

MANUAL FOR USING PUBLIC-PRIVATE PARTNERSHIPS ON HIGHWAY PROJECTS



Message From the Federal Highway Administrator

I am pleased to present the Federal Highway Administration's Public-Private Partnership Manual. This Manual compiles the innovative techniques that have been developed to make it easier for the private sector to enter into a partnership with the public sector to build roads.



Our current system for meeting highway transportation needs is clearly suffering under the burgeoning demands placed on our transportation system. Rising levels of congestion are eroding the ability of our highways to efficiently move people and goods. This adversely affects our economy and degrades our quality of life.

With traditional methods falling short, we must find new ways to meet the complex challenges we face in delivering transportation improvements. Solutions to these challenges will necessarily include more than what the public sector can or should bear on its own. We believe Public-Private Partnerships offer the key to meeting these challenges.

More and more States are beginning to discover the benefits of partnering with private sector firms to deliver transportation facilities. The private sector often has expertise that is not readily available in the public sector, and can bring innovation, and efficiency to many types of projects. Public-Private Partnerships often provide greater flexibility in the design, construction, and maintenance of transportation facilities through the use of innovative financing, design, construction, and management techniques. As a result, these partnerships have the potential to reduce project costs and deliver higher quality transportation projects more quickly than with traditional financing and contracting methods.

Accordingly, we have been working with public and private partners to explore and implement an array of innovative techniques for financing new surface transportation projects as well as providing improvements to current facilities. We have taken steps to address impediments to the formation of Public-Private Partnerships. This manual incorporates that work and is designed to provide guidance on effective ways to meet Federal requirements pertaining to Public-Private Partnerships.

This manual is intended to provide a one-stop resource for States interested in pursuing Public-Private Partnerships and curious as to how Federal requirements apply. Although a summary document itself, it identifies links and references that will provide access to more detailed guidance for anyone interested in exploring a Public-Private Partnership. We hope you will find it to be a useful tool. Our commitment is to continue working with the transportation community, both public and private, to expand Public-Private Partnership opportunities to help meet the Nation's transportation investment needs.

Sincerely,
J. Richard Capka, Acting Federal Highway Administrator

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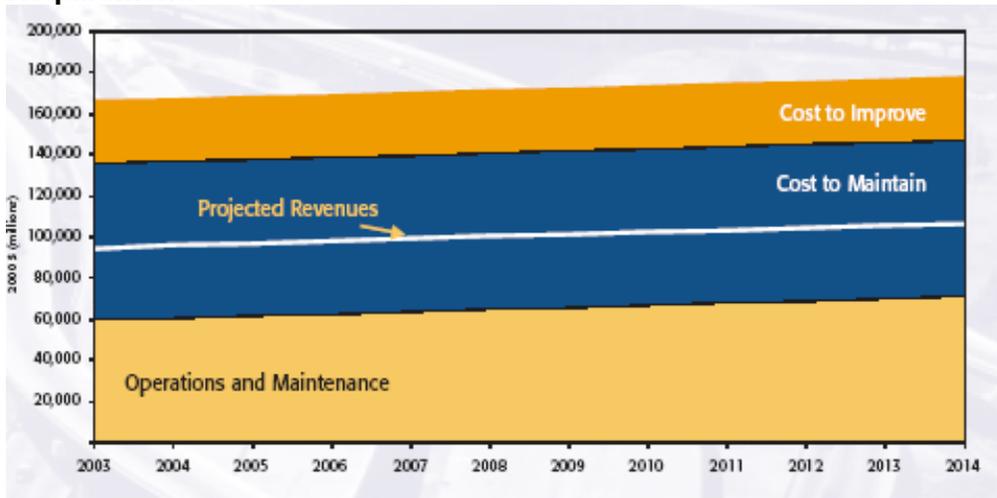
I. BACKGROUND

A. WHY ARE PUBLIC-PRIVATE PARTNERSHIPS IMPORTANT?

The transportation needs of our nation continue to outpace our ability to respond to them through traditional public means. Our infrastructure is aging—much of the Interstate System is over fifty years old. At the same time, congestion is increasing—according to one study, commuters spend 62 hours per year stuck in traffic, costing our economy over \$67 billion a year.¹ Our highway system is now operating beyond the capacity for which it was designed.

Despite the incontrovertible evidence of growing need, the funding available for highway and other transportation facilities has not risen at a corresponding rate. Projected Federal, State and local highway revenues are insufficient to meet estimates for future highway investment requirements. Investment requirements to cover operating and maintenance costs, and to make capital investments that would maintain current highway conditions and performance are 40 percent greater than projected revenues. See Figure 1.²

Figure 1 : Comparison of Projected Highway Revenue with Investment Requirements



Real highway revenues (adjusted for inflation) are declining relative to the growth in vehicle miles of travel (VMT). Both highway condition and performance are directly related to VMT. If past trends in revenues per VMT continue, State and local governments will fall further behind in highway conditions and performance.

To address this widening gap, we are going to need to find new ways to finance, construct, and operate highways. These new ways must focus on solving the problem of

¹ See generally, Texas Transportation Institute 2005 Urban Mobility Study, available at <http://mobility.tamu.edu/ums/>.

² From *Highway Finance and Public-Private Partnerships—New Approaches to Delivering Transportation Services*, January 2005, published by Federal Highway Administration, Publication Number FHWA-HOA-05-003, p. 5.

congestion on our current highway system, whether through the construction of new facilities or through more effective use of existing highways. Successfully managing congestion will reduce delays that cause our current system to be inefficient and, at times, to fail. Congestion management can reduce commute times, improving quality of life. It can increase the economic productivity of our highway system allowing goods and services to be delivered in less time and at less cost.

Public-Private Partnerships have the potential to play a significant role in providing a real solution to the problem of congestion. Public-Private Partnerships can provide additional sources of funding that may allow needed transportation projects to be built. They can save time and money through innovative ways to finance and construct highway projects. They can be a means to more efficiently allocate risks between the public sector and the private sector. They may also provide a way to more effectively price current and future highways so that the public uses the highway more efficiently.

B. WHY HAVE WE WRITTEN THIS MANUAL?

The Federal Highway Administration (FHWA) has devoted significant resources to exploring the role that Public-Private Partnerships can play in constructing, operating, and maintaining key components of our highway system. Having determined that Public-Private Partnerships can provide significant value, the FHWA has undertaken several initiatives to promote innovation in the financing and management of our highway systems. In addition, the FHWA has studied its regulations and policies to find ways to reduce impediments to the application of Federal requirements to Public-Private Partnerships.

This manual is written for States interested in exploring Public-Private Partnerships for highways. It is designed to help States think through opportunities presented by Public-Private Partnerships. This manual can be a single resource for identifying methods and answering questions regarding Public-Private Partnerships. It contains references to more detailed guidance that can aid in the creation of Public-Private Partnerships; however, it only focuses on the Federal issues related to Public-Private Partnerships.

C. WHAT HAS THE FHWA DONE TO FACILITATE PUBLIC-PRIVATE PARTNERSHIPS?

1. Workshops, Conferences, and Reports

In order to educate and discuss the benefits and challenges of Public-Private Partnerships, the FHWA has periodically held workshops to bring all partners—Federal, State, local, and private—together. Not only have these workshops helped to focus attention on Public-Private Partnerships, they also have presented an opportunity to discuss lessons-learned and to explore improvements that can be made to assist the formation and success of Public-Private Partnerships. For example:

- In November 1991, about one month prior to the enactment of the first post-Interstate highway act, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), the FHWA convened a policy workshop about Public-Private Partnerships. The purpose of the workshop was to focus attention on the broad range of issues and tradeoffs that may be associated with changes in public and private roles in the provision of transportation facilities and services. The workshop culminated in a 1992 Report, Exploring Key Issues in Public-Private Partnerships for Highway Development.
- In 2003 and 2004, the FHWA sponsored six workshops in Washington State, Minnesota, Texas, Florida, California, and North Carolina. A report summarizing discussions at all six workshops is on FHWA's Public-Private Partnership web page, www.fhwa.dot.gov/ppp.
- Annually, the FHWA co-sponsors with the American Road and Transportation Builders Association the Public-Private Ventures in Transportation Conference. The conference includes presentations of interest to Public-Private Partnerships, and, as part of the conference, the FHWA conducts a transportation finance workshop. Workshop materials can be found at: www.fhwa.dot.gov/ppp/events.htm.
- The FHWA also periodically sponsors a comprehensive Transportation Finance Conference with the Transportation Research Board. To date, three conferences have been held in 1997, 2000, and 2002. As part of these conferences, the FHWA holds pre-conference workshops on the state of the practice of transportation finance. Additionally, each year the FHWA conducts a transportation finance workshop during the annual meeting of the Transportation Research Board.³ Workshop materials can be found at: www.fhwa.dot.gov/ppp/events.htm.
- In October 2003, the FHWA formed a Public-Private Partnership Task Force, to explore ways the FHWA could address impediments to the formation of Public-Private Partnerships and actions the FHWA should take to encourage their formation. The Task Force consists of the Assistant Secretary for Transportation Policy and representatives from the FHWA policy and program offices, and it has explored opportunities to assist States interested in developing the use of Public-Private Partnerships to meet growing demands for highway infrastructure. Task Force initiatives include the creation of Special Experimental Program No. 15 "SEP-15"⁴ to encourage the use of Public-Private Partnerships on Federal-aid highway transportation projects; a Web site for those interested in using Public-

³ The report from the 2002 conference is available at the following URL: <http://gulliver.trb.org/conferences/2002FinancePapers.pdf>.

⁴ The notice announcing SEP-15, "The New Special Experimental Project (SEP-15) To Explore Alternative and Innovative Approaches to the Overall Project Development Process" was published in the Federal Register on October 6, 2004, at 69 FR 59983.

Private Partnerships to procure Federal-aid construction projects that can be found at: <http://www.fhwa.dot.gov/ppp>; and the Report to Congress on the challenges to the formation of Public-Private Partnerships. The Task Force continues to explore ideas for improving the FHWA's support for Public-Private Partnerships and plans on developing several new products in the future.

- In June 2005, FHWA established a Public-Private Partnerships Program Manager position within the Office of the Administrator to oversee and coordinate the varied activities relating to Public-Private Partnerships, including policy development, technical assistance, research, capacity building and outreach.

