

DEPARTMENT OF TRANSPORTATION**Federal Transit Administration****[Docket No: FTA-2006-25750]****Final Policy Statement on When High-Occupancy Vehicle (HOV) Lanes Converted to High-Occupancy/Toll (HOT) Lanes Shall Be Classified as Fixed Guideway Miles for FTA's Funding Formulas and When HOT Lanes Shall Not Be Classified as Fixed Guideway Miles for FTA's Funding Formulas****AGENCY:** Federal Transit Administration (FTA), DOT.**ACTION:** Final policy statement.

SUMMARY: This notice supersedes the notice published in the *Federal Register* by FTA on December 27, 2006, at 71 FR 77862. This notice corrects certain typographical errors that appeared in the prior notice, makes non-substantive revisions to the prior notice and re-orders the sections of the prior notice.

This final policy statement describes the terms and conditions on which the Federal Transit Administration (FTA) will classify High-Occupancy Vehicle (HOV) lanes that are converted to High-Occupancy/Toll (HOT) lanes as "fixed guideway miles" for purposes of the transit funding formulas administered by FTA. This final policy statement also describes when FTA will not classify HOT lanes as fixed guideway miles for purposes of the transit funding formulas administered by FTA.

DATES: *Effective Date:* The effective date of this final policy statement is January 11, 2007.

ADDRESSES: *Availability of the Final Policy Statement and Comments:* Copies of this final policy statement and comments and material received from the public, as well as any documents indicated in this notice as being available in the docket, are part of docket number FTA-2006-25750. For access to the DOT docket, please go to <http://dms.dot.gov> at any time or 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.

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Policy, Federal Transit Administration, 400 Seventh Street, SW., Washington, DC 20590-0001, (202) 366-4050, robert.tuccillo@dot.gov. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays. **SUPPLEMENTARY INFORMATION:** This document is organized in the following sections:

- I. Background
- II. Final Policy Statement on HOV-to-HOT Conversion
- III. Response to Comments Received

I. Background

On September 7, 2006, the Federal Transit Administration (FTA) published in the *Federal Register* (at 71 FR 52849), a proposed policy on (i) when High-Occupancy Vehicle (HOV) lanes converted to High-Occupancy/Toll (HOT) lanes shall be classified as "fixed guideway miles" for the purpose of FTA's funding formulas and (ii) when HOT lanes shall not be classified as fixed guideway miles for the purpose of FTA's funding formulas. The proposed policy reads as follows:

FTA would classify HOT lanes as "fixed guideway miles" for purposes of the funding formulas administered under 49 U.S.C. 5307 and 49 U.S.C. 5309, so long as each of the following conditions is satisfied: (i) The HOT lanes were previously HOV lanes reported in the National Transit Database as fixed guideway miles for purposes of the funding formulas administered by FTA under 49 U.S.C. 5307 and 49 U.S.C. 5309; (ii) The HOT lanes are continuously monitored and continue to meet performance standards that preserve free flow traffic conditions as specified in 23 U.S.C. 166(d); and (iii) Program income from the HOT lane facility, including all toll revenue, is used solely for "permissible uses."

The proposed policy also addressed whether FTA should require certain transit and tolling policies with respect to HOT lanes classified as fixed guideway miles, and whether FTA should require the return of funds made available under Full Funding Grant Agreements for the construction of HOV lanes that have later been converted to HOT lanes.

II. Final Policy Statement on HOV-to-HOT Conversion

This final policy statement explains when FTA shall classify HOV lanes converted to HOT lanes as "fixed guideway miles" for the purpose of FTA's funding formulas and when FTA shall not classify HOT lanes as fixed guideway miles for the purpose of its funding formulas.

