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GOVERNOR MALLOY'S TRANSPORTATION FINANCE PANEL

TESTIMONY OF JOSEPH SELIGA, PARTNER, MAYER BROWN LLP

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Chairman Staples and Distinguished Members of the Panel:

It is an honor for me to be here today to discuss the important opportunity that the State of Connecticut has to modernize its transportation infrastructure by expanding transportation funding and utilizing the benefits of public-private partnerships.

My name is Joseph Seliga. I am a partner with the international law firm of Mayer Brown LLP and a member of our law firm's Global Infrastructure Practice. We have worked with numerous governmental entities across the country as well as private developers and financing parties to address transportation funding challenges and implement public-private partnership transactions to help meet these challenges.

This Panel has an important task: to examine funding options and develop recommendations that will make Governor Malloy's 30-year, $100 billion vision to modernize Connecticut's transportation infrastructure a reality.

Connecticut has a unique opportunity to be a leader in setting the course for meeting the nation's transportation challenges.

There are several things we know:

- Connecticut's transportation needs are immense—both to maintain its existing infrastructure and develop needed new infrastructure.
- Connecticut cannot rely on the federal government to fill the gap. The federal gas tax has become an inefficient source of funding with the increased move to fuel efficient vehicles and the federal government has not made up the shortfall in the federal highway fund

with any long-term, sustainable, and reliable source. As time goes on, the gap gets larger. Transportation policy expert Kenneth Orski has noted that the Congressional Budget Office has estimated that to maintain the federal surface transportation funding program at its current level would require an extra $15-16 billion each year.

- The action has moved to the state level. States are experiencing the challenges of an underfunded transportation system but states also have the opportunity to meet these challenges. The states that take the bold actions to move their transportation systems forward will be the winners, as their investment in their transportation systems will bring jobs and economic development, while other states that don't take action to fill the gap will fall behind.

The first step to move Connecticut's transportation system forward is to develop a sustainable source of funding for the State's transportation needs. States are doing this in a variety of ways: implementing user fees, developing vehicles' mile-travel systems in lieu of gas taxes, and creating dedicated sources of funding for transportation, whether from state gas taxes, vehicle registration fees, sales taxes or other sources.

The second step is to implement public-private partnerships. These transactions have the benefit of leveraging private investment and innovation to help deliver projects faster, reducing costs to the State and shifting risk to the private sector.

Our law firm has advised clients on numerous innovative public-private partnership transactions across the country, including the following:

- the **SH 288 Toll Lanes Transaction**, in which we advising the Texas Department of Transportation (TxDOT) on the development of new toll express lanes in the Houston area where a private developer is paying TxDOT for the right to develop toll lanes and receive revenues from those toll lanes. TxDOT is receiving the benefit of an expansion of an existing state highway, along with several connecting roads and a new Interstate interchange with the cost and risk shifted to the private sector.

- the **SH 183 Managed Lanes Transaction**, in which we advised TxDOT on the development of new toll express lane facilities in the Dallas-Fort Worth area. In this case, the private developer is constructing the road, financing a portion of the construction costs, and operating and maintaining the facility for 25 years after construction. The Texas Department of Transportation is retaining the tolls from the project. The project procurement was structured so that the bidding parties competed to develop the largest-sized project for a total of $850 million that TxDOT had available for the project. The winning bidder agreed to construct not only the base scope of the project but all four additional optional components offered by TxDOT.

- the **Concession of the Indiana Toll Road**, in which we advised the Indiana Finance Authority on the long-term concession of the Indiana Toll Road, a transaction in which the State received $3.8 billion which it dedicated to its ten-year road plan, making it the only state in the country with a fully funded road plan. You may have heard recently about the private investors in the Toll Road going through a bankruptcy proceeding. The public-private partnership transaction documents worked as intended through this bankruptcy, protecting the interests of the State and the traveling public by ensuring the continued smooth operation of the road.

- the **Concession of the San Juan Luis Muñoz Marín International Airport** in Puerto Rico, in which we advised the Puerto Rico Public-Private Partnerships Authority and the Puerto Rico Port Authority on a 35-year contract with over $2.6 billion in value to Puerto Rico in the form of a $615 million up-front payment, various fixed payments and long-term revenue sharing, with the operational risk and long-term capital expenditures related to the airport shifted to a private entity with strict operating requirements. The transaction enabled Puerto Rico to pay off significant infrastructure-related debt and also included certain protections for existing employees of the airport.

