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Via TCI Website and
U.S. First Class Mail

January 9, 2020

Hon. Ned Lamont, Governor of Connecticut
210 Capitol Avenue, Hartford, CT 06106

Hon. Phil Murphy, Governor of New Jersey
P.O. Box 001, Trenton, NJ 08625

Hon. John Carney, Governor of Delaware
150 MLK Jr. Blvd. S., Dover, DE 19901

Hon. Andrew Cuomo, Governor of New York
Capitol Bldg., Albany, NY 12224

Hon. Janet T. Mills, Governor of Maine
1 State House Station, Augusta, ME 04333

Hon. Tom Wolf, Governor of Pennsylvania
508 Main Capitol Bldg., Harrisburg, PA 17120

Hon. Larry Hogan, Governor of Maryland
100 State Circle, Annapolis, MD 21401

Hon. Gina Raimondo, Governor of Rhode Island
82 Smith St., Providence RI 02903

Hon. Charlie Baker, Governor of Massachusetts
Room 280, State House, Boston, MA 02133

Hon. Phil Scott, Governor of Vermont
109 State St., Pavilion, Montpelier, VT 05609

Hon. Chris Sununu, Governor of New Hampshire
107 N. Main St., Concord NH 03301

Hon. Ralph Northam, Governor of Virginia
P.O. Box 1475, Richmond, VA 23218

Dear Governors of the Northeast and Mid-Atlantic States:

RE: Input on Draft MOU of the Transportation & Climate Initiative of the Northeast and Mid-Atlantic States (released for public comment on December 17, 2019)

This letter presents the comments of the National Federation of Independent Business (NFIB) in response to the request by agencies of your states for input on the Draft Memorandum of Understanding (Draft MOU) on the Transportation & Climate Initiative of the Northeast and Mid-Atlantic States (TCI). The TCI is a collaboration of your states that “seeks to develop the clean energy economy, improve transportation, and reduce carbon emissions in the transportation sector.”¹ NFIB opposes the efforts of your state agency heads through TCI to get the legislatures of your states, and you, to increase taxes and burdens on small businesses and others, such as through the proposed new tax-and-spend program called in the Draft MOU the “cap-and-invest” program that functions as a carbon tax.

¹ <https://www.transportationandclimate.org/content/about-us> (visited December 30, 2019). The government of the District of Columbia, a district under the exclusive legislative authority of Congress, also participates in the TCI. The Georgetown Climate Center of the Georgetown University Law Center facilitates the TCI's work.

NFIB is an incorporated nonprofit association with about 300,000 small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies.

The centerpiece of the TCI is a new carbon tax in the form of mandatory purchase of auctioned credits. The second resolving clause in the Draft MOU states that “the Signatory Jurisdictions will seek to implement a regional cap-and-invest program, through the implementation of individual programs in each Signatory Jurisdiction, that will ensure emissions reductions and enable Signatory Jurisdictions to strategically invest in programs to help their residents transition to affordable, low-carbon transportation options” Use of the phrase “to strategically invest in programs” makes clear that the cap-and-invest program is a revenue-generating program with the funds generated by the program earmarked for spending to encourage “affordable, low-carbon transportation options.” Stated plainly, the second resolving clause calls for a new tax-and-spend program in 12 states and the District of Columbia. Disguising the tax as a duty to buy credits at auction to cover carbon dioxide emissions does not change the key fact -- it is a mandatory outlay for carbon emissions, which means simply that it is a carbon tax. Nothing in the Draft MOU indicates why a state should impose the new carbon tax instead of shifting revenue generated by existing taxes from lower priorities to whatever higher environmental priority the state may have.

Every tax-and-spend program has losers (those who pay) and winners (those who benefit from the payments). The third resolving clause in the Draft MOU defines the guaranteed winners under the cap-and-invest program, to whom benefits must “flow equitably”: (1) “communities that are underserved by clean transportation alternatives,” (2) communities that “disproportionately bear the costs of the current transportation system,” and (3) communities that “suffer disproportionate impacts of vehicular pollution and climate change.” As with most political documents seeking a transfer of wealth from one place to another, the document identifies the winners, but it does not identify the losers. Nothing in the Draft MOU indicates why some citizens of a state should pay more than others nor why some citizens of a state should benefit more than others under the TCI cap-and-invest program.

The TCI plan for a new multistate tax of the future is the subject of the fourth resolving clause in the Draft MOU. While the third resolving clause calls for each state separately to create the tax-and-spend program just for its state, the fourth resolving clause calls for the states in the future to go big with a multistate tax-and-spend program. It says “the Signatory Jurisdictions will establish in the final memorandum of understanding (MOU) a regional carbon dioxide emissions cap that will decline over time, to reduce emissions from on-road diesel and finished motor gasoline, and an objective methodology for apportioning the proceeds to each Participating Jurisdiction, to invest at each jurisdiction’s discretion to support the goals of the program” Further, the fifth resolving clause calls for a Model Rule to implement the regional cap on carbon dioxide emissions. Clearly, especially given the emphasis in the fourth resolving clause on dividing the booty among the participating

jurisdictions, the regional carbon dioxide emissions cap functions as a multistate tax-and-spend program.