Overview

Since the early 1980s, transportation officials have sought to manage traffic

congestion and increase vehicle occupancy by means of High-Occupancy Vehicle (HOV) lanes—highway lanes reserved for the exclusive use of car pools and transit vehicles. Today, there are over 130 freeway HOV facilities in metropolitan areas in the US,¹ of which approximately ten have received funding through FTA's Major Capital Investment program and approximately eighty are counted as fixed guideway miles for purposes of FTA's formula grant programs.² Since 1990, however, HOV mode share in thirty-six of the forty largest metropolitan areas has steadily declined,³ while both excess capacity on HOV lanes and congestion on general purpose lanes have increased.⁴

An increasing number of metropolitan areas are considering new demand management strategies as alternatives to HOV lanes. One emerging alternative is the variably-priced High-Occupancy/Toll (HOT) lane. HOT lanes combine HOV and pricing strategies by allowing Single-Occupant Vehicles (SOVs) to access HOV lanes by paying a toll. The lanes are "managed" through pricing to maintain free flow conditions even during the height of rush hours.

HOT lanes provide multiple benefits to metropolitan areas that are experiencing severe and worsening congestion and significant transportation funding shortages. First, variably-priced HOT lanes expand mobility options in congested urban areas by providing an opportunity for reliable travel times for users prepared to pay a premium for this service. HOT lanes also improve the efficiency of HOV facilities by allowing toll-paying

¹ Office of Operations, Federal Highway Administration, U.S. Department of Transportation.

² National Transit Database.

³ *Journey to Work Trends in the United States and its Major Metropolitan Areas 1960-2000*, Publication No. FHWA-EP-03-058 Prepared for: U.S. Department of Transportation, Federal Highway Administration, Office of Planning, Prepared by: Nancy McGuckin, Consultant, Nanda Srinivasan, Cambridge Systematics, Inc.

⁴ Office of Operations, Federal Highway Administration, U.S. Department of Transportation. Demand for highway travel by Americans continues to grow as population increases, particularly in metropolitan areas. Construction of new highway capacity to accommodate this growth in travel has not kept pace. Between 1980 and 1999, route miles of highways increased 1.5 percent while vehicle miles of travel increased seventy-six percent. The Texas Transportation Institute estimates that, in 2000, the seventy-five largest metropolitan areas experienced 3.6 billion vehicle-hours of delay, resulting in 5.7 billion gallons in wasted fuel and \$67.5 billion in lost productivity. And traffic volumes are projected to continue to grow. The volume of freight movement alone is forecast to nearly double by 2020. Congestion is largely thought of as a big city problem, but delays are becoming increasingly common in small cities and some rural areas as well.

SOVs to utilize excess lane capacity on HOVs. In addition, HOT lanes generate new revenue which can be used to pay for transportation improvements, including enhanced transit service.

In August of 2005, recognizing the advantages of HOT lanes, the U.S. Congress enacted Section 112 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), codified at 23 U.S.C. 166, to authorize States to permit use of HOV lanes by SOVs, so long as the performance of the HOV lanes is continuously monitored and continues to meet specified performance standards. The U.S. Department of Transportation (Department) has strongly endorsed the conversion of HOV lanes to variably-priced HOT lanes, most recently in its *Initiative to Reduce Congestion on the Nation's Transportation Network*. It is the Department's policy to encourage jurisdictions to consider "HOV-to-HOT" conversion as a means of congestion relief and possible revenue enhancement.

The ability of HOT lanes to introduce additional traffic to existing HOV facilities, while using pricing and other management techniques to control the number of additional motorists, maintain high service levels and provide new revenue, make HOT lanes an effective means of reducing congestion and improving mobility. For this reason, and given the new authority enacted by Congress to promote "HOV-to-HOT" conversions, many States, transportation agencies and metropolitan areas are seriously considering applying variable pricing to both new and existing roadways. For example, the current long-range transportation plan for the Washington, DC, metropolitan area includes four new HOT lanes along fifteen miles of the Capital Beltway in Virginia, and six new variably-priced lanes along eighteen miles on the Inter-County Connector in Montgomery and Prince George's Counties in Maryland.⁵ Virginia is also exploring the possibility of converting existing HOV lanes along the I-95/395 corridor into HOT lanes.⁶ Maryland is considering express toll lanes along I-495, I-95 and I-270, as well as along other facilities.⁷ Similarly, in San Francisco, the Metropolitan Transportation Commission's Transportation 2030 Plan advocates development of a HOT network that

