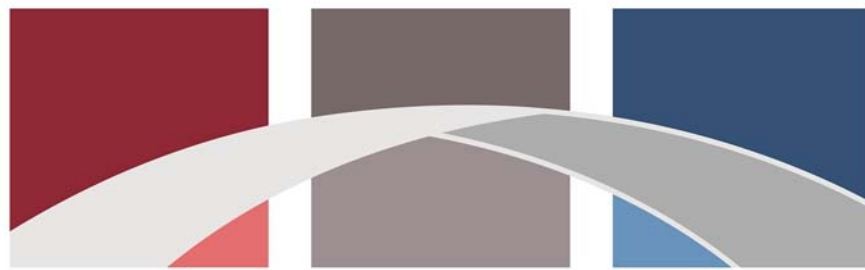


 U.S. DEPARTMENT OF TRANSPORTATION



**BUILD AMERICA BUREAU**

## Credit Programs Guide

Transportation Infrastructure Finance and Innovation Act

Railroad Rehabilitation & Improvement Financing

March 2017

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## Contacting the Build America Bureau

Feel free to write, fax, phone or e-mail the Bureau Credit Programs Office staff. General program contact information follows:

**For credit-related inquiries:**

**Build America Bureau**  
US Department of Transportation  
Room W12-426  
1200 New Jersey Avenue, SE  
Washington, DC 20590  
[BureauCredit@dot.gov](mailto:BureauCredit@dot.gov)

**For general Bureau-related inquiries:**

**Build America Bureau**  
US Department of Transportation  
Room W12-410  
1200 New Jersey Avenue, SE  
Washington, DC 20590  
202-366-2300  
[BuildAmerica@dot.gov](mailto:BuildAmerica@dot.gov)

Hearing- and speech-impaired persons may use TTY by calling the Federal Information Relay Service at 1-800-877-8339. Additional information, including the most recent edition of the program guide and application materials, can be obtained from the Bureau website at <https://www.transportation.gov/buildamerica>.



## **Chapter 1: Introduction to the Build America Bureau**

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The National Surface Transportation and Innovative Finance Bureau (referenced hereafter as the Build America Bureau or the Bureau) was established by the Secretary of Transportation on July 20, 2016, in accordance with the Fixing America's Surface Transportation (FAST) Act (Public Law 114-94).

The Build America Bureau is responsible for driving transportation infrastructure development projects in the United States. The Bureau streamlines credit opportunities and grants and provides access to the credit and grant programs with more speed and transparency, while also providing technical assistance and encouraging innovative best practices in project planning, financing, delivery, and monitoring. To achieve this vision, the Bureau draws upon the full resources of the U.S. Department of Transportation (DOT) to best utilize the expertise of all the modes within the Department while promoting a culture of innovation and customer service. This includes the administration of the application processes for the following programs:

- The Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA) credit program, and
- The Railroad Rehabilitation and Improvement Financing (RRIF) credit program.

The RRIF and TIFIA credit programs (together, the Credit Programs) operates under separate statutory authority, though as the implementation of the Bureau continues, we envision that the application processes described in this Program Guide are being consolidated and refined. This Program Guide, written for prospective TIFIA and RRIF applicants, describes how the Bureau's Credit Programs Office currently administers the TIFIA and RRIF Programs.

The Transportation Infrastructure Finance and Innovation Act of 1998 established a Federal credit program (the TIFIA Program) for eligible transportation projects under which the DOT may provide three forms of credit assistance – secured (direct) loans, loan guarantees, and standby lines of credit. The TIFIA Program's fundamental goal is to leverage Federal funds by attracting substantial private and other non-Federal co-investment to support critical improvements to the nation's surface transportation system. The DOT awards TIFIA credit assistance to eligible applicants, which include state departments of transportation, transit operators, special authorities, local governments, and private entities.

The Transportation Equity Act for the 21st Century (TEA 21) established the Railroad Rehabilitation and Improvement Financing Program (the RRIF Program). The RRIF Program provides direct loans and loan guarantees to finance the development of railroad infrastructure. Under this program, the DOT is authorized to provide direct loans and loan guarantees up to \$35.0 billion to finance development of railroad infrastructure. Not less than \$7.0 billion is reserved for projects benefiting freight railroads other than Class I carriers. The DOT awards RRIF credit assistance to eligible applicants, which include state and local governments, interstate compacts, government sponsored authorities and corporations, railroads, limited option rail freight shippers that own or operate a plant or other facility, and joint ventures that include at least one of the entities previously listed.

This chapter introduces each Credit Program's objectives and provides an overview of how each Credit Program operates. Chapter 2 details the required terms for individual credit instruments and describes how these instruments are funded. Chapter 3 describes the eligibility requirements concerning types of projects, activities, cost limits, and applicants. Chapter 4 describes the process by which potential applicants may apply for credit assistance. Chapter 5 describes the review process that the DOT uses to determine who receives credit assistance. Chapter 6 discusses the contractual documents, prerequisites for executing such documents, and the ongoing monitoring requirements. Chapter 7 discusses special issues related to loan guarantees.

Electronic copies of this Program Guide can be found on the Bureau website located at <https://www.transportation.gov/buildamerica>, as can all application materials and additional information regarding the Credit Programs.

### **Legislative Reference**

The Transportation Infrastructure Finance and Innovation Act of 1998 was enacted as part of TEA 21 (Public Law 105-178, §§1501-04), as amended in 1998 by the TEA 21 Restoration Act (Title IX of Public Law 105-206), was further amended in 2005 by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Public Law 109-59), was amended and restated in 2012, by the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21) (Public Law 112-141), and most recently, was amended in 2015 by the FAST Act. The TIFIA statute is codified within sections 601 through 609 of Title 23 of the United States Code (23 U.S.C. §§601-609), with supporting regulations appearing in part 80 of Title 49 of the Code of Federal Regulations (49 C.F.R. §80). These documents are available at: <http://www.transportation.gov/tifia/legislation-regulations>.

The Railroad Rehabilitation and Improvement Financing program was created in 1998 by the TEA-21 amendments (§7203 thereof) to a predecessor loan and loan guarantee program from the 1970s set forth in Title V of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210), and was amended in 2005 by SAFETEA-LU, was further amended in 2008 by the Rail Safety Improvement Act of 2008 (Public Law 110-432), and most recently, was amended in 2015 by the FAST Act. The RRIF statute is codified within sections 821 through 823 of Title 45 of the United States Code (45 U.S.C. §§821-823)<sup>1</sup>, with supporting regulations appearing in part 260 of Title 49 of the Code of Federal Regulations (49 C.F.R. §260). These documents will be made available at <https://www.transportation.gov/buildamerica>.

### **Policy Considerations**

The public policy underlying the TIFIA Program asserts that the Federal Government can perform a constructive role in supplementing, but not supplanting, existing markets for

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<sup>1</sup> Note that Title 45 of the United States Code is not positive law and citations thereto are used solely for ease of reference. For direct statutory references, please refer to the Railroad Revitalization and Regulatory Reform Act of 1976, as amended by FAST Act §§ 11601–11611.

financing large transportation infrastructure projects. Section 1502 of TEA 21 states that “a Federal credit program for projects of national significance can complement existing funding resources by filling market gaps, thereby leveraging substantial private co-investment.” Because the TIFIA Program offers credit assistance, rather than grant funding, its potential users are infrastructure projects capable of pledging revenue streams generated through user charges or other dedicated funding sources.

A similar public policy underlies the RRIF Program. In addition, the RRIF Program dedicates funding to providing vital access to financing for shortline and regional railroads, which have historically lacked the access to private financing.

Identifying a constructive role for Federal credit assistance begins with the acknowledgement that, when compared to most investors, the Federal Government has a naturally longer-term investment horizon, which enables it to more readily absorb the relatively short-term risks of project financings. Absent typical capital market investor concerns regarding timing of payments and financial liquidity, the Federal Government can become the “patient investor” whose long-term view of asset returns enables the project’s non-Federal financial partners to meet their investment goals, allowing the borrower to receive a more favorable financing package.

### **Funding Levels**

The Credit Programs are subject to the Federal Credit Reform Act of 1990, which requires the DOT to establish a capital reserve<sup>2</sup> sufficient to cover the estimated long-term cost to the Federal Government of a Federal credit instrument, including any expected credit losses, before the DOT can provide TIFIA or RRIF credit assistance.<sup>3</sup>

### **TIFIA Program**

Pursuant to the FAST Act, the DOT announced availability of funding authorized in the amount of \$1.435 billion (\$275 million in Federal Fiscal Year (FY) 2016 funds, \$275 million in FY 2017 funds, \$285 million in FY 2018 funds, \$300 million in FY 2019 funds, and \$300 million in FY 2020 funds (and any funds that may be available from prior fiscal years) to provide TIFIA credit assistance for eligible projects.<sup>4</sup> The FY 2016-2020 authorized funds are subject to an annual obligation limitation in accordance with appropriations law, as well as annual reobligation requirements, as further discussed in Section 2-5. Historically, each dollar of funding has allowed TIFIA to provide approximately \$14 in credit assistance. As a result, these funding levels could translate to potentially \$20 billion in TIFIA credit assistance.

### **RRIF Program**

Under SAFETEA-LU, the RRIF Program was authorized to provide direct loans and loan

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<sup>2</sup> Under the TIFIA Program, the capital reserve is referred to as the “credit subsidy” and under the RRIF Program it is referred to as the “credit risk premium.”

<sup>3</sup> 2 U.S.C. §661c(b).

<sup>4</sup> FAST Act, Pub. L. No. 114-94, §1101(a)(2), (129 Stat. 1322) (2015).

guarantees totaling up to \$35 billion.<sup>5</sup> Not less than \$7 billion is reserved for projects benefiting freight railroads other than Class I carriers. For the current amount of available funding remaining, please refer to the Bureau Credit Programs website: <http://www.transportation.gov/buildamerica>. However, since the RRIF Program does not currently have an appropriation, the cost to the government of providing financial assistance must be borne by the RRIF applicant, or another non-federal entity on behalf of the applicant, through the payment of the credit risk premium.

### **Program Administration**

Implementation of the TIFIA and RRIF Programs is the responsibility of the Secretary of Transportation (the Secretary). The FAST Act established the DOT Council on Credit and Finance to provide policy direction and make recommendations to the Secretary regarding the selection of projects for credit assistance.<sup>6</sup> The Council on Credit and Finance members include five representatives from the Office of the Secretary of Transportation (OST): the Deputy Secretary of Transportation (Chair), the Assistant Secretary for Budget and Programs (Vice-Chair), the Under Secretary of Transportation for Policy, the General Counsel, and the Assistant Secretary for Transportation Policy. The Administrators of the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Railroad Administration (FRA) also sit on the Council on Credit and Finance. Additionally, the Secretary may designate up to three DOT officials to serve as at-large members of the Council on Credit and Finance.

The Build America Bureau administers the TIFIA and RRIF Programs on behalf of the Secretary, including the evaluation of individual projects, and provides overall policy direction and program decisions for the TIFIA and RRIF Programs. Final approval of Bureau credit assistance is reserved for the Secretary.

### **Application Process Overview**

All TIFIA and RRIF credit assistance will be awarded based on a project's satisfaction of TIFIA and/or RRIF (as applicable) statutory eligibility requirements. The summary below provides an overview of the TIFIA and RRIF application process. More information about eligibility requirements can be found in Chapter 3 and more information about the application process can be found in Chapter 4.

1. **Build America Bureau Outreach and Project Development**. The initial point of contact for Bureau engagement is a Project Development Lead (PDL) who works with each project sponsor to determine project needs and the specific ways in which the Bureau can provide TIFIA and RRIF credit assistance. Based on the specific questions, challenges, opportunities, and information needs related to a particular project, appropriate Bureau expertise is assigned and brought to bear for projects. This may require the assignment of more specialized PDL assistance for projects that involve greater complexity in terms of

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<sup>5</sup> SAFETEA-LU, Pub. L. No. 109-59, §9003(d)(1), (119 Stat. 1921) (2005), codified at 45 U.S.C. §822(d).

<sup>6</sup> FAST Act, Pub. L. No. 114-94, §9002(a), (129 Stat. 1618) (2015), codified at 49 U.S.C. §117.



such factors as scope, modal elements, regulatory requirements, private-sector involvement, and financing plan. This approach helps ensure that the project has followed statutory and regulatory requirements and that it appears to be eligible. The intent of this process is to identify major hurdles that might delay a project early in the process. A customized project development team works closely with the project sponsor to navigate relevant Federal processes and to ensure that key program requirements are satisfied.

2. Submission of Letter of Interest/Draft Application. Although letters of interest (LOIs) may be submitted on a rolling basis (i.e. at any time), the Bureau recommends that project sponsors consult the Bureau before submitting LOIs to ensure that the relevant programmatic requirements are met and initial risk assessments are completed. This ensures that all key project elements are in place for an efficient underwriting process.
3. Creditworthiness Review. Once a project sponsor has completed the initial consultation process with a PDL and DOT makes a determination that the project is reasonably likely to satisfy all of the eligibility requirements of the applicable Credit Program(s), DOT can expeditiously accept the LOI, and formally move the Project into the credit underwriting process. Applicants interested in TIFIA credit assistance should use the Letter of Interest form and applicants interested in RRIF credit assistance should prepare a Draft Application using the Application form; both forms can be found at <https://www.transportation.gov/buildamerica>. The Letter of Interest and Application forms allow potential applicants to describe the project (including location, purpose, and cost), demonstrate the project sponsor's ability to meet the DOT's creditworthiness requirements, detail how the TIFIA and/or RRIF statutory eligibility requirements are met, and outline the proposed financial plan, including the requested TIFIA and/or RRIF credit assistance.<sup>7</sup>

Potential applicants should submit these forms electronically via email at [BureauCredit@dot.gov](mailto:BureauCredit@dot.gov). The DOT will conduct an in-depth creditworthiness review of the project sponsor and the revenue stream proposed to repay the TIFIA and/or RRIF credit assistance. The creditworthiness review involves evaluation of the plan of finance, financial model, and feasibility of the anticipated pledged revenue or, in the case of RRIF loans where the proposed collateral is other than a dedicated revenue stream, the sufficiency of such other pledged collateral. In connection with this review, the DOT will ask project sponsors to provide any additional materials necessary to facilitate its review of the project's creditworthiness.

Once the DOT has concluded that the project satisfies statutory eligibility criteria, including a preliminary review of a project's creditworthiness and, for TIFIA projects, satisfaction of readiness requirements,<sup>8</sup> the DOT will ask a project sponsor seeking

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<sup>7</sup> 23 U.S.C. §601(a)(6) and 45 U.S.C. §823(a).

<sup>8</sup> To be eligible for TIFIA credit assistance, the applicant must demonstrate: (a) that it satisfies (or will have satisfied at the time of obligation of Federal credit assistance) all applicable Federal requirements, including all National Environmental Policy Act requirements, and (b) a reasonable expectation that the contracting process for construction of the project can commence no later than 90 days after the date on which the TIFIA credit assistance is obligated. Note that the readiness requirement for TIFIA loans to capitalize rural projects funds is different than

TIFIA credit assistance to provide a preliminary rating opinion letter from at least one nationally recognized statistical rating organization (Credit Rating Agency)<sup>9</sup> and will ask all project sponsors to submit to the DOT an upfront fee to cover the DOT's costs to procure outside financial and legal advisors (the Advisors' Fees Upfront Payment). This fee will be used, dollar-for-dollar, to cover the actual costs incurred for services provided by the DOT's outside financial and legal advisors in connection with the review of the Letter of Interest/Draft Application and application and the negotiation of the transaction documents. For both TIFIA and RRIF, the Advisors' Fees Upfront Payment amount is \$250,000 (subject to availability of funds for assistance for TIFIA small projects, as discussed below). For RRIF projects, the Advisors' Fees Upfront Payment may be higher depending on the nature and complexity of the project. Project sponsors should consult with the Bureau to confirm the applicable amount of the Advisors' Fees Upfront Payment.

*Assistance Available to Offset Advisors' Fees Upfront Payment:*

**TIFIA Program:** For TIFIA projects with eligible project costs reasonably anticipated to be less than \$75 million, the FAST Act requires the Secretary to set aside at least \$2 million of the TIFIA Program's annual budget authority to be used in lieu of fees charged to the project sponsor to cover the costs of the DOT's outside advisors.<sup>10</sup> Project sponsors should indicate in their Letter of Interest whether they wish to be considered for this assistance (though the DOT cannot guarantee that funds will be available to satisfy all requests). To the extent a project sponsor is eligible for this assistance and sufficient funds are available, the Advisors' Fees Upfront Payment will be waived, and the cost of the DOT's outside advisors will be funded through this set-aside.

**RRIF Program:** The FY 2016 Consolidated Appropriations Act set aside \$1.96 million to assist Class II and III railroads pursuing RRIF credit assistance. These funds are available to be used by the Bureau in lieu of fees charged to Class II and III railroads to cover the cost of the DOT's outside advisors.<sup>11</sup> These funds cannot be used to cover the CRP of a RRIF loan.<sup>12</sup> Class II and III railroads seeking RRIF credit assistance should indicate in their Draft Application whether they wish to be considered for this assistance (though the DOT cannot guarantee that funds will be available to satisfy all requests). To the extent a project sponsor is eligible for this assistance and sufficient funds are available, the Advisors' Fees Upfront Payment will be waived and the cost of the DOT's

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that for traditional construction projects. (See 23 U.S.C. §602(a)(10) for readiness requirements and §602(c) for Federal requirements.)

<sup>9</sup> For TIFIA projects, the preliminary rating opinion letter must indicate that the senior obligations of the project have the potential to achieve an investment-grade rating and must include a preliminary rating opinion on the TIFIA credit instrument. 23 U.S.C. §602(b)(3).

<sup>10</sup> 23 U.S.C. §605(f).

<sup>11</sup> Consolidated Appropriations Act, 2016, Division L, §152, Pub. L. 114-113, December 18, 2015, 129 Stat. 2242, 2856 (2015).

<sup>12</sup> Consolidated Appropriations Act, 2016, Division L, §146, Pub. L. 114-113, December 18, 2015, 129 Stat. 2242, 2853 (2015).

outside advisors will be funded through this appropriation. These funds remain available beyond FY 2016 to the extent not expended.

4. Oral Presentation. Following completion of the DOT's in-depth review of the Letter of Interest/Draft Application and receipt of a preliminary rating opinion letter and the Advisors' Fees Upfront Payment, the DOT will request that the potential applicant give an oral presentation on the project and its plan of finance to the DOT, followed by a question and answer session. The DOT will provide guidance regarding the structure and content of the presentation at the time of the request.
5. Application. Once both the preliminary rating opinion letter and the Advisors' Fees Upfront Payment have been received, the project sponsor has made its oral presentation to the DOT, and the DOT has determined that the project satisfies all statutory eligibility requirements, including a full review of the creditworthiness of the project, the project sponsor will then be invited to submit a complete application with all required materials. The DOT will not review incomplete applications or applications for projects that do not fully satisfy eligibility requirements.

Please note that an invitation by the DOT to submit an application does not guarantee that a project will receive credit assistance, which remains subject to a project's continued eligibility and final approval by the Secretary.

6. Notification of Completeness. No later than 30 days after the date of its receipt of the application, the DOT shall notify the applicant in writing that the application is complete or requires additional information or materials to complete the application.<sup>13</sup>
7. Project Recommendation. Based upon the written application, the oral presentation, and any supplemental information submitted by an applicant, DOT staff will prepare a project evaluation and recommendation for the DOT Council on Credit and Finance.
8. Project Selection. The DOT Council on Credit and Finance, in turn, provides a recommendation to the Secretary, who makes the final determination regarding project selection. The DOT will not obligate funds for a project that does not satisfy statutory requirements such as obtaining environmental clearances.
9. Notification of Project Approval. The DOT will notify the project sponsor regarding project approval or disapproval no more than 60 days after notifying the project sponsor that its application was complete.<sup>14</sup>
10. Term Sheet and Credit Agreement Execution and Funding Obligation. For each approved project, the DOT will prepare a term sheet for execution with the borrower. The term sheet sets forth the basic terms and conditions of DOT credit assistance. In addition, the DOT and the borrower will execute a credit agreement, which is the definitive agreement between the DOT and the borrower, memorializes all of the terms

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<sup>13</sup> 23 U.S.C. §602(d)(1) and 45 U.S.C. §822(i)(1).

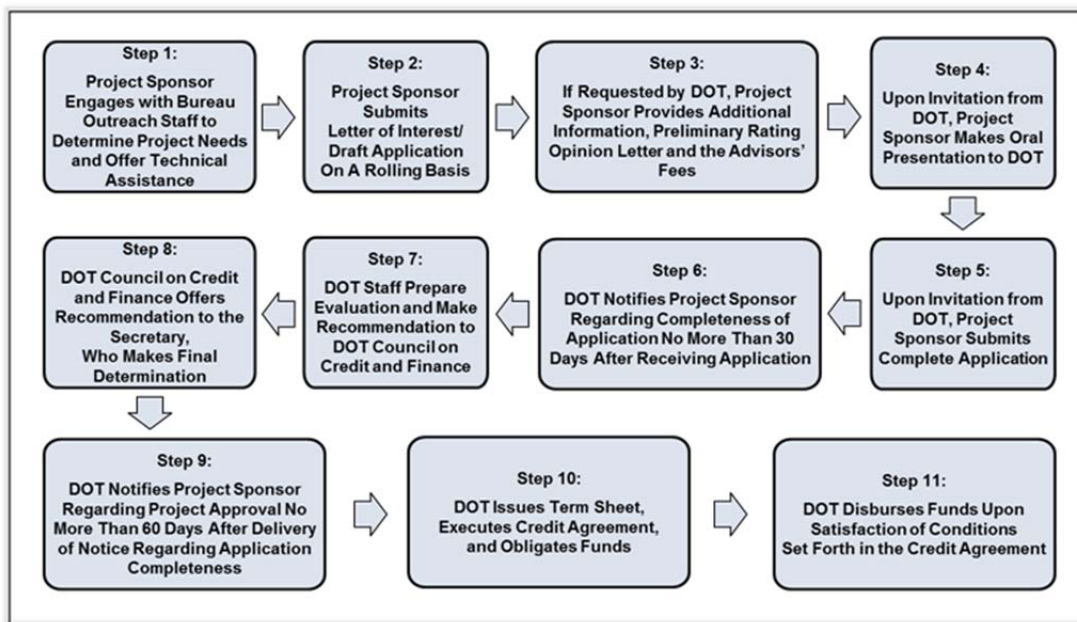
<sup>14</sup> 23 U.S.C. §602(d)(2) and 45 U.S.C. §822(i)(3).

and conditions of TIFIA or RRIF credit assistance, and authorizes the disbursement of funds subject to satisfaction of the specified conditions. Prior to execution of the credit agreement, the borrower must satisfy all applicable TIFIA and/or RRIF Program requirements.

11. Disbursement of Funds. For all credit assistance, the DOT will disburse funds only to reimburse eligible project costs upon satisfaction of the conditions precedent set forth in the credit agreement.<sup>15</sup>

Exhibit 1-A below shows each of these eleven steps as a flow chart.

Exhibit 1-A: Selection and Funding of TIFIA and RRIF Projects



<sup>15</sup> 23 U.S.C. §§603(a), (e)(2), 604(a)(2) and 45 U.S.C. §822(b).

## Chapter 2: Terms and Funding of Bureau Credit Instruments

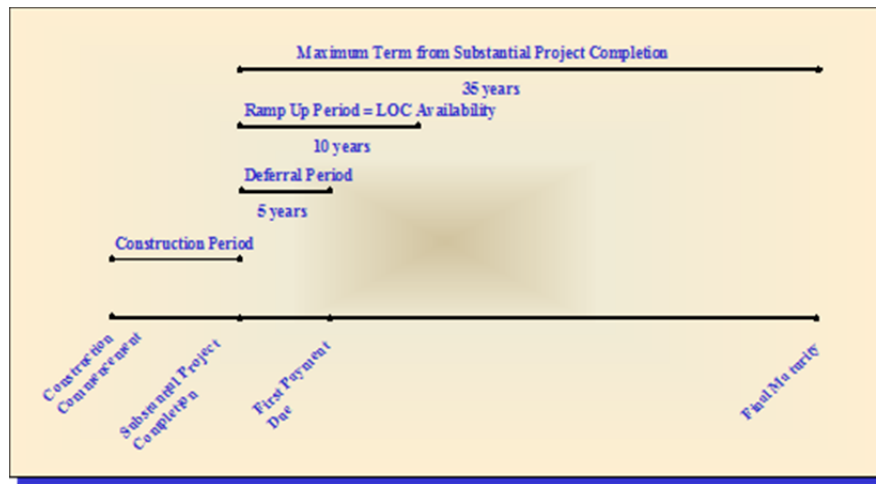
The Bureau Credit Program's secured (direct) loans, loan guarantees, and standby lines of credit<sup>16</sup> may offer more flexible repayment terms and more favorable interest rates compared to other lenders. In addition, master credit agreements offer predictability and efficiency for planning purposes for projects with an identified source of revenue and solidified schedule for construction. This chapter summarizes the terms that apply generally to Bureau credit assistance and describes the major features of each credit instrument. A section on loan repayment and prepayment structuring provides information on financing structures and related repayment issues that may arise during negotiations. The chapter also provides an explanation of the funding controls that govern the amount of credit assistance available under each Bureau Credit Program.

