

**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****23 CFR Part 180****Office of the Secretary****49 CFR Part 80****Federal Railroad Administration****49 CFR Part 261****Federal Transit Administration****49 CFR Part 640**

[OST Docket No. OST-99-5728]

RIN 2125-AE49

**Credit Assistance for Surface Transportation Projects**

**AGENCY:** Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), Office of the Secretary of Transportation (OST), U.S. Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** The Department of Transportation (DOT) is implementing the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA) to provide credit assistance to surface transportation projects. The TIFIA authorizes the DOT to provide secured (direct) loans, lines of credit, and loan guarantees to public and private project sponsors of eligible surface transportation projects. Projects will be evaluated and selected by the Secretary of Transportation. Following selections, individual credit agreements will be developed through negotiations between the project sponsors and the DOT.

**EFFECTIVE DATE:** This final rule is effective August 2, 1999.

**FOR FURTHER INFORMATION CONTACT:** FHWA: Mr. Max Inman, Office of Budget and Finance, Federal-Aid Financial Management Division, (202) 366-0673; or Mr. Steven M. Rochlis, Office of the Chief Counsel, (202) 366-1395. FRA: Ms. JoAnne McGowan, Office of Passenger and Freight Services, Freight Program Division, (202) 493-6390; or Mr. Joseph Pomponio, Office of the Chief Counsel, (202) 493-6051. FTA: Mr. Paul Marx, Office of Policy Development, (202) 366-1734; or Ms. Paula Schwach, Office of the Chief Counsel, (816) 523-0204. OST: Ms. Stephanie Kaufman, Office of Budget and Program Performance, (202) 366-9649; or Mr. Terence W. Carlson, Office

of the General Counsel, (202) 366-9161. Department of Transportation, 400 Seventh Street, SW, Washington, DC, 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays. Hearing- and speech-impaired persons may access this number via TTY by calling the Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:****Electronic Access**

Internet users may access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL) <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions on-line for more information and help. An electronic copy of this document may be downloaded using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the **Federal Register's** home page at <http://www.nara.gov/fedreg> and the Government Printing Office's web page at <http://www.access.gpo.gov/nara>.

Additional information on the TIFIA program and credit assistance for surface transportation projects generally is available at the TIFIA web site at <http://tifa.fhwa.dot.gov>. Among other information, the DOT will provide responses to commonly asked questions and information on participation in the TIFIA program.

**Background**

The Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 241, created the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA). The TIFIA, as amended by section 9007, Public Law 105-206, 112 Stat. 685, 849, and codified at 23 U.S.C. 181-189, establishes a new Federal credit program for surface transportation projects. Funding for this program is limited, meaning that projects obtaining assistance under the TIFIA program will be selected on a competitive basis. Final selections of projects will be made by the Secretary of Transportation.

Credit assistance programs such as TIFIA are designed to assist financial markets in developing the capability to supplement the role of the Federal Government in financing the costs of large projects of national significance. Developing, implementing, and evaluating financial assistance programs is a crucial mission of the DOT. To help ensure financial and programmatic success, the DOT has established a

multi-agency Credit Program Steering Committee and Working Group. The Steering Committee and Working Group are comprised of representatives from the Office of the Secretary, the Office of Intermodalism, the FHWA, the FRA, and the FTA, as well as other DOT agencies and offices. The Steering Committee and Working Group will coordinate and monitor all policy decisions and implementation actions associated with this Federal credit assistance program.

**NPRM**

The DOT published a notice of proposed rulemaking (NPRM) on February 8, 1999, in the **Federal Register** (64 FR 5996). Comments were filed by: Commonwealth of Virginia Department of Transportation; North Texas Tollway Authority; Transportation Corridor Agencies; Texas Department of Transportation; Washington Airports Task Force; City of Reno, Nevada; San Francisco Bay Area Rapid Transit District; Commonwealth of Pennsylvania Department of Transportation; State of Michigan Department of Transportation; American Public Transit Association; Goldman, Sachs, and Co.; and Salomon Smith Barney. The DOT is now issuing this final rule concerning administration of the TIFIA credit assistance program. This rule reflects the DOT's consideration of the comments filed in response to the NPRM.

**Discussion of Rulemaking Text**

The following discussion summarizes the comments submitted to the DOT by the twelve commenters on the NPRM, notes where and why changes have been made to the rule, and, where relevant, states why particular recommendations or suggestions have not been incorporated into the following regulations. Paragraph references are as designated in the NPRM.

**Discussion of Comments and Responses by Section***Section \_\_\_\_.*3 Definitions

*Investment-Grade Rating.* One commenter suggested that the definition of investment-grade rating include references to the equivalent short-term investment-grade ratings in addition to the long-term investment-grade ratings currently presented.

*DOT Response:* The ratings specified in the current definition pertain to any fixed-rate debt obligation with a term of one year or longer. For a project with long-term obligations in the form of variable-rate demand notes or other floating-rate instruments, it will be

necessary for the project sponsor to secure a long-term rating as well as a short-term rating.

*Lender.* One commenter asked whether a lender may be an entity other than a non-Federal qualified buyer (institutional investor).

*DOT Response:* The DOT must adhere to statutory language appearing at 23 U.S.C. 181(4). This language is explicit in defining lender as a "non-Federal qualified institutional buyer."

*Local Servicer.* One commenter suggested that the definition of "local servicer" be revised to clarify that the local servicer may also be the obligor in TIFIA credit transactions.

*DOT Response:* Although the statutory language appearing at 23 U.S.C. 185 does not address whether a governmental obligor may be its own servicer, it would be unsuitable for an obligor to be a servicer of its own credit instrument. Any local servicer will need to be an agent of the Secretary, rather than the obligor. The Secretary will determine the acceptability of proposed servicers for each project.

*Project.* One commenter suggested that discrete pieces of a larger project qualify for TIFIA assistance under the definition of "project."

*DOT Response:* In general, the scope of a TIFIA project should align with the definition that appears or will appear in that project's environmental Record of Decision (ROD). However, if one environmental document is prepared for a project of considerable length (such as a facility where various segments of independent utility may be separately financed, constructed, and operated over a significant period of time), that entire facility may not necessarily be considered a single project. The Secretary will make such determinations on a case-by-case basis.

*Project Obligation.* One commenter suggested that "project obligation" include any refinanced or refunded debt that was previously supported by a TIFIA credit instrument.

*DOT Response:* A project sponsor that receives a TIFIA loan guarantee or line of credit may refund the guaranteed loan or project obligations issued in connection with the line of credit at a subsequent date, provided that the Secretary determines that such refunding does not increase the DOT's credit risk.

*Substantial Completion.* One commenter suggested more flexibility in the definition of "substantial completion."

*DOT Response:* The definition of substantial completion that appears in § \_\_\_\_\_.3 of this rule is quoted directly from statutory language appearing at 23

U.S.C. 181(15). The DOT agrees that, in some cases, this statutory language may require elaboration to accommodate certain types of projects that are eligible for TIFIA assistance. Section \_\_\_\_\_.3 of the rule, therefore, has been revised to reflect that substantial completion means the opening of a project to vehicular or passenger traffic or a comparable event as determined by the Secretary and specified in the credit agreement.

#### *Section \_\_\_\_\_.5 Limitations on Assistance*

*Section \_\_\_\_\_.5(a).* Two commenters suggested that eligible project costs should be measured on an aggregate cash (future value) basis when determining the 33 percent ceiling on Federal credit assistance for projects receiving TIFIA funding.

*DOT Response:* The DOT agrees with the commenters' suggested approach to calculating eligible project costs. The rule has been revised to state that the total amount of credit assistance offered to any project under this part shall not exceed 33 percent of the anticipated eligible project costs, as measured on an aggregate cash (year-of-expenditure) basis.

*Section \_\_\_\_\_.5(b).* One commenter requested clarification regarding the need to obtain Secretarial approval for incurring costs before the application process begins.

*DOT Response:* The project sponsor need not obtain Secretarial approval before incurring costs on a project for which it is seeking TIFIA assistance. However, upon applying for TIFIA assistance, the applicant must obtain Secretarial approval for counting such costs toward "eligible project costs." The Secretary may grant such approval after costs have been incurred and after the application has been submitted. Generally, such costs will be confined to acquisition of right-of-way or development phase expenses incurred no earlier than three years prior to the date of application. The DOT determines that existing language in the rule is sufficiently broad to accommodate this understanding.

