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In December 2007, Marcus J. Lemon was appointed by President George W. Bush to serve as the Chief Counsel for the Federal Highway Administration, where he manages over 60 staff and attorneys in seven regional offices and FHWA head quarters. He is primarily responsible for the provision of legal counsel to the FHWA Administrator, as well as other senior staff within FHWA and DOT, coordinating with members of the Office of the Secretary of Transportation, and representing FHWA before Congress, the private sector, the Executive Branch, and various state agencies.

He is a 1992 graduate of Franklin & Marshall College, *cum laude*, with B.A. degrees in Government and English. He is a 1996 graduate of the Dickinson School of Law of the Pennsylvania State University, where he served on the Intellectual Property Moot Court Team, which successfully argued an antitrust case before a panel of sitting federal judges at Northeastern University in Boston, Massachusetts, in 1996. He is admitted to practice in the Commonwealth of Pennsylvania, the District of Columbia, and the State of New Jersey, the U.S. District Court for the District of New Jersey, the Middle District of Pennsylvania, and the Eastern District of Pennsylvania.

Before entering private practice, Mr. Lemon served as a judicial law clerk to the Honorable Elizabeth R. Crum, Managing Justice of the Commonwealth Workers' Compensation Court. After his judicial clerkship, Mr. Lemon practiced corporate and finance, securities, and intellectual property law for nine years in private practice, including the Corporate Finance, Banking, and Government Relations Groups at Reed Smith, LLP in its Harrisburg Office; Obermayer, Rebmann, Maxwell & Hippel, LLP, in its Harrisburg and Philadelphia Offices; and Mette, Evans & Woodside in its Harrisburg Office.

Mr. Lemon has extensive experience representing corporate, business, institutional, and individual clientele in matters of corporate, business, corporate and public finance, corporate formation and restructuring, securities, government relations, and technology law issues. His experience includes representation in matters of complex corporate, transactional, restructuring, securities, proxy, corporate control, e-commerce, and mergers and acquisitions issues, for Fortune 500 and publicly held enterprises. Mr. Lemon's experience also includes counseling early stage companies on formation, structure, securities regulations, capitalization, restructuring, private and public offerings, employment, intellectual property, and technology licensing issues. He has also counseled and represented banks and other financial institutions in various transactional and regulatory matters.

In 2000, Mr. Lemon was a candidate in the Republican Primary for Representative in the General Assembly of the Commonwealth of Pennsylvania for the 37th District. Later in 2000, Mr. Lemon served as a Statewide Media Coordinator and Advance Member for Bush-Cheney 2000, Inc., and Victory 2000. He also served as a coordinator for the 2001 Presidential Inaugural Opening Day Ceremonies.

In 2002, Mr. Lemon went on leave from private practice after being appointed by the White House to serve as Special Assistant and Deputy Chief of Staff to the Inspector General for the U.S. Department of Defense, in the Office of the Secretary of Defense, at the Pentagon. In his position, Mr. Lemon served as the primary assistant to the Inspector General for policy-making issues and as liaison to other senior officials of the DOD, White House, Congress, and the Executive Branch.

In 2004, Mr. Lemon served as State Chairman of Professionals for Bush-Cheney, a coalition of professionals, and as a Member of the Bush Pioneers Fundraising Team for Pennsylvania. Mr. Lemon also served as Chief Counsel for Middle Pennsylvania for Bush-Cheney 2004, Inc., and as a member of the Executive Committee of the Bush-Cheney 2004 Legal Team in Pennsylvania, which managed over 200 attorneys.

Mr. Lemon is the immediate past Chairman of the Greater Pennsylvania Chapter of the Republican National Lawyers Association. He also serves as a Major in the U.S. Army Reserves, Judge Advocate General Corps, and is currently Assistant Staff Judge Advocate for the Military Intelligence Readiness Command, Fort Belvoir, Virginia. He has served in the military for eight years, and has been awarded the Army Achievement Medal (with two Oak Leaf Clusters), having also graduated from the JAG Basic Course, JAG Advanced Course, and the prestigious Army Inspector General Basic Course.

Mr. Lemon is a member of the Pennsylvania Society and is originally from Lancaster County, Pennsylvania where he currently resides.

Statement of
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U.S. Department of Transportation

Before the
Pennsylvania House of Representatives
Transportation Committee
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Chairman Markosek and other members of the Committee, it is my pleasure today to discuss the growing role of the private sector in financing and managing the U.S. highway system. While the U.S. Department of Transportation (USDOT) has made development and expansion of these public-private partnerships (PPPs) one of our highest priorities, the decision to enable PPPs in your State rightfully belongs to the citizens of Pennsylvania and the State's legislature. I commend you for fully exploring this issue in an open process.

At USDOT, we are strongly encouraging all States to understand the emerging private sector role, to talk to relevant experts, and to consider legislative reforms that would stimulate development of a public-private highway infrastructure market.

While the private sector is keenly interested in investing in a broad range of infrastructure systems in the U.S., my testimony will focus on highways and public transportation facilities with an emphasis on five areas: 1) what are the various forms that public-private partnerships can take; 2) what authority State transportation agencies need to enter into public-private partnerships; 3) why public-private partnerships have become an attractive financing option; 4) what the risks are; and 5) what is the Federal government's role in public-private partnerships.

WHAT FORMS DO PUBLIC-PRIVATE PARTNERSHIPS TAKE?

There has been a great deal of discussion and interest in the lease transactions that took place in Chicago and Indiana, but it is important to bear in mind that the opportunities for PPPs extend well beyond long-term lease agreements. The basic opportunity for the public sector is to allocate various project risks to private sector entities that may be in a better position to efficiently manage and reduce those risks. These include design risk, financial risk, construction risk, operations and maintenance risk, and revenue collection risk, among others. The ability to shift these various risks to private investors increases the public sector's ability to manage a large number of projects, while also reducing strains on government budgets and the taxpayer.

No two projects are identical and, as a result, the scope of risk transfer can vary substantially from transaction to transaction. At one end of the risk transfer spectrum is the basic design-build contract, whereby the public agency transfers various cost and

design risks to the private sector, but retains virtually all other risks. At the other end of the risk transfer spectrum are contracts to build/re-build, lease, and operate. In these agreements, the public sector can insist on various performance requirements and rate schedules, but provides the private sector with broad discretion to operate and invest in the facility in the most cost-effective manner.

In the middle of this spectrum are variations on these contracts, including contracts to build, operate, and transfer, as well as long-term concession/franchise agreements. In both of these arrangements, the private sector bears virtually all the operating and maintenance risk. In the concession arrangement, the private sector also bears financing and revenue risk for the term of the contract.

