

### Monitoring, Oversight and Enforcement

FMCSA will monitor the operational safety of all Mexico-domiciled motor carriers participating in the demonstration project. To accomplish this, FMCSA will work closely with State commercial vehicle safety agencies, the IACP, CVSA, DHS, and others.

Field monitoring will include inspections of vehicles, verification of compliance with the terms of the provisional operating authority, driver license checks, crash reporting, and initiation of enforcement actions when appropriate. Additionally, a Mexico-domiciled motor carrier committing any violations specified in 49 CFR 385.105(a) and identified through roadside inspections or by other means, may be subject to a compliance review and enforcement action.

Monitoring will also include electronic data collection and analysis. Data collected as a result of field monitoring and other activities will be entered into FMCSA databases. The data will be tracked and analyzed to identify potential safety issues. Appropriate action will be taken to resolve any identified safety issues. This could include suspension or revocation of the provisional operating authority or the initiation of other enforcement action against the carrier or driver.

The DOT and the Mexican Secretaría de Comunicaciones y Transportes (Secretariat of Communication and Transport, or SCT) have established a bi-national monitoring group. The group includes officials from FMCSA, DOT, and the U.S. Trade Representative. Mexican participants include representatives from the Federal Motor Carrier General Directorate, Communications and Transport Secretariat (SCT); the Services Negotiations General Directorate, Economy Secretariat; and the SCT Centers from the Mexican Border States. The monitoring group's objective is to supervise the implementation of the demonstration project and to find solutions to issues affecting the operational performance of the project. The group will generally convene weekly via video conference.

Enforcement is a key component of the monitoring and oversight effort. FMCSA has trained and provided guidance to Federal and State auditors, inspectors and investigators to ensure their knowledge and understanding of the demonstration project and the procedures for taking enforcement actions against carriers or drivers participating in the project.

To ensure carrier compliance with operating authority limitations, including the prohibition of domestic point-to-point transportation of cargo in the U.S., FMCSA and the IACP have developed and implemented a training program that provides State and local officials detailed information on cabotage regulations and enforcement procedures.

FMCSA is also working with the DHS to develop guidance concerning the enforcement of DHS cabotage regulations. This material will be incorporated into the CVSA North American Standard Inspection Course and provided to roadside enforcement officers.

FMCSA will be issuing policy memoranda and guidance to the Federal field staff, State agencies and others concerning monitoring and enforcement issues, including English language proficiency, inspection of each participating Mexico-domiciled vehicle every time it enters the U.S., enforcement of the Federal Motor Vehicle Safety Standards, and enforcement of the CVSA decal requirement.

To ensure uniformity and effective enforcement, the CVSA has revised the North American Standard Out-of-Service Criteria to include as out-of-service criteria, violations of 49 CFR 391.11(b)(2) relating to the driver's ability to communicate in English while operating in the U.S. and violations of 49 CFR 385.103(c) relating to the display of a valid CVSA decal on vehicles operated by project participants.

### Evaluation and Reporting

The DOT will evaluate the success of the demonstration project by examining the safety performance of Mexico-domiciled motor carriers operating in the U.S. Specifically, FMCSA anticipates examining the crash rate of Mexican carriers, convictions of Mexican drivers for violations of U.S. traffic safety laws, the rate at which Mexican drivers and vehicles are placed out of service when inspected in the U.S., violations discovered during pre-authority safety audits, and compliance of Mexican trucking companies with U.S. drug and alcohol testing regulations. These data will be collected through police reporting of crashes and moving violations, uploads of roadside inspection results performed by FMCSA or our State partners, and uploads of safety audits and compliance reviews of Mexican motor carriers performed by FMCSA staff.

The DOT also intends to provide for an independent evaluation of the

demonstration project. The Secretary has asked former DOT Inspector General Kenneth Mead, former DOT Deputy Secretary Mortimer Downey and former House Appropriations Sub-Committee Chairman Jim Kolbe to serve on an evaluation panel. The panel will be responsible for evaluating the safety impacts of allowing Mexico-domiciled motor carriers to operate on U.S. roads beyond the border commercial zone. They will operate independently from other monitoring efforts and provide their own assessment of the project. Their conclusions will be considered carefully before a decision is made on a permanent full implementation of the NAFTA trucking provisions.

