Chairman Jeff Bingaman

Subcommittee on Energy, Natural Resources & Infrastructure

Opening Statement, July 24, 2008

Good afternoon, and welcome to this hearing of the Senate Finance Subcommittee on Energy, Natural Resources, and Infrastructure. Our topic today is "Tax and Financing Aspects of Highway Public-Private Partnerships."

At a July 10 full Committee hearing, CBO Director Peter Orszag told us that spending from the Highway Trust Fund has vastly outstripped increases in revenues, at a time when critical surface transportation needs require billions of dollars in

additional spending. That hearing's other witness, GAO's JayEtta Hecker, argued that Congress should clarify national goals and consider the appropriateness of our current funding structure alongside the roles of states and the private sector.

Heeding GAO's advice, I have called today's hearing to consider more closely one financing option that has received considerable attention: the sale of concession rights to existing tolled highways. Indeed, these so-called "Public-Private Partnerships" have been billed by advocates as a silver bullet to our surface transportation problems. The National Surface Transportation Policy and Revenue Study Commission's January report concluded that "public-private partnerships should play an important role in financing and managing our surface transportation program" and the Department of

Transportation has provided states with a “how to” guide that includes model state legislation.

Already, two Public-Private Partnership deals have closed: In 2004, Chicago sold Macquarie of Australia concession rights to the Chicago Skyway for 99 years, in exchange for $1.8 billion, and in 2006, Indiana sold concession rights to the Indiana Toll Road to a partnership between Cintra of Spain and Macquarie for 75 years, in exchange for $3.8 billion. Both deals have generated significant interest from the press, the financial community and, now, state and local governments across the country. Investors are lining up for the piece of what is believed to be a very lucrative pie. Most recently, Governor Ed Rendell announced a $12.8 billion deal for a 75-year sale of concession rights to the Pennsylvania Turnpike, which, if ratified, would

represent the largest privatization of highway infrastructure in US history.

There is no denying the seriousness of America's surface transportation funding challenges. But the question is whether our federal response should be to encourage states to essentially sell off vital components of our interstate highway system. I am open to a role for the private sector, but I have real concerns about this headlong rush into public-private partnerships and its adequacy to replace or supplement a strong and vibrant federal infrastructure program.

Before we move away from our longtime federal-state highway partnership, we must better understand the

consequences. There has already been some Congressional attention paid to the pros and cons from a transportation policy standpoint. But to date, there has been virtually no consideration given to the tax and financing aspects of these transactions. Yet tax benefits are key to making these transactions economically attractive to the private companies. This afternoon, our witnesses will assist us in understanding the tax and financing aspects – an understanding that will prove essential as Congress considers the role of private entities in the future of our interstate system.

Before turning to their testimony, I would like to say how troubled I am that a desire to derive generous federal tax benefits is driving exceedingly long lease lengths. As our tax attorney witnesses will explain, in order to take advantage of the

tax code's 15-year cost recovery period, a lessor must have constructive ownership of the road. Constructive ownership is generally attained by having a lease that exceeds the 45-year period that the Bureau of Economic Analysis says is a road's "useful life." And so parties will not enter these deals unless they are at least 45 years in length – and often longer, to follow tax advisors' guidance to be cautious. What we have, then, is the tax tail wagging the dog: Exceptionally long leases in order to recover capital outlays on an accelerated schedule. In essence, today's tax code provides a taxpayer subsidy for these companies that far exceeds what economic reality would dictate.

And this aspect of the tax code is of interest not just because the Finance Committee must prudently shepherd our nation's tax revenues, but also because there are considerable

transportation policy dangers to these very long-term leases. Chicago signed a 99-year lease for the Skyway, a road that, at the time of the lease, had only a 47 operating history. Indiana signed a 75-year lease for its Toll Road, a highway that, at the time of the lease, had only a 49 year history. I question how, with respect to a critical artery of interstate transportation, a state can possibly predict its future needs for a period that is twice that artery's operating history. It is impossible to envision how transportation will change in the next hundred years. As a point of reference, the Model T is 100 years old this year – can we even pretend to imagine what the next century will bring? These very long lease lengths are all the more troubling because these deals often contain non-compete clauses, which make it difficult for public transportation agencies to address safety and congestion problems on highways and adjacent streets.

I, for one, think we ought to reconsider the perverse incentive that the tax code creates for such long leases – which now come at considerable expense to the nation's taxpayers. I appreciate that these infrastructure firms are merely following the letter of the law. But if depreciation rules lead to forms of investment that we judge to contravene public policy, then the Finance Committee should consider changing those rules, so that companies can write-off their investments on a timeline that more closely mirrors economic reality. Indeed, public policy concerns have already led Congress to alter cost recovery periods for other assets, such as luxury cars, SUVs and sports franchises.

Finally, I wish to state my concern with the Department of Transportation's promotion of these partnerships as the new paradigm for highway infrastructure financing. The simple fact is that for my state of New Mexico – and nearly every other state represented on this Subcommittee – the public-private partnership model is not available. New Mexico has a total of 1000 miles of interstate, which is a little over 2% of the nation's 46,467 miles of interstate. That proportion of interstate miles is nearly three times New Mexico's proportion of the total US population. Thus, our state cannot be fairly asked to bear the cost alone of maintaining interstate roads in New Mexico. But because our roads are not tolled, and are unlikely ever to be tolled, they will never be attractive to investors. I am concerned about a Federal model that promotes privatization as a panacea when that model cannot be extended on a nationwide basis.

Senator Bunning?