While relatively new to the United States, particularly in the post-Interstate highway era, these various arrangements have become commonplace around the world. According to a 2005 Federal Highway Administration (FHWA) synthesis that relied on information from Public Works Financing, there were 1,121 public-private infrastructure partnerships completed around the world between 1985 and 2004. Eighty percent of these projects were in the transport sector, representing a value in excess of $360 billion.[1]

In a recently released design-build study, FHWA found that, among responding agencies that had design-build programs, more than a quarter of total project costs were incurred in connection with design-build contracts. For large-scale highway projects, particularly bridges and tunnels, design-build has become a standardized procurement technique in many States.

Some of the most comprehensive analyses of the benefits of PPPs have been conducted by the United Kingdom's Treasury Department. Among other findings, the UK found that 88 percent of PPP projects were delivered on time or early, and with no cost overruns on construction borne by the public sector, while non-PPP projects were delivered late 70 percent of the time and over budget 73 percent of the time.[2]

Intermodal freight facilities are an emerging area of PPP interest. The Alameda Corridor project in Southern California was one of the earliest examples of a successful PPP. With the passage of the intermodal freight transfer private activity bond provision in SAFETEA-LU, USDOT is expecting several large intermodal facility developments to proceed as public-private partnerships in the next two years. While such projects often have a freight transportation focus, they often have spillover benefits for passenger transportation as well.

As the country's public-private partnership experiences grow, we can expect that our public transportation systems will increasingly explore creative partnerships with the

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[1] Fed. Highway Admin., U.S. Dep't. of Transp., *Synthesis of Public-Private Partnership Projects for Roads, Bridges & Tunnels from Around the World – 1985-2004* 4 (Prepared by AECOM Consult, Inc., 2005), *available at* http://www.fhwa.dot.gov/ppp/ppp_global_sy_rpt_83005.pdf.

[2] Her Majesty's Treasury, *PFI: meeting the investment challenge* 49 (2003), *available at* http://www.hm-treasury.gov.uk/media/F/7/PFI_604a.pdf).

private sector. The majority of empirical studies in both the U.S. and abroad find that the private operation of public transportation lowers costs, increases operational efficiency, produces a more efficient allocation of resources, and enhances innovation in comparison with the public sector.[3] In Indianapolis, for example, cost efficiency increased by 15 percent over a five-year period after its transit agency contracted all bus routes to private operators.[4] Researchers indicate that U.S. public transportation agencies with competitive contracting regimes experience cost savings between 5.5 and 14 percent.[5]

A small but growing number of Federally-supported public transportation projects have experienced reduced costs, shortened project delivery, improved project quality, or enhanced revenues by transferring risks and responsibilities to private partners. The Federal Transit Administration hopes to demonstrate the advantages of PPPs for new fixed guideway capital projects through its newly created Public-Private Partnership Pilot Program, which was formally established on January 19, 2007.[6]

Although no transaction has taken place to date, the Department also expects that creative arrangements involving multiple-mode facilities, including highway and public transportation systems, will emerge. Multiple-mode facility transactions would permit the pooling of low and high risk facilities, as well as revenue positive and revenue negative facilities.

WHAT AUTHORITY DO STATE TRANSPORTATION AGENCIES NEED FOR PUBLIC-PRIVATE PARTNERSHIPS?

Express authorization to engage in a PPP for a particular transportation project has to be provided to agencies by the relevant State or local legislative authority. The USDOT prepared model PPP legislation to provide States with an example of what basic elements to address in PPP legislation. (See Attachment - "Working Draft.") The model is based on a survey of existing State statutes that authorize public-private initiatives. It should not be considered a recommendation by USDOT that States include particular provisions in their PPP legislation. Rather, the model legislation highlights the types of issues that a State should consider when pursuing PPPs for transportation. It is important to note that the extent and type of legislation enacted varies widely from State to State, among other things, in the types and amounts of projects that are authorized and in the breadth of the authorization delegated by the legislature to State or local transportation agencies.

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[3] Matthew G. Karlaftis, Ph.D., *Privazization and Regulation of Urban Transit Systems—Privatization, Regulation and Competition: A Thirty-year Retrospective on Transit Efficiency*, European Conference of Ministers of Transport Joint OECD/ECMT Transport Research Centre, at 35 (January 30, 2007).

[4] M.G. Karlaftis, J.S. Wasson and E.S. Steadham, *Impacts of Privatization on the Performance of Urban Transit Systems*, Transportation Quarterly, 51(3), 67-79 (1997).

[5] Matthew G. Karlaftis, *Privatization and Regulation of Urban Transit Systems—Privatization, Regulation and Competition: A Thirty-year Retrospective on Transit Efficiency*, European Conference of Ministers of Transport Joint OECD/ECMT Transport Research Centre, at 25 (January 30, 2007).

[6] Notice of establishment of Public-Private Partnership Pilot Program; solicitation of applications, 72 Fed. Reg. 2583 (January 19, 2007).

If State policy makers intend to give serious consideration to PPPs, they should consider providing State agencies with the authority to enter into partnerships with the private sector and approve specific activities in conjunction with transportation development. State contractual powers relate to the ability of the State to make commitments to encourage partnership arrangements. This ability depends on enabling legislation. If the State transportation agency does not have adequate powers, partnerships will not be created, because private entities will have no way to develop secure financial relationships with the State.

Enabling legislation should be comprehensive and provide adequate powers to support PPPs, as well as flexible enough to deal with unforeseen needs. To be effective, State PPP legislation should designate a leading State agency (usually the State department of transportation or toll authority). The designated lead agency should have the authority to act on behalf of the State; therefore, it must have certain statutory powers. These powers may include the power to procure projects through negotiation; to accept unsolicited proposals; to enter into binding agreements; to acquire right-of-way through eminent domain; and to blend federal, State, local, and private funds on a project. Without some of these powers, it will be difficult for a State to undertake public-private transportation initiatives.

Already 25 States now have PPP authority. Elsewhere, State and local authorities in the U.S. are increasingly considering PPPs for transportation infrastructure. In 2008, seven States, including Pennsylvania, considered, or are considering, PPP enabling legislation. Only one of the seven, West Virginia, has enacted legislation this year.