The DOT emphasizes that the Secretary will not recognize as "eligible project costs" any costs incurred for projects other than the one for which TIFIA assistance is being sought. Eligible project costs will be determined on a project basis, not a system basis.

*Section \_\_\_\_\_.5(d).* The DOT received multiple comments regarding contingent commitments of budget authority becoming available in subsequent years and the proposed letter of intent to be used to execute these commitments. Those comments

relating to § \_\_\_\_\_.5(d) are addressed by subtopic below.

*Section \_\_\_\_\_.5(d).* Two commenters suggested that a "letter of intent" may not be the appropriate vehicle for executing multi-year commitments of funds under TIFIA since, in other Federal programs, it is often deemed unacceptable as a viable and predictable funding source within the investment community.

*DOT Response:* The DOT acknowledges that the term "letter of intent" may be perceived by the financial community in the context of other programs with terms and provisions different from TIFIA, potentially creating confusion or uncertainty. The DOT also recognizes that the TIFIA program's effectiveness in stimulating private investment in transportation infrastructure projects depends, in large part, on investor recognition that TIFIA credit instruments represent solid and reliable Federal commitments. Therefore, the DOT will make a future-year or multi-year contingent commitment of funds for a project using a conditional term sheet. The conditional term sheet will resemble the standard term sheet that activates DOT's obligation of budget authority, but will also include the specific actions necessary to trigger subsequent obligation(s).

Upon execution of the conditional term sheet, the DOT will reserve budget authority attributable to the appropriate year(s). This reservation will ensure that the project has a priority claim (together with that of any other projects receiving such contingent commitments) on budget authority becoming available for the specified year, provided that the project sponsor satisfies each condition outlined in the conditional term sheet. Although the DOT will reserve funding based on the conditional term sheet, it will not obligate budget authority until the specified conditions have been met. Upon satisfaction of those conditions, the conditional term sheet can be amended and/or restated to trigger an obligation of funds.

*Section \_\_\_\_\_.5(d).* One commenter voiced concern regarding the potential impact of annual appropriations on the availability of TIFIA budget authority. Another commenter expressed support for the possibility of the DOT placing limits on the amount of future-year budget authority that may be reserved through a conditional document, but noted that the DOT should not place a strict cap on the amount of budget authority that may be reserved in this fashion.

*DOT Response:* The TIFIA funding is provided through multi-year contract

authority from the Highway Trust Fund, which can be obligated in advance of appropriations. However, this contract authority is subject to the annual Federal-aid highway obligation limitation, so the DOT will exercise restraint in executing conditional term sheets and reserving budget authority. In no event shall the DOT reserve more than 50 percent of the amount of budget authority authorized for a given fiscal year.

*Section \_\_\_\_ .5(d).* One commenter suggested that a project that has not received its environmental Record of Decision (ROD) be eligible for a contingent commitment of funds.

*DOT Response:* The DOT concurs with the commenter and reserves the right to execute a conditional term sheet with a project sponsor temporarily lacking certain required documents, such as a ROD. Upon satisfaction of the condition(s) specified in the conditional term sheet, the DOT will obligate the budget authority previously reserved. The conditional term sheet will include fixed dates by which any requirements (such as receipt of a ROD) must be satisfied in order for the reserved funding to be obligated. Such requirements should be met within 12 months from the date of execution of the conditional term sheet, except for the project segments or other milestones associated with a multi-year contingent commitment for a project requiring phased funding. In considering requests for contingent commitments of funds for projects temporarily lacking certain requirements, the DOT will give preference to those project sponsors that demonstrate an ability to satisfy such requirements within the fiscal year in which the conditional term sheet is executed.

*Section \_\_\_\_ .5(d).* One commenter asked for clarification regarding how a multi-year commitment would be affected by a downgrade of an initial rating to a below-investment-grade rating.

*DOT Response:* A project's conditional term sheet, term sheet, and credit agreement, as applicable, will specify the consequences of any changes in its creditworthiness, including a downgraded credit rating. In general, multi-year commitments between the DOT and the project sponsor will specify that future obligations are conditional on the project sponsor maintaining an investment-grade rating on its senior obligations.

*Section \_\_\_\_ .5(d).* Three commenters suggested clarification of the phrase "satisfactory progress" in the discussion of multi-year contingent commitments of funds. One of these commenters

requested an elaboration on the consequences of a project sponsor's failure to achieve "satisfactory progress."

*DOT Response:* The DOT concurs with the need for specificity when assessing a project's "satisfactory progress." Upon deciding to make a future-year or multi-year contingent commitment of funds for a project, the DOT and the project sponsor will identify precise project-specific milestones or other events to serve as prerequisites for future obligations of funds. These milestones or events will be determined for each project and specified in the conditional term sheet that the DOT and the project sponsor execute when formalizing a future-year or multi-year contingent commitment of funds.

#### *Section \_\_\_\_ .7 Application Process*

*Section \_\_\_\_ .7(b).* One commenter addressed a number of issues regarding the application checklist included as an appendix to the NPRM. Specific concerns related to: the impracticality of requesting copies of all governmental permits obtained for the project; the number of years for which historical information on the project applicant will be required; and the format of a project schedule, particularly with regard to whether the project's annual increments would be represented as dollars or milestones and how costs for design/build projects would be calculated when there are no base years or annual cost escalations.

*DOT Response:* The DOT agrees with the commenter regarding the impracticality of requiring applicants to include copies of all permits associated with the relevant project. Therefore, the DOT will request copies of only those permits that represent major milestones on the path to construction and completion either as part of the TIFIA application or as part of the credit agreement, as appropriate.

Regarding the number of years for which historical information will be required from the applicant, the DOT intends to require applicants to provide three years of historical financial information.

Concerning the project schedule, the DOT will require applicants to provide a timeline that illustrates the estimated start and completion dates for each major phase of development and construction and/or acquisition. In addition, applicants will be required to provide a statement of sources and uses of funds and a projection of annual cash flows.

Although design/build projects are typically budgeted as a total amount, the

cash flow pro forma should indicate the scheduled payouts. Additionally, the terms or anticipated terms of the design/build contract (including incentive payments or penalty provisions) should be explained.

These clarifications will be reflected in the text of the TIFIA application form, and do not necessitate any changes to the final rule itself.

*Section \_\_\_\_ .7(b)(1).* Four commenters were concerned that the application process for the TIFIA program would require them to produce more permits and approvals than would be feasible at the time of application, especially with respect to environmental documentation. These commenters requested that DOT clarify that certain permits, approvals, and ratings referred to in the threshold and selection criteria do not necessarily have to be obtained at the time of application.

*DOT Response:* The DOT recognizes the need for distinguishing between the documentation that must accompany the TIFIA application and the documentation that must be produced later in the funding process. For example, it is not necessary for the applicant to obtain an environmental Record of Decision (ROD) prior to the time of application submission; however, at a minimum the DOT will require applicants to have already circulated a draft Environmental Impact Statement or received a Finding of No Significant Impact or Categorical Exclusion, as applicable. The ROD will then be required as a condition for obligation of funds.

As another example, the DOT will not require that applicants submit a formal investment-grade rating on the project's senior obligations at the time of application submission. Instead, the DOT will require that project sponsors provide a preliminary rating opinion letter at that point. However, the DOT shall disburse TIFIA funds only after the project's senior obligations have obtained a formal investment-grade rating and a formal credit agreement has been executed. This rating requirement is clarified in § \_\_\_\_ .11 (a) and (b).

The application materials explicitly state what documentation is required at specific points in the process. As noted above, under limited circumstances, the DOT will consider executing a conditional term sheet that reserves budget authority but postpones obligation until the receipt of specified documentation or satisfaction of other requirements.

*Section \_\_\_\_ .7(d).* Several commenters suggested that DOT establish a rolling, rather than annual application and approval process.

*DOT Response:* The DOT has determined that a rolling application and approval process, which could result in a "first-come, first-served" funding process, would be contrary to the public interest. The DOT's commitment to building the strongest TIFIA portfolio possible requires that the Secretary have the opportunity to compare competing proposals each fiscal year.

