The background of the top half of the page is a photograph of the United States Capitol building in Washington, D.C. The building is shown from a low angle, emphasizing its grandeur. The central dome is the focal point, topped with the Statue of Freedom. The building's facade features classical architectural elements like columns and arches. An American flag is visible on the left side. The image is overlaid with a decorative graphic consisting of a blue and maroon curved band at the bottom and a pattern of thin, curved white lines on the right side.

Testimony of Paul P. Skoutelas President and CEO American Public Transportation Association

**Hearing on "Oversight of the Federal Transit Administration's
Implementation of the Capital Investment Grant Program"**

July 16, 2019



AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

Introduction

Chairwoman Norton, Ranking Member Davis, and Members of the Subcommittee on Highways and Transit, on behalf of the American Public Transportation Association (APTA) and its more than 1,500 public- and private-sector member organizations, thank you for the opportunity to testify on “*Oversight of the Federal Transit Administration’s Implementation of the Capital Investment Grant Program*”.

My name is Paul Skoutelas, and I am the President and Chief Executive Officer (CEO) of APTA, an international association representing a \$71 billion industry that employs 430,000 people and supports millions of private-sector jobs. We are the only association in North America that represents all modes of public transportation—bus, paratransit, light rail, commuter rail, subways, waterborne services, and intercity and high-performance passenger rail.¹ Public transportation not only spurs economic growth, but reduces congestion, improves air quality, saves time and money, and advances an equitable and better quality of life for our communities.

Prior to joining APTA in January 2018, I served as national director of WSP USA’s Transit & Rail Technical Excellence Center where I provided strategic direction on public transit and rail projects. Earlier in my career, I was CEO at two major public transportation agencies: the Port Authority of Allegheny County in Pittsburgh, Pennsylvania, and the Central Florida Regional Transportation Authority (LYNX) in Orlando, Florida. At both WSP and the public transit agencies, I was directly involved in delivering Capital Investment Grant (CIG) projects.

Capital Investment Grants Addressing the Mobility Demands of Growing Communities

APTA strongly supports the CIG program. Capital Investment Grants provide critical investments for new and expanded subways, light rail, commuter rail, streetcars, and bus rapid transit (BRT), among others.

As illustrated on the following page, over the past decade, more than **one-half** of all states have benefited from the CIG program or are in the current pipeline. From BRT projects in Michigan and Oregon, to commuter rail projects in Texas, to heavy rail projects in Illinois, and light rail projects in Arizona, Utah, and California, public transportation projects that are funded through the CIG program are an essential component of addressing the mobility demands of growing communities.

¹ APTA members include public transit systems; planning, design, construction, and finance firms; product and service providers; academic institutions; transit associations; and state departments of transportation.

For these reasons, Capital Investment Grants are a critical tool to addressing the mobility demands of our communities and growing the national economy. We greatly appreciate the Subcommittee's continued oversight of the CIG program. We have a great working relationship with the Committee and the Federal Transit Administration (FTA) and we look forward to continuing to work together to advance these critical public transportation capital projects.

The CIG Program: A Bureaucratic Maze

Unfortunately, over the past two decades, both Congress and FTA have repeatedly layered additional requirements on the CIG program, resulting in a bureaucratic maze. If an individual project suffers schedule or budget issues, Congress and FTA have often responded with new statutory, regulatory, or administrative requirements imposed across-the-board on **every** project in the CIG pipeline. As a result, beginning with the enactment of the Transportation Equity Act for the 21st Century (TEA 21) in 1998, the CIG requirements have become vastly more complex, time-consuming, and burdensome than the requirements of other comparable, large U.S. Department of Transportation (DOT) discretionary grant programs.

Moreover, these burdensome requirements cause significant delay in project approvals, which result in considerable increases in project costs prior to construction. Today, a CIG project sponsor faces almost **60,000** words of federal statutory law, regulations, and administrative guidance under the program. Comparatively, a Federal-aid Highway INFRA Grant applicant faces less than one quarter of the statutory language of the CIG program and **no** specific regulations.

The bureaucratic maze is not only a burden on CIG project sponsors. It also affects local decision-making as communities weigh whether to proceed with a CIG transit project, together with the accompanying program requirements and multi-year process, or, alternatively, build a highway project with limited federal requirements and an expedited DOT discretionary grant review process.

