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4910-09X

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Parts 80 and 260

[Docket Number DOT-OST-2024-0006]

RIN 2105-AE69

Railroad Rehabilitation and Improvement Financing Program and Transportation Infrastructure Finance and Innovation Act Program Regulations

AGENCY: Office of the Secretary of Transportation, Department of Transportation.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Transportation (Department) amends the Railroad Rehabilitation and Improvement Financing and Transportation Infrastructure Finance and Innovation Act program regulations to implement provisions of the Infrastructure Investment and Jobs Act and make other necessary updates.

DATES: *Effective Date*: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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I. Introduction and Background

This final rule establishes additional policies and procedures for the Railroad Rehabilitation and Improvement Financing (RRIF) program authorized by title V of the Railroad Revitalization and Regulatory Reform Act of 1976, as amended (49 U.S.C. Ch. 224; the RRIF Act) and the Transportation Infrastructure Finance and Innovation Act (TIFIA) program authorized by the Transportation Infrastructure Finance and Innovation Act of 1998, as amended (23 U.S.C. Ch. 6; the TIFIA Act). The RRIF Act authorizes the Secretary of Transportation (Secretary) to make direct loans and loan guarantees for eligible projects that meet enumerated criteria, and the TIFIA Act authorizes the Secretary to issue secured loans, loan guarantees, and lines of credit for eligible projects that meet statutory factors.

On January 25, 2024, the Department published a notice of proposed rulemaking (89 FR 4880; NPRM) that proposed to amend the RRIF and TIFIA program regulations to implement provisions of the Infrastructure Investment and Jobs Act (IIJA) and make other necessary updates. Having considered all comments submitted to DOT in response to the NPRM, the Department is issuing this final rule that adopts the proposal without change.

II. Public Comments on the Notice of Proposed Rulemaking and DOT's Responses

DOT received comments on the NPRM from nine interested parties. The Department carefully reviewed all comments it received. In sections II.A.-C. of the preamble to this final

rule, the Department summarizes the areas of the NPRM on which it received public comment and discusses DOT's responses to those comments.

A. Interest Rate Setting for TIFIA and RRIF Obligations with a Long Tenor

In the NPRM, DOT proposed to require an interest rate spread on any RRIF or TIFIA obligation if the United States Treasury does not post the yield for securities of a similar maturity on the date of execution of the loan agreement. The spread would be applied to any RRIF or TIFIA loan that has both: 1) a final maturity date more than 35 years after the date of substantial completion of the project; and 2) a loan term – the period beginning on the date of execution of the loan agreement and ending on the final maturity date – of more than 40 years. The interest rate would be equal to the rate on thirty-to-forty-year State and Local Government Series (SLGS) securities plus one basis point plus an annual interest rate adjustment for any period of the loan term after year 40 through year 100, which would be cumulative.

Public Comments:

Several commenters are supportive of the proposed methodology for setting the interest rate for obligations with a long tenor. One commenter supports the proposed rule but encourages DOT to provide more clarity on whether a project qualifies for the extended maturities authorized by the IIJA. (Public Law 117–58, sec. 12001(e)(2), 21301(d)(6) (2021).) Other commenters request specific terms for long-tenor loans.

The America Public Transportation Association (APTA), which represents a diverse membership of transportation entities, supports the proposed rule to set interest rates, but encourages DOT to increase transparency about the specific criteria a project would need to meet to qualify for a loan with a term longer than those authorized before the passage of the IIJA. In addition, APTA requests that the flexibility currently offered under the TIFIA and RRIF programs apply equally to long-tenor loans.

Rembe Urban Design + Development (Rembe) recommend a minimum 40-year amortization period, and ideally 60-year amortization period, for RRIF transit-oriented

development (TOD) projects. In their view, this extended amortization period would increase feasibility for RRIF TOD projects and match "the 40-year fully amortizing non-recourse construction loan" provided by other Federal loan programs.