The DOT recognizes that some prospective applicants may view an annual application process as unduly restrictive. To build greater flexibility into the application process, the DOT may consider establishing a semi-annual process for accepting and approving applications starting in fiscal year 2000. Such a process might be divided into a primary and secondary round of application submissions. For a given fiscal year, the DOT could accept an initial round of applications early in the year and announce project selections by mid-year. If there were current-year budget authority remaining after this initial round, the DOT could choose to accept a second round of applications later in the year, making any additional project selections before the fiscal year-end. Alternatively, the DOT may elect to carry forward unused budget authority without accepting additional applications in a given year. The exact timing of application submittals and project selections in a given fiscal year will be published in advance in the **Federal Register**.

*Section \_\_\_\_ .11 Investment-grade ratings*

*Section \_\_\_\_ .11.* One commenter suggested that DOT consider extending loan guarantees to non-investment-grade credits.

*DOT Response:* The TIFIA statute is explicit in stating that DOT's funding of a secured (direct) loan is contingent on the project's senior obligations receiving an investment-grade rating (23 U.S.C. 183(a)(4)) and applies this requirement to loan guarantees as well (23 U.S.C. 183(e)). Accordingly, the DOT will not guarantee loans to any project whose senior obligations fail to attain an underlying investment-grade rating.

*Section \_\_\_\_ .11.* One commenter suggested that the formal rating requirement be waived if the project has bond insurance.

*DOT Response:* The project sponsor's purchase of bond insurance is relevant to the DOT only if the Federal Government enjoys the same security as do other investors in the project. Neither the preliminary rating opinion letter nor the formal credit rating should reflect the effect of bond insurance, unless that insurance provides credit enhancement

that secures the TIFIA obligation as well. This clarification appears at § \_\_\_\_ .11(c).

*Section \_\_\_\_ .11.* One commenter requested clarification regarding the term "rating agency." Specifically, the commenter asked if a rating agency must be nationally recognized.

*DOT Response:* The term "rating agency" is defined to mean "a bond rating agency identified by the Securities and Exchange Commission as a nationally recognized statistical rating organization" in § \_\_\_\_ .3 (Definitions) of the final rule.

*Section \_\_\_\_ .13 Threshold Criteria*

*Section \_\_\_\_ .13(a)(1).* Two commenters suggested that the DOT require a project's inclusion on a local and/or regional plan as appropriate, but not on a long-range State transportation plan because many States' plans are policy documents that are not project-specific.

*DOT Response:* In recognition of commenters' concerns regarding the planning requirements for TIFIA projects, the DOT has clarified its interpretation of the TIFIA statutory provisions that address this issue (23 U.S.C. 182(a)(1) and 23 U.S.C. 182(a)(2)). The DOT has revised Section \_\_\_\_ .13(a)(1) to require an applicant to demonstrate that its project is consistent with the long-range State transportation plan and, if located in a metropolitan area, is included in that area's metropolitan transportation plan. As stated in the NPRM, any approved project must appear in an approved State transportation improvement program before the DOT will obligate funds on the project's behalf.

*Section \_\_\_\_ .13(a)(1).* One commenter suggested that for a project subject to multi-State jurisdiction, the DOT accept a plan adopted by an agency's Board of Directors rather than require the project to be in a State transportation improvement program.

*DOT Response:* The TIFIA statute is explicit in requiring that State support for any TIFIA project be evidenced by the project's inclusion in the State transportation improvement program (23 U.S.C. 182(a)(1)(B)). The fact that a project spans multiple jurisdictions or States does not obviate this requirement. In the event of a multi-jurisdictional project, the project must appear on the approved State transportation improvement program for each State involved.

*Section \_\_\_\_ .13(a)(4).* One commenter requested clarification regarding the threshold criterion that requires a pledge of dedicated revenue sources (23 U.S.C. 182(a)(4)). The commenter asked whether the referenced requirement

applies to the entirety of the project financing or only to the portion of the project financing deriving from TIFIA credit assistance.

*DOT Response:* The TIFIA statute states that "project financing shall be repayable, in whole or in part, from tolls, user fees, or other dedicated revenue sources," (23 U.S.C. 182(a)(4)). The DOT interprets this to mean that an applicant must pledge a dedicated revenue source, as approved by the Secretary, to repay at least part of the entire project financing. Regarding pledged security for the TIFIA credit instrument, the TIFIA statute is again clear in requiring that at least part, but not necessarily all, of the pledge must derive from an approved dedicated revenue source (23 U.S.C. 183(b)(3) and 23 U.S.C. 183 (c)(3)). Securing the TIFIA credit instrument with dedicated revenue sources, at least in part, would satisfy these statutory requirements.

*Section \_\_\_\_ .13(a)(5).* One commenter suggested that the DOT require private project sponsors to demonstrate State support for the project and prove that they will be given the authority from the State to develop the project for which assistance is being sought. The commenter proposed these requirements in addition to the current requirement that projects be included in the State transportation plan and the approved State transportation improvement program.

*DOT Response:* The DOT considers any project appearing in an approved State transportation improvement program (23 U.S.C. 135(f)) to have been fully reviewed by the State in question. The DOT considers that a project's appearance in the approved State transportation improvement program and its acquisition of necessary permits demonstrate State support for the project, regardless of whether the project is publicly or privately sponsored.

*Section \_\_\_\_ .13(c).* One commenter suggested that the DOT recognize alternative forms of collateral (e.g., revenues from leases or real estate) as pledged security (dedicated revenue sources).

*DOT Response:* The DOT agrees that the collateral value of other types of pledged assets (such as lease income) should be explicitly recognized, and may, upon thorough evaluation, be deemed to represent a satisfactory dedicated revenue source for the purposes of administering the TIFIA program. The DOT has clarified its position on acceptable forms of dedicated revenue sources and/or pledged security in the rule. New

language has been added to § \_\_\_\_13(c) to specify that the Secretary will determine the acceptability of contributions of collateral and other proposed pledges on a case-by-case basis.

*Section \_\_\_\_13(c).* One commenter suggested that the DOT accept a general obligation as a dedicated revenue source and permit project obligations to be repaid from general revenues as well as dedicated revenue sources.

*DOT Response:* The DOT agrees that general obligation pledges or general corporate promissory pledges should be explicitly recognized, and may represent a satisfactory dedicated revenue source for the purposes of administering the TIFIA program. The DOT has clarified its position on acceptable forms of dedicated revenue sources and/or pledged security in the rule. New language has been added to § \_\_\_\_13(c) to specify that general obligation pledges may be acceptable.

*Section \_\_\_\_13(c).* Two commenters suggested that the DOT allow limited use of Federal funds to repay TIFIA credit.

*DOT Response:* Federal funds, regardless of source, are not eligible to serve as pledged security for a TIFIA credit instrument. This position is consistent with both Federal credit policy and Congressional intent that the Federal Government encourage the utilization of project-based revenue sources. Revised regulatory language appearing at § \_\_\_\_13(c) upholds this policy.

#### *Section \_\_\_\_15 Selection Criteria*

*Section \_\_\_\_15(a).* One commenter suggested that the DOT clarify how projects will be evaluated and selected.

*DOT Response:* The TIFIA statute specifies eight criteria by which the Secretary shall evaluate and select qualified projects. The DOT finds these eight mandatory selection criteria to be sufficient, and does not plan to favor certain criteria over others or to establish additional criteria for fiscal year 1999 evaluations and selections. Beginning with fiscal year 2000, and in conjunction with the TIFIA application process, the Secretary will announce specific weighting factors for the statutory selection criteria as well as policy goals for the program. In addition, the Secretary will make publicly available the summary results of each project's evaluation as well as the final project selections.

*Section \_\_\_\_15(a).* One commenter suggested that the DOT give priority to projects that improve airport access.

*DOT Response:* Eligibility for TIFIA assistance extends to all surface

transportation projects specified in § \_\_\_\_3 of this rule, including those that provide airport access. Accordingly, the DOT sees no need for specially recognizing ground transportation systems that seek to improve regional access to airports.

*Section \_\_\_\_15(a)(2).* One commenter suggested that a rate covenant is unnecessarily restrictive and that an investment-grade rating should be sufficient to demonstrate a project's creditworthiness.

*DOT Response:* The TIFIA statute does not require that a rate covenant be provided for proposed TIFIA projects. Rather, the statute notes the need for sufficient pledged security to support the project obligations, and that such security may include a rate covenant, coverage requirement, or other security features (23 U.S.C. 183(b)(3)(iii) and 23 U.S.C. 184 (b)(5)(ii)). The acceptability of pledged security will be determined by the Secretary on a case-by-case basis. There is no need for further clarification in the rule.

