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Before the

United States Senate

Committee on Environment and Public Works

Oversight Hearing on Implementation of MAP-21's TIFIA Program Enhancements

July 24, 2013

A. Introduction

Chairman Boxer, Ranking Member Vitter and members of the Committee, thank you for inviting me to testify today. My name is Geoff Yarema. I am a partner in the Infrastructure Practice Group at the law firm, Nossaman LLP, in Los Angeles. While the views I express here today are my own and not necessarily those of any of my partners or any clients of the firm, my testimony reflects a long career in transportation development and financing. My views on the Transportation Infrastructure Finance and Innovation Act, or TIFIA, are shaped by three different perspectives.

First, I have been involved in the development and implementation of TIFIA from its earliest days. Even before TIFIA's inception in 1998 as part of the Transportation Equity Act for the 21st Century (TEA-21), I worked on its predecessor projects – the Orange County Toll Roads and the Alameda Corridor – which Congress facilitated with line item loans and lines of credit. These projects paved the way for a formal national program.

Second, as a practitioner in the field, I have advised public agencies across the country in the innovative procurement, contracting and financing of large transportation projects in ways that minimize the use of federal gas tax revenues. As a result, my colleagues and I have been fortunate over the years to be involved in over $26 billion worth of projects using nearly $7 billion in total TIFIA assistance, and are currently advising clients that have submitted Letters of Interest (LOI) totaling over $23 billion in project value.

Third, my testimony reflects my years of work on the National Surface Transportation Infrastructure Financing Commission (Commission), a bipartisan commission mandated by Congress under The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The Commission's final report unanimously endorsed a strong TIFIA program and offered recommendations to improve it, many of which Congress incorporated into the reauthorization of the TIFIA program embodied in the Moving Ahead for Progress in the 21st Century Act, or MAP-21.

Based on my experience with TIFIA, I believe it is a critically-important program for the development of transportation infrastructure in this country. The overall effectiveness of the program to date is truly a testament to Congress, to state, regional and private applicants and to the TIFIA Program Office housed in the USDOT – each of which has worked very hard to make the TIFIA program a success. From where I sit, despite declining federal gas tax revenues, I am seeing more mega-projects in the pipeline than I have in many years. This trend speaks to this Committee's leadership, including, especially, Chairman Boxer and then-Ranking Member Inhofe, in creating this enhanced TIFIA program, but it also presents challenges to the TIFIA Program Office to get the loans approved and closed in a timely way.

B. Federal Role in Surface Transportation Continues to Evolve

As the Commission detailed in its final report to Congress entitled "Paying Our Way: A New Framework for Transportation Finance," the role of the federal government in funding and financing our national surface transportation infrastructure is fundamentally changing. Historically, the federal role was to provide significant financial resources to states and transit agencies out of the Highway Trust Fund (HTF) and to restrict the way those monies were spent. In recent years, however, the stability and adequacy of the HTF has diminished. While federal gas tax revenues are falling, investment needs are on the rise.

The TIFIA program responds directly to the need to stretch limited federal resources to fund critical improvements to the nation's aging surface transportation system. While not a substitute for direct apportionments of federal dollars from the HTF, the TIFIA program allows applicants to leverage fewer federal dollars to maximize local, state and private funds through a variety of credit instruments, including direct loans, loan guarantees and lines of credit. The TIFIA value proposition as enhanced by MAP-21 is enormous. A single dollar of TIFIA money can be leveraged into between 10-20 times that amount in direct loans, which can produce projects 2-3 times the size of the loans. Applied to a project of the scale eligible for TIFIA assistance, that means that $33 million in federal credit subsidy can result in a $330 million TIFIA loan to support a $1 billion project.

C. Congressional Signals to Project Sponsors

In MAP-21, Congress recognized that state and regional public agencies were struggling to fund and finance large transportation projects. With HTF resources likely

to remain insufficient to fund mega-projects, Congress greatly expanded the TIFIA credit assistance program, sending clear signals to state and regional public agencies.

- By expanding the amount of TIFIA budget authority from approximately $122 million a year to $750 million in FY 2013 and $1 billion in FY 2014, Congress made it clear that project sponsors should take advantage of a larger, more robust TIFIA program for its projects of regional and national significance, rather than expecting new federal grant money for large projects.

- By sizing and streamlining the TIFIA program with the intent to meet then-projected demand, Congress signaled to project sponsors that they should focus less on competing against each other for this previously-limited federal credit resource and instead should devote their energy to optimizing their own project's financial feasibility.

- By imposing a "ripeness" requirement, Congress signaled that project sponsors should be discouraged from filing applications early in order to make it difficult for other sponsors to discern the extent to which prior filings were using up available capacity during the fiscal year a sponsor was targeting.