### Request for Comments

The FMCSA has decided to request public comment from all interested persons on the demonstration project outlined above. The FMCSA has fulfilled all of the statutory requirements necessary for the lifting of the moratorium against certain Mexico-domiciled motor carriers. The Agency intends the demonstration project to be the means of validating its safety oversight regime.

All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the address section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, the FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Issued on: April 27, 2007.

**John H. Hill,**  
*Administrator.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

[Docket No: FTA-2006-23697]

### Public-Private Partnership Pilot Program

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of agency response to comments.

**SUMMARY:** Section 3011(c) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") authorizes the U.S. Secretary of Transportation (the "Secretary") to establish and implement a pilot program to demonstrate the advantages and disadvantages of public-private partnerships ("PPPs") for certain new fixed guideway capital projects (the "Pilot Program"). This notice summarizes and responds to comments solicited by FTA by notice published in the **Federal Register** on March 22, 2006 (71 FR 14568).

*Availability of the Notice:* Copies of this notice, and any documents indicated in the supplementary information as being available in the docket, are part of docket FTA-2006-23697. To read materials relating to this notice, please visit the DOT docket (<http://dms.dot.gov>) at any time or go to the Docket Management System facility, U.S. Department of Transportation, Room PL-401, on the plaza level of the Nassif Building; 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Shauna J. Coleman, Esq., Federal Transit Administration, Office of the Chief Counsel, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001, (202) 366-4011, [shauna.coleman@dot.gov](mailto:shauna.coleman@dot.gov).

**SUPPLEMENTARY INFORMATION:** Section 3011(c) of the SAFETEA-LU authorizes the Secretary to establish and implement the Pilot Program to demonstrate the advantages and disadvantages of public-private partnerships for certain new fixed guideway capital projects. On March 22, 2006, FTA issued a notice and solicitation for comments with respect to the Secretary's establishment and implementation of the Pilot Program (71 FR 14568). FTA received comments from 19 parties in response to the notice. FTA responds to these comments by topic and in the following order: (A) Statutory background; (B) objective of the Pilot Program; (C) operation of the Pilot Program; (D) common grant rule; (E) seniority of the Federal Interest; and (F) tax-exempt financing.

#### A. Statutory Background

FTA requested comments on the following questions: (i) What, if any, operative criteria beyond those set forth in the statute should the Secretary adopt to implement the Pilot Program; (ii) what, if any, benefits should the Secretary confer on selected projects;

(iii) whether it is significant that section 3011(c) provides no special funding for the Pilot Program; and (iv) what, if any, changes in law or new financial incentives are appropriate or necessary to promote the participation of private enterprise in the delivery and operation of transit systems?

(i) *What, if any, operative criteria beyond those set forth in the statute should the Secretary adopt to implement the Pilot Program?*

Six commenters responded to this question. Some of these commenters thought that additional operating criteria should not limit the opportunities for creativity and that FTA should allow private, state, and local parties maximum latitude to determine the parameters and merits of potential projects. In addition, several of these commenters recommended that selected projects should incorporate innovative contracting mechanisms.

*FTA response:* FTA agrees that operating criteria should not limit the opportunities for creativity. FTA further agrees that innovative procurement contracting mechanisms and financing should be considerations used in the selection of an eligible project.

(ii) *What, if any, benefits should the Secretary confer on selected projects?*

Five commenters responded to this question. Two commenters submitted general comments on the benefits the Secretary should confer on selected projects. For instance, one commenter generally recommended that FTA tailor the benefits it confers to the particular requirements of a project. Another commenter generally recommended that FTA award PPPs the highest priority available from programs for which such projects apply and qualify. Two commenters recommended that FTA waive strict compliance with one or more New Starts and/or NEPA evaluation requirements. One commenter recommended that FTA support Congressional earmarks for selected projects.

*FTA response:* FTA agrees that it should identify alternative bases for compliance with one or more New Starts evaluation requirements applicable to projects that participate in the Pilot Program, insofar as consistent with law. The Pilot Program offers Pilot Projects that are candidates for funding under FTA's New Starts certain program incentives—in the form of improved ratings, accelerated review process, and other benefits—to enter into PPPs for project delivery. FTA's role is not to advocate for Congressional earmarking on behalf of projects, but FTA does recommend projects for funding in the

annual New Starts Report and in the President's budget request.