DOT Response:

As mentioned in the NPRM, DOT administers the RRIF and TIFIA programs pursuant to their respective statutes and regulations, as well as additional criteria in notices of funding, which are issued and updated as necessary, and guidance[1] to applicants. The Department uses criteria in the statutes, regulations, notices of funding, and guidance to determine the loan tenor of all projects and will do the same to determine whether a project qualifies for a loan with a long tenor. Specifically, to qualify for a loan with a term longer than those authorized before passage of the IIJA, the project must meet the criteria of either 49 U.S.C. 22402(g)(1) or 23 U.S.C. 603(b)(5)(C). In addition, DOT must determine with a reasonable degree of confidence that the loan is able to be repaid by the maturity date. Furthermore, each project undergoes an in-depth review of its creditworthiness and must satisfy applicable creditworthiness criteria. Using the above criteria, as well as relevant statutes, regulations, notices of funding, and guidance, DOT will assess each project individually to determine whether it qualifies for a loan with a long tenor.

RRIF loans or loan guarantees, including those for TOD projects, may be structured to allow for a 40-year, or longer, amortization period, if such amortization period complies with the requirements of the RRIF statute. As mentioned in the NPRM, the Secretary shall not make a RRIF direct loan or loan guarantee unless repayment of the obligation is made within a term that is not longer than the shorter of:

(A) 75 years after the date of substantial completion of the project;
(B) the estimated useful life of the rail equipment or facilities to be acquired, rehabilitated, improved, developed, or established, subject to an adequate determination of long-term risk; or
(C) for projects determined to have an estimated useful life that is longer than 35 years, the period that is equal to the sum of—

[1] https://www.transportation.gov/buildamerica/financing/program-guide

(i) 35 years; and
(ii) the product of—
(I) the difference between the estimated useful life and 35 years; multiplied by
(II) 75 percent.

(49 U.S.C. 22402(g)(1).) In addition, payment of the RRIF direct loan or loan guarantee must commence no later than 5 years after the date of substantial completion. (49 U.S.C. 22402(j)(1).) Because of the variable nature of the estimated useful life and substantial completion of RRIF projects, not all RRIF loans will be able to support a 40-year, or longer, amortization period, while complying with the requirements of 49 U.S.C. 22402(g)(1) and (j)(1). Therefore, the Department cannot establish a minimum 40-year amortization schedule for any type of RRIF project, including TOD projects. Instead, DOT will evaluate each project on a project-by-project basis to determine whether it qualifies for a loan with a long tenor.

B. Interest Rate Spread on RRIF Direct Loans and Loan Guarantees with a Positive CRP

DOT proposed to add a credit spread, equivalent to the rate needed to reduce the credit risk premium (CRP) to zero dollars, to the interest rate charged on any RRIF direct loan projected to have a positive subsidy cost. The additional interest would not qualify as a CRP payment and would not be returned to the original source once the obligation is satisfied.

Public Comments:

Multiple commenters are supportive of the proposal to add a credit spread to any RRIF obligation with a positive subsidy cost. One commenter supports the proposed rule but suggests that the CRP be waived or reduced for RRIF projects that meet certain criteria. Another commenter requests that the Department delay consideration of this proposal because the commenter believes the credit spread would prevent project sponsors from applying for RRIF loans.

The American Short Line and Regional Railroad Association (ASLRRA), a non-profit trade association representing the interests of more than 600 short line railroads, notes that

paying an upfront CRP payment can be a potential challenge to borrowers and states that the proposed rule will support lending to short line railroads by eliminating that payment.

Amtrak requests additional clarity on the implementation of the proposed rule, including explanations of the rate adjustment required to achieve zero CRP and how any future appropriations or statutory revisions would affect a RRIF loan with an interest rate adjustment.

APTA urges DOT to delay consideration of this part of the proposed rule because it would increase the cost of RRIF loans and limit demand in the RRIF program. APTA also states that the proposed rule would prevent project sponsors from applying for RRIF loans, in part because the expected credit spread was not discussed in the NPRM. Finally, APTA notes that the proposed rule may not align with Congress's intent, as enacted in 49 U.S.C. 22402(f)(7).

Rembe suggests that special consideration be given to RRIF projects considered catalytic and that CRP should be reduced or waived for certain projects. Specifically, Rembe suggests the reduction of CRP for RRIF projects that: 1) have a debt coverage ratio over 1.28; 2) provide multifamily or workforce housing; 3) have a market study that strongly supports the project; or 4) are public-private partnerships. Rembe also suggests that the DOT consider the size of a project and the project's ability to cover the interest rate spread in calculating that spread.

