For State Regulatory Agencies

108. What current laws or regulations does your State have regarding the disposal of dispensed controlled substances and noncontrolled substances by ultimate users?

109. What laws or regulations, if any, is your State considering regarding the disposal of dispensed controlled or noncontrolled substances by ultimate users?

110. Does your State agency participate in any initiatives (e.g., take-back or mail-back programs) regarding the disposal of dispensed controlled and noncontrolled substances by ultimate users at this time? If so, please describe.

111. Is your State agency aware of any cases of diversion regarding take-back programs? If so, did the diversion result in the arrest or prosecution of any individuals?

112. If your State agency does not participate in any initiatives regarding the disposal of dispensed controlled or noncontrolled substances by ultimate users, why not?

113. If your State agency participates in any initiatives regarding the disposal of dispensed controlled and noncontrolled substances by ultimate users, what would you estimate to be the percentage, quantity, or other measurable unit of controlled substances as compared to noncontrolled substances received?

114. If your State agency participates in any initiatives regarding the disposal of dispensed controlled and noncontrolled substances by ultimate users, does your agency fund all or part of the initiative? If other funding is received, who provides the other funding?

115. If your State agency participates in any initiatives regarding the disposal of dispensed controlled and noncontrolled substances by ultimate users, what successes have you seen regarding these initiatives?

116. If your State agency participates in any initiatives regarding the disposal of dispensed controlled and noncontrolled substances by ultimate users, what challenges or difficulties have you encountered?

For All Interested Parties

117. DEA also seeks comment from all interested parties regarding the funding of the disposal of unwanted or outdated controlled substances held by DEA nonregistrants.

Regulatory Certifications

This action is an Advance Notice of Proposed Rulemaking (ANPRM). Accordingly, the requirement of Executive Order 12866 to assess the costs and benefits of this action does not apply. Rather, among the purposes DEA has in publishing this ANPRM is to seek information from the public on the costs, benefits, and other impacts pertaining to the disposal of controlled substances dispensed to ultimate users and long term care facilities. Similarly, the requirements of section 603 of the Regulatory Flexibility Act do not apply to this action since, at this stage, it is an ANPRM and not a ''rule'' as defined in section 601 of the Regulatory Flexibility Act. Following review of the comments received to this ANPRM, if DEA promulgates a Notice or Notices of Proposed Rulemaking regarding this issue, DEA will conduct all analyses required by the Regulatory Flexibility Act, Executive Order 12866, and any other statutes or Executive Orders relevant to those rules and in effect at the time of promulgation.

Dated: January 13, 2009.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. E9–1056 Filed 1–16–09; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 180

Office of the Secretary

49 CFR Part 80

Federal Railroad Administration

49 CFR Part 261

Federal Transit Administration

49 CFR Part 640

Maritime Administration

49 CFR Part 1700

[Docket No. DOT–OST–2009–0004]

RIN 2105–AD70

Credit Assistance for Surface Transportation Projects

AGENCIES: Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), Maritime Administration (MARAD), Office of the Secretary of Transportation (OST), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: Recent changes to the Transportation Infrastructure Finance and Innovation Act (TIFIA) statute require changes in the TIFIA rule. In addition, the DOT has gained substantial administrative experience since the TIFIA rule was last amended in 2000. The DOT proposes to amend the TIFIA rule to implement the recent statutory changes and to incorporate certain other changes to the rule that it considers will improve the efficiency of the program and its usefulness to borrowers. In addition, the DOT seeks comment on policy issues with potentially significant impact on the TIFIA project selection process.

DATES: Comments must be received on or before March 23, 2009.

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or submit comments electronically at *http://www.regulations.gov,* or fax comments to (202) 493–2251. Alternatively, comments may be submitted via the Federal eRulemaking Portal at *http://www.regulations.gov* (follow the on-line instructions for submitting comments). All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. All comments received into any docket may be searched in electronic format by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Persons making comments may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477–78), or you may view the statement at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Mark Sullivan, TIFIA Joint Program Office (202) 366–5785, or Mr. Steven Rochlis, Office of the Chief Counsel (202) 366–1395, Federal Highway Administration; Mr. Michael Bouril, Office of Budget (202) 366–4587, Mr. Jacob Falk, Office of Policy (202) 366–

8165, or Mr. Terence Carlson, Office of the General Counsel (202) 366–9152, Office of the Secretary, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may submit or retrieve comments online through the Federal eRulemaking portal at: *http://www.regulations.gov*. The Web site is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from Office of the Federal Register's home page at: *http://www.archives.gov/federal_register* and the Government Printing Office's Web page at: *http://www.gpoaccess.gov*.

Background

TIFIA was enacted in 1998 as part of the Transportation Equity Act for the 21st Century (TEA–21) (Pub. L. 105–178, June 1998). TIFIA established a new Federal credit program under which the DOT may provide credit assistance to surface transportation investments of regional or national significance. To be selected for TIFIA assistance, projects must meet a number of statutorily specified criteria. As funding for this program is limited, projects obtaining assistance under the TIFIA program may be selected on a competitive basis. In 1999, the DOT promulgated a rule implementing TIFIA (64 FR 29742, June 2, 1999), and in 2000 amended the rule (65 FR 44936, July 19, 2000). In 2005, Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, Aug. 10, 2005), which made a number of amendments to TIFIA. The DOT proposes to amend the TIFIA rule to implement the changes required by the SAFETEA–LU amendments and to incorporate a number of programmatic features that the DOT considers, based on its experience gained administering the program since the rule was last amended, would improve TIFIA.

In enacting the original TIFIA legislation, Congress found that ''a well-developed system of transportation infrastructure is critical'' to the nation's economy, and it sought to ''attract new investment capital'' to transportation infrastructure projects. Congress further found that TIFIA could fill ''market gaps,'' thereby leveraging additional capital from the private markets: ''a Federal credit program for projects of national significance can complement existing funding resources by filling market gaps, thereby leveraging substantial private co-investment.'' Based on this initial guidance from Congress, the DOT has viewed TIFIA as a means for the Federal Government to attract more private investment capital, to accelerate investment, to encourage a greater cost-beneficial approach to transportation infrastructure investments, and to more efficiently utilize infrastructure once constructed.

This NPRM proposes to amend and partially restate the existing rule; it includes both proposed substantive changes and proposed changes of an editorial, clarifying, or organizational nature. Proposed substantive changes include both those mandated by SAFETEA–LU and those determined by the DOT, based upon several years of administrative experience with the TIFIA program, to improve the program. The DOT seeks comments particularly on proposed changes in the latter category.

The proposed rule would amend the current TIFIA rule to incorporate changes made by SAFETEA–LU to the TIFIA statute. Major changes of this nature include a reduction in the minimum project size eligible for TIFIA assistance and a broadening of the categories of projects eligible to permit TIFIA assistance for private rail facilities providing public benefit to highway users, and surface transportation infrastructure modifications necessary to facilitate direct intermodal transfer and access into and out of a port terminal. Further changes to conform the rule to the statute would limit the amount of TIFIA assistance in certain instances to the amount of the senior project obligations, conform the interest rate setting mechanism for the line of credit to that for secured loans, and eliminate the annual 20 percent cap on line of credit draws.

In the nature of non-statutory administrative improvements, we propose changing the way the DOT will use the term sheet in TIFIA transactions and in how we will apply the TIFIA statute's eight selection criteria. For example, with regard to the selection criteria, the DOT proposes to change ''creditworthiness'' to pass/fail and then reallocate weights for the other seven statutory criteria.

In addition, we propose to reorganize the existing rule to make it more understandable to users. The reorganized rule would generally follow the steps a potential TIFIA user might follow in evaluating the program and applying for assistance.

While the request for comments applies to the entire NPRM, the DOT seeks specific feedback on several key issues noted below.

In order to accommodate emerging financing scenarios using TIFIA's refinancing authority, DOT is seeking comments on the proposed definitions of ''refinance,'' the ''maturity date'' (both defined in section 80.3) associated with a refinancing, and DOT's proposed refinancing procedures (section 80.23), which would require the participation of a guaranteed lender receiving a TIFIA loan guarantee.

To facilitate the financing of projects that may result in significant lease payments or concession fees to a public entity, the proposed rule would clarify that such payments can be considered eligible project costs for the purpose of establishing the maximum amount of TIFIA credit assistance. Several provisons would apply: (1) Such payments must represent a fair market value of the asset acquired, (2) the proceeds of such payments must be dedicated to transportation projects eligible under title 23 or chapter 53 of title 49, United States Code, and (3) such payments must be part of a project in which new capital costs constitute a significant portion of project costs. In other words, the concession fee cannot comprise the only eligible project cost, as in a transaction seeking only to monetize an existing asset. To implement this policy, the DOT proposes to limit its consideration of such payments to no more than 25 percent of total eligible project costs.

To improve its internal credit analysis and capital allocation process, the proposed rule would require (see section 80.11) each applicant and borrower to provide a preliminary rating opinion letter and final investment-grade rating from at least two rating agencies.

Finally, the DOT seeks comment on two additional policy issues with potentially significant impact on the TIFIA project selection process. These two issues are described immediately below.

Use of Benefit-Cost Analysis in Selecting Projects for TIFIA Assistance

In the years since TIFIA was enacted, borrowers have made use of the legislation's inherent flexibility to accelerate creditworthy, public-private projects of regional or national significance. The DOT believes that TIFIA should be targeted to projects where the present value of benefits to the public that result from project completion exceed the costs of delivering the project, and that TIFIA be targeted to advance user-financed projects instead of projects that rely solely or predominantly on grant assistance. Supporting large-scale projects that eliminate or reduce reliance on Federal grant assistance allows the States to target grant assistance on projects that cannot otherwise be financed.

The National Surface Transportation Policy and Revenue Study Commission (*Transportation for Tomorrow,* 2008), the Government Accountability Office (GAO–04–744, 2004; GAO–05–172, 2005; GAO–08–744T, 2008), the U.S. Department of Transportation (*Refocus. Reform. Renew. A New Transportation Approach in America*, 2008), the Brookings Institution (*A Bridge to Somewhere*, 2008) and other organizations have recommended greater use of benefit-cost analysis (BCA) to maximize the rate of return on Federal funds invested in transportation projects. These recommendations are primarily directed at State and municipal project selection, where application of BCA is currently limited. The Federal Transit Administration and the Federal Aviation Administration already require the use of BCA or similar economic analysis for projects with large capital costs that are subject to Federal funding discretion.

Benefit-cost analysis is conducted by assigning monetary values to benefits (*e.g.*, travel time saving) and costs, discounting future benefits and costs using an appropriate discount rate, and then comparing the sum total of discounted benefits to the sum total of discounted costs. Discounting benefits and costs transforms gains and losses occurring in different time periods to a common unit of measurement in the form of present day dollars. The organizations cited above recognize that BCA is a useful tool to help decision-makers identify projects with the greatest net benefits relative to invested public resources. In particular, the systematic process of BCA helps decision-makers organize information about, and determine trade-offs between, alternative transportation investments.

The DOT has responsibility under Executive Order 12893, *Principles for Federal Infrastructure Investments*, 59 FR 4233, to evaluate its programs using BCA. This requirement has not been construed to apply to individual investments made by States of formula funds, but is deemed to apply to overall programs and to discretionary Federal commitments of budget authority to individual projects. The DOT is considering a requirement that TIFIA applicants conduct BCA on their projects. These analyses would inform Federal decisions to provide TIFIA support to individual projects and would also enable the DOT to establish the cost-beneficial status of the overall TIFIA program, thereby providing a basis for future funding requests. The application of BCA to support TIFIA decisions would be subject to guidance in the Office of Management and Budget's Circular A–94, Revised, SUBJECT: *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs* [1], and would follow other guidelines incorporated into the TIFIA application process.

○ The DOT therefore requests comment on the following options for applying BCA to TIFIA applications:

○ Require BCA as a threshold condition for TIFIA consideration. Under this option, projects must have public benefits that exceed their costs by a sufficient threshold level. The DOT seeks comment on the application of a threshold in general as well as the appropriate minimum sufficient ratio of benefits divided by costs that projects should be expected to demonstrate; or

○ Use BCA results to help prioritize projects for TIFIA selection by translating the existing TIFIA selection criteria into monetary values for purposes of project comparison, while eliminating criteria weights. For instance, BCA results could be used to assess the costs and benefits related to the project's ''regional or national significance'', proposed in this rule as the highest weighted criteria. Comments are also requested on how this approach might best be applied to other criteria that do not readily lend themselves to such monetization.

Interest Rate Policy

OMB Circular A–129, *Policies for Federal Credit Programs and Non-tax Receivables* [2], states that Federal agencies with credit programs should establish interest and fee structures for direct loans and loan guarantees and should review these structures at least annually. In administering the TIFIA program, the DOT has set the rate, in all transactions to date, regardless of the perceived credit quality of the loan, at the minimum level allowed by the TIFIA statute: The rate on United States Treasury securities of a similar maturity as the loan.

OMB Circular A–129 states that interest and fees should be set at levels that minimize default and other subsidy costs of the direct loan or loan guarantee, while supporting achievement of the program's policy objectives. The OMB guidance goes on to state that, unless inconsistent with program purposes, riskier borrowers should be charged more than those who pose less risk.