(iii) *Whether it is significant that section 3011(c) provides no special funding for the Pilot Program.*

FTA received the following three comments on this question: one commenter thought that it was unremarkable that Congress authorized no special funding for this program; one commenter noted that by not designating any specific source of funding, Congress provided FTA with the flexibility to identify funds and develop program requirements; and one commenter thought Congress intended to limit the use of private investment in PPPs for selected fixed guideway projects.

*FTA response:* Based on FTA's review of section 3011(c) and pertinent sections of the Conference Report that accompanied SAFETEA-LU, FTA is not limited to funding the Pilot Program from the New Starts program. FTA reminds commenters that while the statute states that the Secretary may establish the Pilot Program to demonstrate the advantages of PPPs for "certain new fixed guideway projects," it does not expressly limit financial support of such projects to New Starts funding. FTA notes that new fixed guideway capital projects may be funded not only through the New Starts program but with certain formula funds, as well.

(iv) *What, if any, changes in law or new financial incentives are appropriate or necessary to promote the participation of private enterprise in the delivery and operation of transit systems?*

Three commenters responded to this question. One commenter suggested that FTA reclassify the retirement of a capital debt from an operating expense to a capital expense. Two commenters suggested that providing Federal grant or loan money for developmental or pre-construction work could induce private investment.

*FTA response:* FTA agrees that reclassifying the retirement of a capital debt from an operating expense to a capital expense and providing Federal grant or loan money for developmental or pre-construction work would promote the participation of private enterprise in the delivery and operation of transit systems. Within the context of the Pilot Program, FTA would be prepared to evaluate proposals to do so on a case-by-case basis, if permitted by law and supported by sound policy that is consistent with the Pilot Program's objectives.

## B. Objective of the Pilot Program

FTA requested comments on whether, and on what terms, the Pilot Program should streamline the New Starts application process, specifically with regard to its due diligence and NEPA components, to promote PPPs that would realize significant savings in the procurement of eligible projects.

### (i) Due Diligence

FTA requested comments regarding how its New Starts application process may be altered to accelerate project delivery without impairing FTA's duties as a steward of Federal funds. Six commenters responded to this question. Two commenters supported the use of contract terms to allocate risk and ensure due diligence. Three commenters recommended that FTA utilize concurrent rather than linear procedures in its New Starts process, and provided specific recommendations on how FTA could alter its New Starts application process. One commenter requested that FTA clarify how the requirement for public accountability and due diligence can be met under the PPP approach.

*FTA response:* FTA agrees that it should streamline certain New Starts due diligence requirements and directs interested parties to section 3(i) of FTA **Federal Register** notice issued on January 19, 2007 (72 FR 2587) for a detailed discussion on how FTA might alter certain due diligence requirements for selected Pilot Projects. In response to the commenter requesting clarity, FTA directs this commenter to section 3(c) of FTA **Federal Register** notice issued on January 19, 2007 (72 FR 2587), which details how commercial arrangements negotiated between the project sponsor and private partner may adequately safeguard the Federal Interest.

### (ii) National Environmental Policy Act ("NEPA")

FTA requested comments on whether, and on what terms, the Pilot Program should streamline its NEPA components to accelerate project delivery without impairing FTA's duties as a steward of the environment.

*(a) Whether the Pilot Program should permit acquisition of engineering and design services prior to the issuance of a Record of Decision ("ROD").*

Several commenters responded to this question. All but one of these commenters supported the acquisition of engineering and design services prior to the issuance of a ROD.

*FTA response:* FTA agrees that it should permit acquisition of engineering and design services prior to the issuance of a ROD, as provided in

section 3(l) of FTA's **Federal Register** notice published at 72 FR 2587 (January 19, 2007). FTA notes that on several prior occasions it has allowed project sponsors to negotiate and award design-build contracts when (1) the contract did not commit the project sponsor or FTA to final design or construction prior to the completion of compliance with NEPA, and (2) the entities performing the NEPA studies had no financial interest in the outcome of the project under the study. FTA directs interested parties to section 3(l) of FTA's **Federal Register** notice published at 72 FR 2587 (January 19, 2007) for a full discussion on the extent to which FTA may permit acquisition of engineering and design services prior to the completion of compliance with NEPA.

