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July 29, 2020

TO: Members
Wisconsin Legislature

FROM: Bob Lang, Director

SUBJECT: *Bartlett v. Evers* -- Decisions of the Supreme Court on Four Gubernatorial Budget Vetoes

On July 10, 2020, the Wisconsin Supreme Court filed its opinions in the case of *Bartlett v. Evers*, regarding the constitutional validity of four of the Governor's partial vetoes of the 2019-21 biennial budget.

As presented by the petitioners, the vetoes in question concerned: (1) the school bus modernization fund; (2) the local roads improvement fund; (3) the vapor products tax; and (4) the vehicle fee schedule.

The court found, "No rationale has the support of a majority. However, a majority has reached a conclusion with respect to the constitutionality of each series of vetoes." The court found the following three vetoes to be unconstitutional.

- School bus modernization fund, 5-2 (Roggensack, Ziegler, R. Bradley, Kelly, Hagedorn).
- Local road improvements fund, 5-2 (Roggensack, Ziegler, R. Bradley, Kelly, Hagedorn).
- Vapor products tax, 4-3 (Ziegler, R. Bradley, Kelly, Hagedorn).

The veto on the vehicle fee schedule was found constitutional, 5-2 (Roggensack, A. Bradley, Ziegler, Dallet, Hagedorn).

In August, 2019, this office distributed its summary of the provisions of the 2019-21 biennial budget, "Comparative Summary of Provisions -- 2019 Act 9." The document describes each of the provisions of Act 9, including all fiscal and policy modifications recommended by the Governor, Joint Committee on Finance, and Legislature.

Attached are the items of that document that have been updated to reflect the decisions of the Supreme Court in *Bartlett v. Evers*. The item and page numbers of the attachments are identical to those of the August, 2019, document. They are listed below.

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BL/lb
Attachments

2. IMPOSE TOBACCO PRODUCTS TAX ON VAPOR PRODUCTS [LFB Paper 350]

	Governor (Chg. to Base)	Jt. Finance/Leg. (Chg. to Gov)	Supreme Ct. (Chg. to Leg.)	Net Change
GPR-Tax	\$34,700,000	- \$29,200,000	- \$1,500,000	\$4,000,000

Governor: Impose the tobacco products tax on vapor products at the rate of 71 percent of the manufacturer's list price to distributors and impose an inventory tax on vapor products held in inventory for sale or resale.

Definition of a Vapor Product. A vapor product subject to the tobacco products tax would be defined as any noncombustible product that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means that can be used to produce vapor from a solution or other substance, regardless of the product's shape or size or whether the product contains nicotine. A vapor product would include an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device, and would include any cartridge or other container of a solution or other substance that is intended to be used with such a device, regardless of whether the solution or other substance contains nicotine. In addition, vapor products would be added to the definition of tobacco products under current law. A vapor product would not include certain products regulated as a drug or device under federal law. DOR indicates the intent of this provision is to exempt products approved for smoking cessation by the Food and Drug Administration from the definition of taxable vapor products.

Inventory Tax Imposed. The bill would levy an inventory tax at a rate equal to 71 percent of the manufacturer's list price on vapor products that are held in inventory by distributors or retailers for sale or resale. Any person liable for this tax would be required to determine the number of vapor products in their possession on the first day of the third month following publication of the bill and would have to file a return and pay the applicable taxes no later than 30 days thereafter.

Definition of Manufacturer's List Price. Current law does not specifically define manufacturer's list price for purposes of the tobacco products tax. The administration indicates an explicit statutory definition is needed to clarify DOR's longstanding treatment of the total price subject to the tobacco products tax. The bill would define manufacturer's list price as the total price of tobacco products charged by the manufacturer or other seller to an unrelated distributor. The total price would include all charges by the manufacturer or other seller that are necessary to complete the sale, and could not be reduced by any cost or expense incurred by the manufacturer or other seller such as fees, delivery, freight, transportation, packaging, handling, marketing, federal excise taxes, and import fees or duties, regardless of whether such cost or expense is separately stated on an invoice. The total price also could not be reduced by the value or cost of discounts or free promotional or sample products. A manufacturer or other seller would be considered related to a distributor if the two parties have significant common purposes and substantial common membership or, either directly or indirectly, have substantial common direction or control.