### Section 2-1

#### Summary of Basic Terms for Bureau Credit Assistance

Certain features of Bureau credit assistance are the same regardless of whether the credit assistance is provided under the RRIF Program or the TIFIA Program. For example, the maximum maturity of all TIFIA and RRIF credit instruments is the lesser of: (i) 35 years after a project's substantial completion or (ii) the useful life of the project being financed by TIFIA or RRIF.<sup>17</sup> The DOT, at its discretion, has the ability to defer the first TIFIA or RRIF payment up to five years after substantial completion, depending on the needs of the project.<sup>18</sup> Exhibit 2-A provides an illustrative repayment structure for the three credit instruments.

Exhibit 2-A: Illustrative Repayment Structure as Permitted by Statute



<sup>16</sup> Note that standby lines of credit are only available under the TIFIA Program and are not available under the RRIF Program.

<sup>17</sup> 23 U.S.C. §§603(b)(5), (e)(2) and 604(c)(2)(B) and 45 U.S.C. §822(g)(1). Note that for TIFIA loans to capitalize rural projects funds within a state infrastructure bank (SIB), the maximum maturity for the secured loan is 35 years after the date on which the TIFIA secured loan is obligated (23 U.S.C. §603(b)(5)(B)).

<sup>18</sup> 23 U.S.C. §603(c)(2), (c)(3), (e)(2), and 45 U.S.C. §822(j)(1). For TIFIA standby lines of credit, repayment can commence up to 15 years after substantial completion (23 U.S.C. §604(c)(2)(A)).

A Bureau credit instrument can be junior (i.e., subordinate) to the project's other debt obligations in the priority of its lien on the project's cash flow. In the event of bankruptcy, insolvency, or liquidation, the DOT is required by both the RRIF and TIFIA statutes to have a parity lien with respect to the project's senior creditors.<sup>19</sup> The credit agreement will clearly specify the DOT's interest in the pledged security relative to other creditors.

## **Other Key Limitations to Bureau Credit Assistance**

### **TIFIA Program**

The TIFIA statute places two other important limits on the Federal Government's exposure to credit risk. First, TIFIA credit assistance is limited to no more than 49 percent of reasonably anticipated eligible project costs for a TIFIA secured loan or loan guarantee and no more than 33 percent of reasonably anticipated eligible project costs for a TIFIA standby line of credit.<sup>20</sup> As noted below, TIFIA direct loans provided to date have only covered up to 33 percent of reasonably anticipated eligible project costs. Applicants requesting assistance in excess of this amount must provide a rationale for such additional assistance. The limitation in the DOT's total share of project costs is designed to ensure that the DOT shares the credit risk with other participants. Second, the applicant must obtain two investment-grade ratings (Baa3/BBB- or higher) on the senior debt obligations and two ratings on the TIFIA credit instrument, both from a Credit Rating Agency, in order to execute a TIFIA credit agreement.<sup>21</sup> If the TIFIA credit assistance is the senior and/or the only debt in the project, then it must receive two investment grade ratings.<sup>22</sup> If the total amount of debt in the project is less than \$75 million, then the applicant must obtain only one investment-grade rating on the senior obligations and one rating on the TIFIA credit instrument from a Credit Rating Agency.<sup>23</sup> Chapter 3 provides further details on eligible project costs and credit ratings.

### **RRIF Program**

As noted above, the RRIF Program does not currently have an appropriation of budget authority to cover the cost of RRIF direct loans and loan guarantees. As such, the cost to the government of providing financial assistance must be borne by the RRIF applicant, or another non-federal entity on behalf of the applicant, through the payment of the credit risk premium

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<sup>19</sup> 23 U.S.C. §§603(b)(6), (e)(2), 604(b)(8), and 45 U.S.C. §822(1)(1). However, the TIFIA and RRIF nonsubordination requirements may be waived if certain specified conditions are satisfied: (i) the borrower is a public agency; (ii) the credit instrument receives a rating within the A category or higher from at least one Credit Rating Agency for RRIF credit instruments and at least two Credit Rating Agencies for TIFIA credit instruments; (iii) the credit instrument is secured and payable from pledged revenues that are not affected by project performance, such as a tax-backed revenue pledge or a system pledge; and (iv) the percentage of eligible project costs being financed by Bureau credit assistance is 33 percent or less for TIFIA credit assistance and 50 percent or less for RRIF credit assistance. However, in such cases for (x) TIFIA credit assistance, the maximum credit subsidy to be paid by the Federal Government may not be more than 10 percent of the principal amount of the TIFIA credit assistance, and the obligor is responsible to pay any remaining subsidy cost, and (y) for RRIF credit assistance, the DOT may impose limitations on the waiver of nonsubordination requirements if it determines that such limitations would be in the financial interest of the Federal Government. 23 U.S.C. §§603(b)(6)(B) and 604(b)(8)(B), and 45 U.S.C. §822(1)(2)(A).

<sup>20</sup> 23 U.S.C. §§603(b)(2) and 604(b)(2).

<sup>21</sup> 23 U.S.C. §602(a)(2)(A).

<sup>22</sup> 23 U.S.C. §602(a)(2)(B).

<sup>23</sup> 23 U.S.C. §602(a)(2)(A)(iv) and (a)(2)(B).

(CRP). The CRP attributable to each drawdown request must be paid on a pro rata basis prior to each disbursement.<sup>24</sup> Chapter 2 provides further information regarding the CRP.

In addition, the RRIF statute requires that RRIF credit agreements provide for certain specific terms and conditions regarding the sufficiency and availability of funds to cover ongoing operations. Those terms and conditions will require a RRIF borrower to agree:

- Not to use any funds or assets from railroad or intermodal operations for purposes not related to such operations if that use would impair the ability of the borrower or its partners to provide rail or intermodal services in an efficient and economic manner or would adversely affect the ability of the borrower or its partners to perform its obligations under the RRIF credit instrument;
- To maintain its capital program, equipment, facilities, and operations on a continuing basis, consistent with its capital resources; and
- Not to make any discretionary dividend payments that unreasonably conflict with its ability to maintain its capital program, equipment, facilities and operations.<sup>25</sup>

## **Section 2-2**

### **Bureau Credit Instruments**

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The main features of direct loans, loan guarantees, lines of credit (TIFIA only), and master credit agreements are summarized below. These features are established by statute. This section also addresses the rules that govern the setting of interest rates, disbursement of funds, and repayment of TIFIA and RRIF credit assistance.

#### **Secured/Direct Loans (23 U.S.C. §603 and 45 U.S.C. §822)**

A direct loan<sup>26</sup> is a debt obligation involving the DOT as the lender and a non-Federal entity as the borrower. Actual terms and conditions will be negotiated between the DOT and the borrower, but the general characteristics include:

- Use of Proceeds. The proceeds of both RRIF and TIFIA direct loans must be used either to finance eligible project costs or to refinance debt that was issued to finance eligible project costs.

TIFIA direct loans can only be used to refinance: (i) interim construction financing of eligible project costs; (ii) existing Federal credit instruments for rural infrastructure projects; or (iii) long-term project obligations or Federal credit instruments if the refinancing provides additional funding capacity for the completion, enhancement, or

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<sup>24</sup> 45 U.S.C. §822(f)(4) and 49 C.F.R. §260.15(c).

<sup>25</sup> 45 U.S.C. §822(h)(1).

<sup>26</sup> Note that the TIFIA statute defines direct loans as “secured loans” and the RRIF statute uses the term “direct loans.” For ease of reference in this Program Guide, we use the term “direct loans.” (See 23 U.S.C. §601(a)(17) and 45 U.S.C. §821(3).)

expansion of an eligible project.<sup>27</sup> In the case of refinancing interim construction financing, the TIFIA direct loan may not refinance the existing debt (x) if that debt's maturity is later than 1 year after the substantial completion of the project, or (y) later than one year following substantial completion of the project.<sup>28</sup>

RRIF direct loans can only be used to refinance outstanding debt incurred for certain types of eligible projects, including debt incurred to acquire, improve, or rehabilitate intermodal or rail equipment or facilities, including track, components of track, bridges, yards, buildings, and shops, and costs related thereto, or to develop or establish new intermodal or railroad facilities.<sup>29</sup> RRIF direct loans cannot be used to refinance outstanding debt incurred for other eligible projects.

- **Amount.** The principal amount of a RRIF direct loan may not exceed available statutory authority.<sup>30</sup> The principal amount of a TIFIA direct loan (in combination with other TIFIA credit assistance, if any) may not exceed 49 percent of the reasonably anticipated eligible project costs.<sup>31</sup> To date, TIFIA direct loans have only covered up to 33 percent of reasonably anticipated eligible project costs in order to ensure other investors are sharing in project costs and associated risks. While TIFIA can fund up to 49 percent of reasonably anticipated eligible project costs, applicants requesting assistance in excess of 33 percent of reasonably anticipated eligible project costs must provide a strong rationale for requiring additional assistance. If the project is supported by debt senior to the TIFIA lien, the TIFIA credit instrument must be secured by the same revenues pledged to the senior debt. If the TIFIA secured loan is rated below investment grade, then the amount of the TIFIA loan may not exceed the amount of the senior debt.<sup>32</sup>
- **Interest Rate.** The interest rate on a TIFIA direct loan will be equal to or greater than the yield on U.S. Treasury securities of comparable maturity on the date of execution of the credit agreement.<sup>33</sup> The interest rate on a RRIF direct loan will be equal to the yield on U.S. Treasury securities of comparable maturity on the date of execution of the credit agreement.<sup>34</sup> The DOT identifies the Treasury rates through use of the daily rate tables published by the Bureau of the Public Debt for the State and Local Government Series (SLGS) investments. Adding one basis point to the SLGS rates produces the estimated average yields on comparable Treasury securities. The SLGS tables can be found on-line at <https://www.treasurydirect.gov/GA-SL/SLGS/selectSLGSDate.htm>. The daily 30-year Treasury rate can be found on the Bureau's website at

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<sup>27</sup> 23 U.S.C. §603(a)(1).

<sup>28</sup> 23 U.S.C. §603(a)(2).

<sup>29</sup> 45 U.S.C. §822(b)(1).

<sup>30</sup> 45 U.S.C. §822(d). In addition, credit assistance for RRIF TOD Projects is limited to 75 percent of total project costs.

<sup>31</sup> 23 U.S.C. §603(b)(2)(A). Note that the maximum amount is limited to 33 percent where the nonsubordination requirement is waived, as described in footnote 17 above. Note also that the principal amount of a TIFIA direct loan to capitalize a rural projects fund within a SIB may not exceed \$100 million.

<sup>32</sup> 23 U.S.C. §603(b)(2).

<sup>33</sup> 23 U.S.C. §603(b)(4)(A).

<sup>34</sup> 45 U.S.C. §822(e) and 49 C.F.R. §260.9.



<https://www.transportation.gov/buildamerica>. Interest begins to accrue on loan proceeds immediately upon disbursement of funds to the borrower.

TIFIA direct loans may be provided to rural infrastructure projects, or under the FAST Act, to capitalize rural projects funds within SIBs (these types of projects together, Rural Projects), at a discounted interest rate of one-half of the Treasury Rate.<sup>35</sup> The reduced interest rate is only available to TIFIA direct loans for Rural Projects where the subsidy cost of such loans is funded out of amounts set aside from the TIFIA Program's annual budget authority specifically for such reduced interest rate loans.<sup>36</sup> The TIFIA Program may set aside up to 10 percent of its annual budget authority to fund the subsidy costs of TIFIA direct loans to Rural Projects at the reduced interest rate.<sup>37</sup> The reduced interest rate is only available in any fiscal year to the extent sufficient funds are available in the set-aside for that fiscal year.<sup>38</sup> Any amounts set aside in a fiscal year to fund the subsidy cost of TIFIA direct loans to Rural Projects at the reduced interest rate that have not been obligated by June 1 of such fiscal year must be made available to fund projects not receiving the reduced interest rate to the extent sufficient funds are not otherwise available.<sup>39</sup>

In addition, the TIFIA statute allows project sponsors to buy down the interest rate on a TIFIA direct loan in the event the rate has increased between the date on which the project sponsor submitted its complete application and the date on which the secured loan is executed.<sup>40</sup> Project sponsors can reduce the interest rate by way of a limited buydown up to 1 1/2 percentage points (150 basis points) or the amount of the increase in the interest rate, whichever is less.

- **Timing of Disbursements.** The DOT will disburse funds as often as monthly, on a reimbursement basis, as costs are incurred for eligible project purposes.<sup>41</sup> The credit agreement will specify a draw schedule, which may be amended if necessary. Note that, for RRIF direct loans, the CRP attributable to each RRIF loan drawdown request must be paid to the DOT on a pro rata basis prior to each disbursement.<sup>42</sup>
- **Maturity.** The final maturity date of a direct loan must be no later than 35 years after the date of substantial completion of the project or the useful life of the project, whichever is less.<sup>43</sup> Note that, for a TIFIA direct loan to capitalize a rural projects fund within a SIB,

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<sup>35</sup> 23 U.S.C. §603(b)(4)(B)(i).

<sup>36</sup> 23 U.S.C. §603(b)(4)(B)(ii).

<sup>37</sup> 23 U.S.C. §608(a)(3)(A).

<sup>38</sup> 23 U.S.C. §603(b)(4)(B)(ii).

<sup>39</sup> 23 U.S.C. §608(a)(3)(B).

<sup>40</sup> 23 U.S.C. §§601(a)(8) and 603(b)(4)(C). In addition, a limited buydown is available in the event a borrower has entered into a master credit agreement and the interest rate has increased between the date on which the master credit agreement was executed and the date on which an underlying TIFIA direct loan is entered into in connection with such master credit agreement.

<sup>41</sup> 23 U.S.C. §603(a)(1) and 45 U.S.C. §§822(b)(1) and (2).

<sup>42</sup> 45 U.S.C. §822(f)(4) and 49 C.F.R. §260.15(c).

<sup>43</sup> 23 U.S.C. §603(b)(5) and 45 U.S.C. §822(g)(1).

the final maturity date of the TIFIA direct loan must be not later than 35 years after the date on which the TIFIA direct loan is obligated.<sup>44</sup>

- **Repayment Terms.** Scheduled repayments must commence no later than five years after the date of substantial completion of the project.<sup>45</sup> Debt service will be structured based on project economics and risk to the DOT.<sup>46</sup> Debt service payments are scheduled semi-annually.
- **Deferrals.** In the event revenues are insufficient to meet scheduled loan payments, the DOT, in its sole discretion, may allow payment deferrals. Any interest payment that is deferred will be added to the outstanding balance of the direct loan and amortized over the existing term of the direct loan. Any principal payment that is deferred will continue to accrue interest on a current basis. In addition, (a) for TIFIA direct loans, any such deferral will be contingent on the project's meeting requirements established by the Secretary, including standards for reasonable assurance of repayment and (b) for RRIF direct loans, such deferral is limited to a maximum aggregate time of one year over the term of the direct loan.<sup>47</sup> There can be no assurance the Secretary will exercise this authority, however, so borrowers should only agree to a debt service schedule they are confident they can meet.
- **Prepayment Conditions.** In general, a direct loan may be prepaid in whole or in part at any time without penalty.<sup>48</sup>
- **Lien Priority.** The DOT's lien on pledged revenues can be subordinated to those of senior lenders to the project except in the event of bankruptcy, insolvency, or liquidation of the obligor. In such an instance, the DOT's lien would be on par with the lien of the project's senior creditors.<sup>49</sup> This provision will be implemented by way of incorporation into the TIFIA or RRIF credit agreement, as applicable, and any other appropriate financing agreements entered into at the time of execution of such credit agreement. As noted in Section 2-1 above, this provision can be waived under certain circumstances for public agency borrowers having senior bonds under preexisting indentures so long as certain conditions are met.<sup>50</sup>

### **Loan Guarantees (23 U.S.C. §603(e) and 45 U.S.C. §822)**

A Bureau loan guarantee is a pledge by the DOT to pay a third-party lender all or part of the debt service on a borrower's debt obligation. The DOT will seek to recover from the borrower all funds paid to the guaranteed lender, pursuant to a reimbursement agreement executed simultaneously with the loan guarantee.

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<sup>44</sup> 23 U.S.C. §603(b)(5)(B).

<sup>45</sup> 23 U.S.C. §603(c)(2) and 45 U.S.C. §822(j)(1).

<sup>46</sup> 23 U.S.C. §603(c)(1) and 45 U.S.C. §822(j)(1).

<sup>47</sup> 23 U.S.C. §603(c)(3) and 45 U.S.C. §822(j)(3).

<sup>48</sup> 23 U.S.C. §603(c)(4) and 45 U.S.C. §822(j)(4).

<sup>49</sup> 23 U.S.C. §603(b)(6) and 45 U.S.C. §822(l).

<sup>50</sup> 23 U.S.C. §603(b)(6)(B) and 45 U.S.C. §822(l)(2).

By statute, the guaranteed lender must be a non-Federal entity, and for TIFIA loan guarantees, the guaranteed lender must be a “non-Federal qualified institutional buyer” as defined in 17 C.F.R. §230.144A(a), including qualified retirement plans and governmental plans.<sup>51</sup> Prospective applicants and lenders should contact the DOT with any questions about what constitutes a “non-Federal qualified institutional buyer.”

The DOT may give preference to applications for loan guarantees rather than other forms of credit assistance.<sup>52</sup> 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 deeper than can be provided by a loan guarantee. Applicants requesting only a direct loan and/or a line of credit (TIFIA only) are required to specify in their application how the plan of finance for the project would be impacted if credit assistance was instead provided in the form of a loan guarantee.

Characteristics of a guaranteed loan include:

- Use of Proceeds. The proceeds of a guaranteed loan must be used either to finance eligible project costs or to refinance debt that was issued to finance eligible project costs.

TIFIA guaranteed loans can only be used to refinance: (i) interim construction financing of eligible project costs; (ii) existing Federal credit instruments for rural infrastructure projects; or (iii) long-term project obligations or Federal credit instruments if the refinancing provides additional funding capacity for the completion, enhancement, or expansion of an eligible project.<sup>53</sup> In the case of a TIFIA guaranteed loan used to refinance interim construction financing, the guaranteed loan may not refinance the existing debt (x) if that debt’s maturity is later than 1 year after the substantial completion of the project, or (y) later than one year following substantial completion of the project.<sup>54</sup>

RRIF guaranteed loans can only be used to refinance outstanding debt incurred for certain types of eligible projects, including debt incurred to acquire, improve, or rehabilitate intermodal or rail equipment or facilities, including track, components of track, bridges, yards, buildings, and shops, and costs related thereto, or to develop or establish new intermodal or railroad facilities.<sup>55</sup> RRIF guaranteed loans cannot be used to refinance outstanding debt incurred for other eligible projects.

- Amount. The amount of a RRIF loan guarantee may not exceed available statutory authority.<sup>56</sup> In addition, a RRIF loan guarantee may not guarantee more than 80% of the

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<sup>51</sup> 23 U.S.C. §601(a)(5) and 45 U.S.C. §821(7).

<sup>52</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-129, Policies for Federal Credit Programs and Non-Tax Receivables (2013) at Section II.B (pp. 4-5) and 49 C.F.R. §80.15(c).

<sup>53</sup> 23 U.S.C. §603(a)(1) and (e)(2).

<sup>54</sup> 23 U.S.C. §603(a)(2) and (e)(2).

<sup>55</sup> 45 U.S.C. §822(b)(1).

<sup>56</sup> 45 U.S.C. §822(d). In addition, credit assistance for RRIF TOD Projects is limited to 75 percent of total project costs.

guaranteed loan.<sup>57</sup> The amount of a TIFIA loan guarantee, in combination with any other TIFIA credit assistance, may not exceed 49 percent of the reasonably anticipated eligible project costs.<sup>58</sup> To date, TIFIA credit assistance has only covered up to 33 percent of reasonably anticipated eligible project costs and applicants requesting assistance in excess of this amount must provide a rationale for such additional assistance.

- **Interest Rate.** The interest rate on a guaranteed loan negotiated by the borrower and the guaranteed lender must be satisfactory to the DOT.<sup>59</sup> Interest payments on a guaranteed loan are subject to Federal income taxation.<sup>60</sup>
- **Maturity.** The final maturity date of the guaranteed loan must be no later than 35 years after the date of substantial completion of the project or the useful life of the project, whichever is less.<sup>61</sup>
- **Repayment Terms.** Scheduled repayments to the guaranteed lender must commence no later than five years after the date of substantial completion of the project.<sup>62</sup>
- **Prepayment Conditions.** The prepayment features on a guaranteed loan negotiated between the guaranteed lender and the borrower must be satisfactory to the DOT.<sup>63</sup>
- **Default Feature.** In the event of an uncured borrower payment default, the guaranteed lender will receive payment from the DOT for the guaranteed payment due.<sup>64</sup> The DOT will seek recovery from the borrower of all funds advanced, pursuant to a reimbursement agreement executed simultaneously with the loan guarantee.
- **Lien Priority.** The DOT's lien on pledged revenues can be subordinated to those of senior lenders to the project except in the event of bankruptcy, insolvency, or liquidation of the obligor. In such an instance, the DOT's lien would be on par with the lien of the project's senior creditors.<sup>65</sup> This provision will be implemented by way of incorporation into the TIFIA or RRIF loan guarantee agreement, as applicable, and any other appropriate financing agreements entered into at the time of execution of such loan guarantee agreement. As noted above, this provision can be waived under certain circumstances for public agency borrowers having senior bonds under preexisting indentures so long as certain conditions are met.<sup>66</sup>

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<sup>57</sup> 49 C.F.R. §260.51(a).

<sup>58</sup> 23 U.S.C. §603(b)(2) and (e)(2).

<sup>59</sup> 23 U.S.C. §603(e)(2) and 45 U.S.C. §822(e)(2).

<sup>60</sup> 26 U.S.C. §149(b).

<sup>61</sup> 23 U.S.C. §603(b)(5) and (e)(2); 45 U.S.C. §822(g)(1).

<sup>62</sup> 23 U.S.C. §603(c)(2) and (e)(2); 45 U.S.C. §822(j)(1).

<sup>63</sup> See 23 U.S.C. §603(e)(2). The RRIF Program will apply a similar requirement for prepayment arrangements to be satisfactory to the DOT.

<sup>64</sup> 23 U.S.C. §601(a)(9) and 45 U.S.C. §823(g).

<sup>65</sup> 23 U.S.C. §603(b)(6) and (e)(2); 45 U.S.C. §822(l).

<sup>66</sup> 23 U.S.C. §603(b)(6)(B) and 45 U.S.C. §822(1)(2).

