Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

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July 12, 2019

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Highways and Transit
FROM: Staff, Subcommittee on Highways and Transit
RE: Subcommittee Hearing on **"Oversight of the Federal Transit Administration's Implementation of the Capital Investment Grant Program"**

PURPOSE

The Subcommittee on Highways and Transit will meet on Tuesday July 16, 2019, at 10:00 a.m. in 2167 Rayburn House Office Building, to receive testimony related to the "Oversight of the Federal Transit Administration's Implementation of the Capital Investment Grant Program." The purpose of this hearing is to examine how the Federal Transit Administration (FTA) is implementing the Capital Investment Grant (CIG) program in light of the Administration's FY 2018 and FY 2019 budget requests to phase the program out and the June 29, 2018, FTA Dear Colleague letter to transit agencies. The Subcommittee will hear from the Federal Transit Administration and representatives of the American Public Transportation Association, the American Road & Transportation Builders Association, and the Kansas City Streetcar Authority.

BACKGROUND

The Capital Investment Grant (CIG) program is a multi-year, multi-step process to fund the construction of new or the expansion of existing fixed-guideway public transportation systems. Fixed guideway systems include subway, light rail, commuter rail, streetcar, ferry, and bus rapid transit (BRT) projects. Currently, there are 54 projects in the CIG program pipeline.[1] There are three types of CIG projects:

- **New Starts** are projects that exceed $300 million in total costs or request $100 million or more in CIG funding and must move through a three step approval process.

[1] Overview of Capital Investment Grant Program. Federal Transit Administration.

- **Core Capacity** projects must go through the same three step approval process, but are projects that expand an existing fixed-guideway corridor to increase capacity by 10 percent or more.

- **Small Starts** projects cost less than $300 million and receive less than $100 million of CIG funding, and have a more streamlined approval process.[2]

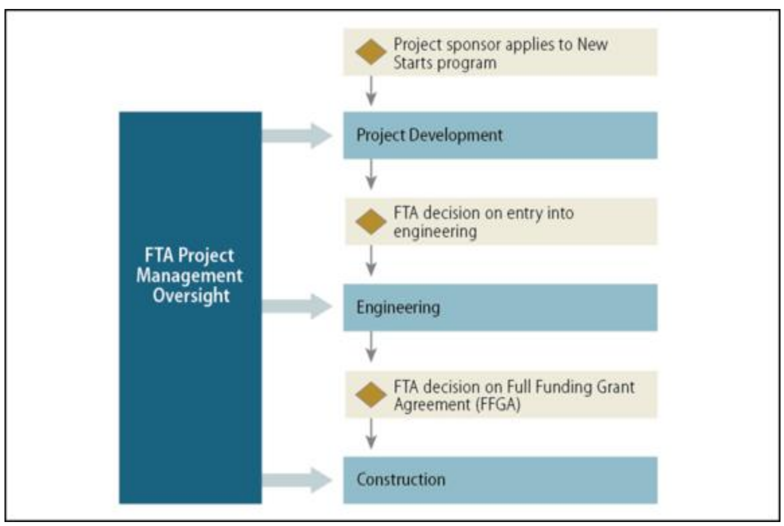
<u>Approval Process New Starts and Core Capacity</u>

New Starts and Core Capacity projects are required by law (49 U.S.C. § 5309) to go through a three-phase approval process—Project Development, Engineering, and Construction, as shown in Figure 1.

After FTA accepts and approves an application for CIG program funding, the project advances to the Project Development phase (PD). During PD, FTA requires an applicant to conduct an environmental review, as required by the National Environmental Policy Act (NEPA), and submit it to FTA. FTA will use this and other documentation to determine a project rating, which includes an assessment of the project justification criteria and local financial commitment criteria. The applicant has two years to complete the PD, although an extension can be granted in certain circumstances.

Moving from the PD to the Engineering phase requires formal approval from FTA. A project can enter into the Engineering phase (Engineering) once the NEPA process is concluded (under which the project is selected as the locally preferred alternative), the project is adopted into the metropolitan plan, and the project is determined by FTA to be justified on its merits through a project rating (discussed in detail below), including an acceptable degree of local financial commitment.

Figure 1: The Capital Investment Grants Program Process



Congressional Research Service, Federal Transit Administration. Capital Investment Grant MAP 21 Overview.

The amount of CIG funding requested by the project sponsor is fixed when the project is approved for entry into Engineering. This means that if a project's cost increases after entry into Engineering, the extra cost must be borne by the project sponsor from non-CIG funding sources.