*(b) Whether the Pilot Program should adopt procedures with the same or similar effects as those described in 23 U.S.C. 112(b)(3), as amended by section 1503 of SAFETEA-LU, concerning design-build contracts.*

Three commenters responded to this question and all of these commenters supported FTA's adoption of procedures similar to those in section 1503 of SAFETEA-LU, concerning design-build contracts.

*FTA response:* FTA agrees that the Pilot Program should adopt procedures with the same or similar effects as those set forth in 23 U.S.C. 112(b)(3), as amended. FTA directs commenters to section 3(l) of FTA's **Federal Register** notice published at 72 FR 2587 (January 19, 2007), which outlines the environmental procedures that FTA adopted with respect to the design-build elements of a Pilot Project's procurement.

*(c) How should the Pilot Program construe the Categorical Exclusion ("CE") to realize savings for project sponsors in connection with the acquisition of rights-of-way and parcels of land?*

One commenter responded to this question. This commenter urged FTA to consider increasing real estate prices as one factor used to establish the imminence of increasing development pressures so that increasing prices in highly developed or rapidly developing areas would permit an agency to rely upon the CE.

*FTA response:* FTA notes that with a few limited exceptions, joint FTA/FHWA regulations implementing NEPA specifically prohibit real estate acquisition activities prior to the completion of the NEPA process. Those exceptions, specified at 23 CFR 771.117, allow for pre-ROD real estate acquisition in some limited circumstances, but not

on the basis of rising property values. Moreover, when it authorized SAFETEA-LU, Congress amended 49 U.S.C. 5324(c) to allow for the pre-ROD acquisition of contiguous railroad right-of-way in certain cases.

*(d) How should the Pilot Program address NEPA to anticipate changes in project scope?*

Five commenters responded to this question and all of these commenters recommended that FTA should not reopen the NEPA process and/or existing ROD for review of a new impact that is not determined to be substantial.

*FTA response:* In general, FTA policy is to perform a supplemental Environmental Assessment ("EA") for review of a new impact if that impact is potentially significant, and a supplemental Environmental Impact Statement ("EIS") in cases where FTA is certain that the new impact is significant. In some cases, a reevaluation may be required to assist FTA in deciding whether supplemental NEPA work is needed.

## C. Operation of the Pilot Program

FTA requested comments on whether, and on what terms, the Pilot Program should provide grants for eligible projects contemplated by long-term operation or concession agreements with private enterprise. Six commenters supported FTA providing grants for eligible projects contemplated by long-term operation or concession agreements with private enterprise. Three commenters offered suggestions as to how the Pilot Program might encourage transit systems to enter into PPPs. One commenter suggested that FTA allow the Pilot Program to privatize all or part of the capital asset. Another commenter suggested FTA provide financial capacity for pre-construction work. One commenter recommended that FTA tie the Pilot Program directly to New Starts funding.

*FTA response:* FTA agrees that projects involving long-term private operations or concession contracts should be eligible for funding under the Pilot Program.

## D. Common Grant Rule

FTA requested comments on whether, and to what extent, the Pilot Program should authorize the use of program income to support a PPP that sponsors an eligible project. Five commenters supported the flexible use of program income.

*FTA response:* FTA agrees and supports flexible uses of program income, as permitted pursuant to 49 CFR 18.25(g).

### E. Seniority of the Federal Interest

FTA requested comments on whether, and to what degree, FTA's subordination of priority of repayment of Federal loans would be useful in structuring a PPP. FTA also requested comments on the extent to which loans, loan guarantees, and other credit enhancing devices available under the Transportation Infrastructure Financing and Innovation Act ("TIFIA") might be used to facilitate the financing of an eligible project. Four commenters supported subordination of the Federal Interest. Three commenters generally supported the use of the loan guarantees available under TIFIA for financing PPPs.

*FTA response:* FTA agrees that subordination of priority of repayment of Federal loans could be useful in structuring a PPP. FTA also agrees that project sponsors should utilize a wide range of financing tools to support PPPs, including loan guarantees and other mechanisms available under the TIFIA program to finance eligible PPPs.

### F. Tax Exempt Financing

FTA requested comments on the extent to which private activity bonds ("PABs") or PABs not subject to State population-based bond issuance limits ("new PABs") might assist in financing an eligible project. Seven commenters generally supported the use of PABs to assist in financing eligible projects.