Recent Public-Private Partnership Legislation

Mississippi enacted authorizing legislation in April 2007.[7] Mississippi's legislation provides a good example of the types of issues that States consider when authorizing PPPs. Like most States with PPP programs, Mississippi did not limit its authorization to design-build projects, but extended authorization for private involvement to all major components of project delivery, authorizing concession-based PPPs for design, construction, financing, operation and maintenance of toll roads or toll bridges. To insure that PPP facilities are just as well built and maintained as public facilities, the law requires that any facilities built through PPPs must be built and maintained in accordance with the minimum highway design, construction and maintenance standards established by the contracting government entity for such facilities, and facilities are subject to inspection during the term of the concession. Failure to comply with the required standards may result in termination of the contract. When a contract terminates or expires all of the concessionaire's interests revert to the State and the collection of tolls ceases.

Mississippi's law authorizes the solicitation of proposals for PPPs from the private sector or the acceptance of unsolicited proposals. The procurement process must be competitive and the project must be awarded to the bidder offering the best value to the contracting

[7] Mississippi Code, Section 65-43-3.

government entity. To protect the users of the facilities from monopolistic pricing, PPPs are only authorized if other, toll-free transportation options exist and increases in toll rates are subject to government approval after public notice and hearings. Tolls are not permitted on existing roads. The law also indicates that concessionaires may be required to share excess revenue. In 2008, the law was amended to increase the length of concessions from 30 to 50 years.

Utah enacted legislation in March 2006 authorizing the State to enter into PPP road projects.[8] Like Mississippi, Utah's legislation provides broad authorization for private concessionaires to design, build, finance, maintain and operate toll roads and to impose and collect tolls pursuant to concession agreements. Utah may solicit proposals and accept unsolicited proposals. Utah's legislation relies on the Utah Department of Transportation (UDOT) to negotiate several important provisions for each facility, including the private sector's profit and any revenue sharing arrangements, toll rates or other user fees, safety and policing standards, and other applicable engineering, construction, operation and maintenance standards. Concession agreements must give UDOT a right to purchase the interest of a private participant in a facility at an agreed price. If the agreement is terminated, the facility must be returned to UDOT in satisfactory condition. The legislation requires UDOT to engage outside consultants and counsel to provide guidance, assist with the evaluation of risks and benefits, and help negotiate the terms of the concession agreement.

Before any concession agreement is executed (or amended or modified) it must be approved by the Utah Transportation Commission, an independent advisory committee appointed by the Governor. Also, UDOT may only toll an existing State highway with the approval of the Transportation Commission and the State legislature. To develop HOT lanes on existing State highways or to develop toll lanes on new State highways or on any added capacity, UDOT needs the approval of the Transportation Commission, but not the State legislature.

Neither Utah nor Mississippi identified any particular projects in their legislation as projects that would be developed as PPPs. Other States, rather than passing broad legislation authorizing PPPs for transportation projects generally, have passed limited legislation authorizing only specific projects to be developed or operated as PPPs.

In March 2008, West Virginia enacted PPP enabling legislation providing authorization for private concessionaires to design, build, finance, maintain and operate toll roads and to impose and collect tolls pursuant to concession agreements.[9] Each concessionaire is required to perform its responsibilities in accordance with the engineering standards applicable to other projects operated or maintained by the Division of Highways and its performance is subject to monitoring by the Division of Highways. Concession agreements must specify a reasonable maximum rate of return on the concessionaire's investment and may include a schedule of the initial user fees, if applicable. Increases in user fees must be approved by the Commissioner of the Division of Highways. The

[8] Utah Code, Section 72-6-201 (Public-Private Partnerships for Tollways Act).
[9] West Virginia Code, Section 17-27-1 through 17-27-18 (Public-Private Transportation Facilities Act).

authority granted by West Virginia's legislation has certain limits, however. Concession agreements must be entered into prior to June 30, 2013, and concession agreements must be approved by the legislature through the adoption of concurrent resolutions and must be approved by the Governor.

Recent Legislative Amendments

As is evident from the recent legislative amendments passed in Texas and Florida, determining best practices is an evolving process and is dependent on the circumstances of particular States.

Texas

Texas has had specific statutory authority to enter into PPPs for toll roads since 2003.[10] On June 11, 2007, Texas Governor Rick Perry signed legislation enacting a two-year moratorium on new toll road PPPs.[11] The legislation allows all of the toll road PPPs currently being procured to proceed, but prohibits the development of new toll road PPPs during the two-year moratorium period. A more restrictive version of the legislation had been passed by the legislature earlier in 2007, but Governor Perry vetoed that legislation and threatened to call a special session of the legislature if it was passed over his veto. In addition to establishing the moratorium, the legislation that was eventually passed refined Texas' PPP program in two important ways. First, the legislation codified certain terms pursuant to which the Texas Department of Transportation (TxDOT) can enter into long-term concession agreements. Second, the legislation gave local toll road authorities a first option to develop new toll roads.

With respect to long-term concession agreements (TxDOT refers to PPP/concession agreements as "Comprehensive Development Agreements" or "CDAs"), the legislation requires that CDAs entered into with the private sector be limited to terms of no more than 50 years. The term of the concession is important to the private sector because investors need sufficient time to recoup their investments. In addition, the length of a concession also affects the concessionaire's ability to depreciate the value of the facility for income tax purposes, which can reduce the concessionaire's cost of capital. On the other hand, the interests of the private sector need to be balanced with the public sector's interest in reclaiming its asset. The new legislation also requires that CDAs specify the State's future buyback cost, should the State buy back the facility during the term of the concession. Under the new rules CDAs must clarify that competing roads may not be built within four miles on either side of the subject toll road, and CDAs must require that revenue generated for the State through the CDA be used only in the region in which it was generated.

The legislation also gives local toll road agencies the first option to build and operate any new toll roads. Before TxDOT develops any new toll road as a PPP, TxDOT and the local toll road authority must agree to certain business terms, including toll rates, and a

[10] Texas Code, Section 223.201.
[11] The moratorium took effect immediately and ends on September 1, 2009.

market valuation study must be performed to determine the toll road's value. Only if the local toll road authority is unwilling to pay the market value determined pursuant to the valuation study may TxDOT open the project to bidding by the private sector as a PPP. Local toll authorities were also given the authority to propose that State roads be built as toll roads.

Florida

Florida broadened its legislation in 2007 to authorize long-term concessions for existing assets, and to refine certain aspects of its PPP program.[12] Florida has had statutory authority to enter into PPPs at the State and local level since 2002. The new legislation authorizes the Florida Department of Transportation (FDOT) to enter into long-term concessions for existing toll roads.[13] The legislation requires upfront payments at closing and revenue sharing during the term of any such concession. PPPs are permitted to develop new facilities or to increase capacity on existing facilities.