### **TIFIA Lines of Credit (23 U.S.C. §604)**

In addition to direct loans and loan guarantees, the TIFIA Program also offers lines of credit. A line of credit provides a contingent loan that may be drawn upon after substantial completion of a project to supplement project revenues during the first 10 years of a project's operations.<sup>67</sup> The DOT will disburse funds only under certain conditions, which will be specified in the TIFIA credit agreement.<sup>68</sup>

Characteristics of a line of credit include:

- **Use of Proceeds.** The proceeds from a draw on a TIFIA line of credit may be used only to pay debt service on project obligations (other than a TIFIA credit instrument) issued to finance eligible project costs, extraordinary repair and replacement costs, operation and maintenance expenses, and/or costs associated with Federal or state environmental restrictions arising after the transaction closed.<sup>69</sup>
- **Amount.** The total principal amount of a TIFIA line of credit may not exceed 33 percent of the reasonably anticipated eligible project costs.<sup>70</sup> The total combined TIFIA credit assistance for a project receiving a TIFIA line of credit plus a TIFIA direct loan or TIFIA loan guarantee may not exceed 49 percent of eligible project costs.<sup>71</sup>
- **Condition Precedent for Draws.** A draw may be made only if revenues from the project are insufficient to pay the costs enumerated above in "Use of Proceeds." Reserve funds need not be tapped prior to a draw.<sup>72</sup>
- **Availability.** A TIFIA line of credit may be available for a period of 10 years following substantial completion of the project.<sup>73</sup>
- **Interest Rate.** The interest rate on a TIFIA direct loan resulting from a draw on a TIFIA line of credit will be equal to or greater than the yield on a 30-year U.S. Treasury security on the date of the execution of the TIFIA line of credit agreement.<sup>74</sup> The DOT identifies the Treasury rates through use of the daily rate tables published by the Bureau of the Public Debt for the State and Local Government Series investments. Adding one basis point to the SLGS rates produces the estimated average yields on comparable Treasury securities. The SLGS tables can be found on-line at <https://www.treasurydirect.gov/GA-SL/SLGS/selectSLGSDate.htm>. The daily 30-year Treasury rate can be found on the Bureau's website at <http://www.transportation.gov/buildamerica>. Interest accrual on loan proceeds begins immediately upon disbursement of funds to the borrower.

<sup>67</sup> 23 U.S.C. §604(a)(1) and (b)(6).

<sup>68</sup> 23 U.S.C. §604(a)(1) and (b)(1).

<sup>69</sup> 23 U.S.C. §604(a)(2).

<sup>70</sup> 23 U.S.C. §604(b)(2).

<sup>71</sup> 23 U.S.C. §604(b)(10).

<sup>72</sup> 23 U.S.C. §604(b)(3)(B).

<sup>73</sup> 23 U.S.C. §604(b)(6).

<sup>74</sup> 23 U.S.C. §604(b)(4).

- **Maturity.** The final maturity date of a TIFIA direct loan resulting from a draw on a TIFIA line of credit must be no later than 35 years after the date of substantial completion of the project or the useful life of the project, whichever is less.<sup>75</sup>
- **Repayment Terms.** Scheduled repayments of a draw on a TIFIA line of credit must commence no later than five years after the end of the 10-year period of availability and be fully repaid no later than 25 years after the end of the 10-year period of availability.<sup>76</sup> Level debt service is not required.<sup>77</sup> Debt service payments should be scheduled semi-annually.
- **Ratings Requirement.** The project's senior obligations must receive an investment grade rating from two Credit Rating Agencies before the DOT will enter into a TIFIA line of credit.<sup>78</sup>
- **Lien Priority.** The DOT's lien on pledged revenues can be subordinated to those of senior lenders to the project except in the event of bankruptcy, insolvency, or liquidation of the obligor. In such an instance, the DOT's lien would be on par with the lien of the project's senior creditors.<sup>79</sup> This provision will be implemented by way of incorporation into the TIFIA credit agreement and any other appropriate financing agreements entered into at the time of execution of the TIFIA credit agreement. As noted above, this provision can be waived under certain circumstances for public agency borrowers having senior bonds under preexisting indentures so long as certain conditions are met.<sup>80</sup>

### **Master Credit Agreements (23 U.S.C. §602(b)(2) and 45 U.S.C. §822(m))**

A master credit agreement is a contingent commitment of TIFIA or RRIF credit assistance for a program of related projects.<sup>81</sup> While these contingent commitments are not an obligation and do not guarantee receipt of RRIF or TIFIA credit assistance, as applicable, they represent an agreement between the DOT and a project sponsor to provide credit assistance subject to the satisfaction of all of the terms and conditions for credit assistance set forth under the RRIF or TIFIA statutes, as applicable, including satisfaction of Federal eligibility requirements (such as the National Environmental Policy Act of 1969) and the availability of budgetary authority for such credit assistance. The DOT will not enter into a credit instrument under and pursuant to a master credit agreement (and as such will not obligate funds) until the DOT has confirmed satisfaction of all such terms and conditions and the availability of sufficient budgetary authority to fund such credit instrument.

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<sup>75</sup> 23 U.S.C. §604(c)(2)(B).

<sup>76</sup> 23 U.S.C. §604(c)(2).

<sup>77</sup> 23 U.S.C. §604(c)(1).

<sup>78</sup> 23 U.S.C. §604(a)(4).

<sup>79</sup> 23 U.S.C. §604(b)(8)(A).

<sup>80</sup> 23 U.S.C. §604(b)(8)(B).

<sup>81</sup> In addition, a TIFIA master credit agreement can be utilized for a single project where current-year funds have been fully obligated to other projects and the project sponsor elects to wait until the fiscal year when additional funds are available for TIFIA credit assistance. (23 U.S.C. §602(b)(2)(B))

To be eligible for a master credit agreement, each project covered by the master credit agreement must be an eligible project under the statutory requirements of the relevant Credit Program. The master credit agreements will incorporate a list of eligible projects, the maximum amount of credit assistance available and the availability period for the contingent commitment. In addition, the master credit agreement will include the terms and conditions for providing the credit assistance as well as terms and conditions that will be common across all credit instruments issued under the master credit agreement.

## **Section 2-3**

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### **Direct Loan Repayment and Prepayment Structuring**

The TIFIA and RRIF statutes give the DOT discretion to defer the commencement of debt service repayments for up to five years after substantial completion.<sup>82</sup> The DOT also has the flexibility to structure a debt service schedule so that repayment is aligned with projected cash flows.

1. Scheduled Debt Service. Projects are not entitled to debt service deferral. In exercising its discretion to defer the commencement of debt service repayments, the DOT will evaluate the economics and risks to the DOT of each project on a project-by-project basis to determine an appropriate repayment schedule. Factors in this assessment include:
  - *Availability of revenues for debt service.* Some projects are not true “project financings,” but rely on tax or other non-project revenues, which may be available for debt service even before the project is completed. In such cases, the DOT is likely to require commencement of debt service upon substantial completion, although the DOT may require commencement of debt service during construction for a project not financed with user revenues. Projects more likely to be favorably considered for interest deferral and backloading of principal are those where project revenues support the financing and borrowers anticipate a long ramp-up period.
  - *Amortization of senior debt.* When the financial plan includes other project debt senior to the TIFIA and/or RRIF credit instruments, the DOT expects that the capitalized interest period for the project’s senior debt is likely to end before the capitalized interest period for the TIFIA and/or RRIF loan(s). Thus, the DOT may agree to continue deferring an appropriate amount of its loan interest to ensure that revenue is adequate to pay full interest on the senior debt. However, the DOT will not increase its investment in a project by deferring interest when other creditors are withdrawing their investment. Therefore, the DOT’s policy is not to permit any amortization of a project’s senior debt while TIFIA/RRIF interest is being deferred.
  - *Returns on equity.* The DOT requires equity investors, who will be subordinate to the DOT, to defer commencement of their return. The DOT will not permit any distribution to equity until all currently accruing TIFIA/RRIF interest is paid. The

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<sup>82</sup> 23 U.S.C. §603(c)(2) and (e)(2); 45 U.S.C. §822(j). Debt service payments on TIFIA direct loans issued under a TIFIA line of credit can be deferred for up to fifteen years after substantial completion. 23 U.S.C. §604(c)(2)(A).

DOT will negotiate, on a project-by-project basis, the priority and relationship of TIFIA/RRIF repayment and equity distributions. As noted above in Section 2-1, the DOT will also prohibit RRIF borrowers from making any discretionary dividend payments that unreasonably conflict with the RRIF borrower's ability to maintain its capital program, equipment, facilities and operations.<sup>83</sup>

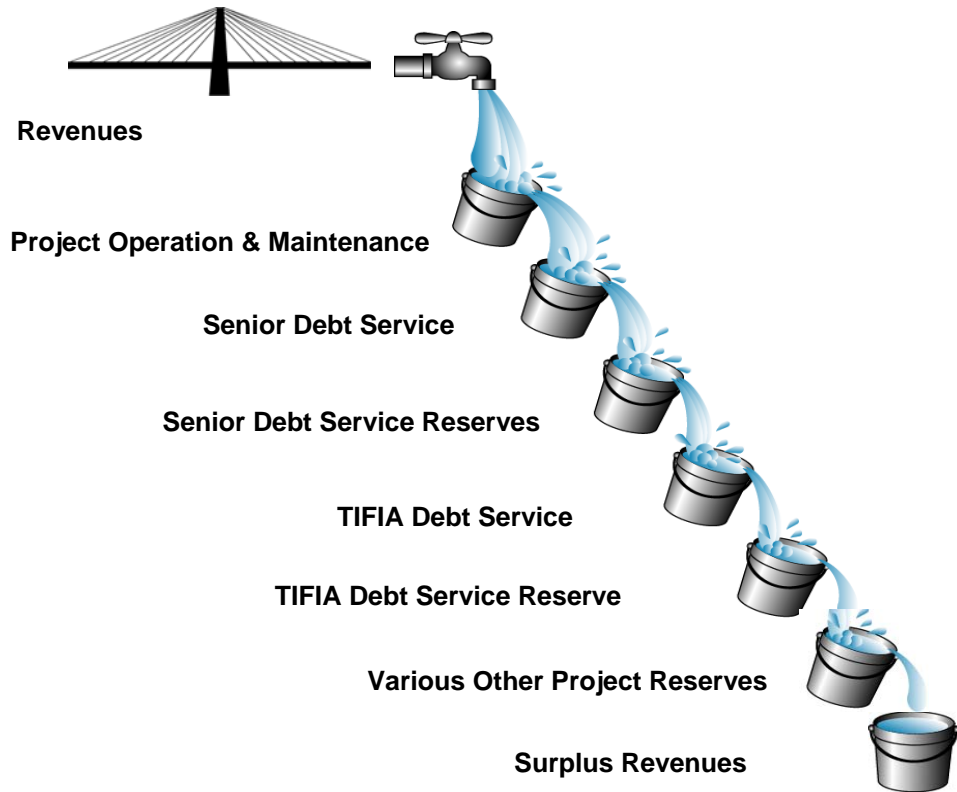
2. Prepayment and Refinancing. Although the Credit Programs provide long-term financing, the DOT does not intend that TIFIA or RRIF direct loans become part of a project's permanent capital structure where a strong revenue stream and vigorous project economics permit prepayment or substitution of the DOT credit instrument. The DOT will negotiate a debt service schedule that provides a high probability of repayment and avoidance of default. In return, the DOT typically requires that excess revenues – not needed for project or ongoing operational purposes – be applied to prepayment of the TIFIA/RRIF loan. The DOT also will seek to structure the financing in a way that encourages borrowers to replace the TIFIA/RRIF loan with capital markets debt at such time as project economics support refinancing.
3. Flow of Funds (Revenue/Project Financings). DOT credit instruments that are secured by revenues, such as toll or system revenues or sales tax revenues, will typically establish a flow of funds that sets forth a prescribed order of cashflows. This flow of funds will be documented in both the DOT credit instrument and ancillary documentation, such as a collateral agency agreement or an indenture. Exhibit 2-B on the following page shows a typical flow of funds for a public project financing secured by project-generated revenues, in this case a financing that includes both senior bonds and a subordinate TIFIA loan. In the example set forth below, senior debt service (as well as reserve accounts for the benefit of senior bondholders) accumulates revenues ahead of TIFIA debt service and reserve accounts for TIFIA debt service, if applicable. However, note that for public-private partnerships, the DOT will require that debt service on the DOT credit instrument must be paid before the funding of any senior debt service reserve accounts.

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<sup>83</sup> 45 U.S.C. §822(h)(1)(C).



Exhibit 2-B: Example of TIFIA Public Sponsor, Project Revenue Flow of Funds



## **Section 2-4**

### **Taxation Issues**

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 Code). Neither the TIFIA nor RRIF statutes override or otherwise modify this provision of the Code. The DOT urges all applicants, and particularly those intending to use tax-exempt bonds in connection with direct loans or TIFIA lines of credit, to consult with the Internal Revenue Service, the U.S. Department of the Treasury, and/or bond and tax counsel.

## **Section 2-5**

### **Credit Program Funding**

The Credit Programs are subject to the Federal Credit Reform Act of 1990, which requires the DOT to establish a capital reserve<sup>84</sup> sufficient to cover the estimated long-term cost to the Federal Government of a Federal credit instrument, including any expected credit losses,

<sup>84</sup> As noted above, under the TIFIA Program, the capital reserve is referred to as the “credit subsidy” and under the RRIF Program it is referred to as the “credit risk premium.”

before the DOT can provide TIFIA or RRIF credit assistance.<sup>85</sup>

### **TIFIA Program**

Congress places limits on the annual subsidy amount available to fund the credit subsidy for TIFIA credit instruments.

The FAST Act authorized \$275 million in FY 2016 funds, \$275 million in FY 2017 funds, \$285 million in FY 2018 funds, \$300 million in FY 2019 funds, and \$300 million in FY 2020 funds in TIFIA budget authority from the Highway Trust Fund to pay the subsidy cost of TIFIA credit assistance.<sup>86</sup> Additional funds may also be available from budget authority carried over from previous fiscal years. Any budget authority not obligated in the fiscal year for which it is authorized remains available for obligation in subsequent years.<sup>87</sup>

The TIFIA budget authority is subject to an annual obligation limitation that may be established in appropriations law. Like all funds subject to the annual Federal-aid obligation ceiling, the amount of TIFIA budget authority available in a given year may be less than the amount authorized for that fiscal year.

The amount of TIFIA budget authority available in a given year is subject to several factors, as described below.

- **Federal-aid Highway Obligation Limitation.** This obligation limitation pertains to most of the programs funded from the Federal Highway Trust Fund (including the TIFIA Program) and is determined through the appropriations process each year. As with appropriations processes for other Federal programs, this limitation typically reduces the total funds available for obligation in the year ahead.
- **Program Administration Expenses.** The TIFIA statute authorizes the DOT to use a specified amount of authorized budget authority for each fiscal year to administer the TIFIA Program.<sup>88</sup> In addition, the statute authorizes the DOT to collect and spend fees to cover expenses related to reviewing, negotiating, monitoring and servicing credit agreements.<sup>89</sup>
- **Carry-over Resources.** Any budget authority made available but not obligated in previous fiscal years may carry over and increase the amount of budget authority available in a given fiscal year.<sup>90</sup>

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<sup>85</sup> 2 U.S.C. §661c(b).

<sup>86</sup> FAST Act, Pub. L. No. 114-94, §1101(a)(2), (129 Stat. 1322) (2015).

<sup>87</sup> 23 U.S.C. §608(a)(4).

<sup>88</sup> 23 U.S.C. §608(a)(5).

<sup>89</sup> 23 U.S.C. §605(b).

<sup>90</sup> 23 U.S.C. §608(a)(4).

## **RRIF Program**

The RRIF Program is authorized to provide direct loans and loan guarantees up to \$35 billion.<sup>91</sup> Not less than \$7 billion is reserved for projects benefiting freight railroads other than Class I carriers. A direct loan can fund up to 100% of the eligible project costs<sup>92</sup>, however, the DOT prefers applicants to provide equity to the project. For the current amount of available funding remaining, please refer to the Bureau Credit Programs website: <https://www.transportation.gov/buildamerica>.

However, since the RRIF Program does not currently have an appropriation, the cost to the government of providing financial assistance must be borne by the RRIF applicant, or another non-federal entity on behalf of the applicant, through the payment of the CRP. The main factors influencing the CRP calculation are the financial health of the applicant (credit rating for larger entities) and the value of the collateral being pledged (if any). Pursuant to the FAST Act, RRIF applicants may provide certain credit enhancements to the DOT, which the DOT will use as a basis for determining the CRP. These credit enhancements include: (1) state or local subsidy income or other dedicated revenues to secure the RRIF direct loan or loan guarantee, (2) adequate coverage requirements to ensure repayment, on a non-recourse basis, from cash flows generated by the project or any other dedicated revenue source, and (3) an investment-grade rating on the RRIF direct loan or loan guarantee.<sup>93</sup> The CRP attributable to each drawdown request must be paid on a pro rata basis prior to each disbursement.<sup>94</sup>

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<sup>91</sup> 45 U.S.C. §822(d).

<sup>92</sup> However, note that for RRIF direct loans for transit oriented development projects, the DOT will require the borrower to provide a non-Federal match of not less than 25% of the eligible project costs. (45 U.S.C. §822(h)(4))

<sup>93</sup> 45 U.S.C. §822(f)(3). Note that if the total amount of the RRIF direct loan or loan guarantee is greater than \$75 million, the applicant must provide an investment grade rating on the RRIF credit instrument from at least two Credit Rating Agencies for the DOT to incorporate such ratings into its calculation of the CRP (45 U.S.C. §822(f)(3)(C)).

<sup>94</sup> 45 U.S.C. §822(f)(4) and 49 C.F.R. §260.15(c).



## Chapter 3: Eligibility Requirements

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The TIFIA and RRIF statutes set forth several prerequisites for an award of credit assistance. This chapter describes the types of projects, costs, applicants, regulatory, and statutory requirements upon which TIFIA and RRIF credit assistance is conditioned.

### Section 3-1

#### Eligible TIFIA Projects and Costs

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##### Eligible Projects

Highway, transit, passenger rail, certain freight facilities, certain port projects, rural infrastructure projects, transit-oriented development projects, and SIB rural projects funds may receive credit assistance through the TIFIA Program.

- Eligible highway facilities include interstates, state highways, bridges, toll roads, international bridges or tunnels, and any other type of facility eligible for grant assistance under Title 23, the highways title of the U.S. Code (23 U.S.C.).<sup>95</sup> This also includes a category specifically permitted under the TIFIA statute, i.e., a project for an international bridge or tunnel for which an international entity authorized under Federal or State law is responsible.<sup>96</sup>
- Eligible transit projects include the design and construction of stations, track, and other transit-related infrastructure, purchase of transit vehicles, and any other type of project that is eligible for grant assistance under the transit title of the U.S. Code (Chapter 53 of Title 49 of the U.S. Code), including the installation of positive train control systems.<sup>97</sup> Additionally, intercity bus vehicles and facilities are eligible to receive TIFIA credit assistance.<sup>98</sup>
- Rail projects involving the design and construction of intercity passenger rail facilities or the procurement of intercity passenger rail vehicles are eligible for TIFIA credit assistance.<sup>99</sup>
- Public freight rail facilities, private facilities providing public benefit for highway users by way of direct freight interchange between highway and rail carriers, intermodal freight transfer facilities, projects that provide access to such facilities, and service improvements (including capital investments for intelligent transportation systems) at such facilities, are also eligible for TIFIA credit assistance.<sup>100</sup> In addition, a logical series

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<sup>95</sup> 23 U.S.C. §601(a)(12)(A).

<sup>96</sup> 23 U.S.C. §601(a)(12)(B).

<sup>97</sup> 23 U.S.C. §601(a)(12)(A); *see also* 49 U.S.C. §5302(3) for a list of capital projects, including the installation of positive train control, that are eligible for Federal funding under Chapter 53.

<sup>98</sup> 23 U.S.C. §601(a)(12)(C).

<sup>99</sup> 23 U.S.C. §601(a)(12)(C).

<sup>100</sup> 23 U.S.C. §601(a)(12)(D)(i).

of such projects with the common objective of improving the flow of goods can be combined.<sup>101</sup>

- Projects located within the boundary of a port terminal are also eligible to receive TIFIA credit assistance, so long as the project is limited to only such surface transportation infrastructure modifications as are necessary to facilitate direct intermodal interchange, transfer, and access into and out of the port.<sup>102</sup>
- Eligible projects also include related transportation improvement projects grouped together in order to reach the minimum cost threshold for eligibility, so long as the individual components are eligible and the related projects are secured by a common pledge.<sup>103</sup>
- Rural Project Assistance: The TIFIA statute provides two different forms of assistance to rural infrastructure projects. The FAST Act expanded TIFIA eligibility to include capitalization of rural projects funds within SIBs, and it continued the DOT's ability to offer reduced interest rates to Rural Projects<sup>104</sup>:
  - The definition of rural infrastructure projects was narrowed under the FAST Act. As amended, the definition of a rural infrastructure project is a surface transportation infrastructure project located outside of an urbanized area with a population greater than 150,000 individuals, as determined by the Bureau of the Census.<sup>105</sup>
  - In addition, the FAST Act expanded TIFIA eligibility to enable the use of TIFIA credit assistance to capitalize a rural projects fund established by a SIB for the purpose of making loans to sponsors of rural infrastructure projects.<sup>106</sup> Prior to the FAST Act, SIBs were permitted to use Federal-aid funds to capitalize a highway, a transit, and a rail account within the SIB. The funds in those accounts could then be used to make loans to eligible highway, transit, and rail projects, respectively. The FAST Act permits SIBs to establish a fourth account (a rural projects fund) that can be capitalized by a TIFIA direct loan.<sup>107</sup> The SIB must use the funds in its rural projects fund to make loans for projects meeting the rural infrastructure project definition set forth above.<sup>108</sup> The maximum principal amount of a TIFIA direct loan to capitalize a rural projects fund within a SIB is \$100 million and the minimum principal amount is \$10 million.<sup>109</sup> A TIFIA loan

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<sup>101</sup> 23 U.S.C. §601(a)(12)(D)(i)(V).

<sup>102</sup> 23 U.S.C. §601(a)(12)(D)(iii).

<sup>103</sup> 23 U.S.C. §601(a)(12)(D)(iv).

<sup>104</sup> As defined in Section 2-2 herein to refer to both rural infrastructure projects and projects to capitalize rural projects funds within SIBs.

<sup>105</sup> 23 U.S.C. §601(a)(15).

<sup>106</sup> 23 U.S.C. §601(a)(12)(F) and (a)(16).

<sup>107</sup> 23 U.S.C. §610(d)(4).

<sup>108</sup> 23 U.S.C. §610(e)(1)(B).

<sup>109</sup> 23 U.S.C. §603(b)(2)(B). Note that a TIFIA direct loan can capitalize 100% of a SIB's rural projects fund; the size limitations that apply to other TIFIA direct loans (49% of eligible project costs and 80% total Federal assistance) are applied to SIB capitalization loans through 23 U.S.C. §610(e)(3)(B).

capitalizing a rural projects fund within a SIB must mature not later than 35 years after the date on which the secured loan is obligated.<sup>110</sup> Loans made by SIBs from a rural projects fund must comply with certain specific requirements, as set forth in section 610 of Title 23 U.S. Code<sup>111</sup>, including: (i) the SIB loan cannot exceed 80% of the cost of carrying out the project;<sup>112</sup> (ii) the SIB loan must bear interest at or below the interest rate on the TIFIA loan used to capitalize the rural projects fund;<sup>113</sup> (iii) repayment of the SIB loan must commence not later than 5 years after completion of the project;<sup>114</sup> and (iv) the term of the SIB loan cannot exceed 30 years after the date of the first payment on the loan.<sup>115</sup>

- As much as 10 percent of the TIFIA Program’s budget authority can be set aside to fund the subsidy cost of secured loans for Rural Projects at a reduced interest rate equal to one-half of the Treasury Rate (see Section 2-2 for additional information regarding the calculation of interest rates on TIFIA direct loans).<sup>116</sup> The reduced interest rate is only available in any fiscal year to the extent sufficient funds are available in the set-aside for that fiscal year.<sup>117</sup> Any amounts set aside in a fiscal year to fund the subsidy cost of TIFIA direct loans to Rural Projects at the reduced interest rate that have not been obligated by June 1 of such fiscal year must be made available to fund projects not receiving the reduced interest rate to the extent sufficient funds are not otherwise available.<sup>118</sup>
- The FAST Act expanded eligibility to include projects to improve or construct public infrastructure that are located within walking distance of, and accessible to, a fixed guideway transit facility, passenger rail station, intercity bus station, or intermodal facility, including a transportation, public utility, or capital project described in 49 U.S.C. §5302(3)(G)(v), and related infrastructure (collectively, Transit-Oriented Development Projects or TOD Projects).<sup>119</sup> 49 U.S.C. §5302(3)(G)(v) sets forth a list of specific elements that would generally be included in a TOD Project once the DOT has determined a TOD Project is eligible. Subject to project-specific review, eligible elements could include: property acquisition; demolition of existing structures; site preparation; utilities; building foundations; walkways; pedestrian and bicycle access to a public transportation facility; construction, renovation, and improvement of intercity bus and intercity rail stations and terminals; renovation and improvement of historic transportation facilities; open space; safety and security equipment and facilities; facilities that incorporate community services such as daycare or health care; a capital project for, and improving, equipment or a facility for an intermodal transfer facility or

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<sup>110</sup> 23 U.S.C. §603(b)(5)(B).