- By enhancing the predictability and efficiency of the TIFIA review and approval process, Congress sought to make the program more applicant-friendly and to encourage program participation.

D. Congressional Signals to TIFIA Program Administrators

With the passage of MAP-21, Congress also sent clear signals to the USDOT administrators of the TIFIA program.

- By sizing the program to meet then-projected demand and removing statutory discretion to select among eligible projects, Congress signaled that program administrators were to treat all eligible and creditworthy projects equally—in effect, first come, first served.

- By increasing lending capacity by a factor of seven in FY 2013 and by a factor of eight in FY 2014, Congress signaled that the program need not restrict loan applications to a once a year application window, permitting a rolling application process – in effect, making loans available on a project's schedule, not on the USDOT's schedule.

- By increasing permitted loan size from 33% to 49% of eligible costs without changing the creditworthiness requirements, Congress signaled approval of the way USDOT had previously been structuring loans and encouraged USDOT to expand the size of creditworthy loans.

- By imposing statutory deadlines on processing applications, Congress signaled the importance of speeding up the delivery of federal creditworthy projects of regional and national significance.

- By imposing the "ripeness" requirement referenced above, Congress signaled that USDOT should focus on those projects that are ready for a TIFIA commitment.

- By providing funding for enhanced program administration, Congress showed that it was willing to devote the resources necessary to deliver on the new Congressional commitments.

E. From Bills To Bulldozers: MAP-21 on the Ground

Since the passage of MAP-21, prospective applicants have, at last count, submitted 31 Letters of Interest for MAP-21 TIFIA loans. The most recent we know of is the California Department of Transportation (Caltrans) Letter of Interest for its project in cooperation with Los Angeles County Metropolitan Transportation Authority (LA Metro), the Accelerated Regional Transportation Improvements Project. This project is a critical effort being undertaken in Chairman Boxer's state. While not all of the projects currently seeking TIFIA support may be ready to receive loans this or next fiscal year, they nevertheless reflect a potential demand for TIFIA loans to help in financing projects valued at an estimated $42 billion. And, if all Letters of Interest submitted to date culminate in TIFIA loans, the number of states with projects benefited by TIFIA financing would jump from 15 to 24. Beyond that, we are aware of projects in the pipeline that contemplate submission of ripe Letters of Interest in the next 12 months, increasing further the number of states seeking to participate. There is no reason why every state in the Union, the District of Colombia and Puerto Rico shouldn't be TIFIA borrowers.

As this growing demand demonstrates, states and regional governments are getting Congress' message. They are increasingly looking to the TIFIA program as a key component of their transportation funding and financing plans. Project sponsors are finding new sources of dedicated funding to replace federal grant funds, motivated by the availability of TIFIA assistance. They are doing so in unprecedented numbers, which is exactly what Congress hoped would happen.

TIFIA program administrators are endeavoring to meet the challenges Congress has given it, but in certain important respects they are struggling. We have seen USDOT take positive steps to increase the transparency of the program and to implement MAP-21's requirements for timely processing of applications. We note, for example, that guidance recently issued by the USDOT reflects an aspirational 7½ to 9-month timeframe to process a request for TIFIA credit assistance, commencing from the submittal of a letter of interest to the execution of an approved credit agreement. Yet, much remains to be done.

F. Getting into High Gear

Despite these aspirations, as of this writing, we understand that USDOT has given final approval to only a single new loan under MAP-21, despite no shortage of eligible, creditworthy and shovel-ready projects and despite being more than a year out from the Act's passage. While the success of the TIFIA program absolutely depends on careful and consistent review by USDOT, its success also depends on an efficient and timely

review and approval process that supports the TIFIA program's enormous promise to accelerate project delivery.

These goals are not mutually-exclusive. Instead, with proper parameters and guidance from Congress, as well as sufficient personnel and resources to tackle growing demand for the TIFIA program, we are hopeful that USDOT will institutionalize the administrative improvements made to date and will continue to build upon them.

Among the challenges TIFIA program administrators should be encouraged to continue to resolve, include:

- **Streamline the Pre-Application Process.** The first two steps in USDOT's review process require the submission of a Letter of Interest and a creditworthiness review. Only once a project sponsor succeeds in satisfying all of the statutory eligibility criteria, including creditworthiness, is that sponsor invited to submit an application for TIFIA credit assistance. While this substantive review serves a valuable function, the enormous level of detail that USDOT is requiring at this initial screening stage is tantamount to a full-blown application, but without the statutory deadlines for review and approval of applications imposed by Congress in MAP-21.[1] Frontloading the due diligence in this way effectively prevents the statutory deadlines for processing applications from having the desired effect of speeding projects through to approval and circumvents the statutory rolling application process.