Pursuant to Florida's amended legislation, regulations governing toll rate increases and provisions requiring revenue sharing need to be included in the concession agreement. PPPs in Florida must comply with all requirements of (i) Federal, State, and local laws, (ii) State, regional, and local comprehensive plans, (iii) FDOT rules, policies, procedures, and standards for transportation facilities, and (iv) any other conditions which FDOT determines to be in the public's best interest. FDOT is also specifically authorized under the legislation to enter into PPPs that utilize a payment structure based on the availability of the facility or based on the level of traffic using the facility. Concessions are limited to terms not exceeding 50 years, unless the secretary of FDOT authorizes a term of up to 75 years. Any term in excess of 75 years must be specifically approved by the Legislature.

WHY HAVE PUBLIC-PRIVATE PARTNERSHIPS BECOME AN ATTRACTIVE OPTION?

Any analysis of the policy merits or pitfalls of public-private transportation partnerships is only appropriately discussed in comparison with the predominant approach of sole government provision. In other words, the burden on proponents of the public-private model is to articulate how such a model improves on our current policy framework. In that regard, we believe there are five critical (and related) policy failures that have emerged with regards to our current approach.

First and foremost, we are suffering an intolerable decline in system performance in the form of travel delays and unreliability. Sadly, we are far too tolerant of this obvious deterioration, choosing to assume that there are few, if any, solutions. Transportation system decline poses a threat to our continued economic prosperity, to our quality of life, and to our environment. An increased private sector role can help reverse these trends. Because congestion is an internal cost to a private operator, there are powerful incentives for the private entity to take aggressive steps to reduce it. A decline in vehicle

[12] Florida Code, Section 334.30.
[13] Florida Turnpike Enterprise toll roads are excluded from this legislation.

throughput caused by congestion or an inability to effectively operate and manage a facility will reduce revenues and encourage customers to seek alternate routes.

Second, decision makers using current planning and programming processes are not selecting projects that generate high returns. According to Clifford Winston from the Brookings Institution, "It would be expected that as the road system matures, the payoff from investments would decline, but inefficient highway policies also appear to have significantly reduced the rate of return from highway infrastructure investments." FHWA is working with States to develop mechanisms to analyze the economic costs and benefits of major investments; however, substantial work remains. Because private investors have little interest in investing in low return projects, resources are far more likely to flow where they are most critical. Most often, these will be major congestion relief projects in some of our largest metropolitan areas. In turn, this frees up public resources to invest in socially desirable transportation projects that would not rate highly on purely economic grounds.

Third, due to various budget and political constraints, highway capitalization has been sub-optimal. The majority of pavements in the U.S. Interstate and primary systems were designed on the basis of a 20-25 year initial service life. The original design life of many of these assets is now over, and a growing percentage of Federal and State resources are being directed to preservation and maintenance activities. Current materials and technologies are widely available in the U.S. and around the world for much longer lasting pavement. Improved management practices, using timely preservation actions, can also significantly extend the life of existing infrastructure. In addition to providing substantial amounts of new investment resources, a long-term contract with the private sector can reverse some of the incentive challenges inherent in the current approach to government budgeting. As with congestion, an under-capitalized asset is an internal cost to a private concessionaire and its lenders. Over time, the operating and maintenance costs of such an asset will grow at rates far faster than would have been the case with a larger up-front investment. Equally important, more efficient investment schedules will lower the costs to users.

Fourth, as with any asset or service provided solely by government agencies, the current policy framework provides weak incentives for innovation and competition. Because the rewards of a given advancement – for example, in extended life pavements or more sophisticated traveler information systems – accrue broadly and not to specific creative individual firms or individuals, the current approach is unlikely to deliver the pace of breakthroughs that we are seeing in other critical infrastructure sectors like telecommunications and energy. Public-private partnerships can greatly improve the incentives to innovate, as well as the level of competition in the highway and public transportation sectors.

Finally, accountability to customers in transportation lags behind other infrastructure sectors. The current policy framework largely disconnects highway users from the ownership, operation, and management of highway assets despite the fact that users depend on these facilities and indirectly finance their existence. This disconnect weakens

the facility owner's incentive to provide superior customer service, as well as reduces opportunities for customers to voice complaints. Because the health of transit systems is in part dependent on satisfied customers, customer interaction tends to be much more frequent and sustained than can be observed with highway systems.

In addition to the need for a new direction in transportation policy, public sentiment increasingly supports the use of tolls and other direct user fees rather than fuel taxes. A May 2007 report from the Reason Foundation reported that polls conducted around the United States clearly demonstrate that a majority find it preferable and fairer to fund transportation with tolls rather than with increases in fuel taxes.[14] For example, a recent survey conducted by the American Automobile Association found that more than half of the respondents favor tolls while only 21 percent favor fuel taxes.[15] A survey by the Colorado Department of Transportation found 66 percent in favor of tolls as a way of financing new highway capacity, while only 16 percent favored fuel taxes. A 2005 Washington Post survey for the D.C. area similarly found 60 percent in favor of tolls, compared with 30 percent in favor of fuel taxes.[16] A 2004 poll by the Minneapolis Star Tribune found 69 percent in favor of express toll lanes, but only 23 percent in favor of increases in fuel taxes.[17] A 2006 poll for the Richmond-Times Dispatch found that 59 opposed an increase in fuel taxes, while tolls were supported by a 49-45 margin.[18]

Although indirect taxes on gasoline, diesel, general sales, motor vehicles, property and income still dominate the transportation revenue landscape, it is important to observe the trends closely. From 2000 to 2006, toll revenues grew 49% in the U.S. compared to 13% for motor fuel and vehicle taxes. The majority of new highway projects over $500 million that are currently in the development phase in the U.S. will be toll roads. In many cases, they will be toll roads constructed using some form of public-private partnership and whose prices will vary based on congestion levels.

WHAT ARE THE RISKS ASSOCIATED WITH PUBLIC-PRIVATE PARTNERSHIPS?

Despite the clear opportunities that PPPs present to address some of the most pressing policy failures, it is also critical that public authorities, policymakers, and elected officials protect the public interest by fully understanding and analyzing the risks to the general taxpayer and transportation system user that can arise in connection with these transactions. The most important risks are: monopoly pricing risk, corruption risk, thin market risk, system distortion risk, financial risk, and inexperience risk.