After the Engineering phase is completed, FTA can approve the project for entry into Construction by signing a Full Funding Grant Agreement, (FFGA), which is a multiyear agreement between the

[2] Public Transportation Capital Investment Grant (New Starts) Program: Background and Issues for Congress. Congressional Research Service.

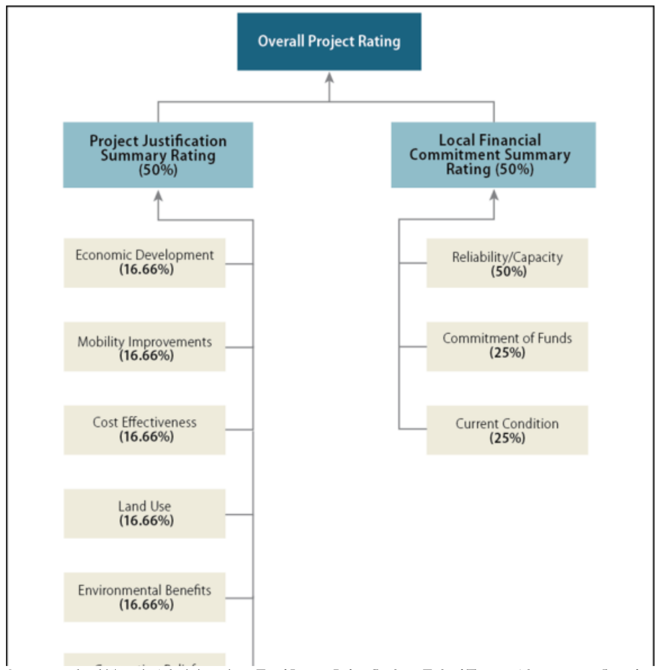
Federal Government and a transit agency. An FFGA establishes the terms and conditions for federal financial participation, including the maximum amount of federal funding that is committed. FTA retains some oversight of a project during Construction to ensure compliance with the terms of the FFGA.

Small Starts Approval Process

Small Start projects are also required by law (49 U.S.C. § 5309(h)) to go through an approval process, but it only consists of two-phases —PD and construction. As with New Starts projects, entry into PD only requires the project sponsor to apply to FTA and initiate the NEPA process. Consequently, for Small Starts only one formal decision is made by FTA, and that is whether to award funding and, hence, move the project into construction. Once FTA approves a small start project, funding is provided in a Small Starts Grant Agreement (SSGA). The Federal Government's funding commitment, as stipulated in the SSGA is typically for a single year.

Project Rating

Figure 2: Capital Investment Grants Program Project Rating



Source: Federal Transit Administration, *Final Interim Policy Guidance Federal Transit Administration Capital Investment Grant Program*, June 2016.

FTA determines a project rating to decide whether to approve a project's advancement to the next phase in the CIG process. FTA computes an overall project rating by averaging the summary ratings that the project received in the project justification criteria and local financial commitment criteria. A New Starts or Core Capacity project is required by law to achieve an overall rating of at least "medium" on a five-point scale (low, medium-low, medium, medium-high, high). Small Starts projects are similarly rated, but the law does not set a minimum rating to be eligible for a grant.

Local Financial Commitment

To be approved for federal CIG funding, FTA must determine that the project has an acceptable degree of local financial commitment. Federal law requires that the project have financing that is stable, reliable, and timely; sufficient resources to maintain and operate both the existing public transportation system and the new addition; and contingency money to support cost overruns or funding shortfalls.

IMPLEMENTATION CONCERNS

CIG Program Funding

Table 1: Enacted Capital Investment Grants Program Funding	
FY 2016	$2.18 billion
FY 2017	$2.41 billion
FY 2018	$2.65 billion
FY 2019	$2.55 billion

The CIG program was reauthorized from FY2016 through FY2020 as part of the Fixing America's Surface Transportation (FAST) Act (P.L. 114-94) at $2.3 billion per year. Unlike FTA's other major programs, funding for the CIG program comes from the general fund of the U.S. Treasury, rather than the mass transit account of the Highway Trust Fund and is therefore subject to appropriation each year. Table 1 shows the appropriated funding levels provided in FY 2016-FY2019. In addition, FTA allocates CIG program funding via discretionary grant, whereas FTA apportions formula funds for the other major transit grant programs.

The President's Budget for FY 2018 proposed $1.23 billion (a reduction of $1.18 billion from FY 2017 enacted) and for FY 2019 proposed $1 billion (a reduction of $1.65 billion from FY 2018 enacted) to only fund CIG projects with existing FFGAs. The Administration did not request funding to allow FTA to advance any new New Starts, Core Capacity, or Small Starts projects,[3] thereby proposing to phase-out the CIG program.

