Department of Legislative Services

Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 931 (Senator Waldstreicher)
Budget and Taxation

Maryland Transportation Public-Private Partnership Oversight Act

This bill establishes the Office of Transportation Oversight (OTO) as the regulatory entity for transportation-related public-private partnerships (P3s) and partnership agreements. The bill establishes a new tax on diesel and bunker fuels in order to fund OTO. The Governor must appropriate (1) at least $20.0 million annually for the operation of OTO and (2) $5.0 million annually from fiscal 2021 through 2026 for OTO and the Maryland Department of Transportation (MDOT) to complete a statewide transportation plan. The bill also temporarily suspends planning and construction on specified transportation-related P3 projects and expands the legal recourse available to persons who wish to pursue legal action against a party to a transportation-related P3 agreement. **The bill takes effect July 1, 2019.**

Fiscal Summary

State Effect: Transportation Trust Fund (TTF) expenditures increase by $20.0 million in FY 2020 and by $25.0 million annually thereafter. TTF revenues from the new tax increase correspondingly. The bill may also increase costs for the Purple Line and Traffic Relief Plan projects or make the projects infeasible, as discussed below. **This bill establishes a mandated appropriation beginning in FY 2021.**

($ in millions)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
SF Revenue	$20.0	$25.0	$25.0	$25.0	$25.0
SF Expenditure	$20.0	$25.0	$25.0	$25.0	$25.0
Net Effect	$0.0	$0.0	$0.0	$0.0	$0.0

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: Local governments can likely work with OTO and MDOT as necessary using existing budgeted resources.
Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Funding for the Office – Diesel Fuel and Bunker Fuel Tax

The Comptroller and the State Treasurer must establish a new tax (that is in addition to any other existing tax) on diesel fuel and bunker fuel. Tax revenues must be an amount that is sufficient to provide OTO with (1) $25 million per year or (2) an amount that is sufficient to cover OTO's operating costs, but at least $15 million per year.

The Governor must appropriate at least $20 million in the annual budget bill for the operation of OTO. OTO's director must submit specified budget information to OTO's board of directors, and the bill establishes a process for the revision and approval of this budget information.

Office of Transportation Oversight

OTO is established as an independent unit in the Executive Branch of State government with its own board of directors (described below). The stated purpose of OTO is to ensure transportation-related P3s and partnership agreements serve the residents of Maryland by being fair, responsive to citizen concerns, complying with applicable laws, and improving the quality of life for State residents and residents of neighboring states. The bill establishes the appointment process for OTO's director and requires the appointment of an interim director in a specified manner until a director is appointed. The director may exercise specified powers and authority if the director determines that an action is in the best interest of the State and its citizens. The office has the power or authority to:

- require modifications to contracts, work orders, or designs related to partnership agreements for specified reasons;
- regulate transit fares and services related to, carried out, applied, or used under a partnership agreement;
- apply legal and equitable remedies to enforce any relevant law, contract, or mitigation commitment;
- inspect, investigate, or monitor any issues regarding the operation or implementation of a partnership agreement;
- consult with and make recommendations to the appropriate federal and State agencies regarding improvements or issues in a partnership agreement;
- subject to the approval of its board unless the matter is time-sensitive, bring an action against a party to a partnership agreement or other specified parties, for relief as a result of a violation of the partnership agreement or other related commitments;

- subject to the approval of its board, represent or advise an agency, local government, or State resident in an action against a party to a partnership agreement; and
- require that a defendant or respondent in an administrative proceeding pay the reasonable attorney's and expert witness fees and related costs at specified phases of the proceeding.

OTO must annually submit an operating plan to its board of directors that meets specified requirements; the first operating plan is due by September 1, 2020. OTO must also submit a strategic plan to its board of directors for review and approval every five years; the first strategic plan is due by December 1, 2020. The strategic plan must detail OTO's goals for meetings its statutory requirements over the next five years. The bill establishes a process for the revision and approval of these plans.

OTO must adopt regulations to implement the bill.

Office of Transportation Oversight – Board of Directors

A board of directors is established to manage OTO and an appointment process is established for the board. The board may (1) remove the director of OTO at any time; (2) approve specified enforcement actions taken by OTO; (3) approve OTO's representation of aggrieved entities, as specified; and (4) take any other actions necessary to fulfill its duties. The board must review, revise, and approve OTO's budget, annual operating plan, and five-year strategic plan. The board must meet at least once every four months.