<sup>111</sup> Note that certain of these requirements differ for loans made from the SIB’s other accounts (i.e., the highway, transit, or rail account). For a list of the specific requirements applicable to all SIB loans, see 23 U.S.C. §610.

<sup>112</sup> 23 U.S.C. §610(e)(3)(B).

<sup>113</sup> 23 U.S.C. §610(g)(4).

<sup>114</sup> 23 U.S.C. §610(g)(5).

<sup>115</sup> 23 U.S.C. §610(g)(6).

<sup>116</sup> 23 U.S.C. §§603(b)(4)(B) and 608(a)(3)(A).

<sup>117</sup> 23 U.S.C. §603(b)(4)(B)(ii).

<sup>118</sup> 23 U.S.C. §608(a)(3)(B).

<sup>119</sup> 23 U.S.C. §601(a)(12)(E).

transportation mall; and construction of space for commercial uses.<sup>120</sup> The DOT may also fund “related infrastructure;” however, the DOT will prioritize the use of TIFIA funds for TOD projects that are significantly integrated into the related transportation facility.

In reviewing Letters of Interest for TOD Projects, the DOT may prioritize TOD Projects based on:

- (i) the TOD Project’s distance from the transportation facility. This analysis may also include consideration of the distance pedestrians in the area of the TOD Project typically walk to access transportation facilities; and
- (ii) the nexus between the proposed TOD Project and the transportation facility. In conducting this analysis, the DOT will consider the functional or physical relationship of the proposed TOD Project to the transportation facility. If the TOD Project is not physically connected to the transportation facility, the DOT may consider the extent of the functional relationship between the two, such as the extent to which the TOD Project enhances the use of, connectivity with, or access to the transportation facility.

### **Eligible Costs**

TIFIA credit assistance is available to cover only eligible project costs.<sup>121</sup> A calculation of total eligible project costs is important to determine whether the project meets the eligibility test for minimum project size (as discussed in more detail in Section 3-7 below)<sup>122</sup> and whether the credit request does not exceed applicable thresholds of reasonably anticipated eligible project costs (as discussed in more detail in Sections 2-2 and 3-7),<sup>123</sup> as required by statute.

The TIFIA statute, codified at 23 U.S.C. §§601-610, defines eligible project costs as those expenses associated with the following:

- Development phase activities, including planning, feasibility analysis, revenue forecasting, environmental review, permitting, preliminary engineering and design work, and other pre-construction activities;<sup>124</sup>
- 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;<sup>125</sup>

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<sup>120</sup> This list specifically applies to capital projects eligible under 49 U.S.C. §5302(3)(G) and is meant for demonstrative purposes only with respect to other TOD projects. An analysis of eligibility will be required in all cases and will be based on the specific facts and circumstances of the project, including environmental approvals.

<sup>121</sup> 23 U.S.C. §§603(a)(1)(A), 603(e)(1) and 604(a)(2).

<sup>122</sup> 23 U.S.C. §602(a)(5).

<sup>123</sup> 23 U.S.C. §§603(b)(2), 603(e)(2) and 604(b)(2).

<sup>124</sup> 23 U.S.C. §601(a)(2)(A).

<sup>125</sup> 23 U.S.C. §601(a)(2)(B).



- Capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction; and<sup>126</sup>
- Capitalizing a rural projects fund.<sup>127</sup>

Capitalized interest on TIFIA credit assistance may not be included as an eligible project cost.

Also, TIFIA administrative charges, such as application fees, transaction fees, loan servicing fees, credit monitoring fees, and the charges associated with obtaining the required preliminary rating opinion letter, will not be considered among the eligible project costs.<sup>128</sup> In all cases, eligible project costs should be calculated and presented on a cash basis (that is, as year-of-expenditure dollars) with the year of planned expenditure clearly identified.<sup>129</sup>

In determining eligible project costs, the following two clarifications should be considered:

- Acquisition of Real Property. While acquisition of real property is eligible for TIFIA reimbursement, such property must be physically and functionally related to the project. If excess land surrounding the project's immediate right-of-way is acquired for development, the cost of this real property may not be included among eligible project costs. The acquisition of real property must be in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (see page 3-6).<sup>130</sup>
- Costs Incurred Prior to Application. It is permissible for an applicant to incur costs prior to submitting an application for TIFIA credit assistance. However, these costs may be considered eligible project costs for TIFIA purposes only upon approval from the DOT.<sup>131</sup> Generally, such costs will be confined to development phase or right-of-way acquisition expenses. This eligibility determination will be made on a case-by-case basis, depending on the nature and timing of the costs. Project sponsors that intend to request the inclusion of such costs as eligible project costs are encouraged to provide the DOT with supporting materials and information for such costs as early as possible to provide adequate time for DOT staff to review and make a determination as to eligibility.

## **Section 3-2**

### **Eligible RRIF Projects and Costs**

#### **Eligible Projects**

RRIF credit assistance may be available to:

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<sup>126</sup> 23 U.S.C. §601(a)(2)(C).

<sup>127</sup> 23 U.S.C. §601(a)(2)(D).

<sup>128</sup> 49 C.F.R. §§80.5(b) and 80.17(b).

<sup>129</sup> 49 C.F.R. §80.5(a).

<sup>130</sup> 42 U.S.C. §4601 et seq.

<sup>131</sup> 49 C.F.R. §80.5(b).

- Acquire, improve, or rehabilitate intermodal or rail equipment or facilities, including track, components of track, bridges, yards, buildings, and shops, and costs related to these activities, including pre-construction costs. Note that this category of eligible activities includes the installation of positive train control systems;<sup>132</sup>
- Develop or establish new intermodal or railroad facilities;<sup>133</sup>
- Reimburse planning and design expenses relating to activities listed above;<sup>134</sup>
- Refinance outstanding debt incurred for the purposes listed above;<sup>135</sup> and
- Finance transit-oriented development, as described in more detail below.<sup>136</sup>

*RRIF Transit-Oriented Development:*

In addition to the activities described above, the FAST Act expanded eligible purposes to include financing economic development, including commercial and residential development, and related infrastructure and activities, that (i) incorporate private investment, (ii) is physically or functionally related to a passenger rail station or multimodal station that includes rail service, (iii) has a high probability of the applicant commencing the contracting process for construction not later than 90 days after the date on which the RRIF loan or loan guarantee is obligated, and (iv) has a high probability of reducing the need for financial assistance under any other Federal program for the relevant passenger rail station or service by increasing ridership, tenant lease payments, or other activities that generate revenue exceeding costs (Transit-Oriented Development Projects or TOD Projects).<sup>137</sup> Note that RRIF credit assistance for TOD Projects is only available until December 4, 2019.<sup>138</sup> Sponsors of TOD Projects are therefore encouraged to begin working with the Bureau as early as possible to ensure adequate time to prepare a RRIF Draft Application, Application, and enable the Bureau to evaluate the TOD Project's satisfaction of the eligibility criteria discussed above and elsewhere in this Chapter 3, including creditworthiness and compliance with Federal requirements.

Eligibility Criteria:

In reviewing Pre-Applications for TOD Projects, the DOT will evaluate TOD Projects for satisfaction of the above criteria, as further described below, and may prioritize projects based on:

- i. Economic Development, Including Commercial and Residential Development, and Related Infrastructure and Activities: The extent to which the TOD Project will anchor transformative, positive, and long-lasting

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<sup>132</sup> 45 U.S.C. §822(b)(1)(A).

<sup>133</sup> 45 U.S.C. §822(b)(1)(C).

<sup>134</sup> 45 U.S.C. §822(b)(1)(D).

<sup>135</sup> 45 U.S.C. §822(b)(1)(B).

<sup>136</sup> 45 U.S.C. §822(b)(1)(E).

<sup>137</sup> 45 U.S.C. §822(b)(1)(E).

<sup>138</sup> 45 U.S.C. §822(b)(3).

changes that will result in increased investment in the economic competitiveness of the neighborhood and region; increased transportation choices to decrease household and/or business transportation costs and provide other benefits; improved transportation access to employment centers, educational opportunities, and essential services, particularly for disadvantaged communities, which include low income populations, minority populations, older adults, and persons with disabilities; provide affordable housing; and support walkable communities, and improved quality of life. This also includes a consideration of whether the TOD Project targets Federal funding toward existing communities; reduces our dependence on oil; improves air quality, and promotes public health; and expands location- and energy-efficient housing choice.

- ii. Private Investment: The extent to which the TOD Project incorporates private investment into the overall economic development in and around the TOD Project and the related station.
  - o To the extent the sources of funding for the TOD Project do not include private equity, the DOT will consider how and to what extent private investment is incorporated into the overall plans for the economic development of which the TOD Project is a part to determine satisfaction of this criterion.
- iii. Physical or Functional Relationship: The nexus between the proposed TOD Project and the station. In conducting its analysis of the nexus between the TOD Project and the station, the DOT will consider the functional or physical relationship of the proposed TOD Project to the station. If the TOD Project is not physically connected to the station, the DOT will consider the extent of the functional relationship between the two, such as the distance between the TOD Project and the station, and the extent to which the TOD Project enhances the use of, connectivity with, or access to the station.
  - o In considering the distance between the TOD Project and the station, the DOT may consider the distance pedestrians and cyclists in the area of the TOD Project typically traverse to access transportation facilities.
- iv. Project Readiness: The project sponsor must demonstrate that the construction contracting process for the TOD project can commence no more than 90 days after the execution of a RRIF credit instrument.
- v. Reduction in Other Federal Assistance: The project sponsor must demonstrate that the TOD Project is highly likely to reduce the related station's or service's need for financial assistance under any other Federal program.
  - o As part of this demonstration, the project sponsor should describe how and to what extent the completion of the TOD Project will

benefit the rail station or service such that the station's or service's need for Federal financial assistance will be demonstrably reduced.

The RRIF Program is generally focused on financing new or improved railroad infrastructure. The DOT prioritizes projects that provide public benefits, including benefits to public safety, the environment, economic development, and rail or rail-related intermodal service.<sup>139</sup> All projects, including new construction, purchase of new or existing goods, and refinancing of existing debt, are subject to the DOT's Buy America policy for RRIF projects as described in Section 3-4. Financial assistance under the RRIF Program cannot be used for railroad operating expenses.

### **Section 3-3**

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## **Federal Requirements**

### **Generally Applicable Requirements: RRIF and TIFIA**

There are several common Federal statutes and regulations that apply to all projects receiving DOT credit assistance, whether TIFIA or RRIF. In addition, certain laws and regulations apply to specific types of projects, such as highway, transit, or rail projects. Applicants seeking DOT credit assistance must comply with all applicable modal and Federal laws and regulations. We encourage project sponsors to coordinate with the Bureau ([BuildAmerica@dot.gov](mailto:BuildAmerica@dot.gov)), which can facilitate discussions with the relevant modal staff, early in their planning process to ensure satisfaction of all Federal requirements. This Section discusses some of the key Federal requirements that apply to projects receiving DOT credit assistance.

### **National Environmental Policy Act of 1969 (NEPA)**

To comply with NEPA<sup>140</sup>, each proposed project receiving credit assistance must be evaluated to determine its impact on the environment. The DOT will not obligate funds for a project until it has received a final agency decision, including (if necessary) a Record of Decision (ROD).<sup>141</sup> The three scenarios for addressing NEPA requirements are outlined below.

- **Categorical Exclusion.** Some projects, such as minor widening, rehabilitation, safety upgrading, or bus replacements, do not individually or cumulatively affect the environment significantly. These projects are termed Categorical Exclusions, and thus are exempt from the requirement to prepare an Environmental Assessment or an Environmental Impact Statement (EIS).
- **Environmental Assessment.** An Environmental Assessment is usually prepared for a project that does not qualify as a Categorical Exclusion. The Environmental Assessment may reveal that the project's impacts are not significant, in which case a Finding of No Significant Impact (FONSI) is issued for the project.

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<sup>139</sup> See Notice Regarding Consideration and Processing of Applications for Financial Assistance Under the Railroad Rehabilitation and Improvement Financing (RRIF) Program, 75 Fed. Reg. 60165 (September 29, 2010).

<sup>140</sup> 42 U.S.C. §4321 et seq.

<sup>141</sup> 23 U.S.C. §602(c)(2).

- **Environmental Impact Statement and Record of Decision.** Assuming that a project does not qualify for a Categorical Exclusion or FONSI, the project sponsor is required to prepare a draft EIS. For major investments, the draft EIS must include an analysis of various alternative solutions. A variety of agencies and the public at large have the opportunity to comment on the draft EIS. These comments are addressed during the preparation of the final EIS. This second iteration ensures that adequate consideration has been given to public comments and the anticipated effects of the project. Depending on the nature of the project, the FHWA, FRA, FTA, or MARAD issues a Record of Decision to signify Federal approval of the final EIS.

We encourage project sponsors to coordinate with the Bureau early in their planning process to ensure full compliance with and satisfaction of all NEPA requirements. The Bureau can facilitate discussions with relevant modal agencies to answer any questions about the NEPA process.

To ensure project readiness to receive credit assistance and appropriately deploy DOT resources, an applicant must have circulated a draft EIS at the time it submits an application, unless the project has received either a FONSI or a Categorical Exclusion.

### **Buy America Requirements**

This Program Guide collectively refers to domestic steel, iron and manufactured products content requirements for projects receiving DOT credit assistance as “Buy America” requirements. Buy America provisions were established pursuant to Section 165 of the Surface Transportation Assistance Act, of 1982 to ensure that transportation infrastructure projects are built with American-made products.<sup>142</sup> Since 1982, the Buy America requirements that apply to highway, transit, rail, and other projects have been further developed pursuant to implementing legislation and regulation on a modal level:

- **Highway Projects:** For highway and other projects eligible for TIFIA credit assistance under Title 23, the relevant Buy America provisions can be found at 23 U.S.C. §313 and 23 C.F.R. Part 635. Additional information can be found at <https://www.fhwa.dot.gov/construction/cqit/buyam.cfm>.
- **Transit Projects:** For transit and other projects eligible for TIFIA credit assistance under Chapter 53 of Title 49, the relevant Buy America provisions can be found at 49 U.S.C. §5323(j) and 49 C.F.R. §661. Additional information can be found at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/buy-america>.
- **Rail Projects:** For rail projects eligible for TIFIA and RRIF credit assistance pursuant to the TIFIA and RRIF statutes, the DOT expects recipients of TIFIA and RRIF credit assistance to comply with the domestic steel, iron, and other manufactured products content requirements that apply to FRA passenger rail grant programs. These requirements are described in 49 U.S.C. §24405(a). Additional information can be found at <http://www.fra.dot.gov/Page/P0185>.

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<sup>142</sup> 49 U.S.C. §5323(j).

- All Other Projects: As with other project types, the DOT expects recipients of TIFIA and RRIF credit assistance to comply with the domestic steel, iron, and other manufactured products content requirements of the applicable modal agency by law or policy.

For additional information regarding the DOT's Buy America program, as well as specific information regarding project types not described above, please contact the Bureau at [BuildAmerica@dot.gov](mailto:BuildAmerica@dot.gov).

### **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970**

Project construction may displace current residents or businesses. Under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,<sup>143</sup> every displaced resident must be offered a comparable replacement dwelling that is decent, safe, and sanitary. Additionally, relocation advisory services must be furnished and payments made to those residents who must relocate. Such payments cover moving expenses, the cost of replacement housing, and certain incidental expenses. Businesses, farms, and non-profits must also be reimbursed for moving and related expenses.

### **Title VI of the Civil Rights Act of 1964**

Title VI of the Civil Rights Act of 1964 states that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the recipient receives Federal assistance.<sup>144</sup> Companion legislation extends these protections such that no person shall be subjected to discrimination on the basis of sex, age, or disability. As applied to transportation programs, regulations to implement this statute appear at 49 C.F.R. Part 21.

### **Prevailing Wage and Employee Protection Requirements**

Projects receiving RRIF credit assistance and transit projects receiving TIFIA credit assistance must comply with specific prevailing wage and employee protection requirements.

- Prevailing Wage Requirements:
  - The RRIF statute requires all recipients of RRIF credit assistance to comply with the prevailing wage requirements applicable to Amtrak pursuant to 49 U.S.C. §24312 in the same manner Amtrak is required to comply with such standards for construction work financed under an arrangement made with a rail carrier or regional transportation authority under 49 U.S.C. §24308(a).<sup>145</sup>
  - 23 U.S.C. §113 and 49 U.S.C. §5333(a) implement Davis-Bacon prevailing wage protections for highway and transit projects, respectively, receiving Federal financial assistance. Pursuant to the implementation of Davis-Bacon for highway and transit projects, the DOT must ensure that all labor contracts executed by

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<sup>143</sup> 42 U.S.C. §4601 et seq.

<sup>144</sup> 42 U.S.C. §2000d et seq.

<sup>145</sup> 45 U.S.C. §822(h)(3)(A).

project sponsors adhere to prevailing wage rates as determined by the Secretary of Labor before credit assistance can be obligated.

- Employee Protection:
  - The RRIF statute requires all recipients of RRIF credit assistance to comply with the requirements to ensure adequate arrangements exist to protect the interests of railroad employees who may be adversely affected by projects for which RRIF financing is utilized.<sup>146</sup>
  - 49 U.S.C. §5333(b) requires the DOT to receive certification from the Department of Labor that protective arrangements are in place to protect the interests of mass transit employees, including that protective arrangements are in place to provide for the preservation of rights and benefits of mass transit employees and the protection of individual employees against a worsening of their positions in relation to their employment, before credit assistance can be obligated for a project. As such, prior to receipt of TIFIA credit assistance for a transit project, the DOT must have received this certification from the Department of Labor.

### **Program-Specific Requirements: TIFIA**

In addition to the generally applicable requirements described above, TIFIA projects are subject to certain modal requirements depending on the project type (i.e., highway, transit, or rail projects). Some of the key modal requirements related to typical TIFIA projects are listed below.

#### **Title 23 – Highway Projects**

Title 23 of the U.S. Code and related implementing regulations in Title 23 of the Code of Federal Regulations set forth the rules that govern the design, construction, and operation of federally assisted highway infrastructure projects, including projects financed with TIFIA credit assistance. These rules cover a broad range of activities. The following bullet points provide an example of some of the relevant regulations:

- Design. Part 625 of 23 C.F.R. requires that all federally assisted roads, highways, and bridges adhere to minimum design standards and specifications. Generally speaking, the regulations refer all sponsors of projects eligible under Title 23 for Federal assistance, whether grant or credit assistance, to the relevant standards and specifications published by the American Association of State Highway and Transportation Officials.
- Procurement. Part 172 of 23 C.F.R. prescribes policies and procedures related to procurement of engineering and design related services. Part 636 of 23 C.F.R. describes FHWA policies and procedures relating to design-build projects financed under Title 23. Part 635 of 23 C.F.R. covers many topics related to purchasing materials and procuring construction services. For example, Section 635.107 requires the applicant to

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<sup>146</sup> 45 U.S.C. §822(h)(3)(B).

affirmatively encourage disadvantaged business enterprise participation in the highway construction program. Section 635.410 (part of FHWA's Buy America implementing regulations) limits the amount of foreign-produced steel and iron that may be used on Federal-aid projects.

- **Construction.** Part 633 Subpart A relates to required contract provisions for Federal-aid construction contracts. Part 635 contains construction and maintenance procedures and includes a number of labor and employment rules that apply to employees working on a Federal-aid construction project. For example, the minimum wage rates that the Secretary of Labor determines to be prevailing for the same type of work on similar construction in the same locality must be part of the construction contract. Labor rules also state that no construction work may be performed by convict labor unless the convicts are on parole, supervised release, or probation.

### **Title 49 – Transit and Public Transportation Projects**

As with Title 23, Title 49 of the U.S. Code and related regulations in Title 49 of the C.F.R. concern a wide range of activities. Just as all highway projects must comply with all Federal laws and related regulations detailed in Title 23, all transit projects must comply with Chapter 53 of Title 49 and related regulations. For example, drug and alcohol rules specific to FTA-funded projects appear at 49 C.F.R. §655. In other cases, the regulations appearing in 49 C.F.R. apply common types of rules specifically to transit-oriented concerns, such as the procurement of buses and rail cars. For example, FTA's Buy America implementing regulations appear at 49 C.F.R. §661 and provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by the FTA, or the product is subject to a general waiver. The FTA has published a best practices manual on transit procurement regulations. This manual can be found on-line at: <https://www.transit.dot.gov/funding/procurement/best-practices-procurement-manual>.

The regulations that implement Chapter 53 of Title 49 apply to all Federally-assisted transit projects, including those receiving credit assistance under the TIFIA Program.

### **Program-Specific Requirements: RRIF**

In addition to the generally applicable requirements described above (including the specific prevailing wage and labor protection requirements set forth in the RRIF statute), the rail safety standards set forth in 49 C.F.R. §§209-244 detail minimum safety requirements for railroad track that is part of the general railroad system of transportation. The RRIF regulations also require specific maintenance standards where RRIF credit assistance was used for track, roadbed, equipment, or facilities.<sup>147</sup>

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<sup>147</sup> 49 C.F.R. §260.39.



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## Section 3-4

### Eligible Applicants

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Both the TIFIA and RRIF statutes specify types of entities that are eligible to apply for credit assistance. This section describes the types of entities that are eligible to apply under both Credit Programs.

#### **Eligible Applicants: TIFIA**

Public or private entities seeking to finance, design, construct, own, or operate an eligible surface transportation project may apply for TIFIA credit assistance. Examples of such entities include state departments of transportation; local governments; transit agencies; special authorities; special districts; railroad companies; and private firms or consortia that may include companies specializing in engineering, construction, materials, and/or the operation of transportation facilities.<sup>148</sup>

All applicants must demonstrate relevant experience, strong qualifications, a sound project approach, and financial stability, as each of these items ultimately has a bearing on the project's creditworthiness.

Applicants also must meet various Federal standards for participation in a Federal credit program as well as modal-specific requirements, among other factors, to receive TIFIA credit assistance.<sup>149</sup> For example, applicants may not be delinquent or in default on any Federal debts.<sup>150</sup> Such requirements will be specified in the contractual documents between the DOT and each applicant.

In the context of a public-private partnership, where multiple bidders may be competing for a concession such that the obligor has not yet been identified, the procuring agency must submit the project's Letter of Interest on behalf of the eventual obligor.<sup>151</sup> The DOT will not consider Letters of Interest from entities that have not obtained rights to develop the project.<sup>152</sup> However, the DOT is able to work with the procuring agency to better facilitate the integration of the TIFIA application process into the public-private partnership procurement. In this context, the DOT may negotiate a preliminary indicative term sheet with the procuring agency that sets forth the general intent of the DOT, which the procuring agency may provide to potential bidders. An indicative term sheet will assist private bidders in understanding certain basic terms and conditions for TIFIA credit assistance and will help to reduce any delays in the application process and ultimate negotiation of a credit agreement. Prior to awarding credit assistance to the selected bidder, the private entity must demonstrate state support for the project through the project's inclusion in the state's planning documents (the long-range plan and the STIP), as noted in Section 3-5 below.

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<sup>148</sup> See 23 U.S.C. §602(a)(4).

<sup>149</sup> 23 U.S.C. §602(c).

<sup>150</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-129, Policies for Federal Credit Programs and Non-Tax Receivables (2013).

<sup>151</sup> 23 U.S.C. §602(a)(1)(A), (a)(8).

<sup>152</sup> 23 U.S.C. §602(a)(10).

## **Eligible Applicants: RRIF**

To be eligible to receive RRIF credit assistance, a project sponsor must be an eligible applicant.<sup>153</sup> Entities that are eligible to receive RRIF credit assistance include:

- State and local governments;
- Interstate compacts consented to by Congress under Section 410(a) of the Amtrak Reform and Accountability Act of 1997;<sup>154</sup>
- Government sponsored authorities and corporations;
- Railroads;<sup>155</sup>
- Limited option freight shippers that own or operate a plant or other facility (solely for the purpose of constructing a rail connection between a plant or facility and a railroad); and
- Joint ventures that include at least one of the above entities.