would convert that region's existing HOV lanes to HOT lanes;⁸ Houston's 2025 Regional Transportation Plan includes plans to implement peak period pricing within the managed HOT lanes of the major freeway corridors in the region;⁹ and the Miami-Dade, Florida 2030 Transportation Plan includes conversion of existing HOV lanes to reversible HOV/HOT lanes to provide additional capacity to I-95 in Miami-Dade County.¹⁰ Other jurisdictions are exploring the potential for HOT lanes with grants provided by the Department's Value Pricing Pilot Program.¹¹ These include the Port Authority of New York/New Jersey; San Antonio, Texas; Seattle, Washington; Atlanta, Georgia; and Portland, Oregon.¹²

While an increasing number of metropolitan planning organizations and State departments of transportation are studying the HOT lane concept as a strategy to improve mobility, six HOT lane facilities currently operate in the United States: State Route 91 (SR 91) Express Lanes in Orange County, California; the I-15 FasTrak in San Diego, California; the Katy Freeway QuickRide and the Northwest Freeway (US 290) in Harris County, Texas; I-394 in Minneapolis and St. Paul, Minnesota; and I-25 in Denver, Colorado.

Prior FTA Policy

Since 2002, FTA's policy has been to continue to classify the lanes of an HOV facility converted to HOT lanes as fixed guideway miles for funding formula purposes on the condition that the facility meets two requirements: (i) The HOT facility manages SOV use so that it does not impede the free-flow and high speed of transit and high-occupancy vehicles and (ii) toll revenues collected on the facility will be used for mass transit purposes.¹³ FTA

has considered requiring as an additional condition for eligibility that the lowest toll payable by SOVs on a HOT facility be not less than the fare charged for transit services on the HOT facility.

Final FTA Policy

(a) *Purpose of Final Policy.* This final policy statement will help ensure that Federal transit funding for congested urban areas is not decreased when existing HOV facilities are converted to variably-priced HOT lanes in an effort by localities to reduce congestion, improve air quality, and maximize throughput using excess HOV lane capacity. The policy will also promote a uniform approach by the Department's operating agencies concerning HOV-to-HOT conversions. In particular, FTA's policy will be coordinated with the statutes enacted by the U.S. Congress under Section 112 of SAFETEA-LU applicable to the Federal Highway Administration that are intended to simplify conversion of HOV lanes to HOT lanes. The policy will also support the Department's objective of encouraging HOV-to-HOT conversions.

(b) *Final Policy.* FTA shall classify HOT lanes as fixed guideway miles for purposes of the funding formulas administered under 49 U.S.C. 5307 and 49 U.S.C. 5309, so long as each of the following conditions is satisfied:

(i) *The HOT lanes were previously¹⁴ HOV lanes reported in the National Transit Database as fixed guideway miles for purposes of the funding formulas administered by FTA under 49*

"* * * FTA will recognize, for formula allocation purposes, exclusive fixed guideway transit facilities that permit toll-paying SOVs on an incidental basis (often called high occupancy/toll (HOT) lanes) under the following conditions: the facility must be able to control SOV use so that it does not impede the free flow and high speed of transit and HOV vehicles, and the toll revenues collected must be used for mass transit purposes."

¹⁴ With respect to whether HOT lanes were previously HOV lanes reported in the National Transit Database ("NTD") as "fixed guideway miles," HOV facilities classified as "fixed guideway miles" in the NTD on or before date of the publication of this final policy statement shall satisfy this requirement. With respect to HOV lanes that have not been classified as "fixed guideway miles" in the NTD on or before the date of publication of this final policy statement, such HOV lanes may not be converted to HOT lanes and maintain their classification as "fixed guideway miles" unless: (i) The HOV lanes have reported to the NTD as "fixed guideway miles" for three years prior to their conversion to HOT lanes, (ii) users of public transportation have accounted for at least 50% of the passenger miles traveled on the HOV lanes in their last twelve months of service (or once the HOV lanes are converted to HOT lanes, users of public transportation are reasonably expected to account for at least 50% of the passenger miles traveled on the HOT lanes in their first twelve months of service), or (iii) in his or her discretion, the Administrator so approves.

