The Attorney Advisory Committee (AAC) writes to express legal considerations about IFTA BALLOT PROPOSAL 03-2023. The subject of Ballot 3 is "Creating a mechanism for member jurisdictions to collect and report tax based on distance rather than fuel consumed".

As of 7/6/23 – updates to amended Ballot #3-2023:

The AAC is grateful to IFTA Inc. for discussing the AAC's comments on Ballot #3 and look forward to reviewing further versions of the ballot.

1. **The AAC is concerned that language used in the changes proposed in Ballot 3 and the commentary in the proposal document, may support an interpretation that IFTA is not in compliance with the *Intermodal Surface Transportation Efficiency Act* (ISTEA) and, therefore, the U.S. Constitution. Language used to enable the calculation of tax based on distance travelled should indicate that such methodology is being used as a method for measuring consumption rather than as an alternative to taxation based on or measured by consumption.**

   The Compact Clause of the U.S. Constitution provides that "No State shall, without the Consent of Congress, ... enter into Any Agreement or Compact with another State, or with a foreign Power" (Article 1, Section 10, Clause 3). In 1991, through ISTEA, Congress authorized States to impose a "fuel use tax" reporting requirement and collection of a "fuel use tax" by a single base state for proportional sharing among the states, but only if it conformed with the "International Fuel Tax Agreement". ISTEA defined "fuel use tax" as follows:

   > 49 USC 31701 (2) "fuel use tax" means a tax imposed on or measured by the *consumption* of fuel in a motor vehicle. (emphasis added)
   >
   > (3) "International Fuel Tax Agreement" means the interstate agreement on collecting and distributing *fuel use taxes* paid by motor carriers, developed under the auspices of the National Governors' Association. (emphasis added)

   Accordingly, any fuel use tax (and the IFTA itself) must be imposed on or measured by the consumption of fuel.

   The "Subject"" section of the Ballot Proposal indicates that it "*create[s] a mechanism for member jurisdictions to collect and report tax based on distance **rather than fuel consumed**".* (emphasis added)

   The "Intent" section of the Ballot Proposal indicates that *"The intent of the ballot is to establish a short term solution in which a carrier has the ability to report and pay tax for the use of alternative fuels in qualified motor vehicles based on distance **rather than fuel consumed**.* (emphasis added)

   Stating that the purpose and intent of the changes is to facilitate the imposition or measurement of tax on a basis other "than fuel consumed" appears contrary to the explicit wording of ISTEA. The argument that the proposed amendments are inconsistent with ISTEA could be supported by the proposed changes to P720.350 which require the average fuel consumption factor to two decimal places for the tax reporting period "(*if the member jurisdiction is imposing tax based on fuel consumption)".* Similar language appears in proposed P1040.350. Again, ISTEA requires that tax be

imposed or based on fuel consumption. This language suggests that tax could be imposed or based on something other than fuel consumption.

The AAC believes that a finding that the changes proposed in Ballot 3 were found to be unconstitutional would not put the IFTA in jeopardy as a whole. However, the AAC believes that a motor carrier could challenge an assessment by one state of a distance-based fuel imposed by another jurisdiction if the provisions of the Agreement were interpreted as relating to tax that is imposed on or measured by something other than the consumption of fuel.

To minimize this risk, the AAC recommends amending the language of the proposed changes and the commentary to indicate that IFTA continues to adhere to a consumption-based tax as stipulated in federal law even where a distance-based calculation is used. The language of the revisions and the surrounding commentary might be revised to better align with federal law and the U.S. Constitution by clarifying that the ballot provides a means to 'estimate the taxable fuel consumed based on distance traveled', and to eliminate the appearance of collecting and reporting tax based on distance *rather than* fuel consumed.