2. Report to Congress

House Report 108-243, accompanying the FY 2004 Department of Transportation Appropriations Act, requested that the U.S. Department of Transportation (DOT) prepare a report identifying the impediments to the formation of large, capital-intensive highway and transit projects involving Public-Private Partnerships. The report is divided into five major sections: history of Public-Private Partnerships in highways and transit; value of Public-Private Partnerships; impediments in current law, regulations, and practice that discourage the formation of Public-Private Partnerships; recommendations from States, trade associations, private law firms, consultants, designers and contractors to remove those impediments; and DOT legislative proposals to facilitate Public-Private Partnerships. The report also contains case studies on completed and current projects. The report will be a valuable resource for those interested in using Public-Private Partnerships as an alternative method to the traditional procurement process. The report is available on the FHWA's Public-Private Partnership web site at www.fhwa.dot.gov/ppp.

3. Public-Private Partnership Research

The FHWA has several research projects related to Public-Private Partnerships underway or planned. In addition to the Public-Private Partnership workshops described above, research is underway to develop detailed case studies of current Public-Private Partnerships in the United States and abroad to develop model legislation and contract documents that could be used as the basis for establishing partnerships that meet the unique requirement of individual States and individual projects. The case study report will:

- Develop a series of detailed case studies of domestic Public-Private Partnerships and project overviews of international Public-Private Partnerships that characterize Public-Private Partnerships according to an accepted typology, describe their institutional challenges and how those challenges were addressed, and identify general strategies to overcome various types of impediments that may confront other Public-Private Partnerships.
- Synthesize and document the study findings in a guidebook for prospective participants in Public-Private Partnerships.

The model legislation research:

- Compares and contrasts State legislation pertaining to Public-Private Partnerships for highway programs and projects
- Compares and contrasts partnership agreements and key legal documents to allow potential partners to more readily identify opportunities and options for handling various partnership issues.

Future research will build on results of ongoing research, input from the Public-Private Partnership workshops, and other activities.

II. FINANCING

A. WHAT FINANCING METHODS ARE AVAILABLE FOR PUBLIC-PRIVATE PARTNERSHIPS?

Changes in the law and innovations in financing have created a wide array of financing options for highways that complement and enhance existing pay-as-you-go financing from fuel and other traditional highway user taxes. These techniques range from fairly modest strategies that permit States greater flexibility in satisfying the standard matching requirements for receipt of Federal funds to very ambitious credit enhancement strategies. These “innovative financing techniques” can be used to accomplish four things:

- Maximize the ability of States and other project sponsors to leverage Federal capital for needed investment in the nation’s transportation system;
- More effectively use existing funds;
- Move projects into construction more quickly than under traditional financing mechanisms; and
- Make possible major transportation investments that might not otherwise receive financing.

Many of these new techniques involve partnering with the private sector. This section identifies several new approaches to financing highways that may be applicable to Public-Private Partnerships, and explains the eligibility criteria, procedural requirements, and any other conditions to participating. It also identifies the advantages of each approach, and provides references to more detailed guidance.

1. **Transportation Infrastructure Finance and Innovation Act of 1998 – the TIFIA Credit Program**

The TIFIA Program provides Federal credit assistance to large-scale projects of regional or national significance that might otherwise be delayed or not constructed at all because of risk, complexity, or cost. There are three forms of credit assistance available - secured (direct) loans, loan guarantees, and standby lines of credit - for surface transportation projects of national or regional significance. These credit instruments may offer more flexible repayment terms and more favorable interest rates than would be available from other lenders. The fundamental goal of the TIFIA Credit Program is to leverage Federal funds by attracting substantial private and other non-Federal co-investment in critical improvements to the nation’s surface transportation system. In general, public or private entities seeking to finance, design, construct, own, or operate an eligible surface transportation project may receive TIFIA credit assistance.

Examples of TIFIA projects include:

- *Central Texas Turnpike (Austin, TX)*
- *Miami Intermodal Center (Miami, FL)*
- *State Route 125 South (San Diego, CA)*
- *Reno Transportation Access Corridor (ReTRAC) (Reno, NV)*

See <http://tifia.fhwa.dot.gov/>.

⇒ *How does TIFIA assistance leverage existing Federal funds?*

Credit assistance can provide an efficient means of utilizing scarce Federal budget authority. The cost to the Federal government of providing credit assistance is a function of the perceived risk of the loan. Congress has generally provided TIFIA budget authority amounting to five percent of the face amount of the credit assistance. Since the program's inception in 1999, TIFIA has provided more than \$3.6 billion in credit assistance to projects representing more than \$16 billion in infrastructure investment, at an initial cost to the Federal government of less than \$200 million.

⇒ *What are the benefits of TIFIA credit assistance?*

TIFIA credit assistance has many features that make it attractive to private investors:

- *Revenue leverage.* TIFIA can enhance funding available for a project by leveraging revenue streams that otherwise might be considered too risky to obtain needed capital market financing. This factor often benefits user-backed financings that involve start-up facilities with uncertain revenues expected to grow over time.
- *Senior Debt Enhancement.* The TIFIA credit on projects can be subordinated to those of senior lenders. With TIFIA holding a junior lien on part of the credit, the creditworthiness of the remaining senior-lien capital markets financing is enhanced. This credit structure can move a senior debt from a borderline rating to an investment grade rating.
- *Interest Cost Savings.* TIFIA's interest rate can result in cost savings compared to the likely rates on alternative financing instruments. For projects that must access the taxable debt markets, borrowing rates are typically well above the comparable U.S. Treasury yield. Because the DOT lends TIFIA funds at the U.S. Treasury's borrowing rate, with no premium for credit risk, it can provide an attractive interest cost. Even for projects able to access the tax-exempt municipal market, TIFIA direct loans may prove cost-effective.
- *Payment Flexibility.* TIFIA can significantly benefit the project financing through its flexible payment features. TIFIA provisions aim to facilitate financings backed by user charges by allowing debt service to be structured according to project cash flows. Often this entails deferral of interest not only during construction but also during the project's ramp-up of operations, which private investors may be hesitant to accept. In addition, the TIFIA program allows borrowers to prepay at any time without penalty. This same flexibility, through the municipal bond market, could add as much as ½ percent to the borrowing cost, depending on market conditions.
- *Project Acceleration.* TIFIA can expedite the financing and accelerate the public benefits flowing from a completed facility. This factor essentially reflects the cumulative effects of the other factors. In some cases, TIFIA assistance is viewed as essential in advancing the project in its current form. In others, while the project likely would have been financed eventually, TIFIA assistance helps advance the project more quickly and at a lower cost.

- *Long Terms of Maturity.* The final maturity date of TIFIA credit can be as much as 35 years after the date of substantial completion of the project.

The advantages and characteristics of each type of TIFIA program are summarized in Figure 2 below:

Figure 2:

Characteristics of TIFIA Credit Instruments

Characteristics	Direct Loan	Loan Guarantee	Line of Credit
<i>Use of Proceeds</i>	To finance eligible project costs, or To refinance interim construction financing of eligible costs (no later than one year after substantial completion).	To finance eligible project costs, or To refinance interim construction financing of eligible costs (no later than one year after substantial completion).	To pay debt service on obligations (but not the TIFIA credit instrument) issued to finance eligible project costs, extraordinary repair and replacement costs, operating and maintenance expenses, and/or costs due to unexpected environmental restrictions. Available only after substantial completion.
<i>Interest Rate</i>	Equal to or greater than the yield on marketable U.S. Treasury securities of comparable maturity on date of execution of credit agreement.	Negotiated between the guaranteed lender and the borrower, subject to consent from the DOT. Interest payments on a guaranteed loan are subject to Federal income taxation.	Interest rate on a direct loan resulting from a draw on a line of credit will be equal to or greater than the yield on a 30-year marketable U.S. Treasury security on the date the line of credit is obligated.
<i>Disbursements</i>	As frequently as monthly, as costs are incurred for eligible project purposes.	In event of borrower default, guaranteed lender receives payment from the DOT for guaranteed payment due. DOT's payment then becomes a direct TIFIA loan to the borrower.	A draw may be made only if revenues are insufficient. A maximum of 20% of total principal amount of line of credit may be drawn in a single year. Available for 10 years after substantial completion.
<i>Repayments</i>	Based on cash flow forecasts, but must commence no later than five years after date of substantial completion of project.	Based on cash flow forecasts, but must commence no later than five years after date of substantial completion of project.	Based on cash flow forecasts, but must commence no later than five years after the end of the 10-year period of availability.
<i>Deferrals</i>	When revenues are insufficient to meet scheduled TIFIA loan payments within 10 years after substantial completion, DOT may allow payment deferrals.	When revenues are insufficient to meet scheduled TIFIA loan payments within 10 years after substantial completion, DOT may allow payment deferrals.	Not addressed in TIFIA statute.
<i>Prepayment</i>	May be prepaid in whole or in	Negotiated between lender and	May be prepaid in whole or in

Characteristics	Direct Loan	Loan Guarantee	Line of Credit
<i>Conditions</i>	part at any time without penalty.	borrower.	part at any time without penalty.

See *TIFIA Report to Congress*, Chapter 4, June 2002, for a more extensive discussion of the benefits of the TIFIA program, available at <http://tifa.fhwa.dot.gov/>.

⇒ ***What projects and what costs are eligible for TIFIA assistance?***

Highway, transit, passenger rail, and intermodal projects may receive credit assistance through the TIFIA program. Eligible highway facilities include interstates, State highways, bridges, toll roads, and any other type of facility eligible for grant assistance under title 23, the highways title of the U.S. Code (23 U.S.C.). Eligible transit projects include the design and construction of stations, track, and other transit-related infrastructure, purchase of transit vehicles, and any other type of project that is eligible for grant assistance under the transit title, chapter 53 of 49 U.S.C. Additionally, intercity bus vehicles and facilities are eligible to receive TIFIA assistance. Rail projects involving the design and construction of intercity passenger rail facilities or the procurement of intercity passenger rail vehicles are eligible for TIFIA assistance. Publicly owned intermodal facilities on or adjacent to the National Highway System are also eligible for TIFIA assistance, as are projects that provide ground access to airports or seaports. Finally, surface transportation projects principally involving the installation of intelligent transportation systems are eligible for TIFIA assistance.

Eligible project costs are those expenses associated with the following:

- development phase activities, including planning, feasibility analysis, revenue forecasting, environmental review, permitting, preliminary engineering and design work, and other pre-construction activities;
- construction, reconstruction, rehabilitation, replacement, and acquisition of real property (including land related to the project and improvements to land), environmental mitigation, construction contingencies, and acquisition of equipment; and
- capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction.

Any deferrals of interest during the construction period may not be included as an eligible project cost. Likewise, if TIFIA credit assistance is provided for a project financing, capitalized interest may not be included as an eligible project cost.