*FTA response:* FTA agrees that project sponsors should utilize a wide range of financing tools, including PABs and new PABs, to support PPPs, if the project is eligible to use such financing tools.

Issued in Washington, DC, this 25th day of April 2007.

**James S. Simpson,**

*Administrator.*

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA 2007-27073; Notice 2]

#### Nissan North America, Inc.; Grant of Petition for Decision of Inconsequential Noncompliance

Nissan North America, Inc. (Nissan) has determined that certain rims on certain vehicles that it produced in 2000 through 2005 do not comply with paragraphs S5.2(a) and S5.2(c) of 49 CFR 571.120, Federal Motor Vehicle Safety Standard (FMVSS) No. 120, *Tire*

*Selection and Rims for Motor Vehicles Other Than Passenger Cars.* Pursuant to 49 U.S.C. 30118(d) and 30120(h), Nissan has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR part 573, "Defect and Noncompliance Responsibility and Reports." Notice of receipt of a petition was published, with a 30-day public comment period, on February 16, 2007, in the **Federal Register** (72 FR 7709). The National Highway Traffic Safety Administration (NHTSA) received no comments. To view the petition and all supporting documents and comments submitted, go to: <http://dms.dot.gov/search/searchFormSimple.cfm> and enter Docket No. NHTSA-2007-27073.

Affected are a total of approximately 5,000 optional dealer accessory wheels that have been sold and have been installed on approximately 1,250 model year 2000 through 2005 Nissan Xterra multipurpose passenger vehicles and Frontier pickup trucks. Specifically, paragraph S5.2 of FMVSS No. 120, rim marking, requires that each rim be marked with certain information on the weather side, including:

S5.2(a) requiring a one-letter designation which indicates the source of the rim's published nominal dimensions, and S5.2(c) requiring the symbol DOT.

The rims installed on the affected vehicles do not contain the markings required by paragraphs S5.2(a) or S5.2(c). Nissan has corrected the problem that caused these errors so that they will not be repeated in future production.

Nissan believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. Nissan states that the affected rims are 16" x 7" aluminum alloy, which are commonly available and utilized in the United States. They are a correct specification for mounting 16" original equipment tires specified for Xterra and Frontier models, and are capable of carrying the gross vehicle weight rating (GVWR) of the vehicle. Nissan first became aware of the noncompliance of these vehicles during a regulatory compliance review that Nissan conducted during March 2006.

Nissan states that no accidents or injuries have occurred, and no customer complaints have been received related to the lack of the markings or any problem that may have resulted from the lack of the markings. Nissan further states that the missing markings do not affect the performance of the wheels or the tire and wheel assemblies.

The rims are marked in compliance with paragraphs S5.2(b), rim size designation; S5.2(d), manufacturer identification; and S5.2(e) month, day and year or month and year of manufacture. The rims are also marked with a 4030S RSD20-10/20 part number.

The tire size is marked on the tire sidewalls, and the owner's manual and tire inflation pressure placard contain the appropriate tire size to be installed on the original equipment rims. Therefore, Nissan does not believe there is a possibility of a tire and rim mismatch as a result of the missing rim markings. All other requirements under FMVSS No. 120 are met.

NHTSA agrees that the noncompliance is inconsequential to motor vehicle safety. The rims are marked in compliance with paragraphs S5.2(b) rim size designation; S5.2(d) manufacturer identification; and S5.2(e) month, day and year or month and year of manufacture. The rims are also marked with a part number. The tire size is marked on the tire sidewalls, and the owner's manual and tire inflation pressure placard contain the appropriate tire size to be installed on the original equipment rims. Therefore, there is little likelihood of a tire and rim mismatch as a result of the missing rim markings. With regard to the omission of the DOT symbol, the agency regards the noncompliance with paragraph S5.2(c) as a failure to comply with the certification requirements of 49 U.S.C. 30115, and not a compliance failure requiring notification and remedy.

In consideration of the foregoing, NHTSA has decided that the petitioner has met its burden of persuasion that the noncompliance described is inconsequential to motor vehicle safety. Accordingly, Nissan's petition is granted and the petitioner is exempted from the obligation of providing notification of, and a remedy for, the noncompliance.

**Authority:** 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: April 24, 2007.

**Daniel C. Smith,**

*Associate Administrator for Enforcement.*

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