2. **The AAC is concerned that the phrase "specific schedules included on the IFTA Tax Return for member jurisdictions that have elected to tax alternative fuels used in qualified motor vehicles" used in the revisions to R820 of the Agreement and P550.700 of the Procedures Manual is ambiguous and imprecise.** We understand that the unstated intention is that the specific schedules contemplated are those that relate to the consumption of alternative fuels where the tax is calculated with reference to distance travelled. However, this intention is not explicit and could be interpreted more broadly. The concern could be addressed by explicitly stating that the schedules in question are those that relate to the consumption of alternative fuels where the tax is calculated with reference to distance travelled.

3. **The changes to R820 and P550 are written as an exception to a duty imposed on licensees, which is less clear than stating an affirmative duty.** In other words, the changes say what is not required to be done but do not say what is required to be done. From a clarity and drafting perspective, it is clearer to state when the duty does apply as opposed to stating when the duty does not apply.

4. **The proposed amendments could be interpreted as exempting distance-based alternative fuel taxation from collection and dissemination under IFTA.** The changes to R820 are worded as an exception to both reporting *and* taxability and therefore, suggest an exception to the general rules establishing what is "taxable fuel use" under IFTA. If the intent is to include such tax within IFTA but allow variations in reporting of alternative fuel use based on distance, one would expect the amendments to have been made in the reporting sections at Article IX. However, inclusion of these provisions in Article VIII could be interpreted as creating an exemption not just with respect to reporting but with respect to taxability where a jurisdiction uses a distance-based tax. These exemptions appear to create a dichotomy between taxes on fuels calculated on distance travelled and those calculated on the traditional consumption calculations. That dichotomy appears to be furthered by the proposed amendments at P720 and P1040 that clarify those procedures' application to tax "based on fuel consumption."

(END)

Rebuttal to AAC Ballot 3-2023 Comments

The IFTA Team respectfully disagrees with the AAC's comments and position on this ballot. Here are our reasons and facts to support said dissent with the AAC's comments:

1. Ballot 3-2023 does not violate the Compact Clause of the United States Constitution. A violation of the Compact Clause would have to include an act that would enhance or increase the political power of a state and/or undermine the authority of the federal government. **Ballot 3-2023 does neither.** *(NCSL Report 1999 Chapter 2* ***IFTA Is A Unique Hybrid Agreement*** *pgs. 6 through 9)*

2. Section 4008 of the ISTEA only acknowledges IFTA, requires conformity to same on or before September 30, 1996, and specifically mentions the three core provisions of IFTA (base jurisdiction concept, definition of qualified motor vehicle, and retention of state sovereignty to establish tax rates and exercise tax authority). No other aspects of administering the Agreement exist within the ISTEA legislation. **Ballot 3-2023 does not interfere with nor alter any of the core provisions already agreed to by the United States Congress by virtue of Section 4008 of ISTEA.** *(NCSL Report 1999 Chapter 2* ***IFTA Is A Unique Hybrid Agreement, IFTA Is Not A Federal Mandate*** *(pg. 10),* ***Congressional Consent*** *(pgs. 9-10),* ***Reciprocity Characteristics*** *(pgs. 11-12),* ***Congressional Coercion*** *(pgs. 13-14), Page 14 Specifically: "In short, ISTEA recognizes three core IFTA provisions that were contemplated by the member jurisdictions as the essence of the agreement: the base jurisdiction concept, uniform definition of the taxpayer and state retention of substantive tax authority. Congressional coercion of state participation in the IFTA provides the consent necessary to elevate these core provisions to compact status. Other provisions that are not core provisions and are not specifically recognized in ISTEA do not have compact status and should be legally recognized as interstate reciprocity."*

3. The United States Supreme Court has ruled on numerous occasions that certain agreements do not rise to the level of meeting the test for application of the Compact Clause. The Supreme Court has adopted a functional interpretation in which only compacts that increase the political power of the states while undermining federal sovereignty require congressional consent. These cases include:
    a. United States Steel Corp. vs. Multistate Tax Comm'n, 434 U.S. 452, 470 [1978]
    b. Virginia vs. Tennessee, 148 U.S. 503, 519 [1893]

c. New York vs. United States, 505 U.S. 144, 182 [1992]