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[14] *The Role of Tolls in Financing 21st Century Highways*, Reason Foundation, May 2007, pp. 14-15.
[15] AAA Market Research, *Transportation Omnibus "Pockets of Pain" Survey* 5 (2006), *available at* http://www.aaapublicaffairs.com/Assets/Files/20061251637530.TransportationOmnibusFinalReport.pdf.
[16] TOLLROADSNews.com, "Landslide victory! Tolls 60% Taxes 30% in Washington DC metro area poll," http://www.tollroadsnews.com/node/1021 (last visited Oct. 1, 2007).
[17] Laurie Blake, "Minnesota Poll 69 percent comfortable with toll roads," *Star Tribune*, Jan. 28, 2004, at 1A.
[18] Jeff E. Schapiro, "Poll: State voters want transit aid but no taxes Survey says Virginians oppose remedies pressed by politicians," *Richmond Times Dispatch*, Aug. 1, 2006, at A1.

Monopoly Pricing Risk

To the extent that the government views the leasing of existing transportation assets as a potential income source, there is an inherent tension that must be addressed. Contractual terms that provide substantial degrees of pricing power and protection from competition can substantially increase the discounted present value of the revenue stream associated with the asset. Obviously, there are other critical assumptions that go into asset valuations, such as traffic growth projections, the ability to control costs, and the cost of long term borrowing. However, there is little question that pricing flexibility in a potentially constrained market will be a major driver of facility value.

As a result, it is important that public agencies analyze closely the potential for prices that do not bear a close relationship to costs plus some reasonable return commensurate with the level of risk being assumed. Around the world, we have witnessed a trend in utility infrastructure toward price cap regulations that provide the regulated entity the authority to increase prices at a rate not to exceed the consumer price index plus or minus some X factor related to productivity improvements and changes in costs.

Another form of economic regulation is rate of return regulation. Rate of return regulation was the traditional form of economic regulation in the U.S. for many years. It has increasingly fallen out of favor because it provides perverse cost incentives and encourages overcapitalization. Given the complexity of these matters, it is important that public sector officials without regulatory experience gain a better understanding of the various penalties and incentives that are unlocked in connection with any economic regulatory decision.

A related issue is the treatment of competing facilities in the concession agreement. Contract provisions that limit the prospect of competition will increase the up front lease value of a highway, but may run counter to the public interest if such a provision is not commensurate with the private sector's risk. The emerging trend in this area appears to be the inclusion of either a limited provision or no protection at all. As with economic regulations, public sector officials must fully understand the implications of the various forms that these provisions can take prior to entering into any agreement.

Despite the monopoly risks, economists ask the more salient question: how do inefficiencies in a privatization compare to the inefficiencies of sole government provision? As Nobel Prize winning economist Gary Becker wrote recently on his internet site, in the context of a discussion about highways:

> "Still, I generally strongly support privatization, even when privatized companies have monopoly power in setting prices and other conditions of the sale. The reason is that other companies are more likely to find ways to compete against private monopolies than against government ones. A very important part of this argument is that technological progress is faster with private monopolies than with public monopolies. For example, ATT was a private regulated monopoly before the breakup of the Bells in the early 1980's into competing entities. The

breakup was desirable, but still ATT was much more efficient than were the government run companies that dominated the telephone industry in the rest of the world."[19]

Facility characteristics differ greatly across the country, and a uniform pricing policy at the national level is not appropriate. The Department hopes to conduct research into this economic regulatory question so that we can provide helpful guidance to State and local governments considering these transactions.

Corruption Risk

In any public-private contractual arrangement, there is always a risk of corruption, and the risks must be particularly managed when the agreement is for a large amount of money and for a lengthy period of time. An open and transparent process is the single most effective means to combat corruption. It is important that clear selection criteria are established, and that the qualifications of the various competitors are fully disclosed. In rare circumstances, even with such transparency, an inappropriate concession award may be made. In these cases, public authorities should protect themselves and their constituents with provisions that allow a contract award to be cancelled if it can be proven that the award was corruptly made.

Thin Market Risk

In the past, the number of investors capable of bidding on major infrastructure projects was limited, and this raised the risk that the market for investors in such projects was so thin that the public authority could not be assured that fair value for the public was being received. In a thin market, and with a public agency focused on short-term returns, an agency might fail to receive returns commensurate with the long-term value of an asset. To a large extent, this risk has now receded, as the capital funding available to invest in such projects has multiplied several-fold over the past few years. With multiple U.S. investment firms entering this market, and foreign investment funds expanding their capacity, the risk that a thin market will fail to provide fair market value to the public is lessening year by year.

System Distortion Risk

The national highway system is a well-developed network, and we want to ensure that the system continues to work efficiently even when some parts of the system have been privatized. Of course, we already have substantial experience with operating a system that has multiple owners – the current national highway system is owned by 50 different States and numerous other highway, bridge, and tunnel authorities. For the most part, this multiple ownership of the system has not been a problem, and we do not expect that private ownership of part of the system would present an operational problem. Private owners have a financial incentive to maintain their facilities to a high standard and to

[19] Posting of Gary Becker to The Becker-Posner Blog, "On Privatizing Highways and Other Functions," http://www.becker-posner-blog.com/archives/2006/06/on_privatizing_1.html (June 20, 2006, 13:18 EST).

ensure that construction activities, inclement weather, and other potential service disruptions do not interfere with continuous operations. The fact that part of the system is subject to tolls and part is not is an issue that has been with us for many years. This creates a distortion primarily when the prices charged do not reflect the real value of the facility to the user (as when prices do not reflect levels of congestion). These types of facilities also may cause certain maintenance, operational, and/or safety impacts on other parts of the roadway network; and public authorities should ensure that actions necessary to address these impacts are included in formal agreements so that appropriate public policy needs are advanced. Public authorities also should ensure that the pricing structure established by private operators reflects congestion and other characteristics affecting the value that the user receives, so that traffic is not inappropriately diverted from one part of the system to another.

Financial Bailout Risk

Public authorities that use private sector finance will want to ensure that, if a private sector project encounters financial difficulties, the operations of the project will not be interrupted and that unforeseen financial liability does not transfer to the public sector. The public partner will also want to ensure that control of operations on the facility will not be tied up in bankruptcy proceedings. We have extensive experience in private sector ownership of essential facilities, such as railroads and power plants, so these issues are not novel and the means to ensure uninterrupted service are well-established.

Inexperience Risk

Finally, given the novelty of some of these concepts, there is risk that public agencies will lack the capability to successfully administer public-private programs in the public's interest. An inexperienced public agency, for example, might underestimate the value of an asset and lease it for too little. As a result, it will often be necessary for these agencies to procure legal and financial expertise to assist them. As experience grows across the country, the sharing of best practices and lessons learned from State to State will also grow, thereby helping to minimize some of these risks. In addition, it will be necessary for States to acquire different types of in-house skills.