- the **East End Crossing Transaction**, in which we advised the private developer on the construction of an over $700 million new toll bridge over the Ohio River connecting Indiana and Kentucky. The transaction, which was undertaken by the Indiana Finance Authority, is structured as an availability payment transaction. Under this approach, the state receives revenues from the toll bridge and utilizes those and other revenues to make payments to the private developer during construction and during a 35-year operations-and-maintenance period. The private developer offers a fixed price for these payments during the term and finances the transaction based on the promise of the government to make the payments during the term of the agreement. The government, however, has the ability to reduce its payments if the project is not made "available" either because it was not constructed by certain time periods or was not constructed or operated and maintained up to certain standards in the contract. As a result of this structure and the competitive procurement between four different contracting teams, the price received by Indiana for this project was 23% less than construction estimates.

These transactions demonstrate there are a variety of approaches to implementing public-private partnerships. Public-private partnerships are sometimes described as a "tool in the toolbox." That is true, but it's more complicated than that. They are like the screwdriver in the toolbox and there are various types (Phillips or flat and every other permutation imaginable). The transactions I have described include full concessions of the right to operate and receive revenue from existing assets, the development of new infrastructure through concessions where revenue risk is shifted to the private sector, and the development of new infrastructure where project revenue is retained by the governmental entity and a private entity finances some or all of the construction of the project. Add to this the use of design-build contracting, which we have assisted various states in implementing and expanding, and there is a full panoply of public-private partnership structures that can assist Connecticut in lowering cost, shifting risk to the private sector, and accelerating project delivery.

The following are some of the things we have learned from our experience:

- the most successful states are the ones that have a plan: a plan for raising revenues to fund transportation needs and a plan to utilize public-private partnerships to develop transportation projects. We also have seen the opposite: states where proposals for infrastructure projects that were desperately needed fall flat because of lack of public understanding, lack of political leadership and courage, lack of imagination, and lack of cooperation between parties, between business and government, even between agencies of the very same government.

- having a public champion is critical: jurisdictions that have been successful at meeting their transportation funding needs and developing public-private partnerships have had a public champion who has articulated those needs, moved forward bold initiatives to develop new projects, and developed a vision in the face of uncertainty and at times opposition.

- a reliable legal framework is a necessary precondition to getting things done: whether it is creating a source of revenue or initiating a public-private partnership procurement, a reliable legal framework is crucial. Private parties investing in the state and its infrastructure need to know that sources of revenue will be there and that when a project procurement is initiated it will get to the finish line.

- while there are many types of public-private partnerships, it is critical to know when a public-private partnership is the right structure for the project and to know what type of public-private partnership should be implemented on a project: not all projects are well-suited for public-private partnership contracting. Certain types of projects are more suited than others for public-private partnerships because of the ability to reduce cost, introduce innovation, and accelerate delivery through a public-private partnership. Knowing which projects those are and then implementing the right public-private partnership model for those projects is critical.

- credibility is important: successful jurisdictions have credibility—credibility with their constituents that they are making the best decisions on new sources of revenue; credibility with private sector partners that they will accomplish what they set out to do; and credibility with investors and financing parties that will meet their obligations.

- important policy objectives can be incorporated in public-private partnership transactions: we have helped governmental entities include labor protections, including requirements for project labor agreements, labor neutrality and card check procedures, wage and benefit requirements and required offers of employment to existing employees. We also have crafted disadvantaged, minority, female, disabled and veterans' contracting requirements. In addition, we have imposed limitations on toll increases and other fees imposed by private sector partners on public-private partnership projects.

- protecting the public interest is paramount: ultimately decisions must be made on whether the public interest is being protected—not all sources of revenue may be the most efficient and not all projects are well-suited as public-private partnerships. When a public-private partnership is negotiated, the jurisdiction must ensure that it structures its contractual relationship to protect the public interest with strong oversight requirements and operating standards.

Your challenge is very serious. With every year that Connecticut fails to act boldly to fix its infrastructure, you will create many more years of decay and it will take longer and longer to get the State to where it needs to be.

But your opportunity is very great. Connecticut can make itself a leader in funding its transportation needs and implementing innovative solutions to get projects completed faster, at lower cost, and with less risk to the State.

I wish you great success in your important work. Please feel free to reach out to me if I can be of any further assistance in your efforts.