American Public Transportation Association
Summary of
Federal Transit Administration (FTA) Dear Colleague Letter on the Capital Investment Grants (CIG) Program

July 9, 2018

On June 29, 2018, Federal Transit Administration (FTA) Acting Administrator K. Jane Williams sent a Dear Colleague letter to public transit agencies highlighting the Trump Administration's policies regarding the Capital Investment Grants (CIG) program. FTA also made changes to the CIG Risk Assessment process (which were posted to the FTA website). The Administration's Dear Colleague letter and CIG Risk Assessment process include four primary issues of note:

- emphasizing the discretionary nature of FTA's decision-making regarding CIG projects;
- establishing geographic diversity as a factor in FTA funding allocation decisions;
- considering U.S. Department of Transportation (DOT) loans "*in the context of*" all federal funding sources requested by the project sponsor, and not separate from the Federal funding sources; and
- changing the CIG Risk Assessment process.

FTA has stated that these changes reflect the Administration's current policy and are in effect. Separately, as required by law, FTA intends to publish revised CIG Policy Guidance later this year for notice and comment.

CIG Program Background

There are three categories of eligible projects under the CIG program: New Starts, Core Capacity, and Small Starts. New Starts and Core Capacity projects are required by law to go through a three-phase process—Project Development, Engineering, and Construction. Small Starts projects are required by law to go through a two-phase process—Project Development and Construction.

There are currently eight New Starts projects and two Core Capacity projects which have Full Funding Grant Agreements (FFGAs) and are seeking funding in fiscal year (FY) 2019 and subsequent years. In the President's Budget request for FY 2019, the Administration proposes to limit funding for the CIG Program only to projects with existing FFGAs. The Administration does not propose funding for any new New Starts, Core Capacity, or Small Starts projects. It argues that future new transit projects "would be funded by the localities that use and benefit from these localized projects." The Administration made this same request in its FY 2018 Budget request. However, Congress rejected that proposal and provided $2.6 billion for the CIG Program.

Under the Trump Administration, FTA has signed two FFGAs for projects that were originally proposed by the Obama Administration. The Trump Administration has not proposed any new New Starts or Core Capacity projects for funding. The Administration has signed eight Small Starts Grant Agreements (SSGAs).

FTA's Discretionary Decision-making Regarding CIG Projects

In its June 29, 2018 letter, FTA repeatedly notes the discretionary nature of the CIG program.

However, although FTA has discretionary decision-making authority regarding which CIG projects receive New Starts or Core Capacity FFGAs or Small Starts SSGAs, it is important to note that the CIG program is somewhat unique as compared to other competitive grant programs.

Under most competitive grant programs, DOT agencies receive funding for a program and announce a competitive solicitation, applicants apply by a specific deadline, and then the agencies select projects for funding among the eligible applicants. The CIG program is different. Public transit agencies proposing CIG projects must complete a rigorous, multi-year, multi-step process, which includes meeting a host of criteria and securing necessary project ratings, before being eligible to receive funding through a multi-year FFGA or one-year SSGA. Funding recommendations are based on the needs of projects with existing grant agreements and those that may qualify for and request a grant agreement in upcoming fiscal years. Congress appropriates funding for the program and dictates how much should go to each project or group of projects. Historically, Congress generally follows the specific funding recommendations provided by FTA. However, because the Administration has not proposed any new projects for FFGAs and Congress has appropriated significantly more funding than requested by the Administration, there is currently less congressional guidance on how CIG funds should be allocated among projects.

Geographic Diversity

In its letter, FTA establishes geographic diversity as a factor in FTA funding allocation decisions.

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

Federal Loans as a Federal Funding Source

In its letter, FTA states that it "considers U.S. Department of Transportation loans *in the context of* all Federal funding sources requested by the project sponsor when completing the CIG evaluation process, *and not separate from the Federal funding sources*." (emphasis added).

Some CIG projects include Transportation Infrastructure Finance and Innovation Act (TIFIA) or Railroad Rehabilitation and Improvement Financing (RRIF) loans or Private Activity Bonds (PABs) as part of their overall project financing package. They use the loans as part of their local financial commitment and repay the loans using non-federal funding sources. Current law (23 U.S.C. § 603(b)(8)) specifically provides that TIFIA loans may be used for any non-federal share of transit project costs if the loan is repayable from non-federal funds. Given this statutory requirement, it is unclear how FTA will implement its federal loan policy. It appears to be distinguishing calculating the federal and non-federal shares from its evaluation of the project's local financial commitment.

CHANGES TO RISK ASSESSMENT PROCESS

In addition to sending the Dear Colleague letter, FTA also announced two changes to the CIG Risk Assessment process.

Timing of FTA Risk Assessment

First, FTA will conduct a risk assessment of New Starts and Core Capacity projects prior to entry into the Engineering phase (i.e., during Project Development) of its CIG program. Previously, risk assessments were generally conducted during the Engineering phase of CIG projects. In addition, FTA may perform updates to the risk assessment and scope, cost, and schedule reviews of the project prior to awarding an FFGA. For Small Starts projects, scope, cost, and schedule reviews and a risk assessment will continue to be conducted during the Project Development phase. FTA has stated that it believes this change could have the positive effect of allowing projects to identify and address issues earlier in the process and better estimate the final costs and therefore make sure that the CIG contribution that gets locked in as a project moves from Project Development into Engineering is sufficient.

It is important to note that current law (e.g., 49 U.S.C. § 5309(d)(1)(C)) limits the Project Development phase of a CIG project to a two-year period (although FTA may extend the time-period). Conversely, the Engineering phase is not time-limited (although projects must show that they are making progress three years after entering Engineering). There is a concern that the change to require the risk assessment during the Project Development phase provides an additional hurdle to completing Project Development within the two-year time period. For instance, under Project Development, the project sponsor is already required to select a locally preferred alternative (LPA); have the LPA included in the fiscally constrained metropolitan transportation plan; and complete the environmental review process required under the National Environmental Policy Act (NEPA). Requiring the risk assessment during Project Development may also identify issues that FTA will require to be addressed during Project Development even though they could be addressed at a later point in the process. Finally, according to FTA, in its review of completed projects with risk assessments (likely conducted during Engineering), 89 percent of these projects are within budget and 79 percent are completed within schedule. Given the high percentage of on-time, on-budget CIG projects it is unclear what problem FTA is addressing with this change.

Increase to Probability Threshold of CIG Project Budget and Schedule

Second, when determining the reasonableness of a project sponsor's cost and schedule, FTA reviews the estimates to determine whether they include reasonable assumptions or adjustments need to be made. FTA then examines risks related to the project to determine the appropriate level of contingency needed. FTA is increasing its probability threshold from 50 percent to 65 percent in determining the reasonableness of the cost and schedule estimates. There is a concern that increasing the probability threshold percentage will require more contingency funds, increasing the costs for project sponsors. Again, given the high percentage of on-time, on-budget CIG projects it is unclear what problem FTA is addressing with this change.