The provision would take effect on the first day of the third month beginning after publication of the bill. The administration estimates levying the tobacco products tax on vapor

products would increase state tax revenues by \$14,900,000 in 2019-20 and \$19,800,000 in 2020-21 and annually thereafter. The Governor's recommendations did not include any revenues associated with the imposition of the inventory tax.

Joint Finance: Delete provision. Instead, define a vapor product to mean a noncombustible product that produces vapor or aerosol for inhalation from the application of a heating element to a liquid or other substance that is depleted as the product is used. Include vapor products in the definition of tobacco products, and impose an excise tax on vapor products at the rate of \$0.05 per milliliter on the volume of the liquid or other substance as listed by the manufacturer and a proportionate tax at the like rate on all fractional parts of a milliliter thereof. Require every distributor to file a return showing the quantity and taxable price of milliliters of vapor product brought, shipped, or transported into Wisconsin for sale in the state, or made, manufactured, or fabricated in Wisconsin for sale in the state, during the preceding month. Specify that the provision would take effect on October 1, 2019. Estimate increased excise tax revenues relative to current law of \$2,300,000 in 2019-20 and \$3,200,000 in 2020-21. Compared to the bill, the estimated excise tax revenues are lower by \$12,600,000 in 2019-20 and \$16,600,000 in 2020-21.

Assembly/Legislature: Modify the Joint Finance provision to impose the tax on vapor products separately from the tax on tobacco products, rather than to include vapor products in the definition of tobacco products. Current law provisions regulating the sale and taxation of tobacco products would be amended to also regulate the sale and taxation of vapor products. As under the Joint Finance provision, the tax would be imposed at the rate of five cents per milliliter on the volume of the liquid or other substance as listed by the manufacturer, and at a proportionate rate on all fractional parts of a milliliter thereof.

Veto by Governor [E-60]: Delete "to a liquid or other substance that is depleted as the product is used" from the definition of vapor products, but retain the imposition of the tax on vapor products as passed by the Legislature.

[Act 9 Sections: 1753b thru 1757w, and 9437(2m)]

[Act 9 Vetoed Section: 1754]

Supreme Court: Restore provisions as passed by the Legislature. In its July 10, 2020, decision in *Bartlett v. Evers*, the Wisconsin Supreme Court found the Governor's veto unconstitutional.

As a result of the Court's decision, the Department of Revenue indicates that the vapor products tax does not apply to a liquid or other substance sold separately from vapor products. The Court's decision will reduce excise tax revenues by an estimated \$1,500,000 in 2020-21, including \$650,000 in refunds related to taxes paid in the prior fiscal year. As a result, the vapor products tax is estimated to increase excise tax revenues by \$1,700,000 in 2020-21, rather than \$3,200,000.

1. **VOLKSWAGEN SETTLEMENT DISTRIBUTIONS** [LFB
Paper 505]

PR	- \$17,000,000
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Governor: Reestimate Volkswagen settlement funds by \$4,000,000 in 2019-20 and by -\$21,000,000 in 2020-21. Under the bill, Volkswagen settlement funds would be budgeted at \$25,000,000 in 2019-20 and \$0 in 2020-21. Although the provision would modify budgeted settlement expenditures in the biennium, total settlement revenues available to the state are not anticipated to change. Further, the Department of Administration (DOA) would retain the authority to expend all monies received from the settlement trustee for purposes specified by statutes and the settlement.

Expand the authorized use of funds under DOA's transit capital assistance grant program for the replacement of public transit vehicles to also include the installation of charging stations for electric vehicles. Specify that DOA allocate 60% of available grant funding for replacement of public transit vehicles, and 40% for installation of charging stations for electric vehicles. Provide that the DOA Secretary may adjust the allocation if necessary. Repeal the restriction that DOA provide no more than \$32 million in transit capital assistance grants.

Repeal the requirement that use of Volkswagen settlement funds for replacement of state fleet vehicles take precedence over transit capital assistance grants. Further, repeal the provision allowing the DOA Secretary to lapse to the general fund any GPR or PR amounts saved by state agencies in their replacement of state fleet vehicles. Finally, repeal the restriction that no more than \$21 million of Volkswagen settlement funds be expended in 2017-18.

Modify the percentage reduction in county and municipal aid payments, from 75% to 20%, that is required for each county or municipality that receives a Volkswagen transit capital assistance grant for an urban mass transit system serving a population exceeding 200,000 (Milwaukee County and Madison). The 20% reduction is the same amount required for urban mass transit systems serving populations between 50,000 and 200,000. [See "Shared Revenue and Tax Relief -- Direct Aid Payments."]