FTA's Implementation of the CIG Program

Funding

Funding Levels. In fiscal year (FY) 2018 and FY 2019, the President's Budgets proposed to eliminate funding for new CIG projects and limit funding to projects with existing Full Funding Grant Agreements (FFGAs). APTA strongly opposed these proposals and greatly appreciates that Congress continued significant funding for Capital Investment Grants, including new projects. This year, the President's Budget proposes \$1.5 billion for the CIG program, including \$500 million for new projects. Although we are encouraged that the Administration has expressed support for the program, **we strongly urge Congress to provide funding at or above the FY 2019 enacted level of \$2.6 billion.**

In the past three fiscal years (FY 2017 – FY 2019), Congress has repeatedly recognized the importance of CIG investments and provided funding that is greater than the \$2.3 billion authorized in the Fixing America’s Surface Transportation Act (FAST Act) (P.L. 114-94). Investment in public transportation yields significant economic and community benefits and we are grateful for this Committee’s and Congress’ support throughout the years.

Investing Available Funds. In addition, Congress has specifically directed FTA to obligate 85 percent of CIG funding by a specific date (e.g., obligating 85 percent of FY 2018 CIG funds by December 31, 2019). We strongly support this requirement because it requires FTA to help projects navigate the bureaucratic maze of the CIG program and obligate the available funds.

For instance, in FY 2019, Congress provided \$2.6 billion for CIG investments. To date, more than one-half (\$1.3 billion) of these funds remain unallocated (i.e., FTA has not assigned the funds to a specific project).⁴ In fact, FTA has not completed allocating its FY 2018 funds—\$41 million remains unallocated from last year.⁵

Communities across the nation have proposed CIG projects to address their growing mobility demands. FTA’s current CIG pipeline includes 10 New Start and Core Capacity projects under FFGA and 53 additional projects seeking construction grants, including 14 New Start, 3 Core Capacity, and 36 Small Start projects in 20 different states.⁶

In total, communities are requesting approximately **\$27 billion** of Capital Investment Grants to fund these projects in the pipeline.

We urge FTA to move forward as expeditiously as possible to use the available FY 2018 and FY 2019 funds to invest in critical CIG projects.

Local Overmatch. APTA is concerned that many New Start project sponsors believe that FTA is strongly encouraging significant “local overmatch” of the federal CIG share. Despite current law restrictions,⁷ these project sponsors believe that DOT will not move forward with their New Start projects unless the project sponsor requests significantly less than a 50 percent CIG share. This significant overmatch could discourage project sponsors from seeking a CIG grant. Moreover, overmatch requirements can affect local community decisions on whether to proceed with a highway or transit project because of the unequal playing field between the availability of highway and transit federal funds to complete a project.

⁴ Allocating funds is simply designating the funding for the project and is a step prior to the obligation of funds, which require project approval. Federal Transit Administration, FY 2019 Section 5309 Fixed Guideway Capital Investment Grants Allocations, Table 7, July 9, 2019.

⁵ Federal Transit Administration, FY 2018 Section 5309 Fixed Guideway Capital Investment Grants Allocations, Table 7, June 20, 2019.

⁶ Federal Transit Administration, Current Capital Investment Grant Projects, Accessed July 2019.

⁷ Section 5309(1)(5) of Title 49, United States Code, states: “Nothing in this section shall be construed as authorizing the Secretary to require a non-Federal financial commitment for a project that is more than 20 percent of the net capital project cost.”

We urge Congress to establish a fixed CIG share for New Start, Core Capacity, and Small Start projects.

CIG Policies

On June 29, 2018, FTA issued a “Dear Colleague” letter to public transit agencies highlighting the Administration’s policies regarding the CIG program. The Administration’s Dear Colleague letter established geographic diversity as a factor in FTA funding allocation decisions; considered DOT loans “in the context of” all federal funding sources requested by the project sponsor, and not separate from the federal funding sources; and included other Administration policy objectives.⁸ FTA stated that these changes reflect the Administration’s current policy and are in effect. At the same time, FTA also made changes to the CIG Risk Assessment process.⁹

Section 165 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act (P.L. 116-6, Division G) prohibits FTA from implementing or furthering new policies detailed in FTA’s June 29, 2018 Dear Colleague letter to CIG project sponsors.

Although we have a great partnership with FTA, we have a serious difference of opinion with the agency regarding the policies outlined in FTA’s Dear Colleague letter. We regret that FTA did not consult with the public transit industry prior to making these significant policy changes. FTA’s Dear Colleague letter has created considerable confusion among project sponsors regarding certain CIG policies. In addition, it remains unclear how FTA interprets the THUD Appropriations Act limitation of the Dear Colleague letter.