⇒ ***What are the major conditions for TIFIA assistance?***

The major requirements for TIFIA program include:

- *Application Submission.* Each project sponsor must submit a project application. (An application package is included in DOT's *TIFIA Program Guide*, available at <http://tifia.fhwa.dot.gov>.)
- *Total Eligible Costs.* The project's eligible costs must be reasonably anticipated to total at least \$50 million, or, alternatively, at least one-third of the State's Federal-aid highway apportionments for the most recently completed fiscal year, whichever is less. For projects that principally involve Intelligent Transportation Systems (ITS), eligible project costs must be reasonably anticipated to total at least \$15 million.
- *Transportation Planning Process.* In metropolitan areas, the project must be reflected in the financial plan that accompanies the Metropolitan Planning Organization's (MPO) long-range transportation plan and Transportation Improvement Program (TIP). In addition, the project must be included in the approved Statewide Transportation Improvement Program (STIP).
- *Dedicated Revenue Sources.* Project financing must be repayable, in whole or in part, from "tolls, user fees and other dedicated revenue sources." Federal policy precludes a pledge of Federal funds as repayment for a TIFIA credit instrument.
- *Credit Rating:* Projects selected for TIFIA assistance must receive an investment grade rating BBB from Standard & Poor's, Fitch Ratings or Dominion Bond Rating Service, or Baa3 from Moody's on their senior debt obligations.
- *Amount of TIFIA Credit Assistance:* The principal amount of TIFIA credit assistance, in any combination of the instruments above, cannot exceed 33 percent of the reasonably anticipated eligible project costs.
- *Nonsubordination of Lien in Event of Bankruptcy.* Although the TIFIA claim on project revenues can be subordinated to those of senior lenders, it cannot be subordinated in the event of bankruptcy, insolvency or liquidation of the obligor. In such an instance, the TIFIA lien would be on parity with senior creditors.

⇒ *What Federal requirements apply to TIFIA projects?*

Elements of a project receiving TIFIA credit assistance include complying with the requirements of Federal laws that apply to federally-assisted projects. These requirements are discussed more extensively in Section III of this Manual. Nonetheless, the application of Federal construction requirements under the Federal-aid Highway Act is limited to the specific activity or contract carried out with Federal funds. They do not apply to other parts of the project not financed with Federal funds. These construction requirements include:

- *Procurement.* Procedures related to procurement of engineering, design and construction services, and the purchase of materials.
- *Construction.* Labor and employment rules apply to all workers involved in constructing a Federal-aid project.

Other Federal requirements outside of the Federal-aid Highway Act, such as Federal environmental laws, the Uniform Relocation Assistance and Real Property Acquisition Policies Act, and Federal non-discrimination laws still apply to the entire project.

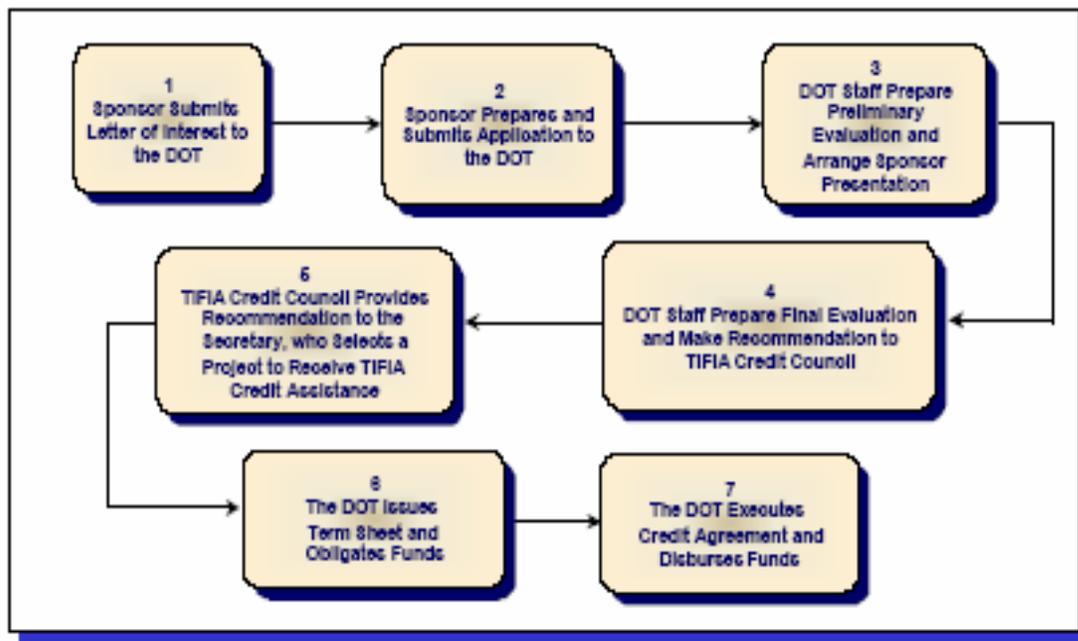
However, if a project sponsor wishes to advance specific contracts without following Federal requirements, then the costs associated with the particular contracts may not be taken into account in meeting the TIFIA cost threshold, and such costs would be treated as TIFIA ineligible costs. Further, such costs would not be eligible for reimbursement with TIFIA funds. The application of Federal construction requirements on a contract basis may serve to foster Public-Private Partnership initiatives that combine TIFIA assistance with capital markets financing, one of the goals that Congress established for the TIFIA program.

⇒ How does a project sponsor apply for TIFIA assistance?

Each project sponsor must apply to the U.S. DOT first by submitting a Letter of Interest, and then completing a TIFIA application form. Application forms can be obtained at <http://tifa.fhwa.dot.gov>. U.S. DOT will evaluate the project based on selection criteria (see Chapter 5 of the *TIFIA Program Guide* for more information on the selection criteria). The TIFIA office encourages potential project sponsors to contact the office directly for informal discussions prior to submitting a Letter of Interest.

If selected, appropriate contractual documents will be prepared and executed to establish the TIFIA credit and to disburse funds. See Figure 3 below describing the process for applying for TIFIA assistance. The TIFIA Program Guide is available at <http://tifa.fhwa.dot.gov/pguide.htm>.

Figure 3: Process for TIFIA Application



More information on the TIFIA program can be found in the *TIFIA Report to Congress*, June 2002, at <http://tifa.fhwa.dot.gov>, and in Chapter 2 of the *U.S. DOT Report to*

2. Section 129(a) Loans

Traditionally, Federal-aid highway funds were provided as grants to reimburse costs for eligible highway projects. Section 129(a)⁵ allows States to loan some of its Federal-aid funds to pay for projects with dedicated revenue streams. A State may directly lend apportioned Federal-aid funding to projects generating a toll or that have some other dedicated revenue such as excise taxes, sales taxes, property taxes, motor vehicle taxes and other beneficiary fees. The State must receive a pledge from the project sponsor to use those revenues to repay the loans.

⇒ *How do Section 129(a) loans enhance existing Federal funding?*

Section 129(a) loans provide States with a means to recycle Federal-aid highway funds by lending them out, obtaining repayments from project revenues, and then reusing the repaid funds on other highway projects. This gives States the opportunity to get more mileage out of the annual apportionments.

⇒ *What are the benefits of Section 129(a) loans?*

Private investors find Section 129(a) loans attractive for several reasons.

- The loans can be used to offset up-front capital requirements that might otherwise have to be borrowed in the open market at higher rates.
- Section 129(a) loans can be subordinate to other debt so that other investors in the project, such as bondholders, can have a first or senior lien on project revenues. This allows the State to absorb a share of the risk that revenues will fall short of debt service requirements. The amount of senior debt remaining is now smaller, and therefore less risky, so it is more likely to obtain an investment grade rating and, as a consequence of the higher rating, a lower interest rate.

⇒ *What are the requirements for Section 129(a) loans?*

Any Federal-aid highway project is a potential candidate for a Section 129(a) loan, so long as the project sponsor pledges revenues from a dedicated source for repayment of the loan. Loans can be in any amount, up to 80 percent of the project cost, provided that a State has sufficient obligation authority to fund the loan.

A \$135 million Section 129(a) loan provided Texas with the bonding capacity needed to pay for the \$940 million President George Bush Turnpike Project and greatly enhanced the creditworthiness of \$446 million in revenue bonds issued for the first four segments of the project.

⁵ The provision of law allowing these types of leases is codified at Section 129(a)(7) of Title 23, United States Code.

Proceeds from Section 129(a) loans can fund the costs of engineering, right-of-way acquisition, and physical construction. However, only those costs incurred after the date FHWA authorizes the loan may be funded by the loan; no costs incurred prior to the loan authorization can be reimbursed.

The following are the major requirements for Section 129(a) loans:

- *Revenues from a Dedicated Source.* The project sponsor must pledge revenue from a dedicated source to repayment of the loan.
- *Loan Amount.* The loan can be up to 80 percent of the project cost, provided that a State has sufficient obligation authority to fund the loan.
- *Commencement of Repayment.* Borrowers must begin to repay Section 129(a) loans within five years after the project opened to traffic or was otherwise completed.
- *Completion of Repayment.* The loan must be wholly repaid within 30 years from the date Federal funds are authorized for the loan.
- *Interest Rates.* States have discretion to set interest rates, so long as the rates are at or below market rates and improve the financial feasibility of the project receiving the loan.
- *Compliance with Federal Requirements.* All projects receiving Section 129(a) loans must comply with all Federal regulations that attach to any other Federal-aid highway project. There is one exception to this rule: if the Section 129(a) loan represents the only Federal participation in the project, it is acceptable for the project sponsor to select consultants and contractors consistent with State law; the Brooks Act and Title 23 competition bidding procures do not apply in this instance.

⇒ ***How can repayments of Section 129(a) loans be used?***

States may use loan repayments to fund (1) any project eligible for funding under Title 23; (2) credit enhancement in the form of bond insurance purchases or as a capital reserve for project debt. These credit enhancement opportunities can improve project sponsors' access to the credit markets or to lower interest rates specifically for projects eligible for funding under Title 23. No Federal requirements attach to projects advanced with loan repayments. This means that, once the Federal funds cycle through the first loan, they no longer retain Federal character and may be used without complying with Federal requirements and laws that attach to Federal-aid highway projects.

For more information on Section 129(a) loans, see Chapter 4 of the *Innovative Finance Primer*, available at <http://www.fhwa.dot.gov/innovativefinance/ifp/credass.htm>, and Chapter 2 of the U.S. DOT Report to Congress on Public-Private Partnerships, at <http://www.fhwa.dot.gov/reports/pppdec2004/index.htm#2cv1>.

3. GARVEE Bonds

A Grant Anticipation Revenue Vehicle or GARVEE is a debt financing instrument where debt service and related financing costs can be reimbursed by Federal-aid highway funds. GARVEEs can be issued by a State, a political subdivision of a State, or a public authority. States can receive Federal-aid reimbursements for a wide array of debt-related costs incurred in connection with an eligible debt financing instrument, such as a bond, note, certificate, mortgage, or lease. Reimbursable debt-related costs include interest payments, retirement of principal, and any other cost incidental to the sale of an eligible debt instrument.