The DOT seeks comment regarding the use of its authority to offer different rates to different borrowers. For instance, the DOT could use the selection criteria, including benefit cost analysis, to weight applications by the social return to the public, consistent with Federal credit policies and TIFIA programmatic goals. Those projects with higher scores would receive the lower interest rates. Credit risk should also be factored into final interest rate determinations. Alternatively, some form of competitive loan pricing such as a reverse auction could be used to allocate TIFIA's subsidized credit assistance in a manner that maximizes social returns while protecting the government's interests.

Section-by-Section Discussion of the Proposed Changes

Section 80.1 Purpose

The purpose of the proposed rule is to implement the TIFIA statute. Readers should refer to the statute as well as the rule for a complete understanding of the TIFIA program.

Section 80.3 Definitions

Definitions in the proposed rule generally follow the statutory definitions. Two exceptions are the proposed definitions for ''guaranteed lender,'' which would replace the statutory ''lender,'' and ''borrower,'' which would replace the statutory ''obligor''; the DOT believes both of these proposed changes would enhance the rule's clarity and more closely conform the regulatory language to industry convention.

Other proposed changes to the definitions in the current rule and matters on which the DOT seeks comment include:

''*Borrower*'': For the definition of the newly defined term ''borrower,'' we propose to use the current rule's definition of ''obligor,'' which definition closely follows the language in the TIFIA statute's definition of ''obligor.'' Additionally, we clarify that only non-Federal entities are eligible borrowers.

''*Conditional term sheet*'': We propose to eliminate this definition in light of our proposed change in the use of the defined term ''term sheet,'' which proposed change is discussed in detail below in this section under the heading ''Term sheet.''

[1] *http;//www.whitehouse.gov/omb/circulars/a094/a094.html.*

[2] *http://www.whitehouse.gov/omb/circulars/a129/a129rev.html.*

''*Current credit evaluation*'': We propose to add a definition of current credit evaluation and provide clarification related to project monitoring requirements.

''*Eligible project costs*'': We propose to add to the definition of ''eligible project costs'' explicit language implementing current Federal law excluding from eligibility certain project costs incurred prior to environmental clearance. (See 23 CFR 771.113). The proposed definition clarifies the eligibility of costs during construction associated with the operations of a special purpose entity formed solely to construct and operate the facility, in an amount not to exceed 5 percent of total eligible project costs (see 80.25, Limitations of Federal credit assistance). The proposed definition clarifies the eligibility of concession payments made to a government agency by a non-governmental concessionaire for the lease acquisition and right to operate a transportation facility, provided that the concessionaire and the State ensure that payments associated with lease acquisition represent fair market value and are dedicated to transportation projects eligible under title 23 or chapter 53 of title 49, United States Code (see 80.25, Limitations on Federal credit assistance). In addition, lease acquisition payments must be part of a project in which new capital costs constitute a significant portion of project costs. In other words, the concession payment, in and of itself, does not comprise an eligible project cost. In order to implement this policy, the DOT proposes to limit such payments to 25 percent of total eligible project costs and seeks public comment on this proposal. Further, the definition is expanded to include specifically the costs associated with refinancing long-term project obligations under 23 U.S.C. 603(a)(1)(C). In the case of a refinancing, eligible project costs must be consistent with eligible project costs for any TIFIA project. In the case of a refinancing, existing debt would be considered an eligible project cost. Eligible project costs must also be consistent with the Federal cost principles applicable to the borrower: 2 CFR Part 225 (OMB Circular A–87 (State and local governments)), 2 CFR Part 230 (OMB Circular A–122 (non-profit organizations)), or 48 CFR Part 31 (commercial organizations). Lobbying costs would continue to be excluded under existing law. (See 31 U.S.C. 1352, 2 CFR Part 225, App. B, 2 CFR Part 230, App. B, 48 CFR 31.205–22, and 49 CFR 20.100.)

''*Guaranteed lender*'': The proposed definition is identical to the current rule's, and to the TIFIA statute's, definition of ''lender.'' Applicants should note that the limitations the TIFIA statute imposes on the types of institutions which may qualify to be a ''guaranteed lender'' do not affect or limit who may hold project obligations.

''*Investment-grade rating*'': The proposed definition recognizes that some projects receiving TIFIA assistance, particularly those with private developers using bank financing rather than capital markets debt, may not have a public rating, and it makes clear that, although the investment-grade rating requirement still is imposed, the actual rating would not need to be published. The proposed definition also recognizes rating terminology used by rating agencies that have become identified by the Securities and Exchange Commission (SEC) as Nationally Recognized Statistical Rating Organizations (NRSROs) since the TIFIA rule was last published. The SEC engaged in a rulemaking, pursuant to the Credit Rating Agency Reform Act of 2006,[3] which modified the regulatory treatment of NRSROs.[4] The TIFIA statute relies on the SEC's determination of qualifications for NRSROs, irrespective of the regulatory regime the SEC uses for making such determination.

''*Local servicer*'': The DOT services the TIFIA loan portfolio centrally and does not expect ever to use local servicers for TIFIA loans. In response, Congress eliminated the definition of ''local servicer'' from the TIFIA statute and further expressed its intent that TIFIA loan servicing should be managed by a single entity [5]; therefore, we propose to eliminate the definition of local servicer from the rule.

''*Maturity date*'': The proposed definition recognizes that tying scheduled loan repayments to the date of substantial completion is not appropriate for credit assistance used to refinance long-term project obligations under 23 U.S.C. 603(a)(1)(C). Therefore, the proposed definition establishes the final maturity date for repayment of credit assistance used for refinancing purposes as the lesser of not later than 35 years after the date the credit agreement is executed, or the useful life of the overall asset.

[3] Public Law 109–291 (Sept. 29, 2006).

[4] The Credit Rating Agency Reform Act of 2006 mandated that firms desiring to be NRSROs register with the SEC and become subject to certain record-keeping and financial reporting requirements. The SEC's Final Rule implementing the Credit Agency Reform Act of 2006 is found at 72 FR 33564 (June 8, 2007). See 17 CFR 240.17g–1 through 240.17g–6.

[5] House of Representatives Report 109–203 (2005), p. 874.

''*Project*'': The proposed rule would expand the current rule's definition to reflect the expanded definition contained in 23 U.S.C. 601(a)(8). In accordance with the SAFETEA-LU amendments, the proposed rule would permit TIFIA assistance for private freight-related rail facilities that serve a public benefit for highway users, which the proposed rule defines as the direct freight interchange between highway and rail carriers. In further accordance with the SAFETEA-LU amendments, the proposed rule would make eligible a group of such freight-related projects (*e.g.*, bridge clearances throughout a rail corridor, traffic projects to improve port access) each of which separately might not be large enough to meet the threshold requirements, and surface transportation infrastructure improvements (*e.g.*, road, rail, gate, equipment) necessary to facilitate direct intermodal transfer and access into and out of a port terminal.

''*Project obligation*'': We propose to interpret the statutory definition contained in 23 U.S.C. 601(a)(9) to include a ''loan'' to make clear that a bank loan or other private debt, and not just capital markets debt, can be a ''project obligation'' for purposes of the TIFIA program. With private entities now more frequently seeking TIFIA assistance, the DOT is sometimes presented with plans of finance relying on bank debt rather than capital markets debt for some or all of the non-TIFIA portion of the financing. Adding ''loan'' to the definition would make clear that in such financings bank debt would be treated as a project obligation. This is not intended to add any new forms of debt not currently available; rather it is intended to reflect TIFIA's participation in bank financings.

''*Project sponsor*'': The DOT believes that this definition no longer adequately characterizes those seeking or using TIFIA credit assistance. Generally, such an entity can be characterized as either an applicant or a borrower. If a public agency submits an application on behalf of multiple competing concessionaires, it can be characterized as an applicant. Therefore, we propose to eliminate this definition from the regulation.

''*Rating agency*'': The proposed definition diverges from the statute only in its substitution of the word ''organization'' for the words ''rating agency'' in order to eliminate the statutory language's circularity.

''*Refinance*'': The TIFIA statute at 23 U.S.C. 603(a)(1)(c) uses ''refinance'' without defining the term; the DOT proffers a defined term. The proposed definition permits Borrowers to pay off existing project obligations and any

TIFIA credit assistance owed by the Borrower with funds acquired by the same Borrower (or its successor) through the creation of new project obligations and TIFIA credit assistance.

''*Subsidy cost*'': The DOT proposes to change the defined term from ''subsidy amount'' to ''subsidy cost'' to reflect Federal credit terminology.

''*Substantial completion*'': At 23 U.S.C. 601(a)(14), the TIFIA statute defines this term to be ''the opening of a project.'' The DOT believes that the statute's bare simplicity does not, in practice, always provide clear guidance, and that the Secretary has discretion to define, for a particular project, the circumstances constituting ''substantial completion.'' The current rule recognizes that discretion. Since publication of the current rule, the DOT has often, in individual TIFIA credit agreements, found it useful for both the DOT and the borrower to state explicitly in the credit agreement the precise circumstances the occurrence of which would constitute ''substantial completion.'' The proposed definition would continue to incorporate, with clarifying language changes, this beneficial use of Secretarial discretion.

''*Term sheet*'': The proposed change in the definition of ''term sheet'' reflects a significant change in the procedure the DOT would use for entering into TIFIA agreements with borrowers. The term sheet would no longer be executed by both parties, but only by the DOT, and it would no longer serve as the instrument that the DOT uses to obligate Federal funds. The term sheet provides a transactional blueprint between the DOT and the borrower for the purposes of developing the credit agreement. The term sheet is subject to cancellation at any time for any reason at the discretion of the Secretary. Through this proposed administrative change, the DOT would create a single point—the execution of a credit agreement—when funds would be obligated.

Section 80.5 Federal Requirements

The current rule enumerates several specific Federal requirements set out in the TIFIA statute to which TIFIA funds are subject and adds to that list such other ''requirements as applicable.'' While carrying forward the statutorily specified requirements, the proposed rule would clarify the latter provision by providing that any such additional requirements would be imposed by Secretarial determination of applicability to a particular project. Each project would adhere to the requirements associated with the relevant DOT administration's grant program. For example, under the Federal-aid highway program, most construction-related requirements apply only to those highway segments constructed with Federal assistance. A segment constructed without Federal assistance is not subject to these construction requirements. Because many TIFIA projects combine Federal grant and TIFIA assistance, adhering to the associated grant program requirements provides administrative efficiencies to the borrower and the relevant DOT administration.

Section 80.7 Threshold Criteria for TIFIA Projects

Eligibility for TIFIA financial assistance requires that the project satisfies the applicable planning and programming requirements of 23 U.S.C. 134 and 135 at the time an agreement to make available a Federal credit instrument is entered into. 23 U.S.C. 602(a)(1).[6] Prior to the SAFETEA–LU amendments, eligibility required specifically that the project be included in an approved State Transportation Improvement Program (STIP) at the time an agreement to make available a Federal credit instrument was entered into.[7] The NPRM proposes to conform the current threshold eligibility criteria for projects to changes mandated by the SAFETEA–LU amendments.

The STIP is a multi-year[8], statewide listing of all transportation projects proposed for funding—Federal, State, and local. It must include all federally supported transportation expenditures within the State. 23 U.S.C. 123(g)(4)(A). Thus, a project funded by TIFIA financial assistance must be included in the STIP when an agreement to make available a Federal credit instrument is entered.

Congress was apparently concerned that this requirement could be misinterpreted to constrain TIFIA assistance in the case of a project with a construction timetable that extended beyond the typical four-year approved STIP.[9] We note that construction timetables for a project are not limited to the time horizon of a STIP; and multi-phase, large scale projects often appear on updated STIPs. There may be circumstances where the Department, on a case-by-case basis, should exercise the discretion to determine the applicable planning and programming requirements that apply to a TIFIA project at the time a credit assistance agreement is entered into, and we interpret the SAFETEA–LU amendments as providing this discretionary authority.

The new provisions, mandated by the SAFETEA–LU amendments, would permit smaller projects to participate in the TIFIA program. SAFETEA–LU provided that the minimum size for TIFIA projects is $50 million or one-third of a State's apportionment of Federal-aid funds, whichever is less; SAFETEA–LU also provided that the minimum size for TIFIA projects principally involving the installation of an intelligent transportation system is $15 million.[10] The proposed rule would amend the current TIFIA rule to implement these new, lower minimum size thresholds, as applicable.

The NPRM also proposes to amend the current rule to elaborate on the statutory language with respect to security to make clear that the term ''dedicated revenue sources'' encompasses not just user fees, but also taxes pledged to secure the TIFIA instrument. The standard by which taxes are deemed pledged is the same as for any revenue pledged to secure the TIFIA loan, *i.e.*, the legal and commercial terms of the credit agreement. The proposed rule essentially would retain the provision of the current rule under sections 80.13(a)(4) and 80.13(c) permitting use of general obligation pledges or general corporate promissory pledges as security or ''collateral'' for TIFIA credit assistance. The policy of the Department, however, is that preference will be given to user financed projects. The proposed rule would continue the

[6] ''To be eligible to receive financial assistance under this chapter, a project shall meet the following criteria: Inclusion in transportation plans and programs.—The project shall satisfy the applicable planning and programming requirements of sections 134 and 135 at such time as an agreement to make available a Federal credit instrument is entered into under this chapter.'' 23 U.S.C 602(a)(1).

[7] ''The project—(A) shall be included in the State transportation plan required under section 135; and (B) at such time as an agreement to make available a Federal credit instrument is entered into under this chapter, shall be included in the approved State transportation improvement program required under section 134.'' Public Law 109–59, § 1601(b)(1).