Instituting (and meeting) workable deadlines to complete preliminary review, consistent with the needs of both USDOT and applicants, would help effectuate Congress' intent that applications be timely considered and project delivery be accelerated. Deadlines would also encourage project sponsors to meet the new statutory ripeness requirement, which requires an applicant to demonstrate project readiness.[2]

- **Enhance Bidding Competition With Earlier TIFIA Commitments to Public Sponsors.** It is an important federal policy to maximize robust, open and fair competition. Agencies seeking to procure a contractor that will use TIFIA in its financing are struggling to maximize private sector competition in their procurements because bidders are unsure of the availability of TIFIA. To counter that uncertainty, USDOT should be able to provide conditional commitments or indicative term sheets before final bids are received. These tools would help maximize competitive tension and generate best value in critical mega-project procurements.

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1 Section 2002 of MAP-21 (amending § 602(d) of Title 23 of the United States Code).

2 Section 2002 of MAP-21 (amending § 602(a)(10) of Title 23 of the United States Code) requires an applicant to "demonstrate a reasonable expectation that the contracting process for construction of the project can commence by not later than 90 days after the date on which a Federal credit instrument is obligated for the project. . . ."

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- **Accelerate Financial Closings.** State officials need to move procurements, start to finish, for projects of regional and national significance through narrow windows of political opportunity. If a project's financing takes too long, the project opportunity as a whole may be lost. Additionally, because lender commitments typically do not run more than 120-150 days from proposal submission, where there are delays in USDOT's due diligence for TIFIA, lender commitments may expire, adding public sector risk, cost and further delay.

Delays can often be attributed to poor integration of the procurement process in TIFIA review. Ensuring the execution of credit agreements within 60-90 days of proposer selection and 120-150 days of proposal submission would minimize risk associated with delayed financial close, while giving USDOT time to complete its necessary due diligence. Coordination with the proposed procurement's schedule is essential for all parties to gain the value of TIFIA and not place their investment or other public dollars at risk.

- **Preserve TIFIA's Value Proposition.** As noted by USDOT's guidance on the TIFIA program, the purpose of TIFIA credit assistance is to provide "improved access to capital markets, flexible repayment terms, and potentially more favorable interest rates than can be found in private capital markets for similar instruments." It is essential that Congress preserve TIFIA's powerful incentives and maintain its flexible loan terms if TIFIA is to continue to "fill market gaps and leverage substantial private co-investment by providing supplemental and subordinate capital."

While USDOT, as the program administrator, might be inclined to integrate more restrictive loan terms into TIFIA credit agreements, I do not believe that the program's track record merits this strategy. To my knowledge, over 15 years and more than 30 loans, there has been only one loan default under the program. Even in that case, the TIFIA program acknowledges that it is positioned to recoup 100% of the original loan balance. In fact, there is a good case to be made that TIFIA has actually made money for the U.S. Treasury, considering that the credit subsidy Congress has made available has far exceeded any risk of loss to date.

TIFIA loans are intended to be subordinate to investment-grade debt, not be investment-grade themselves, except in a very limited circumstance where the principal amount of the TIFIA loan exceeds the principle amount of the senior debt or is the only debt for the project. Loans are intended to allow for sculpting of repayment towards the latter part of the loan's duration. USDOT needs to be encouraged to retain these important features, as they are the hallmark of the TIFIA program.

Moreover, Congress has already put in place powerful safeguards to protect the public interest in making TIFIA loans. Existing protections include: (i) statutory rights granted USDOT as a creditor; (ii) the credit subsidy, which is intended to cover the risk of default; (iii) access to inside and outside experts as part of USDOT's comprehensive due diligence effort; (iv) variable OMB scoring; and (v) the benefit of a portfolio, which spreads the risk across all loans made under TIFIA.

- **Enhance Transparency.** While the USDOT has increased its communications to the public, it remains impossible for public agencies to obtain sufficient information about pending LOIs and applications to understand the extent to which program capacity remains for a given fiscal year. As an example, I have not been able to find out the extent to which the USDOT expects to obligate FY 2013 funds by the end of this fiscal year and its projection of the extent to which it expects to obligate the total credit Congress made available in MAP-21 through FY 2014. There is certainly no shortage of credit being sought. This lack of transparency makes it very difficult for project sponsors to develop financing plans and procurements anticipating the potential use and availability of such a significant financial tool, which is a huge disincentive to the challenge of building the complicated political consensus at the state and regional levels and maturing a project to a level necessary to move it beyond concept to delivery.