Candidates for GARVEE financing are typically projects, or a program of projects, that are large enough to merit borrowing rather than pay-as-you-go grant funding, with the costs of delay outweighing the costs of financing. GARVEE candidates do not have access to another revenue stream, such as local taxes or tolls, and other forms of repayment are not feasible. The sponsors must be willing to reserve a portion of future Federal-aid highway funds to satisfy debt service requirements. States are finding GARVEEs to be an attractive financing mechanism to bridge funding gaps and accelerate construction of major corridor projects.

New Mexico sold its first GARVEE bond in September 1998, to finance 118 miles of improvements on Corridor 44.

Arizona is using GARVEEs, in combination with SIBs, to finance acceleration of the Maricopa Country freeway system.

See Innovative Finance Primer, Chapter 4, and U.S. DOT Report To Congress, Appendix E, for more information.

⇒ What are the benefits of GARVEE Bonds?

Although GARVEEs cannot be issued by private entities, they can facilitate the creation of Public-Private Partnerships by making financing available for transportation projects in a way that could attract greater private sector involvements. For example:

- They can provide an immediate and reliable source of funds that would make a project more attractive to the private sector.
- They can expand access to capital markets, as a supplement to general obligation or revenue bonds.
- They can make very large projects possible. Some transportation projects or programs of projects are so large that their costs exceed available current grant funding and tax receipts, or would consume so much of these current funding sources as to delay many other planned projects. GARVEEs yield an immediate influx of cash in the form of bond proceeds.
- They can enable construction to begin faster. GARVEE financing generates up-front capital for major highway projects at tax-exempt rates and enables a State to construct a project earlier than using traditional pay-as-you-go grant resources.

⇒ What projects and costs are eligible for GARVEE bonds?

Projects are eligible for GARVEE financing if they fall into one or more of the following program funding categories:

- National Highway System (NHS)
- Interstate Construction (IC)
- Interstate Maintenance (IM)
- Surface Transportation Program (STP)
- Congestion Mitigation and Air Quality (CMAQ) Improvement Program
- Bridge Replacement and Rehabilitation (BRR)
- State Planning and Research
- Metropolitan Planning

In metropolitan areas, the project must be reflected in the financial plan that accompanies the MPO's long-range transportation plan and TIP. In addition, the projects must be included in the approved STIP and applicable Metropolitan Transportation Improvement Program. States or the issuing entity must have the appropriate State authorizations related to debt issuance.

Costs eligible for reimbursement include the following:

- Interest payments and retirement of principal (including any capitalized interest) under an eligible debt financing instrument;
- Issuance costs (including but not limited to underwriters' discounts, rating agency fees, fees paid to financial advisors and bond counsel, and printing costs) and credit enhancement fees (such as bond insurance premiums); and
- Any other related incidental costs as determined by the Secretary (including ongoing trustee fee and audit costs).

Under certain conditions, capitalization from bond proceeds of a required reserve account or contingency fund may also be eligible for Federal-aid reimbursement.

For more information on GARVEE financing, see *GARVEE Bond Guidance*, <http://www.fhwa.dot.gov/innovativefinance/garguid1.htm>; *Innovative Finance Primer*, Chapter 3, at <http://www.fhwa.dot.gov/innovativefinance/ifp/debtfin.htm>, and *U.S. DOT Report to Congress*, Chapter 2 at <http://www.fhwa.dot.gov/reports/pppdec2004/index.htm#2civ>.

4. Flexible Matches

The Federal-Aid Highway Program statutorily requires recipients of Federal assistance to contribute toward the total cost of any given project.

In traditional Federal-aid financing, the State typically must provide matching State funds in order to receive Federal funds for a project. Historically, only cash contributed by State and local governments could satisfy the matching requirements.

The Federal –Aid Highway program requires a 10% match for certain projects on the Interstate highways, and a 20% State match for most other projects.

⇒ *What are the benefits of flexible matches?*

Provisions in recent Federal-aid highway laws⁶ introduced new flexibility to the matching requirements for the Federal-aid program. These provisions allow a wide variety of public and private contributions -- including cash, land, materials, and services -- to be counted toward the non-Federal match of Federal-aid projects. This flexible match provides a new opportunity for a private investor to participate in a highway project. As an example, a private entity may have an interest in seeing a project advance and might be willing to make a contribution toward the project's construction. This could help accelerate the project if the State does not have other funds readily available to provide a match.

⇒ *What types of contributions may be used as flexible matches?*

A broad range of contributions may be used as flexible matches under these provisions of law. Whether the contribution is eligible depends generally on the nature of the contribution (cash, materials, land, services or buildings and equipment) and the source of the contribution (private, local State, or Federal). Figure 4 outlines the types and sources of contributions that can be used as a flexible match.

Figure 4: Types and Sources of Flexible Matches

<i>Type of Donation</i>	<i>Source of Donation</i>	<i>Conditions</i>
Funds	Private, State or Local Government	<ul style="list-style-type: none"> • Funds must be received during the period between project approval and submittal of final voucher
Land (right-of-way)	Private, State, or Local Government	<ul style="list-style-type: none"> • Property must be appraised to determine fair market value • Value must be included in total project cost • Property may be donated anytime during the project development • Land must have been acquired in

⁶ The National Highway System Designation Act of 1995 [Public Law 104-59] and the Transportation Equity Act for the 21st Century [Public Law 105-178; 112 Stat. 107].

		<p>accordance with the Uniform Relocation and Real Property Acquisition Act</p> <ul style="list-style-type: none"> • Donation does not influence environmental assessment
Materials	Private or Local Government	<ul style="list-style-type: none"> •Materials must be appraised to determine fair market value
Services	Private or Local Government	<ul style="list-style-type: none"> •Grantee must document the market value of services
Services	State	<ul style="list-style-type: none"> •Publicly-contributed services count toward match for only Transportation Enhancement projects

Any Federal-aid project for which a non-Federal match is required may employ some form of flexible match, although the project sponsor (usually the State DOT) must first obtain approval from the FHWA Division Office. Any project employing flexible matches must comply with all provisions that apply to any other Federal-aid highway project.

For more information on flexible matches, see the *Innovative Finance Primer* at <http://www.fhwa.dot.gov/innovativefinance/ifp/innoman.htm>; the *Innovative Finance Brochure* at <http://www.fhwa.dot.gov/innovativefinance/brochure/manageme.htm>; and *U.S. DOT Report to Congress*, Chapter 2 at <http://www.fhwa.dot.gov/reports/pppdec2004/index.htm#2cii1>.

5. Toll Credits

Pursuant to a provision of law enacted in the Intermodal Surface Transportation Efficiency Act of 1991,⁷ States may apply toll revenues used for capital expenditures on highways to earn toll credits. These toll credits can then be used to satisfy the State's matching requirement for receipt of Federal-aid highway funding.

⇒ *What are the conditions for toll credits?*

Toll credits are earned when a public, quasi-public, or private agency uses toll revenues to fund a capital highway improvement to build, improve, or maintain a highway, bridge, or tunnel that serves interstate commerce. SAFETEA-LU revised 23 U.S.C. 120(j) to permit toll credits to be earned for any toll revenues that are generated and used by public, quasi-public, and private agencies to build, improve, or maintain highways,

⁷ Pub.L. 102-240, December 18, 1991.

bridges, or tunnels that serve the public purpose of interstate commerce. Previously, toll credits could only be earned from expenditures of toll revenues on projects that were completed entirely without Federal funds.

To qualify for the credit, the following criteria must be met:

- *Maintenance of Effort (MOE)*: The State's total non-Federal highway and transit transportation capital expenditures must equal or exceed the average of three prior years. This "maintenance of effort" test is required at the time the credit amount is established. Once a credit amount is appropriately established, this credit will remain available until used by the State.
- *Open to Public Travel*: The toll facility that generates the toll credits must be open to public travel. It may be operated by a public, quasi-public, or private toll authority.
- *Revenues Must Be Spent on Eligible Expenses*: The amount of credit earned is based on toll revenues that the toll authority subsequently spends on eligible expenses for public highway facilities (including bridges, tunnels, and certain ferry systems) that serve interstate commerce. Expenditures for routine maintenance (e.g., snow removal, mowing), debt service, or costs of collecting tolls cannot be included. All such expenditures must have been made entirely from non-Federal sources.
- *Source of Revenues*: The revenues may derive from toll receipts, concession sales, right-of-way leases, interest earnings, or bond or loan proceeds that are backed by these revenue streams. State grants are not considered to be revenues generated by the toll authority and cannot be used in calculating earned toll credits.

States may apply toll credits toward the non-Federal matching share of any Federal-aid highway project, except for emergency relief projects. Toll credits may also be applied toward the non-Federal matching share of transit projects eligible under Chapter 53 of Title 49. The State must establish a special account to track toll credits as they are earned and used.

For more information on toll credits, see the *Innovative Finance Primer* at <http://www.fhwa.dot.gov/innovativefinance/ifp/index.htm>, and *U.S. DOT Report to Congress*, Chapter 2, at <http://www.fhwa.dot.gov/reports/pppdec2004/index.htm#2cii2>.

B. MAY A FEDERAL-AID HIGHWAY BE SOLD OR LEASED TO A PRIVATE ENTITY?

Federal law allows a State to enter into a transaction to allow a private party to invest in and improve an already-existing federally funded highway. Such a transaction could either be a sale or a long-term lease of a Federal-aid highway facility to a private investor. The ability of the private investor to charge tolls would be governed by 23 U.S.C. 129 and other provisions of Federal law relating to tolling. The investor could also rely on other revenue streams to make the lease payments or to pay the debt service.

⇒ *What are the conditions for such a sale or lease?*

A lease or sale of a facility funded by Federal-aid highway funds must be made under the following conditions:

- *Fair Market Value.* The State must charge, at a minimum, fair market value for the sale, use, or lease renewal of real property (including land and any improvements thereto) that has been acquired for Federal assistance.
- *Toll Agreement.* If the facility will be operated as a toll facility, the State transportation department and other public authority with jurisdiction over the facility, if any, must execute a toll agreement with the FHWA. The law establishes a number of preconditions for the tolling of existing highways.
- *Continued Maintenance Responsibility.* The State must continue to be responsible for ensuring that the facility is properly maintained. This maintenance responsibility can be met through an agreement with a private entity, including the lease or purchase of the highway.
- *State Retains Adequate Interest in Property.* The State must continue to have adequate interests in the property that would permit it to construct, operate, and maintain the facility in the event the private entity was unable to. Such interests would be deemed to be adequate if the State retains the right and responsibility to construct, operate, and maintain the facility if the private entity becomes insolvent or otherwise neglects to properly construct, operate, and maintain the facility.