The FAST Act expanded the last category of eligible applicants listed above, that of joint ventures. Previously, an eligible joint venture needed to include at least one railroad. Under the expanded FAST Act language, a joint venture may include any of the other categories of eligible applicants (Eligible Applicants)<sup>156</sup>. A joint venture is an agreement between at least one Eligible Applicant and one or more other entities with the shared goal of accomplishing the project receiving the RRIF loan. The agreement between the parties can be memorialized in a contract, a memorandum of understanding, or other arrangement that describes the mutual consideration exchanged in order to accomplish the project. To the extent that the joint venture includes any entity that is not an Eligible Applicant, the parties to the joint venture must be able to demonstrate (i) that all parties have made (or will make) a meaningful contribution to (or for) the project and (ii) the benefit to all parties of the project.

- An example of an eligible joint venture in the context of a RRIF TOD project is as follows:
  - Joint venture parties:
    - A private entity undertaking a TOD Project to be constructed adjacent to a multimodal station that included rail service, and
    - The railroad providing rail services to that station.

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<sup>153</sup> 45 U.S.C. §822(a).

<sup>154</sup> 49 U.S.C. §24101 note.

<sup>155</sup> Note that the FAST Act added a definition for the term “railroad” as used in the RRIF statute. Pursuant to such amendment by the FAST Act, the term “railroad” as used in the RRIF statute has the meaning given the term “railroad carrier” in 40 U.S.C. §20102.

<sup>156</sup> The list of Eligible Applicants can be found at 45 U.S.C. §822(a), items (1) – (4) and (6).

- Railroad contribution: Railroad owns the parcel of land needed to construct the TOD Project and sells that parcel to the private sponsor.
- Railroad benefit: Railroad will receive a portion of the annual lease revenues derived from the TOD Project upon completion.

## **Section 3-5**

### **Threshold Requirements**

A project's eligibility to apply for TIFIA and RRIF credit assistance depends on its satisfaction of certain additional requirements beyond project and applicant eligibility. This section details these statutory threshold requirements to eligibility.

#### **Total Eligible Costs**

The two Credit Programs have different cost threshold requirements: the TIFIA Program has specific total eligible cost threshold requirements, whereas the RRIF Program does not have such requirements.

#### **TIFIA Program**

With certain exceptions noted below, the project's eligible costs, as defined under 23 U.S.C. §601(a)(2), must be reasonably anticipated to be at least (i) \$50 million or (ii) 33 1/3 percent or more of the state's Federal-aid highway apportionments for the most recently completed fiscal year, whichever is less.<sup>157</sup> The DOT will revisit apportionments to states annually, to determine if any states qualify under the alternative test.

The FAST Act set a lower eligible cost threshold for intelligent transportation system projects, TOD Projects, Rural Projects, and local infrastructure projects.

- For projects that principally involve the installation of an intelligent transportation system (ITS), eligible project costs must be reasonably anticipated to total at least \$15 million. This \$15 million threshold applies only to projects for which the ITS component is the central feature of the project and not an ancillary component.<sup>158</sup>
- For TOD Projects<sup>159</sup> and local infrastructure projects, eligible project costs must be reasonably anticipated to total at least \$10 million.<sup>160</sup> Local infrastructure projects are projects (i) for which the sponsor is a local government or instrumentality or public authority, (ii) that are located on a facility owned by a local government, and (iii) for which a local government is substantially involved in its development, in the determination of the Secretary.<sup>161</sup>

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<sup>157</sup> 23 U.S.C. §602(a)(5)(A).

<sup>158</sup> 23 U.S.C. §602(a)(5)(B)(i).

<sup>159</sup> See Section 3-1 for the definition of TIFIA TOD Projects.

<sup>160</sup> 23 U.S.C. §602(a)(5)(B)(ii) and (iv).

<sup>161</sup> 23 U.S.C. §602(a)(5)(B)(iv).

- For Rural Projects<sup>162</sup>, eligible project costs must be reasonably anticipated to total at least \$10 million but not exceed \$100 million.<sup>163</sup>

In addition, eligible costs include costs for related improvement projects grouped together to meet the eligible cost threshold, so long as the individual components are eligible and the related projects are secured by a common pledge.<sup>164</sup>

In all cases, the principal amount of the requested credit assistance is limited to 49 percent of reasonably anticipated eligible project costs for a TIFIA secured loan or loan guarantee and 33 percent for a TIFIA standby line of credit.<sup>165</sup> Applicants should calculate and represent all costs, including both eligible project costs and the credit assistance request, on a cash (year-of-expenditure) basis.<sup>166</sup>

### **RRIF Program**

The RRIF Program does not have minimum project cost thresholds; however, as noted in Chapter 2 above, the principal amount of RRIF credit assistance may not exceed available statutory authority. In addition, credit assistance for RRIF TOD Projects is limited to 75 percent of total project costs.<sup>167</sup>

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<sup>162</sup> As defined in Section 2-2, Rural Projects include rural infrastructure projects and projects to capitalize rural projects funds within SIBs.

<sup>163</sup> 23 U.S.C. §602(a)(5)(B)(iii).

<sup>164</sup> 23 U.S.C. §601(a)(12)(D)(iv).

<sup>165</sup> 23 U.S.C. §§603(b)(2) and 604(b)(2). As noted in Section 2-2 above, TIFIA secured loans provided to date have only covered up to 33 percent of reasonably anticipated eligible project costs. Applicants requesting assistance in excess of this amount must provide a rationale for such additional assistance.

<sup>166</sup> 49 C.F.R. §80.5(a).

<sup>167</sup> 45 U.S.C. §822(h)(4).

## **Creditworthiness and Dedicated Revenue Source**

All RRIF and TIFIA projects must satisfy the DOT's creditworthiness requirements. The DOT will review the project's plan of finance, financial model, and feasibility of the anticipated pledged revenue or, in the case of RRIF loans where the proposed collateral is other than a dedicated revenue stream, the sufficiency of such other pledged collateral. In order for a project to satisfy the creditworthiness evaluation, the DOT must determine with a reasonable degree of confidence that the credit assistance is able to be repaid. However, as far as pledged collateral and a dedicated revenue source, the TIFIA and RRIF statutes differ. The TIFIA statute requires a dedicated pledged revenue source for repayment of TIFIA credit assistance. The RRIF statute does not require collateral, however, the calculation of the CRP is affected by any collateral, such as a dedicated revenue source, pledged in repayment of the RRIF credit assistance. The DOT interprets "dedicated revenue sources" to include such levies as tolls, user fees, special assessments, tax increment financing, and any portion of a tax or fee that produces revenues that are pledged for the purpose of retiring debt on the project. The Secretary may accept general obligation pledges or corporate promissory pledges and will determine the acceptability of other pledges or forms of collateral as dedicated revenue sources on a case-by-case basis. Without exception, the Secretary will not accept a pledge of Federal funds, regardless of source, as security for a credit instrument.

### **TIFIA Program**

The TIFIA statute requires that TIFIA credit instruments are repayable, in whole or in part, from tolls, user fees, payments owing to the borrower under a public-private partnership, or other dedicated revenue sources that also secure the senior project obligations.<sup>168</sup> For a TIFIA direct loan to capitalize a rural projects fund within a SIB, the DOT may consider dedicated revenue sources available to the SIB, including repayments from the SIB's loans for rural infrastructure projects.<sup>169</sup> In addition, the TIFIA statute requires all projects to satisfy applicable creditworthiness standards.<sup>170</sup> See Section 5-1 for additional discussion of the creditworthiness evaluation process.

### **RRIF Program**

While the RRIF Program cannot require a borrower to provide collateral, any collateral pledged to the repayment of the RRIF credit instrument will be relevant to the calculation of the CRP.<sup>171</sup> In addition, as part of the DOT's creditworthiness assessment of a project and an applicant prior to awarding credit assistance, the DOT must have made a determination that the credit assistance can reasonably be repaid, which determination can be based on the value of any collateral pledged.<sup>172</sup>

## **Project Readiness**

Because credit assistance cannot be awarded until a project has received a final NEPA determination (as described above in Section 3-3), all applicants for credit assistance must

<sup>168</sup> 23 U.S.C. §§602(a)(6), 603(b)(3)(A)(i), and 604(b)(5)(A)(i).

<sup>169</sup> 23 U.S.C. §603(b)(3)(A)(i)(V).

<sup>170</sup> 23 U.S.C. §602(a)(2).

<sup>171</sup> 45 U.S.C. §822(h)(2) and (f)(2)(A) and (f)(3).

<sup>172</sup> 45 U.S.C. §822(g)(4).

demonstrate in the Letter of Interest/Draft Application that the project for which credit assistance is being sought is reasonably likely to have completed the NEPA process prior to the anticipated financial closing date. In addition, all applicants for TIFIA credit assistance (other than in connection with projects to capitalize a rural projects fund within a SIB) must demonstrate that the construction contracting process for the project can commence no more than 90 days after the execution of a TIFIA credit instrument.<sup>173</sup>

### **Advancement of DOT Policy Goals**

In addition to the evaluation criteria set forth above with respect to both RRIF and TIFIA projects, both statutes sets forth certain additional evaluation criteria with respect to DOT policy goals.

#### **TIFIA Program**

For all TIFIA projects, including the capitalization of a rural projects fund in a SIB (with the exception noted below), the DOT must make a determination that Federal credit assistance would satisfy the following statutory mandates:

- *Foster Partnerships that Attract Public and Private Investment to the Project:* The extent to which assistance would foster innovative public-private partnerships and attract debt and/or equity investment from private capital.<sup>174</sup>
- *Ability to Proceed at an Earlier Date or Reduced Lifecycle Costs (Including Debt Service Costs):* The likelihood that assistance would enable the project to proceed at an earlier date than the project would otherwise be possible.<sup>175</sup> This includes documenting how the applicant has been unable to obtain credit assistance from private sources on reasonable terms. In addition, the applicant may describe how the costs of traditional financing would constrain their ability to deliver the project, or that delivery of this project through traditional financing approaches would constrain their ability to deliver additional components of their capital programs.
- *Reduces Contribution of Federal Grant Assistance for the Project:* The extent to which assistance would reduce the contribution of Federal grant assistance to the project.<sup>176</sup>

#### **RRIF Program**

The RRIF statute specifies certain policy criteria for consideration in evaluating potential RRIF projects.<sup>177</sup> The DOT will give priority to projects that:

- *Enhance public safety, including projects for the installation of a positive train control system (as defined in section 20157(i) of title 49):* This is DOT's highest programmatic priority. The DOT will prioritize projects that ensure safe and efficient transportation choices. The DOT's goal is to improve public health and safety by reducing

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<sup>173</sup> 23 U.S.C. §602(a)(10).

<sup>174</sup> 23 U.S.C. §602(a)(9)(A).

<sup>175</sup> 23 U.S.C. §602(a)(9)(B).

<sup>176</sup> 23 U.S.C. §602(a)(9)(C).

<sup>177</sup> 45 U.S.C. §822(c).

transportation-related fatalities and injuries and improving the safety experience for all transportation system users, including passengers, employees, pedestrians, and motorists.

- *Enhance the environment:* The DOT will prioritize projects that promote environmental sustainability of transportation through investments that focus on energy efficiency and environmental quality, including investments that reduce carbon emissions and protect the human and natural environment.
- *Promote economic development and Enable United States companies to be more competitive in international markets:* The DOT will prioritize projects that build a foundation for economic competitiveness and target its investments in projects that serve the travelling public and freight movement to bring lasting economic and social benefit to the Nation. Note that this criteria is directly related to the Buy America discussion set forth in Section 3-3 above.
- *Are endorsed by the plans prepared under section 135 of title 23 or chapter 227 of title 49 by the State or States in which the projects are located:* Similar to the planning and programming requirements applicable to all TIFIA projects, as discussed below in Program-Specific Threshold Requirements: TIFIA sub-part of this Section, the DOT will give priority to projects requesting RRIF credit assistance that are incorporated in the applicable statewide planning documents. See the discussion below regarding the TIFIA planning and programming requirements for additional information on these documents.
- *Improve railroad stations and passenger facilities and increase transit-oriented development:* The DOT will prioritize projects that incorporate eligible transit-oriented development elements and that improve railroad stations and passenger facilities.
- *Preserve or enhance rail or intermodal service to small communities or rural areas and Enhance service and capacity in the national rail system:* The DOT will prioritize projects that support the development of interconnected, livable communities and that provide transportation choices and improve the quality of life for all Americans.
- *Materially alleviate rail capacity problems which degrade the provision of service to shippers and would fulfill a need in the national transportation system:* The DOT will prioritize projects promoting a state of good repair for transportation assets to ensure a reliable and safe rail system.

These criteria are described in more detail in the Federal Register *Notice Regarding Consideration and Processing of Applications for the Financial Assistance Under the RRIF Program*.<sup>178</sup>

### **Program-Specific Threshold Requirements: TIFIA**

The TIFIA statute conditions a project's receipt of TIFIA credit assistance on the project's satisfaction of all applicable planning and programming requirements.<sup>179</sup> That generally

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<sup>178</sup> Notice Regarding Consideration and Processing of Applications for Financial Assistance Under the Railroad Rehabilitation and Improvement Financing (RRIF) Program, 75 Fed. Reg. 60165 (September 29, 2010).

<sup>179</sup> 23 U.S.C. §602(a)(3).

means inclusion in both the state's long-range transportation plan and the approved State Transportation Improvement Program (STIP).<sup>180</sup>

State transportation plans extend as far as 20 years into the future and are often geared to setting general priorities rather than listing individual projects. Therefore, at the time of submitting an application, each applicant must certify that the proposed project is consistent with the transportation plan(s) of the affected state(s). For projects in metropolitan areas, the applicant must also demonstrate that the project is or can be included in the metropolitan transportation plan.<sup>181</sup>

In contrast to the long-range state transportation plan, the STIP focuses on specific projects to be funded in the near term; STIPs typically look ahead no more than three years. The TIFIA statute requires that the project satisfy planning and programming requirements of Section 134 (Metropolitan Planning) and Section 135 (Statewide Planning) of Title 23, at such time as a TIFIA credit agreement is executed.<sup>182</sup> Therefore, the applicant must demonstrate that the proposed project is part of the appropriate STIP(s) which reflects the requested TIFIA credit assistance amount programmed in the Federal fiscal year of expected financial close before the DOT will issue a term sheet and obligate funds.<sup>183</sup>

### **Program-Specific Threshold Requirements: RRIF**

The RRIF statute sets forth certain additional prerequisites to receipt of RRIF credit assistance. Those are as follows:

- The RRIF credit assistance is justified by present and probable future demand for rail services or intermodal facilities,<sup>184</sup> and
- The applicant has given reasonable assurances that the facilities or equipment to be acquired, rehabilitated, improved, developed, or established with the proceeds of the RRIF credit assistance will be economically and efficiently utilized.<sup>185</sup>

### **Invitation to Submit Application**

Each potential applicant seeking DOT credit assistance must demonstrate its ability to meet the statutory eligibility requirements, including an in-depth review of a project's creditworthiness, at the Letter of Interest/Draft Application stage. A project sponsor may only submit an application once a determination of eligibility, including a satisfactory review of a project's creditworthiness, is made and the project sponsor has received an invitation from the DOT to submit a formal application. A downloadable version of the TIFIA and RRIF application forms can be found on the Bureau website at <https://www.transportation.gov/buildamerica>.

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<sup>180</sup> 49 C.F.R. §80.13(a)(1).

<sup>181</sup> 49 C.F.R. §§80.7(b)(1) and 80.13(a)(1).

<sup>182</sup> 23 U.S.C. §602(a)(3).

<sup>183</sup> 49 C.F.R. §§80.7(b)(1) and 80.13(a)(1).

<sup>184</sup> 45 U.S.C. §822(g)(2).

<sup>185</sup> 45 U.S.C. §822(g)(3).



## Section 3-6

### Rating Opinions

The RRIF and TIFIA Programs differ in their requirements with respect to credit ratings. The TIFIA statute requires project sponsors to submit both a preliminary indicative rating letter in connection with the submission of a Letter of Interest and two ratings letters prior to closing on a TIFIA credit instrument. RRIF applicants are not required to obtain a credit rating in order to apply for RRIF credit assistance, though a potential RRIF applicant may submit a recent investment-grade credit rating to be used by the DOT in its determination of the CRP for RRIF credit assistance.<sup>186</sup> This Section describes the credit rating requirements applicable to projects seeking TIFIA credit assistance.

#### Preliminary Rating Opinion Letter

Each potential applicant for TIFIA credit assistance must provide a preliminary rating opinion letter from at least one Credit Rating Agency<sup>187</sup> indicating that the project's senior obligations (which may include the TIFIA credit instrument) have the potential to achieve an investment grade rating and providing a preliminary rating opinion on the TIFIA credit instrument and provides rating rationales for both preliminary ratings.<sup>188</sup> Before the DOT completes its review of a Letter of Interest and renders a determination of eligibility, the DOT will request that a project sponsor provide this preliminary rating opinion letter.

The preliminary rating opinion letter must address the creditworthiness of both the senior debt obligations funding the project (i.e., those which have a lien senior to that of the TIFIA credit instrument on the pledged security) and the TIFIA credit instrument. The letter must conclude that there is a reasonable probability for the senior debt obligations (or the TIFIA credit instrument if there are no debt obligations senior to the TIFIA facility) to receive an investment grade rating.<sup>189</sup> This requirement applies to all potential TIFIA applicants, even those with current credit ratings on other debt instruments. The DOT will not complete its review of a TIFIA Letter of Interest and make a determination of eligibility until a project sponsor has provided a preliminary rating opinion letter. As part of the DOT's review, the DOT will also request that the TIFIA applicant provide copies of all documents submitted to the Credit Rating Agency in connection with the preliminary rating process. The DOT will use the preliminary rating opinion letter for two purposes.

1. Potential for Senior Obligations to Receive Investment Grade Rating. The letter must indicate that the senior obligations funding the project have the potential to receive an investment grade rating. This preliminary assessment by the Credit Rating Agencies will

<sup>186</sup> 45 U.S.C. §822(f)(3). Note that if the total amount of the RRIF direct loan or loan guarantee is greater than \$75 million, the applicant must provide an investment grade rating on the RRIF credit instrument from at least two Credit Rating Agencies for the DOT to incorporate such ratings into its calculation of the CRP (45 U.S.C. §822(f)(3)(C)).

<sup>187</sup> According to 23 U.S.C. §601(a)(14), "the term 'rating agency' means a credit rating agency identified by the Securities and Exchange Commission as a nationally recognized statistical rating organization (as that term is defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a))." The complete list of nationally recognized statistical rating organizations can be found at <http://www.sec.gov/answers/nrsro.htm>.

<sup>188</sup> 23 U.S.C. §602(b)(3).

<sup>189</sup> 23 U.S.C. §602(b)(3).

be based on the financing structure proposed by the applicant. The DOT will not consider projects that do not demonstrate the potential for their senior obligations to receive an investment grade rating.

2. **Default Risk.** The DOT will also use the preliminary rating opinion letter to assess the project's overall economic, legal, and financial viability and the default risk on the requested TIFIA instrument and on any senior project obligations. Therefore, the letter should provide a preliminary rating and rating analysis of the financial strength of the overall project and the default risk (i.e., without regard to recovery potential) of the requested TIFIA credit instrument and the project's senior debt.

### **Pre-Closing Rating Opinion Letters**

Prior to execution of a TIFIA credit instrument, the senior debt obligations for each project receiving TIFIA credit assistance must obtain investment grade ratings from at least two Credit Rating Agencies and the TIFIA credit instrument must obtain ratings from at least two Credit Rating Agencies unless the total amount of the debt is less than \$75 million, in which case only one investment grade rating on the senior debt obligations and one rating on the TIFIA credit instrument are required.<sup>190</sup> The TIFIA debt cannot exceed the amount of the senior obligations unless the TIFIA credit assistance receives two investment grade ratings.<sup>191</sup> If the TIFIA credit instrument is proposed as the senior debt, then it must receive two investment grade ratings, unless the total amount of the debt is less than \$75 million, in which case only one investment grade rating is required.<sup>192</sup> The applicant must provide confirmation of the assigned ratings at least two weeks prior to execution of a TIFIA credit instrument.<sup>193</sup>

The rating requirement offers security to the DOT only if the same repayment source is being pledged to both the senior debt obligations and the subordinate TIFIA credit instrument. In such a structure, the investment grade ratings for senior debt helps the DOT evaluate its credit risk as a subordinate lender. To maintain the value implied by the senior debt rating, the TIFIA debt cannot exceed the amount of the senior obligations unless the TIFIA credit instrument receives two investment grade ratings.<sup>194</sup>

Both the preliminary rating opinion letter and the final credit ratings must be based on the contemplated tenor of both the project's senior debt obligations and the TIFIA credit instrument.

### **The DOT's Use of Credit Ratings**

Credit ratings on TIFIA-supported projects are used for three purposes:

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<sup>190</sup> 23 U.S.C. §602(a)(2)(A).

<sup>191</sup> 23 U.S.C. §603(b)(2).

<sup>192</sup> 23 U.S.C. §602(a)(2)(B).

<sup>193</sup> Note that the DOT can work to accommodate, on a case-by-case basis, situations where ratings are not able to be provided two weeks prior to closing for structural or procedural reasons.

<sup>194</sup> 23 U.S.C. §603(b)(2).

1. **Statutory Rating Requirement.** By statute, a project cannot receive TIFIA credit assistance unless the senior debt obligations funding the project, i.e., those obligations having a lien senior to that of the TIFIA credit instrument on the pledged security, receive investment grade ratings from at least two Credit Rating Agencies, as discussed above. Therefore, even though a project may be selected for TIFIA credit assistance, this credit assistance will not be provided (i.e., the DOT will not close on the credit agreement) until two Credit Rating Agencies assign an investment grade rating to the project's senior debt obligations, or the TIFIA facility itself if there are no debt obligations senior to the TIFIA credit instrument.
2. **Capital Allocation Requirement.** Default risk is a key component of the DOT's assessment of expected losses related to the TIFIA Program. The Federal Credit Reform Act of 1990 requires Federal agencies with credit programs to allocate capital, in the form of budget authority, to cover these expected losses.<sup>195</sup> The DOT uses the TIFIA Capital Allocation Model to estimate credit exposure. The model employs such variables as the repayment structure, the drawdown assumptions, the nature of the dedicated revenues securing the TIFIA credit instrument, and the ratings assigned to the TIFIA credit instrument.
3. **Annual Capital Reserve Adjustments.** As part of its ongoing portfolio monitoring, the DOT is required to annually adjust, or "reestimate," its allowance for credit losses based on updated loss expectations.<sup>196</sup> The DOT will incorporate information from credit surveillance reports, including changes in credit ratings, on TIFIA-supported projects in this annual reassessment process.

### **Ongoing Rating Requirements**

Throughout the life of the TIFIA credit instrument, the borrower must obtain annually, at no cost to the Federal Government, current credit evaluations of the project, the project obligations, and the TIFIA credit instrument.<sup>197</sup> The current credit evaluations must be performed by a Credit Rating Agency.<sup>198</sup> By "current credit evaluation," the DOT means: (i) in the case of a project with a published rating, either a current rating or the borrower's certification stating that the rating and outlook are unchanged from the previous year, and (ii) in the case of a project without a published rating, a current rating of the project obligations and the TIFIA credit instrument.

### **Use of Underlying Ratings**

Neither the preliminary rating opinion letter nor the credit ratings should reflect the use of bond insurance or other credit enhancement that does not also secure the TIFIA credit

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<sup>195</sup> Note that because the RRIF Program does not currently have an appropriation, this capital allocation must be borne by the RRIF applicant, or another non-federal entity on behalf of the applicant, through the payment of the credit risk premium.

<sup>196</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-11, Preparation, Submission, and Execution of the Budget (2012).

<sup>197</sup> 49 C.F.R. §80.11(d).

<sup>198</sup> 49 C.F.R. §80.11(d).

instrument.<sup>199</sup> The assessment of the senior obligations’ investment grade potential and the default risk for the TIFIA credit instrument and the senior obligations should be based on the underlying ratings of the unenhanced debt obligations and the project’s fundamentals.

