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May 1, 2020

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: Senate Bill 226

Dear Governor Hogan:

We hereby approve for constitutionality and legal sufficiency Senate Bill 226, “Highways – Prohibition on Outdoor Signs Along Expressways – Modification.” Nevertheless, we write to alert you to a significant risk that Maryland would be required to pay back the federal government more than \$2 million and also could lose future federal funding should Senate Bill 226 be enacted. We explain further below.

Federal law relevant to Senate Bill 226 includes the Bonus Act Program, which is the federal program enacted in the Federal-Aid Highway Act of 1958, Public Law 85-381. The law was passed April 16, 1958 and, with the later passed but less restrictive Highway Beautification Act (“HBA”), serves to control outdoor advertising. As described by the Federal Highway Administration (“FHWA”):

The Act provided that States which voluntarily agreed to control outdoor advertising adjacent to Interstate highways in accordance with national standards presently codified at 23 CFR 750, Subpart A, would receive a bonus of one-half of one percent of the highway’s cost of construction. . . The bonus States must still comply with the provisions of the Highway Beautification Act of 1965 as well as adhere to the national standards and the terms of the required bonus agreement.¹

FHWA has recently made clear to the Maryland State Highway Administration (“SHA”) that the Bonus Act prohibits the erection and maintenance of outdoor advertising signs, displays,

¹ FHWA, “Outdoor Advertising Control—A History and Overview,” (May 5, 1994, rev. July 8, 1997), https://www.fhwa.dot.gov/real_estate/oac/oacprog.cfm#BONUSPR.

or devices within 660 feet of the edge of the right-of-way and visible from the main-traveled way of all portions of the Interstate System, except those very limited exceptions specified in 23 CFR § 750.105. FHWA also confirmed that allowing or causing the placement of signs along the interstate other than those listed in 23 CFR § 750.105 would be a violation of the Bonus Act and the 1961 Bonus Act Agreement between FHWA and SHA. FHWA specifically noted that under Bonus Act regulations, “[n]o sign may be permitted which contains, includes, or is illuminated by any flashing, intermittent or moving light or lights.” 23 CFR § 750.108(c).

Maryland is one of the states that voluntarily agreed to participate in the Bonus Act program by entering into a Federal-State Bonus Agreement that includes the continuing obligation to control outdoor advertising pursuant to the requirements of the Bonus Act and Agreement, subject to a repayment penalty of all Bonus Act funds received for non-compliance. Senate Bill 226 likely constitutes non-compliance because it would change the law under which Maryland voluntarily participated in the Bonus Act and received Bonus Act funds. The bill would do so by permitting off-premise signs in locations where they are either currently excluded or that exceed the size, lighting, spacing, proximity, or other requirements for the very limited signs allowed by the Bonus Act and Agreement. While a State permit would be required under Senate Bill 226, it is unclear whether, under Senate Bill 226, the State could preclude signs that are prohibited by the Bonus Act and Agreement.² Allowing such a sign in violation of the Bonus Act and Agreement would have significant fiscal impact for the State. FHWA Guidance on Bonus Act Repayments states:

Unless and until a [federal] statutory change is made, the only recourse available to a State that wishes to extinguish the control provisions imposed by the Bonus Act and its Federal-State Bonus Agreement is created by the terms of the Federal-State Bonus Agreement. That option is to repay funds received under the Bonus Program. The repayment of funds, although not popular, is the only recourse of action FHWA can offer at this time.

FHWA Guidance Memorandum, dated Nov. 30, 2004.

Thus, if a State that participates in the Bonus Program ceases to control outdoor advertising as required under the Bonus Act and Bonus Agreement, the State must pay back any funds received during its participation in the program. If Maryland wishes to cease control of outdoor advertising on routes required under the Bonus Act, the payback amount would be \$2,011,055.

In addition, federal law, 23 USC § 131(b), authorizes the Secretary of Transportation to impose a penalty of ten percent reduction in Federal-aid apportioned funds each year that a State fails to exercise effective control over outdoor advertising under the HBA along controlled routes. Federal law, 23 CFR § 750.705(b) requires, at a minimum, that newly erected signs comply with

² It is also unclear whether enactment of Senate Bill 226 itself would be seen as a violation of the Bonus Act and Agreement.

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size, spacing, and lighting requirements set forth in the Federal-State Agreement, which prohibits “flashing, intermittent, or moving light or lights.”³

Finally, FHWA also reiterated that the State may delegate its control in zoned and unzoned commercial and industrial areas to local zoning authorities that regulate size, spacing, and lighting under a comprehensive zoning plan, pursuant to 23 CFR § 750.706(c). Nevertheless, the State, and not the local zoning authority, is ultimately accountable for effective control of outdoor advertising. 23 CFR § 750.706(c)(5).

In light of the foregoing, although the bill is constitutional, we believe it important to advise you that we cannot give assurance that Maryland will not be negatively fiscally impacted by the enactment of Senate Bill 226. The only certain way to ensure that the State would not be penalized is for Senate Bill 226 to be vetoed.

Sincerely,

A handwritten signature in blue ink that reads "Brian E. Frosh". The signature is fluid and cursive, with the first name being the most prominent.

Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber

³ Moreover, recent communications from FHWA to SHA confirmed: “Maryland and FHWA may modify the 1968 Federal State Agreement at any time, following the established process which includes State and Federal coordination, publication in the Federal Register, and a public comment period. In addition, any modifications must be consistent with the requirements set forth in the Bonus Act, the Highway Beautification Act, and the regulations that implement these Acts.” Accordingly, any inconsistent State law enacted prior to an appropriate modification of the 1968 Federal-State Agreement presents a risk of the loss of ten percent of the State’s annual allocation of all Federal-aid highway funds.