*Section \_\_\_\_15(a)(3).* One commenter suggested that the DOT modify the language in this paragraph to read: "The extent to which such assistance would foster innovative public-private partnerships [OR] attract private debt or equity investment."

*DOT Response:* The TIFIA statute is clear in its use of the word "and." Accordingly, the DOT will apply this criterion conjunctively by assessing both the extent to which the project involves a public-private partnership and the extent to which the project is funded with private investment. A project may achieve each of the two objectives in varying degrees.

*Section \_\_\_\_15(a)(3).* Two commenters suggested that the DOT recognize local and State government investment in projects when evaluating applications for TIFIA assistance.

*DOT Response:* The DOT recognizes that the TIFIA program will leverage Federal funds with both private investment and State and local government investment. The DOT will acknowledge all sources of contributed or invested capital when evaluating applications and sees no justification for amending the rule on this issue.

*Section \_\_\_\_15(a)(5).* One commenter suggested that the DOT further emphasize technology as an evaluation criterion and that the technology requirement not be limited strictly to intelligent transportation systems (ITS).

*DOT Response:* The selection criterion related to the applicant's use of new technologies appearing in the TIFIA statute (23 U.S.C. 182(b)(2)(A)(v)) and in § \_\_\_\_15(a)(5) of the rule, which

references ITS, is not intended to be limiting. The DOT's project evaluation will take into account all new technologies being deployed.

*Section \_\_\_\_15(a)(6).* Two commenters suggested that the DOT measure the impact of TIFIA financing on a relative basis rather than strictly calculating the absolute amount of budget authority needed or the amount of private investment attracted.

*DOT Response:* The DOT agrees that the absolute amount of budget authority required to fund a TIFIA credit instrument will not indicate the leveraging effect of the credit assistance as effectively as a relative comparison of the required budget authority and nominal value of credit assistance. The DOT intends to evaluate projects on the basis of ratios as opposed to absolute amounts wherever appropriate. The DOT believes that this approach is consistent with the language in § \_\_\_\_15(a)(6) and does not necessitate any change to the rule.

*Section \_\_\_\_15(d).* Two commenters requested that the DOT clarify what is meant by a "small" Federal contribution. Additionally, the commenters suggested that the DOT refrain from placing any limits on the level of Federal contribution for those projects receiving TIFIA assistance.

*DOT Response:* The DOT's assessment of total Federal contributions is intended to support selection criteria three and eight as specified in the TIFIA statute (23 U.S.C. 182(b)(2)(A)(iii and viii)) and the rule (§ \_\_\_\_15(a)(3 and 8)). The DOT will implement these criteria through a relative evaluation of the total Federal contribution as a share of total project costs, and in considering criterion eight will give preference to projects for which total Federal assistance would be reduced due to the use of the TIFIA credit instrument. The DOT has revised the rule in § \_\_\_\_15(d) to reflect the Federal Government's interest in the relative reduction in Federal assistance rather than a "small" contribution as measured in absolute terms.

#### *Section \_\_\_\_17 Charges*

*Section \_\_\_\_17(c).* Two commenters suggested placing limits on the amount of any application initiation charges or credit processing charges. Allowing the DOT to increase the application initiation or credit processing charges up to the full cost of the Federal subsidy seemed unreasonable and could potentially result in lower-risk projects "subsidizing" higher-risk projects.

*DOT Response:* The DOT has clarified its position on various charges relating to the TIFIA program. The DOT will

require a non-refundable application initiation charge for each project applying for TIFIA assistance. The DOT may also require an additional credit processing charge for projects selected to receive assistance. Any required application initiation or credit processing charge must be paid by the project sponsor applying for the TIFIA assistance and cannot be paid by another party on behalf of the project sponsor. The proceeds of any such charges will equal a portion of the costs to the Federal Government of soliciting and evaluating applications, selecting projects to receive assistance, and negotiating credit agreements. For fiscal year 1999, the DOT will require an application initiation charge of \$5,000 for each project applying for TIFIA assistance. The DOT will not require any credit processing charges for fiscal year 1999. For each application and approval cycle in fiscal year 2000 and beyond, the DOT may adjust the amount of the application initiation charge and will determine the appropriate amount of the credit processing charge on the basis of its program implementation experience. The DOT will publish these amounts in each **Federal Register** solicitation for applications.

If, in any given year, there is insufficient budget authority to fund the credit instrument for a qualified project that has been selected to receive TIFIA assistance, the DOT and the approved applicant may agree upon a supplemental charge to be paid by or on behalf of the approved applicant to reduce the subsidy cost of that project.

Project sponsors shall not include any of these fees or charges among eligible project costs for the purpose of calculating the maximum 33 percent credit amount.

Sections \_\_.17(a), \_\_.17(b), and \_\_.17(c) have been revised to reflect these clarifications regarding charges.

#### General Comments

One commenter suggested that the TIFIA regulations be amended to clarify that a project sponsor may draw on a line of credit before drawing on its debt service reserve fund.

*DOT Response:* Section 184(b)(3) of title 23 provides that the obligor may draw upon the line of credit only if net project revenues (including, among other sources, any debt service reserve fund) are insufficient to pay costs specified in 23 U.S.C. 184(a)(2). These costs include debt service costs. The DOT interprets debt service costs to include both direct payments of principal and interest as well as reimbursements for such payments in the form of legally required deposits to

a debt service reserve fund. Nothing would prohibit a credit agreement for a line of credit from allowing immediate reimbursements to a debt service reserve fund in the event of withdrawals from such a fund. This clarification appears at \_\_.5(e).

One commenter suggested that the 20 percent limitation on annual draws on a line of credit should be adjusted to reflect the amount's future value for the year in which the draw may be made, as opposed to the present value for the year in which the line of credit is executed.

*DOT Response:* The TIFIA statute is explicit in stating that the total amount of a line of credit shall not exceed 33 percent of the reasonably anticipated eligible project costs (23 U.S.C. 184(b)(2)(A)), and that the amount drawn in any one year shall not exceed 20 percent of the total amount of the line of credit (23 U.S.C. 184(b)(2)(B)). Also, the DOT has determined that eligible project costs will be measured on an aggregate cash basis (i.e., year-of-expenditure dollars) through the end of the construction period (without any discounting or inflating of nominal amounts). It would be both contrary to statute and internally inconsistent to inflate future-year amounts for the draws on a line of credit.

One commenter suggested that the DOT consider the possibility of purchasing the loans it has guaranteed.

*DOT Response:* While the TIFIA statute explicitly authorizes the DOT to sell direct loans (23 U.S.C. 183(d)), the statute does not provide similar language that would authorize the DOT to purchase guaranteed loans. Moreover, the policy of the DOT acquiring loans it has guaranteed would be contrary to the program's goal of supporting the private sector's ability to accurately assess the risk of revenue-backed surface transportation projects. Other than instances involving the assignment of guaranteed loans due to default, the DOT will not consider the acquisition of guaranteed loans.

Several commenters requested clarification of the statements in the NPRM regarding the provisions of section 149(b) of the Internal Revenue Code (the "Code") that deny tax-exempt status to obligations that are directly or indirectly federally guaranteed within the meaning of the Code. Two commenters asked whether interest on otherwise tax-exempt bonds used to finance a TIFIA-assisted project would be deemed taxable as a consequence of Federal assistance to the project under the TIFIA program.

*DOT Response:* The Conference Report for TIFIA contains the following

statements: "The Conference recognizes that the Congress enacted the Deficit Reduction Act of 1984 provision prohibiting the combination of Federal guarantees with tax-exempt debt, because of concerns that such a double-subsidy could result in the creation of a 'AAA' rated security superior to U.S. Treasury obligations. Accordingly, any project loan backed by a loan guarantee as provided in TIFIA must be issued on a taxable basis." And, "The Conferees are aware that present Federal income tax law prohibits the use of direct or indirect Federal guarantees in combination with tax-exempt debt (section 149(b) of the Internal Revenue Code of 1986). The TIFIA provisions of the conference agreement do not override or otherwise modify this provision of the Code."

