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Joan Claybrook, President

January 27, 2009

The Hon. Ray LaHood
Secretary of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

Dear Secretary LaHood:

Congratulations on your appointment as Secretary of Transportation. As the new incoming Secretary, Public Citizen appeals to you to correct quickly a grave and careless policy of the past Federal Highway Administration (FHWA).

Public Citizen encourages you to put an end to the previous Administration's occasional practice of withholding federal highway funds from states that attempt to protect the integrity of government contracts by enacting pay-to-play reforms. Most recently, on December 2, 2008, the FHWA threatened to withhold highway funds from the state of Illinois in response to that state's efforts to rein in apparent abuses in government contracting by Gov. Rod Blagojevich, allegations that continue to shock the nation.¹

Many state and local governments have been tainted by all-too-common "pay-to-play" practices, in which a business entity makes campaign contributions to a public official with the hope of gaining a lucrative government contract. Pay-to-play practices create not only the appearance of corruption in government contracting, but also the real possibility that contracts will be awarded based on campaign contributions rather than merit.

Several state and local governments have instituted pay-to-play reforms to address government contracting scandals and enhance the integrity of the government contracting process. New Jersey, Connecticut, Los Angeles, Chicago and Philadelphia have suffered crippling political and legal consequences because of pay-to-play scandals. Illinois is just the most recent state to be damaged by a pay-to-play scandal and, consequently, has joined eight other states, the Securities and Exchange Commission (SEC) and countless localities nationwide in approving pay-to-play reforms.²

¹ Norman Stoner, FHWA Division Administrator, Letter to Milton Sees, Illinois Department of Transportation (Dec. 2, 2008)

² States with pay-to-play laws include: Colorado, Connecticut, Hawaii, Kentucky, New Jersey, Ohio, South Carolina and West Virginia, along with Illinois. The Securities and Exchange Commission has had its pay-to-play rule (G-37) on the books since the early 1990s, ushered into place by former SEC Chairman Arthur Levitt. Several dozen localities across the country also have pay-to-play ordinances.

Unfortunately, the Federal Highway Administration (FHWA) under the Bush Administration has decided to make it difficult, if not impossible, for states to address this serious problem. In 2004, the FHWA decided to punish New Jersey for reforming its contracting system by withholding federal highway funds from the state. At the same time that Illinois Gov. Rod Blagojevich was impeached by the Illinois legislature for pay-to-play scandals, FHWA threatened again to withhold highway funds from that state for its new pay-to-play law.

This federal intervention is unjustified and counterproductive. States have the right, and in fact the duty, to ensure that their contracting procedures conform to the highest ethical standards and offer the best value for taxpayers. Government contracts awarded due to campaign contributions rather than merit are frequently mismanaged and costly. New Jersey's "Parsons scandal" is a case in point.

The infamous case several years ago brought pay-to-play in New Jersey to the front pages of newspapers. The \$400 million government contract awarded to Parsons Infrastructure Technology Group, a major campaign contributor to targeted state officials of the then-Republican administration, amounted to nothing less than an indictment against New Jersey's government contracting process. In a scathing report, the State Commission of Investigation charged that the primary duty of government to safeguard citizen interests in government contracting was "set aside in favor of a deeply flawed initiative that cost too much and produced too little in the way of satisfactory results."³

As a result of the scandal, New Jersey adopted an effective pay-to-play law that has curtailed further abuses. Nevertheless, in a stunning setback to the effort to clean up New Jersey's contracting procedures, Dennis Merida, Administrator of the New Jersey Division of FHWA, intervened to block the state's contracting law. According to FHWA, New Jersey's pay-to-play policy of divorcing campaign money from government contracts is neither "cost effective" nor an "emergency circumstance" and thus, the FHWA contended, failed to conform to federal contracting standards.⁴

As a result, New Jersey Gov. Richard Codey reluctantly suspended the state's pay-to-play rules for highway contracts. "This is a temporary measure forced on us by the federal government," Codey said. "I am not happy about it. In making this necessary, the federal government is dead wrong, but I cannot jeopardize nearly \$1 billion in federal transportation funds."⁵

Equally stunning is FHWA's recent intervention in Illinois, which follows sensational allegations of pay-to-play corruption leveled against the state's last two governors. Former Gov. George Ryan of Illinois, who once was rumored to be in the running for a Nobel Peace Prize, went to prison for issuing state contracts in exchange for financial contributions and gifts over a period of 10 years. Impeached Gov. Rod Blagojevich is in the middle of a massive federal probe for even more astounding pay-to-play allegations – for example that he offered a highway contractor additional state funding for a project in exchange for campaign contributions.⁶ Illinois appropriately responded with narrowly tailored pay-to-play legislation in an effort to ensure that taxpayer dollars are not wasted on

³ New Jersey State Commission of Investigation, "N.J. Enhanced Motor Vehicle Inspection Contract" (March 2002).

⁴ Federal Highway Administration, Memorandum: "New Jersey E.O. #134" (Nov. 18, 2004).

⁵ Tom Hester, "Governor eases pay to play rules," *Trenton Times* (Jan. 27, 2005) at 1.

⁶ Natasha Korecki & Abdon M. Pallasch, "Illinois Governor Rod Blagojevich Taken into Federal Custody," *Chicago Sun-Times* (Dec. 9, 2009), available at <http://www.suntimes.com/news/metro/blagojevich/1321300.rod-blagojevich-illinois-governor-custody-120908.article>.

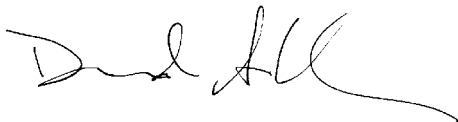
future unmerited government contracts. But if the decisions by the previous Administration's FHWA remain in place, Illinois will be forced to expose its highway contracts to the same corrupt practices that have plagued the state for years.

Pay-to-play laws have survived court challenges as a reasonable means for governmental entities to ensure that contracts are awarded based on merit.⁷ They are a critical means by which the states can ensure that taxpayer dollars are not squandered on mismanaged and costly government contracts.

It is not the place of FHWA to second guess the courts or the states on how best to preserve integrity in government contracting, especially for those states where public confidence in government contracting has been shattered by severe pay-to-play scandals.

Public Citizen strongly urges you to end FHWA's practice of occasionally withholding highway funds to states that have implemented narrowly tailored pay-to-play reforms.

Sincerely,



David Arkush
Director
Public Citizen's Congress Watch division



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cc: Office of Federal Highway Administrator

⁷ *Blount v. Sec. & Exch. Comm'n*, 61 F.3d 938, 941 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996); *Green Party v. Jeffrey Garfield*, --- F.Supp.2d ----, 2008 WL 5273434 (D. Conn. 2008).