DOT Response:

The Department will continue to determine the applicable CRP by estimating the total long-term cost to the Federal Government of the RRIF direct loan or loan guarantee. (49 U.S.C. 22402(f)(2).) To calculate the CRP for a RRIF obligation, the Department uses the criteria in 49 U.S.C. 22402(f), the regulations, notices of funding, and guidance, to determine the net present value of expected losses due to default or delinquency. This calculation is then reviewed and confirmed by the Office of Management and Budget (OMB). OMB either concurs with the CRP, as calculated, or advises DOT of changes needed to the calculation to fully capture the estimated cost to the government of providing the financial assistance.

In the NPRM, the Department proposed to add a credit spread to the interest rate charged on a RRIF direct loan where the calculated CRP is a positive amount. To determine this credit spread, the President's Budget rate would be adjusted to an interest level sufficient to bring the CRP down to zero dollars. The interest rate on the RRIF direct loan would then be adjusted to match the President's Budget rate credit spread. The interest rate will continue to be set on the date of the execution of the loan agreement for the RRIF direct loan or loan guarantee.

The NPRM provides that removal of the requirement that the Department return CRP payments would remove the requirement for the addition of a credit spread. As mentioned above, the interest rate, plus any credit spread, will be calculated on the date of execution of the RRIF loan agreement. Therefore, the removal of the credit spread would apply to any RRIF loans not yet entered into, but would not change the requirements of an existing RRIF obligation. Similarly, any future appropriation from Congress to cover subsidy cost would not change the terms of an existing RRIF loan agreement.

In the NPRM, DOT also addressed the fact that without an appropriation from Congress to cover the subsidy cost and with the requirement to return CRP payments, the cost of RRIF loans would increase and result in a CRP that would be cost prohibitive to borrowers. In initial calculations carried out with the assistance of the Department of Treasury and OMB, the Department found that the CRP would have to be sized to the face value of the direct loan to allow CRP payments, plus interest accrued, to be returned to the original source once the loan obligation is satisfied. Without an appropriation to cover the CRP, the Department calculated that a RRIF borrower would be required to pay a CRP payment equal to each loan disbursement, prior to such disbursement. DOT believes that such high CRP payments would prevent project sponsors from applying for RRIF loans and severely limit demand in the RRIF program.

The Department proposed the credit spread to remove the barriers to utilization of the RRIF program created by the need to repay CRP, while ensuring proper accounting of the government's risk. The Department considered preserving optionality for borrowers and

allowing each borrower to determine whether it is preferable to pay a high CRP, but have those payments returned upon satisfaction of the obligation, or to pay an interest rate premium. DOT determined, however, that the vast majority, if not all, borrowers could not afford to pay the face value of the RRIF direct loan to preserve repayment. This conclusion is supported by feedback from prospective RRIF applicants that the need to pay CRP contributed to their decision to not apply for a RRIF loan and the comment from the ASLRRA that reiterates that paying the cost of the loan before the loan proceeds are disbursed to the borrower is a challenge to borrowers.

For these reasons, the Department has determined not to delay consideration of this portion of the proposal and is adopting it as proposed. In addition, the Department proposed to add a credit spread in the amount needed to result in a CRP of zero dollars. Given that the CRP will be $0, DOT does not plan to waive or reduce the CRP further. Furthermore, the Department cannot waive or reduce the subsidy cost of a loan.

C. Inclusion in Transportation Plans and Programs

In the NPRM, the Department proposed to amend 49 CFR part 80 to delete outdated statutory language. With this change, a TIFIA project would only need to "satisfy the applicable planning and programming requirements of sections 134 and 135 at such time as an agreement to make available a Federal credit instrument is entered into under the TIFIA program." (23 U.S.C. 602(a)(3).)

Public Comments:

The Airports Council International – North America (ACI-NA), representing local, regional, and state governing bodies that own and operate commercial airports in the United States and Canada, believes that FAA's Master Plan and Airport Layout Plan approval processes should be sufficient to enable airports to meet the requirements of 23 U.S.C. 602(a)(3) and requests that DOT clarify that airport projects included in a FAA-approved Airport Master Plan and Airport Layout Plan do not also need to meet the requirements of 23 U.S.C. 134 and 135.

APTA supports the objective to revise the TIFIA regulations to comply with 23 U.S.C. 602(a)(3) but believes that this would be better accomplished by adding the statutory language to the rule. In addition, APTA notes that the rule should be implemented in a way that recognizes the unique characteristics of transit-oriented development projects.

LOCUS, Smart Growth America's coalition of triple bottom line real estate developers, recommends that the final rule explicitly exclude or exempt TOD projects from the requirements of 23 U.S.C. 602(a)(3).