Joint Finance/Legislature: Delete the Governor's recommendation. Instead, provide the same level of Volkswagen settlement funding as in the Governor's bill (\$25,000,000 in 2019-20 and \$0 in 2020-21) but require DOA to allocate \$3,000,000 in settlement funding to award grants to school districts for the replacement of eligible school buses. Repeal the restriction that DOA provide no more than \$32,000,000 in transit capital assistance grants. The balance of the Volkswagen settlement funding remaining in the appropriation after the \$3,000,000 school bus allocation could be awarded for the replacement of eligible vehicles in the state fleet (as approved in the 2017-19 budget) and for grants under the transit capital grant program for the replacement of eligible transit vehicles. The balance of settlement funding would include the remaining \$22,000,000 appropriated under the bill, plus any settlement funds remaining at the end of the 2017-19 biennium.

Require DOA to establish a school bus replacement grant program to award grants of settlement funds from the appropriation to school boards for the replacement of school buses owned and operated by the school boards with energy-efficient school buses, including school buses that use alternative fuels. Allow any school board to apply for a grant under the program.

Specify that as a condition of receiving a grant, the school board must provide matching funds equal to the amount of the grant award. Provide that a school board may use settlement funds awarded only for the payment of costs incurred by the school board to replace school buses in accordance with the settlement guidelines.

Veto by Governor [C-34]: Modify the statutory language that created the school bus replacement program to: (a) delete the school bus replacement program and related provisions; (b) delete the requirement that DOA allocate \$3,000,000 in settlement funding to award grants to the school bus replacement program; and (c) create a requirement that DOA establish a program to award grants of Volkswagen settlement funds from the settlement funds appropriation for alternative fuels. In the veto message, the Governor directs DOA "to allocate up to \$10,000,000 of the settlement funds to this revised grant program for electric vehicle charging stations, and at least \$15,000,000 for the transit capital assistance grant program under s. 16.047(4m)."

[Act 9 Sections: 55, 55c, and 292]

[Act 9 Vetoed Sections: 55c (as it relates to school bus replacement grants) and 9101(2i)]

Supreme Court: Restore provisions passed by the Legislature. In its July 10, 2020, decision in *Bartlett v. Evers*, the Wisconsin Supreme Court found the Governor's veto unconstitutional.

The Court's decision: (1) requires that \$3.0 million in settlement funding be awarded as grants to school districts for the replacement of school buses; and (2) eliminates the directive of the Governor's veto that up to \$10.0 million be used for alternative fuels. Under his veto message, the Governor indicated that \$10.0 million for alternative fuels would have been used for electric vehicle charging stations.

As a result of the Court's decision, of the \$25.0 million of settlement funding, \$3.0 million will be used as grants for school buses and the remaining \$22.0 million will be available for transit capital assistance grants.

6. VOLKSWAGEN SETTLEMENT -- TRANSIT CAPITAL ASSISTANCE [LFB Paper 505]

Governor: Reestimate Volkswagen settlement funds by \$4,000,000 in 2019-20 and by -\$21,000,000 in 2020-21, which would result in estimated funding of \$25,000,000 in 2019-20 and \$0 in 2020-21. Specify that the Department of Administration (DOA) allocate 60% of available grant funding for replacement of public transit vehicles, and 40% for installation of charging stations for electric vehicles. Provide that the DOA Secretary may adjust the allocation if necessary. Repeal the restriction that DOA provide no more than \$32 million in transit capital assistance grants.

Repeal the requirement that use of Volkswagen settlement funds for replacement of state fleet vehicles take precedence over transit capital assistance grants. Further, repeal the restriction that no more than \$21 million of Volkswagen settlement funds be expended in 2017-18. [See "Miscellaneous Appropriations."]

Joint Finance/Legislature: Delete the Governor's recommendation. Instead, provide the same level of Volkswagen settlement funding as the Governor (\$25,000,000 in 2019-20 and \$0 in 2020-21) but require DOA to allocate \$3,000,000 in settlement funding to award grants to school districts for the replacement of eligible school buses. Repeal the restriction that DOA provide no more than \$32,000,000 in transit capital assistance grants. The balance of the Volkswagen settlement funding remaining in the appropriation after the \$3,000,000 school bus allocation could be awarded for the replacement of eligible vehicles in the state fleet (as approved in the 2017-19 budget) and for grants under the transit capital grant program for the replacement of eligible transit vehicles. The balance of settlement funding would include the remaining \$22,000,000 appropriated under the bill, plus any settlement funds remaining at the end of the 2017-19 biennium.