The Internal Revenue Service and the Department of the Treasury, rather than the DOT, are responsible for the interpretation of the Federal tax laws, including Federal guarantee provisions. Applicants intending to use tax-exempt bonds in connection with TIFIA loans or lines of credit should consult with the Internal Revenue Service, the Department of the Treasury, or their bond counsel. The DOT will be available to provide applicants with assistance on the interpretation of the non-tax legal and financial provisions of TIFIA.

One commenter suggested that since mass transit capital projects are eligible for TIFIA credit assistance, the Mass Transit Account of the Highway Trust Fund should fund the subsidy costs of TIFIA credit instruments provided for such projects.

*DOT Response:* The TIFIA statute explicitly authorizes that funding will be provided from the Highway Trust Fund other than the Mass Transit Account (23 U.S.C. 188(a)(1)).

One commenter requested that DOT clarify how long TIFIA funds are available and whether funds carry over to future years.

*DOT Response:* As specified in the preamble of the NPRM, the TIFIA authorizes annual funding levels for both total credit amounts (i.e., the total principal amounts that may be disbursed in the form of direct loans, loan guarantees, or lines of credit) and subsidy amounts (i.e., the amounts of budget authority available to cover the estimated present value of expected losses associated with the provision of credit instruments, net of any fee income). Funding for the subsidy amounts is provided in the form of budget authority funded from the Highway Trust Fund, other than the Mass Transit Account. As a practical

example, for fiscal year 1999, the TIFIA authorizes \$80 million in budget authority to fund the subsidy costs associated with a total nominal amount of direct loans, loan guaranties, and lines of credit that is limited to \$1.6 billion. Depending on the individual risk assessments made for each of the projects receiving assistance, the total amount of credit assistance provided in fiscal year 1999 may be less than the \$1.6 billion limitation.

Total Federal credit assistance authorized under the TIFIA program is limited to \$1.6 billion in fiscal year 1999; \$1.8 billion in fiscal year 2000; \$2.2 billion in fiscal year 2001; \$2.4 billion in fiscal year 2002; and \$2.6 billion in fiscal year 2003. These amounts lapse if not awarded by the end of the fiscal year for which they are provided.

To support this assistance by funding the required subsidy amounts, the TIFIA provides budget authority of \$80 million in fiscal year 1999; \$90 million in fiscal year 2000; \$110 million in fiscal year 2001; \$120 million in fiscal year 2002; and \$130 million in fiscal year 2003. Of the amounts made available, the Secretary may use up to \$2 million for each of the fiscal years for administrative expenses. Unobligated budget authority remains available for obligation in subsequent years.

Note that TIFIA budget authority is subject to an annual obligation limitation that may be established in appropriations law. Like the funding for certain other administrative or allocated programs (not apportioned to the States) that are subject to the annual Federal-aid obligation ceiling, the TIFIA budget authority likely will be reduced each year before it is made available to fund credit instruments. The extent of any budget authority reduction will depend on the ratio of the obligation ceiling, which is determined annually in the appropriations process, to the contract authority for the Federal-aid highway program, which was established in TEA-21. For fiscal year 1999, this reduction was 11.7 percent, which left about \$70.6 million of TIFIA budget authority instead of the \$80 million originally authorized under TEA-21. Future annual reductions of like amount would result in a cumulative amount of budget authority available to fund TIFIA credit instruments of about \$470 million through fiscal year 2003 instead of the \$530 million originally authorized under TEA-21. The TIFIA credit amounts authorized under TEA-21 are not subject to this annual reduction.

One commenter suggested that the DOT clarify its position in regard to the

Federal Government's "parity" claim in the event of bankruptcy.

*DOT Response:* The statute permits the DOT to have a lien on revenues subject to any lien securing project obligations (see 23 U.S.C. 183(b)(3)(B) and 184(b)(5)(B)), but TIFIA also requires that the secured loan, loan guarantee, or line of credit "shall not be subordinated to the claims of any holder of project obligations in the event of bankruptcy, insolvency, or liquidation of the obligor" (see 23 U.S.C. 183(b)(6) and 184(b)(8)). The credit agreement will specify the DOT's interest in the pledged security consistent with these provisions of law and in relation to the interests of any other creditors.

#### Rule Document Format

In the NPRM, the DOT proposed a common rule that would have been issued by FHWA, FRA, and FTA and repeated verbatim in each of the three Operating Administration's chapters of the Code of Federal Regulations (CFR). After reconsideration, the Secretary of Transportation is issuing the final rule once in a new CFR part (49 CFR Part 80). For clarity, three brief cross-references to the final rule are being added to each of the three Operating Administration's rules. The cross-references are found in 23 CFR Part 180 for FHWA, 49 CFR Part 261 for FRA, and 49 CFR Part 640 for FTA. These cross-references will enable members of the public who are familiar with only one of the Operating Administrations to have a simple way of locating the final rule.

#### Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

DOT has determined that issuance of a rule is necessary to implement TIFIA, and has concluded that this action represents a "significant regulatory action" within the meaning of DOT's Regulatory Policies and Procedures (44 FR 11034, February 26, 1979) and Executive Order 12866. This determination is based on a finding that the rule may have an annual effect on the economy of \$100 million or more. This rule was reviewed by the Office of Management and Budget under E.O. 12866.

This section summarizes the estimated economic impact of this rule. This regulation would affect only those entities that voluntarily elected to apply for TIFIA assistance and were selected to receive a Federal credit instrument. It would not impose any direct costs on non-participants.

The DOT has evaluated the economic impact of this regulatory action.

However, because the number, nature, and size of projects to be assisted will not be known until specific project applicants come forward, this analysis is by necessity an estimate. Congress recognized this by including a provision in TIFIA (23 U.S.C. 189) requiring the Secretary to submit a report summarizing the effectiveness of the program within four years of the date of enactment of the legislation (June 9, 2002).

DOT and industry research has indicated that there are substantial economic productivity gains to be derived from capital investment in surface transportation facilities. One study estimates that in the four-decade period from 1950 to 1989, U.S. firms realized annual production cost savings of 18 percent from general highway investment (yearly return of 18 cents per dollar invested in all roads) and 24 percent from investment in non-local roads.<sup>1</sup> In addition to these direct returns, transportation capital investment typically generates significant spillover benefits, which may be of a non-financial nature, such as reduced pollution, increased safety, improved international competitiveness, and enhanced accessibility.

Just as transportation investment produces benefits, failure to invest results in cost increases. Another recent study estimates that congestion costs the average U.S. citizen \$370 annually, in terms of time lost and fuel wasted.<sup>2</sup> These costs are expected to increase as growing investment needs—both in terms of system renewal and capacity expansion—and limited availability of public funding contribute to declining performance.

There has been dramatic growth in both freight movement and passenger travel in recent years, which is expected to continue. For example, since 1980, total ton-miles and intercity passenger miles have grown by 30 percent and 60 percent, respectively, according to a recent study by the American Association of State Highway and Transportation Officials.

Despite substantial increases in authorized Federal funding levels for surface transportation under the Transportation Equity Act for the 21st Century, current resources from all levels of government are not expected to be able to keep pace with maintenance and preservation needs, let alone the additional demands resulting from

<sup>1</sup> Contribution of Highway Capital to Industry and National Productivity Growth—Executive Summary, Ishaq Nadirir, New York, FHWA, 1996.

<sup>2</sup> Measuring and Monitoring Urban Mobility, Texas Transportation Institute, November 1996.

growth in population and goods movement. Funding shortfalls can be particularly acute for large infrastructure projects (costing \$100 million or more) which, due to their scale, often cannot be readily accommodated in ongoing State and local capital renewal programs.

The economic drag created by underinvestment in the nation's transportation network is substantial, as shippers and motorists incur increased vehicle maintenance and fuel costs, shipping delays, safety hazards, and time delays associated with congestion and poorly maintained roads.

The TIFIA was established to provide fractional credit assistance to major transportation infrastructure projects—such as border crossings, trade corridors, and intermodal transfer facilities—that have the potential of generating substantial economic benefits both regionally and nationally. In many cases, such projects are capable of being supported through direct user charges or dedicated revenue streams that can be used to access private capital and other non-Federal funding sources. The TIFIA is designed to fill market gaps through providing supplemental and/or subordinate capital to such projects. It should facilitate their ability to access the capital markets or other financing sources for the majority of their funding needs. Through the TIFIA program's leverage of limited Federal funds with private capital, these capital-intensive projects can be advanced without displacing smaller, more traditional grant-supported projects. Federal risk exposure should be mitigated by substantial co-investment from non-Federal parties and the use of objective, market-based credit evaluation criteria.