[8] Each State must develop a STIP that covers a period of 4 years and is updated at least every 4 years. 23 U.S.C. 135(g)(1).

[9] While the House Bill does not make any change in threshold criteria, the Senate Bill says: ''The change * * * clarifies the provision regarding statewide and metropolitan planning requirements. The existing provision contained language that could be misinterpreted to constrain TIFIA assistance in the case of a project with a construction timetable that extended beyond the typical three-year approved State Transportation Improvement Program (STIP).'' H. Rept. 109–203 (July 28, 2005) at H. 7458. The Conference Substitute accepts the Senate amendment without additional clarification: ''Subsection (b) amends Section 182 of title 23 to clarify the requirements regarding statewide and metropolitan planning.'' *Id.* at H. 7459.

[10] 23 U.S.C. 602(a)(3).

current rule's bar against securing a TIFIA instrument with a pledge of Federal funds from any source, including Federal-aid reimbursements.

Section 80.9 Application Process

The NPRM proposes to re-organize the existing rule's various provisions relating to the TIFIA application and provides greater detail than the current rule about the application process.

The NPRM proposes that, prior to submission of the TIFIA application, the applicant must have submitted a letter of interest satisfactory to the DOT. Although applications would be accepted only during prescribed periods, the DOT would continue to accept letters of interest at any time.

The NPRM maintains the current rule's requirement for the DOT to publish an annual **Federal Register** notice to solicit applications for credit assistance. In maintaining this provision, the DOT intends to return to the practice of specifying timeframes during which it will accept TIFIA applications. This use of application cycles will help DOT manage the TIFIA project pipeline and enable consistent use of the TIFIA selection criteria. This marks a departure from DOT practice since 2001 of accepting applications at any time during the year.

The NPRM proposes to add a requirement that an applicant must submit with its application a working model of the project's comprehensive plan of finance. The DOT's current practice is to ask applicants to submit such models. As many applicants consider such models proprietary in nature, the DOT has not publicly disclosed them, and the DOT will continue to treat them as confidential commercial information. Applicants should prominently mark the model as confidential and proprietary information. Having access to the models has greatly enhanced the ability of the DOT and its financial advisors to analyze and understand the plans of finance for which TIFIA assistance is sought. The DOT believes that requiring applicants to include models with their application is necessary to evaluate applications, and will ensure our continued ability to conduct appropriate analysis of plans of finance for proposed TIFIA projects.

The proposed rule would make clear that the preliminary rating opinion letters must be submitted with the application. The NPRM also proposes to include a provision that the Secretary may request such additional information as necessary to determine whether TIFIA assistance should be provided.

Section 80.11 Preliminary Rating Opinion Letter and Investment-Grade Rating

We propose to add a requirement that each applicant and borrower obtain a preliminary rating opinion letter and subsequent investment-grade rating from at least two rating agencies, and seek public comment on this proposal.

We propose to add a requirement that the preliminary rating opinion letters and the subsequent ratings address the credit quality of the TIFIA instrument; *i.e.*, the preliminary rating opinion letter must address the likely rating category of the TIFIA instrument, and the borrower must obtain a rating for the TIFIA instrument when it obtains the investment-grade rating for the project obligations. The DOT already draws substantially on the credit analysis work of the rating agencies, and this requirement would assist the internal capital allocation process that results in a subsidy cost estimate for each TIFIA transaction.

To provide flexibility for a governmental agency seeking to make TIFIA assistance available to multiple potential borrowers as part of its solicitation of a private concession, the DOT is proposing to require submission of the credit ratings at a later stage in the process. In such an instance, the governmental agency must submit a TIFIA application that addresses the seven statutory criteria, and the selected concessionaire must provide the preliminary rating opinion letters with its submission of the project's finance plan.

The proposed rule would make clear that all debt senior to the TIFIA instrument must receive an investment-grade rating, not just the senior project obligations. While the DOT accepts multi-lien debt structures, it believes that a non-investment-grade lien senior to the TIFIA lien would not comport with the legislative intent underlying the investment-grade rating requirement. Thus, the DOT considers this proposed change a clarification of the TIFIA statute's requirement.

The proposed rule would require that the borrower deliver final ratings, and other such evidence related to the most current project financial plan upon which the rating evidence is based, to the DOT *at least* two weeks before the credit agreement closing in order to give the DOT adequate time to analyze any credit issues those ratings identify. This requirement will be restated in the project term sheet.

The DOT believes that implicit in the statute's investment-grade rating provision is a requirement that the TIFIA instrument itself attain an investment-grade rating if there are no project obligations senior to the TIFIA instrument. The statute, at 23 U.S.C. 602(b)(2)(B), imposes such a requirement with respect to the preliminary rating opinion letter. The proposed rule would make that requirement explicit for both the preliminary rating opinion letter and the investment-grade rating.

The proposed rule would elaborate and clarify the current rule's specification that all TIFIA program credit rating requirements pertain to ''underlying'' ratings.

Section 80.13 Selection Criteria for TIFIA Projects

As noted above, the DOT seeks comment on potential methods of incorporating benefit-cost analysis into the project selection process.

The statute prescribes eight criteria for project evaluation, without specifying any relative weighting or whether any of the criteria is mandatory. The current rule assigns weights, ranging from 5 percent to 20 percent, to each of the 8 statutory criteria. In the past, the DOT has assigned scores on a scale of zero to four to each of the eight criteria for all projects for which it has received applications and then weighted those scores to arrive at a composite score.

The NPRM proposes to make several important changes to this framework: First, a project's ''creditworthiness'' would now be evaluated separately. For every TIFIA project, the DOT analyzes the project economics and legal provisions supporting the Government's credit security. This analysis is fundamentally important and should be treated separately from the other seven statutory criteria. The proposed rule would make creditworthiness a requirement. In order for a project to be selected for TIFIA assistance under the proposed rule, the Secretary must determine that it is creditworthy. This proposed requirement that a project must be determined to be creditworthy does not mean that a project's TIFIA instrument, if subordinated to project obligations which are investment-grade itself, would be required to be investment-grade. Guidelines on how DOT will evaluate and determine creditworthiness will be published and updated regularly in the TIFIA program guidance.

In addition, should project selection and ranking continue to consist of a weighted scoring of statutory criteria, the DOT proposes to realign the weights assigned to the remaining seven criteria to match national transportation policies and the goals of reducing congestion and improving system performance. Because creditworthiness would be evaluated separately, the weights attached to these criteria would be changed so that the seven weightings, as revised, would total 100 percent. The DOT retains the discretion not to advance projects that rate low in these seven criteria even if the project is creditworthy.

Under the current rule, the extent to which a project is nationally and regionally significant is weighted at 20 percent of the total score, and is scored based on the extent to which a project generates economic benefits, supports international commerce, or otherwise enhances the national transportation system. The proposed change would increase the weight to 40 percent and reorganize the evaluation factors by creating 2 subcategories, and assigning each subcategory a percentage of the total weight for this criterion. Under the proposed revision, national and regional significance would be assessed based on: (A) The ability of a project to enhance the national or regional transportation system by reducing congestion and improving overall system performance on a sustainable basis (30 percent), and (B) the extent to which the project generates economic benefits beyond those captured under (A) and furthers interstate or international commerce (10 percent).

To accommodate the increased emphasis on national and regional significance, the DOT proposes to reassign the weights given to the following criteria: Likelihood that Federal credit assistance would enable the project to proceed at an earlier date than the project would otherwise be able to proceed (5 percent; currently 12.5 percent); extent to which the project helps maintain or protect the environment (10 percent; currently 20 percent); extent to which the project uses new technologies (10 percent; currently 5 percent); and amount of budget authority required to fund the Federal credit instrument made available (10 percent; currently 5 percent). The DOT proposes to evaluate the budget authority criterion by measuring the amount of TIFIA budget authority required to fund the Federal credit instrument relative to the total project investment.

Weights for the remaining two criteria—private participation (20 percent) and reduced Federal grant assistance (5 percent)—would remain as under the current rule.

The proposed rule would clarify the DOT's preference for applications for TIFIA loan guarantees over applications for secured loans and lines of credit. Such a preference is in accordance with Federal credit policies, as expressed in OMB Circular A–129, and is further reflected in proposed section 80.23(d)(6) below concerning refinancing of existing debt. The DOT seeks comments on how to increase the participation of private sector lenders in providing guaranteed loans consistent with the TIFIA statute and government-wide credit policy.

Section 80.15 Term Sheet

We propose to add a new section on term sheets that would make significant changes in how the DOT uses the TIFIA program term sheet and in how we obligate Federal funds for TIFIA projects.

Currently, the term sheet is a letter contract between the DOT and the borrower, and the DOT uses it to obligate budget authority. The DOT proposes to streamline loan administration and use the term sheet as an expression of the DOT's intent to proceed to negotiation of a credit agreement with the borrower. Budget authority would be obligated at the time the credit agreement is executed rather than, as is the current practice, at the time the term sheet is executed.

Because the term sheet would no longer be used to obligate current year budget authority, we propose to eliminate the ''conditional term sheet'' provided for in the current rule. To aid budgetary planning, the DOT may issue future-year term sheets which, like current-year term sheets, also would be cancellable at any time by the DOT at its own discretion.

Section 80.17 Interest Rate on Federal Credit Instruments

The proposed rule contains language that would implement the TIFIA statute's various interest rate provisions. Under the amended TIFIA statute, the interest rate on both TIFIA secured loans and TIFIA lines of credit is set at the time the credit agreement is executed, and this requirement is set forth in the proposed rule. The proposed rule provides that the rate on a guaranteed loan would be negotiated between the borrower and the guaranteed lender, but in accordance with the TIFIA statute, makes such negotiated rate subject to the Secretary's approval.

The proposed rule provides, in accordance with Federal credit policies,[11] that all TIFIA credit agreements impose an interest rate penalty on outstanding loan balances in the event of a development default. DOT will publish guidelines on development default penalties in its program guidance.

The TIFIA statute specifies only a lower bound on the interest rate for a TIFIA instrument: The rate on United States Treasury securities of a similar maturity. The current rule contains no provision implementing the statute's rate-setting provisions. Under both the statute and the current rule, therefore, the DOT currently has broad discretion to set the interest rate so long as the rate is at or above the statutory minimum. In administering the TIFIA program, however, the DOT has set the rate, in all transactions to date, at the statutory minimum. As noted above, the DOT seeks comment regarding the use of its authority to charge different interest rates to different borrowers, on the basis of program policy goals and guidance in OMB Circular A–129.

The current rule is silent on the calculation method by which the statutory minimum is determined. The DOT has determined the statutory minimum for a specific transaction by reference on the closing date to the rate table, published daily by the Treasury Department, for State and Local Government Series (SLGS) securities, and we have previously noted in the TIFIA Program Guide that we use this method of determining interest rate minimums. The NPRM proposes to incorporate into the regulation the calculation method for interest rate minimums heretofore noted in the Program Guide.[12]

Section 80.19 Guaranteed Loans; Eligibility Requirements for Guaranteed Lenders

The NPRM proposes to include a new section to provide that the terms of a guaranteed loan, including the interest rate, would be subject to approval by the Secretary. The proposed new section also specifies eligibility requirements for guaranteed lenders and would require that the Secretary approve all guaranteed lenders. Currently, eligibility standards for guaranteed lenders are set

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[11] See section V, paragraph 4 of OMB Circular A–129, ''Managing Federal Credit Programs'' (November 2000). This Circular is available at the following URL: *http://www.whitehouse.gov/omb/circulars/a129/a129rev.html.*

[12] The DOT publishes detailed guidance for TIFIA borrowers in a Program Guide. The Program Guide also includes the TIFIA application form and the text of both the TIFIA statute and the TIFIA rule, and will post a form loan template. The Program Guide may be found on the TIFIA Web site at: *http://tifia.fhwa.dot.gov/.*

forth in the TIFIA Program Guide.[13] The DOT believes these eligibility standards should instead be incorporated in the regulation.

Section 80.21 Draws on Line of Credit

The proposed rule would move the current rule's line of credit provisions, contained in 49 CFR 80.5, into a new section with modifications to implement the changes made by the SAFETEA–LU amendments to the TIFIA statute. The proposed rule would limit draws that are made to pay debt service on project obligations to the payment of debt service on those project obligations which financed eligible project costs, and it requires that draws for the purpose of paying debt service may not be made until any capitalized interest fund is exhausted. Consistent with the changes in SAFETEA–LU, the proposed rule would make clear that a draw for payment of debt service may be made even if a debt service reserve fund is available, thereby enabling borrowers to use a line of credit to avoid the default which usually arises when a debt service reserve fund is drawn.

There would be no limitation in the amount that may be drawn under a line of credit in any one year, reflecting an amendment to the TIFIA statute.

Section 80.23 Refinancing

This proposed rule creates a new section on refinancing to implement the new TIFIA refinancing authority created by SAFETEA–LU and contained in 23 U.S.C. 603(a)(1). In addition, the current rule's provision dealing with refinancing of interim construction financing not more than one year after substantial completion is moved into this proposed new section.