Real Property Devoted Exclusively to Public Highway Purposes. The State must continue to ensure that all real property, including air space, within the right-of-way boundaries is devoted exclusively to public highway purpose unless the Administrator approves a non-highway use. Such use will be approved only if the FHWA determines that the additional use, installation, facility, or encroachment is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic.

- *Specific Lease Provisions.* If the State is leasing real property (including land and any improvements thereto) that has been acquired with Federal assistance, the lease must include the following: a provision to ensure the safety and integrity of the federally funded facility; a provision governing lease revocation or reversion; a provision governing the removal of improvements at no cost to the FHWA; a provision to hold the State and the FHWA harmless; a provision concerning nondiscrimination; and provisions providing for access by the State and FHWA for inspection, maintenance, and reconstruction of the facility.
- *Design Standards and National Network Requirements.* The State must continue to ensure that the facility meets the applicable design standards and, if on the National Network, ensure that the facility continues to meet the National Network requirements.
- *Ensure Compliance with Federal Requirements.* The State must remain responsible for ensuring compliance with all applicable Federal requirements with respect to the facilities.

⇒ *How may the proceeds of the transaction be used?*

The proceeds from the transaction must be used in the following ways:

- *Proceeds from Sale or Lease:* If any of the real property (including land and any improvements thereto) for the project was acquired with Federal assistance, the State is required to use the Federal share of the net income from the sale or lease only for projects that would be eligible for assistance under Title 23, United States Code. The Federal share is defined as a percentage based on the amount of Federal funding used on the facility compared to the total funds spent on Title 23 eligible work on the facility at the time of the sale or lease. The non-Federal share is not subject to this restriction. 23 U.S.C. §156.
- *Toll Revenues:* Toll revenues from this transaction must first be used for debt service, to provide a reasonable return on investment to private parties, and for the necessary operation and maintenance of the facility. If the State certifies that the facility is being adequately maintained, any excess toll revenues may be used for any Title 23 eligible purpose. 23 U.S.C. §129.

III. FEDERAL LAW AND REGULATION

A. WHEN DO FEDERAL LAWS APPLY TO PUBLIC-PRIVATE PARTNERSHIPS?

Public-Private Partnerships that involve a Federal or federally-assisted project, are subject to Federal laws. However, in some circumstances, the Federal requirements for Public-Private Partnerships apply differently to projects with more significant private sector involvement or there is other flexibility in the law that can be used by a Public-Private Partnership. We have tried to identify these circumstances in this Manual. Further, we have undertaken a number of efforts that would streamline Federal requirements to eliminate duplication and delay and to make the process more reliable. These initiatives can help make participation in highway projects more attractive for the private sector.

B. WHAT FEDERAL LAWS APPLY?

Any Federal law that applies to a Federal or federally-assisted project would apply to Public-Private Partnerships. Major Federal-aid highway laws (U.S. Code Title 23) include:

- *Design.* Adherence to minimum design standards and specifications adopted by FHWA.⁸
- *Procurement.* Following prescribed policies and procedures related to procurement of engineering, design and construction services, and the purchase of materials (see 23 CFR Parts 172 and 635 for more information).
- *Construction.* Complying with labor and employment rules applying to all workers involved in constructing a Federal-aid project (see 23 CFR Part 633). In addition, all projects receiving TIFIA assistance must comply with all generally applicable Federal laws and regulations, including:
 - *Nondiscrimination.* The non-discrimination provisions of Title VI of the Civil Rights Act of 1964 and other Federal non-discrimination laws.
 - *Environment.* Evaluation of environmental impacts under the National Environmental Policy Act of 1969 (NEPA), as well as compliance with other Federal environmental laws such as the Clean Air Act, the Clean Water Act, and the Endangered Species Act.
 - *Acquisition and Relocation Assistance.* Property must be acquired consistent with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and provisions must be made for replacement dwellings and relocation advisory services.

⁸ For more information on design standards, see *A Policy on Geometric Design of Highways and Streets*, or the “*Green Book*,” published by the American Association of State Highway and Transportation Officials. Information on the *Green Book* and other design standards can be found at <http://www.fhwa.dot.gov/programadmin/standards.html>

Safety is the number one priority for the U.S. DOT, and it will be important for projects developed through Public-Private Partnerships to follow the Department's safety goals. Candidate projects for Public-Private Partnerships will typically carry large volumes of traffic, and will be more complex in terms of design and operations. It will be important to fully consider safety as these projects are developed.

One example of how safety will be considered in projects developed through Public-Private Partnerships is the adherence to minimum design and safety standards. These standards have been adopted by FHWA and industry, and have a long history of use and success in achieving a level of safety for the traveling public. Three major documents applied to Federal projects are: A Policy on Geometric Design of Highways and Streets, which provides design standards for all classifications of roadways; the Roadside Design Guide, which provides standards for roadside treatments such as guardrail, and proper roadside clearance, sometimes known as the "clear zone" or "recovery area" of the roadway; and the Manual on Uniform Traffic Control Devices (MUTCD), the document that establishes national uniformity of signs and markings. See <http://mutcd.fhwa.dot.gov>.

Federal standards apply to all projects on the National Highway System (NHS), which is comprised of approximately 160,000 miles of roadway nationally, including all of the Interstate system. These standards apply regardless of how the project is funded, whether 100 percent State funds, a combination of Federal and State funds, or by Public-Private Partnerships. For projects off the NHS, State standards apply to projects. To a large degree, State standards are also based upon the documents referenced above.

The information above highlights key Federal requirements but is not comprehensive. For more information on applicable Federal laws, see Appendix H to U.S. DOT Report to Congress on Public-Private Partnerships, December 2004 at <http://www.fhwa.dot.gov/reports/pppdec2004/index.htm#apph>

C. CAN THE ENVIRONMENTAL REVIEW PROCESS BE MORE EFFICIENT?

A wide range of Federal environmental laws may apply to highway projects performed by Public-Private Partnerships. A Summary of Environmental Laws Affecting Transportation can be found at http://www.fhwa.dot.gov/environment/env_sum.htm. NEPA is the overarching Federal law that applies to Federal projects. It directs Federal agencies, when approving projects or issuing permits to conduct environmental reviews to consider the potential impacts on the environment by their proposed action. NEPA requires the preparation of an environmental document that assesses the environmental impacts of the proposal. If the impact of the project is "significant," then the Federal agency responsible for the project must prepare an Environmental Impact Statement (EIS). Depending on the type, size and location of the project, an EIS can be quite involved and require consultation with many affected groups. For information on how to

participate in the environmental process, see FHWA's website on Public Involvement at <http://www.fhwa.dot.gov/environment/pubinv2.htm> and FHWA Publication *Public Involvement Techniques for Transportation Decisionmaking* at <http://www.fhwa.dot.gov/reports/pittd/cover.htm>.

In addition to NEPA, many other environmental laws may apply. The following are the key environmental laws applying to Federal-aid highway projects:

- *Clean Air Act*: requires DOT to ensure that Federal funding and approval goes to those transportation activities that are consistent with air quality goals. This requirement is met by a conformity determination demonstrating that the total emissions projected for a long-range transportation plan or transportation improvement program are within the emissions limits ("budgets") established by the air quality plan or State Implementation Plan, and that transportation control measures are implemented in a timely fashion. The Clean Air Act also requires a demonstration that highway projects will not cause new air quality violations in areas that are already out of compliance.
- *Clean Water Act*: requires a Section 404 permit whenever a project discharges dredged or fill material into certain bodies of water and wetlands. Where applicable, it also may require a National Pollutant Discharge Elimination System (NPDES) permit for any pollutants discharged into navigable waters of the U.S. Permits for stormwater runoff for construction projects of a certain size are also required.
- *Endangered Species Act*: requires Federal agencies to ensure that their actions will not likely jeopardize the continued existence of any threatened or endangered species and will not adversely modify any critical habitat. The Act also establishes a consultation process with the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to coordinate decisions on Federal actions relative to the requirements of the Act.
- *Section 4(f) of the DOT Act*: prohibits the use of publicly owned land from a park, recreation area, wildlife and waterfowl refuge or significant historic properties by a transportation project unless there is no other feasible and prudent alternative.⁹
- *National Historic Preservation Act*: requires consultation with the Advisory Council on Historic Preservation when a project will affect an historic property.

Completing the environmental analysis, assessments, documentation and obtaining the necessary permits and approvals can take time. If a necessary environmental approval is not granted pursuant to one of these laws, then the project will not be able to move forward without some modification of the project. Delays caused by the environmental reviews can be significant, particularly on controversial projects where public opposition is strong. For highway projects requiring EISs, the median time for the NEPA process is over five years.

⁹ Section 4(f) of the Department of Transportation Act of 1966 has been codified at 49 U.S.C. 303 and 23 U.S.C. 138.

For the past several years, the FHWA has embarked on an effort to streamline the application of environmental laws to highway projects. Recently, these efforts have been given greater prominence by the President's Executive Order 13274, Environmental Stewardship and Transportation Infrastructure Project Reviews. These efforts are more specifically described in sections 2.2 and 2.3 of the *Annual Report to Congress* dated December 2004, which can be found at <http://www.fhwa.dot.gov/stewardshipeo/annualreport04.htm>.

As part of its environmental streamlining efforts and oversight responsibilities, the FHWA has sought to clarify some of the environmental laws that frequently apply to highway projects and to make them more efficient. We have attempted to eliminate duplication, clarify standards, and more clearly define roles of various public agencies reviewing and approving environmental assessments. For example:

- ***Integrating the Transportation Planning and NEPA Processes.*** Federal law requires State and local governments to conduct a transportation planning process to set the stage for future development of transportation projects. Much of the data and decisionmaking by State and local governments overlap with work that will need to be performed during the NEPA process. To take advantage of the work products and planning decisions made during the transportation planning processes, the FHWA has issued guidance on how to integrate planning products and decisions into any NEPA analysis that is subsequently conducted. A copy of this guidance can be found at <http://nepa.fhwa.dot.gov/ReNepa/ReNepa.nsf/aa5aec9f63be385c852568cc0055ea16/9fd918150ac2449685256fb10050726c?OpenDocument>.
- ***Clarifying Responsibility for Determining Project Purpose and Need.*** Determining the purpose and need for a project is a critical component of the NEPA analyses. The project alternatives to be analyzed in the NEPA process will be based on the purpose and need statement, and the environmental analysis will flow from those. If the purpose and need is not properly presented, then it could result in an environmental analysis that is misdirected and wasteful. Yet because of the various Federal agencies participating in the NEPA process for a highway project, the determination of purpose and need at times has been influenced by goals or perspectives unrelated to transportation. In a letter to DOT Secretary Mineta, the Chairman of the President's Council on Environmental Quality (CEQ) made clear that the DOT should be afforded substantial deference by other agencies in determining the purpose and need for a transportation project. The guidance contained in the Chairman's letter makes it easier to avoid extended disputes over the correct project purpose and need. For a copy of the CEQ letter, see <http://environment.fhwa.dot.gov/guidebook/Gconnaughton.htm>. For further guidance on purpose and need statements, see <http://environment.fhwa.dot.gov/guidebook/Gjoint.htm> and <http://environment.fhwa.dot.gov/guidebook/vol2/doc7d.pdf>.

