



Committee on Transportation and Infrastructure
U.S. House of Representatives

Bill Shuster
Chairman

Washington, DC 20515

Peter A. DeFazio
Ranking Member

Christopher W. Vieson, Staff Director

July 17, 2018

Katherine W. Dedrick, Democratic Staff Director

The Honorable Elaine L. Chao
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Secretary Chao:

We are writing to express concern about a recent “Dear Colleague” letter sent by the Federal Transit Administration (FTA) to transit agencies that outlines new layers of bureaucracy that appear designed to add unnecessary delays, increase project costs, and add considerable uncertainty to the Capital Investment Grant (CIG) program. When you testified before the Committee on Transportation and Infrastructure on March 6, 2018, you spoke of an intent to “streamline permitting to speed up project delivery and reduce unnecessary and overly burdensome regulations.” Given this testimony, we are confused as to why the Department of Transportation (DOT) appears to be intent on creating new regulatory burdens designed to thwart transit infrastructure investment, in overt disregard of clear Congressional intent.

The “Dear Colleague” letter mischaracterizes the discretionary nature of the CIG program. As you know, the CIG program’s statutory language is not like a typical discretionary grant program like INFRA, bus, or ferry discretionary grants. It is a pipeline program where eligible projects that meet the statutory criteria under section 5309 are funded subject only to continued appropriations. The FTA does not get to pick which projects that meet section 5309 criteria are deserving of CIG funding.

The FTA letter also attempts to further disadvantage transit projects by proposing to treat TIFIA loans differently based on the mode of transportation. The FTA appears to suggest two different definitions of non-Federal share under TIFIA loans that will be used in projects also seeking an FFGA. The letter implies FTA will count TIFIA loans repaid with local funds as non-Federal shares when determining the 20 percent non-Federal match criteria. However, FTA will consider the same loan as part of the Federal share of a project when calculating the extent to which the project’s local financial commitment exceeds the minimum cost share. This directly conflicts with section 603(b)(8) of title 23, United States Code, which clearly establishes TIFIA as a non-Federal share of project costs if the loan is to be repaid with non-Federal funds.

We note that DOT’s INFRA grant notice also gives preference to freight projects that exceed the minimum non-Federal cost share requirement. However, the notice explicitly permits

TIFIA loans to count as non-Federal share for the purpose of determining how much a project's non-Federal share exceeds the minimum cost share requirement. We can only conclude that DOT is ignoring the TIFIA statute to apply greater regulatory burdens to transit projects.

FTA's letter also attempts to add a new criterion to the CIG program, referred to as geographic diversity. We are concerned that FTA is adding another layer of bureaucracy to discourage multiple transit projects from entering the pipeline from within the same growing urban area or state. Demographic shifts mean some urban areas and states are in greater need of expanded transit. Because the program is set up as a pipeline, projects are not really competing against each other; therefore, such a limitation is unnecessary. Limiting multiple projects in high-congestion areas is nonsensical and is directly contrary to the intent of Congress.

Finally, we are concerned about the recent changes to the risk assessment for each CIG project. FTA has used recent project cost increases to justify a higher probability threshold for project costs and schedules. The higher threshold means that project sponsors will need a larger contingency fund, guaranteeing higher project cost estimates with the burden falling on local funding sources. Yet the problem FTA purports to solve is not a transit problem. The DOT's highway construction cost index shows the economy is currently driving up costs for highway projects too, but we do not see any evidence of this administration telling state departments of transportation to modify their project cost estimates. We also do not see contingency funding demands on local governments for highways. Again, FTA appears to be gumming up the bureaucratic process to slow down transit projects.

It is not just the FTA letter we are concerned about, but also the administration's refusal to move forward with new transit projects despite available funding and clear direction from Congress. The FAST Act reauthorized the CIG program through 2020, passing both Houses with a strong bipartisan majority. The law requires FTA to implement the CIG program, enabling eligible recipients to apply for federal funds to expand transit capacity. Subsections (d) and (e) of section 5309 provide a process to move New Start and Core Capacity projects through a pipeline using criteria found in section 5309(g). Upon meeting those criteria, subsection 5309(k)(2)(B) states the Secretary **shall** enter into a Full Funding Grant Agreement (FFGA) for projects that have been rated high, medium-high, or medium.

The FAST Act authorized \$2.3 billion for the CIG program in FY 2018. However, the President's budget proposal for FY 2018 requested only \$1.2 billion for transit projects with existing FFGAs. We can only assume that the intent of this request was to eliminate the CIG program, by refusing to issue new CIG grants. As further evidence of the Department's intent with respect to this program, in early 2017 the administration officially began deferring decisions on whether to execute FFGAs. We remind you that the President's budget proposal is merely a request to Congress and provides the administration no legal authority to disregard current law.

Among CIG projects currently in the pipeline, there are seven projects in the engineering phase of the CIG process. One of those has met all the requirements of section 5309, and most of these projects are likely to meet these requirements later this year or in 2019. Twelve more projects are in the project development phase. Communities across the Nation continue to seek these funds by entering the backlogged pipeline, thus demonstrating the need for congestion relief through public transportation options.

The FY 2018 Consolidated Appropriations Act clearly rejected the administration's budget request to eliminate the CIG program. The Act provided \$2.6 billion for the program, well above the FAST Act authorized level of \$2.3 billion. The Act also directed DOT to obligate \$2.25 billion by December 31, 2019, thus requiring the Department to spend CIG money in a timely manner and triggering the enforcement provisions of the Impoundment Control Act. Finally, the Act directed that \$1.5 billion be obligated on New Starts projects and that \$715 million be obligated on Core Capacity projects, which will require the execution of new FFGAs because projects with existing FFGAs will only utilize \$1.1 billion and \$200 million respectively. The remaining \$400 million for New Starts and \$515 million for Core Capacity projects in FY 2018 funds should be used on new projects ready for final approval in the project pipeline. Despite this statutory language, DOT continues to delay and avoid executing new FFGAs. This is unacceptable.

We strongly support language included in the FY 2019 committee-approved THUD bills in both the House and Senate, which mirror our frustration with your recalcitrance. The House Appropriations Committee-passed FY 2019 Transportation, Housing and Urban Development Appropriations bill (THUD) again provides \$2.6 billion for the CIG program, with \$2.2 billion to be obligated by the end of 2020. Of this amount, the bill carves out \$500 million for New Start projects that do not have a signed FFGA and \$550 million for core capacity projects that do not have a signed FFGA.

The report accompanying the Senate FY 2019 THUD bill provides important instructions to DOT to continue to advance CIG projects through the pipeline as they meet the requirements for funding. The Senate report highlights "**unnecessary delays** for projects seeking advancement into engineering or a grant agreement. These **delays are costly** for local project sponsors and **create uncertainty** for transit planners and providers across the country" (emphasis added). Furthermore, the report "directs the Secretary to continue to advance eligible projects into project development and engineering in the capital investment grant evaluation, rating, **and approval process** pursuant to 49 U.S.C. 5309 and section 3005(b) of the FAST Act **in all cases when projects meet the statutory criteria**" (emphasis added).

The administration's attempts to eliminate the CIG program have been rejected by Congress, and we expect you to carry out the clear intent of the law by executing FFGAs for any project that has met the requirements of section 5309.

It is time for FTA to approve New Starts and Core Capacity projects that meet the criteria established in section 5309 and to cease efforts to undermine the CIG program with extraneous bureaucratic burdens that you reject for other modes of transportation. Thank you for your attention to this important matter.

Sincerely,



PETER DeFAZIO
Ranking Member



ELEANOR HOLMES NORTON
Ranking Member
Highways and Transit Subcommittee