SAFETEA–LU amended TIFIA to permit the use of TIFIA secured loans and loan guarantees in certain refinancing transactions. In general, the new provision authorizes the Secretary to enter into TIFIA secured loan agreements, or loan guarantee agreements, to refinance long-term project obligations, or Federal credit instruments, if such refinancing will provide additional funding capacity that will be used to fund the completion, enhancement, or expansion of a project. This proposed new section provides guidance on the types of refinancing transactions the DOT will consider for TIFIA credit assistance and specifies application requirements and certain refinancing terms that the DOT believes are consistent with Federal credit policies. In addition, in order to minimize displacement of private sector credit markets while achieving program goals, the DOT proposes to participate in a qualified refinancing only by means of a TIFIA loan guarantee. As noted in the section 80.13 discussion above, the DOT seeks comments on how to increase the participation of private sector lenders in providing guaranteed loans consistent with the TIFIA statute and government-wide credit policy.

The DOT's new refinancing authority continues the TIFIA program's principle emphasis: Stimulating investment in new transportation infrastructure.

The DOT will require the applicant to demonstrate that the refinancing will increase available funding capacity for the completion, enhancement, or expansion of a project that qualifies for funding under 23 U.S.C. 602. The new improvement facilitated as part of the TIFIA refinancing must cost at least $50 million (in eligible project costs) consistent with the SAFETEA–LU statutory minimum threshold for a new TIFIA project. The DOT notes that certain selection criteria tend to favor a project comprised entirely of new construction over one that includes the refinancing of existing project debt. While the new transportation project must follow the same Federal requirements as any TIFIA project, the DOT believes that an asset previously financed with the debt being refinanced under the TIFIA program is subject to those Federal requirements to which it was previously subject, including applicable Federal requirements concerning operations, maintenance, and design standards for future construction for a project receiving TIFIA refinancing assistance.

A borrower will have the flexibility to apply the proceeds of a TIFIA guaranteed loan to the refinancing, the new project, or apportion an amount to each element of the transaction. It is not required that guaranteed loan proceeds be used to build the new project. If the guaranteed loan is made available for both the refinancing and the new project, the assistance will be structured in two tranches. The proposed rule establishes a maximum maturity date of 35 years from the date the credit agreement is executed for the portion of credit assistance used for the refinancing. The maximum maturity date for the new project will be 35 years from the date of substantial completion, the same as for any new project receiving TIFIA credit assistance. In no case will the term of the loan guarantee exceed the useful life of the asset being financed.

The DOT is proposing to provide credit assistance in connection with a refinancing in an amount no greater than the eligible project costs of the new transportation investment that is facilitated through the additional funding capacity provided by the refinancing. However, to provide an incentive to the private sector to invest in transportation infrastructure, consistent with the objectives of the TIFIA program, DOT may approve an increase in this limit up to an amount equal to the amount of equity actually committed at financial close. For any refinancing transaction, the maximum amount of credit assistance is limited to 33 percent of the combined total of eligible project costs of the refunding and new project.

The DOT considers that generating new investment in transportation is the essential purpose of a TIFIA-assisted refinancing transaction. For that reason, it will require that construction of the new project commence within a reasonable period of time. This requirement will apply even if the new construction is financed from sources other than TIFIA. To ensure timely advancement and completion of project construction, the DOT will require a penalty interest rate in the guaranteed loan in the event there is a development default. Guidelines on development default penalties for refinancing transactions will be published in the TIFIA program guidance.

An applicant seeking TIFIA refinancing assistance must submit an application, including the new transportation asset construction project, using the TIFIA application form contained in the DOT's TIFIA Program Guide. The application should describe in detail the refinancing plan of finance and demonstrate that it conforms to statutory and regulatory requirements. The fee for a refinancing application is proposed to be the same as the fee for a new TIFIA project application.

Section 80.25 Limitations on Federal Credit Assistance

The proposed rule would impose certain limitations on TIFIA assistance.

Amount of credit assistance: The current rule incorporates the statutory limitation of 33 percent of reasonably anticipated eligible project costs, and the proposed rule would retain that provision. In addition, we propose to incorporate the new statutory provision, contained in 23 U.S.C. 603(b)(2), further limiting the amount of TIFIA credit assistance to the sum of project obligations senior to the TIFIA instrument when the TIFIA instrument

[13] For information about the TIFIA Program Guide, see the preceding note 13 and section 80.35 of the proposed rule.

does not have an investment-grade rating.

Look-back in determining project costs: The current rule permits costs incurred prior to submission of the TIFIA application to be included in the calculation of eligible project costs if approved by the Secretary. The proposed rule would permit costs incurred up to three years prior to the TIFIA application to be used in the calculation of eligible project costs, while allowing for further look-backs only in exceptional circumstances and if approved by the Secretary. However, the proposed rule would limit the consideration of such total costs to no more than 20 percent of total eligible project costs.

Operating costs during construction: The proposed rule clarifies that the operating costs of a special purpose entity formed solely to construct and operate the facility for which the TIFIA credit assistance is provided would be included in the calculation of eligible project costs. The proposed rule would limit the consideration of such total costs to no more than 5 percent of total eligible project costs.

Lease acquisition payments or concession fees: To be considered eligible project costs, payments to a public entity associated with the lease acquisition or concession fee must be dedicated to transportation projects eligible under title 23 or chapter 53 of title 49, United States Code. Lease acquisition payments must be part of a project in which new capital costs constitute a significant portion of project costs and represent fair market value. In other words, the concession fee, in and of itself, does not comprise an eligible project cost. In order to implement this policy, the DOT proposes to limit its consideration of such concession payments to 25 percent of total eligible project costs and seeks public comment on this proposal.

Timing of funding of assistance: The current rule specifies that the DOT will fund a secured loan ''based on a project's funding needs.'' In practice, the DOT has funded TIFIA loans on a reimbursement basis; *i.e.*, borrowers may draw funds only for the payment of costs already incurred. This reimbursement practice aligns TIFIA assistance with assistance provided to Federal-aid grant-funded projects. In addition, the DOT has typically included in the credit agreement a provision specifying the maximum frequency (*e.g.*, monthly or quarterly) with which draw requests can be submitted. Therefore, we propose to incorporate these practices into the regulation.

Section 80.27 Credit Agreement Closing and Obligation of Funds

The proposed new section states that obligation of Federal funds would occur at the closing of the credit agreement, thus making clear that the DOT is changing its current practice of obligating funds at the time a term sheet is executed.

Section 80.29 Reporting Requirements and Credit Monitoring

The proposed rule reorganizes the current rule to consolidate within a single section all reporting and monitoring requirements. The NPRM proposes to provide that the DOT may impose, in a particular credit agreement, additional reporting requirements which it considers necessary in order to properly monitor the credit performance of the specific project.

The proposed rule moves the current rule's annual credit reporting requirement to this section. It would require borrowers to maintain a credit rating at their own expense and furnish it annually to the DOT. The current rule requires borrowers to provide ongoing credit evaluations to the DOT annually. The proposed rule makes clear that such credit evaluations must be current credit ratings. It is not the intent of this provision to require borrowers with project obligations that have published credit ratings to obtain new ratings, but rather merely to require that the borrower establish that such ratings are still in effect. Borrowers which do not have project obligations with published credit ratings, such as borrowers which use bank debt and fulfill the statutory investment-grade rating requirement by obtaining a private rating, would be required to obtain a credit rating each year.

The current rule provides that the DOT may conduct periodic financial and compliance audits of TIFIA borrowers. The proposed rule would make clear that such audits conducted by the DOT are at the borrower's expense.

Section 80.31 Fees

Consistent with section 603(b)(7), section 604(b)(9), and 605(b) of title 23, United States Code, the proposed rule identifies several fees the DOT would assess program participants to recover the program's various administrative and transactional costs. The following fees cannot be considered eligible project costs for the purpose of calculating the maximum amount of credit assistance.

The proposed rule would not specify amounts for fees that are fixed, *i.e.*, fees that are not transaction-based, namely the application fee and the servicing fee. The DOT needs to retain the flexibility to change these fixed fees from time to time, in response to changes in its own costs. Thus, rather than specify the fee amounts in the regulation, the DOT would announce changes in these fees by notice published from time to time in the **Federal Register**. A schedule of fees currently in effect will also be posted on the TIFIA Web site.

The current rule prohibits payment of the application fee or the processing fee by anyone other than the applicant. The DOT is not aware of any circumstance where such fees were not paid by the applicant or an affiliated entity; even if a third party were to pay such fees, the DOT does not believe the TIFIA program would be adversely affected. The DOT has concluded this prohibition is unnecessary, and thus proposes to eliminate it.

The NPRM proposes that the DOT would assess the following fees:

1. Application fee. The applicant would be required to remit the application fee with its application for TIFIA assistance. There would be a single application fee for each application, irrespective of the number of TIFIA instruments the applicant is seeking. The current rule provides that the application fee is non-refundable, and the proposed rule would leave that provision unchanged. The purpose of the application fee is to cover, in part, the DOT's cost for outside consulting services engaged to assist in reviewing the application. The amount of the application fee will be posted on the TIFIA Web site. The DOT may change the amount of the application fee from time to time, and will publish these changes in the **Federal Register** and post on the TIFIA Web site. The application fee is not considered an eligible project cost for the purpose of calculating the maximum amount of credit assistance.

2. Subsidy fee. As authorized by section 603(b)(7) and section 604(b)(9) of Title 23, United States Code, the current rule, in section 80.17(c), permits the payment of a supplemental fee to reduce the subsidy cost of a project. The proposed rule would identify this as a ''subsidy fee'' and restate the current rule's language. If, in any given year, there is insufficient budget authority to fund the credit instrument for a qualified project that has been selected to receive assistance under TIFIA, the DOT and the approved applicant may agree upon a supplemental fee to be paid by or on behalf of the approved applicant at the time of execution of the term sheet to reduce the subsidy cost of that project. Although such a fee has yet to be imposed, the DOT anticipates use of this provision as the demand for TIFIA assistance increases. The subsidy fee is not considered an eligible project cost for the purpose of calculating the maximum amount of credit assistance.

3. Transaction fee. The transaction fee would be a one-time fee, set at an amount sufficient to reimburse the DOT for the actual costs, other than Federal employee costs, incurred in evaluating the application and negotiating the credit agreement. Such costs consist principally of fees the DOT pays to its consultants and outside legal advisors. The transaction fee would be due at closing of the credit agreement or within 30 days of financial close as specified in the credit agreement. The proposed rule provides that the transaction fee would be an obligation of the applicant, payable irrespective of whether or not the credit agreement was ever executed. The transaction fee is not considered an eligible project cost for the purpose of calculating the maximum amount of credit assistance.

4. Servicing fee. The DOT would assess the servicing fee annually in accordance with section 605(b)(1)(B) of SAFETEA–LU. There would be a servicing fee for each credit instrument so that a single borrower could be assessed more than one servicing fee. The servicing fee would offset, in part, the DOT's costs in servicing its portfolio of TIFIA loans. The amount of the servicing fee will be posted on the TIFIA Web site. The DOT may change the amount of the servicing fee from time to time, and will publish these changes in the **Federal Register** and post on the TIFIA Web site. The servicing fee is not considered an eligible project cost for the purpose of calculating the maximum amount of credit assistance.

5. Monitoring fee. The DOT would include in each credit agreement a provision obligating the borrower to reimburse the DOT for costs incurred in connection with monitoring the credit performance of a project, the enforcement of credit agreement provisions, amendments to the credit agreement and related documents, and other performance-related activities in accordance with section 603(b)(7) of SAFETEA–LU. The monitoring fee is not considered an eligible project cost for the purpose of calculating the maximum amount of credit assistance.

The proposed rule provides that the DOT would seek administrative offset to recoup the above fees in the event the applicant or borrower fails to pay them.

Section 80.33 Use of Administrative Offset

The proposed rule carries forward the current rule's provision making clear that the DOT does not intend to recoup by means of administrative offset losses incurred through TIFIA credit instruments except under circumstances relating to fraud, misrepresentation, false claims or similar acts. It clarifies the DOT's intent, as stated in the rule, to recover through administrative offset any fees assessed under the TIFIA program and not paid.

Section 80.35 Program Guide; TIFIA Web site

The proposed rule would establish a new section advising those interested in the TIFA program of the TIFIA Program Guide and the TIFIA Web site (*http://tifia.fhwa.dot.gov*). The proposed new section would be informational only, intended to notify the public of where to find additional program information, including information relating to a fee schedule.

Section 80.37 Applicant Information Requirements

The proposed rule would establish a new section addressing certain requirements that apply to all recipients of Federal assistance, including entities receiving credit assistance. First, an applicant must obtain a Data Universal Number System (DUNS) number. The DUNS number, which is a unique nine-character number that identifies an organization, is a tool used by the Federal Government to track how Federal money is distributed. Second, an applicant must register with the Central Contractor Registration (CCR). The Federal Government requires that Federal agencies collect certain information from recipients of Federal assistance. This information is collected through the CCR system, which is the primary registrant database for the Federal Government. Registration in the CCR requires a DUNs number.

Distribution and Derivation Tables

For ease of reference, distribution and derivation tables are provided for the current sections of the proposed rule as follows.

DERIVATION TABLE

New section	Old section
80.1	80.1.
80.3	80.3 Administrative offset.
80.3 Borrower	None.
80.3 Budget authority	None.
None	80.3 Conditional term sheet.
80.3	80.3 Credit Agreement.
80.3 Current Credit Evaluation	80.3 None.
80.3	80.3 Eligible project costs.
80.3	80.3 Federal credit instrument.
80.3 Guaranteed lender	None.
80.3	80.3 Investment-grade rating.
None	80.3 Lender.
80.3	80.3 Line of credit.
80.3	80.3 Loan guarantee.
None	80.3 Local servicer.
80.3 Maturity Date	None.
None	80.3 Obligor.
80.3 Preliminary rating opinion letter	None.
80.3	80.3 Project.
80.3	80.3 Project obligation.
None	80.3 Project sponsor.
80.3	80.3 Rating agency.
80.3 Refinance	None.