⁵ Letter to U.S. Department of Transportation, August 28, 2006, from National Capital Region Transportation Planning Board.

⁶ *Id.*

⁷ *Id.*

⁸ A Vision for the Future Transportation 2030, February 2005, Chapter 1, Page 6.

⁹ 2025 Regional Transportation Plan Houston-Galveston Area, June 2005, Page 31.

¹⁰ Miami-Dade Transportation Plan (to the Year 2030) December 2004, FINAL DRAFT, Page 24.

¹¹ Federal Highway Administration, U.S. Department of Transportation. The Department's Value Pricing Pilot Program (VPPP), initially authorized by the Intermodal Surface Transportation Efficiency Act as the Congestion Pricing Pilot Program and continued as the VPPP under SAFETEA-LU, encourages implementation and evaluation of value pricing pilot projects, offering flexibility to encompass a variety of innovative applications including areawide pricing, pricing of multiple or single facilities or corridors, single lane pricing, and implementation of other market-based strategies.

¹² Federal Highway Administration, U.S. Department of Transportation.

¹³ In a Letter to U.S. Representative Randall Cunningham, dated June 10, 2002, concerning the I-15 FasTrak facility in San Diego, FTA stated:

U.S.C. 5307(b) and 49 U.S.C.

5309(a)(E).¹⁵ Facilities that were not eligible HOV lanes prior to being converted to HOT lanes will remain ineligible for inclusion as fixed guideway miles in FTA's funding formulas. Therefore, neither non-HOV facilities converted directly to HOT facilities nor facilities constructed as HOT lanes will be eligible for classification as fixed guideway miles.¹⁶

(ii) The HOT lanes are continuously monitored and continue to meet performance standards that preserve free flow traffic conditions as specified in 23 U.S.C. 166(d). 23 U.S.C. 166(d) provides operational performance standards for an HOV facility converted to a HOT facility. It also requires that the performance of the facility be continuously monitored and that it continue to meet specified performance standards. Due to original project commitments, HOV facilities constructed using capital funds available under 49 U.S.C. 5309(d) or (e) may be required, when converted to HOT lanes, to achieve a higher performance standard than required under 23 U.S.C. 166(d). Standards for operational performance and determining degradation of operational performance for facilities constructed with funds from FTA's New Starts program shall be determined by FTA on a case-by-case basis. FTA will require real-time monitoring of traffic flows to ensure on-going compliance with operational performance standards.

(iii) *Program income from the HOT lane facility, including all toll revenue,*

is used solely for "permissible uses." "Permissible uses" means any of the following uses with respect to any HOT lane facility, whether operated by a public or private entity: (a) Debt service, (b) a reasonable return on investment of any private financing, (c) the costs necessary for the proper operation and maintenance of such facility,¹⁷ and (d) if the operating entity annually certifies that the facility is being adequately operated and maintained (including that the permissible uses described in (a), (b) and (c) above, if applicable, are being duly paid), any other purpose relating to a project carried out under Title 49 U.S.C. 5301 *et seq.* In cases where the HOT lane facility has received (or receives) funding from FTA and another Federal agency, such that use of the facility's program income is governed by more than one Federal program, FTA's restrictions concerning permissible use shall not apply to more than transit's available share¹⁸ of the facility's program income. FTA shall not require recipients to assign priority in payment to any permissible use.

(c) *Transit Fares and Tolls on HOT Lane Facilities.* FTA shall not condition the classification of HOT lanes converted from HOV lanes as fixed guideway miles, or condition any approval or waiver under a Full Funding Grant Agreement, on a grantee's adopting transit fare policies or a tolling authority's adopting of tolling policies concerning, respectively, the price of transit services on the HOT lane facility and the tolls payable by SOVs. Instead, FTA shall permit grantees and tolling authorities to develop their own fare structures for transit services and tolls, respectively, on HOT lane facilities. Transit fares shall remain subject to 49 U.S.C. 332 (Nondiscrimination) and 49 U.S.C. 5307 (Urbanized area formula grants), however.