**Applicant Questions about Rating Requirements**

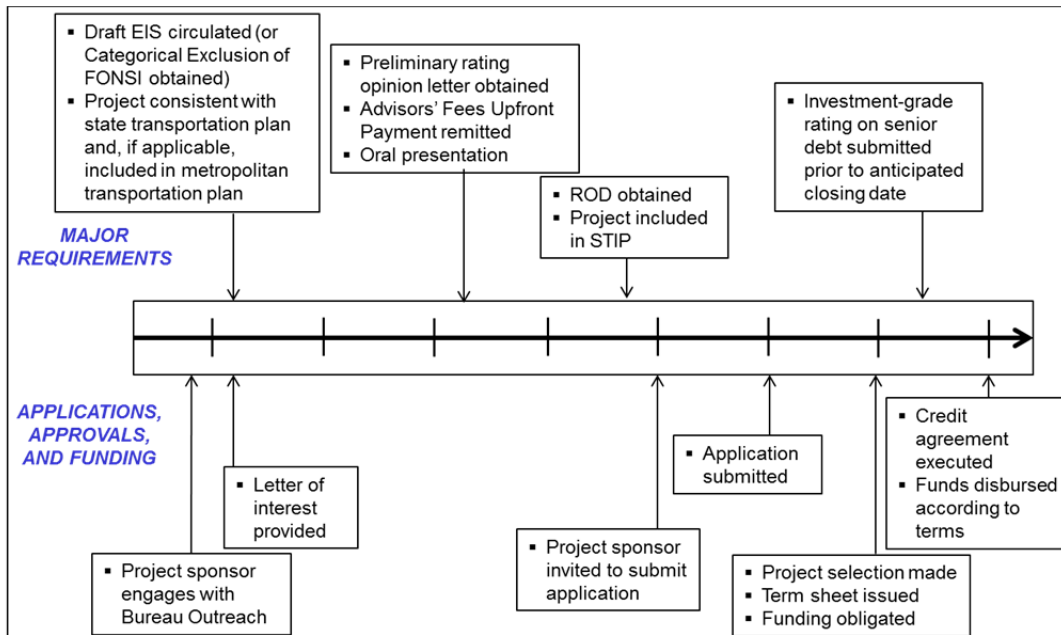
Applicants should contact the Bureau with any questions about the rating process and the requirements for a preliminary rating opinion letter, two investment grade credit ratings on the senior obligations’ and two ratings on the TIFIA credit instrument. The Credit Rating Agencies will be able to answer questions concerning fees, timing of assessments, information requirements, and surveillance practices associated with obtaining preliminary rating opinion letters, credit ratings, periodic rating updates, and credit surveillance reports.

**Section 3-7**

**Timing of Environmental, Planning, and Credit Documents**

Requirements for environmental, planning, and credit documents correspond with the application and selection processes, which are described in Chapters 4 and 5, respectively. Exhibit 3-A provides an overview of how these requirements relate to the various stages of the application and selection processes.

Exhibit 3-A: Major Documentation Required During the Application and Selection Processes



<sup>199</sup> 49 C.F.R. §80.11(c).

## Chapter 4: Application Process

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This chapter describes the process to apply for DOT credit assistance. The DOT welcomes informal consultations with prospective applicants at any time. Prospective applicants can contact [BuildAmerica@dot.gov](mailto:BuildAmerica@dot.gov) for additional information or assistance.

### Section 4-1

#### **Initial Steps: Build America Bureau Project Development and Letter of Interest/Draft Application Submission**

Regionally-focused Project Development Leads (PDLs) are members of the Bureau's Outreach and Project Development Team who serve as the initial point of contact for Bureau engagement. PDLs work with project sponsors to determine project needs and the specific ways in which the Bureau can provide TIFIA and RRIF credit assistance. Prospective applicants can contact [BuildAmerica@dot.gov](mailto:BuildAmerica@dot.gov) or call (202) 366-2300.

Based on the specific questions, challenges, opportunities, and information needs related to a particular project, appropriate Bureau expertise is assigned and brought to bear for projects. This may require the assignment of more specialized PDL assistance for projects that involve greater complexity in terms of such factors as scope, modal elements, regulatory requirements, private-sector involvement, and financing plan. This approach helps ensure that the project has followed statutory and regulatory requirements and that it appears to be eligible and ready for credit assistance. The intent of this process is to identify major hurdles that might delay a project early in the process. A customized project development team works closely with the project sponsor to navigate relevant Federal processes and to ensure that key program requirements are satisfied.

#### **Emerging Projects Agreements**

The Bureau offers sponsors of capital programs consisting of high-priority projects in the early stages of development with technical assistance in the development and planning of the projects in the form of an emerging projects agreement. Emerging projects agreements are not credit instruments. However, they are a tool the Bureau offers to provide heightened technical assistance to large capital programs of national significance. An emerging projects agreement will establish a framework for the provision of technical assistance by the Bureau to the project sponsor prior to the project sponsor's submission of a Letter of Interest/Draft Application. Sponsors of programs of projects that meet the criteria listed below will be considered for an emerging projects agreement. However, satisfaction of the criteria does not automatically guarantee that the DOT will enter into an emerging projects agreement, which is a determination made at the discretion of the DOT.<sup>200</sup>

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<sup>200</sup> Note: A decision by the DOT to not enter into an emerging projects agreement with a project sponsor does not disqualify a project from ultimately receiving credit assistance from a Credit Program through the traditional application process, as described in more detail in this Program Guide.

- The program consists of at least two related projects, each of which are usable by the public even if the other projects are not completed;
- Each project must be an eligible project under the statutory requirements of the relevant Credit Program<sup>201</sup>;
- The estimated total cost of the program of projects is no less than \$5 billion (as evidenced by a preliminary budget included with the request for the emerging projects agreement);
- The projects within the program are located in multiple states or in multiple counties within a metropolitan area;
- The program of projects is critical to the continued mobility and economic health of the region in which it is located and is of national significance;
- Each project is being carried out by, or is receiving material financial support from, multiple state, local, or regional governmental authorities;
- Construction of the first project is expected to begin within 5 years; and
- The sponsors of the Project Program have demonstrated the need for heightened technical assistance from the Department.

### **Letters of Interest/Draft Applications**

Although Letters of Interest for TIFIA credit assistance and Draft Applications for RRIF credit assistance are required as part of DOT's credit approval process, and may be submitted on a rolling basis (i.e. at any time)<sup>202</sup>, the Bureau recommends that project sponsors consult the Bureau before formally submitting these documents to DOT to ensure that the relevant programmatic requirements are met and initial risk assessments are completed. (This ensures that all key project elements are in place for an efficient underwriting process.) Once these milestones are complete, DOT can expeditiously accept the Letter of Interest or Draft Application, as the case may be, and formally move the Project into the credit underwriting process. Project sponsors will be notified by the DOT if it is determined that their projects are not eligible or are lacking key programmatic requirements.

Projects seeking both RRIF and TIFIA credit assistance for the same project can use the TIFIA Letter of Interest form and add, to the extent necessary, any additional information requested in the RRIF Draft Application. All credit assistance will be awarded based on a project's merits and its satisfaction of the eligibility requirements discussed above and, for RRIF projects, prioritization will be given to projects that satisfy the criteria described in Section 3-5 above.

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<sup>201</sup> See Chapter 3 for additional information regarding Credit Program eligibility criteria.

<sup>202</sup> However, as described in Section 4-1 below, the TIFIA Program may establish a date by which Letters of Interest for Rural Projects should be submitted. The date for these submissions will be provided on the Bureau website.

The Letter of Interest/Draft Application must: (i) describe the project and the location, purpose, and cost of the project, (ii) outline the proposed financial plan, including the requested credit assistance and the proposed obligor, (iii) provide a status of environmental review, (iv) provide information regarding satisfaction the eligibility requirements of the applicable Credit Program(s), and (v) for TIFIA Letters of Interest, indicate whether the project sponsor would like to use the TIFIA streamlined application process and, if so, how the project satisfies the criteria for that process.<sup>203</sup> The DOT templates for the required Letter of Interest and Draft Application for the specified Federal fiscal year can be found on the Bureau website, which can be found at: <https://www.transportation.gov/buildamerica>. The DOT will be updating the Letter of Interest/Draft Application forms to reflect changes made to the TIFIA and RRIF Programs by the FAST Act and to consolidate them into one consolidated Letter of Interest form that can be used for TIFIA, RRIF, or joint credit assistance. Pending publication of the updated forms, potential applicants should continue to use the forms posted on the Bureau's website. Potential applicants must submit detailed Letters of Interest/Draft Applications so the DOT can review creditworthiness and the other statutory eligibility requirements detailed in Chapter 3. The DOT requests that project sponsors submit the Letter of Interest/Draft Application by attaching it via email to [BureauCredit@dot.gov](mailto:BureauCredit@dot.gov).

Currently, the Bureau will review requests for the reduced interest rate available for Rural Projects<sup>204</sup> on a rolling basis. However, to the extent that the demand for the reduced interest rate exceed amounts available in the set-aside,<sup>205</sup> the DOT will establish a date by which sponsors of Rural Projects should submit their TIFIA Letters of Interest. In the event such a date is established, the Bureau will post the applicable date for each fiscal year on its website: <https://www.transportation.gov/buildamerica>.

Upon receipt of a satisfactory Letter of Interest/Draft Application and upon making a determination that the project is reasonably likely to satisfy all of the eligibility requirements of the applicable Credit Program, the DOT will conduct an in-depth creditworthiness review of the project sponsor and the proposed revenue stream identified to repay the DOT credit assistance, as well as any other collateral proposed to secure the DOT credit instrument. In connection with this review, the DOT will request that the project sponsor provide a feasibility study (as applicable) and a fully functional Microsoft Excel-based financial model. In addition, for projects requesting TIFIA credit assistance, the DOT will also request the preliminary rating opinion letter described in more detail in Section 3-6 above. At this time, the project sponsor will also be required to submit the Advisors' Fees Upfront Payment in the amount of \$250,000 to the DOT in order to continue the review process.<sup>206</sup> As noted in

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<sup>203</sup> For Letter of Interest and Application contents, see 23 U.S.C. §601(a)(6) and 49 C.F.R. §260.23-260.27, and for the streamlined application process, see 23 U.S.C. §603(f).

<sup>204</sup> As defined in Section 2-2 herein to refer to both rural infrastructure projects and projects to capitalize rural projects funds within SIBs.

<sup>205</sup> As noted above, 23 U.S.C. §608(a)(3)(A) limits TIFIA budget authority available for Rural Projects receiving the reduced interest rate to not more than 10 percent of the total TIFIA budget authority in any fiscal year. In addition, the TIFIA Program must make funds set aside for Rural Projects available to projects not receiving the reduced interest rate after June 1 of each fiscal year pursuant to 23 U.S.C. §608(a)(3)(B).

<sup>206</sup> Note that, for RRIF projects, the Advisors' Fees Upfront Payment may be higher depending on the nature and

Chapter 1 above, these funds will be used to cover the costs incurred by the DOT for services provided by the DOT's outside financial and legal advisors in connection with the review of the Letter of Interest/Draft Application and, in the event the project sponsor is invited to submit an application, the review of the project sponsor's application, and the negotiation of the transaction documents. After the Advisors' Fees Upfront Payment has been received, the DOT will engage an independent financial advisor to prepare a report and recommendation to the DOT. The DOT may also engage an independent legal advisor and other advisors to help complete its review of a project's eligibility. For projects seeking more than \$1 billion in credit assistance, two financial advisors will be hired to produce independent financial evaluations and recommendations to the DOT. The DOT will not complete its creditworthiness review until the project sponsor has provided all requested information and materials, including, for TIFIA credit assistance, a preliminary rating opinion letter, and, for all forms of credit assistance, the Advisors' Fees Upfront Payment necessary to enable the DOT to engage its outside financial and, as and when necessary, legal advisors.

In the context of TIFIA credit assistance for a public-private partnership, where multiple bidders may be competing for a concession such that the obligor has not yet been identified, the procuring agency must submit the project's Letter of Interest on behalf of the eventual obligor. The DOT will not consider Letters of Interest from project sponsors that have not obtained the legal rights to develop the project. However, as noted in Section 3-4 above, the DOT can assist procuring agencies in integrating the TIFIA application process with the procurement process. In these circumstances, the DOT may negotiate a preliminary indicative term sheet with the procuring agency that sets forth the general intent of the DOT, which the procuring agency may provide to potential bidders.<sup>207</sup>

### **Components of the Letter of Interest/Draft Application**

The Letter of Interest/Draft Application should describe the project and the proposed financial plan, identify the proposed borrower, detail how the applicable statutory eligibility requirements are met, and discuss the benefits of the proposed project and its use of credit assistance. The Letter of Interest/Draft Application should also summarize the project's status in the environmental review process. As noted above, the DOT will be updating the Letter of Interest/Draft Application forms to reflect changes made to the TIFIA and RRIF Programs by the FAST Act and to consolidate them into one unified Letter of Interest form that can be used for TIFIA, RRIF, or joint credit assistance. Pending publication of the updated forms, potential applicants should continue to use the forms posted on the Bureau's website.

- **Project Description.** The Letter of Interest/Draft Application should describe the project, including its location, purpose (including quantitative or qualitative details on public benefits the project will achieve), design features, estimated capital cost, development

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complexity of the project. Project sponsors should consult with the Bureau to confirm the applicable amount of the Advisors' Fees Upfront Payment.

<sup>207</sup> 23 U.S.C. §602(a)(1)(A), (a)(8). While the RRIF statute does not contain parallel language to the forgoing sections of the TIFIA statute, the DOT will consider requests for a similar process for RRIF projects being procured as public-private partnerships on a case-by-case basis.



schedule, and other relevant descriptions of the project.<sup>208</sup> If the potential applicant is seeking credit assistance for a RRIF or TIFIA TOD project, the Letter of Interest/Draft Application should detail how the project satisfies the criteria for a RRIF and/or TIFIA TOD Project, as described in Sections 3-1 and 3-2, respectively.

- **Proposed Plan of Finance.** The project sponsor should detail the plan of finance in sufficient detail to assist the DOT in its creditworthiness assessment.<sup>209</sup> The Letter of Interest/Draft Application should include the proposed sources and uses of funds for the project. For requests for TIFIA credit assistance, the sources and uses of funds for the project should demonstrate that total Federal assistance does not exceed 80% of the TIFIA eligible project cost. In addition, the Letter of Interest/Draft Application should include, if applicable, a proposed flow of funds of the revenue source that will be used to satisfy repayment of credit assistance as well as any other project obligations, and state the type and amount of credit assistance to be sought from the DOT, including whether the project sponsor is requesting a master credit agreement. The discussion of proposed financing should also identify the source(s) of revenue or other security that would be pledged to repay the credit instrument. Additionally, the Letter of Interest/Draft Application should address the status of any revenue feasibility study. In both the Letter of Interest/Draft Application and in the subsequent application, the project sponsor should propose a single financing structure representing the most likely scenario. The DOT may ask applicants to develop alternative scenarios, as necessary. If the project sponsor has requested TIFIA credit assistance in excess of 33 percent of reasonably anticipated eligible project costs, the project sponsor should provide a rationale for the amount of TIFIA credit assistance requested and explain the flexibility in the financial plan to finance the project with a reduced percentage of TIFIA credit assistance. If the potential applicant is seeking a TIFIA direct loan at the reduced, rural interest rate, the TIFIA Letter of Interest should also either detail how the project meets the definition of a rural infrastructure project or indicate that the loan will be used to capitalize a rural projects fund.<sup>210</sup>
- **Environmental Review.** The Letter of Interest/Draft Application should summarize the status of the project's environmental review, and it should state specifically whether the project has received a Categorical Exclusion, Finding of No Significant Impact, or Record of Decision, or whether a draft Environmental Impact Statement has been circulated.
- **Satisfaction of Eligibility Requirements.** The Letter of Interest/Draft Application should provide information regarding satisfaction the eligibility requirements of the applicable Credit Program(s), including all generally applicable and program-specific requirements (see Chapter 3 for more information regarding Federal requirements and threshold criteria). The Letter of Interest/Draft Application must demonstrate how the project satisfies applicable creditworthiness standards and must include proposed indicative

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<sup>208</sup> 23 U.S.C. §601(a)(6)(A) and 49 C.F.R. §260.23(e).

<sup>209</sup> 23 U.S.C. §601(a)(6)(B) and 49 C.F.R. §§260.23(f) and 260.25(b).

<sup>210</sup> See 23 U.S.C. §601(a)(15).

terms sought for the credit assistance (including proposed lien position, amortization schedule, and debt service coverage ratios) (see Sections 3-5 and 6-1 for additional discussion regarding creditworthiness requirements). In addition, the project sponsor should explain in the Letter of Interest/Draft Application how the project satisfies the DOT's policy goals, as set forth in Section 3-5. For project sponsors seeking TIFIA credit assistance, the Letter of Interest should demonstrate that the construction contracting process for the project will commence no more than 90 days after the execution of a TIFIA credit instrument.

- **Proposed Participants.** The Letter of Interest/Draft Application should describe the proposed borrower's organizational structure, identify the entity that will serve as the applicant, identify if the applicant and borrower will be the same entity, list significant members of the project team, describe the proposed borrower's relationship to subsidiaries or affiliates, if any, and provide a website link where additional information can be found. A public agency that seeks access to credit assistance on behalf of multiple competitors for a project concession must submit the project's Letter of Interest/Draft Application. Although the public agency would not become the borrower, nor even have yet identified the eventual applicant, it must provide information sufficient for the DOT to evaluate the project against the criteria and objectives described in Chapter 3. The DOT will not consider Letters of Interest/Draft Applications from entities that have not obtained rights to develop the project. For joint ventures seeking RRIF credit assistance, the RRIF Draft Application should detail how the joint venture satisfies the joint venture eligibility criteria, as described in Section 3-4.
- **Planning.** The Letter of Interest/Draft Application should confirm that the project is endorsed in the statewide and metropolitan planning documents or the state rail plans described in Section 3-5 above, or provide a schedule for the incorporation of the project into those planning and programming documents.<sup>211</sup>
- **Schedule.** The Letter of Interest/Draft Application should detail the timetable for requesting credit assistance, demonstrate that the application could be prepared within a short timeframe, and explain any potential factors that could impact the timetable. The Letter of Interest/Draft Application should include the project's anticipated procurement and construction contracting scheduling (including the anticipated dates for bidder selection and contract execution), the schedule for finalization of the feasibility study (where applicable), and the timeline for achieving financial close.
- **Contact Information.** The Letter of Interest/Draft Application should identify a key contact person with whom all communication should flow.
- **Additional Information.** The Letter of Interest/Draft Application should provide the additional information requested in the Letter of Interest/Draft Application form, including certification as to no delinquency or default on any Federal debt or debarment

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<sup>211</sup> As required under the TIFIA statute (23 U.S.C. §602(a)(3)) and as a priority consideration under the RRIF statute (45 U.S.C. §822(c)(5)).

from participation in any Federal programs,<sup>212</sup> and any other relevant information that could affect the development and financing of the project, such as congressional districts impacted, type of jurisdiction (rural/urban), community support, pending legislation, or litigation. In addition, RRIF Draft Applications should include the additional information specified in 49 C.F.R. §§260.23-260.27 to the extent not already covered by the above.

When preparing the Letter of Interest/Draft Application, applicants must utilize the formats provided on the TIFIA website. In cases where there are differences between the guidance in this document and the guidance on the applicable website form, the website form will govern and project sponsors should conform their responses to the form.

### **Oral Presentation**

Following the Bureau's acceptance of the Letter of Interest/Draft Application and receipt of a preliminary rating opinion letter and the Advisors' Fees Upfront Payment, the DOT will request that the potential applicant give an oral presentation to the DOT, followed by a question and answer session. In addition to Bureau staff and outside advisors, other officials, including members of the Bureau's Credit Review Team and the DOT Council on Credit and Finance, may attend the presentation. This presentation is intended to clarify the potential applicant's proposed development plans for the project, including the financing structure, and to resolve other issues relating to the Letter of Interest/Draft Application. The structure and content of the presentation will be discussed with each potential applicant at the time of the request. At the presentation, the DOT may require the potential applicant to provide additional information, including clarifications regarding cash flows, sources and uses, and/or other issues.

## **Section 4-2**

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### **Application**

After concluding its in-depth review of the creditworthiness of a project and related information submitted by potential applicants, along with the independent financial analysis report from the DOT's independent financial advisor, and after the project sponsor's oral presentation, the DOT will invite sponsors of eligible projects to submit complete applications. Upon receiving an invitation from the DOT, the applicant may submit an application. The RRIF and TIFIA application forms for the current fiscal year required to request credit assistance is available on the Bureau website, which can be found at: <https://www.transportation.gov/buildamerica>. As with the Letter of Interest/Draft Application forms, the DOT will be updating the application form to reflect changes made to the TIFIA and RRIF Programs by the FAST Act and to develop one consolidated application form that can be used for TIFIA, RRIF, or joint credit assistance. Pending publication of the updated forms, applicants should continue to use the forms posted on the Bureau's website.

The DOT must inform each applicant whether its application is complete, or, if not complete,

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<sup>212</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-129, Policies for Federal Credit Programs and Non-Tax Receivables (2013).

identify additional materials needed for completion, within 30 days of receiving the application.<sup>213</sup> No later than 60 days after issuing such notice, the applicant will be notified whether the application is approved or disapproved.<sup>214</sup>

An invitation to submit an application for credit assistance does not guarantee the DOT's approval, which will remain subject to evaluation, based on all of the statutory evaluation criteria, and the successful negotiation of terms and conditions acceptable to the Secretary.

## **Components**

RRIF and TIFIA applications request information covering the following general categories of information regarding the applicant(s) and the project.

- **Applicant Information.** These questions request information about where and how to contact the applicant, the applicant's organizational structure, any other parties who will be involved in the project, and the applicant's prior experience.
- **Project Information.** These questions request information about the project, including a description of the project and project purpose, a timeline of the project's construction, the type and amount of credit assistance requested, cost estimates, and a description of the applicant's operations and maintenance plans for the project and, if applicable, the related system (e.g., rail or transit system).
  - If the applicant is requesting a master credit agreement, the timing and amount of each credit instrument to be provided thereunder should be described.
  - In the case of a TIFIA applicant that has been invited to apply for consideration as a Rural Project, a description of how the project meets the applicable definition of a Rural Project, including satisfaction of the project cost ceiling and floor applicable to Rural Projects.<sup>215</sup>
  - If the applicant is requesting credit assistance for a RRIF or TIFIA TOD Project, a description of how the project meets the eligibility criteria described in Sections 3-1 and 3-2 above.
- **Financial Information.** These questions request information necessary for the DOT to determine whether the project and the applicant meet the applicable creditworthiness standards, such as a cash flow pro forma, credit ratings, revenue/feasibility/market studies, and a description of the dedicated revenue source or collateral, as applicable.

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<sup>213</sup> 23 U.S.C. §602(d)(1) and 45 U.S.C. §822(i)(1) and (2).

<sup>214</sup> 23 U.S.C. §602(d)(2) and 45 U.S.C. §822(i)(3). Note that for RRIF applications, this notice is provided within 60 days after a notice that the application is complete has been provided pursuant to 45 U.S.C. §822(i)(1), i.e., under the RRIF statute, the 60-day timeline is not triggered by a notice of an incomplete application, whereas under the TIFIA statute, the 60-day timeline is triggered by a notice of an incomplete application.

<sup>215</sup> For Rural Projects, eligible project costs must be reasonably anticipated to total at least \$10 million but not exceed \$100 million (23 U.S.C. §602(a)(5)(B)(iii)). See Section 3-5 for more information about project cost threshold requirements.

- **Federal Requirements.** These questions request information regarding the project and the applicant's satisfaction of the generally applicable Federal requirements and the Credit Program-specific requirements described in Section 3-3, such as the status of environmental review of the project and the incorporation of the project into the applicable planning and programming documents.<sup>216</sup>
- **Threshold Requirements.** These questions request information regarding the project and the applicant's satisfaction of the other threshold requirements described in Section 3-5, including the policy-based requirements applicable to each of the Credit Programs, such as, for TIFIA projects, a description of how the project fosters partnerships that attract private investment and how TIFIA credit assistance would (1) enable the project to proceed at an earlier date than the project would otherwise be able to proceed or would reduce lifecycle costs for the project and (2) reduce the project's need for Federal grant assistance.
- **Federal Debts and Delinquencies; Other Information.** The application forms request information regarding any of the applicant's outstanding Federal debts to the U.S. Government and certifications as to no delinquency or default on any Federal debt or debarment from participation in any Federal program.

The application forms also require applicants to submit certain supplementary exhibits to document or evidence the information provided in response to the questions described above.

### **Submission**

The applicant must submit at least one original copy of the complete application package with all supporting exhibits and related documentation as well as additional hard copies (the specific number of both originals and copies are set out in the application form).<sup>217</sup> In addition, applicants must submit a CD-ROM containing electronic versions of the entire application with attachments, including, as applicable, separate files for any excel-based attachments, such as the cash flow pro forma and financial plan, which must be executable electronic files, not in PDF or "values" format.