- ***Avoiding Unnecessary Delays Under the Endangered Species Act (ESA).*** The Endangered Species Act (ESA) requires Federal agencies to consult with the FWS or the NMFS to ensure that actions they authorize, fund or carry out will not jeopardize the continued existence of endangered or threatened species and will not adversely modify critical habitat. If a Federal agency determines that a project may affect a listed species, formal consultation is required unless the agency determines and the FWS or NMFS concurs as a result of a biological assessment or through informal consultation activities that the project is not likely to adversely affect such species. The ESA sets forth a specific “consultation” process for the dialogue between the FWS/NMFS and the Federal agency taking the action, including time frames for the steps in the consultation process, which can be quite lengthy. In an effort to clarify the respective responsibilities of the FWS and FHWA in the consultation process and to find ways to more quickly reach resolution of issues, FHWA and FWS issued a joint agency agreement on the consultation process required under the ESA. This joint agreement clarified the respective responsibilities of both FWS and FHWA to meet the time frames for consultation set forth in the ESA regulations. In addition, it established elevation procedures for issues that are not readily resolved within the consultation time frames. A copy of the *Joint Agreement* can be found at <http://www.fhwa.dot.gov/environment/ecosystems/esalegalemail.htm>.
- ***Clarifying the Application of Section 4(f).*** Section 4(f) of the DOT Act of 1966 prohibits the approval of transportation projects which requires the use of any publicly-owned land from a public park, recreation area, or wildlife and waterfowl refuge of National, State, or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of National, State, or local significance as so determined by such officials unless there is a determination by FHWA that “no feasible and prudent alternative” exists and the project includes “all possible planning to minimize harm.” Numerous court cases interpreting Section 4(f) have created confusion as to when it applies and, in some parts of the country, have issued strict interpretations of the law that has limited flexibility in project implementation. This has made Section 4(f) difficult to apply. In March 2005, the FHWA published a revised Section 4(f) policy paper that provides updated and detailed guidance to clarify when and how to apply the provisions of Section 4(f) on FHWA projects that propose to use Section 4(f) land or resources. For a copy of the Section 4(f) Policy Paper, see <http://environment.fhwa.dot.gov/projdev/4fpolicy.htm>.

While we believe these initiatives and other environmental streamlining activities will help make compliance with environmental laws less complicated and more efficient, we also realize that the environmental review process can be very complex. Therefore, we encourage the private sector to work with the States in navigating the environmental requirements. For more general information on environmental streamlining, see <http://environment.fhwa.dot.gov/strmlng/index.asp>.

Title VI of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1144, addresses Planning and Project Development including a number of changes aimed at streamlining the environmental review process. Sections 6002, 6003, 6004, 6005, 6007, 6009, and 6010 address the following topics: a new environmental review process, State assumption of categorical exclusions, a pilot delegation of the environmental responsibilities for Recreational Trails and Transportation Enhancement projects, and changes associated with Section 4(f) requirements to address “de minimis” impacts and standards for “prudent and feasible” alternatives.

D. HOW DO FEDERAL RIGHT-OF-WAY LAWS APPLY TO PUBLIC-PRIVATE PARTNERSHIPS?

Assembling a right-of-way at a reasonable cost is an important aspect of developing a highway project. The ability to purchase the right-of-way in a timely manner is often the key to enabling a project to move forward. However, acquisition of right-of-way is subject to many Federal requirements. Although these requirements serve an important public purpose by providing protection to owners and tenants affected, Federal requirements for the acquisition of right-of-way can at times impede a project sponsor’s ability to timely purchase the right-of-way necessary for a transportation corridor.

1. Uniform Relocation Assistance and Real Property Acquisition Policies Act

The Uniform Relocation Assistance and Real Property Acquisition Policies Act (“Uniform Act”) (42 U.S.C. 4601 et seq.) sets forth the basic responsibilities of Federal, State, and local government entities and, under certain conditions, private parties, to provide assistance to persons who are displaced by, and forced to relocate for, a Federal or federally-assisted program or project. It also establishes basic policies that govern the acquisition practices to be used when the property of others is needed for a Federal or federally-assisted program or project. Its overarching purpose is to provide some fundamental protections to persons forced to sell property or to move from property as the result of a Federal or federally-assisted project.

⇒To what projects does the Uniform Act apply?

The Uniform Act applies to all Federal projects or projects receiving Federal financial assistance.

⇒ What does the Uniform Act require?

The Uniform Act provides three basic protections for persons whose property is acquired or who are displaced as a result of a Federal or federally-assisted project:

- *An acquisition process to ensure the seller receives fair market value for the property.* This process includes, among others, the provision of notice and appraisal by an independent appraiser.

- *Relocation benefits for the seller.* This includes the cost of moving and assistance in finding comparable housing or replacement business premises. These benefits are triggered when the property is acquired.
- *Relocation benefits for tenants.* This includes fair payment for improvements, the cost of moving, and assistance in finding comparable housing or replacement business premises. These benefits are triggered when a tenant is required to move as a result of a displacing activity associated with a Federal or federally-assisted project.

⇒ ***How does the Uniform Act apply to private entities that purchase right-of-way used in Federal or federally-assisted projects?***

The requirements of the Uniform Act may apply to a private entity if it purchases right-of-way that is used in a Federal or federally-assisted highway project. The application of the Uniform Act will depend on the degree to which the activities of the private entity can be fairly attributable to the State or can be said to be undertaken “for a federally assisted project.” Specifically, the Uniform Act:

→ **Does not apply to wholly independent activity:** The Uniform Act does not cover the independent acquisition and displacement activities of a private entity that do not involve the use of Federal funds. Truly independent actions taken by a private entity, where the risk and cost are borne by the private entity, are not covered by the Act.

→ **Applies fully when the private entity acts on behalf of the State:** All of the requirements of the Uniform Act apply when a private entity acting on behalf of the State, by virtue of a formal or informal agreement, acquires the property that is needed for a federally-assisted project as a way of expediting the progress of that project to benefit both the private and public sector interest. For example, if a private developer offered to acquire property needed for a federally-assisted project to reduce the cost to the State so that the State would expedite the schedule for delivery of the project, the activities of the private developer must comply with the Uniform Act. Because of the relationship or understanding that exists between the State and the developer, the State, as the Federal-aid recipient, is responsible for ensuring compliance with the Uniform Act requirements. The State is not allowed to evade the Uniform Act by doing indirectly (through a third party) what it could not do directly.

→ **Factors to consider to determine whether the developer’s activities are attributable to the State:** The Federal agency providing Federal assistance to a project must determine if the Uniform Act has been complied with as part of its decision to provide funding. In making this determination, the Federal agency will typically consider factors such as (1) the existence or absence of agreements between the developer and the State, (2) the degree to which decisions made by the developer or by the State are coordinated or interdependent, even in the absence of any written agreement, (3) the risk borne by the developer in acquiring the property should no project go forward, (4) the existence of any financial or other benefit to the developer from the State or vice versa that is connected to the property acquisition, (5) the timing of the acquisition in relation

to other steps in the project development process, and (6) the degree of involvement by the State in facilitating the acquisition of property by the developer.

Also, it should be noted that the acquisition policies and practices required by the Uniform Act vary depending upon whether the acquisition by the State or the developer is made with or without the threat of the use of eminent domain power.

For more information regarding the acquisition of property for Federal-aid highway projects, see *Real Estate Acquisition Guide for Local Public Agencies* at <http://www.fhwa.dot.gov/realestate/lpaguide/toc.htm>, *Program development Guide* for right-of-way projects, at <http://www.fhwa.dot.gov/realestate/pdg.htm> and *Acquiring Real Property for Federal and Federal-aid and Programs and Projects*, at <http://www.fhwa.dot.gov/realestate/realprop/index.html>.

2. Protective Buying and Early Acquisition Of Right-of-Way

Typically, right-of-way for a Federal-aid highway project is purchased after the environmental analysis has been completed and a project agreement executed. However, in view of rapid development and escalating real estate costs in many areas, a project sponsor may find that acquisition early in project development—or even before project development begins—is advantageous. In fact, in some cases, early acquisition may be the only practical way to preserve a highway corridor before rising costs or entrenched development make acquisition almost impossible. For this reason, Federal law allows for reimbursement of advance acquisition of right-of-way under certain conditions.

⇒ When can Federal funds be used for early acquisition of right-of-way?

Early acquisition of right-of-way for a highway project can be reimbursed in two circumstances. First, the purchase of a particular parcel or limited number of parcels may be reimbursed prior to final environmental approval if necessary to prevent imminent development and increased costs on the preferred location (“*protective purchase*”). Second, subject to certain conditions, the purchase of right-of-way acquired in advance of any Federal approval or authorization can be used as a credit for the non-Federal match required on a Federal-aid project or reimbursed by Federal funds (“*early acquisition*”).

⇒ Under what conditions can a “Protective Purchase” of right-of-way be made before environmental approval is obtained?

Prior to final environmental approval for a project, the project sponsor may request reimbursement for advance acquisition of a particular parcel or a limited number of parcels to prevent imminent development and increased costs on the preferred location. To do this, the following conditions must be met:

- *On the TIP/STIP.* Inclusion of project in the currently approved STIP (which includes metropolitan TIPs in whole or by reference).

- *Public Involvement Completed.* The project sponsor has complied with applicable public involvement requirements for planning and environmental review.¹⁰
- *Section 4(f) Determination.* If the property includes a park, a recreation area, a historic property, or a refuge, FHWA must have made a determination under Section 4(f) of the DOT Act of 1966 that there is no other prudent and feasible alternative to using this property.¹¹
- *Completion of Historic Preservation Process.* Procedures of the Advisory Council on Historic Preservation are completed if the parcels contain historic properties.
- *Imminent Development.* The project sponsor must clearly demonstrate that development of the property is imminent and that such development would limit future transportation choices. A significant increase in cost may be considered as an element justifying a protective purchase.
- *No Influence on Environmental Analysis.* The advance acquisition will not influence the environmental assessment of a project, including the decision relative to the need to construct the project or the selection of a specific location.