¹⁷ The costs necessary for the proper operation and maintenance of a HOT lane facility may include reconstruction, rehabilitation, and the costs associated with operating transit service on the facility.

¹⁸ *Transit's allocable share* of the facility's program income shall be an amount equal to the facility's total program income, for any period, multiplied by a ratio, (a) The numerator of which shall be the cumulative amount of funds contributed to the facility through a program established by transit law, and (b) the denominator of which shall be the cumulative amount of all Federal, State and local capital funds contributed to the facility, in each case at the time transit's allocable share is calculated. For purposes of 49 CFR part 18.25, (i) amounts other than transit's allocable share shall not constitute program income and (ii) any expenditure of transit's allocable share that is not deducted from outlays made under transit law shall be deemed an "alternative" under 49 U.S.C. 18.25(g) and deemed by FTA a term of the grant agreement.

(d) *No Return of Funds under Full Funding Grant Agreements.* In the event that an HOV facility is converted to a HOT facility and the HOV facility has received funds through FTA's New Starts program, FTA shall not require the grantee to return such funds so long as the facility complies with the conditions set forth in this final policy statement and the original grant agreement or Full Funding Grant Agreement, as applicable.

III. Response to Comments Received

Thirty-four parties submitted comments in response to FTA's proposed policy, published in the **Federal Register** on September 7, 2006, at 71 FR 52849 (the proposed policy). This section responds to those comments by topic in the following order: (a) Policy Statement Generally; (b) HOT Lanes Were Previously HOV Lanes Reported in the National Transit Database as "Fixed Guideway Miles"; (c) Monitoring and Performance Standards; (d) Program Income and Toll Revenues; (e) Transit Fares and Tolls; (f) Return of Funds under Full Funding Grant Agreements; and (g) Miscellaneous Comments.

(a) *Policy Statement Generally.* The purpose of the proposed policy was to ensure that Federal transit funding for congested urban areas would not be decreased if HOV facilities were converted to variably-priced HOT lanes. The proposed policy also sought to achieve a uniform approach among the operating agencies of the Department concerning HOV-to-HOT conversions, and supported the Department's policy of encouraging HOV-to-HOT conversions. Eight commenters agreed generally with FTA's proposed policy. Six parties submitted general comments. Four commenters asked FTA to defer its final policy determination until the impacts become more apparent. One commenter articulated four policy principles that discuss ways to integrate transit into toll roads and HOT lanes.¹⁹ Another commenter stated that one of FTA's top priorities in developing the policy should be to foster an increase in alternative transportation ridership—whether that alternative is carpool, vanpool, transit, or other shared-mode—and suggested four ways the policy

¹⁹ The commenter's suggested policy principles are as follows: (1) Metropolitan areas and states should have greater latitude to use roadway tolling; (2) Tolling should be a supplement to and not a substitution for existing transportation funding; (3) Local sponsors should have the discretion to fund public transportation with toll revenues; and (4) Tolling should be permitted as a long-term strategy.

¹⁵ FTA apportions amounts made available for fixed guideway modernization under 49 U.S.C. 5309 pursuant to fixed guideway factors detailed at 49 U.S.C. 5337. One of these fixed guideway factors, located at 49 U.S.C. 5337(a)(5)(B), apportions a percentage of the available fixed guideway modernization funds to "fixed guideway systems placed in revenue service at least seven years before the fiscal year in which amounts are made available." For purposes of 49 U.S.C. 5337(a)(5)(B), (i) no HOV facility that has been in revenue service at least seven years shall forfeit its eligibility for fixed guideway modernization funds because it is converted to a HOT lane facility in accordance with this final policy statement; and (ii) no HOV facility that has been in revenue service for less than seven years shall forfeit the years it has accrued under 49 U.S.C. 5337(a)(5)(B) because it is converted to a HOT lane facility and for so long as the HOT lane facility maintains its "fixed guideway" classification in accordance with this final policy statement, it shall continue to accrue years thereunder.