DOT Response:

The Department proposed to amend 49 CFR part 80 to align with 23 U.S.C. 602(a)(3) and has done so by replacing outdated statutory language with the requirement that a project comply with 23 U.S.C. 602(a)(3). The Department believes that the approach taken in the final rule addresses the concern raised by APTA in their comment suggesting that DOT include the language of the current statutory provision in the final rule at 49 CFR 80.13(a)(1). In addition, sections 134 and 135 of title 23 of the U.S.C., and the underlying regulations, are administered by the Federal Highway Administration and the Federal Transit Administration. The Department believes it is in the best interest of TIFIA borrowers to rely on the agencies with expertise in transportation planning and programming to determine which projects must satisfy the requirements of sections 134 and 135 of title 23 of the U.S.C.

The Department may consider in future rulemaking whether referring to this and other statutory requirements in the regulations assists in program administration.

III. Regulatory Review

A. Executive Order 12866, 13563, and 14094

This rule has been determined to not be a significant regulatory action under Executive Order (E.O.) 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993), as supplemented by E.O. 13563, "Improving Regulation and Regulatory Review," 76 FR 3821 (Jan. 21, 2011), and amended by E.O. 14094, "Modernizing Regulatory Review," 88 FR 21870 (Apr.

11, 2023). Accordingly, this action was not subject to review under that Executive order by the Office of Information and Regulatory Affairs within the Office of Management and Budget.

B. Paperwork Reduction Act

According to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), no Federal agency may collect or sponsor the collection of information, nor may it impose an information collection requirement, unless it displays a currently valid OMB control number. The National Surface Transportation and Innovative Finance Bureau (Bureau) received approval from OMB for use of forms for the RRIF and TIFIA program under OMB control number 2105-0569, with an expiration date of February 28, 2025. This rule does not change that collection of information or create any collection of information, and therefore, is not subject to the Paperwork Reduction Act requirements.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.), as amended, requires preparation of a final regulatory flexibility analysis for any final rule that by law must first be proposed for public comment, unless the Federal agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ‘‘Proper Consideration of Small Entities in Agency Rulemaking,’’ 67 FR 53461 (August 16, 2002), DOT issued procedures and policies to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process and DOT has made its procedures and policies available on its website: https://www.transportation.gov/regulations/rulemaking-requirements-concerning-small-entities.

The Bureau has evaluated the effects of this action on small entities and has determined that the rule would not have a significant economic impact on a substantial number of small entities. First, the Bureau does not expect to enter into loans with a substantial number of small entities. In the last five years, the Bureau has obligated almost 40 loans under both the RRIF and TIFIA programs, and no borrowers have been small entities. Given that zero percent of

borrowers were small entities in the time period sampled, the Bureau does not expect that a large number of borrowers will be small entities in the future. Second, the Bureau doesn't believe that this action would have a significant economic impact. The changes to 49 CFR part 80 related to inclusion in the transportation plans and programs will not have any economic impact because the regulatory change merely updates the regulation consistent with existing statutory requirements. While the changes to 49 CFR parts 80 and 260 related to long-tenored obligations will raise interest rates for borrowers of long-tenored obligations, this impact can be avoided by a borrower opting for a loan term that is less than 40 years. A RRIF loan with a positive CRP will similarly have a higher interest rate, but the Bureau believes this economic impact is preferable to a CRP payment that is so large it is cost prohibitive.

The Department did not receive comments on its certification in the proposed rule and responds to comments on the economic impact of the rule in the preamble to the final rule.

For the reasons discussed in this section, the Department certifies that this action would not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 et seq.) requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final rule that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. The rule does not contain such a mandate; therefore, the analytical requirements of title II of the Act do not apply.

E. Executive Order 12988

Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), requires that Federal agencies promulgating new regulations or reviewing existing regulations take steps to minimize litigation, eliminate ambiguity and to reduce burdens on the regulated public. The

Bureau has reviewed this rulemaking and has determined that this rulemaking action conforms to the applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

F. Executive Order 13175

Consistent with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000), DOT ensures that Federally Recognized Tribes (Tribes) are given the opportunity to provide meaningful and timely input regarding proposed Federal actions that have the potential to affect uniquely or significantly their respective Tribes. The Bureau has not identified any unique or significant effects, environmental or otherwise, on Tribes resulting from this rule.

G. Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOT has examined this rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

List of Subjects

49 CFR Part 80

Credit, Highways and roads, Loan programs-transportation, Mass transportation, Railroads.

49 CFR Part 260

Loan programs-transportation, Railroads.

Issued in Washington, DC on May 16, 2024.

Peter Paul Montgomery Buttigieg,

Secretary, Department of Transportation.

For the reasons stated in the preamble, the Department of Transportation amends 49 CFR parts 80 and 260 as follows:

PART 80—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION

1. The authority citation for part 80 is revised to read as follows:

Authority: Secs. 1501 et seq., Pub. L. 105–178, 112 Stat. 107, 241, as amended; 23 U.S.C. 601-611 and 315; 49 U.S.C. 116.

2. Amend § 80.13 by:

a. In the introductory text of paragraph (a), removing the word "five" and adding in its place the word "four";

b. Revising paragraph (a)(1); and

c. Removing paragraph (a)(5).

The revision reads as follows:

§ 80.13 Threshold criteria.

(a) * * *

(1) A project shall comply with 23 U.S.C. 602(a)(3).

* * * * *

3. Add § 80.23 to read as follows:

§ 80.23 Loan terms.

(a) The interest rate on a secured loan will be not less than the rate on United States Treasury securities of a similar maturity to the maturity of the secured loan on the date of the execution of the loan agreement, except as provided in paragraph (b) of this section and 23 U.S.C. chapter 6.

(b) If, on the date of the execution of the loan agreement, the United States Treasury does not post the rate of securities of a similar maturity to the maturity of the secured loan, the interest rate on any secured loan with both a final maturity date that is more than 35 years after the date of substantial completion of the project, and a loan term that is more than 40 years, will be equal to not less than the rate on thirty-to-forty year Treasury securities plus an annual interest rate adjustment. The annual interest rate adjustment will be, cumulatively:

(i) 1.4 basis points for each year of the loan term after year 40 to, but not including, year 51;

(ii) 0.4 basis points for each year of the loan term from year 51 to, but not including, year 71; and

(iii) 0.2 basis points for each year of the loan term from year 71 to year 100.

(c) For purposes of this section, "loan term" means the period beginning on the date of the execution of the loan agreement and ending on the final maturity date.

PART 260—REGULATIONS GOVERNING LOANS AND LOAN GUARANTEES UNDER THE RAILROAD REHABILITATION AND IMPROVEMENT FINANCING PROGRAM

4. The authority citation for part 260 is revised to read as follows:

Authority: 49 U.S.C. 22401, 22402, 22403, 22404, 22405, 22406; 49 U.S.C. 116.

5. Revise § 260.9 to read as follows:

§ 260.9 Loan terms.

(a) The interest rate on a direct loan will be not less than the rate on United States Treasury securities of a similar maturity of the direct loan on the date of the execution of the loan agreement, except as described in paragraph (b) of this section and in § 260.17(d).

(b) If, on the date of the execution of the loan agreement, the United States Treasury does not post the rate of securities of a similar maturity of the direct loan, the interest rate on any direct loan with both a final maturity date that is more than 35 years after the date of substantial

completion of the project, and a loan term that is more than 40 years, will be equal to not less than the rate on thirty-to-forty year Treasury securities plus an annual interest rate adjustment. The annual interest rate adjustment will be, cumulatively:

(i) 1.4 basis points for each year of the loan term after year 40 to, but not including, year 51;

(ii) 0.4 basis points for each year of the loan term from year 51 to, but not including, year 71; and

(iii) 0.2 basis points for each year of the loan term from year 71 to year 100.

(c) For purposes of this section, “loan term” means the period beginning on the date of the execution of the loan agreement and ending on the final maturity date.

6. Amend § 260.17 by adding paragraph (d) to read as follows:

§ 260.17 Credit risk premium analysis.

* * * * *

(d)(1) Where the Credit Risk Premium determined pursuant to paragraph (a) of this section is a positive amount, the interest rate on the direct loan will be equal to not less than the rate set pursuant to § 260.9 plus an interest rate adjustment sufficient to result in a Credit Risk Premium of zero dollars.

(2) Paragraph (d)(1) of this section shall apply to a direct loan or loan guarantee only so long as the Act requires the Secretary to return Credit Risk Premiums paid on that loan or loan guarantee to the original source.

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