⇒ *Under what conditions can a project sponsor get credit for or be reimbursed for the acquisition of right-of-way made prior to the execution of a project agreement?*

Although real property to be used in a highway project may be acquired at any time the project sponsor has legal authority to do so, the cost of its acquisition typically cannot be reimbursed if it is acquired prior to the execution of a project agreement. However, Federal law does allow acquisition costs for any property that is ultimately incorporated into a Federal-aid highway project to be credited to the non-Federal matching share if the following conditions are met:

- *Not a Section 4(f) Property.* The property was not a park, recreation area, refuge, or historic property;
- *Compliance with Uniform Act.* The property was acquired in compliance with the Uniform Act;¹²
- *Compliance with Non-Discrimination Laws.* The property was obtained in compliance with applicable Federal non-discrimination laws; and
- *No Influence on Environmental Assessment.* The State and the FHWA must concur that acquisition of the right-of-way will have no influence on the environmental assessment of the project.

Further, Federal law allows for reimbursement of acquisition costs for any property incorporated into a Federal-aid highway project if the following additional conditions are met:

¹⁰ See <http://www.fhwa.dot.gov/environment/pubinv2.htm> and <http://www.fhwa.dot.gov/planning/citizen/citizen1.htm> for more information on public involvement requirements for highway projects.

¹¹ See Section III, B of this Manual for further information on the requirements of Section 4(f).

¹² See Section III, B of this Manual for information regarding the application of the Uniform Act.

- *Compliance with Planning and Environmental Laws.* Prior to the acquisition, the Governor determines and certifies that the acquisition is consistent with the transportation planning process and applicable environmental laws.
- *EPA Concurrence with No Influence on Environmental Assessment.* Prior concurrence was obtained from the Environmental Protection Agency that the action did not influence the environmental assessment of the project.

The amount of the reimbursement may be based on either the current fair market value or the historic acquisition cost of such lands, depending on the method that has been adopted by the State. For more information on early acquisition or protective buying of right-of way, see <http://www.fhwa.dot.gov/realestate/21final.htm>.

3. Projects with Right-of-Way Acquisition as Sole Purpose

Federal highway law allows a State or other project sponsor to treat the acquisition of right-of-way itself as the purpose of the project. The acquisition could take the form of a fee purchase of the land, or could merely be an easement interest that prevents development until the State has had the time needed to determine exactly what is required for the transportation project. In order to receive Federal approval for such an acquisition program, it is necessary to comply with the normal steps that precede Federal project approval. However, the restriction on early acquisition set forth above does not apply if the acquisition occurs after compliance with NEPA.

Indeed, the purpose and need of such a project would be substantially different from the transportation project that might ultimately use that right-of-way. Since the purpose of the acquisition is to preserve the status quo, existing land uses typically would not change. Moreover, should the sponsor decide not to proceed with the project, the land could be disposed of with no impact on the existing environment. Thus, while the environmental document must generally address what might ultimately happen in the corridor because that is what justifies the acquisition project in the first place, the actual environmental impact of such a land acquisition may be quite small.

While the government would have to satisfy NEPA (with an Environmental Impact Statement (EIS), Environmental Assessment (EA)/Finding of No Significant Impact (FONSI), or Categorical Exclusion (CE)) before beginning any specific transportation project, it would not be required to complete NEPA before merely acquiring the right-of-way or a legal interest (such as an easement) in the right-of-way. This would be particularly the case where the underlying land use following land acquisition is not changed until the nature of the ultimate transportation improvement is determined. On the other hand, the inevitability of significant environmental impacts of some kind flowing from the project that will be implemented eventually may make it prudent to prepare a NEPA document.

4. Projects with Fiber Optic Installation on Freeway Right-of Way

An opportunity may exist for a Public-Private Partnership between State DOTs and the telecommunications industry by utilizing the State's freeway right-of-way (ROW) for the installation of fiber optic cables. Several States have bartered access to their ROW in return for fiber communications capacity to be used for their deployment of ITS facilities on the freeway or to produce revenue. These have been termed "Shared Resource" projects. Shared Resource Projects are facilitated by the FHWA delegation of authority to individual States so that they can establish their own utility accommodation policy approved by the FHWA Division Office. The FHWA has issued guidance on the installation of fiber optics in freeway ROW in December 2000, which was approved by American Association of State Highway and Transportation Officials (AASHTO). See www.fhwa.dot.gov/realestate/index.htm.

E. IS THERE FLEXIBILITY IN STANDARD CONTRACTING PROCEDURES AND REQUIREMENTS?

1. Alternatives to Low-Bid Procurement Procedures for Construction Contracts

In traditional public procurement for construction contracts, competitive bidding is the accepted process. Under the laws applicable to Federal-aid highways, competitive bidding is generally required on highway construction contracts that use Federal-aid, with award to the lowest responsive bidder. However, under certain conditions, methods other than competitive bidding may be used to select a contractor if FHWA determines that the alternative contracting method is more cost-effective or if an emergency exists and time is a critical factor.

2. Design-Build Contracts

Design-build contracts are an alternative to traditional design-bid-build contracts and are expressly permitted under the law applicable to Federal-aid highways. The design-build concept allows the contractor maximum flexibility for innovation in the selection of design, materials, and construction methods. Unlike traditional design-bid-build, the project sponsor combines both the project's design and construction activities into one contract. With design-build procurement, the contracting agency identifies the parameters of the end result and establishes the design that optimizes their construction abilities. The submitted proposals may be rated by the contracting agency on factors such as design quality, timeliness, management capability, and cost, and these factors may be used to adjust the bids for the purpose of awarding the contract.

⇒ What projects are eligible for design-build contracting?

All Federal-aid highway construction projects may now use design-build contracting. Section 1503 of SAFETEA-LU eliminates the \$50 million threshold on the size of eligible projects.

⇒ What are the procedures for soliciting a design-build contract?

A State may use its own procedures for the solicitation and receipt of proposals and information. Oral presentations can be used as a substitute for portions of a written proposal or information. The State may elect to pay a stipend to unsuccessful offerors who have submitted responsive proposals. Stipends may be reimbursed with Federal-aid funds and are recommended on large projects where there are substantial opportunities for innovation and the cost of submitting the proposal is significant. For a project being developed under a public-private agreement to be eligible for Federal-aid funding, the design-build contract must have been awarded to the public-private entity through a competitive process that complies with applicable State and local laws.

SAFETEA-LU section 1503 requires the FHWA to issue revised design-build regulations that allow State DOTs to issue Requests for Proposals, award contracts, and issue notices to proceed with preliminary design work on design-build projects prior to receipt of final NEPA approval. The State DOTs must receive FHWA's concurrence prior to proceeding with any of the above activities. Additionally, final design or construction of any permanent improvement prior to NEPA compliance is still prohibited.

⇒ How are design-build proposals to be evaluated?

The State must evaluate the quality of the proposal through non-price evaluation factors, such as compliance with solicitation requirements, completion schedules, and technical solutions. Price must be an evaluation factor in any contract where construction is a significant component of the scope of work. In addition, the State may at its discretion consider past performance, technical experience, and management experience.

3. Special Experimental Project No. 15 (SEP-15)

Special Experimental Project No. 15 (SEP-15) is a new experimental process within FHWA to encourage Public-Private Partnership approaches to project delivery. SEP-15 is designed to increase project management flexibility, encourage innovation, improve timely project construction, and generate new revenue streams for Federal-aid transportation projects. While FHWA has long encouraged increased private sector participation in Federal-aid projects, SEP-15 allows FHWA to actively explore much needed changes in the way we approach the oversight and delivery of highway projects to further the Administration's goals of reducing congestion and preserving our transportation infrastructure.

SEP-15 addresses, but is not limited to, four major components of project delivery:

- innovative contracting;
- compliance with environmental requirements;
- right-of-way acquisition; and
- project finance.

However, SEP-15 is not a magic wand to eliminate Federal requirements. This experimental authority does require applicants to fully comply with all requirements of NEPA and other State and Federal environmental laws and regulations. SEP-15 is limited to Title 23 of the United States Code, and thus cannot be used to experiment with legal or regulatory requirements that fall outside of Title 23. For example, States will have to follow the same environmental requirements under SEP-15 as they would for any other project, but may be permitted to experiment with the procedures used to accomplish such requirements. Additionally, SEP-15 is not a tool for broad, programmatic changes.

⇒ *What are the benefits of SEP-15?*

SEP-15 is built on two earlier experimental programs – Special Experimental Project No. 14 (SEP-14) and Test and Evaluation Project No. 045 (TE-045). SEP-14 encouraged innovation in contracting and was very successful in encouraging the use of design-build. TE-045 encouraged experimentation in the area of highway finance, which has allowed for the construction of projects with fewer Federal dollars. Similarly, a key feature of SEP-15 is that it will allow FHWA to identify current FHWA laws, regulations, and practices that inhibit greater use of Public-Private Partnerships and private investment in transportation improvements. At the same time, it will allow us to develop procedures and approaches that address these impediments. With the creation of SEP-15, FHWA will be able to move beyond merely encouraging Public-Private Partnerships and begin actively working with our State partners and industry to bring more innovation, private funding, and intellectual capital to the delivery of Federal-aid construction projects.

⇒ *What is the application process for SEP-15?*

All SEP-15 applications must come from a State DOT. Proposals may include localities and private transportation ventures as joint project sponsors, but the State highway agency should be the primary project sponsor. A State DOT should submit SEP-15 proposals to its FHWA Division Office.

SEP-15 applications should provide a brief description of the project, the experimental techniques proposed, and the reasons why the experiment is sought. The FHWA headquarters and the FHWA Division Office will work together in evaluating SEP-15 applications. Once a SEP-15 application is approved, the FHWA will work with the State DOT to negotiate an Early Development Agreement (EDA).

Upon the completion of major milestones, the public-private sponsors will be responsible for submitting an independently prepared report that summarizes lessons learned from the SEP-15 process. These reports shall include the experiment undertaken and the lessons learned, an evaluation of the success of the process and its impact on the project, and recommend statutory and regulatory changes with an explanation of how the changes will improve the delivery of the Federal-aid highway program.

More information on SEP-15 and specific guidance on the application process can be found at <http://www.fhwa.dot.gov/ppp/sep15.htm>.