The TIFIA is authorized to receive \$530 million of budget authority to support up to \$10.6 billion in nominal amounts of credit (or such lesser amounts of credit as can be supported by the budget authority). Under the terms of the legislation, the Federal share is limited to not more than 33 percent of total eligible project costs. In many cases, the actual share of TIFIA assistance may be considerably less. For example, prior to passage of the TIFIA, three major surface transportation projects in southern California obtained Federal credit instruments pursuant to special appropriations from Congress. Between 1993 and 1996, the Congress approved a \$120 million standby Federal line of credit for the San Joaquin Hills Toll Road; two standby lines of credit totaling \$145 million for the Foothill-Eastern Toll Road; and a \$400 million direct Federal loan for the Alameda Corridor project. Each of these

projects would have met the threshold eligibility criteria under the terms of the TIFIA program. The Federal credit assistance as a percent of total project costs for these three investments is approximately 8.5 percent, 11.5 percent, and 17.5 percent, respectively.

Under the Federal Credit Reform Act of 1990 (FCRA), the amount of budget authority necessary to support a Federal credit instrument depends upon the subsidy cost (i.e., the estimated present value cost of estimated losses that will be incurred as a result of defaults, net of any fee income). Each project will be assigned a subsidy cost based upon an evaluation of its creditworthiness.

Since the actual projects participating in the TIFIA program have yet to be identified, it is not possible at this stage to ascertain the appropriate subsidy amounts. If, for example, the assumed average subsidy rate under TIFIA were 10 percent, the \$530 million of budget authority could support \$5.3 billion in nominal amount of Federal credit instruments, and (assuming a 33 percent TIFIA share of project costs) an aggregate of \$15.9 billion in capital investment. This would represent a benefit:cost ratio (total capital investment compared to federal budgetary cost) of 30:1. If the subsidy rate averaged 5 percent, the budget authority could support \$31.8 billion in aggregate investment; and if the subsidy rate averaged 15 percent, the budget authority could support approximately \$10.6 billion in aggregate investment. The only costs imposed on the participants are the repayment of credit at the U.S. Treasury rate (which in certain instances may be significantly less than their own marginal cost of capital), a credit processing charge, and an application charge based upon direct costs incurred by the DOT in processing applications.

On this basis, the DOT has concluded that the TIFIA will promote the efficient functioning of project delivery and the private markets, and will generate both direct and indirect benefits, including reduced congestion, greater mobility, improved safety, an enhanced environment, and greater economic growth. These benefits are anticipated to far surpass the combined direct costs to the Federal Government (\$530 million) and to the entities that elect to participate in the program.

#### **Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 5 U.S.C. 601-612) requires an assessment of the extent to which rules will have an impact on small business or other small entities. Consistent with the Regulatory

Flexibility Act, the DOT has evaluated the effects of this rule on small business or other small entities. This rule implements a Federal credit assistance program for surface transportation projects. There will be a substantial economic impact on the projects funded. However, the DOT anticipates that few, if any, of the applicants for assistance, will be small entities. Applicants are likely to be States and large public, or quasi-public entities. Based on that evaluation, the DOT hereby certifies that this action will not have significant economic impact on a substantial number of small entities.

#### **Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than \$100 million annually. This rule would not impose a Federal mandate resulting in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. The rule simply implements a Federal credit assistance program.

#### **Executive Order 12612 (Federalism Assessment)**

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612. The DOT has determined that this action does not have sufficient federalism implications to warrant the preparation of a federalism assessment. The bases for this determination are that: (a) eligibility for assistance under this program extends to both private and public entities; and (b) the recipients of credit under this voluntary program will receive a benefit, rather than incur costs, through participation.

#### **Executive Order 12372 (Intergovernmental Review)**

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

#### **Paperwork Reduction Act**

This document does not contain information collection requirements for the purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Based upon preliminary assessments, research reports, meetings

with focus groups, and discussions with potential respondents, the DOT anticipates approximately six respondents to the application annually. In the future, the DOT anticipates ten or more respondents annually, immediate steps will be taken to seek approval from OMB for an information collection, as required under the Paperwork Reduction Act.

### National Environmental Policy Act

As specified under section 1503 of TIFIA, and codified under section 182(c)(2) of title 23, U.S.C., each project obtaining assistance under this program is required to adhere to the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*). This final rule simply provides the procedure to apply for credit assistance; therefore, by itself, this rule will not have any effect on the quality of the environment.

### Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

### List of Subjects

#### 23 CFR Part 180

Credit programs-transportation, Highways and roads, Investments.

#### 49 CFR Part 80

Credit programs-transportation, Highways and roads, Investments, Mass transit, Railroads, Reporting and recordkeeping requirements.

#### 49 CFR Part 261

Credit programs-transportation, Investments, Railroads.

#### 49 CFR Part 640

Credit programs-transportation, Investments, Mass transit.

### Federal Highway Administration

#### 23 CFR Chapter I

For the reasons set forth in the preamble, the Federal Highway Administration amends chapter I, title 23, Code of Federal Regulations, as follows:

1. Add Part 180 to read as follows:

### PART 180—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION PROJECTS

Sec.

180.1 Cross-reference to credit assistance.

**Authority:** secs. 1501 *et seq.*, Pub. L. 105–178, 112 Stat. 107, 241, as amended; 23 U.S.C. 181–189 and 315; 49 CFR 1.48.

#### § 180.1 Cross-reference to credit assistance.

The regulations in 49 CFR Part 80 shall be followed in complying with the requirements of this part. Title 49 CFR Part 80 implements the Transportation Infrastructure Finance and Innovation Act of 1998, secs. 1501 *et seq.*, Pub. L. 105–178, 112 Stat. 107, 241.

Dated: May 25, 1999.

**Kenneth R. Wykle,**

*Administrator, Federal Highway Administration.*

### Office of the Secretary of Transportation

#### 49 CFR Part 80

For the reasons set forth in the preamble, the Office of the Secretary of Transportation amends title 49, Code of Federal Regulations, subtitle 4 as follows:

2. Add Part 80, to read as follows:

### PART 80—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION PROJECTS

Sec.

- 80.1 Purpose.
- 80.3 Definitions.
- 80.5 Limitations on assistance.
- 80.7 Application process.
- 80.9 Federal requirements.
- 80.11 Investment-grade ratings.
- 80.13 Threshold criteria.
- 80.15 Selection criteria.
- 80.17 Charges.
- 80.19 Reporting requirements.

**Authority:** secs. 1501 *et seq.*, Pub. L. 105–178, 112 Stat. 107, 241, as amended; 23 U.S.C. 181–189 and 315; 49 CFR 1.48, 1.49, and 1.51.

#### § 80.1 Purpose.

This part implements a Federal credit assistance program for surface transportation projects.

#### § 80.3 Definitions.

The following definitions apply to this part:

**Conditional term sheet** means a contractual agreement between the U.S. Department of Transportation (DOT) and the project sponsor (and the lender, if applicable) by which the DOT reserves TIFIA funding for a specific project and commits to providing Federal credit assistance to that project at a future point in time upon satisfaction of specified conditions and subject to the future availability of obligation authority. The DOT will not legally obligate budget authority until those conditions are met. Upon satisfaction of those conditions, the conditional term sheet can be amended and/or restated to trigger an obligation of funds.

**Credit agreement** means a contractual agreement between the DOT and the project sponsor (and the lender, if applicable) that formalizes the terms and conditions established in the term sheet (or conditional term sheet) and authorizes the execution of a secured loan, loan guarantee, or line of credit.

**Eligible project costs** mean amounts substantially all of which are paid by, or for the account of, an obligor in connection with a project, including the cost of:

(1) Development phase activities, including planning, feasibility analysis, revenue forecasting, environmental review, permitting, preliminary engineering and design work, and other pre-construction activities;

(2) Construction, reconstruction, rehabilitation, replacement, and acquisition of real property (including land related to the project and improvements to land), environmental mitigation, construction contingencies, and acquisition of equipment; and

(3) Capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction.