DERIVATION TABLE—Continued

New section	Old section
80.3 Secretary	None.
80.3	80.3 Secured loan.
80.3	80.3 State.
80.3 Subsidy cost	80.3 Subsidy amount.
80.3	80.3 Substantial completion.
80.3	80.3 Term sheet.
80.3	80.3 TIFIA.
80.5(a)–(e)	80.3(a)–(e).
80.7(a)	80.13(a).
80.7(a)(1)	80.13(a)(1) and (a)(5).
80.7(a)(2) through (a)(2)(i)	80.13(a)(3).
80.7(a)(2)(ii)	80.13(b).
80.7(a)(3)	80.13(a)(4).
80.7(b) through (c)	80.13(c).
80.9(a)	80.7(d) Added to new section.
80.9(b)	None.
80.9(c)	80.7(b).
80.9(c)(1)	80.7(b)(1).
80.9(c)(2)	None.
80.9(c)(3)	80.7(b)(1).
80.9(c)(4)	80.7(b)(2).
80.9(c)(5)	80.7(b)(3).
80.9(c)(6)	80.7(b)(4).
80.9(c)(7)	80.7(b)(5).
80.9(c)(8)	None.
80.9(c)(9)	None.
80.9(c)(10)	None.
80.9(d)	80.7(c).
80.11(a) through (a)(1)	80.11(a).
80.11(a)(2)	None.
80.11(b)	None.
80.11(c)(1) through 80.11(c)(1)(i)	80.11(b).
80.11(c)(1)(ii)	None.
80.11(c)(2)	None.
80.11(d)	None.
80.11(e)	80.11(c).
80.13(a)	80.15(a)(2).
80.13(b)	80.15(a).
80.13(b)(1)	80.15(a)(1).
80.13(b)(2)	80.15(a)(3).
80.13(b)(3)	80.15(a)(4).
80.13(b)(4)	80.15(a)(5).
80.13(b)(5)	80.15(a)(6).
80.13(b)(6)	80.15(a)(7).
80.13(b)(7)	80.15(a)(8).
80.13(c)	80.15(c).
80.15(a) through (b)	80.5(d)(1) through (d)(2).
80.17(a) through (d)	None.
80.19(a) through (c)	None.
80.21(a) through (b)	80.5(e).
80.23(a)	80.5(c).
80.23(b) through (e)(7)	None.
80.25(a) through (a)(1)	80.5(a).
80.25(a)(2)	None.
80.25(b)(1)	80.5(b).
80.25(b)(2)	None.
80.25(b)(3)	None.
80.25(c)	None.
80.25(d)	80.5(g) in part.
80.27 Heading	None.
80.27(a)	None.
80.27(a)(1)	80.13(a)(1).
80.27(a)(2)	80.5(f).
80.27(a)(3)	80.11(b).
80.27(a)(4)	None.
80.27(b)	80.5(d)(2).
80.29 Heading	80.19.
80.29(a)	80.11(d).
80.29(b)	80.19 First sentence.
80.29(c) through (c)(2)	None.
80.29(d)	80.19 Second sentence.
80.29(e)	80.19(d) Last sentence.

DERIVATION TABLE—Continued

New section	Old section
80.31 Heading	80.17.
80.31	None.
80.31(a)	80.17(a).
80.31(b)	80.17(c).
80.31(c)	80.17(a).
80.31(d)	80.17(d).
80.31(e)	None.
80.33	80.21.
80.35	None.
80.37	None.

DISTRIBUTION TABLE

Old section Part 80	New section Part 80
80.1 Heading	80.1 Heading text unchanged.
Purpose	80.1 Revised.
80.3 Heading	80.3 Heading text unchanged.
Administrative offset	Revised.
None	80.3 Borrower replaced obligor; definition revised.
None	80.3 Budget authority added.
Conditional term sheet	80.3 Removed.
Credit Agreement	80.3 Revised.
None	80.3 Current Credit Evaluation added.
Eligible project costs	80.3 Revised.
Federal credit instrument	80.3 Revised.
None	80.3 Guaranteed lender replaces lender.
Investment-grade rating	80.3 Revised.
Lender	Removed, replaced by Guaranteed lender.
Line of credit	80.3 Revised.
Loan guarantee	80.3 Revised.
Local Servicer	80.3 Removed.
None	80.3 Maturity date added.
Obligor	Removed, replaced by Borrower.
None	80.3 Preliminary rating opinion letter added.
Project	80.3 Revised.
Project obligation	80.3 Revised.
Project sponsor	80.3 Removed.
Rating agency	80.3 Revised.
None	80.3 Refinance added
None	80.3 Secretary added.
Secured loan	80.3 Revised.
State	80.3 "States"capitalized.
Subsidy amount	80.3 Changed to Subsidy cost.
Substantial completion	80.3 Revised.
Term sheet	80.3 Revised.
TIFIA	80.3 Revised.
80.5 Heading	80.25 Heading redesignated and revised.
80.5(a)	80.25(a) through (a)(1) Redesignated and revised.
None	80.25(a)(2) Added.
80.5(b)	80.25(b)(1) Redesignated and revised.
None	80.25(b)(2) Added.
None	80.25(b)(3) Added.
80.5(c)	80.23(a) Redesignated and revised.
80.5(d)(1) through (d)(2)	80.15(a) through (b) Conditional term sheet deleted; redesignated and revised with regard to term sheet.
80.5(e)	80.21(a) through (b) Redesignated and revised.
80.5(f)	80.27(a)(2) Redesignated and revised.
None	80.25(c) Added.
80.5(g)	80.25(d) Redesignated and revised.
80.7 Heading	80.9 Heading redesignated.
80.7(a)	Removed.
None	80.9(a) Added; language from 80.7(d) incorporated.
None	80.9(b) Added.
80.7(b)	80.9(c) Redesignated and revised.
80.7(b)(1)	80.9(c)(1) and (c)(3) Redesignated and revised.
None	80.9(c)(2) Added.
80.7(b)(2)	80.9(c)(4) Redesignated and revised.
80.7(b)(3)	80.9(c)(5) Redesignated and revised.
80.7(b)(4)	80.9(c)(6) Redesignated and revised.
80.7(b)(5)	80.9(c)(7) Redesignated and revised.

DISTRIBUTION TABLE—Continued

Old section Part 80	New section Part 80
80.7(c)	80.9(d) Redesignated and revised.
80.7(d)	80.9(a) Language incorporated.
80.9 Heading	80.5 Redesignated and heading text unchanged.
80.9	80.5 Redesignated and revised.
80.9(a)	80.5(a) Redesignated and revised.
80.9 through (d)	80.5(b) through (d) Redesignated and text unchanged.
80.9(e)	80.5(e) Redesignated.
80.11 Heading	80.11 Heading revised.
80.11(a)	80.11(a) through (a)(1) Revised.
None	80.11(a)(2) Added.
None	80.11(b) Added.
80.11(b)	80.11(c)(1) through (c)(1)(i) Redesignated and revised.
None	80.11(c)(1)(ii) Added.
None	80.11(c)(2) Added.
None	80.11(d) Added.
80.11(c)	80.11(e) Redesignated and revised.
80.11(d)	80.29(a) Redesignated and revised.
80.13 Heading	80.7 Redesignated and heading revised.
80.13(a)	80.7(a) Redesignated and revised.
80.13(a)(1)	80.7(a)(1) Redesignated and revised.
80.13(a)(2)	Removed.
80.13(a)(3)	80.7(a)(2)(i) Redesignated and revised.
80.13(a)(4)	80.7(a)(3) Redesignated and revised.
80.13(a)(5)	80.7(a)(1) Redesignated and revised.
80.13(b)	80.7(a)(2)(ii) Redesignated and revised.
80.13(c)	80.7(b) through (c) Redesignated and revised.
80.15 Heading	80.13 Redesignated and heading revised.
80.15(a)	80.13(b) Redesignated and revised.
80.15(a)(1)	80.13(b)(1) Redesignated
80.15(a)(2)	80.13 Redesignated and revised.
80.15(a)(3)	80.13(b)(2) Redesignated and revised.
80.15(a)(4)	80.13(b)(3) Redesignated and revised.
80.15(a)(5)	80.13(b)(4) Redesignated and revised.
80.15(a)(6)	80.13(b)(5) Redesignated and revised.
80.15(a)(7)	80.13(b)(6) Redesignated and revised.
80.15(a)(8)	80.13(b)(7) Redesignated.
80.15(b)	80.11(a) Redesignated and revised.
80.15(c)	80.13(c) Redesignated and revised.
80.17 Heading	80.31 Redesignated and revised.
None	80.31 Added.
80.17(a)	80.31(a) and (c) Redesignated and revised.
80.17(b)	Removed.
80.17(c)	80.31(b) Redesignated.
80.17(d)	80.31(d) Redesignated and revised.
None	80.31(e) Added.
80.19 Heading	80.29 Redesignated and revised.
80.19 First sentence	80.29(b) Redesignated and revised.
None	80.29(c)(1) through (c)(2) Added.
80.19 Second sentence	80.29(d) Redesignated and revised.
80.19 Last sentence	80.29(e) Redesignated and revised.
80.21 Heading	80.33 Redesignated.
80.21	80.33 Redesignated and revised.
None	8015 New heading added.
80.5(d)(1) through (d)(2)	80.15(a) through (b) Redsignated and revised.
None	80.17 New heading added.
None	80.17(a) through (d) Added.
None	80.19 New heading added.
None	80.19(a) through (c) Added.
None	80.21 New heading added
80.5(e)	80.21(a) through (b) Redesignated and revised.
None	80.23 New heading added.
80.5(c)	80.23(a) Redesignated and revised.
None	80.23(b) through (e)(7) Added.
None	80.27 New heading added.
None	80.27(a) Added
80.13(a)(1)	80.27(a)(1) Redesignated and revised.
80.5(f)	80.27(a)(2) Redesignated and revised.
80.11(b)	80.27(a)(3) Redesignated and revised.
None	80.27(a)(4) Added.
80.5(d)(1) through (d)(2)	80.27(b) Redesignated and revised.
None	80.35 New heading added.
None	80.35(a) through (c) Added.

DISTRIBUTION TABLE—Continued

Old section Part 80	New section Part 80
None	80.37 Added.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, the DOT will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period.

Executive Order 12866 (Regulatory Planning and Review) and U.S. DOT Regulatory Policies and Procedures

The DOT has determined preliminarily that this action would be an economically significant regulatory action within the meaning of Executive Order 12866, and that it would it be significant within the meaning of Department of Transportation regulatory policies and procedures because it implements important changes made to statutory law and makes a number of substantive changes to the current TIFIA regulation. Our determination is based on the activity to date of the program, which has had an annual effect on the economy of $100 million or more.

This action proposes to update and streamline the DOT's regulation on Credit Assistance for Surface Transportation Projects. It implements the changes SAFETEA–LU made to the TIFIA statute, and reorganizes the current rule to make it more comprehensible to users.

As of May 2008, the TIFIA program has provided approximately $4.8 billion in Federal credit assistance which has supported an aggregate of $18.6 billion in combined public and private sector capital investment, at a budgetary cost of approximately $346 million.

The proposed regulation would affect only those entities that elect to apply for TIFIA assistance and are selected to receive a Federal credit instrument. It would not impose any direct costs on non-participants.

Recognizing the significant impact of this program, SAFETEA–LU directed the Secretary of Transportation to submit biannually to Congress a report summarizing the financial performance of the projects receiving assistance under the TIFIA credit program. Two reports have been submitted to date, and a June 2008 report was recently submitted. The June 2006 report briefly updates financial information originally presented in the Department's comprehensive June 2002 report to Congress.[14]

The DOT and industry research has indicated that there are economic productivity gains to be derived from efficient capital investment in surface transportation facilities. According to a 2005 GAO report, ''[t]ransportation improvements also lead to increased productivity and economic growth, through improving access to goods and services for businesses and individuals and increasing the geographic size of potential labor pools for employers and potential jobs for individuals.'' [15] This GAO report cited a September 2003 study, which estimated that average annual returns on highway investment of approximately 14 percent between 1990 and 2000.[16] The DOT continues research, updating the returns on highway capital investment for 2000–2005. Preliminary results show positive returns but lower than the 1990–2000 time period. TIFIA can serve to efficiently allocate public and private investment in surface transportation infrastructure and encourage de-politicizing investments. In addition to the direct returns it produces, transportation capital investment typically generates spillover benefits, which may yield financial and non-financial benefits, such as reduced pollution, increased safety, improved international competitiveness, and enhanced accessibility.

