

## Chapter 6: Transaction Documents and Ongoing Monitoring Requirements

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This chapter describes the process by which the DOT will commit to provide credit assistance to a selected borrower (also termed “obligor”). The chapter also describes the two major contractual documents used for the TIFIA program: the term sheet and the credit agreement.

Each of the contractual documents is used for specific purposes as summarized in Exhibit 6-A. The term sheet establishes the DOT’s legal commitment and triggers the obligation of budget authority for the project. The credit agreement is the definitive agreement between the DOT and the borrower, containing all of the terms and conditions pursuant to which the credit assistance is provided.

Exhibit 6-A: TIFIA Prerequisites

Document	Major Prerequisites
Term Sheet	<ul style="list-style-type: none"><li>• Credit Assessment: Preliminary rating opinion letter on senior debt and TIFIA credit instrument*</li><li>• Environmental Clearance: ROD, FONSI, or Categorical Exclusion Planning Consistency:</li><li>• Compliance with applicable planning requirements.</li></ul>
Credit Agreement	<ul style="list-style-type: none"><li>• Credit Assessment: Investment grade credit rating on senior debt and rating on TIFIA credit instrument</li><li>• Appropriate Security Features: Rate covenants, etc.</li><li>• All necessary grant funds committed to the project</li><li>• All non-TIFIA equity and debt agreements executed</li></ul>

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

### Section 6-1

#### Term Sheet

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

## Term Sheet Prerequisites

Before issuing a term sheet, the DOT will confirm that all prerequisites for the obligation of funds have been satisfied. As shown in Exhibits 3-A and 6-A, these prerequisites include: (i) submission of the preliminary rating opinion letter as part of the TIFIA application; (ii) the project's receipt of its ROD, FONSI, or Categorical Exclusion; and (iii) the project's inclusion in the approved STIP.

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

## Term Sheet Contents

General rules concerning the terms for secured loans, loan guarantees, and standby lines of credit appear at 23 U.S.C. 603 and 604 and are also summarized in Chapter 2. More specific terms will be determined on a project-specific basis. The DOT commitment in the term sheet is subject to subsequent negotiation of the credit agreement.

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

- Parties to the agreement (*e.g.*, lender, borrower, and guaranteed lender, as applicable);
- Type(s) of credit instrument (*i.e.*, secured loan, loan guarantee, or line of credit);
- Description of the project;
- Estimated total project costs and total TIFIA-eligible project costs;
- Maximum amount of TIFIA credit assistance;
- Method for establishing the interest rate;
- Estimated final maturity date;
- Source of payment and security, including lien structure and TIFIA credit instrument priority;
- Requirement to reimburse the DOT for credit processing fees; and
- Conditions, if applicable, for execution of a credit agreement.

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## **Term Sheet Conditions: Future-Year Commitments**

For projects with extended construction periods and/or special financing needs, the Secretary may consider making future-year contingent commitments of budget authority and associated credit assistance. This might be considered, for example, if a selected project required the obligation of more TIFIA assistance than was available in the current fiscal year. In such a circumstance, the term sheet would include a provision by which the DOT would administratively reserve future year TIFIA funding for the project, upon satisfaction of specified conditions (such as project-specific milestones). Any such contingent commitments would be subject to the future availability of obligation authority. The DOT would initially administratively reserve budget authority for the project only in the current fiscal year, and would not administratively reserve budget authority in future years until the conditions of the term sheet were met and the availability of sufficient budget authority was confirmed.

To ensure additional projects' access to the program in future years, the DOT will not administratively reserve more than 25 percent of the amount of budget authority authorized for a single fiscal year.

## **Section 6-2**

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### **Credit Agreement**

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

#### **Credit Agreement Prerequisites**

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

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

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

#### **Credit Agreement Contents**

The contents of the credit agreement will include both standard provisions and transaction-specific provisions. The borrower and the DOT will execute the credit agreement for a secured loan or line of credit; the guaranteed lender, the DOT, and the borrower will execute the credit agreement for a loan guarantee. Additionally, the guaranteed lender will execute a separate loan agreement with the borrower, and the borrower will execute a borrower's certificate, compliance, and loan agreement with the DOT. Depending on the nature of the

transaction, additional documents, such as an intercreditor agreement, may also be necessary. The DOT may require the borrower to provide copies of the bond documents and other agreements material to the flow of funds or to DOT's security for its review. The DOT also will review any disclosure with respect to the TIFIA transaction, which the borrower includes in offering documents.

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

- Security features and additional terms;
- Detailed description of pledged security (*e.g.*, rate covenants);
- Flow of funds;
- Repayment terms, including amortization schedule and final maturity;
- Representations and warranties;
- Borrower covenants;
- Annual disbursement schedule and conditions for draws;
- Financial plan requirements; and
- Monitoring and reporting requirements.

The credit agreement will also include the form of requisition for disbursements and the note form.