**Federal credit instrument** means a secured loan, loan guarantee, or line of credit authorized to be made available under this subchapter with respect to a project.

**Investment-grade rating** means a rating category of BBB minus, Baa3, or higher assigned by a rating agency to project obligations offered into the capital markets.

**Lender** means any non-Federal qualified institutional buyer (as defined in 17 CFR 230.144A(a)), known as Rule 144A(a) of the Securities and Exchange Commission and issued under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), including:

(1) A qualified retirement plan (as defined in section 4974(c) of the Internal Revenue Code of 1986, 26 U.S.C. 4974(c)) that is a qualified institutional buyer; and

(2) A governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986, 26 U.S.C. 414(d)) that is a qualified institutional buyer.

**Line of credit** means an agreement entered into by the Secretary with an obligor under section 184 of title 23 to provide a direct loan at a future date upon the occurrence of certain events.

**Loan guarantee** means any guarantee or other pledge by the Secretary to pay all or part of the principal of and interest on a loan or other debt

obligation issued by an obligor and funded by a lender.

*Local servicer* means:

- (1) A State infrastructure bank established under title 23; or
- (2) A State or local government or any agency of a State or local government that is responsible for servicing a Federal credit instrument on behalf of the Secretary.

*Obligor* means a party primarily liable for payment of the principal of or interest on a Federal credit instrument, which party may be a corporation, partnership, joint venture, trust, or governmental entity, agency, or instrumentality.

*Project* means:

- (1) Any surface transportation project eligible for Federal assistance under title 23 or chapter 53 of title 49;
- (2) A project for an international bridge or tunnel for which an international entity authorized under Federal or State law is responsible;
- (3) A project for intercity passenger bus or rail facilities and vehicles, including facilities and vehicles owned by the National Railroad Passenger Corporation, and components of magnetic levitation transportation systems; and
- (4) A project for publicly owned intermodal surface freight transfer facilities, other than seaports and airports, if the facilities are located on or adjacent to National Highway System routes or connections to the National Highway System.

*Project obligation* means any note, bond, debenture, or other debt obligation issued by an obligor in connection with the financing of a project, other than a Federal credit instrument.

*Project sponsor*, for the purposes of this part, means an applicant for TIFIA assistance or an obligor, as appropriate.

*Rating agency* means a bond rating agency identified by the Securities and Exchange Commission as a Nationally Recognized Statistical Rating Organization.

*Secured loan* means a direct loan or other debt obligation issued by an obligor and funded by the Secretary in connection with the financing of a project under section 183 of title 23.

*State* means any one of the fifty states, the District of Columbia, or Puerto Rico.

*Subsidy amount* means the amount of budget authority sufficient to cover the estimated long-term cost to the Federal Government of a Federal credit instrument, calculated on a net present value basis, excluding administrative costs and any incidental effects on governmental receipts or outlays in accordance with the provisions of the

Federal Credit Reform Act of 1990 (2 U.S.C. 661 *et seq.*).

*Substantial completion* means the opening of a project to vehicular or passenger traffic or a comparable event as determined by the Secretary and specified in the credit agreement.

*Term sheet* means a contractual agreement between the DOT and the project sponsor (and the lender, if applicable) that sets forth the key business terms and conditions of a Federal credit instrument. Execution of this document represents a legal obligation of budget authority.

*TIFIA* means the Transportation Infrastructure Finance and Innovation Act of 1998, Pub. L. 105-178, 112 Stat. 107, 241 (1998).

#### § 80.5 Limitations on assistance.

(a) The total amount of credit assistance offered to any project under this part shall not exceed 33 percent of the anticipated eligible project costs, as measured on an aggregate cash (year-of-expenditure) basis.

(b) Costs incurred prior to a project sponsor's submission of an application for credit assistance may be considered in calculating eligible project costs only upon approval of the Secretary. In addition, applicants shall not include application charges or any other expenses associated with the application process (such as charges associated with obtaining the required preliminary rating opinion letter) among the eligible project costs.

(c) No costs financed internally or with interim funding may be refinanced under this part later than a year following substantial completion of the project.

(d)(1) Within the overall credit assistance limitation of 33 percent of eligible project costs, the Secretary may consider making future-year or multi-year contingent commitments of budget authority and associated credit assistance for projects temporarily lacking certain requirements or with extended construction periods and financing needs. The TIFIA's effectiveness in stimulating private investment in transportation infrastructure depends, in large part, on investor recognition that TIFIA credit instruments represent solid and reliable Federal commitments. Therefore, the Secretary shall make any future-year or multi-year contingent commitment of funds for a project using a conditional term sheet. The conditional term sheet will resemble the standard term sheet that enables the obligation of budget authority, but will also specify the additional actions necessary to trigger subsequent obligation(s). The

conditional term sheet will include fixed dates by which any requirements must be met in order for the reserved funding to be obligated.

(2) Upon execution of the conditional term sheet, the Secretary shall reserve budget authority attributable to the appropriate year(s). This reservation will ensure that a project with a conditional commitment will have a priority claim (along with that of any other projects receiving such contingent commitments) on budget authority becoming available in the specified year(s), provided that the project sponsor satisfies each condition outlined in the conditional term sheet. The Secretary will limit such reservations to not more than 50 percent of the budget authority becoming available in the applicable year(s). If a multi-year contingent commitment is made, each year's loan will be tied to distinct, clearly identified project segments or stages or other milestones as specified in the credit agreement.

(e) The obligor may draw upon the line of credit only if net project revenues (including, among other sources, any debt service reserve fund) are insufficient to pay costs specified in 23 U.S.C. 184(a)(2) under the line of credit, including debt service costs. Debt service costs include direct payments of principal and interest as well as reimbursements for such payments in the form of legally required deposits to a debt service reserve fund.

(f) The Secretary shall not obligate funds in favor of a project that has not received an environmental Categorical Exclusion, Finding of No Significant Impact, or Record of Decision.

#### § 80.7 Application process.

(a) Public and private applicants for credit assistance under this part will be required to submit applications to the DOT in order to be considered for approval by the Secretary.

(b) At a minimum, such applications shall provide:

(1) Documentation sufficient to demonstrate that the project satisfies each of the threshold criteria in § 80.13 and describe the extent to which the project satisfies each of the selection criteria in § 80.15;

(2) Background information on the project for which assistance is sought, such as the project's description, status of environmental and other major governmental permits and approvals, and construction schedule;

(3) Background information on the applicant (project sponsor);

(4) Historical information, if applicable, concerning the applicant's financial condition, including, for

example, independently audited financial statements and certifications concerning bankruptcies or delinquencies on other debt; and

(5) Current financial information concerning both the project and the applicant, such as sources and uses of funds for the project and a forecast of cash flows available to service all debt instruments.

(c) An application for a project located in or sponsored by more than one State or other entity shall be submitted to the DOT by just one State or entity. The sponsoring States or entities shall designate a single obligor for purposes of applying for, receiving, and repaying TIFIA credit assistance.

(d) Each fiscal year for which Federal assistance is available under this part, the DOT shall publish a **Federal Register** notice to solicit applications for credit assistance. Such notice will specify the relevant due dates, the estimated amount of funding available to support TIFIA credit instruments for the current and future fiscal years, contact name(s), and other details for that year's application submissions and funding approvals.

#### § 80.9 Federal requirements.

All projects receiving credit assistance under this part shall comply with:

(a) The relevant requirements of title 23, U.S.C., for highway projects, chapter 53 of title 49, U.S.C., for transit projects, and section 5333(a) of title 49 for rail projects, as appropriate;

(b) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*);

(c) The National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*);

(d) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 *et seq.*); and

(e) Other Federal and compliance requirements as may be applicable.

#### § 80.11 Investment-grade ratings.

(a) At the time a project sponsor submits an application, the DOT shall require a preliminary rating opinion letter. This letter is a conditional credit assessment from a rating agency that provides a preliminary indication of the project's overall creditworthiness and that specifically addresses the potential of the project's senior debt obligations to achieve an investment-grade rating. However, the DOT shall disburse funds under a secured (direct) loan or line of credit or extend a loan guarantee only after a formal credit agreement has been executed and the project's senior obligations have obtained a formal investment-grade rating.

(b) The full funding of a secured (direct) loan, loan guarantee, or line of credit shall be contingent on the assignment of an investment-grade rating by a nationally recognized bond rating agency to all project obligations that have a lien senior to that of the Federal credit instrument on the pledged security.