The provisions of Ballot 3-2023 fall within the Supreme Court's adoption of a functional interpretation of what constitutes a violation of the Compact Clause as there is no increase in the political power of the states nor has federal sovereignty been undermined. *(NCSL Report 1999 Chapter 2* ***IFTA Is A Unique Hybrid Agreement, The Compact Clause Threshold*** *(pgs. 7-9))*

4. The NCSL Report of 1999 included extensive research by several attorneys from IFTA jurisdictions, IFTA, Inc. executives, independent attorneys, the American Trucking Associations, a United States Congressman, and the NCSL staff which authored the report. This report identified several areas where IFTA is a unique hybrid agreement, is not subject to the Compact Clause (citing several court cases and **excepting** what has been expressly accepted by Congress), validated that ISTEA required conformity with the Agreement, only identified and embraced the three core provisions of IFTA, and remanded (by its silence) all other regulatory authority to the members of the Agreement. **The NCSL Report illustrates that amendments to IFTA fall outside of the provisions of the Compact Clause provided the three core provisions are not altered as they have been approved by Congress. Nothing in Ballot 3-2023 interferes with what the U.S. Congress has already approved.** *(NCSL Report 1999 Chapter 2* ***IFTA Is A Unique Hybrid Agreement, Congressional Coercion*** *(pgs. 13-14))*

5. The legislation in question, Indiana House Bill 1050, amended Indiana's Motor Carrier Fuel Tax law. A new tax was **not** created; rather, the fuel use tax law of Indiana was amended to account for the use of alternative fuels, established the rules for determining an applicable tax rate, and acknowledged the continuance of IFTA as the instrument through which Indiana's motor carrier fuel tax shall be paid. Moreover, Indiana's calculation method is based on consumption. The prevailing Indiana diesel tax rate is divided by the average MPG for diesel vehicles computed by Indiana to arrive at an effective use tax rate. That rate is applied to distance in Indiana. **Since this imposition of tax is clearly in the Indiana Motor Carrier Fuel Tax code and is based on consumption, it is being imposed consistent with existing motor carrier fuel taxes in Indiana and therefore still within the confines of IFTA.**

Commentary:

We believe that the extensive research and conclusions embodied in the NCSL Report of 1999 are as valid in 2023 as they were in 1999. We encourage every voting commissioner to read the full NCSL report which includes the support of their research including references to supreme court cases, congressional law, and other extensive supporting facts and examples -vs- the opinions stated by the AAC which are not supported by any facts or research yet attempt to present a concern without referencing any support for their comments. In addition to the NCSL report, common sense analysis also supports the NCLS conclusions that Congress never intended for every amendment in the IFTA to require congressional approval. If the AAC comments were true, then anytime there is a proposed ballot that seeks to amend the IFTA, it would require congressional approval. As the NCSL clearly concludes, this is not true and the hybrid IFTA has only three core provisions which relate to the Compact Clause. All other provisions of our IFTA represent either a reciprocal jurisdiction agreement or an administrative agreement between jurisdictions, neither of which falls under the Compact Clause. Ballot 3-2023 does nothing more than make a small change to the return requirements (administrative) and clearly, does not run afoul of the Compact Clause or ISTEA. Please do not accept the AAC comments as fact and take the time to read through the NCSL report. The full NCSL report is available on our website, or you can e-mail dmeise@iftach.org and she will e-mail you a copy.

This Ballot does not interfere with the Core Provisions, nor does it pose a violation of the Compact Clause of the United States Constitution. Therefore, Ballot 3-2023 is well within the membership's authority, if desired, to ratify Ballot 3-2023 as it has hundreds of ballots before within the authority of being recognized as a reciprocal administrative agreement.