IV. SAFETEA-LU UPDATE

A. HOW DOES SAFETEA-LU AFFECT PUBLIC-PRIVATE PARTNERSHIPS?

On August 10, 2005, the President signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1144. SAFETEA-LU makes it easier and more attractive for the private sector to participate in highway infrastructure projects, bringing new ideas and resources to the table. Innovative changes such as eligibility for private activity bonds, additional flexibility to use tolling to finance infrastructure improvements, and broader Transportation Infrastructure Finance and Innovation Act (TIFIA) program and State Infrastructure Bank (SIB) loan policies, will all stimulate needed private investment. SAFETEA-LU also gives States more flexibility to use road pricing to manage congestion, and promotes real-time traffic management in all States to help improve transportation security and provide better information to travelers and emergency responders. This Chapter provides an overview of some of the changes made by SAFETEA-LU that will encourage Public-Private Partnerships.

B. WHAT SPECIFIC PROVISIONS IN SAFETEA-LU MAKE IT EASIER AND MORE ATTRACTIVE FOR THE PRIVATE SECTOR TO INVEST IN HIGHWAY INFRASTRUCTURE PROJECTS?

1. Tolling

SAFETEA-LU provides States with increased flexibility to use tolling, not only to manage congestion, but also to finance infrastructure improvements. The following programs are available to States to toll on a pilot or demonstration basis --

- Under the new **Interstate System Construction Toll Pilot Program**, the Secretary may permit a State or compact of States to collect tolls on an Interstate highway, bridge, or tunnel for the purpose of constructing Interstate highways. This program is limited to 3 projects in total (nationwide), and prohibits a participating State from entering into an agreement with a private person which would prevent the State from improving adjacent public roads to accommodate diverted traffic.
- The **Interstate System Reconstruction and Rehabilitation Toll Pilot Program** was established in the Transportation Equity Act for the 21st Century (TEA-21) to allow up to 3 Interstate tolling projects for the purpose of reconstructing or rehabilitating Interstate highway corridors that could not be adequately maintained or improved without the collection of tolls. SAFETEA-LU makes no revisions to the program, therefore it continues without change.
- The **Value Pricing Pilot Program** is continued, funded at \$59 million through 2009, to support the costs of implementing up to 15 variable pricing pilot programs nationwide to manage congestion and benefit air quality, energy use,

and efficiency. A new set-aside totaling \$12 million through 2009 must be used for projects not involving highway tolls.

- The new **Express Lanes Demonstration Program** will allow a total of 15 demonstration projects through 2009 to permit tolling to manage high levels of congestion, reduce emissions in a nonattainment or maintenance area, or finance added Interstate lanes for the purpose of reducing congestion. A State, public authority, or public or private entity designated by a State may apply. Eligible toll facilities include existing toll facilities, existing High Occupancy Vehicle (HOV) facilities, and a newly created toll lane. Tolls charged on HOV facilities under this program must use pricing that varies according to time of day or level of traffic; for non-HOV, variable pricing is optional. Automatic toll collection is required, and the Secretary must promulgate a final rule specifying requirements, standards, or performance specifications to ensure interoperability within 180 days of enactment.

2. Innovative Finance

To help close the gap between highway infrastructure investment needs and resources available from traditional sources, SAFETEA-LU includes the following provisions which, in addition to tolling options discussed above, will enhance innovative financing and encourage private sector investment --

- **Private Activity Bonds** -- To provide the opportunity for new sources of investment capital to finance our nation's transportation infrastructure system, SAFETEA-LU expands bonding authority for private activity bonds by adding highway facilities and surface freight transfer facilities to a list of other activities eligible for exempt facility bonds. Qualified projects, which must already be receiving Federal assistance, include surface transportation projects eligible under Title 23, international bridge or tunnel projects for which an international entity authorized under Federal or State law is responsible, and facilities for the transfer of freight from truck to rail or rail to truck (including any temporary storage facilities related to the transfers). These bonds are not subject to the general annual volume cap for private activity bonds for State agencies and other issuers, but are subject to a separate National cap of \$15 billion.
- **Transportation Infrastructure Finance and Innovation Act (TIFIA)** -- The TIFIA program provides Federal credit assistance to nationally or regionally significant surface transportation projects, including highway, transit and rail. This program was established in TEA-21 to fill market gaps and leverage substantial private co-investment by providing projects with supplemental or subordinate debt. SAFETEA-LU authorizes a total of \$610 million through 2009 to pay the subsidy cost (similar to a commercial bank's loan reserve requirement) of supporting Federal credit under TIFIA. To encourage broader use of TIFIA financing, the threshold required for total project cost is lowered to \$50 million (\$15 million for ITS projects), and eligibility is expanded to include public freight

rail facilities or private facilities providing public benefit for highway users, intermodal freight transfer facilities, access to such freight facilities and service improvements to such facilities including capital investment for Intelligent Transportation Systems (ITS).

- **State Infrastructure Banks (SIBS)** -- SAFETEA-LU establishes a new SIB program which allows all States, including, Puerto Rico, the District of Columbia, American Samoa, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands, to enter into cooperative agreements with the Secretary to establish infrastructure revolving funds eligible to be capitalized with Federal transportation funds authorized for fiscal years 2005-2009. This program gives States the capacity to increase the efficiency of their transportation investment and significantly leverage Federal resources by attracting non-Federal public and private investment.
- **Toll Credits** -- SAFETEA-LU revised 23 USC 120(j) to permit toll credits to be earned for any toll revenues that are generated and used by public, quasi-public, and private agencies to build, improve, or maintain highways, bridges, or tunnels that serve the public purpose of interstate commerce. Previously, toll credits could only be earned from expenditures of toll revenues on projects that were completed entirely without Federal funds. Note that the other provisions of section 5 of this manual still apply (e.g., Maintenance of Effort, Revenues Must Be Spent on Eligible Expenses, etc.).

3. Miscellaneous Provisions

There are a variety of other SAFETEA-LU provisions that will encourage greater private sector involvement in highway infrastructure projects. These provisions include:

- **High Occupancy Vehicle (HOV) Lanes** -- SAFETEA-LU enhances and clarifies provisions governing the use and operation of HOV lanes. States are required to establish occupancy requirements for HOV lanes, with mandatory exemption for motorcycles and bicycles unless it creates a safety hazard, and optional exemptions for public transportation vehicles, low-emission and energy-efficient vehicles, and High Occupancy Toll (HOT) vehicles (otherwise-ineligible vehicles willing to pay a toll to use the facility). States are required to monitor, assess, and report on the operation of the facility to ensure that it does not become seriously degraded.
- **Environmental Review Process** -- A new environmental review process is established for highways, transit, and multimodal projects. A new category of “participating agencies” is added, to allow more state, local, and tribal agencies a formal role and rights in the environmental process. After providing an opportunity for public and interagency involvement, DOT will define the project’s purpose and need, and establish a plan for coordinating public and agency participation. As early as practicable in the process, DOT is to provide an

opportunity for a range of alternatives to be considered for a project. If any issue that could delay the process cannot be resolved within 30 days, DOT must notify Congress. A 180-day statute of limitations for lawsuits challenging Federal agency approvals is provided, but it will require a new step of publishing environmental decisions in the Federal Register. This statute of limitations will help to provide greater certainty with the environmental process.

- **Section 4(f)** – This provision prohibits projects on publicly owned parks, recreation areas, wildlife and waterfowl refuges, or historic sites unless there is no feasible and prudent alternative and all possible mitigation is used. SAFETEA-LU includes tightly circumscribed changes in 4(f). Under SAFETEA-LU, the Secretary has some flexibility to allow an exemption from 4(f) requirements if a program or project will have a “de minimis” impact on the area – i.e., there are no adverse effects of the project and the relevant State Historic Preservation Officer or other official with jurisdiction of a property concurs. The provision creates public involvement and consultation responsibilities associated with the de minimis determination. The Secretary is to conduct a rulemaking to clarify the 4(f) standard of “prudent and feasible” for alternatives. The Interstate System is exempted from being treated as an historic resource under Section 4(f), unless the Secretary determines that individual elements possess national or exceptional historic significance and should receive protection.
- **State Assumption of Environmental Review Responsibilities** – After entering into a Memorandum of Understanding with the Secretary, each State may assume responsibility for categorical exclusions, with FHWA in a programmatic monitoring role. Another provision calls for the Secretary to establish a categorical exclusion, to the extent appropriate, for activities that support the deployment of intelligent transportation infrastructure and systems.

The States of Alaska, Ohio, Oklahoma, Texas, and California can enter into a project delivery pilot program, allowing them to apply to the DOT to assume all DOT environmental responsibilities under NEPA and other environmental laws, excluding the Clean Air Act and transportation planning requirements. This delegation authority is limited to highway projects, and could be for specific projects within a State or a programmatic delegation.

Under another pilot program, the Secretary may allow up to five States to assume environmental responsibilities, including NEPA and Section 4(f), for Recreational Trails and Transportation Enhancement projects.

- **Design-Build** -- To encourage more projects to use design-build contracting, SAFETEA-LU eliminates the \$50 million floor on the size of eligible contracts. Also, the DOT Secretary must issue revised regulations that will allow transportation agencies to proceed with certain actions prior to receipt of final NEPA approval. This change will encourage public-private partnerships by allowing private sector partners to be involved in the project definition process.

- **Highways for LIFE Pilot Program** -- To foster the use of new technologies and more efficient ways of building highways, this pilot program calls for the DOT Secretary to provide leadership and incentives to demonstrate and promote state-of-the-art technologies, elevated performance standards, and new business practices in the highway construction process that result in improved safety, faster construction, reduced congestion from construction, and improved quality and user satisfaction. A total of \$75 million is authorized through 2009 for incentive grants, to fund up to 20% but not more than \$5 million of the total cost of a qualifying project. A maximum of 15 projects may receive incentive funds in a given fiscal year, but the goal is to approve and provide funds to at least 1 project in each State by 2009. A State may also use up to 10% of its Interstate Maintenance (IM), National Highway System (NHS), Surface Transportation Program (STP), and Congestion Mitigation and Air Quality Improvement Program (CMAQ) funds for these projects; up to 100% Federal share is allowed.

V. CONCLUSION

There is a widening gap between our nation's highway infrastructure requirements and our collective ability to fund them through traditional public means. Public-Private Partnerships hold great promise for addressing this gap, both by increasing funds available to finance important transportation priorities and improving the efficiency in transportation project construction, operation, and maintenance. Not only do they provide a potential mechanism for constructing new facilities, but they also can play a significant role in operating and maintaining existing highway facilities.

At FHWA, we have been devoting significant resources to exploring the role Public-Private Partnerships can play in the future of our highway system. We believe they may hold the answer to our nation's growing transportation needs. We will continue to work to facilitate Public-Private Partnerships through education and by removing barriers and impediments. As we develop new tools or information, we will update this Manual so it continues to serve as a comprehensive resource for Public-Private Partnership guidance.