¹⁶ FTA recognizes one exception to this statement—bus-only shoulders. Accordingly, FTA shall classify HOT lane facilities converted from bus-only shoulders as fixed guideway miles, so long as such HOT lanes satisfy the conditions set forth in sections II(b)(ii) and (iii) of this final policy statement and were bus-only shoulders previously reported in the National Transit Database as fixed guideway miles for purposes of the funding formulas administered by FTA under 49 U.S.C. 5307 and 5309.

statement could better support this end.²⁰

FTA Response: The commenters that asked FTA to defer its final policy determination until the impacts are more apparent seemed to misunderstand the scope of FTA's proposed policy. FTA's HOV-to-HOT policy will not result in all HOT lane facilities being classified as fixed guideway miles for purposes of FTA's funding formulas. Rather, only those HOT lane facilities converted from HOV lanes that have been previously classified as fixed guideway miles shall qualify for continued classification as such, subject to the conditions set forth in the final policy statement in section II of this notice.

In response to the four policy principles summarized at footnote (19), FTA reminds the commenter that, without this final policy statement, transit formula funding for congested urban areas would decrease if existing HOV facilities were converted to variably-priced HOT lanes. For this reason, FTA believes that this policy statement: (1) Gives states greater latitude to use tolling without negatively impacting available transit resources; (2) enhances existing transportation funding through the collection of toll revenues; (3) grants project sponsors discretion to use toll revenues for any "permissible use" (as defined in section II of this notice); and (4) encourages variably-priced HOT lanes as a long-term strategy, consistent with the policy of the Department.

In response to the commenter that stated FTA should consider fostering an increase in alternative transportation ridership as one of its top priorities in developing this guidance, FTA reemphasizes its primary purpose in drafting this guidance—to ensure that Federal transit funding for congested urban areas is not decreased when existing HOV facilities are converted to HOT lanes. FTA responds to the commenter's four suggestions summarized at footnote (20) in turn. With respect to the first suggestion, the final policy statement supports HOV usage, but recognizes that many HOV facilities are underutilized; the ability of

HOT lanes to introduce additional traffic to existing HOV facilities, while using pricing and other demand management techniques to control the number of additional motorists, maintain high service levels and provide new revenue, make HOT lanes an effective means of reducing congestion and improving mobility. With respect to the second and third suggestions, FTA will rely on the management, operation, monitoring and enforcement provisions of 23 U.S.C. 166(d). With respect to the fourth suggestion, the final policy statement does not modify language at 23 U.S.C. 166(c)(3).

Accordingly, FTA has adopted as final the general provisions of its proposed policy.

(b) *HOT Lanes Were Previously HOV Lanes Reported in the National Transit Database as Fixed Guideway Miles.* In its notice describing the proposed policy, FTA requested comments on its proposal to classify HOT lanes as fixed guideway miles for purposes of the funding formulas administered under 49 U.S.C. 5307 and 49 U.S.C. 5309, so long as each of three conditions is satisfied. The first condition is that the HOT lanes were previously HOV lanes reported in the National Transit Database as fixed guideway miles for purposes of the funding formulas administered by FTA under 49 U.S.C. 5307 and 49 U.S.C. 5309. FTA received thirty-five comments on this condition, with some parties offering multiple comments. Eight commenters favored FTA's proposed policy. Eighteen commenters asked FTA to expand its policy to classify *all* HOT lanes as fixed guideway miles for purposes of the funding formulas administered by FTA, regardless of whether the HOT lane facility was newly constructed or was previously an HOV facility. Seven commenters asked FTA not to fund HOT lane facilities at a level that would dilute the pool of transit funding available for existing fixed guideway facilities. Two commenters proposed that FTA require converted HOV lanes to have operated as HOV lanes for seven years prior to their conversion to HOT lanes before FTA would classify them as fixed guideway miles.