Veto by Governor [C-34]: Modify the statutory language that created the school bus replacement program to: (a) delete the requirement that DOA allocate \$3,000,000 in settlement funding to award grants to the school bus replacement program; and (b) create a requirement that DOA establish a program to award grants of Volkswagen settlement funds from the settlement funds appropriation for alternative fuels. In the veto message, the Governor directs DOA "to allocate up to \$10,000,000 of the settlement funds to this revised grant program for electric vehicle charging stations, and at least \$15,000,000 for the transit capital assistance grant program under s. 16.047(4m)."

[Act 9 Sections: 55, 55c, and 292]

[Act 9 Veto Sections: 55c and 9101(2i)]

Supreme Court: Restore provisions passed by the Legislature. In its July 10, 2020, decision in *Bartlett v. Evers*, the Wisconsin Supreme Court found the Governor's veto unconstitutional.

The Court's decision: (1) requires that \$3.0 million in settlement funding be awarded as grants to school districts for the replacement of school buses; and (2) eliminates the directive of the Governor's veto that up to \$10.0 million be used for alternative fuels. Under his veto message, the Governor indicated that \$10.0 million for alternative fuels would have been used for electric

vehicle charging stations.

As a result of the Court's decision, of the \$25.0 million of settlement funding, \$3.0 million will be used as grants for school buses and the remaining \$22.0 million will be available for transit capital assistance grants.

10. INCREASE TO REGISTRATION FEES FOR VEHICLES REGISTERING BASED ON GROSS VEHICLE WEIGHT [LFB Paper 695]

	Governor (Chg. to Base)	Jt. Finance/Leg. (Chg. to Gov)	Veto/Supreme Ct. (Chg. to Leg.)	Net Change
SEG-REV	\$36,352,900	- \$17,859,500	\$7,184,800	\$25,678,200

Governor: Increase the following registration fees for motor vehicles that are registered based on gross vehicle weight, as shown in the table below. Increase estimated transportation fund revenue by \$15,579,800 in 2019-20 and by \$20,773,100 in 2020-21.

<u>Gross Weight Not Exceeding (in Pounds)</u>	<u>Current Fee</u>	<u>Increase</u>	<u>Proposed Fee</u>
4,500	\$75	\$21	\$96
6,000	84	23	107
8,000	106	29	135
10,000	155	42	197
12,000	209	57	266
16,000	283	77	360
20,000	356	97	453
26,000	475	129	604
32,000	609	165	774
38,000	772	209	981
44,000	921	249	1,170
50,000	1,063	288	1,351
54,000	1,135	307	1,442
56,000	1,209	327	1,536
62,000	1,367	370	1,737
68,000	1,543	417	1,960
73,000	1,755	474	2,229
76,000	2,081	562	2,643
80,000	2,560	692	3,252

The administration indicates that it intended the above registration fee modifications (a 27% increase) to apply only to vehicles with gross weights in excess of 8,000 pounds. As drafted, the bill would increase fees by the amounts shown for vehicles lighter than the 8,000 pound threshold, which includes a variety of lower-weight vehicle types, such as sport utility vehicles, pick-up trucks, and vans. The estimated revenue associated with the proposed fee change reflects the administration's intent to increase only the fees on vehicles with gross weights in excess of 8,000 pounds. A modification to the bill would be needed to capture the administration's intent.

Specify that these increased fee amounts would first apply to an application for registration received by DOT on the effective date of the bill. However, the estimated revenues in the bill associated with this provision appear to reflect nine months of collections in 2019-20.

Joint Finance/Legislature: Delete the Governor's recommendation to increase registration fees for vehicles weighing 8,000 pounds or more. Instead, modify the annual registration fees for the following vehicle weight classes such that the fee amount due for each of the affected classes would be \$100, as shown the table below. Increase estimated transportation fund revenue by

\$7,874,900 SEG-REV in 2019-20 and by \$10,618,500 SEG-REV in 2020-21. [As compared to the bill, this would reduce estimated revenue by \$7,704,900 in 2019-20 and by \$10,154,600 in 2020-21.] Specify that these provisions would first apply to vehicle registration applications on October 1, 2019.