Federal Loans as a Federal Funding Source. In the Dear Colleague letter, FTA states that it “considers U.S. Department of Transportation loans *in the context of* all Federal funding sources requested by the project sponsor when completing the CIG evaluation process, *and not separate from the Federal funding sources.*”¹⁰ (emphasis added). This change could be read to curtail a public transit agency’s ability to use Transportation Infrastructure Finance and Innovation Act (TIFIA) loans for the local share of a CIG project.

Current law specifically provides that TIFIA may be used for any non-federal share of transit project costs if the loan is repayable from non-federal funds. Thus, we believe that FTA’s policy is inconsistent with TIFIA’s statutory requirements. Moreover, under FTA’s policy, DOT will treat TIFIA loans differently based on whether they are funded under FTA or Federal Highway Administration (FHWA) programs.

We urge Congress to clarify that TIFIA loans repaid with non-federal funds are local match.

⁸ U.S. Dep’t of Transportation, Federal Transit Administration, Dear Colleague letter, June 29, 2018.

⁹ The Risk Assessment changes were posted to the FTA website as part of a set of questions and answers, and not distributed through a formal notice and comment process or other public process.

¹⁰ U.S. Dep’t of Transportation, *supra* note 8.

Changes to Risk Assessment Process. On June 29, 2018, FTA also announced two changes to the CIG Risk Assessment process that could cause delays to projects going through the pipeline: the timing of the Risk Assessment and increasing the Probability Threshold of CIG projects' budget and schedule.

Timing of FTA Risk Assessment. Under the new policy, FTA conducts a Risk Assessment of New Starts and Core Capacity projects prior to entry into the Engineering phase (i.e., during Project Development) of the program. Prior to the new policy, Risk Assessments were generally conducted during the Engineering phase of CIG projects.¹¹ This change is problematic because project sponsors may not have an adequate level of design and engineering completed to provide accurate and fair estimates for the Risk Assessment at this early stage.

In addition, current law limits the Project Development phase of New Start and Core Capacity projects to a two-year period (although FTA may extend the time period). Conversely, the Engineering phase is not time-limited (although projects must show that they are making progress three years after entering Engineering).

APTA is very concerned that requiring the Risk Assessment during the Project Development phase provides an additional hurdle to completing Project Development within the two-year time period. Given the significant number of tasks already required to be completed during the two-year period,¹² this change is likely to require CIG project sponsors to conduct and fund even more preliminary work before seeking entry into Project Development. The sponsor's funding of this preliminary work is not included in calculating the CIG share.

Probability Threshold. When determining the reasonableness of a project sponsor's cost and schedule, FTA reviews the estimates to determine whether they include reasonable assumptions or whether adjustments need to be made. FTA then examines risks related to the project to determine the appropriate level of contingency funding needed. FTA increased its Probability Threshold from 50 percent to 65 percent in determining the reasonableness of the cost and schedule estimates. APTA is concerned that increasing the Probability Threshold percentage will require project sponsors to identify more contingency funds, adding to the costs for project sponsors.

Moreover, given that the federal share is established upon entry into Engineering, cost overruns are the risk and responsibility of the project sponsor. This change increases costs for project sponsors regarding risks for which they are already responsible.

¹¹ New Start and Core Capacity projects are required by law to go through a three-phase process—Project Development, Engineering, and Construction. Small Start projects are required by law to go through a two-phase process—Project Development and Construction. The FFGA or Small Start Grant Agreement (SSGA) are typically awarded prior to the Construction phase of the project.

¹² Under Project Development, the project sponsor is already required to select a locally preferred alternative (LPA); have the LPA included in the fiscally constrained metropolitan transportation plan; and complete the environmental review process required under the National Environmental Policy Act (NEPA).

We urge Congress to require FTA to conduct the Risk Assessment and establish the federal CIG share during the Engineering phase of New Start and Core Capacity projects. Similarly, we urge Congress to require FTA to reduce the Probability Threshold from 65 percent to 50 percent in determining the reasonableness of cost and schedule estimates, which will restore the Probability Threshold to the level required prior to FTA's 2018 changes in Risk Assessment policy.

Reforming the CIG Program: A Zero-Based Review

Over the past 18 months, APTA has solicited input from our diverse membership on priorities for the next surface transportation authorization bill. At our Legislative Committee meeting on June 23, 2019, members unanimously approved APTA's surface transportation authorization recommendations, which include numerous proposed reforms of the CIG program. In October, APTA's Board of Directors will consider these recommendations for final approval.