While there are risks with PPPs that public officials need to be aware of, it is important to recognize that these risks are manageable and that public officials can mitigate these risks if they take prudent and reasonable steps to ensure that they are creating well-balanced PPP programs, performing necessary due diligence before committing to projects, and negotiating well structured concession agreements. In addition, the risks associated with PPPs need to be evaluated in the context of the failings of traditional approaches to project funding and delivery. Policymakers should pursue approaches that improve upon the status quo, recognizing that all approaches to procuring, financing and operating infrastructure assets will entail risks. A July 18, 2008, USDOT report on PPPs describes some of the risks that have been raised in the context of PPPs, and explains how these risks may be managed

WHAT IS THE FEDERAL ROLE?

The Federal Government must focus more closely on ensuring that national transportation objectives, such as system performance, are being achieved. These objectives are reflected in our recently released surface transportation reform plan – *Refocus. Reform. Renew. A New Transportation Approach for America.*[20] In the plan, we articulate the need for a more focused Federal role on national transportation priorities, including, among others, maintaining and improving the condition of the Interstate Highway System, reducing congestion in major metropolitan areas, making strategic investments to improve highway safety, and using Federal dollars to leverage non-Federal resources.

We believe that public-private partnerships, by bringing more market-oriented perspectives into transportation planning, construction, and management, will help to ensure that both private and public transportation dollars are allocated more efficiently. Our top priority, as always, is safety. As an integral part of the roadway network, it is essential that privately financed and operated highways be a full partner in the goal of improving safety. We also believe that these partnerships can provide a powerful tool in improving mobility for individuals and businesses.

CONCLUSION

In closing, Mr. Chairman, I want to reiterate my strong support for this hearing and my appreciation for this Committee's consideration of the benefits that PPPs could provide to the people of Pennsylvania. PPPs maximize the strengths of both the public and private sectors, and we at the USDOT believe that it is time to take advantage of the private sector's flexibility, innovation, creativity, expertise, and access to capital, while maintaining public oversight, accountability to taxpayers and long-term strategic planning. Thank you, and I would be happy to answer any questions that you might have.

[20] Details about the plan can be found at: http://www.fightgridlocknow.gov/reform/index.htm.

WORKING DRAFT

This model legislation has been prepared solely for informational purposes and should be not construed as a statement of United States Department of Transportation or Federal Highway Administration policy.

This model legislation is based on a survey of existing State statutes that authorize public-private initiatives. The purpose of this model PPP legislation is to provide States with an example of what basic elements to consider and address in PPP authorizing legislation. It is meant to serve as a representation of the core provisions dealing with issues that a State should consider when pursuing greater private sector involvement in the delivery of transportation services. Users are advised that the model legislation cannot anticipate the relationship of State laws with the model provisions contained herein. This model legislation has been prepared solely for informational purposes and should be not construed as a statement of United States Department of Transportation or Federal Highway Administration policy.

AN ACT

concerning Public-Private Transportation Initiatives

Be it enacted by the [State Legislature] that:

SECTION 1. [State Code Citation] is amended to read:

§1-101. Definitions.

(a) "Affected jurisdiction" means any county [, city, or town / or municipal corporation], or other unit of government within the State in which all or part of a transportation facility is located or any other public entity directly affected by the transportation facility.

(b) "Department" means the State Department of Transportation.

(c) "Force majeure" means an uncontrollable force or natural disaster not within the power of the operator or the State.

(d) "Maintenance" includes ordinary maintenance, repair, rehabilitation, capital maintenance, maintenance replacement, and any other categories of maintenance that may be designated by the Department.

(e) "Material default" means any failure of an operator to perform any duties under a public-private agreement, which jeopardizes delivery of adequate service to the public and remains unsatisfied after a reasonable period of time and after the operator has received written notice from the Department of the failure.

(f) "Operate" means any action to maintain, rehabilitate, improve, equip, or modify a transportation facility.

(g) "Operator" means a private entity that has entered into a public-private agreement under this [title/chapter/article].

(h) "Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, non-profit entity, or other business entity.

(i) "Public-private agreement" means the agreement between a private entity and the Department that relates to the development, financing, maintenance, or operation of a transportation facility subject to this [title/chapter/article].

(j) "Public-private initiative" means an arrangement between the Department and one or more private entities, the terms of which are stated in a public-private agreement, that provides for:

(1) acceptance of a private contribution, including a money payment, for a project or service for a transportation facility;

(2) sharing of resources and the means of providing a project or service for a transportation facility;

(3) cooperation in researching, developing, and implementing projects or services for a transportation facility.

(k) "Transportation facility" means any, including new and existing, highway, road, bridge, tunnel, overpass, ferry, airport, public transportation facility, vehicle parking facility, seaport facility, rail facility, intermodal facility, or similar facility open to the public and used for the transportation of persons or goods, and any building, structure, parking area, appurtenances, or other property needed to operate such facility that is subject to a public-private agreement.

(l) "User fees" means the rate, toll, fee, or other charges imposed by an operator for use of all or part of a transportation facility.

(m) "Utility" means a privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including fire or police signal system or street lighting system, which directly or indirectly serves the public.

§1-102. Solicited Proposals.

(a) The [INSERT STATE'S PROCUREMENT ACT] shall not apply to solicited proposals under this [title/chapter/article].

(b) The Department may solicit, receive, consider, evaluate, and accept a proposal for a public-private initiative.

(c) In soliciting and selecting a private entity with which to enter into a public-private initiative, the Department may utilize one or more of the following procurement approaches:

(1) sealed bidding;

(2) selection of proposals, with or without negotiations, based on qualifications, best value, or both; or

(3) any competitive selection process that the Department determines to be appropriate or reasonable.

(d) The Department may consider the following factors in evaluating and selecting a bid or proposal to enter into a public-private initiative:

(1) the ability of the transportation facility to improve safety, reduce congestion, increase capacity, and promote economic growth;

(2) the proposed cost of and financial plan for the transportation facility;

(3) the general reputation, qualifications, industry experience, and financial capacity of the private entity;

(4) the proposed design, operation, and feasibility of the transportation facility;

(5) comments from local citizens and affected jurisdictions;

(6) benefits to the public;

(7) the safety record of the private entity; and

(8) other criteria that the Department deems appropriate.

(e) The Department may select multiple private entities with which to enter a public-private agreement for a transportation facility if it is in the public interest to do so.

(f) The Department shall select a private entity or entities for a public-private initiative on a competitive basis to the maximum extent practicable.