Just as transportation investment produces benefits, failure to invest results in cost increases. According to the DOT, ''transportation system congestion is one of the single largest threats to our nation's economic prosperity and way of life.'' [17] In 2003, Americans lost 3.7 billion hours and 2.3 billion gallons of fuel due to traffic jams, resulting in an estimated cost of $200 billion per year.[18] According to the Texas Transportation Institute, ''The solutions to this problem will require commitment by the public and by national, state and local officials to increase investment levels and identify projects, programs and policies that can achieve mobility goals.'' [19]

According to a recent study by the American Association of State Highway and Transportation Officials (AASHTO), the U.S. population will grow at a more rapid pace in the next 50 years than during the previous 50 years when the nation's modern highway system was first being constructed. As a result of this growth, the number of vehicles on U.S. highways, estimated at 246 million in 2007 (compared to 65 million cars and trucks in 1955), could rise to nearly 400 million by 2055. The AASHTO report also estimated that between 2004 and 2035 truck tonnage could increase 114 percent and rail tonnage could increase 63 percent; truck traffic, measured in trucks per day, per mile, is expected to more than double in the same period.[20]

The TIFIA program was established to provide fractional credit assistance to major transportation infrastructure projects—such as highway, transit, passenger rail, certain freight facilities, and certain port projects—that have the potential of generating substantial economic benefits both regionally and nationally. In many cases, such projects are capable of being supported through direct user charges or dedicated revenue streams that can be used to access private capital and other non-Federal funding sources. The TIFIA program is designed to fill market gaps through providing supplemental and/or subordinate capital to such projects,

[14] These reports to Congress are available on the TIFIA Web site: *http://tifia.fhwa.dot.gov*.

[15] Government Accountability Office, *Highway and Transit Investments: Options for Improving Information on Projects' Benefits and Costs and increasing Accountability for Results* (GAO)–05–172), Washington, DC, January 2005.

[16] Theofanis P. Mamuneas and M. Ishaq Nadiri, ''Production, Consumption and the rates of Return to Highway Infrastructure Capital,'' (September 2003).

[17] See *http://www.fightgridlocknow.gov*.

[18] United States Department of Transportation, *http://www.fightgridlocknow.gov*.

[19] ''Urban Traffic Congestion Costs the USA $63 Billion per Annum,'' September 14, 2004, Texas Transportation Institute. (*http://www.citymayors.com/transport/congestion_usa.html*;).

[20] ''Transportation Investment in our Future Needs of the U.S. Transportation System'' by the American Association of State Highway and Transportation Officials, *http://www.transportationl.org/tiflreport/*, March 2007.

facilitating access to the capital markets or other financing sources for the majority of project funding needs. Through the TIFIA program's leverage of limited Federal funds with private capital, these capital-intensive projects can be advanced without displacing smaller, more traditional grant-supported projects. Federal risk exposure is mitigated by substantial co-investment from non-Federal parties and the use of objective, market-based credit evaluation criteria.

Through SAFETEA–LU, Congress authorized $122 million for each Federal Fiscal Year (FFY) from 2005 through 2009. Under TEA–21, Congress had authorized up to a total of $530 million for FFY 1999 through FFY 2003. These funds pay the subsidy cost to the Federal Government of providing credit assistance, and are available until expended by the DOT or reprogrammed by Congress. Based on experience, this funding amount can support more than $2 billion of average annual credit assistance. Under the terms of the legislation, the Federal share is limited to 33 percent of total eligible project costs. In many cases, however, the actual share of TIFIA assistance is considerably less. For example, the average request for TIFIA assistance by applicants to the TIFIA program between October 1998 and March 2007 was approximately 26 percent of total project cost.

Under the Federal Credit Reform Act of 1990 (FCRA), the amount of budget authority necessary to support a Federal credit instrument depends upon the subsidy cost (i.e., the estimated present value cost of estimated losses that will be incurred as a result of defaults, net of any fee income or recoveries on default). Each project is assigned a subsidy cost based upon an evaluation of its creditworthiness and the specific terms and conditions of the loan or loan guarantee agreement. As noted previously, since the inception of the TIFIA program, total subsidy costs have amounted to nearly $346 million, supporting approximately $4.8 billion in Federal credit with an aggregate of $18.6 billion in public and private capital investment.

The TIFIA program can promote the efficient functioning of project delivery and the private markets, and can generate both direct and indirect benefits, including reduced congestion, greater mobility, improved safety, an enhanced environment, and greater economic growth, all of which further interstate commerce.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) the DOT has evaluated the effects of this proposed action on small entities and has determined preliminarily that the proposed action would not have a significant economic impact on a substantial number of small entities.

The TIFIA program is generally intended to assist large transportation projects and large entities and has little effect on small entities. This action proposes to extend availability of TIFIA credit assistance to smaller projects than those heretofore eligible; thus, to the degree they affect small entities, the changes will have a positive effect on small entities by making it possible for such smaller projects to obtain Federal credit assistance. The DOT expects, nevertheless, that the bulk of TIFIA assistance will go to large projects and that most small entities will be unaffected by the proposed action.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). The proposed updates are applicable only to Federal and federally-assisted programs. This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $128.1 million or more in any one year (2 U.S.C. 1532).

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the DOT has determined that this proposed action would not have a substantial direct effect or sufficient federalism implications on States that would limit the policymaking discretion of the States. The DOT has also determined that this proposed action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. This proposed rule does not contain information collection requirements for the purpose of the PRA. Since the inception of the TIFIA program, the DOT has never received 10 or more applications for Federal credit assistance in a single year. During the years the program has been in existence, the DOT has received an average of three TIFIA applications per year. Preparing a TIFIA application requires a significant commitment of resources on the part of the applicant, and even with the lower project-size thresholds enacted by the SAFETEA–LU amendments, the DOT does not expect to receive 10 or more applications for TIFIA assistance in a single year. If in the future it appears that there will be 10 or more applications in a year, the DOT will take immediate steps to seek approval from OMB for an information collection control number, as required under the PRA.

National Environmental Policy Act

This proposed rule would make a number of changes in the way the TIFIA Federal credit assistance program is administered. As specified under 23 U.S.C. 602(c)(2), each project obtaining such assistance under the TIFIA program is required to adhere to the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*) (NEPA). None of the changes this NPRM proposes would affect the applicability of NEPA to TIFIA projects. Therefore, this proposed rule would not have any effect on the quality of the environment.

Executive Order 12630 (Taking of Private Property)

This proposed action would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Government Actions and Interface with Constitutionally Protected Property Rights.

Executive Order 12988 (Civil Justice Reform)

This proposed action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this proposed action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed action does not concern an environmental risk to health or safety that may disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

The DOT has analyzed this proposal under Executive Order 13175, dated November 6, 2000, and believes that the proposed action will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a significant energy action under that order because although it is a significant regulatory action under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

Regulation Identification Number

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

List of Subjects

23 CFR Part 180

Credit programs—transportation, Highways and roads, Investments.

49 CFR Part 80

Credit programs—transportation, Highways and roads, Investments, Public transportation, Railroads, Reporting and recordkeeping requirements.

49 CFR Part 261

Credit programs—transportation, Investments, Railroads.

49 CFR Part 640

Credit programs—transportation, Investments, Mass transit.

49 CFR Part 1700

Credit programs—transportation.

Issued on: January 13, 2009.

Mary E. Peters,

Secretary of Transportation.

For the reasons set forth in the preamble, and under the authority of 23 U.S.C. 601–609 it is proposed to amend Chapter I of Title 23, Code of Federal Regulations by amending part 180, and to amend Title 49, Code of Federal Regulations, by revising part 80, and amending parts 261 and 640, and adding Chapter XIII consisting of part 1700 respectively as set forth below:

Title 23—Highways

CHAPTER I

PART 180—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION PROJECTS

1. Revise the authority citation for part 180 to read as follows:

Authority: Secs. 1501 *et seq.*, Pub. L. 105–178, 112 Stat. 107, 241, as amended; sec. 1601, 1602 Pub. L. 109–59, 119 Stat. 1144; 23 U.S.C. 601–609 and 315; 49 CFR 1.48.

Title 49—Transportation

Subtitle A—Office of the Secretary of Transportation

2. Revise Part 80 to read as follows:

PART 80—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION PROJECTS

Sec.

Authority: Secs. 1501 *et seq.*, Pub. L. 105–178, 112 Stat. 107, 241, as amended; Sec. 1601, 1602, Pub. L. 109–59. 119 Stat. 1144; 23 U.S.C. 601–609 and 315; 49 CFR 1.4, 1.48, 1.49, and 1.51.

§ 80.1 Purpose.

This part implements TIFIA (as defined within), a statute establishing a Federal credit assistance program for surface transportation projects.

§ 80.3 Definitions.

The following definitions apply to this part:

Administrative offset means the withholding of funds, otherwise payable by the government, to satisfy a claim due the government from a debtor.

Borrower means an obligor primarily liable for payment of the principal of or interest on a Federal credit instrument, which obligor may be a corporation, partnership, joint venture, trust, or a non-Federal governmental entity, agency, or instrumentality.

Budget authority means the authority provided by Federal law for the government to incur financial obligations.

Credit agreement means the definitive agreement between the DOT and the borrower (or between the DOT and the guaranteed lender, for the benefit of the borrower) pursuant to which the DOT provides a Federal credit instrument to, or for the benefit of, the borrower.

Current credit evaluation means:

(1) In the case of a project with a published rating, either a current rating or the borrower's certification stating the rating and outlook then in effect, and;

(2) In the case of a project without a published rating, a current rating of the project obligations and the Federal credit instrument.

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

(1) Development phase activities, including planning, feasibility analysis, technical studies, revenue forecasting, environmental review and related engineering studies, preliminary engineering and preliminary design work, and other pre-construction activities that are eligible for funding consistent with 23 CFR 771.113 and 771.117;

(2) Final design, construction (including the associated operating costs during construction of a special purpose entity formed solely to construct and operate the facility), reconstruction, rehabilitation, replacement, permitting, acquisition of real property (including land related to the project and improvements to land), lease acquisition

payments (including concession payments acceptable to the Secretary) made under an acquisition agreement, environmental mitigation, construction contingencies, and acquisition of equipment after the project has completed the National Environmental Policy Act (NEPA) process and the DOT has made an environmental finding, unless the cost activity is eligible for a categorical exclusion under 23 CFR 771.117;

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

(4) Refinancing of long-term project obligations or Federal credit instruments pursuant to 23 U.S.C. 603(a)(1)(C).

Federal credit instrument means Federal credit assistance in the form of a secured loan, loan guarantee, or line of credit authorized to be made available under TIFIA with respect to a project.

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

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

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

Investment-grade rating means a rating, published or unpublished, not lower than BBB minus, Baa3, bbb minus, BBB (low), or an equivalent assigned by a rating agency.

Line of credit means an agreement entered into by the Secretary with a borrower under section 604 of Title 23, United States Code to provide a secured loan at a future date upon the occurrence of certain events.

Loan guarantee means an agreement by the Secretary under section 603 of Title 23, United States Code to pay all or part of the principal of and interest on a loan or other debt obligation issued by a borrower and funded by a guaranteed lender.

Maturity date means the final maturity date of the Federal credit instrument which shall be the lesser of not later than 35 years after the date of substantial completion of the project, or the remaining useful life of the project. For a refinancing pursuant to 23 U.S.C. 603(a)(1)(C), the final maturity date for the repayment of that portion of the TIFIA credit assistance applied to the refinancing of long-term obligations shall not be later than 35 years after the date the credit agreement is executed.

Preliminary rating opinion letter is a letter from an NRSRO that assigns a preliminary rating opinion of the project's creditworthiness as described in section 80.11 of this Part.

Project means:

(1) Any surface transportation project eligible for Federal assistance under Title 23, United States Code or under chapter 53 of Title 49, United States Code;

(2) An international bridge or tunnel for which an international entity authorized under Federal or State law is responsible;

(3) Intercity passenger bus or rail facilities and vehicles, including facilities and vehicles owned by the National Railroad Passenger Corporation, and components of magnetic levitation transportation systems; and

(4) A project that:

(i) Is a project:

(A) For a public freight rail facility or a private facility providing public benefit for highway users via direct freight interchange between highway and rail carriers

(B) For an intermodal freight transfer facility

(C) For a means of access to a facility described in subparagraph (A) or (B);

(D) For a service improvement for a facility described in subparagraph (A) or (B) (including a capital investment for an intelligent transportation system); or

(E) That comprises a series of projects described in subparagraphs (A) through (D) with the common objective of improving the flow of goods;

(ii) May involve the combining of private and public sector funds, including investments of public funds in private sector facility improvements;

(iii) If located within the boundaries of a port terminal, includes only such surface transportation infrastructure modifications as are necessary to facilitate direct intermodal interchange, transfer, and access into and out of the port.

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

Rating agency means an organization identified by the Securities and Exchange Commission as a Nationally Recognized Statistical Rating Organization.

Refinance means to pay off existing project obligations and any TIFIA credit assistance owed by the Borrower with funds acquired by the same Borrower (or its successor) through the creation of new project obligations and TIFIA credit assistance, pursuant to section 603(a)(1) of Title 23, United States Code.

Secretary means the United States Secretary of Transportation.

Secured loan means a direct loan or other debt obligation issued to a borrower and funded by the Secretary in connection with the financing of a project under section 603 of Title 23, United States Code.

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

Subsidy cost means the amount of budget authority sufficient to cover the estimated long-term cost to the Federal Government of a Federal credit instrument, calculated on a net present value basis, excluding administrative costs and any incidental effects on governmental receipts or outlays in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 *et seq.*).

Substantial completion means the opening of a project to vehicular or passenger traffic or, if determined by the Secretary and specified in the Credit Agreement, the occurrence of a comparable event.

Term sheet means a letter from the Secretary or the Secretary's designee to the borrower (and the guaranteed lender, if applicable) that sets forth the essential terms and conditions of a Federal credit instrument. A term sheet may be cancelled at any time by the Secretary for any reason, and does not obligate budget authority.