As of the date of the applicant submits an application, the applicant must have commenced the Federal System for Awards Management (SAM) registration process. To complete the SAM registration process, the applicant must first obtain a Data Universal Number System (DUNS) number. Applicants should expect the DUNS process to take some time, so this step should be done well in advance of seeking SAM registration. In addition, a Tax Identification Number or a Federal Employer Identification Number must be provided to

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<sup>216</sup> As required under the TIFIA statute (23 U.S.C. §602(a)(3)) and as a priority consideration under the RRIF statute (45 U.S.C. §822(c)(5)).

<sup>217</sup> The current RRIF application form requests one original, compiled copy and four (4) hard copies. The current TIFIA application form requests two (2) original, compiled copies and three (3) hard copies of just the application form, without attachments. As noted above, both application forms will be updated to reflect changes made to the TIFIA and RRIF Programs by the FAST Act and to develop one consolidated application form that can be used for TIFIA, RRIF, or joint credit assistance. Pending publication of the updated forms, applicants should continue to submit the number of original and hard copies of the application forms that are noted in the applicable form.

satisfy Internal Revenue Service tax reporting requirements. Upon completing the SAM registration process, the applicant will receive a Commercial and Government Entity code.

## **Charges**

As noted in Chapter 1 and in the Letter of Interest/Draft Application discussion in Section 4-1 above, the DOT requires applicants for and recipients of DOT credit assistance to reimburse the Federal Government for its out-of-pocket costs for its outside legal counsel and financial advisors needed to review an applicant's Letter of Interest/Draft Application and application, and to negotiate and close the credit agreement.<sup>218</sup> These charges are not considered as eligible project costs.<sup>219</sup>

- (1) Upon request by the DOT, project sponsors must pay the DOT the Advisors' Fees Upfront Payment in the amount of \$250,000<sup>220</sup> as part of the Letter of Interest/Draft Application review process, which amount is not refundable. As noted in Chapter 1, these funds enable the DOT to hire outside financial and, as and when necessary, legal advisors as part of the Letter of Interest/Draft Application review process. These funds are used, dollar-for-dollar, to cover the actual costs incurred for services provided by the DOT's outside advisors in connection with the review of the Letter of Interest/Draft Application and application and the negotiation of the transaction documents. For projects with multiple sponsors that may be pursuing different loans and/or credit structures, the DOT will require each entity to submit the Advisors' Fees Upfront Payment upon request during the review of the Letter of Interest/Draft Application. In addition, each party would be responsible for the final cost of the individual evaluation (including review by both the DOT's financial and legal advisors).

### Assistance Available to Offset Advisors' Fees Upfront Payment:

TIFIA Program: For TIFIA projects with eligible project costs reasonably anticipated to be less than \$75 million, the FAST Act requires the Secretary to set aside at least \$2 million of the TIFIA Program's annual budget authority to be used in lieu of fees charged to the project sponsor to cover the costs of the DOT's outside advisors.<sup>221</sup> Project sponsors should indicate in their TIFIA Letter of Interest whether they wish to be considered for this assistance (though the DOT cannot guarantee that funds will be available to satisfy all requests). To the extent a project sponsor is eligible for this assistance and sufficient funds are available, the Advisors' Fees Upfront

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<sup>218</sup> See 23 U.S.C. §§603(b)(7), (e)(2), 604(b)(9), and 605(b), and 45 U.S.C. §823(l)(1).

<sup>219</sup> 49 C.F.R. §80.17(b). While the RRIF statute and regulations do not contain parallel language to the forgoing sections of the TIFIA statute, the DOT will apply the same principle to these charges in respect of RRIF applications, consistent with 2 C.F.R. Part 200, Subpart E.

<sup>220</sup> Note that, for RRIF projects, the Advisors' Fees Upfront Payment may be higher depending on the nature and complexity of the project. Project sponsors should consult with the Bureau to confirm the applicable amount of the Advisors' Fees Upfront Payment.

<sup>221</sup> 23 U.S.C. §605(f).

Payment will be waived and the cost of the DOT's outside advisors will be funded through this set-aside.

**RRIF Program:** The FY 2016 Consolidated Appropriations Act set aside \$1.96 million to assist Class II and III railroads pursuing RRIF credit assistance. These funds are available to be used by the Bureau in lieu of fees charged to Class II and III railroads to cover the cost of the DOT's outside advisors.<sup>222</sup> These funds cannot be used to cover the CRP of a RRIF loan.<sup>223</sup> Class II and III railroads seeking RRIF credit assistance should indicate in their Draft Application whether they wish to be considered for this assistance (though the DOT cannot guarantee that funds will be available to satisfy all requests). To the extent a project sponsor is eligible for this assistance and sufficient funds are available, the Advisors' Fees Upfront Payment will be waived, and the cost of the DOT's outside advisors will be funded through this appropriation. These funds remain available beyond FY 2016 to the extent not expended.

- (2) As projects advance through the application review process as well as the negotiation and documentation phase, additional funds may be necessary to cover the costs of the DOT's advisors in the event that they cumulatively exceed the \$250,000<sup>224</sup> paid as the Advisors' Fees Upfront Payment. DOT's total advisors' fees for a typical transaction generally range between \$400,000 and \$700,000. However, the amount of this fee may vary significantly depending on the complexity of the project.<sup>225</sup> The Advisors' Fees Upfront Payment is used dollar-for-dollar to cover these costs and only to the extent the DOT's actual costs exceed \$250,000 will additional fees be charged to the applicant. These amounts reimburse the Federal Government for out-of-pocket costs for its outside legal counsel and financial advisors needed to review the Letter of Interest/Draft Application and application and negotiate and close the credit agreement. For projects seeking more than \$1 billion in credit assistance, two financial advisors will be hired to produce independent financial analyses and recommendations acceptable in form and content to the DOT. **By submitting a Letter of Interest or Draft Application, the proposed borrower acknowledges that it is responsible for payment of these fees regardless of whether the credit agreement is executed.**

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<sup>222</sup> Consolidated Appropriations Act, 2016, Division L, §152, Pub. L. 114-113, December 18, 2015, 129 Stat. 2242, 2856 (2015).

<sup>223</sup> Consolidated Appropriations Act, 2016, Division L, §146, Pub. L. 114-113, December 18, 2015, 129 Stat. 2242, 2853 (2015).

<sup>224</sup> Note that, for RRIF projects, the Advisors' Fees Upfront Payment may be higher depending on the nature and complexity of the project. Project sponsors should consult with the Bureau to confirm the applicable amount of the Advisors' Fees Upfront Payment.

<sup>225</sup> Projects with a straightforward capital structure and a highly rated revenue source that is not dependent upon construction or other high-value collateral and streamlined documentation will likely have lower advisor costs than projects with a complex financing structure and extensive ancillary documentation such as intercreditor or interagency agreements, compliance agreements, equity funding agreements, etc.

TIFIA Program: As noted above, to the extent a project sponsor is eligible for fee assistance described above and sufficient funds are available, these incremental fees will be covered by funds in the set-aside but only to the extent of available funds in the set-aside.

RRIF Program: As noted above, to the extent a project sponsor is eligible for fee assistance described above and sufficient funds are available, these incremental fees will be covered by appropriated funds but only to the extent of available appropriated funds.

- (3) An annual servicing fee, indexed to inflation, of approximately \$13,000 for each credit instrument approved, is required for each project that receives credit assistance. The servicing fee will be collected based on the DOT's out-of-pocket costs to administer the credit instruments, including accounting, collections, document maintenance, and financial reporting. This fee is due by November 15 each year during the life of the credit instrument.
- (4) Project monitoring fees are charged to borrowers in cases where the DOT incurs costs in connection with monitoring the performance of a project, the enforcement of credit agreement provisions, amendments to the credit agreement and related documents, and other performance-related activities. The DOT includes a provision requiring the borrower to reimburse the DOT for such costs in each credit agreement.

The DOT periodically will announce in the Federal Register changes to the types and amounts of fees for applicants and program participants, and in some cases may provide more current information than this Program Guide. Applicants should be sure to check the Federal Register for the most current information.



## **Chapter 5: Selection Process**

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This chapter describes the project review and selection process for both the TIFIA and RRIF Credit Programs.

### **Section 5-1**

#### **Project Review**

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##### **TIFIA Streamlined Application Process**

The FAST Act required that the DOT develop a streamlined application process for certain TIFIA requests for credit assistance.<sup>226</sup> The Bureau has developed such a process, identifying potential reductions in processing time while preserving an appropriate level of due diligence. Eligibility for this streamlined application process is dependent on satisfaction of certain project criteria. In general, projects that inherently present lower risks to the Government, such as requests for credit assistance of not more than \$100 million and dedicated revenue sources that are not affected by project performance (e.g., sales tax revenue pledges), are eligible for the streamlined process. Smaller loan requests backed by highly-rated pledges would be expected to incur less review and underwriting time than larger requests for credit assistance, lower-rated credits, or projects with complex legal considerations. Applicants that agree to DOT's standard terms for secured loans would likely experience a reduction in Letter of Interest and application review time and the cost of DOT's outside advisors due to the minimal negotiation required to document the transaction.<sup>227</sup> In addition, the Bureau may consider offering a streamlined application process to qualified projects on a case-by-case basis. Please contact the Bureau for more information about the streamlined application process, including the applicable eligibility criteria.

##### **Submission of the Letter of Interest and Invitation to Submit an Application**

Chapter 4 describes the process of engaging with the Bureau for purposes of seeking credit assistance. The DOT conducts an in-depth creditworthiness review of the project sponsor and the revenue stream proposed to repay the TIFIA and/or RRIF credit assistance. The creditworthiness review involves evaluation of the plan of finance, financial model, and feasibility of the anticipated pledged revenue or, in the case of RRIF loans where the proposed collateral is other than a dedicated revenue stream, the sufficiency of such other pledged collateral. Concurrently with this review, the DOT will ask project sponsors requesting TIFIA credit assistance to provide a preliminary rating opinion letter. In addition, at this time, the DOT will ask project sponsors to submit the \$250,000<sup>228</sup> Advisors' Fees Upfront Payment to enable the DOT to hire outside financial and, as and when necessary, legal advisors to complete its review of the project. (See Section 4-2 for additional

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<sup>226</sup> 23 U.S.C. §603(f).

<sup>227</sup> The TIFIA loan agreement templates for P3 and public borrowers are available on the Bureau's website: <https://www.transportation.gov/buildamerica>.

<sup>228</sup> Note that, for RRIF projects, the Advisors' Fees Upfront Payment may be higher depending on the nature and complexity of the project. Project sponsors should consult with the Bureau to confirm the applicable amount of the Advisors' Fees Upfront Payment.

discussion of the Advisors' Fees Upfront Payment, including regarding the availability of DOT-funded assistance for TIFIA projects with costs anticipated to be less than \$75 million.) In addition, the DOT will request that the potential applicant give an oral presentation to the DOT followed by a question and answer session. As noted above, potential applicants will be invited to submit a formal application only once the DOT has satisfactorily completed its review of a project's eligibility, including a satisfactory review of the creditworthiness of the project. See Chapters 1 and 4 for a step-by-step description of the application process.

### **Eligibility Criteria**

The preliminary review team led by a Project Development Lead from the Bureau's Outreach and Project Development Team (as described in Section 4-1) ensures satisfaction of the threshold requirements described in Chapter 3, including satisfaction of Federal requirements, Credit Program-specific requirements, and project readiness. Such team also reviews the Letter of Interest/Draft Application for completeness of information. The DOT employs the services of an independent financial advisor to assist with financial and credit risk assessments of the project.

The Project Development team's preliminary review will focus on certain key eligibility elements to ensure the relevant project is ready for the more in-depth creditworthiness review. These key preliminary items are:

- **Project Eligibility.** The preliminary review team will first verify that the project and the potential applicant satisfy the program-specific requirements applicable to the relevant Credit Program. This review will determine whether the project is eligible for credit assistance under the requested Credit Program and the potential applicant is an eligible applicant.
- **Federal Requirements.** The preliminary review team will verify whether certain preliminary Federal requirements either have been satisfied or are on schedule to be completed in sufficient time to continue the review process. The Federal requirements most likely to delay the Letter of Interest/Draft Application process are Buy America and NEPA, however, the preliminary review team will flag all Federal compliance issues it discovers during the initial Letter of Interest/Draft Application review.
- **Credit Program-Specific Requirements.** In addition to the generally applicable Federal requirements, the preliminary review team will verify whether the other threshold criteria described in Section 3-5 have been (or are reasonably likely to be) satisfied. For example, the review team will determine whether the amount of the requested credit assistance exceeds the statutory authority for the applicable program (such as a request for a TIFIA loan in excess of 49 percent of eligible project costs,<sup>229</sup> or combined RRIF and TIFIA credit assistance in excess of 80 percent of eligible project costs in the aggregate<sup>230</sup>) or the project size does not meet the applicable Credit Program's

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<sup>229</sup> 23 U.S.C. §603(b)(2)(A).

<sup>230</sup> 23 U.S.C. §603(b)(9)(A).

requirements (such as a request for TIFIA credit assistance for a non-rural, non-local project with anticipated eligible costs of \$40 million<sup>231</sup>). This review will also confirm whether the project has been reflected in the applicable state planning and programming documents<sup>232</sup> and satisfies the applicable readiness requirements<sup>233</sup>.

After concluding its initial review and upon making a determination that the project is reasonably likely to satisfy all of the eligibility requirements of the applicable Credit Program, the DOT will conduct an in-depth creditworthiness review of the project sponsor and the proposed plan of finance. This review focuses on the following eligibility criteria set forth in the RRIF and TIFIA statutes, as applicable:

- Creditworthiness: The DOT will review the creditworthiness of the project. This includes a demonstrated capacity to repay the Federal credit assistance as well as a determination that the project has appropriate security features, such as appropriate coverage ratios, rate covenants and reserves, as applicable. For requests for TIFIA credit assistance, project sponsors will need to specifically demonstrate the following:
  - i) Ability to satisfy applicable creditworthiness standards;<sup>234</sup>
  - ii) Rate covenant, if applicable;<sup>235</sup>
  - iii) Adequate coverage requirements to ensure repayment;<sup>236</sup> and
  - iv) Ability to obtain investment grade ratings on senior debt.<sup>237</sup>
- Repayment Source. While the RRIF statute does not require a borrower to pledge a dedicated revenue source to the repayment of RRIF credit assistance, for both the RRIF and TIFIA Programs, the DOT will analyze the revenue stream proposed to repay the DOT credit assistance to determine whether there is adequate assurance that the credit assistance can be repaid, including under downside scenarios. In addition, the TIFIA statute requires that both project debt generally and TIFIA debt specifically must be repaid in whole or in part by a dedicated revenue source(s) as discussed in Section 3-5 above.<sup>238</sup> The DOT will require that revenues pledged to the TIFIA obligation be of substantially similar credit quality to those securing the senior debt, except with respect

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<sup>231</sup> 23 U.S.C. §602(a)(5)(A).

<sup>232</sup> As required under the TIFIA statute (23 U.S.C. §602(a)(3)) and as a priority consideration under the RRIF statute (45 U.S.C. §822(c)(5)).

<sup>233</sup> For requests for RRIF credit assistance, this review and the NEPA status review will one and the same; for requests for TIFIA credit assistance, the review team will determine whether the project sponsor has demonstrated that the construction contracting process for the project can commence no more than 90 days after the execution of a TIFIA credit instrument.

<sup>234</sup> 23 U.S.C. §602(a)(2).

<sup>235</sup> 23 U.S.C. §602(a)(2)(A)(i).

<sup>236</sup> 23 U.S.C. §602(a)(2)(A)(ii).

<sup>237</sup> 23 U.S.C. §602(a)(2)(A)(iii).

<sup>238</sup> 23 U.S.C. §602(a)(6).

to TIFIA's lien position, which can be junior (i.e., subordinated) the project's other debt obligations.<sup>239</sup>

- **Rating Opinion (TIFIA).** The DOT will not complete its review of a TIFIA Letter of Interest and render a determination of eligibility before the project sponsor has submitted at least one preliminary rating opinion letter from a Credit Rating Agency. This preliminary assessment of the project's proposed financing structure must indicate that the senior obligations funding the project have the potential to receive an investment grade rating.<sup>240</sup> The DOT will not consider projects that do not demonstrate the potential for the obligations senior to the TIFIA obligation to receive an investment grade rating. The preliminary rating opinion letter should also provide a preliminary assessment of the likely rating category for the requested TIFIA credit instrument. In addition, the preliminary rating opinion letter should provide a preliminary rating assessment of the financial strength of the overall project and the default risk (i.e., without regard to recovery potential) of the requested TIFIA credit instrument.<sup>241</sup> See Section 3-6 for additional discussion regarding the DOT's use of credit ratings.
- **DOT Policy Goals.** The preliminary review team will review the Letter of Interest/Draft Application, and any supplemental materials, to determine whether and to what extent a project satisfies the DOT policy goals described in Section 3-5 above. (See Section 3-5 for a description of the applicable policy goals.) For requests for TIFIA credit assistance, the review team must make a determination that the policy goals described in Section 3-5 are satisfied in order for the project to be eligible for TIFIA credit assistance. Failure to achieve the RRIF policy goals described in Section 3-5 is not a bar to eligibility, but will be used to determine the prioritization of projects and failure to satisfy any or all of the goals identified may result in a project not receiving RRIF credit assistance.

With respect to public-private partnerships (P3s) seeking Bureau credit assistance, the DOT expects a partnership in which all parties will work together to ensure that the project is successful from construction through loan maturity. The terms within the P3 concession agreement are critical to the DOT's analysis. Prior to execution of a concession agreement, typically when the public sponsor finalizes a draft concession agreement for the Request for Proposals process, the DOT will review the agreement with a focus on credit underwriting. The DOT's review will ensure the concession terms are incorporated into the overall credit due diligence process and will identify terms that may negatively impact the repayment of the project's debt. The Department may require changes to the concession agreement to reach a finding of creditworthiness. To ensure that all parties will work together during the concession period while the loan would be outstanding, particularly in distress situations, the DOT will review previous experience by private entities in making a creditworthiness

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<sup>239</sup> As noted in Section 2-1 above, the TIFIA lien on pledged revenues can be subordinated to those of senior lenders to the project except in the event of bankruptcy, insolvency, or liquidation of the obligor. In such an instance, the TIFIA lien would be on par with the lien of the project's senior creditors. However, this provision can be waived under certain circumstances for public agency borrowers having senior bonds under preexisting indentures so long as certain conditions are met, as further discussed in Section 2-1 above.

<sup>240</sup> If there are no debt obligations senior to the TIFIA credit instrument, then the TIFIA credit instrument itself must be shown to have the potential to obtain an investment grade rating. 23 U.S.C. §602(b)(3).

<sup>241</sup> 23 U.S.C. §602(b)(3).

determination.

After concluding its review of each Letter of Interest/Draft Application and related information submitted by potential applicants, along with the independent financial analysis report from the DOT's independent financial advisor, and after the project sponsor's oral presentation, the DOT will invite sponsors of eligible projects to submit complete applications. In addition to the foregoing requirements, project sponsors must have circulated a draft EIS by the time it submits an application, unless the project has received either a FONSI or a Categorical Exclusion. The DOT will not obligate funds for a project before a ROD (if required, or the equivalent final agency decision) has been issued for that project. (See Sections 3-3 and 3-7 for additional discussion regarding NEPA requirements). Further, applicants must certify in their application that they are not delinquent on any Federal debt, including tax debt.<sup>242</sup>

### **Credit Subsidy/Credit Risk Premium Calculation**

Based on the financial information presented in the Letter of Interest/Draft Application and application (and any supplemental materials), the DOT will estimate the credit subsidy/CRP for the proposed credit assistance. This preliminary calculation, reflecting the DOT's estimated credit risk, will determine, for TIFIA credit assistance, the amount of TIFIA budget authority the project would consume if selected for credit assistance, and for RRIF credit assistance, the size of the CRP payment the applicant will ultimately be required to pay to the DOT.<sup>243</sup>

## **Section 5-2**

### **Project Recommendations**

Based on work of the technical review team, Bureau staff will prepare a recommendation regarding TIFIA credit assistance and present it, first to the Bureau's Credit Review Team, a team of DOT staff drawn from credit and modal expertise throughout the Department. After the Credit Review Team has reviewed and affirmed the Bureau's recommendation, the Bureau will present its recommendation to the DOT Council on Credit and Finance.

## **Section 5-3**

### **Project Selection**

The DOT Council on Credit and Finance provides recommendations to the Secretary, who will make the final determination regarding award of Bureau credit assistance. The Secretary's approval, if received, will instruct the Bureau to proceed to finalize the

<sup>242</sup> See 31 U.S.C. §3720B, 31 C.F.R. §285.13, and Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-129, Policies for Federal Credit Programs and Non-Tax Receivables (2013), at Section III(A)(1)(b).

<sup>243</sup> As noted in Chapter 2, since the RRIF Program does not currently have an appropriation, the cost to the government of providing financial assistance must be borne by the RRIF applicant, or another non-federal entity on behalf of the applicant, through the payment of the CRP. See Chapter 2 for additional information regarding the credit subsidy/CRP.

negotiation of the documentation for the credit assistance. Once terms and conditions acceptable to the DOT have been finalized, the parties will execute a term sheet, which obligates the credit assistance, a definitive credit agreement, which sets forth the terms and conditions of the credit assistance, and the other documents necessary to provide credit assistance, and close the transaction. The typical transaction documents utilized in connection with DOT credit assistance are described in Chapter 6.

## Section 5-4

### Summary of the Bureau Selection Process

Exhibit 5-A provides a summary of the Bureau application and selection processes addressed in Chapters 4 and 5.

#### Exhibit 5-A: The Bureau Application Process

Action	Responsible Party
<b>Bureau Outreach and Project Development</b> <ul style="list-style-type: none"> <li>Project Sponsor Engages with Bureau Outreach Staff.</li> </ul>	<ul style="list-style-type: none"> <li>Project Sponsor</li> </ul>
<b>Initial Project Assessment:</b> <ul style="list-style-type: none"> <li>Establish a preliminary review team to review the Letter of Interest/Draft Application.</li> <li>Determine whether the prospective project meets statutory eligibility requirements.</li> <li>Provide additional information (if requested by the DOT).</li> </ul>	<ul style="list-style-type: none"> <li>DOT</li> <li>DOT</li> <li>Project Sponsor</li> </ul>
<b>Letter of Interest:</b> Prepare the Letter of Interest and submit it to the DOT.	<ul style="list-style-type: none"> <li>Project Sponsor</li> </ul>
<b>In-Depth Creditworthiness Review:</b> <ul style="list-style-type: none"> <li>Review creditworthiness of the project sponsor and the revenue stream proposed to repay the credit assistance.</li> <li>Upon request from the DOT, provide a feasibility study (as applicable), and a fully functional Microsoft Excel-based financial model.</li> <li>For TIFIA applicants, upon request from the DOT, provide the preliminary rating opinion letter.</li> <li>Upon request from the DOT, provide the \$250,000 Advisors' Fees Upfront Payment to enable the DOT to hire outside financial and legal advisors in order to continue project review.</li> </ul>	<ul style="list-style-type: none"> <li>DOT</li> <li>Project Sponsor</li> <li>Project Sponsor</li> <li>Project Sponsor</li> </ul>
<b>Oral Presentation:</b> <ul style="list-style-type: none"> <li>After initial determination of eligibility and receipt of the Advisors' Fees Upfront Payment and, for TIFIA applicants, the preliminary rating opinion letter, and upon request from the DOT, present the project to the review team and advisors, as well as representatives of the Bureau and the DOT Council on Credit and Finance.</li> </ul>	<ul style="list-style-type: none"> <li>Project Sponsor</li> </ul>
<b>Application:</b> <ul style="list-style-type: none"> <li>After successful determination of eligibility, oral presentation, and receipt of the Advisors' Fees Upfront Payment and, for TIFIA applicants, the preliminary rating opinion letter, notify selected projects that have been invited to submit an application.</li> <li>Prepare and submit the complete application (with the appropriate number of copies).</li> </ul>	<ul style="list-style-type: none"> <li>DOT</li> <li>Project Sponsor</li> </ul>
<b>Application Review:</b> <ul style="list-style-type: none"> <li>Based on the written application and oral presentation, reassess the project's satisfaction of the applicable eligibility criteria, with particular focus on creditworthiness.</li> <li>Calculate the credit subsidy cost/CRP estimate.</li> </ul>	<ul style="list-style-type: none"> <li>DOT</li> <li>DOT</li> </ul>
<b>Recommendations to Bureau Credit Review Team, DOT Council on Credit and Finance and Secretary:</b> <ul style="list-style-type: none"> <li>Prepare and present a recommendation for the project to the Bureau's Credit Review Team.</li> <li>If approved by the Credit Review Team, present a recommendation for the project to the DOT Council on Credit and Finance.</li> <li>Review, approve, or revise recommendation and forward to the Secretary for final decision on approval.</li> </ul>	<ul style="list-style-type: none"> <li>DOT</li> <li>DOT</li> <li>DOT Council on Credit and Finance</li> </ul>
<b>Approval and Notifications:</b> <ul style="list-style-type: none"> <li>Approve project, as appropriate, and authorize the issuance of a term sheet and completion of negotiations of a credit agreement.</li> <li>Advise applicant of Secretary's determination.</li> </ul>	<ul style="list-style-type: none"> <li>Secretary</li> <li>DOT</li> </ul>





## Chapter 6: Transaction Documents and Ongoing Monitoring Requirements

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This chapter describes the process by which the DOT will commit to provide credit assistance to a selected borrower (also termed “obligor”). The chapter also describes the two major contractual documents used for the TIFIA and RRIF Programs: the term sheet and the credit agreement. The term sheet establishes the DOT’s legal commitment and triggers the obligation of budget authority for the project. The credit agreement is the definitive agreement between the DOT and the borrower, containing all of the terms and conditions pursuant to which the DOT’s credit assistance is provided. The DOT will not execute the term sheet or the credit agreement until the Credit Review Team and the Council on Credit and Finance have recommended the approval of an application, and the Secretary has approved the application and instructed the Bureau to execute these agreements. As described in Chapter 5, the Bureau will not present an application to the Credit Review Team and Council on Credit and Finance until all prerequisite to receipt of credit assistance, such as receipt of a final NEPA determination, receipt of a preliminary rating opinion letter (for TIFIA credit assistance), and satisfaction of the eligibility requirements described in Chapter 3, have been satisfied.