Version #1

(g) (1) A private entity may request a review, prior to submission of a solicited proposal, by the Department of information that the private entity has identified as confidential or proprietary to determine whether such information would be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) A private entity may identify confidential or proprietary information submitted as part of a solicited proposal. A private entity shall have an opportunity to object to the release of any information it identifies as confidential or proprietary.

(3) The Department shall review any information identified as confidential or proprietary by a private entity as part of a solicited proposal and shall determine if such information is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(4) The Department shall inform the private entity that submitted the information of its determination of whether information identified by the private entity as confidential or proprietary is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(5) The private entity shall have the opportunity to object to the determination that the information is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT] or to withdraw its proposal.

(6) Any information determined by the State to be confidential or proprietary shall be exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(7) Any information not determined to be confidential or proprietary may be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

Version #2

(g) (1) A private entity may request a review, prior to submission of a solicited proposal, by the Department of information that the private entity has identified a

confidential or proprietary to determine whether such information will be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) The Department shall take appropriate action to protect confidential or proprietary information that a private entity provides as part of a solicited proposal and that is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

§1-103. Unsolicited Proposals.

(a) The [INSERT STATE'S PROCUREMENT ACT] shall not apply to this section.

(b) (1) The Department may receive, consider, evaluate, and accept an unsolicited proposal for a public-private initiative if the proposal:

(A) is independently originated and developed by the proposer;

(B) benefits the public;

(C) is prepared without Department supervision; and

(D) includes sufficient detail and information for the Department to evaluate the proposal in an objective and timely manner.

(2) Within [INSERT NUMBER] days after receiving an unsolicited proposal, the Department shall undertake a preliminary evaluation of the unsolicited proposal to determine if the proposal complies with the requirements under paragraph (1) of this subsection.

Version #1

(c) (1) A private entity may request a review, prior to submission of an unsolicited proposal, by the Department of information that the private entity has identified as confidential or proprietary to determine whether such information would be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) A private entity may identify confidential or proprietary information submitted as part of an unsolicited proposal. A private entity shall have an opportunity to object to the release of any information it identifies as confidential or proprietary.

(3) The Department shall review any information identified as confidential or proprietary by a private entity as part of an unsolicited proposal and shall determine if such information is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(4) The Department shall inform the private entity that submitted the information of its determination of whether information identified by the private entity as confidential or proprietary is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(5) The private entity shall have the opportunity to object to the determination that the information is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT] or to withdraw its proposal.

(6) Any information determined by the State to be confidential or proprietary shall be exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(7) Any information not determined to be confidential or proprietary may be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

Version #2

(c) (1) A private entity may request a review, prior to submission of an unsolicited proposal, by the Department of information that the private entity has identified a confidential or proprietary to determine whether such information will be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) The Department shall take appropriate action to protect confidential or proprietary information that a private entity provides as part of an unsolicited proposal and that is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(d) (1) If the unsolicited proposal does not comply with the subsection (b)(1) of this section, the Department shall return the proposal without further action.

(2) If the unsolicited proposal complies with the subsection (b)(1) of this section, the Department may continue to evaluate the proposal in accordance with this section.

(e) (1) If the unsolicited proposal complies with the subsection (b)(1) of this section, the Department shall advertise the unsolicited proposal for the purpose of receiving competitive proposals for the same proposed transportation facility.

(2) The advertisement shall outline the general nature and scope of the unsolicited proposal, including the location of the transportation facility and the work to be performed on or in connection with the transportation facility and shall specify an address to which a competing proposal may be submitted.

(3) The advertisement shall specify a reasonable time period by which competitors must submit a competing proposal to the Department.

(f) The Department may charge a reasonable fee to cover its costs to process, review, and evaluate an unsolicited proposal and any competing proposals.

(g) The Department shall:

(1) determine if any competing proposal is comparable in nature and scope to the original unsolicited proposal;

(2) evaluate the original unsolicited proposal and any comparable competing proposal; and

(3) conduct any good faith discussions and, if necessary, any negotiations concerning each qualified proposal.

(h) The Department shall evaluate an unsolicited proposal and any comparable competing proposal using the following factors:

(1) novel methods, approaches, or concepts demonstrated by the proposal;

(2) scientific, technical, or socioeconomic merits of the proposal;

(3) potential contribution of the proposal to the Department's mission;

(4) capabilities, related experience, facilities, or techniques of the private entity or unique combinations of these qualities that are integral factors for achieving the proposal objectives;

(5) qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel, who are critical to achieving the proposal objectives;

(6) how the proposal benefits the public; and

(7) any other factors appropriate to a particular proposal.

(i) After evaluating the unsolicited proposal and any competing proposals, the Department may:

(1) accept the unsolicited proposal and reject any competing proposals;

(2) reject the unsolicited proposal and accept a comparable competing proposal if the Department determines that the comparable competing proposal is the most advantageous to the State;

(3) accept both an unsolicited proposal and a competing proposal if accepting both proposals is advantageous to the State; or

(4) reject the unsolicited proposal and any competing proposals.

(j) Subsection (c) of this section shall apply to any unsolicited proposal or competing proposal that is rejected.

§1-104. Public-Private Agreement. Version #1

(a) (1) After selecting a solicited or unsolicited proposal for a public-private initiative, the Department shall enter into a public-private agreement for a transportation facility with the selected private entity or any configuration of private entities.

(2) An affected jurisdiction may be a party to a public-private agreement entered into by the Department and a selected private entity or combination of private entities.

(b) The public-private agreement shall provide for the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a transportation facility.

(c) The financing mechanism included in a public-private agreement may include the imposition and collection of user fees and the development or use of other revenue sources.

(d) A public-private agreement between the Department and a private entity shall specify at least the following:

(1) which party will assume responsibility for which specific project elements and the timing of the assumption of responsibility;

(2) the type of property interest, if any, the private entity will have in the transportation facility;

(3) if and how the parties will share costs of development of the project;

(4) if and how the parties will allocate financial responsibility for cost overruns;

(5) liability for nonperformance;

(6) any incentives for performance;

(7) any accounting and auditing standards to be used to evaluate progress on the project; and

(8) other terms and conditions.

§1-104. Public-Private Agreement. Version #2

(a) (1) After selecting a solicited or unsolicited proposal for a public-private initiative, the Department shall enter into a public-private agreement for a transportation facility with the selected private entity or any configuration of private entities.

(2) An affected jurisdiction may be a party to a public-private agreement entered into by the Department and a selected private entity or combination of private entities.