The TCI plan may well run afoul of the Compact Clause of the U.S. Constitution. The Compact Clause provides that “No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State”² The Compact Clause serves to prevent two or more states from making agreements among themselves (1) “which might affect injuriously the interests” of other states, or (2) which might work an “infringement on the rights of the national government.”³ The decision of 12 states to set their own air pollution policy, and especially if it imposes a carbon tax on citizens and businesses of other states under the cap-and-invest program, may injure the interests of the remaining 38 states. That decision of the 12 states may also infringe on the rights of the national government to establish a national air pollution policy (currently under the Clean Air Act) and may complicate U.S. relationships with foreign countries on air pollution.

The TCI plan also may run afoul of the negative implications of the Commerce Clause of the U.S. Constitution. The Commerce Clause provides that “The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁴ Implementation of the TCI plan must not discriminate against either out-of-state goods or nonresident economic actors unless the 12 states can show that the implementation is narrowly tailored to advance a legitimate local purpose.⁵ For example, imposing exactions (whether labeled honestly as taxes, or labeled politically as fees, tolls, carbon payments, auction charges, or something else) on coal or gasoline imported into the 12 states from Kentucky or Texas while not imposing the exactions on energy sourced in the 12 states, or imposing exactions on 18-wheel trucks from elsewhere passing through the 12 states but not on intrastate trucking, would have difficulty passing constitutional muster. Absent statutory approval by Congress, the Commerce Clause will not allow the 12 states to design a carbon dioxide emissions reduction system in which the citizens of the 12 states get the benefits and the citizens of the other 38 states pay for them. In the end, you will hurt the citizens and businesses of your own states.

Consumers and businesses in the 12 states will suffer from the increased costs of goods and services. If the 12 states impose new taxes on carbon emissions as part of TCI

² U.S. Const., art. I, sec. 10.

³ *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018). The taxation aspects of multistate tax-and-spend program under the fourth resolving clause of the Draft MOU would likely fail to pass muster under the Compact Clause if it delegated authority to a multistate institution with authority binding on the participating states. See, *U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452 (1978). At all events, if the 12 states present TCI-based agreements to Congress and Congress by law consented to them, the agreements could proceed and would have the force of federal law. See *Texas v. New Mexico*, 138 S. Ct. at 958 (“But once Congress gives its consent, a compact between States -- like any other federal statute -- becomes the law of the land.”). And, of course, the exclusive legislative jurisdiction of Congress over the District of Columbia would allow Congress to enact a statute authorizing the District of Columbia to participate in a compact among states.

⁴ U.S. Const., art. I, sec. 8.

⁵ *Tennessee Wine and Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449, 2461 (2019).

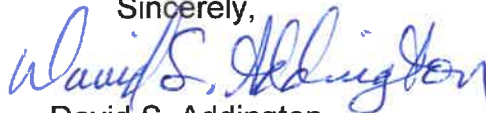
implementation, the citizens and businesses of the 12 states will end up paying more for goods or services to which such fuels are an input and for which demand is not elastic. Also, when small and independent businesses spend more money on goods and services they need for their businesses, they have less money left over to grow the business and create more jobs. Given that small businesses generate more than forty percent of the U.S. economy's annual output of goods and services and two-thirds of net new jobs, a 12-state policy to increase the cost of fuel to small and independent businesses would hurt the economies of the 12 states and the rest of the country. The 12-state policy with a carbon tax and a detailed monitoring and reporting regime would be an especially heavy burden on small and independent businesses that are themselves part of the fuel production and distribution system.

For the foregoing reasons, the 12 states should terminate the TCI. If they fail to terminate it, they they should revise the Draft MOU by striking the second, third, fourth, and fifth resolving clauses, and the Appendix, and substituting in their place the following resolving clause:

BE IT FURTHER RESOLVED, that the Signatory Jurisdictions shall (a) prepare an agreement to reduce carbon dioxide emissions within the Signatory Jurisdictions, through cooperation among such Jurisdictions, that (1) provides for no new revenue generation, (2) does not discriminate among the citizens of the several States or against interstate, foreign, or tribal commerce, and (3) recognizes the central role of small and independent businesses in the American economy and imposes no new exactions or burdens on them; and (b) submit the agreement for the consent of Congress under section 10 of article I of the U.S. Constitution.

NFIB urges your states' agency heads to step back from the brink of endorsing the Transportation & Climate Initiative's tax-and-spend program known as the "cap-and-invest program." The state legislatures and you should reject the Transportation & Climate Initiative and its new burdens on the economies of your states and stand instead with the citizens and small businesses of your states.

Sincerely,



David S. Addington

Senior Vice President and General Counsel