U.S. Public Interest Research Group comments relating to public private partnership provisions in the "Surface Transportation Authorization Act of 2009" issued by the House Transportation and Infrastructure Committee on June 22, 2009

As a general note, the bill discusses privatized toll roads and public private partnerships as largely synonymous and treats these arrangements as pertaining to highways. This discussion does not explicitly include discussion of bus, rail, or ferry transportation. Nor does it include "value capture" funding by private real estate developers whose investments increase in value from nearby public transit.

Sec. 1204. "Office of Public Benefit" – We support this proposed creation of an Office of Public Benefit to protect the public interest in private toll road deals or other public private partnerships on federal-aid highways. As the GAO has noted, states do not currently have the capacity to adequately screen, monitor, or enforce private toll road deals. The new office should assist states and localities with already-signed deals as well as possible deals in the future. The GAO should also issue annual reports evaluating whether the new office is in fact protecting the public interest. The definition of the "public interest" should not be defined in solely monetary terms, but should instead include goals such as those outlined in the bill for the Office of Livability, such as access for bicycles and pedestrians, energy-efficiency, and environmental and equity concerns. A good list of such overarching national transportation objectives is found in U.S. House Bill 2724, The National Transportation Objectives Act of 2009.

Sec.1301.A.D.2 (page 290) – We commend the provision that excess toll revenues can be used for public transit.

Sec. 1301.A.E (p. 291) – We commend the bill's prohibition of public private partnerships from having "non-compete clauses" prohibiting states from improving capacity in the same travel corridor. This is appropriate because such clauses hinder the pursuit of transportation policy and may be especially harmful in the context of private contracts that have typically lasted 50-99 years.

However, the bill would better protect the public if it also prohibited "adverse action" or "compensation clauses" that allow private companies to make monetary claims against the state when public policies or rulings reduce toll traffic. Non-compete clauses are just one example of a larger class of contract provisions that allow private operators to claim compensation for laws, judicial decisions and rule making. For instance, the State of Indiana had to pay $447,000 in September 2008 to compensate the road operator for waiving toll collections to assist in evacuations during flooding.

Compensation and adverse action clauses have a similar effect as non-compete clauses because they discourage public bodies from the normal course of policy making by encumbering such decisions with considerations about potentially incurring additional and uncertain costs. State and local policy makers should make transportation decisions based upon what best serves the public, not based on the potential reprisals from the legal team of private toll operators. Leaving public policy unencumbered may have the effect of increasing the risk for private investors. The assumption of risk is one of the prime ways that private investors claim to add value in public private partnerships.

1301.A.G (p. 292) – It is an important and commendable provision that the Secretary must review and approve any toll hike schedule since those toll increases will affect traffic patterns in other states and localities and may impose disproportionate costs for particular localities and low-

income populations. The bill also appropriately requires that all toll schedules be fair, have reasonable rates of return, and do not harm interstate commerce or travel.

Sec 1504 (p316) – We support the bill's requirement to determine clearly whether proposed public private partnerships would provide additional value compared to traditional public delivery methods.

However, traditional delivery methods do not likely include borrowing against revenues from future toll hikes. Potential partnerships should therefore also be assessed against the long-term value that could be generated by public-sector borrowing using the same toll hike schedule. No private deal should win out simply because it can deliver upfront cash. The long-term net value must exceed what could be accomplished without the private deal. Provisions to examine such deals from a long-term perspective are particularly important given that state and local officials will have a strong incentive to use proceeds from private deals to bridge short-term budget shortfalls and have much weaker incentive to consider lost revenue and other problems that will be incurred long after they leave office. The additional costs of monitoring and enforcing private arrangements should also be part of these comparisons.

Sec 1504 (p.317) – "Transparency" – This section requires that "key provisions" of a contract must be made public before approval, but does not require disclosure of full contract terms, much less public disclosure with a minimum period for adequate review. Under contemporary standards of transparency, it is not enough for public officials to determine what information is important for the public to see. Citizens, journalists, or watchdog groups may identify potential problems with a contract that officials might miss or in some cases might be reluctant to divulge. Long-term toll contracts are complex documents that can run hundreds of pages and understanding them requires reading multiple sections and definitions together. Given the length and impact of these contracts on vital infrastructure and the complexity of the documents, it is important to have many eyes checking for problems. This is not possible unless the full document is made available.

The definition of what information should be considered confidential or legitimately proprietary should be extremely narrow, such as bank account numbers and social security numbers. Industry traffic forecasts may also be considered proprietary for a short number of years, though those same forecasts can be used by the state when making side by side comparisons about relative generation of public value from public private partnerships compared to public borrowing.

We believe that transparency related to such extraordinary commitments of public assets for extended periods of time should also include campaign contributions and lobbying related to companies tendering offers. There should also be ongoing disclosure once a private deal has been signed such as to make all materials public record as they would be under public records law for a public entity.

Sec 1504 (p. 321) – "Early Termination for Convenience" – We commend the Committee for including this public protection, which entitles the public to buy back operation of the facility by paying fair market value. Many contracts already include these provisions, though once states or localities have already spent upfront cash from concession deals, it may become extremely difficult politically to generate the funds required to buy back such contracts.

Sec 1504 (p. 321) – "Buyback Standards" – The bill also does well to require that any contract make provision for the quality of the roadway at the time when it will eventually be returned to public control. As some contracts have done, it should be standard operating procedure to require the private entity to put aside money in an escrow account toward restoration of good repair for future standards. Such precautions avoid the possibility of companies emptying their reserves to shareholders and delivering a roadway in disrepair but without resources to conduct the repair.

For more information, see the research report *Public Roads, Private Costs: The Facts about Toll Road Privatization and How to Protect the Public* or contact Phineas Baxandall, Ph.D. at Phineas@pirg.org or (617) 747-4351.