(c) Neither the preliminary rating opinion letter nor the formal credit rating should reflect the effect of bond insurance, unless that insurance provides credit enhancement that secures the TIFIA obligation.

#### § 80.13 Threshold criteria.

(a) To be eligible to receive Federal credit assistance under this part, a project shall meet the following five threshold criteria:

(1) The project shall be consistent with the State transportation plan, if located in a metropolitan area shall be included in that area's metropolitan transportation plan, and shall appear in an approved State transportation improvement program before the DOT and the project sponsor execute a term sheet or credit agreement that results in the obligation of funds;

(2) The State, local servicer, or other entity undertaking the project shall submit a project application to the Secretary of Transportation;

(3) A project shall have eligible project costs that are reasonably anticipated to equal or exceed the lesser of \$100 million or 50 percent of the amount of Federal-aid highway funds apportioned for the most recently completed fiscal year to the State in which the project is located (in the case of a project principally involving the installation of Intelligent Transportation Systems (ITS), eligible project costs shall be reasonably anticipated to equal or exceed \$30 million);

(4) Project financing shall be repayable, in whole or in part, from tolls, user fees or other dedicated revenue sources; and

(5) In the case of a project that is undertaken by an entity that is not a State or local government or an agency or instrumentality of a State or local government, the project that the entity is undertaking shall be included in the State transportation plan and an approved State Transportation Improvement Program as provided in paragraph (a)(1) of this section.

(b) With respect to paragraph (a)(3) of this section, for a project located in more than one State, the minimum cost threshold size shall be the lesser of \$100 million or 50 percent of the amount of Federal-aid highway funds apportioned for the most recently completed fiscal

year to the participating State that receives the least amount of such funds.

(c) With respect to paragraph (a)(4) of this section, the Secretary may accept general obligation pledges or general corporate promissory pledges and will determine the acceptability of other pledges and forms of collateral as dedicated revenue sources on a case-by-case basis. The Secretary shall not accept a pledge of Federal funds, regardless of source, as security for the TIFIA credit instrument.

#### § 80.15 Selection criteria.

(a) The Secretary shall consider the following eight criteria in evaluating and selecting among eligible projects to receive credit assistance:

(1) The extent to which the project is nationally or regionally significant, in terms of generating economic benefits, supporting international commerce, or otherwise enhancing the national transportation system;

(2) The creditworthiness of the project, including a determination by the Secretary that any financing for the project has appropriate security features, such as a rate covenant, to ensure repayment;

(3) The extent to which such assistance would foster innovative public-private partnerships and attract private debt or equity investment;

(4) The likelihood that such assistance would enable the project to proceed at an earlier date than the project would otherwise be able to proceed;

(5) The extent to which the project uses new technologies, including Intelligent Transportation Systems (ITS), that enhance the efficiency of the project;

(6) The amount of budget authority required to fund the Federal credit instrument made available;

(7) The extent to which the project helps maintain or protect the environment; and

(8) The extent to which such assistance would reduce the contribution of Federal grant assistance to the project.

(b) In addition, 23 U.S.C. 182(b)(2)(B) conditions a project's approval for credit assistance on receipt of a preliminary rating opinion letter indicating that the project's senior debt obligations have the potential to attain an investment-grade rating.

(c) The Secretary shall evaluate each project's distinct public benefits and contribution to program goals according to each of the selection criteria specified in this section.

(d) In considering the selection criterion in paragraph (a)(8) of this section, the Secretary will give

preference to projects for which the applicant's use of TIFIA credit assistance would reduce the applicant's degree of reliance on Federal grant assistance.

(e) The Secretary may also give preference to applications for loan guarantees rather than other forms of Federal credit assistance. This preference is consistent with Federal policy that, when Federal credit assistance is necessary to meet a Federal objective, loan guarantees should be favored over direct loans, unless attaining the Federal objective requires a subsidy, as defined by the Federal Credit Reform Act of 1990 (2 U.S.C. 661 *et seq.*), deeper than can be provided by a loan guarantee.

#### **§ 80.17 Charges.**

(a) The DOT will require a non-refundable application initiation charge for each project applying for credit assistance under TIFIA. The DOT may also require an additional credit processing charge for projects selected to receive assistance. Any required application initiation or credit processing charge must be paid by the project sponsor applying for TIFIA assistance and cannot be paid by another party on behalf of the project sponsor. The proceeds of any such charges will equal a portion of the costs to the Federal Government of soliciting and evaluating applications, selecting projects to receive assistance, and negotiating credit agreements. For fiscal year 1999, the DOT will require an application initiation charge of \$5,000 for each project applying for credit assistance under TIFIA. The DOT will not require any credit processing charges for fiscal year 1999. For each application and approval cycle in fiscal year 2000 and beyond, the DOT may adjust the amount of the application initiation charge and will determine the appropriate amount of the credit processing charge on the basis of its program implementation experience. The DOT will publish these amounts in each **Federal Register** solicitation for applications.

(b) Applicants shall not include application initiation or credit processing charges or any other

expenses associated with the application process (such as charges associated with obtaining the required preliminary rating opinion letter) among eligible project costs for the purpose of calculating the maximum 33 percent credit amount referenced in § 80.5(a).

(c) If, in any given year, there is insufficient budget authority to fund the credit instrument for a qualified project that has been selected to receive assistance under TIFIA, the DOT and the approved applicant may agree upon a supplemental charge to be paid by or on behalf of the approved applicant at the time of execution of the term sheet to reduce the subsidy cost of that project. No such charge may be included among eligible project costs for the purpose of calculating the maximum 33 percent credit amount referenced in § 80.5(a).

#### **§ 80.19 Reporting requirements.**

At a minimum, any recipient of Federal credit under this part shall submit an annual project performance report and audited financial statements to the DOT within 120 days following the recipient's fiscal year-end for each year during which the recipient's obligation to the Federal Government remains in effect. The DOT may conduct periodic financial and compliance audits of the recipient of credit assistance, as determined necessary by the Secretary. The specific credit agreement between the recipient of credit assistance and the DOT may contain additional reporting requirements.

Issued in Washington, DC on May 25, 1999.

**Rodney E. Slater,**

*Secretary, U.S. Department of Transportation.*

#### **FEDERAL RAILROAD ADMINISTRATION**

##### **49 CFR Chapter II**

For the reasons set forth in the preamble, the Federal Railroad Administration amends chapter II, title 49, Code of Federal Regulations, as follows:

3. Add Part 261 to read as follows:

#### **PART 261—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION PROJECTS**

Sec.

261.1 Cross-reference to credit assistance.

**Authority:** Secs. 1501 *et seq.*, Pub. L. 105-178, 112 Stat. 107, 241, as amended; 23 U.S.C. 181-189 and 315; 49 CFR 1.49.

##### **§ 261.1 Cross-reference to credit assistance.**

The regulations in 49 CFR Part 80 shall be followed in complying with the requirements of this part. Title 49, CFR, Part 80 implements the Transportation Infrastructure Finance and Innovation Act of 1998, secs. 1501 *et seq.*, Pub. L. 105-178, 112 Stat. 107, 241.

Dated: May 25, 1999.

**Jolene M. Molitoris,**

*Administrator, Federal Railroad Administration.*

#### **FEDERAL TRANSIT ADMINISTRATION**

##### **49 CFR Chapter VI**

For the reasons set forth in the preamble, the Federal Transit Administration amends chapter VI, title 49, Code of Federal Regulations, as follows:

4. Add Part 640 to read as follows:

#### **PART 640—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION PROJECTS**

Sec.

640.1 Cross-reference to credit assistance.

**Authority:** Secs. 1501 *et seq.*, Pub. L. 105-178, 112 Stat. 107, 241, as amended; 23 U.S.C. 181-189 and 315; 49 CFR 1.51.

##### **§ 640.1 Cross-reference to credit assistance.**

The regulations in 49 CFR Part 80 shall be followed in complying with the requirements of this part. Title 49, CFR, Part 80 implements the Transportation Infrastructure Finance and Innovation Act of 1998, secs. 1501 *et seq.*, Pub. L. 105-178, 112 Stat. 107, 241.

Dated: May 25, 1999.

**Gordon J. Linton,**

*Administrator, Federal Transit Administration.*

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