APTA strongly urges the Committee to conduct a zero-based review of the CIG program to assess all statutory, regulatory, and other administrative requirements through a two-part test:

- **Does the requirement strengthen the CIG program and ensure that beneficial projects across the country are delivered in a timely manner?**
- **Does the requirement protect the taxpayer's interest in funding good projects?**

We strongly believe that dozens of current CIG requirements fail this two-part test.

In addition to a zero-based review, we recommend **four additional policy reforms** to strengthen the CIG program.

First, APTA recommends that FTA establish a CIG Pipeline Dashboard. The Dashboard would allow for the public to track the status of each project in the CIG pipeline. The Dashboard would provide a level of transparency and oversight that enhances good governance and can be a valuable tool for current and future project sponsors, Congress, interested stakeholders, and many others.

Second, providing funding certainty is essential for any multi-year transportation project. To that end, **APTA calls on Congress to codify a fixed federal CIG share for New Start, Core Capacity, and Small Start projects.** Codifying a fixed federal CIG share will provide certainty for project sponsors contemplating entry into the CIG program and it will expedite FTA decision-making.

Third, **APTA advocates for the continued use of TIFIA loans to be considered as a local match.** Many CIG project sponsors have utilized TIFIA loans to help offset upfront costs

associated with capital projects. While the federal government does provide money to fund these critical public transportation capital projects, the TIFIA loan is repaid with local funds. APTA seeks a technical clarification stipulating that such TIFIA loans shall be counted as the non-federal share of project costs.

Finally, **we call on Congress to move the Risk Assessment to the Engineering phase of the CIG process and reverse the changes to the Probability Threshold.** Specifically, we urge Congress to require FTA to conduct the Risk Assessment and establish the federal CIG share no earlier than 180 days after entering the Engineering phase (for New Starts and Core Capacity projects) or earlier at the project sponsor's request. Similarly, we urge Congress to require FTA to reduce the Probability Threshold from 65 percent to 50 percent in determining the reasonableness of cost and schedule estimate.

The Appendix includes APTA's surface transportation authorization recommendations regarding the CIG program, as approved by APTA's Legislative Committee on June 23, 2019.

Conclusion

On behalf of APTA, thank you for giving me the opportunity to testify and share our thoughts on Capital Investment Grants. We look forward to working with the Committee on Transportation and Infrastructure to strengthen the CIG program and ensure that these critical public transportation projects across the country are delivered in a timely manner.

Appendix

Capital Investment Grants Program (§ 5309)

APTA strongly supports the CIG program. Beginning with enactment of the Transportation Equity Act for the 21st Century (TEA 21) in 1998, both Congress and FTA have repeatedly layered additional requirements on the CIG program, which has resulted in a bureaucratic maze. Congress must continue to reject policies that would cut, delay, or make this vital program more burdensome. We urge Congress to adopt provisions that will strengthen the CIG program and ensure that beneficial projects across the country are delivered in a timely manner.

APTA Recommendations:

- **Establish a fixed federal CIG share for New Start, Core Capacity, and Small Start projects. The fixed federal CIG shares shall be:**
 - i. **New Starts: 60 percent or, for New Start projects with significant total project costs, a lesser percentage;**
 - ii. **Core Capacity: 80 percent or, for Core Capacity projects with significant total project costs, a lesser percentage; and**
 - iii. **Small Starts: 80 percent.**
- **Increase the maximum federal and total estimated net capital costs for Small Starts projects by \$100 million.** In 49 U.S.C. § 5309(a)(7)(A), strike “\$100,000,000” and insert “\$200,000,000”; and in subparagraph (B), strike “\$300,000,000” and insert “\$400,000,000”.
- **Extend the time period for Core Capacity projects to be at or over capacity from five years to 10 years, and clarify that projects that expand or modify existing station facilities are increasing capacity.** Strike clause (iii) of 49 U.S.C. § 5309(e)(2)(A), and insert “(iii) will increase capacity of an existing fixed guideway system, corridor, or station at least 10 percent and is – (I) at or over capacity; or (II) projected to be at or over capacity within the next 10 years;”.
- **Extend the deadline to complete Project Development activities for New Starts and Core Capacity projects from 2 to 3 years.** In 49 U.S.C. § 5309(d)(1)(C)(i) and in § 5309(e)(1)(C)(i), strike “2” and insert “3”.
- **Strike the requirement for New Starts and Core Capacity project sponsors to complete a Before and After Study and require the Government Accountability Office to provide Congress a biannual report that analyzes the impacts of New Starts and Core Capacity projects on public transportation services and ridership.** Strike 49 U.S.C. § 5309(k)(2)(E).
- **Expand the use of warrants, where a project can pre-qualify for a satisfactory rating on particular requirements if certain conditions are met. Current FTA policy guidance does not allow warrants for projects with a capital cost greater than \$500 million.** Strike 49 U.S.C. § 5309(g)(3)(D). In 49 U.S.C. § 5309(g)(3)(C), strike “; and” and insert “.”