Gross Vehicle Weight Not Exceeding	Current Fee	Change	Proposed Fee	Estimated Revenue Change to Base	
				2019-20	2020-21
4,500 lbs.	\$75	\$25	\$100	\$4,592,700	\$6,224,300
6,000	84	16	100	6,309,800	8,551,400
8,000	106	-6	100	-1,060,100	-1,436,800
10,000	155	-55	100	<u>-1,967,500</u>	<u>-2,720,400</u>
				\$7,874,900	\$10,618,500

Vetoed by Governor [E-62 and E-70]: Retain the vehicle fee increases for vehicles between 4,500 and 8,000 pounds in gross vehicle weight, but delete the registration fee reductions for the two, heavier gross vehicle weight categories. The partial veto has the effect of increasing estimated transportation fund revenue, as compared to the bill, by \$3,027,600 in 2019-20 and by \$4,157,200 in 2020-21. Delete the applications "received by" phrasing related to the initial applicability of the provision. As a result, the fee increases would first apply to an application for vehicle registration on October 1, 2019.

Gross Vehicle Weight Not Exceeding	Fee Amounts	
	Prior Law	Act 9
4,500 lbs.	\$75	\$100
6,000	84	100
8,000	106	106
10,000	155	155

[Act 9 Sections: 1988b, 9344(1), and 9444(2p)]

[Act 9 Vetoed Sections: 1988b and 9344(1)]

Supreme Court: Uphold the Governor's vetoes. In its July 10, 2020, decision in *Bartlett v. Evers*, the Wisconsin Supreme Court upheld the constitutionality of the Governor's vetoes. Consequently, the fees for vehicles not exceeding 10,000 pounds are as follows.

Gross Vehicle Weight Not Exceeding	Fee Amounts
4,500 lbs.	\$100
6,000	100
8,000	106
10,000	155

2. LOCAL ROADS IMPROVEMENT PROGRAM -- GPR FUNDING [LFB Paper 720]

	Jt. Finance/Leg. (Chg. to Base)	Veto (Chg. to Leg.)	Supreme Ct. (Chg. to Veto)	Net Change
GPR	\$90,000,000	- \$15,000,000	\$15,000,000	\$90,000,000

Joint Finance/Legislature: Provide \$90,000,000 GPR in 2019-20 to a newly-created GPR appropriation that would be used to fund local government project costs that would be eligible for program funding under the current law the local roads improvement program discretionary component, to be allocated as follows: (a) \$32,003,200 for county projects; (b) \$22,847,400 for municipalities; and (c) and \$35,149,400 for towns. Specify that notwithstanding local road improvement program cost-sharing requirements, that a required local project cost match of 10% of total project cost would apply to project submitted for funding under the GPR appropriation. Require DOT to solicit project applications for this funding, beginning in 2019-20, until the funds appropriated have been expended. Provide DOT the authority to promulgate administrative rules for this purpose. Because the funding would be provided in 2019-20, there would be no ongoing base level funding for this supplemental program component.

Veto by Governor [E-63]: Write down the \$90,000,000 GPR appropriation to \$75,000,000 GPR and modify the newly-created appropriation such that the funds may be used for "local grants," rather than exclusively for local roads improvement program projects. Delete the local government funding distribution requirements and local government project cost match. The Governor's veto message directs DOA not to allot the partially vetoed funds and indicates that the partial veto will allow DOT to use the remaining funding to address "critical transit and transportation needs."

[Act 9 Section: 184s]

[Act 9 Vetoed Sections: 126 (as it relates to 20.395(2)(fc)), 184s, and 1095m]

Supreme Court: Restore provisions as passed by the Legislature. In its July 10, 2020, decision in *Bartlett v. Evers*, the Wisconsin Supreme Court found the Governor's veto unconstitutional.

The Court's decision: (1) changes the title of the appropriation from "Local supplement" to "Local roads improvement discretionary supplement," thus specifying that the funding is to be used solely for local road projects; (2) sets the appropriation at \$90 million GPR, rather than \$75 million GPR; (3) specifies the distribution of funding for counties, municipalities, and towns as passed by the Legislature; and (4) requires a local match of 10%.