the purpose of the Privacy Act is to balance the government’s need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy stemming from federal agencies’ collection, maintenance, use, and disclosure of personal information about them. The Privacy Act focused on four basic policy objectives:

- (1) To restrict disclosure of personally identifiable records maintained by agencies.

³⁸ 5 U.S.C. 552(b) (2009).

³⁹ 5 U.S.C. 552(b)(6) (2009).

⁴⁰ Dept. of Justice, *Overview of the Privacy Act of 1974*, at <http://www.justice.gov/opcl/privacyact1974.htm>.

- (2) To grant individuals increased rights of access to agency records maintained on them.
- (3) To grant individuals the right to seek amendment of agency records maintained on themselves upon a showing that the records are not accurate, relevant, timely, or complete.
- (4) To establish a code of 'fair information practices' which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records.⁴¹

The Privacy Act “protects certain federal government records pertaining to individuals. In particular, the Act covers systems of records that an agency maintains and retrieves by an individual’s name or other personal identifier (e.g., social security number).... In general, the Privacy Act prohibits unauthorized disclosures of the records it protects. It also gives individuals the right to review records about themselves, to find out if these records have been disclosed, and to request corrections or amendments of these records, unless the records are legally exempt.”⁴² The agency then has ten days to either make the correction or to notify the requestor that the correction will not be made.⁴³

Exemptions to the Privacy Act protections are allowed for:

- the Census Bureau,
- the Bureau of Labor Statistics,
- the Government Accountability Office,
- routine uses (referring to external sharing of information outside the agency)
- archival purposes if the record has sufficient historical value,
- law enforcement purposes,
- congressional investigations, and
- other administrative purposes.⁴⁴

The Privacy Act requires agencies to “keep an accurate accounting” of information disclosures, except when the disclosure is made within the agency for routine administrative uses or made under the Freedom of Information Act (FOIA). The Act requires “each agency that maintains a system of records” to restrict the collection of information to only the information relevant to the purpose, to ensure the information remains accurate, to collect information directly from the

⁴¹ Dept. of Justice, *Overview of the Privacy Act of 1974*, at <http://www.justice.gov/opcl/privacyact1974.htm>.

⁴² Federal Trade Commission, *Privacy Act of 1974, as amended*, at: http://www.ftc.gov/foia/privacy_act.shtm

⁴³ 5 U.S.C. § 552a(d) (2009).

⁴⁴ 5 U.S.C. § 552a(b) (2009).

subject whenever possible, and to tell the subject the purpose for which the information is being collected and the authority under which it is being collected.⁴⁵

Like FOIA, the Privacy Act applies to records maintained by the federal government, not state records.

3. Computer Matching and Privacy Act of 1988

The Privacy Act was amended by the Computer Matching and Privacy Act of 1988. Congress later enacted the Computer Matching and Privacy Protection Amendments of 1990⁴⁶ which further clarified due process provisions, and addressed the use of records in automated matching programs.

New provisions added procedural requirements for agencies to follow when engaging in computer-matching activities; provide matching subjects with opportunities to receive notice and to refute adverse information before having a benefit denied or terminated; and require that agencies engaged in matching activities establish Data Protection Boards to oversee those activities.⁴⁷ Specifically, the new law required:

“each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.”⁴⁸

4. Driver’s Privacy Protection Act of 1994 (“DPPA”)

The federal Driver’s Privacy Protection Act (“DPPA”) regulates the disclosure and resale of personal information contained in motor vehicle records. DPPA thus applies to state and federal records. The prohibition extends to persons, including government agencies, who have obtained

⁴⁵ 5 U.S.C. § 552a(e) (2009).

⁴⁶ Pub. L. No. 101-508 (Nov. 5, 1990).

⁴⁷ Dept. of Justice, *Overview of the Privacy Act of 1974*, 2010 Edition; See 5 U.S.C. § 552a(a)(8)-(13), (e)(12), (o), (p), (q), (r), (u).

⁴⁸ 5 U.S.C. § 552a(r) (2009).

the information from the state. Violations of the DPPA are punishable by criminal and civil penalties and the statute also provides a civil cause of action.⁴⁹

Information is divided into two classes – “highly restricted personal information”, which includes photographs, social security numbers, and medical or disability information; and “personal information” which includes driver identification numbers, names, addresses (but not zip-codes), telephone numbers, as well as the highly restricted information described above. Information on accidents, driving violations and driver status is not covered. Highly restricted personal information may be disclosed for:

- Use by any government agency, including any court, law enforcement agency or private person or entity acting on behalf of a federal, state, or local agency.
- Use in connection with any civil, criminal, administrative or arbitral proceeding, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a federal, state, or local court.
- Use in insurance claims investigations, anti-fraud activities, ratings or underwritings.
- Use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver’s license that is required under chapter 313 of title 49.

Other personal information can be disclosed for the following purposes:

- To be used in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.
- To be used by a business to verify the accuracy of personal information submitted by an individual, or to correct such information to prevent fraud, pursue legal remedies, or recover a debt or security interest against the submitting individual.
- To be used for research activities, as long as the personal information is not published, redisclosed or used to contact individuals.

⁴⁹ 8 U.S.C. §§ 2723-2724 (2009).

- To be used in providing notice to owners of towed or impounded vehicles.
- To be used by private investigators.
- To be used in connection with the operation of private toll transportation facilities.
- To be used by any requester, if the requester can demonstrate it has obtained the written consent of the individual.
- For any other use related to the operation of a vehicle or public safety that is specifically authorized under the law of the state holding the record.

If the government obtains express consent from the individual, either written or electronic, personal information (but not highly confidential personal information) may be used for bulk distribution surveys, marketing, and solicitations.

IV. Conclusion

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

- It is unlikely that constitutional restraints exist for states seeking to implement a system of VMT-based charges. Direct user charges, including those based on mileage, have been upheld by the Supreme Court. Reasonable VMT-based charges are sufficiently similar to taxes and tolls collected under current law to have been tested repeatedly before the United States Supreme Court.
- The collection of VMT-based charges is significantly more complex than current taxes on motor fuel. If VMT-based charges are implemented at a federal level, they will involve transactions with millions of taxpayers each year, rather than the several thousand who currently pay fuel taxes.
- Although technology should answer some of these problems, it may be wise to collect state and federal VMT-based charges simultaneously. FHWA already relies on states to assist with efforts to implement and enforce various highway programs, and could use grant conditions and other incentive programs to encourage state cooperation in collecting and enforcing a federal VMT system. It remains to be seen if either the federal government or the states would be interested in pursuing this approach.
- Finally current law protects personal information from release for non-governmental purposes. Federal laws are already supplemented by state laws in this regard.