- **Require FTA to conduct the Risk Assessment and establish the federal CIG share during the Engineering phase of New Start and Core Capacity projects.** In 49 U.S.C. § 5309, insert a subsection: “(r) For projects defined under subsection (a)(2) or (a)(5), the Secretary may not determine a maximum Capital Investment Grant contribution or perform a risk assessment until at least 180 days after a project has entered into the Engineering phase, unless the project sponsor specifically requests a risk assessment on an earlier date.”.
- **Require FTA to reduce the probability threshold from 65 percent to 50 percent in determining the reasonableness of cost and schedule estimates, which will restore the probability threshold to the level required prior to FTA’s recent changes in Risk Assessment policy.** In 49 U.S.C. § 5309(f)(1)(A) before the semicolon, add “but may not exceed 50 percent”.
- **Establish a CIG Program Pipeline Dashboard on a publicly available website that includes complete information on the program and the status of each CIG project in the pipeline, including:**
 - i. **the amount of CIG funding appropriated, allocated, and obligated for the program and each of its components (New Starts, Core Capacity, and Small Starts).**
 - ii. **the date the project entered Project Development and Engineering (if applicable);**
 - iii. **the status of FTA and DOT review at each stage of the process, including when a Letter of No Prejudice (LONP) was requested and the date of when the LONP was issued;**
 - iv. **the date the New Starts FFGA, Core Capacity FFGA, or Small Starts grant agreement was executed; and**
 - v. **the status of the project sponsor in securing its non-federal match, based on information provided by the project sponsor.**
- **Reduce the required period of notification to Congress from 30 days to 10 days before issuing a letter of intent, entering into an FFGA, or entering into an early systems work agreement.** In 49 U.S.C. § 5309(k)(5), strike “30 days” and insert “10 days”.
- **Reduce the required period of notification to Congress for a Small Start project from 10 days to 3 days.** In 49 U.S.C. § 5309(h)(6)(C), strike “10 days” and insert “3 days”.
- **Allow expenditures to fulfill compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), to be counted toward the non-federal match for CIG projects prior to entering Project Development.**
- **Require the Secretary to issue updated guidance no later than six months after the date of enactment.** In 49 U.S.C. § 5309(g)(5)(A), strike “of the Federal Public Transportation Act of 2012”.

- **Add a Congressional notification requirement on the status of implementation for the Program of Interrelated Projects and the Expedited Project Delivery Pilot Program. Add the following new section:**

“Sec. ____ Capital Investment Grants Program Notification Requirement.

Not later than 90 days after the date of enactment of this section, and every 90 days thereafter, the Administrator shall notify the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate of—

(A) The status of implementation for the Program of Interrelated Projects and the Expedited Project Delivery Pilot; and

(B) Any additional legislative actions that may be needed.”

Expedited Project Delivery for Capital Investment Grants Pilot Program (FAST Act § 3005(b))

The Expedited Project Delivery for Capital Investment Grants Pilot Program was originally established in MAP-21. This pilot program allows for up to eight New Starts, Core Capacity, or Small Starts projects to expedite the evaluation process normally required for CIG. FTA has only issued an expression of interest for projects and has not begun implementation of the pilot program.