However, Congress, on a bipartisan basis, appropriated $2.65 billion for the CIG program in FY 2018 and directed FTA to obligate $2.25 billion, or 85 percent, of this funding by December 31, 2019. Congress also directed that FTA, "continue to administer the capital investment grant program in accordance with the procedural and substantive requirements of section 5309 [title 49]."[4]

In FY 2019, Congress appropriated $2.55 billion for the CIG Program and again directed FTA to obligate $2.17 billion, 85 percent, of this funding by December 31, 2020. The Act contained language that repeated its direction from the FY 2018 Act that FTA, "continue to administer the capital investment grant program in accordance with the procedural and substantive requirements of section 5309 [title 49]."[5]

In a general, the FY 2020 President's Budget proposed $1.5 billion (a reduction of $1.05 billion from FY 2019 enacted) for the CIG program, including a $500 million set aside for new CIG projects.[6] The House-passed FY 2020 THUD appropriations bill provides $2.3 billion for the CIG program and continues the direction contained in the FY 2018 and FY 2019 THUD Appropriations Acts to FTA.

FTA Dear Colleague

On June 29, 2018, FTA Acting Administrator K. Jane Williams sent a Dear Colleague letter to public transit agencies highlighting the Trump Administration's policies regarding the CIG

[3] Federal Transit Administration, Annual Report on Funding Recommendations, Fiscal Year 2019 Capital Investment Grants Program, Report of the Secretary of Transportation to the United States Congress; Federal Transit Administration, Annual Report on Funding Recommendations, Fiscal Year 2018 Capital Investment Grants Program, Report of the Secretary of Transportation to the United States Congress
[4] P.L. 115-141, Consolidated Appropriations Act, 2018.
[5] P.L. 116-6, Consolidated Appropriations Act, 2019.
[6] FY 2020 Budget Highlights of the U.S. Department of Transportation (DOT).

program.[7] Many transit agencies have raised concerns with the policies addressed in the Dear Colleague: the treatment of federal loans, inclusion of a geographic diversity factor in grant awards, and encouraging a low federal cost share. Separately, FTA also changed the CIG Risk Assessment process, which has also concerned many in the stakeholder community. As a result, many transit agencies fear higher project costs and more bureaucratic challenges.

In response, Congress included a provision in the FY 2019 Omnibus Appropriations Act that prohibited FTA from using funds to implement or further new policies detailed in FTA's Dear Colleague letter to CIG project sponsors,[8] and addressed some of these issues within the CIG appropriating paragraph and FTA administrative provisions in the House-passed FY 2020 THUD Appropriations Bill.[9]

Treatment of Federal Loans

Some CIG projects include federal loans from the Transportation Infrastructure Finance and Innovation Act (TIFIA) program as part of their overall project financing package. Since these loans are typically repaid using non-federal funding sources, project sponsors believe the loans should count toward their local financial commitment.

FTA's Dear Colleague letter states that it "considers U.S. Department of Transportation loans in the context of all Federal funding sources requested by the project sponsor when completing the CIG evaluation process, and not separate from the Federal funding sources."[10]

Current law states that TIFIA loans may be used for any non-federal share of project costs required under title 23, United State Code (USC) or Chapter 53 of title 49 USC, if the loan is repayable from non-federal funds.[11] Prior to the Dear Colleague letter, FTA allowed project sponsors to decide whether the TIFIA loan would count as local or federal funding. FTA's new policy provides less flexibility for project sponsors of transit projects than for highway and other projects that receive a TIFIA loan.

Section 193 of the FY 2020 House-passed THUD bill amends federal law to ensure that TIFIA loans repaid with non-federal sources are treated as local dollars when assessing cost share requirements.

Geographic Diversity

In its Dear Colleague letter, FTA states that it will consider geographic diversity as a factor in FTA funding allocation decisions. In its July 2018 Fact Sheet on the Dear Colleague letter, FTA states, "[i]t is longstanding FTA practice to consider geographic diversity in discretionary funding decisions."[12]

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[7] U.S. Dep't of Transportation, Federal Transit Administration, Dear Colleague letter, June 29, 2018.
[8] P.L. 116-6, Consolidated Appropriations Act, 2019.
[9] House-passed FY 2020 THUD Appropriations Bill
[10] U.S. Dep't of Transportation, Federal Transit Administration, Dear Colleague letter, June 29, 2018.
[11] 23 U.S.C. § 603(b)(8) states: "The proceeds of a secured loan under the TIFIA program may be used for any non-Federal share of project costs required under this title [title 23] or chapter 53 of title 49, if the loan is repayable from non-Federal funds."
[12] U.S. Dep't of Transportation, Federal Transit Administration, FACT SHEET: Capital Investment Grants Program Dear Colleague Letter, July 2018.