Access to current information about the status of pending LOIs, applications and program capacity would assist prospective applicants and help USDOT optimize management of the program. A track record of publicly-available and funded loan agreements would clarify if the USDOT is in fact, as Congress intended, prioritizing loan processing for eligible and creditworthy projects based on project readiness. Up-to-date information would also reveal the extent to which TIFIA should grow further to meet anticipated demand.

Lastly with respect to transparency, we eagerly await a new TIFIA Program Guide, form of application and regulations that reflect the July 2012 adoption of MAP-21. While a new form of application was recently circulated for public comment, we are hopeful that more of this critical material will be finalized quickly.

- **Process Higher Quality Credits More Quickly and Efficiently.** Consistent with Congress' intent, TIFIA applicants dedicate a wide range of revenue sources to repay TIFIA credit assistance. Projects backed by their own future user fees such as tolls generally deserve revenue-specific analysis. Projects backed, however, by sales taxes, other public agency-generated revenues, and/or are structured around availability payments payable from a state's highway fund or other non-project sources deserve a streamlined due diligence and approval process that better reflects the stability and quality of the dedicated revenue stream. This is particularly true of issuers that are themselves investment grade, such as availability payments where a state may already have a sovereign rating. In such circumstances, the LOI stage reasonably need not be more than a determination of legal eligibility and at no stage should the TIFIA Program Office feel compelled to recreate the better-resourced work the rating agencies have already performed.

- **Avoid Rationing.** Despite Congress' express authorization of loans of up to 49% of eligible project costs, to my knowledge, USDOT has yet to even consider a maximum loan amount of more than 33%, despite numerous creditworthy letters of interest asking for exactly that. In fact, the TIFIA Program Office has responded to all such requests with a demand that project sponsors requesting a loan amount of more than 33% of eligible project costs provide an (undefined) rationale for any such request – an obligation not derived from any MAP-21 statutory language. To date, no project

sponsor, to my knowledge, has met this demand. It is unclear whether this USDOT demand is intended to spread out the available credit across more projects, whether administrators feel they can use discretion to impose some unarticulated public policy threshold or standard for the higher amount, or for some other unexplained reason. Whatever the purported justification, Congress authorized this higher amount for those whose creditworthy finance plans could incorporate this amount efficiently. USDOT has, to date, ignored this enhanced authority.

Furthermore, if despite Congress' efforts to size the TIFIA program to meet demand, project sponsors are stepping up to the plate to a greater degree than the program can accommodate, the answer is not to return to the practice of picking winners and losers, or using discretion to limit the amount of TIFIA credit below Congressionally-authorized amounts. Instead, Congress should encourage the USDOT to use up all available credit on the first come, first served basis that Congress reengineered the program to employ for two fiscal years. In that way it could view clearly, with transparent results, the right program size for subsequent fiscal years, recognizing that a successful TIFIA program means ever-more newly dedicated state, local and private monies to replace ever-eroding federal grant support for a system much in need of new capital investment.

Perhaps it is TIFIA's prior incarnation as a more limited and discretionary program that hampers the expeditious administration of the "new-and-improved" MAP-21 TIFIA. USDOT should be encouraged to implement the full extent of Congress' intent and TIFIA's programmatic capabilities by utilizing all of the new tools provided by MAP-21, including the 49% loan amount ceiling and the direction that all eligible and creditworthy projects be approved to the extent of available funding. By administering TIFIA in such a way, USDOT can create a reliable testing environment to help Congress determine whether the program is properly structured and working as intended.

G. Where Do We Go From Here?

MAP-21 is set to expire in September of next year. As Congress starts to focus on the reauthorization of the surface transportation program, certain further improvements of TIFIA can already be anticipated:

- Sizing the TIFIA program to meet demand, the bipartisan direction Congress gave the program under MAP-21, will likely result in an increase in the program's loan capacity. There are more states and more projects every month responding to the signals Congress has sent.

- While not formally in this Committee's jurisdiction, pairing TIFIA with Private Activity Bonds (PABs) remains critically important. The $15 billion cap on the PABs demonstration program will, in all likelihood, be close to exhaustion by expiration of MAP-21.

H. Conclusion

TIFIA has proven to be a powerful incentive for states and local governments to leverage scarce federal funds and encourage the investment of private monies to complete large-scale transportation infrastructure projects across the country that might not otherwise be possible. We encourage this Committee to build upon the momentum created by the enactment of MAP-21 by offering further guidance and parameters to improve the efficiency and transparency of the process by which TIFIA credit assistance is secured. For the revamped and expanded TIFIA Program to fulfill its enormous potential to deliver transportation infrastructure projects of regional and national significance, Letters of Interest must be timely and reliably transformed into concrete commitments. Thank you for the opportunity to offer my recommendations to help achieve this objective. I am pleased to answer any questions and to otherwise assist the Committee in any way.