Hold on Existing Public-private Partnerships

By November 1, 2019, all work associated with a P3 for the planning or construction of new rail-based transportation modes or new State or federal highways in the State must be placed on hold while OTO reviews the P3 for compliance with the bill. The director may suspend the hold one time for a period of up to six months if the P3 is likely to be in compliance without significant alterations or during the time in which the hold is suspended, the P3 will come into compliance. During the hold period, there must be an opportunity for public comment, which must be taken into account in a specified manner. OTO may negotiate and impose the hold, rescission, or terms of a P3 during or after the development of the statewide transportation plan.

Statewide Transportation Plan

The Secretary of Transportation and the director of OTO must develop a Statewide Transportation Plan. To create the plan, OTO and MDOT must (1) coordinate with the Maryland Transit Administration, the Washington Metropolitan Area Transit Authority, and the head of transportation for each local government and (2) consult with the Pennsylvania, Delaware, Virginia, West Virginia, and District of Columbia departments of transportation. Once complete, the plan must be updated every five years.

The plan must establish a framework for considering a transportation project's impact on pedestrians, bicyclists, telecommuting, ride sharing, hailing a vehicle, motor vehicles, vehicles that operate in the water, and vehicles that operate in the air. The plan must also generally require projects to (1) be cost effective; (2) have positive environmental impacts; and (3) expedite an increase in energy efficiency and the State's production and use of renewable energy. OTO must develop a method for assigning a value to each of the factors that are identified by the bill.

Legal Actions

Specified provisions of the Maryland Environmental Standing Act, including provisions that bar actions for monetary damages, do not apply to actions brought by a resident, county, or municipality against a party to a transportation-related P3 agreement.

In an action brought by a State agency, local government, or State resident against a party to a transportation-related partnership agreement or other parties, evidence that the party caused a breach of a partnership agreement or a related commitment creates a rebuttable presumption of a violation that may be overcome by a preponderance of the evidence that the party is in compliance with the terms of the agreement and that the party has taken every reasonable step to avoid a breach.

Current Law:

Public-private Partnerships

Chapter 5 of 2013 established a new framework for the approval and oversight of P3s in the State. It defined a "public-private partnership" as a method for delivering public infrastructure assets using a long-term, performance-based agreement between specified State "reporting" agencies and a private entity where appropriate risks and benefits can be allocated in a cost-effective manner between the contract partners, in which:

- a private entity performs functions normally undertaken by the government, but the reporting agency remains ultimately accountable for the public infrastructure asset and its public function; and
- the State may retain ownership of the public infrastructure asset, and the private entity may be given additional decision-making rights in determining how the asset is financed, developed, constructed, operated, and maintained over its life cycle.

A "public infrastructure asset" is a capital facility or structure, including systems and equipment related to the facility or structure intended for public use.

Only specified "reporting agencies" may establish a P3. Reporting agencies include the Department of General Services, which oversees building purchases and leases for most of State government, MDOT, the Maryland Transportation Authority (MDTA), and State higher education institutions.

Chapter 5 establishes the public policy of the State to utilize P3s, if appropriate, for (1) developing and strengthening the State's public infrastructure assets; (2) apportioning between the public sector and the private sector the risks involved in the development and strengthening of public infrastructure assets; (3) fostering the creation of new jobs; and (4) promoting the State's socioeconomic development and competitiveness. The public policy also asserts that private entities that enter into P3s must comply with the provisions of the Labor and Employment Article and the federal Fair Labor Standards Act.

The Board of Public Works (BPW) must approve all P3 agreements, subject to specified processes; however, BPW may not approve a P3 partnership that results in the State exceeding its capital debt affordability guidelines.

Environmental Impact Studies

For major transportation projects, the National Environmental Policy Act (NEPA) requires a range of alternatives to be considered and the environmental impacts of each alternative to be analyzed. This type of study is required prior to the commitment of federal funds to any major project or prior to any action taken by a federal agency that might cause a significant impact on the environment. Some of the basic steps in this process include a public scoping process, data collection, analysis of policy alternatives, and preparation of draft and final documents. The process involves numerous federal, state, and local partners; can take several years; and costs millions of dollars.

Standing for Environment-related Legal Action

Under the Maryland Environmental Standing Act, a person, as defined in the Act, may pursue legal action in an appropriate circuit court for mandamus or equitable relief against the State or a political subdivision for its failure to perform a nondiscretionary duty under an environmental law or regulation or for its failure to enforce an applicable environmental quality standard for the protection of the air, water, or other natural resources of the State.

Background:

Purple Line

The Purple Line is a P3 project that consists of a 16.2-mile light rail line that will extend from Bethesda, in Montgomery County, to New Carrollton, in Prince George's County. The Purple Line will operate largely at street level in a combination of dedicated and semi-exclusive rights-of-way and also includes segments on elevated structures and in tunnels. The alignment for the Purple Line will provide direct connections to the Washington Metropolitan Area Transit Authority at Bethesda, Silver Spring, College Park, and New Carrollton. The project will also connect to all 3 Maryland Area Regional Commuter rail lines, Amtrak, and local bus routes. The project includes 21 stations, 2 storage and maintenance facilities, and 25 light rail vehicles. The Purple Line Project is currently in the construction phase, with revenue operations scheduled for December 31, 2022. The estimated project cost is $2.4 billion.