FTA Response: FTA recognizes that *all* HOT lanes provide similar benefits to metropolitan areas that are experiencing severe and worsening congestion, regardless of whether the facility is newly constructed or converted from HOV or general purpose lanes. However, the purpose of the final policy statement is to ensure that Federal transit funding for congested urban areas is not decreased when

existing HOV facilities are converted to variably-priced HOT lanes in an effort by localities to reduce congestion, improve air quality, or maximize throughput using excess HOV lane capacity and to promote a uniform approach by the Department's operating agencies concerning HOV-to-HOT conversions. If FTA were to classify all HOT lanes as fixed guideway miles without a commensurate increase in overall funding levels, it could negatively impact the ability of many transit operators to finance needed capital maintenance on existing infrastructure. For this reason, FTA has limited the scope of the final policy statement to classifying as fixed guideway miles only those HOT lane facilities that are converted from HOV lanes which had *previously* been classified as fixed guideway miles. In this way, FTA will ensure that Federal transit funding for congested urban areas is not decreased when existing HOV facilities are converted to variably-priced HOT lanes. FTA believes it appropriate to leave for the U.S. Congress, and not to determine on an administrative basis, the question of whether and on what terms facilities newly constructed as HOT lanes or general purpose lanes converted directly to HOT lanes would be classified as fixed guideway miles given the substantial reallocation of formula funds among transit authorities that might result over time if such facilities were also classified as fixed guideway miles.

FTA has included the following footnote (15) in section II (b)(i) of this notice in response to the recommendation that FTA require HOV lanes to have operated as HOV lanes for seven years before they may be converted to HOT lanes and remain classified as fixed guideway miles:

FTA apportions amounts made available for fixed guideway modernization under 49 U.S.C. 5309 pursuant to fixed guideway factors detailed at 49 U.S.C. 5337. One of these fixed guideway factors, located at 49 U.S.C. 5337(a)(5)(B), apportions a percentage of the available fixed guideway modernization funds to 'fixed guideway systems placed in revenue service at least seven years before the fiscal year in which amounts are made available.' For purposes of 49 U.S.C. 5337(a)(5)(B), (i) no HOV facility that has been in revenue service *at least* seven years shall forfeit its eligibility for fixed guideway modernization funds because it is converted to a HOT lane facility in accordance with this final policy statement; and (ii) no HOV facility that has been in revenue service for *less than* seven years shall forfeit the years it has accrued thereunder because it is converted to a HOT lane facility, and for so long as the HOT lane facility maintains its fixed guideway classification in accordance with this policy

²⁰ The commenter's four suggestions on how FTA's policy statement could foster alternative transportation ridership are as follows: (1) The policy statement should support transportation demand management and HOV usage; (2) Greater emphasis on enforcement should be considered; (3) FTA should tie fixed guideway qualification to integrity of the lane; and (4) FTA should emphasize language at 23 U.S.C. 166(c)(3), which section requests that States, in the use of toll revenues, give priority consideration to projects for developing alternatives to single occupancy vehicle travel and projects for improving highway safety.

statement, it shall continue to accrue years thereunder.

Accordingly, FTA will not require that converted HOV lanes operate as HOV lanes for seven years before they may be converted to HOT lanes and remain classified as fixed guideway miles in accordance with this final policy statement.

(c) *Monitoring and Performance Standards.* In its notice describing the proposed policy, FTA requested comments on its proposal to classify HOT lanes as fixed guideway miles for purposes of the funding formulas administered under 49 U.S.C. 5307 and 49 U.S.C. 5309, so long as each of three conditions is satisfied. The second condition is that the HOT lanes are continuously monitored and continue to meet performance standards that preserve free flow traffic conditions as specified in 23 U.S.C. 166(d). FTA received twenty comments on this topic. Four commenters favored FTA's proposed position. Seven commenters proposed that FTA require a minimum level of transit service on a HOT lane facility before its lanes could be classified as fixed guideway miles for purposes of the funding formulas administered by FTA. Five commenters requested that FTA adopt more exacting performance standards. One commenter requested that FTA state explicitly that local agencies may increase HOV occupancy levels as necessary to ensure free flow conditions needed for transit bus service. Another commenter asked FTA to amend its policy to state that single occupant vehicles may be permitted on HOT lanes that are classified as fixed guideway miles, provided that the lanes satisfy the conditions set forth in FTA's final policy statement. One commenter requested that FTA acknowledge that compliance with State law governing performance standards for HOT lanes suffices in terms of meeting the condition that the HOT lanes are continuously monitored and continue to meet performance standards that preserve free flow traffic conditions as specified in 23 U.S.C. 166(d). One commenter asked FTA to require a study on degradation of transit service before an HOV facility may convert to a HOT lane facility and be classified as fixed guideway miles for purposes of funding formulas administered by FTA.