(b) A public-private agreement under this [title/chapter/article] shall provide for the following:

(1) the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a transportation facility;

(2) the term of the public-private agreement;

(3) the type of property interest, if any, the private entity will have in the transportation facility;

(4) a description of the actions the Department may take to ensure proper maintenance of the transportation facility;

(5) whether user fees will be collected on the transportation facility and the basis by which such user fees shall be determined and modified;

(6) compliance with applicable Federal, State, and local laws;

(7) grounds for termination of the public-private agreement by the Department or operator; and

(8) procedures for amendment of the agreement.

(c) A public-private agreement under this [title/chapter/article] may provide for the following:

(1) review and approval by the Department of the operator's plans for the development and operation of the transportation facility;

(2) inspection by the Department of construction of or improvements to the transportation facility;

(3) maintenance by the operator of a policy of liability insurance or self-insurance;

(4) filing by the operator, on a periodic basis, of appropriate financial statements in a form acceptable to the Department;

(5) filing by the operator, on a periodic basis, of traffic reports in a form acceptable to the Department;

(6) financing obligations of the operator and the Department;

(7) apportionment of expenses between the operator and the Department;

(8) the rights and duties of the operator, the Department, and other State and local governmental entities with respect to use of the transportation facility;

(9) the rights and remedies available in the event of default or delay;

(10) the terms and conditions of indemnification of the operator by the Department;

(11) assignment, subcontracting, or other delegation of responsibilities of the operator or the Department under the agreement to third parties, including other private entities and other State agencies;

(12) sale or lease to the operator of private property related to the transportation facility;

(13) traffic enforcement and other policing issues, subject to section 1-111, including any reimbursement by the private entity for such services; or

(14) other terms and conditions.

§1-105. Reversion of Transportation Facility to the Department.

In the event of termination of the public-private agreement, the authority and duties of the operator cease, except for any duties and obligations that extend beyond the termination as provided in the public-private agreement, and the transportation facility reverts to the Department and shall be dedicated to the Department for public use.

§1-106. Material Default; Remedies.

(a) Upon the occurrence and during the continuation of material default by an operator, not related to an event of force majeure, the Department may:

(1) elect to take over the transportation facility, including the succession of all right, title, and interest in the transportation facility, subject to any liens on revenues previously granted by the private entity; and

(2) terminate the public-private agreement and exercise any other rights and remedies that may be available.

(b) In the event that the Department elects to take over a transportation facility under subsection (a), the Department:

(1) shall collect and pay any revenues that are subject to lien to satisfy any obligation;

(2) may develop and operate the transportation facility, impose user fees for the use of the transportation facility, and comply with any service contracts; and

(3) may solicit proposals for the maintenance and operation of the transportation facility under section 1-102 of this [title/chapter/article].

§1-107. Bonds.

(a) (1) The Department may issue and sell bonds or notes of the Department for the purpose of providing funds to carry out the provisions of this [title/chapter/article] with respect to the development, financing, or operation of a transportation facility or the refunding of any bonds or notes, together with any costs associated with the transaction.

(2) Any bond or note issued under this section:

(A) constitutes the corporate obligation of the Department;

(B) does not constitute the indebtedness of the State within the meaning or application of any constitutional provision or limitation; and

(C) is payable solely as to both principal and interest from:

(i) the revenues from a lease to the Department, if any;

(ii) proceeds of bonds or notes, if any;

(iii) investment earnings on proceeds of bonds or notes; or

(iv) other funds available to the Department for such purpose.

(b) (1) For the purpose of financing a transportation facility, the Department and operator may apply for, obtain, issue, and use private activity bonds available under any Federal law or program.

(2) Any bonds debt, other securities, or other financing issued for the purpose of this [title/chapter/article] shall not be considered to be a debt of the State or any political subdivision of the State or a pledge of the faith and credit of the State or any political subdivision of the State.

(c) Nothing in this section shall limit a local government or any authority of the State to issue bonds for transportation projects.

§1-108. Funding from Federal Government or Other Sources.

(a) (1) The Department may accept from the United States or any of its agencies funds that are available to the State for carrying out this [title/chapter/article], whether the funds are made available by grant, loan, or other financial assistance.

(2) The State assents to any Federal requirements, conditions, or terms of any Federal funding accepted by the Department under this section.

(3) The Department may enter into agreements or other arrangements with the United States or any of its agencies as may be necessary for carrying out the purposes of this [title/chapter/article].

(b) The Department may accept from any source any grant, donation, gift, or other form of conveyance of land, money, other real or personal property, or other item of value made to the State or the Department for carrying out the purpose of this [title/chapter/article].

(c) Any transportation facility may be financed in whole or in part by contribution of any funds or property made by any private entity or affected jurisdiction that is party to a public-private agreement under this [title/chapter/article].

(d) The Department may combine Federal, State, local, and private funds to finance a transportation facility under this [title/chapter/article].

§1-109. Property Tax Exemption.

(a) This section applies to:

(1) a transportation facility; and

(2) tangible personal property used exclusively with a transportation facility that are:

(A) owned by the Department and leased, licensed, financed, or otherwise conveyed to an operator; or

(B) acquired, constructed, or otherwise provided by an operator on behalf of the Department.

(b) Property listed under subsection (a) of this section are exempt from all ad valorem property taxes and special assessments levied against property by the State or any political subdivision of the State.

§1-110. Eminent Domain.

The Department may exercise the power of eminent domain to acquire property, rights of way or other rights in property for transportation projects that are part of a public-private initiative.

§ 1-111. Police Powers; Violations of Law.

(a) All law enforcement officers of the State and of an affected local jurisdiction shall have the same powers and jurisdiction within the limits of the transportation facility as they have in their respective areas of jurisdiction and access to the transportation facility at any time for the purpose of exercising such powers and jurisdiction.

(b) The traffic and motor vehicle laws of the State or, if applicable, any affected local jurisdiction shall be the same on the transportation facility as those laws applied to conduct on similar transportation facilities in the State or local jurisdiction.

(c) Punishment for violations of traffic and motor vehicle laws of the State or, if applicable, any affected local jurisdiction on the transportation facility shall be as prescribed by law for conduct occurring on similar transportation facilities in the State or local jurisdiction.

§1-112. Utility Crossings.

An operator under this [title/chapter/article] and any utility whose facility is to be crossed or relocated shall cooperate fully in planning and arranging the manner of the crossing or relocation of the utility facility.

§1-113. Sovereign Immunity.

Nothing in this [title/chapter/article] shall be construed or deemed to limit any waiver of the sovereign immunity of the State or any officer or employee of the State with respect to the participation in or approval of all or any part of the transportation facility or its operation.

§1-114. Regulations.

The Department may adopt rules and regulations to carry out the provisions of this [title/chapter/article].

SECTION 2. This Act shall take effect on [DATE].