If a project is also financed with other DOT funds, the recipient of credit assistance is required to comply with applicable modal project requirements and approvals as well as the applicable Credit Program’s requirements. These may include approval for innovative contracting approaches and “mega project” procedures, such as submission of a financial plan and plan updates. The Bureau process minimizes duplication of effort by borrowers, while ensuring effective oversight and monitoring of the Federal investment for projects. The applicant can choose to take advantage of the coordinated processes as long as the timing of the submission of required documents fulfills both the Credit Program and the other applicable Federal program requirements. The credit agreement will specifically address financial plan requirements and monitoring procedures.

### Section 6-1

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#### Term Sheet

The term sheet is a contractual agreement between the DOT and the borrower that sets forth certain business terms and conditions of the credit assistance for the project.<sup>244</sup> The DOT’s issuance of this document triggers the DOT’s obligation (*i.e.*, legal commitment) of budget authority.

#### Term Sheet Prerequisites

Before issuing a term sheet, the DOT will confirm that all prerequisites for the obligation of funds have been satisfied. These prerequisites are described in detail in Chapter 3.

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<sup>244</sup> Note that this term sheet is a different instrument from the indicative term sheet the Bureau offers to negotiate with public sponsors conducting P3 procurements. The term sheet described above will be executed for all transactions receiving credit assistance and is necessary for the DOT to obligate funds.

The term sheet obligates budget authority and binds the DOT and the borrower to the specified terms; it does not bind the DOT to details of the borrower's application. Further, the term sheet does *not* trigger a disbursement of funds to the borrower. Disbursements are made pursuant to the credit agreement, which is the definitive financing agreement between the borrower and the DOT.

### **Term Sheet Contents**

General rules concerning the terms for secured loans, loan guarantees, and standby lines of credit are summarized in Chapter 2. More specific terms will be determined on a project-specific basis. The DOT commitment in the term sheet, and the terms and conditions applicable to the DOT's credit assistance, are subject in all respects to the terms of the credit agreement.

Because term sheets serve primarily as obligating instruments for TIFIA and RRIF credit assistance, they include only basic terms and conditions related to the DOT's provision of credit assistance. Typically, the following will appear in every term sheet:

- Parties to the agreement (*e.g.*, lender, borrower, and guaranteed lender, as applicable);
- Type(s) of credit instrument (*i.e.*, secured loan, loan guarantee, or line of credit);
- Description of the project;
- Estimated total project costs and total eligible project costs;
- Maximum amount of TIFIA and/or RRIF credit assistance;
- Method for establishing the interest rate;
- Estimated final maturity date;
- Source of payment and security, if applicable, including lien priority of the credit instrument;
- Requirement to reimburse the DOT for all costs in excess of the Advisors' Fees Upfront Payment;
- Conditions, if applicable, for execution of a credit agreement; and
- Covenants such as limitations on additional bonds, minimum coverage ratios, and any required reserve funds.

### **Section 6-2**

#### **Credit Agreement**

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The credit agreement is the definitive agreement between the DOT and the borrower (and the guaranteed lender, if applicable). It specifies all terms and conditions of the credit assistance and authorizes the disbursement of credit assistance to the project.

### **Credit Agreement Prerequisites**

In order for the DOT to execute the credit agreement and disburse funds, the borrower must satisfy at a minimum any requirements set forth in the term sheet. Also, for TIFIA credit assistance, the borrower must have received two investment grade ratings on the senior debt obligations and two ratings on the TIFIA credit instrument, as described in Section 3-6. If the TIFIA debt is intended to be the senior debt, it must receive two investment grade ratings.

Prior to closing a credit agreement, the borrower will be required to submit updates to both the financial plan and project management and monitoring plan.

The DOT reserves the right to review and, as appropriate, approve all related project documents, including, but not limited to design-build contracts, concession agreements, development agreements, financing agreements, and funding agreements with third parties.

In addition to satisfying the requirements set forth above, prior to executing the credit agreement, the applicant must complete the Federal System for Award Management (SAM) registration process. To complete the SAM registration process, the applicant must first obtain a Data Universal Numbering System (DUNS) number. In addition, a Federal Employer Identification Number (FEIN, also known as a Federal Tax Identification Number) must be provided to satisfy the IRS tax reporting requirements. Upon completing the SAM registration process, the applicant will receive a Commercial and Government Entity code. The DOT will verify that the applicant has active registration status in SAM, has no active exclusions in SAM, and will require evidence of the applicant's DUNS number and FEIN prior to executing a credit agreement.

### **Credit Agreement Contents**

The contents of the credit agreement will include both standard provisions and transaction-specific provisions. The borrower and the DOT will execute the credit agreement for a secured loan or line of credit; the guaranteed lender, the DOT, and the borrower will execute the loan guarantee agreement or instrument for a loan guarantee. Additionally, for a loan guarantee, the guaranteed lender will execute a separate loan agreement with the borrower, and the borrower will execute a borrower's certificate, compliance, and loan agreement with the DOT. Depending on the nature of the transaction, additional documents, such as an intercreditor agreement or collateral agency agreement, may also be necessary. The DOT will require the borrower to provide copies of the bond or loan documents, as applicable, and other agreements material to the flow of funds or to the DOT's security for its review of the project's creditworthiness. The DOT may also review any disclosure with respect to the transaction that the borrower includes in offering documents.

Generally, borrowers can expect credit agreements to include, in addition to the items listed under "Term Sheet Contents," the following:

- Detailed description of the dedicated revenue source and pledged security, if applicable;
- Credit enhancement features (*e.g.*, rate covenants, additional bonds tests, and coverage requirements);

- Flow of funds;
- Repayment terms, including amortization schedule and final maturity;
- Representations and warranties;
- Borrower covenants;
- Annual disbursement schedule and conditions for draws;
- Financial plan requirements; and
- Monitoring and reporting requirements.

The credit agreement will also include the form of requisition for disbursements and the form of bond/note. Each borrower under a direct loan agreement executes a bond or note, as applicable, evidencing the obligation to repay the loan.

### **Section 6-3**

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#### **Closing Activities**

When the parties to the transaction have completed negotiations and finalized the credit agreement and other related financing documents, the pre-closing and closing occur. This process is very similar to a bond transaction closing.

At closing, authorized representatives of the borrower, the DOT, and the guaranteed lender (if applicable) execute the legal documents. Documents requiring execution by persons not attending the closing are signed in advance. Copies of the agreements are made and distributed to the appropriate parties. The timing of the closing is typically tied to the closing of the senior financing, if applicable. The closing of the senior debt and the DOT credit instrument can be simultaneous, but the TIFIA and/or RRIF transaction can close ahead of the senior financing so long as the senior documents have been substantively finalized and execution is within a week of the TIFIA and/or RRIF closing. In those circumstances, the DOT credit agreement will include conditions subsequent to closing that will terminate the commitment if the senior financing does not close by an outside date (not more than a week after the TIFIA and/or RRIF closing) or is on terms and conditions different than the forms of senior financing documents agreed when the TIFIA and/or RRIF loan(s) closed. Standard transaction closing documents are required, including various legal opinions.

Following the closing, a binder is prepared which includes all the legal documents, project documents, condition precedent materials from the DOT transaction, and other closing documents. The Bureau uses this closing binder as the source of project information for accounting, budgeting, and program monitoring systems. Exhibit 6-A contains a sample checklist for a secured loan closing.

Exhibit 6-A: Sample Loan Closing Checklist for a TIFIA or RRIF Direct Loan

1. Organizational Documents of the Borrower
  - If the Borrower is a public entity:
    - a. Approval resolutions approving project and authorizing official to execute documents
    - b. Copies of enabling legislation, bylaws, minutes of meetings regarding the project
  - If the Borrower is a private entity:
    - a. Articles of incorporation, partnership agreement or similar documents, as appropriate
    - b. Good standing certificate
    - c. Bylaws
    - d. Incumbency certificate
    - e. Resolutions authorizing officials to execute documents
2. TIFIA/RRIF Loan Agreement
3. TIFIA/RRIF Term Sheet
4. TIFIA/RRIF Promissory Note
5. Intercreditor Agreement
6. Development agreements (including design/build or concession agreements) and any other construction contracts
7. Borrower's Officer's Certificate (certifying to project documents, incumbency, and other matters)
8. Evidence of project's inclusion in State Transportation Improvement Program (if applicable)
9. Evidence of consistency with other State or metropolitan transportation plans (if applicable)
10. Evidence of all necessary approvals
11. Environmental Record of Decision, Finding of No Significant Impact or Categorical Exclusion
12. Evidence of active registration in SAM
13. Insurance Documents
14. Borrower Non-Debarment Certificate (certifying that the borrower has not been suspended or debarred from participation in any Federal program)
15. Independent Engineer's Report
16. Feasibility Study/Traffic and Revenue Study
17. Working Financial Model (not in .pdf or values format) and Financial Plan
18. Credit rating(s) (if applicable)
19. Opinion of borrower's counsel (addressing legal authority of Borrower, execution of documents, etc.) and of bond counsel (addressing legality and validity of security interests and validity, priority and perfection of lien, if applicable, and due authorization, legality, and binding nature of the credit instrument)
20. For Senior Project Bonds (tax-exempt or taxable bonds):
  - a. Enabling legislation and other documentation of issuer of senior project bonds
  - b. Borrower's resolution
  - c. Trust indenture
  - d. Bond purchase agreement
  - e. Official statement
  - f. Continuing disclosure agreement
  - g. Bond insurance policy or other credit enhancement

## Section 6-4

### Oversight and Monitoring Requirements

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The DOT requires certain ongoing, periodic reporting with respect to project receiving Bureau credit assistance. This periodic review has three purposes: (i) to provide the DOT with an oversight tool for ensuring the borrower's compliance with the provisions of the credit agreement; (ii) to monitor the overall status of the project; and (iii) to assist the DOT and the Office of Management and Budget (OMB) in identifying any changes to the credit risk posed to the Federal Government under individual credit agreements. The credit instrument will specify the scheduled annual and project milestone reporting requirements, as well as any other ad hoc or periodic reporting requirements.

As part of its oversight and monitoring of TIFIA and RRIF projects, the DOT will routinely update its information on credit quality, construction schedules, legal issues, revenue forecasts, financial projections, and project performance. Accordingly, borrowers will be required to covenant in the credit agreement to provide ongoing financial and project information not only during construction, but so long as any Bureau credit instrument is outstanding and/or until any debt obligation to the Federal Government is fully repaid. Documentary evidence that may be requested for each project includes: audited financial statements, updated budget and cash flow projections, audit reports, sources and uses of funds, coverage ratios, project schedules, operating statistics, and management updates (no more than 180 days following the borrower's fiscal year-end). In addition, the credit agreement will obligate the borrower to provide the DOT with an annual update to the project's financial plan in accordance with specified requirements. Financial plans must show full funding for the project and are subject to review and approval by the Bureau. Each borrower will be required to give notice to the DOT of material events, including litigation, which could affect project development or the credit quality of the project.

Borrowers of TIFIA credit assistance are also required to provide annually, at no cost to the Federal Government, ongoing credit evaluations of the project and all project debt, including the TIFIA credit instrument.<sup>245</sup> These surveillance reports must be prepared by a Credit Rating Agency throughout the life of the TIFIA credit instrument.<sup>246</sup> By "current credit evaluation," the DOT means: (i) in the case of a project with a published rating, either a current rating or the borrower's certification stating that the rating and outlook are unchanged from the previous year, and (ii) in the case of a project without a published rating, a current rating of the project obligations and the Federal credit instrument. The DOT will also require periodic updates to the rating rationale to the extent that it is not included as part of the annual rating letter. The borrower must furnish the DOT with any other credit surveillance reports on the TIFIA-assisted project as soon as they are available.

The DOT's oversight and monitoring may also include site visits, periodic status meetings with the borrower, and reviews of independent engineer and/or other relevant reports. The

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<sup>245</sup> 49 C.F.R. §80.11(d).

<sup>246</sup> 49 C.F.R. §80.11(d).

Bureau will coordinate oversight and monitoring activities with the appropriate DOT field offices.

Each credit agreement between the DOT and a borrower will specify the types of ongoing documentation required by the DOT and the frequency of such information requests. The credit agreement will also authorize the DOT to commence increased monitoring and reporting, as may be necessary, to ensure the continued credit quality of the project and minimize the Federal Government's risk. With respect to P3 projects financed by DOT, in the event that issues arise during the concession term, all parties must make a good faith effort to resolve the situation, which may include discussions regarding the feasibility of additional equity infusions, changes to concession terms or any other corrective measure that could stabilize the financial condition of the project.

## **Section 6-5**

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### **Loan Servicing**

The DOT may retain outside assistance to perform loan servicing for Bureau credit instruments, including credit accounting, collections, maintenance of documents, and financial reporting.<sup>247</sup> To offset in part the DOT's costs, a borrower is charged an annual fee for loan servicing activities associated with each credit instrument, which is adjusted periodically based on inflation.<sup>248</sup>

The DOT will provide general payment instructions to the borrower in each credit agreement. Prior to each repayment date, the DOT's loan servicer will notify the borrower of the date and amount due in accordance with the payment schedule in the credit agreement. The loan servicer will also bill each borrower annually for servicing fees, for the DOT's account, in accordance with the provisions in the credit agreement.

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<sup>247</sup> 23 U.S.C. §605(c)(1) and 45 U.S.C. §823(1)(3) and 45 U.S.C. §823(1)(1) and (3).

<sup>248</sup> 23 U.S.C. §605(b)(2) and 45 U.S.C. §823(1)(2).





## **Chapter 7: Special Issues Related to Loan Guarantees**

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By guaranteeing a loan, the DOT promises to pay a guaranteed lender in the event that the borrower defaults on its scheduled payments of the guaranteed loan. By statute, the guaranteed lender must be a non-Federal entity, and for TIFIA loan guarantees, the guaranteed lender must be a “non-Federal qualified institutional buyer” as defined in 17 C.F.R. §230.144A(a), including qualified retirement plans and governmental plans.<sup>249</sup>

The DOT must have confidence that the guaranteed lender has entered into a reasonable loan agreement with the borrower and also is capable of fulfilling its loan servicing responsibilities. To this end, the DOT has established basic eligibility criteria to evaluate and approve guaranteed lenders prior to execution of a loan guarantee agreement. This chapter outlines these eligibility criteria as well as the guaranteed lender’s major responsibilities.

### **Section 7-1**

#### **Guaranteed Lender Eligibility**

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The guaranteed lender and the terms of the guaranteed loan must be approved by the DOT. The DOT will evaluate prospective guaranteed lenders with respect to the criteria set forth below. These criteria are derived from the TIFIA and RRIF statutes and regulations. While some provisions appear solely in one or the other, the DOT will harmonize the requirements among the two Credit Programs with respect to loan guarantees and guaranteed lenders.

- The guaranteed lender must meet the definition of “lender” set forth in the TIFIA statute (23 U.S.C. §601(a)(5)). While the RRIF statute does not mirror the TIFIA statute with respect to the criteria for an eligible guaranteed lender, the DOT will evaluate prospective guaranteed lenders under the RRIF Program using the definition applicable to the TIFIA Program unless a borrower makes a compelling justification for departing from that definition. Any such justification must demonstrate an acceptable level of credit quality for the transaction and level of risk to the DOT.<sup>250</sup> The definition set forth in the TIFIA statute is as follows:

“... any non-Federal qualified institutional buyer (as defined in Section 230.144A(a) of Title 17, Code of Federal Regulations (or any successor regulation), 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:

- (A) A qualified retirement plan (as defined in Section 4974(c) of the Internal Revenue Code of 1986) that is a qualified institutional buyer; and

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<sup>249</sup> 23 U.S.C. §601(a)(5) and 45 U.S.C. §821(7).

<sup>250</sup> See 49 C.F.R. Subpart F, including §260.51(a) and (c) and §260.53(b) for additional information regarding the DOT’s evaluation of loan guarantee requests and potential guaranteed lenders.

(B) A governmental plan (as defined in Section 414(d) of the Internal Revenue Code of 1986) that is a qualified institutional buyer.”<sup>251</sup>

- The guaranteed lender must not be debarred or suspended from participation in any Federal program.<sup>252</sup>
- The guaranteed lender must not be delinquent on any Federal debt or loan.<sup>253</sup>
- The guaranteed lender must be duly organized and legally authorized to enter into the transaction.<sup>254</sup>
- The guaranteed lender must demonstrate experience in originating and servicing loans for large-scale developments.<sup>255</sup>
- The guaranteed lender must demonstrate that it has sufficient capital to originate the loan and disburse for its own portfolio.
- If a guaranteed lender chooses to use a subservicer, the guaranteed lender must demonstrate that the subservicer is capable of handling the servicing responsibilities under the credit agreement. (The guaranteed lender shall remain responsible to the DOT for all servicing responsibilities under the credit agreement.)
- The guaranteed lender must provide certifications as specified in the loan guarantee agreement with the DOT and must maintain lender eligibility conditions.
- The guaranteed lender must provide periodic financial information to the DOT’s loan servicer in accordance with requirements specified in the loan guarantee agreement.<sup>256</sup>

## Section 7-2

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### Guaranteed Lender Responsibilities

The guaranteed lender may perform the following types of activities. The DOT may request documentation demonstrating the guaranteed lender’s capacity to handle such responsibilities.

- Loan and application processing;
- Loan file compilation and retention;
- Loan disbursement;

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<sup>251</sup> 23 U.S.C. §601(a)(5).

<sup>252</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-129, Policies for Federal Credit Programs and Non-Tax Receivables (2013).

<sup>253</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-129, Policies for Federal Credit Programs and Non-Tax Receivables (2013).

<sup>254</sup> See 49 C.F.R. §260.51(c).

<sup>255</sup> *Id.*

<sup>256</sup> See 49 C.F.R. §260.55(d).

- Collection and accounting of all amounts due and received under the terms of the loan, including release of liens for pay-off at maturity and prepayments;
- Maintenance of reserve accounts (if applicable);
- Supervision of construction (if applicable);
- Supervision and quality control of subservicing (if applicable);
- Negotiation and restructuring of loans - loan workouts as approved by the DOT;
- Coordination with senior lender/trustee (if applicable);
- Immediate notifications in the event of payment delinquency and/or default, other defaults under the loan guarantee, potential corrective action plans, potential workout plans, change in borrower status, change in lender status, change in project status, failure of borrower to meet terms of the loan, etc.

See 49 C.F.R. §260.53 for a more detailed list of typical guaranteed lender responsibilities.

## **Section 7-3**

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### **Loan Guarantee Provisions**

#### **Requirements for the Guaranteed Lender**

After the DOT has approved a guaranteed lender and a project has satisfied all conditions for Bureau credit assistance, a loan guarantee agreement or instrument will be negotiated and signed by the borrower, the guaranteed lender, and the DOT. The DOT will monitor the borrower and the guaranteed lender according to the conditions and requirements specified in the loan guarantee agreement. The DOT may periodically perform on-site reviews of the guaranteed lender's business operations or may request audited financial statements or updated certifications from the guaranteed lender indicating that the eligibility requirements are being maintained.

If the guaranteed lender fails to meet its obligations or to maintain the eligibility requirements, the DOT will advise the guaranteed lender of corrective actions that must be performed. If these corrective actions are not performed within the specified timeframe, the DOT may require a transfer of loan servicing to another entity and/or pursue legal remedies.

#### **Interest Rate**

The interest rate on the guaranteed loan is negotiated between the guaranteed lender and the borrower, subject to the DOT's approval.<sup>257</sup>

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<sup>257</sup> 23 U.S.C. §603(e)(2) and 45 U.S.C. §822(e)(2).

## **Payment Process**

Under a loan guarantee, the DOT commits to pay to the guaranteed lender, upon the occurrence of a payment default by the borrower, the full amount of the defaulted payment, as specified in the loan guarantee agreement.

In the event of a payment default, the guaranteed lender will issue a notice of default to the borrower and copy the DOT. If the lender then makes a draw on the guarantee from the DOT, the payment initiates a loan between the DOT and the borrower. So long as the borrower makes its payments to the DOT on this new loan, there is no default of the DOT's loan. The guaranteed lender may enter into a loan workout or similar agreement with the borrower as approved by the DOT. In the event of assignment of the guaranteed loan to the DOT, the guaranteed lender is responsible for transferring all the guaranteed loan documents to the DOT.

## **For Further Information**

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For further information regarding the Bureau's Credit Programs or for comments to this Program Guide, please contact the Bureau at [BureauCredit@dot.gov](mailto:BureauCredit@dot.gov). Additional information regarding Bureau Credit Programs can be obtained from the Bureau's website: <http://www.transportation.gov/buildamerica>.

## Appendix A: Acronyms

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<b>C.F.R.</b>	Code of Federal Regulations
<b>DOT</b>	United States Department of Transportation
<b>DUNS</b>	Data Universal Number System
<b>EIS</b>	Environmental Impact Statement
<b>FAST</b>	Fixing America's Surface Transportation
<b>FEIN</b>	Federal Employer Identification Number
<b>FHWA</b>	Federal Highway Administration
<b>FONSI</b>	Finding of No Significant Impact
<b>FRA</b>	Federal Railroad Administration
<b>FTA</b>	Federal Transit Administration
<b>ITS</b>	Intelligent Transportation System
<b>MAP-21</b>	Moving Ahead for Progress in the 21 <sup>st</sup> Century
<b>MARAD</b>	Maritime Administration
<b>NEPA</b>	National Environmental Policy Act of 1969
<b>OMB</b>	Office of Management and Budget
<b>OST</b>	Office of the Secretary of Transportation
<b>ROD</b>	Record of Decision
<b>RRIF</b>	Railroad Rehabilitation & Improvement Financing
<b>SAFETEA-LU</b>	Safe, Accountable, Flexible, Effective Transportation Equity Act: A Legacy for Users
<b>SAM</b>	System for Awards Management
<b>SIB</b>	State Infrastructure Bank
<b>SLGS</b>	State and Local Government Series
<b>STIP</b>	State Transportation Improvement Program
<b>TEA 21</b>	Transportation Equity Act for the 21 <sup>st</sup> Century
<b>TIFIA</b>	Transportation Infrastructure Finance and Innovation Act of 1998
<b>TOD</b>	Transit-Oriented Development
<b>U.S.C.</b>	United States Code