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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Private Enterprise Participation

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of policy guidance.

SUMMARY: The Federal Transit Administration (FTA) hereby establishes policy guidance for documenting compliance with the private enterprise participation requirements under the Moving Ahead for Progress in the 21st Century Act (MAP-21). It also includes additional clarifications under the Fixing America's Surface Transportation (FAST) Act. Because the policy guidance requirement reiterates existing statutes and regulations and imposes no new requirements on recipients, FTA is not soliciting public comment on this policy guidance.

EFFECTIVE DATE: This policy guidance will be effective [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For policy guidance questions, Kimberly Gayle, Office of Budget and Policy, telephone: 202-366-1429; or e-mail: Kimberly.Gayle@dot.gov. For legal questions, Dana Nifosi, Office of Chief Counsel, telephone: 202-366-1936; or email: Dana.Nifosi@dot.gov.

I. BACKGROUND

The FTA is issuing this policy guidance pursuant to Section 20013(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21) (Pub. L. 112-141). Section 20013(d) requires the Secretary of Transportation to publish policy guidance regarding how recipients of Federal financial assistance under 49 U.S.C. chapter 53 can

best document compliance with the requirements for private enterprise participation in public transportation planning and transportation improvement programs contained in sections 5303(i)(6), 5306(a), and 5307(b)¹ of title 49, United States Code.

A. Statutory Requirements for Private Enterprise Participation

Section 5303(i)(6) requires that each metropolitan planning organization (MPO) provide interested parties, including private providers of transportation, with a reasonable opportunity to comment on the metropolitan transportation plan (MTP). The Fixing America's Surface Transportation (FAST) Act (Pub. L. 114-94) amended this section to include the following private providers: "intercity bus operators, employer-based commuting programs, such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program." In addition, MPOs must develop a participation plan that defines a process for providing all interested parties, including private providers of transportation, with reasonable opportunities to be involved in the metropolitan transportation planning process. The MPO participation plan must be developed in consultation with all interested parties.

Section 5306(a) provides that a plan or program required by 49 U.S.C. 5303, 5304, or 5305 must encourage, to the maximum extent feasible, the participation of private enterprise (Note: 49 U.S.C. 5305 simply provides formula funding for the planning programs and does not establish procedural requirements.) 49 U.S.C. 5307(b) requires recipients of Urbanized Area Formula Grants to develop, in consultation with

¹ FTA notes that Section 20013(d) of MAP-21 refers to 49 U.S.C. 5307(c); however, the private transportation provider participation requirement is contained within 5307(b). Section 3010(b) of the Fixing America's Surface Transportation Act makes a technical correction to reference the correct subsection.

interested parties, including private transportation providers, a proposed program of projects (POP) for activities to be financed.

B. Regulatory Requirements for Metropolitan Planning Organizations in Metropolitan Areas

The FTA and the Federal Highway Administration (FHWA) recently promulgated a joint final rule (Joint Planning Rule) to update their regulations governing the development of MTPs and programs for urbanized areas, long-range statewide transportation plans and programs, and the congestion management process, as well as revisions related to the use of and reliance on planning products developed during the planning process for project development and the environmental review process. 81 FR 34049 (May 27, 2016), codified at 23 CFR part 450 and 49 CFR part 613. The regulatory changes implement amendments that MAP-21 and the FAST Act made to the metropolitan transportation planning and statewide and non-metropolitan planning processes.

Subpart C of the Joint Planning Rule implements 49 U.S.C. 5303 Metropolitan transportation planning. Each MPO must develop a Transportation Improvement Program (TIP) for the metropolitan planning area that provides all interested parties with a reasonable opportunity to comment on the proposed TIP in accordance with a documented participation plan that defines a process for providing individuals, affected public agencies, representatives of public transportation employees, public ports, freight shippers, providers of freight transportation services, private providers of transportation (including intercity bus operators, employer-based commuting programs, such as carpool programs, vanpool programs, transit benefit programs, parking cash-out programs, shuttle programs, or telework programs), representatives of users of public transportation,

representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with reasonable opportunities to be involved in the metropolitan transportation planning process. 23 CFR 450.316(a), 450.326(b). When an MPO submits a proposed TIP to FTA and FHWA as part of the Statewide Transportation Improvement Program (STIP) approval process outlined in 23 CFR part 450, subpart B, the MPO must certify that the metropolitan transportation planning process is being carried out in accordance with all applicable requirements, including 49 U.S.C. 5303. This self-certification must be made at least every four years per 23 CFR 450.336.

C. Regulatory Requirements for Statewide and Non-Metropolitan Planning

Subpart B of the Joint Planning Rule implements 49 U.S.C. 5304 Statewide and metropolitan transportation planning. Each state must undertake a transportation planning process and develop a long-range statewide transportation plan and STIP, which must be submitted, at least every four years, to FTA and FHWA for joint approval. When a state submits a STIP, it must certify that the transportation planning process is being carried out in accordance with all applicable requirements.

In implementing the statewide transportation planning process, States must develop and use a documented public involvement process that, *inter alia*, establishes early and continuous public involvement opportunities that provide timely information about issues and decision-making processes to individuals, affected public agencies, representatives of public transportation employees, public ports, freight shippers, private providers of transportation (including intercity bus operators), representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle

transportation facilities, representatives of the disabled, providers of freight transportation services, and other interested parties. See, 23 CFR 450.210.

D. Section 5307 Certification

Section 5307(b) requires recipients of urbanized area formula grants to develop a POP in consultation with interested parties, including private transportation providers. Recipients must then publish the proposed POP to provide affected individuals, private transportation providers and local elected officials an opportunity to examine and submit comments on the proposed POP and performance of the recipient. Recipients also must provide an opportunity for a public hearing. In preparing the final POP, recipients must consider comments and views received, especially those of private transportation providers. A recipient of Section 5307 funds must, in each fiscal year in which it requests such funds, submit a final POP and must certify that it has complied with Section 5307(b).

FTA Circular 9030.1E, “Urbanized Area Formula Program: Program Guidance and Application Instructions (January 16, 2014), includes guidance that recipients may satisfy the requirements of Section 5307(b) by following the procedures of the public involvement process outlined in the FTA/FHWA planning regulations. The Circular advises that a recipient that chooses to integrate the metropolitan planning process with the development of the POP should coordinate with the MPO and ensure that the public knows that the recipient is using the public participation process associated with TIP development to satisfy the public hearing requirements of Section 5307(b).

II. POLICY GUIDANCE

FTA has determined that the best way to document compliance with the private enterprise participation provisions of 49 U.S.C. 5303(i)(6), 5306(a) and 5307(b) is to comply with the public participation requirements imposed by the recently promulgated Joint Planning Rule. FTA's recipients will continue to submit the applicable certifications required by Subparts B and C of the Joint Planning Rule and 49 U.S.C. 5307 through the annual certifications and assurances process. In addition, recipients must retain, and provide to FTA when requested, documentation of participation by interested parties in the metropolitan and statewide planning processes, and evidence of compliance with participation plans and POPs, as applicable, that are developed as part of the 49 U.S.C. 5303 and 5304 metropolitan and statewide planning processes and the 49 U.S.C. 5307 Urbanized Area Formula Grant process.

Accordingly, recipients shall document compliance with the private sector participation provisions through the existing regulatory process implementing Federal planning requirements. FTA will verify compliance through its current oversight procedures either during the triennial review, state management review, planning certification review, the STIP approval process, and the Section 5307 grant application process. Given that this policy guidance imposes no new requirements, FTA is not requesting public comment.

Carolyn Flowers
Acting Administrator

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