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Legal Opinion Asserts: Oil Franchise Tax Likely to be Struck Down by Courts
State Budget Committee needs to seriously consider alternative or Wisconsin transportation funding would be put in serious jeopardy

A legal opinion requested by the Wisconsin Motor Carriers Association reaffirms previous analyses of the Governor's proposed "Oil Company Profits Tax." (Attached) The findings should be of concern to anyone who cares about the stability and solvency of the transportation fund.

The memo emphasizes three key areas that cause great concern:

- The "no pass through" provision in the Governor's budget is built on a premise that has been found to violate the Commerce Clause and is likely to be found unconstitutional.
- The economic burden imposed by this tax will fall on Wisconsin companies and businesses, and not the "big oil" companies it is attempting to target.
- Enactment of the tax as structured could result in the state of Wisconsin having to pay back, with interest, monies collected, in addition to attorney fees, if as expected the proposal is struck down in court.

With this Foley & Lardner opinion, three leading Wisconsin law firms, including one written by former Wisconsin AG Peg Lautenschlager, as well as the non-partisan Legislative Council, conclude the oil franchise tax will be challenged and likely ruled unconstitutional.¹ Each of the law firms note that the legal flaws are a significant threat to transportation funding.

"Transportation funding is our top priority and to risk it on this type of scheme makes no sense. Let's do the responsible thing and make sure the money that provides safe roads and bridges in Wisconsin will actually be there when we need it," said Thomas Howells of the Wisconsin Motor Carriers Association.

"This is just further confirmation that the state legislature needs to move to an alternative plan to protect transportation funding in Wisconsin," said Bill Sepic of the Wisconsin Auto & Truck Dealers Association. "This is the wrong time to flirt with disaster when there is broad support to find a more reliable funding source."

In a March 25, 2009, memo to legislative leaders, the Wisconsin Motor Carriers Association, the Wisconsin Auto & Truck Dealers Association and ten other Wisconsin associations presented a viable alternative to the oil company tax. The groups cited concerns over legal, supply, and other issues with the Governor's proposal.

¹See Lawton & Cates (Former Attorney General Lautenschlager) Memo (Apr. 19, 2007) finding that "litigation would be likely and a case to deem the assessment unconstitutional would be strong" and that "the uncertainty of a continuing revenue source during the pendency of the litigation would likely impact the political will of decision makers to invest money in roads."

See also Michael, Best & Friedrich Memo (May 30, 2007) finding that "If, as expected, the tax is found to be unconstitutional following litigation by parties who pay under protest, the State would be required to refund all revenues collected, with nine percent (9%) interest, as well as the attorney fees and other costs."

See also Wisconsin Legislative Council Memo to Speaker Huebsch (Feb. 26, 2007) finding that the oil company tax "raises the legal issue of whether it violates the Commerce Clause of the U.S. Constitution because its practical effect will be to pass on the cost of the assessment to out-of-state customers of suppliers subject to the assessment."