Traffic Relief Plan

In September 2017, the Governor announced plans to add four new lanes to I-270 in Montgomery County, the Capital Beltway (I-495), and the Baltimore-Washington Parkway (MD 295), with the first two projects expected to be completed using P3s. The combined cost of all three projects is estimated to be $9 billion, with the I-270 and I-495 projects seeking private developers to design, build, finance, operate, and maintain the new (toll) lanes on both roads. The MD 295 project is not expected to involve a P3 but instead would be carried out by MDTA following the transfer of ownership of the parkway from the U.S. Department of the Interior to the State.

The *Consolidated Transportation Program* for fiscal 2019 through 2024 includes $129.5 million to continue planning for the new lanes on I-270 and I-495. MDOT advises that one of the goals of the I-270 and I-495 project is to have no net cost to the State. To that end, MDOT advises that, in time, it will be repaid for these and other project development costs by the P3 partners.

State Expenditures:

Office of Transportation Oversight

This analysis assumes that funding for the office begins immediately upon the bill's July 1, 2019 effective date, even though the Governor is not required to fund the office in fiscal 2020. Accordingly, TTF expenditures increase by $20.0 million annually, beginning in fiscal 2020. A reliable estimate of staffing needs for the office is not available, but it is assumed that the annual $20.0 million mandated appropriation is sufficient to cover any staffing and operating requirements.

Statewide Transportation Plan

A reliable estimate for the production of a statewide transportation plan is not available, but it is assumed that the annual $5.0 million mandated appropriation from fiscal 2021 through 2026 is sufficient for MDOT and OTO to complete the plan.

Existing Projects

The bill requires both the planning and construction for any existing P3 to be put on hold in order for OTO to determine whether the project meets the substantial requirements established by the bill. This requirement directly affects both the Purple Line (which is approximately three years from completion) and the traffic relief plan (which is in the planning stage). Any delay in either project is likely to lead to a significant increase in costs and may lead to cancellation of the project if OTO does not give its approval. Even so, this potential effect cannot be reliably estimated at this time and is not included in this estimate.

Public-private Partnership Effects – Generally

MDOT and MDTA are responsible for any transportation-related P3s in the State. They advise that the bill's provisions related to the power of the office to alter provisions of partnership agreements has a detrimental effect on current and future P3 projects in the State. Specifically, the bill could dissuade potential State partners from entering into P3 agreements. Any economic or financial consequences of foregone or disrupted partnership agreements cannot be reliably quantified but could be significant. Similarly, any environmental benefits from limiting the formation of new P3 agreements or securing monetary damages from P3 partners cannot be reliably quantified.

MDOT and MDTA advise that transportation-related P3 projects are already subject to multiple layers of oversight by the federal and State governments, including, but not limited to NEPA, BPW, and the Transportation Public-Private Partnership Steering Committee established by State regulation.

State Revenues: The bill requires the Comptroller and the State Treasurer to establish a new tax (that is in addition to any other existing tax) on diesel fuel and bunker fuel in order to fund OTO; fuel tax revenues generally accrue to TTF. Specifically, tax revenues from the new tax must be an amount that is sufficient to provide OTO with (1) $25 million per year or (2) an amount that is sufficient to cover OTO's operating costs, but at least $15 million per year.

For purposes of this analysis, it is assumed that the tax rates are (1) set to fully cover the estimated $20 million in annual operating costs beginning in fiscal 2020 and (2) increase from fiscal 2021 through 2026 to also cover the mandated appropriation for producing a statewide transportation plan. Therefore, TTF revenues increase by $20 million in fiscal 2020, by $25 million annually from fiscal 2021 through 2026, and by $20 million annually thereafter.

Small Business Effect: Small businesses that wish to enter into, or enter into, transportation-related P3 agreements with the State are exposed to greater risk associated with the power and authority of OTO.

Additional Information

Prior Introductions: None.

Cross File: HB 1257 (Delegate Carr) - Environment and Transportation and Appropriations.

Information Source(s): Baltimore City; Montgomery and Prince George's counties; Maryland Association of Counties; Maryland Municipal League; Office of the Attorney General; Comptroller's Office; Governor's Office; Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Department of Budget and Management; Maryland Department of the Environment; Department of General Services; Department of Natural Resources; Board of Public Works; Maryland Department of Transportation; Office of Administrative Hearings; Department of Legislative Services

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