TIFIA means the Transportation Infrastructure Finance and Innovation Act of 1998, Pub. L. 105–178, 112 Stat. 107, 241 (1998), as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109–59, 119 Stat. 1239 (2005).

§ 80.5 Federal requirements.

All projects receiving Federal credit assistance must comply with:

(a) The relevant requirements of Title 23, United States Code, for highway projects; chapter 53 of Title 49, United States Code, specifically including, without limitation, section 5333(b) dealing with employee protective arrangements, for transit projects; and section 5333(a) of Title 49, United States Code, for rail projects, as appropriate;

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

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

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

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

§ 80.7 Threshold criteria for TIFIA projects.

(a) To be eligible to receive a Federal credit instrument, a project must meet the following threshold criteria:

(1) The project must have satisfied the applicable planning and programming requirements of section 134 and 135 of Title 23 of the United States Code;

(2) The project must have eligible project costs that are reasonably anticipated to equal or exceed the lesser of $50 million or one-third of the amount of Federal-aid highway funds apportioned for the most recently completed fiscal year to the State in which the project is located, provided that:

(i) In the case of a project principally involving the installation of Intelligent Transportation Systems (ITS), eligible project costs shall be reasonably anticipated to equal or exceed $15 million; and

(ii) In the case of a project located in more than one State, eligible project costs must be reasonably anticipated to equal or exceed the lesser of $50 million or one-third of the amount of Federal-aid highway funds apportioned for the most recently completed fiscal year to the participating State that receives the least amount of such funds; and

(3) The proposed Federal credit instrument must be secured by and payable from, in whole or in part, tolls, user fees, rentals, taxes, or other dedicated revenue sources. In order to fulfill the requirements of § 80.11, any of these dedicated revenue sources that secure any project obligations senior to or on a parity with the Federal credit instrument must also secure, in similar proportion, the Federal credit instrument.

(b) In addition to or in lieu of the dedicated revenue sources specified in paragraph (a)(3) of this section, the Secretary may accept municipal general obligation pledges, general corporate promissory pledges, or other pledges and forms of collateral as security for a Federal credit instrument.

(c) A pledge of Federal funds, regardless of source, may not be used to secure a Federal credit instrument.

§ 80.9 Application process.

(a) Letter of interest. Prior to submission of an application for Federal credit assistance, the applicant must have submitted to the DOT a letter of interest and been notified by the DOT that the letter of interest adequately addresses threshold criteria discussed in this paragraph. The letter of interest required by this section should describe the project, the project's plan of finance, and the amount and type of Federal credit instrument(s) sought. An applicant who has been notified by the DOT that its letter of interest is satisfactory may apply for Federal credit assistance in accordance with the schedule set forth by the DOT.

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

(c) Application. An application for Federal credit assistance must provide:

(1) Documentation sufficient to demonstrate that the project satisfies each of the threshold criteria in 49 CFR 80.7;

(2) The applicant's confirmation that it has complied with the environmental clearance requirement of 49 CFR 80.9(a);

(3) A description of the extent to which the project satisfies each of the selection criteria in 49 CFR 80.13;

(4) A description of the project for which Federal credit assistance is sought, status of environmental and other major governmental permits and approvals, and the construction schedule;

(5) A description of the applicant and borrower;

(6) Historical information, if applicable, concerning the applicant's financial condition, including, for example, independently audited financial statements and certifications concerning bankruptcies or delinquencies on other debt;

(7) Current financial information concerning both the project and the applicant, and a comprehensive project plan of finance, including sources and uses of funds for the project and a forecast of cash flows available to service all project obligations and the Federal credit instrument(s). Spreadsheets and cash flows must be submitted in both hard copy and in the form of a working computer model. Computer models should include among other things intact logic functions and assumption drivers, all business cases considered by the borrower and project sponsors, and an analysis of expected returns for each source of capital;

(8) If the Federal credit assistance applied for is not a loan guarantee, a statement as to why a loan guarantee would not be as useful as the Federal credit assistance sought;

(9) Preliminary rating opinion letters from at least two rating agencies; and

(10) Such additional information as the Secretary may from time to time prescribe.

(d) An application for a project located in or sponsored by more than one State or other entity may be submitted to the DOT. The sponsoring States or entities must designate a single borrower for purposes of receiving and repaying the Federal credit instrument.

§ 80.11 Preliminary rating opinion letter and investment-grade rating.

(a) An applicant must submit with its application preliminary rating opinion letters from at least two rating agencies. The letters must be current and based on the same project plan of finance that is submitted as part of the TIFIA application per § 80.9(b)(7). Each preliminary rating opinion letter must provide a conditional credit assessment of the project's overall creditworthiness and must specifically address:

(1) The potential of all project obligations having a lien senior to that of the Federal credit instrument on the pledged security to achieve an investment-grade rating; and,

(2) The likely credit rating category of the Federal credit instrument.

(b) If a governmental agency is submitting an application on behalf of potential borrowers in connection with a concession procurement process, the governmental entity does not need to submit a preliminary rating opinion letter. Rather, the DOT will require the selected concessionaire seeking TIFIA assistance to provide the preliminary rating opinion letters, which meet all of the requirements of § 80.11(a), with its submission of its comprehensive financial plan.

(c) Not later than 14 days prior to the closing of the credit agreement, the borrower must cause to be delivered to the DOT:

(1) Satisfactory evidence, such as a rating letter or rating confirmation letter, that at least two rating agencies have assigned ratings:

(i) To all project obligations that have a lien senior to that of the Federal credit instrument on the pledged security, which ratings must be investment-grade; and

(ii) To the Federal credit instrument.

(2) Other such evidence related to the most current project financial plan upon which the rating evidence is based.

(d) If no project obligations have a lien senior to that of the Federal credit instrument, then the requirements of paragraphs (a) and (b) of this section apply to the Federal credit instrument.

(e) The ratings required by this section are underlying ratings. Neither the preliminary rating opinion letter, nor the investment-grade rating, may reflect the effect of bond insurance or other private credit enhancement, unless such private credit enhancement secures the Federal credit instrument.

§ 80.13 Selection criteria for TIFIA projects.

(a) For a project to be selected for Federal credit assistance, the Secretary must have determined that it is creditworthy. The Secretary's determination will ensure that any financing for the project has appropriate security features, such as a rate covenant, to ensure repayment. Notwithstanding the creditworthiness of the project, the Secretary retains the discretion not to advance a project that is not highly rated under the criteria discussed below.

(b) In addition to making a determination with respect to creditworthiness, the Secretary will consider the degree to which a project advances the policy objectives embodied in the following seven criteria. The Secretary will assign weights as indicated in evaluating and selecting which eligible projects will receive Federal credit assistance:

(1) The extent to which the project is nationally or regionally significant, in terms of:

(i) The ability of the project to enhance the national or regional transportation system by reducing congestion and improving overall system performance (30 percent); and

(ii) The extent to which the project generates economic benefits not accounted for above in 80.13(b)(1)(i), and supports interstate and international commerce (10 percent). (Total: 40 percent);

(2) The extent to which Federal credit assistance would foster innovative public-private partnerships and attract private debt or equity investment (20 percent);

(3) The likelihood that Federal credit assistance would enable the project to proceed at an earlier date than the project would otherwise be able to proceed (5 percent);

(4) The extent to which the project uses new technologies, including Intelligent Transportation Systems (ITS), that enhances the efficiency of the project (10 percent);

(5) The amount of budget authority, relative to total dollars invested in the project, required to fund the Federal credit instrument made available (10 percent);

(6) The extent to which the project helps maintain or protect the environment (10 percent); and

(7) The extent to which such assistance would reduce the contribution of Federal grant assistance to the project (5 percent).

(c) The Secretary will give preference to applications for loan guarantees rather than other forms of Federal credit instruments. Such preference is consistent with Federal credit policies under OMB Circular A–129 that state when Federal credit assistance is necessary to meet a Federal objective, loan guarantees should be favored over loans, unless attaining the Federal objective requires a subsidy, as defined by the Federal Credit Reform Act of 1990 (2 U.S.C. 661, *et seq.*), deeper than can be provided by a loan guarantee.

§ 80.15 Term sheet.

(a) When the Secretary has approved the project for Federal credit assistance processing, the Secretary will issue a term sheet to the approved applicant. Although the term sheet will be used to administratively reserve the requisite budget authority, it is subject to cancellation at the discretion of the Secretary.

(b) Subject to the limitation of 33 percent of eligible project costs, the Secretary may make a future-year administrative reservation of budget authority and the associated commitment of Federal credit assistance. This reservation will ensure that a project with a future reservation will have a priority (along with the priority of any other projects receiving such future reservations) on budget authority becoming available in the specified year(s).

§ 80.17 Interest rate on Federal credit instruments.

(a) Except as described in section (b) below, the interest rate on secured loans and lines of credit will be set at the discretion of the Secretary.

(b) The minimum interest rate on secured loans and lines of credit will be set as follows:

(1) The interest rate on a secured loan will be not less than the yield on United States Treasury securities of a similar maturity to the final maturity of the secured loan on the date of execution of the credit agreement.

(2) The interest rate on any draw made on a line of credit will be not less than the yield on United States Treasury securities of a 30-year maturity on the date of execution of the credit agreement.

(c) The interest rate on a guaranteed loan is the rate agreed to by the borrower and the guaranteed lender, subject to approval by the Secretary.

(d) For purposes of this section, the DOT may determine the ''yield on United States Treasury securities'' by reference to the published rate for State and Local Government Series (''SLGS'') securities, adjusted as appropriate to reflect the market yield of publicly traded United States Treasury securities.

(e) Consistent with Section V, Paragraph 4, of OMB Circular A–129, and 31 U.S.C. 3717, the DOT will include in the credit agreement a provision imposing a default interest rate.

§ 80.19 Guaranteed loans; eligibility requirements for guaranteed lenders.

(a) Terms of a guaranteed loan must be approved by the Secretary.

(b) To participate in this program, a guaranteed lender must be approved by the Secretary and must:

(1) Not be debarred or suspended from participation in any Federal program;

(2) Not be delinquent on any Federal debt or loan;

(3) Be duly organized and legally authorized to enter into the transaction;

(4) Demonstrate experience in originating and servicing loans for large-scale developments; and

(5) Have sufficient capital to originate the loan and disburse its own portfolio.

(c) The Secretary will periodically review lender eligibility, consistent with Federal credit policies under OMB Circular A–129.

§ 80.21 Draws on line of credit.

(a) Use of proceeds. A borrower may draw on a line of credit to pay debt service on project obligations, extraordinary repair and replacement costs, operation and maintenance expenses, and costs associated with unexpected Federal or State environmental restrictions imposed after credit agreement closing; provided, however, that when the line of credit is drawn to pay debt service, it may be applied only to debt service on project obligations which were used to finance eligible project costs.

(b) Eligibility to draw. A draw on the line of credit may be made only if net revenues from the project are insufficient to pay the costs specified in the preceding paragraph. With respect to any shortfall in the sufficiency of net revenues to pay debt service, a draw on the line of credit may be made only after application of any funds in a capitalized interest account. The borrower may draw on the line of credit before drawing on a debt service reserve fund. A draw on the line of credit may not be made to replenish a debt service reserve fund.

§ 80.23 Refinancing.

(a) Proceeds of a secured loan provided under 23 U.S.C. 603 may be used to refinance interim construction financing of eligible project costs, provided that such refinancing is completed not later than one year after substantial completion. Otherwise secured loans used for this purpose are generally made available under the same provisions as loans under 23 U.S.C. 603(a)(1)(A).

(b) Except for the purpose described in section (a) above, proceeds of a secured loan provided under section 603 of Title 23, United States Code may not be used to refinance long-term project obligations or Federal credit instruments.

(c) Proceeds of a loan provided by a guaranteed lender receiving a TIFIA loan guarantee may be used to refinance long-term project obligations or Federal credit instruments if the project applicant demonstrates to the DOT's satisfaction that such refinancing will provide at least $50 million of additional funding capacity and that such capacity will be used to fund the completion, enhancement, or expansion of a project that:

(1) Is selected under section 602 of Title 23, United States Code, or

(2) Otherwise meets the requirements of section 602 of Title 23, United States Code.

(d) The fee for a refinancing application is the same as the fee for a new TIFIA project application.

(e) The following special provisions, terms, and limitations are applicable to the Federal loan guarantee for a refinancing made available under 23 U.S.C. 603(a)(1)(C):

(1) The borrower will have the flexibility to apply the guaranteed loan proceeds to the refinancing, the new project, or apportion an amount to each element of the transaction. It is not required that the guaranteed loan proceeds be used to build the new project. However, Federal requirements (see § 80.5) will apply to the new project.

(2) The loan guarantee made available in connection with a refinancing under this paragraph will be in an amount not larger than the greater of:

(i) The amount applied to funding the completion, enhancement, or expansion of the project; and

(ii) The amount of equity invested in the project, provided that in no event will the amount of the secured loan exceed 33 percent of the amount of the financing.

(3) Returns and payouts on equity investments in a financing transaction under this paragraph must be subordinated to the Federal credit instrument for so long as the TIFIA debt is outstanding, consistent with OMB Circular A–129 requirements that business borrowers have equity at risk. (Appendix A, section II, 3a. (2)).

(4) If the guaranteed loan proceeds are disbursed to fund both the refinancing of the long-term obligations and the completion, enhancement, or expansion of the project, the following provisions apply to the repayment:

(i) The guaranteed loan will be structured in two tranches. The first tranche will be that portion funding the refinancing of the long-term obligations and the second tranche will be that portion funding the project.