However, neither current law nor FTA's current Policy Guidance for the CIG program (2016) include geographic diversity as a factor.[13] When prioritizing projects among those that have met all the necessary requirements and ratings, official FTA policy guidance emphasizes local financial commitments (including private contributions) and project readiness, but not geographic distribution.[14] In fact, current law allows FTA to expedite certain reviews for projects whose sponsors have recently successfully completed another CIG project.

Federal and CIG Cost share

Under the FAST Act, a CIG project cannot exceed a maximum federal share of 80 percent; however, a New Starts project may not receive more than 60 percent of its total cost from the CIG program. Core Capacity and Small Starts projects may receive up to 80 percent of total cost from the CIG program.[15] The FY 2019 Omnibus Appropriations Act reduces the amount a New Starts project can receive in CIG funding to not more than 51 percent.

FTA's Dear Colleague letter states that "Federal law requires FTA to evaluate all projects seeking CIG funding on local financial commitment, and it has the authority to consider the extent to which the project has a local financial commitment that exceeds the required non-government share of the cost of the project." Transit agencies have informed the Committee that FTA staff are encouraging project sponsors to "overmatch" the federal share by committing additional local funds to the project beyond the required share.

Further, FTA staff are indicating that New Starts projects are unlikely to get approval unless they are under a 40 percent federal cost share, despite the fact the FY 2019 Omnibus Appropriations Act allows a federal match of up to 51 percent. Although Federal law allows FTA to encourage overmatch, it does not authorize FTA to require a project sponsor to overmatch in order to receive a New Starts grant.[16]

Section 164 of the FY 2020 House-passed THUD bill addressed FTA's new policy by prohibiting the use of funds to request or require any project to have a maximum CIG contribution lower than 50 percent of the total project cost.

Changes to Risk Assessment Process

In addition to the Dear Colleague letter, FTA also announced two changes to the CIG Risk Assessment process. The risk assessment is a third party assessment of the project risks and their effects on the project's timeline and cost estimate. It also calculates the amount of contingency funding that FTA will require the project sponsor to have in order to cover potential cost overruns. The required contingency fund comes from local dollars.

First, FTA moved the Risk Assessment of New Starts and Core Capacity projects from the Engineering phase to the Project Development phase. In addition, FTA may perform updates to the Risk Assessment and conduct scope, cost, and schedule reviews of the project prior to awarding an

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[13] U.S. Dep't of Transportation, Federal Transit Administration, Final Interim Policy Guidance, Capital Investment Grant Program, June 2016.
[14] See id.
[15] 49 U.S.C. 5309(l)(1)
[16] 49 U.S.C. 5309(l)(5) establishes that FTA is not authorized to require a local match for a project that is more than the federal cap. FY 2019 Omnibus Appropriations Act set the federal cap at 51 percent of the project cost.

FFGA. FTA stated that it believes this policy change would allow projects to identify and address issues earlier in the process and improve the estimate for final costs. In turn, it would ensure that the CIG contribution that FTA locks in is sufficient as a project moves from Project Development into Engineering. However, current law limits the Project Development phase of New Start and Core Capacity projects to a two-year period (although FTA may extend the time-period).[17] Transit agencies are concerned that requiring the Risk Assessment during the Project Development phase provides an additional hurdle to completing Project Development within the two-year time period.

Second, when assessing the appropriateness of the New Starts project's budget, FTA increased its probability threshold from 50 percent to 65 percent in determining the reasonableness of the cost and schedule estimates. This policy change means is that project sponsors whose contingencies do not meet the 65 percent threshold will experience project costs increases. However, FTA establishes the project's Federal share upon entry into Engineering, and any cost overruns are the responsibility of the project sponsor. Many transit agencies believe this new policy is unnecessarily increases costs for project sponsors, since they are already responsible for project overruns.

Section 164 of the FY 2020 House-passed THUD bill provides an additional six months within the Engineering Phase to determine the project's CIG grant amount, and prohibits FTA from requiring a probability threshold higher than 50 percent in the risk assessment.

WITNESS LIST

Panel I

The Honorable K. Jane Williams
Acting Administrator
Federal Transit Administration

Panel II

Mr. Bob Alger
President and Chief Executive Officer
The Lane Construction Corporation
on behalf of the American Road & Transportation Builders Association

Mr. Tom Gerend
Executive Director
The Kansas City Streetcar Authority

Mr. Paul P. Skoutelas
President and CEO
American Public Transportation Association

[17] 49 U.S.C. § 5309(d)(1)(C) and (e)(1)(c).