APTA Recommendations:

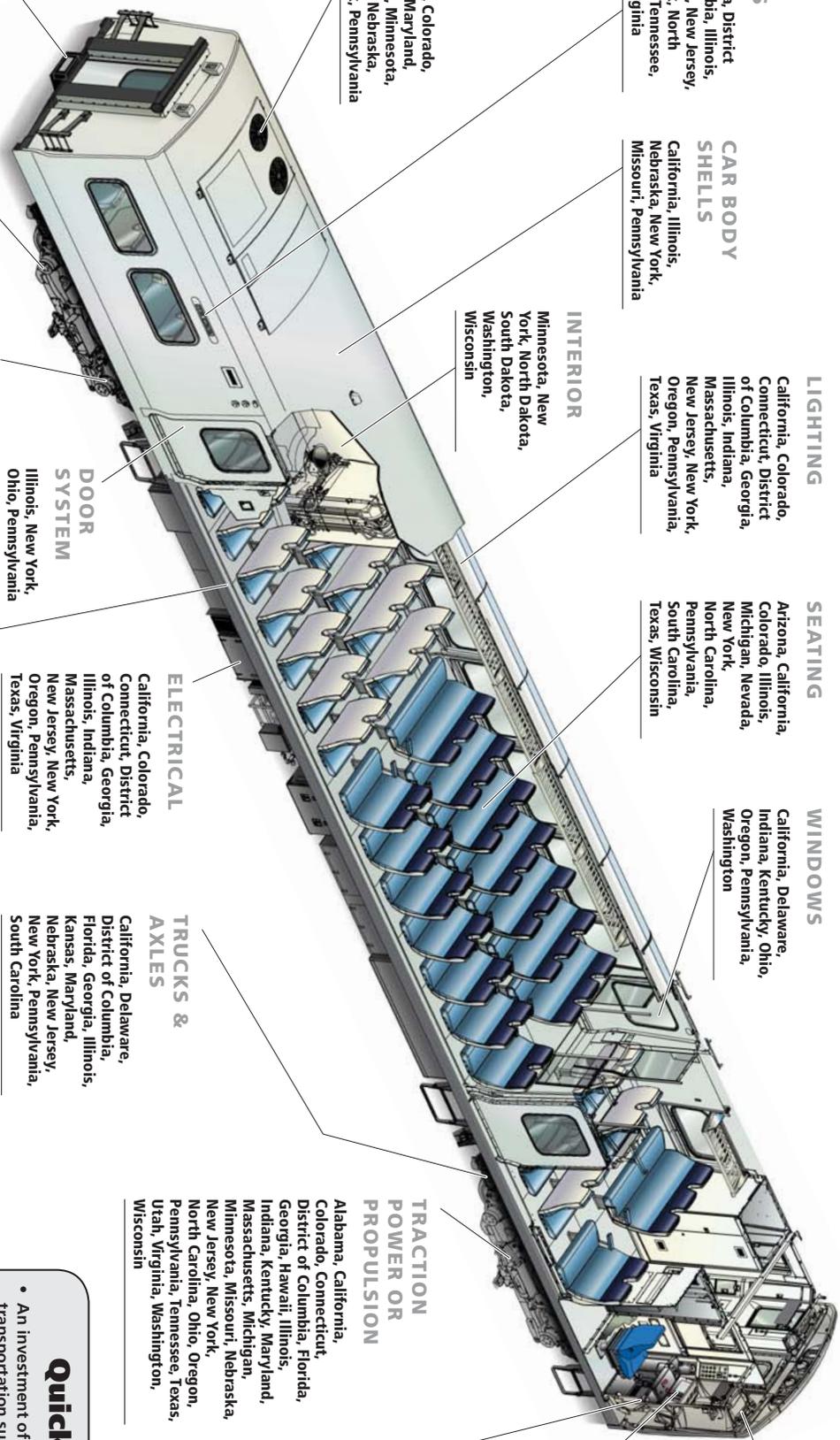
- **Increase the maximum federal CIG share from 25 percent to 50 percent.** Amend § 3005(b)(9)(A) by striking “25 percent” and insert “50 percent”.
- **Reduce the required period of notification to Congress from 30 days to 10 days.** Amend § 3005(b)(8)(D) by striking “30 days” and insert “10 days”.
- **Increase the maximum federal and total estimated net capital costs for Small Starts projects to be consistent with 49 U.S.C. § 5309(a)(7), as amended by these Recommendations.** Amend § 3005(b)(1)(I) in clause one by striking “\$75,000,000” and insert “\$200,000,000”; and in clause two, strike “\$300,000,000” and insert “\$400,000,000”.
- **Strike the requirement for project sponsors to complete a Before and After Study.** Amend § 3005(b) by striking paragraph (12) and re-designating paragraph (13) as (12).

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Quick Facts

- An investment of \$1 billion in public transportation supports and creates 50,000 jobs.
- Public transportation is a \$71 billion industry that directly employs 420,000 people and supports millions of private sector jobs.

Bus Manufacturing = Jobs Across America

Strong public transportation makes our economy grow and makes the U.S. more competitive



Quick Facts

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