## **Section 6-3**

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### **Closing Activities**

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

At closing, authorized representatives of the borrower, the DOT, and the guaranteed lender (if applicable) execute the legal documents. Documents requiring execution by persons not attending the closing are signed in advance. Copies of the agreements are made and distributed to the appropriate parties. The timing of the TIFIA closing is typically tied to the closing of the senior financing. The closing of the senior and TIFIA debt can be simultaneous, but the TIFIA transaction cannot close until the senior documents have been finalized and execution is within a week of the TIFIA closing. Standard transaction closing documents are required, including various legal opinions. A closing memorandum is prepared describing the actions that will take place, including funds disbursement, if applicable. This memorandum sets forth in detail the time and place of the closing, conditions precedent, and the required documentation.

Following the closing, a binder is prepared which includes all the legal documents, project selection materials, and other closing documents. The TIFIA JPO uses this closing binder as the source of project information for accounting, budgeting, and program monitoring systems. Exhibit 6-B contains a sample checklist for a secured loan closing.

Exhibit 6-B: Sample Loan Closing Checklist for a Secured Loan

<p>1. Organizational Documents of the Borrower</p> <p style="padding-left: 20px;">If the Borrower is public entity:</p> <p style="padding-left: 40px;">a. Approval resolutions approving project and authorizing official to execute documents</p> <p style="padding-left: 40px;">b. Copies of enabling legislation, bylaws, minutes of meetings regarding the project</p> <p style="padding-left: 20px;">If the Borrower is private entity:</p> <p style="padding-left: 40px;">a. Articles of incorporation, partnership agreement or similar documents, as appropriate</p> <p style="padding-left: 40px;">b. Good standing certificate</p> <p style="padding-left: 40px;">c. Bylaws</p> <p style="padding-left: 40px;">d. Incumbency certificate</p> <p style="padding-left: 40px;">e. Resolutions authorizing officials to execute documents</p> <p>2. Loan Agreement and Promissory Note</p> <p>3. Inter-creditor Agreement</p> <p>4. Evidence of site control</p> <p>5. Evidence of project's inclusion in State Transportation Improvement Program</p> <p>6. Evidence of consistency with other State or metropolitan transportation plans</p> <p>7. Evidence of approval by all necessary State or local governmental entities</p> <p>8. List of all required permits</p> <p>9. Environmental Record of Decision, Finding of No Significant Impact or Categorical Exclusion</p> <p>10. Development agreements and construction contracts</p> <p>11. Independent Engineer's Report</p> <p>12. Feasibility Study/Traffic and Revenue Study</p> <p>13. Credit rating(s)</p> <p>14. TIFIA Credit Agreement</p> <p>15. Opinion of borrower's counsel (addressing legal authority of Borrower, execution of documents, etc.); DOT also requires 10b-5 opinions from attorneys participating in the transaction</p> <p>16. Opinion of DOT's counsel (addressing DOT's authority to make loan to the borrower)</p>
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17. Development Agreement (s) or Contracts for Project (dates for start of Project, phases, and completion)
18. For Senior Project Bonds (tax-exempt or taxable bonds):
  - a. Enabling legislation and other documentation of issuer of senior project bonds
  - b. Borrower's resolution
  - c. Trust indenture
  - d. Loan agreement (if applicable)
  - e. Bond purchase agreement
  - f. Preliminary official statement
  - g. Official statement
  - h. Continuing disclosure agreement
  - i. Bond insurance policy or other credit enhancement

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## Section 6-4

### DOT Oversight and Monitoring Requirements

The DOT will periodically evaluate the credit status of all projects receiving TIFIA assistance. This periodic review has three purposes: *(i)* to provide the DOT with an oversight tool for ensuring the borrower's compliance with the provisions of the credit agreement; *(ii)* to monitor the overall status of the project; and *(iii)* to assist the DOT and the Office of Management and Budget (OMB) in identifying any changes to the credit risk posed to the Federal Government under individual credit agreements.

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

The borrower is also required to provide annually, at no cost to the Federal Government, ongoing credit evaluations of the project and all debt obligations, including the TIFIA credit instrument. These surveillance reports must be prepared by an NRSRO throughout the life of the TIFIA credit instrument. By "current credit evaluation" DOT means: *(i)* in the case of a

project with a published rating, either a current rating or the borrower's certification stating that the rating and outlook are unchanged from the previous year, and (ii) in the case of a project without a published rating, a current rating of the project obligations and the Federal credit instrument. The borrower must furnish the DOT with any other credit surveillance reports on the TIFIA-assisted project as soon as they are available.

The DOT's oversight and monitoring may also include site visits, periodic status meetings with the borrower, and reviews of independent engineer and/or other relevant reports. The TIFIA JPO will coordinate oversight and monitoring activities with the appropriate DOT field offices.

Each credit agreement between the DOT and a borrower will specify the types of ongoing documentation required by the DOT and the frequency of such information requests. The credit agreement will also authorize the DOT to commence increased monitoring and reporting, as may be necessary, to ensure the continued credit quality of the project and minimize the Government's risk.

## **Section 6-5**

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### **DOT Loan Servicing**

The DOT has contracts with an outside entity to perform loan servicing for TIFIA credit instruments on its behalf, including credit accounting, collections, maintenance of documents, and financial reporting. To offset in part the DOT's costs, a TIFIA borrower is charged an annual fee for loan servicing activities associated with each TIFIA credit instrument, which is adjusted periodically.

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