(ii) Repayments of principal or interest on the first tranche shall be scheduled to commence six months following the first disbursement of funds and to conclude, with full repayment of principal and interest, by the date that is the lesser of not later than 35 years after the date the credit agreement is executed, or the remaining useful life of the asset.

(iii) Repayments of principal or interest on the second tranche shall be scheduled based on project cash flow and shall commence not later than five years after substantial completion of the capital improvement. The final maturity of the tranche shall be the lesser of no later than 35 years after substantial completion of the project, or the remaining useful life of the asset.

(5) For improvements financed with guaranteed loan proceeds under this section, terms and conditions will be incorporated into the guaranteed loan agreement to ensure that the completion, enhancement, or expansion of the refinanced facility will commence and be completed within a reasonable period after the closing of the transaction. The DOT will require a binding commitment assuring the project will be completed and shall require a penalty interest rate on the guaranteed loan in the event of a development default.

(6) An applicant seeking a TIFIA loan guarantee under this section must submit an application that addresses the proposed refinancing and the improvement(s) facilitated by the refinancing using the TIFIA application form contained in the DOT's TIFIA Program Guide, describing in detail the plan of finance associated with the refinancing, and demonstrate conformance with TIFIA requirements, and how the refinancing will increase the funding capacity and enable the completion, enhancement, or expansion of the facility.

(7) The improvement being financed with proceeds of a guaranteed loan must adhere to the requirements in § 80.5.

§ 80.25 Limitations on Federal credit assistance.

(a) The total dollar amount of Federal credit assistance offered to a project in the form of Federal credit instruments will not exceed the lesser of:

(1) 33 percent of the reasonably anticipated eligible project costs, as measured on an aggregate cash (year-of-expenditure) basis; or

(2) If the Federal credit instrument does not receive an investment-grade rating, the amount of project obligations senior to the Federal credit instrument.

(b) The costs used to calculate eligible project costs may not include:

(1) Costs incurred more than three years prior to the submission of an application for a Federal credit instrument unless exceptional circumstances exist, and inclusion of such costs is approved by the Secretary.

(2) Costs incurred prior to submission of an application for a Federal credit instrument that are in excess of 20 percent of total eligible project costs.

(3) Operating costs incurred prior to substantial completion of the project by a special purpose entity formed solely to construct and operate the facility that are in excess of 5 percent of total eligible project costs.

(c) To be considered eligible project costs, payments to a public entity associated with the lease acquisition or concession fee must reflect fair market value and be dedicated to transportation projects eligible under title 23 or chapter 53 of title 49, United States Code. Further, the eligibility of such payments is limited to 25 percent of total eligible project costs. The final amount of eligible project costs associated with such payments is subject to the approval of the Secretary.

(d) Any loan made in connection with a credit agreement, whether a secured loan, a guaranteed loan, or a loan made by drawing on a line of credit, will be funded on a reimbursement basis, at such intervals as specified in the credit agreement. In the case of a secured loan or a guaranteed loan, the credit agreement will include the anticipated schedule for such loan disbursements, which schedule the parties may amend from time to time.

§ 80.27 Credit agreement closing and obligation of funds.

(a) Closing conditions. The DOT will enter into a credit agreement only when the project to receive Federal credit assistance meets the following requirements:

(1) The project or project elements, as appropriate, comply with applicable planning and programming requirements in 23 U.S.C. 134 and 135;

(2) The project has received an environmental Categorical Exclusion, Finding of No Significant Impact, or Record of Decision;

(3) The requirements of 49 CFR 80.11 with respect to the investment-grade rating must have been satisfied; and

(4) The project, if eligible pursuant to Section 5302 of 49 U.S.C., Chapter 53, has complied with 49 U.S.C. 5333(b) as evidenced by a letter from the U.S. Department of Labor.

(b) Obligation of Federal funds. The DOT will obligate the subsidy amount at the time it executes the credit agreement.

§ 80.29 Reporting requirements and credit monitoring.

(a) Credit rating maintenance. Throughout the life of the Federal 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 Federal credit instrument. The current credit evaluations must be performed by a rating agency. In the case of an unpublished rating, the credit evaluation must consist of a formal credit rating letter.

(b) Annual financial plan. Each recipient of Federal credit assistance must submit an annual financial plan, elements of which may be specified in the credit agreement, and audited financial statements to the DOT not later than 180 days following the recipient's fiscal year-end for each year during which the Federal credit instrument remains outstanding. The annual financial plan must include a current credit evaluation, as described in the preceding paragraph 80.29(a).

(c) The borrower will furnish the DOT with:

(1) Any information it submits to any rating agency; and

(2) Any report of which the borrower has knowledge relating to the project credit, whether prepared by a rating agency or other institution and irrespective of whether prepared at the direction of the borrower or otherwise.

(d) Periodic audits. The DOT may periodically conduct, so long as a Federal credit instrument is outstanding, such financial and compliance audits as it deems necessary. Such audits will be at the borrower's expense.

(e) Additional reporting requirements. The DOT may require additional reporting requirements in the credit agreement which it deems necessary to enable it properly to monitor the credit performance of the project.

§ 80.31 Fees.

Section 603(b)(7) and section 604(b)(9) of Title 23, United States Code, and Appendix A, Part II, Section 3b of OMB Circular A–129 authorize the Secretary to establish fees at a level sufficient to recover all or a portion of the cost of making credit assistance available under the TIFIA program. The following fees are not considered eligible project costs for the purpose of calculating the maximum amount of credit assistance.

(a) Application fee. An applicant must remit with its application for Federal credit assistance a non-refundable application fee. The amount of the application fee will be posted on the TIFIA Web site. The DOT may change the application fee from time to time by notice published in the **Federal Register**.

(b) Subsidy fee. If, in any given year, there is insufficient budget authority to fund the credit instrument for a qualified project that has been selected to receive assistance under TIFIA, the DOT and the approved applicant may agree upon a supplemental fee to be paid by or on behalf of the approved applicant at the time of execution of the credit agreement to reduce the subsidy cost of that project. No such fee may be included among eligible project costs for the purpose of calculating the maximum 33 percent credit amount referenced in § 80.25(a).

(c) Transaction fee. The DOT will assess each borrower a transaction fee to reimburse the DOT for its actual costs incurred in evaluating the application and processing the transaction, which transaction fee the borrower must pay not later than thirty days after closing. In the event a transaction does not result in a credit agreement closing, the approved applicant must pay the transaction fee not later than 30 days after notifying the DOT that it will no longer seek credit assistance, or if the approved applicant fails to give the DOT such notice, the Secretary establishes by objective evidence that the approved applicant is no longer seeking credit assistance and so notifies the approved applicant, not later than 30 days after such notification.

(d) Servicing fee. The DOT will assess each borrower a servicing fee for each Federal credit instrument to reimburse the DOT for the costs of servicing Federal credit instruments. The amount of the servicing fee will be posted on the TIFIA Web site. The DOT may change the servicing fee from time to time by notice published in the **Federal Register**.

(e) Monitoring fee. The DOT will include in each credit agreement terms and conditions obligating the borrower to reimburse the DOT for costs incurred in connection with monitoring the credit performance of a project, the enforcement of credit agreement provisions, amendments to the credit agreement and related documents, and other performance-related activities.

§ 80.33 Use of administrative offset.

(a) The DOT will not apply an administrative offset to recover any losses to the Federal Government resulting from project risk the DOT has assumed under a Federal credit instrument.

(b) The DOT will employ an administrative offset to recover fees assessed under 49 CFR 80.31 and also in cases of fraud, misrepresentation, false claims, or similar criminal acts or acts of malfeasance or wrongdoing.

§ 80.35 Program Guide; TIFIA Web site.

(a) Program Guide. The DOT will from time to time publish updates to a TIFIA Program Guide, which will include updated information, a loan template, and may reflect modifications to the application process to provide more flexibility to project sponsors who are advancing projects as private concessions. Reference should be made to the Program Guide for additional information about the TIFIA program.

(b) Web site. The DOT maintains a Web site for the TIFIA program: *http://tifia.fhwa.dot.gov.* The DOT will post on the TIFIA Web site:

(1) Amounts of application fee and monitoring fee assessed under 49 CFR 80.31;

(2) Promptly after execution, each term sheet, and;

(3) Promptly after closing of each credit agreement, the credit agreement for such transaction to the extent that the credit agreement does not contain confidential commercial information.

(c) Additional information. Additional DOT records related to the TIFIA program may be requested through a Freedom of Information Act request pursuant to 49 CFR Part 7.

§ 80.37 Applicant Information Requirements.

An applicant must obtain a Data Universal Number System (DUNS) number and register on the Central Contractor Registration (CCR) site. These requirements apply to all recipients of Federal assistance, including entities receiving credit assistance. If an applicant does not have a DUNS number, it can be obtained free of charge through the Dun & Bradstreet (D&B) online Web process at *http://fedgov.dnb.com/webform*. Information on CCR's on-line registration can be found at *http://www.ccr.gov.* Additional information on these requirements can be found at *http://www.grants.gov/applicants/register_your_organization.jsp*.

CHAPTER II—FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 261—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION PROJECTS

3. Revise the authority citation for part 261 to read as follows:

Authority: secs. 1501, *et seq.*, Pub. L. 105–178, 112 Stat. 107, 241, as amended; sec. 1601, 1602, Pub. L. 109–59, 119 Stat.1144; 23 U.S.C. 601–609 and 315; 49 CFR 1.49.

CHAPTER VI—FEDERAL TRANSIT ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 640—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION PROJECTS

4. Revise the authority for Part 640 to read as follows:

Authority: secs. 1501, *et seq.*, Pub. L. 105–178, 112 Stat. 107, 241, as amended; sec. 1601, 1602, Pub. L. 109–59, 119 Stat.1144; 23 U.S.C. 601–609 and 315; 49 CFR 1.51.

5. Add 49 CFR Chapter XIII to read as follows:

CHAPTER XIII—MARITIME ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 1700—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION PROJECTS

Authority: secs. 1501, *et seq.*, Pub. L. 105–178, 112 Stat. 107, 241, as amended; sec. 1601, 1602, Pub. L. 109–59, 119 Stat. 1144; 23 U.S.C. 601–609 and 315; 49 CFR 1.66.

§ 1700.1 Cross-reference to credit assistance.

The regulations in 49 CFR Part 80 shall be followed in complying with the requirements of this part. Title 49, CFR Part 80 implements the Transportation Infrastructure Finance and Innovation Act of 1998, secs. 1501, *et seq.*, (Pub. L. 105–178, 112 Stat. 107, 241), as amended; sec. 1601, 1602, Pub. L. 109–59, 119 Stat. 1144; 23 U.S.C. 601–609.

[FR Doc. E9–1117 Filed 1–16–09; 8:45 am]
BILLING CODE 4910–62–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–150670–07]

RIN 1545–BH49

Guidance Regarding the Treatment of Stock of a Controlled Corporation Under Section 355(a)(3)(B); Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document contains a correction to a notice of proposed rulemaking by cross-reference to temporary regulations (REG–150670–07) that was published in the **Federal Register** on Monday, December 15, 2008 (73 FR 75979) giving guidance regarding the distribution of stock of a controlled corporation acquired in a transaction described in section 355(a)(3)(B) of the Internal Revenue Code. This action is necessary in light of amendments to section 355(b). The text of those regulations also serves as the text of these proposed regulations. These regulations will affect corporations and their shareholders.

FOR FURTHER INFORMATION CONTACT: Russell P. Subin, (202) 622–7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The correction notice that is the subject of this document is under section 355 of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking by cross-reference to temporary regulations (REG–150670–07) contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the notice of proposed rulemaking by cross-reference to temporary regulations (REG–150670–07), which was the subject of FR Doc. E8–29545, is corrected as follows:

On page 75980, column 2, under the CFR part heading ''PART 1—INCOME TAXES'', line 2 of the authority citation, the language ''Section 1.355–2(g) also issued under 26'' is corrected to read ''Section 1.355–2(g) and (i) also issued under 26''.

LaNita Van Dyke,
Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E9–1104 Filed 1–16–09; 8:45 am]
BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–149519–03]

RIN 1545–BC63

Section 707 Regarding Disguised Sales, Generally

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: This document withdraws proposed regulations relating to the treatment of transactions between a partnership and its partners as disguised sales of partnership interests between the partners under section 707(a)(2)(B) of the Internal Revenue Code. The withdrawal affects partnerships and their partners.

FOR FURTHER INFORMATION CONTACT: Deane M. Burke or Allison R. Carmody, (202) 622–3070 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 707(a)(2)(B) provides that, under regulations prescribed by the Secretary, if transfers of property between a partner or partners and a partnership, when viewed together, are properly characterized as a sale or exchange of property, such transfers shall be treated as either transactions between the partnership and one who is not a partner or between two or more partners acting other than in their capacity as partners. The legislative history of section 707(a)(2)(B) indicates the provision was adopted as a result of Congressional concern that taxpayers were deferring or avoiding tax on sales of partnership property, including sales of partnership interests, by characterizing sales as contributions of property, including money, followed or preceded by related partnership distributions. *See* H.R. Rep. No. 861, 98th Cong. 2nd Sess. 861 (1984), 1984–3 (Vol. 2) CB 115. Specifically, Congress was concerned about court decisions that allowed tax-free treatment in cases that were economically