FTA Response: FTA disagrees that it should require a more exacting performance standard, including a minimum level of transit service. FTA recognizes that a more exacting standard would be necessary if *all* HOT lane facilities were eligible for classification

as fixed guideway miles, for under this scenario rural or suburban HOT lane facilities with little or no transit service could receive a significant portion of the Federal transit funds needed by the Nation's largest transit providers to maintain their current infrastructure. For this reason, FTA has limited the benefits of the final policy to HOV lanes that have previously been classified as fixed guideway miles. Such designation as a fixed guideway mile indicates that a facility has a minimum level of transit service. FTA believes that compliance with the performance standards codified at 23 U.S.C. 166(d) is sufficient to ensure free flow traffic conditions and to avoid degradation of transit service on these facilities when converted from HOV lanes to HOT lane facilities. Moreover, HOV facilities constructed using capital funds available under 49 U.S.C. 5309(d) or (e) could be required, when an HOV facility converts to a HOT lane facility, to achieve a higher performance standard than required under 23 U.S.C. 166(d). In all circumstances, FTA shall require real-time monitoring of traffic flows to ensure on-going compliance with 23 U.S.C. 166(d).

FTA does not agree that compliance with State law governing HOT lane performance standards will satisfy FTA's requirements in all circumstances. Rather, FTA shall require all HOT lane facilities to comply with the statutory requirements of 23 U.S.C. 166 to be classified as fixed guideway miles for purposes of FTA's funding formulas. It may be the case that the laws of certain states require a higher level of performance than the Federal standard articulated here. In these instances, the lesser Federal standard should present no obstacle to HOT conversion.

With respect to the request that FTA require a study on the degradation of transit service before an HOV facility may convert to a HOT facility, FTA (i) believes that compliance with the free flow traffic requirements of 23 U.S.C. 166 is sufficient to avoid the degradation of transit service on these facilities and accordingly (ii) will not require that project sponsors incur the additional expense of a formal study on the degradation of transit service.

(d) *Program Income and Toll Revenues.* In its notice describing the proposed policy, FTA requested comments on its proposal to classify HOT lanes as fixed guideway miles for purposes of the funding formulas administered under 49 U.S.C. 5307 and 49 U.S.C. 5309, so long as each of three conditions is satisfied. The third condition is that program income from

the HOT lane facility, including all toll revenue, is used solely for "permissible uses." FTA received twenty-five comments on this condition. Five commenters favored FTA's proposed policy. Seven commenters requested that FTA expressly state in its final policy that grantees may use toll revenues for transit operating costs. Four commenters stated that FTA funds should not be used for the maintenance and/or construction of HOT lane facilities. Four commenters asked FTA to require that all Federal transit funds generated by HOT lane facilities because of their classification as fixed guideway miles be directed to the "designated recipient" for Federal transit funding. Three commenters stated that FTA should not permit the operators of HOT lane facilities to finance a HOT lane facility's operating losses with Federal funds generated by the facility's classification as fixed guideway miles. One commenter asked FTA not to limit the use of HOT lane toll revenues to transit. Another commenter asked FTA to require that priority of payment be provided for in the project implementation documents.

FTA Response: Based on the recommendation of several commenters that FTA expressly state that grantees may use toll revenues for transit operating costs, and pursuant to 49 CFR part 18.25, which states that FTA "grantees may retain program income for allowable capital or operating expenses," FTA has added transit operating costs to its description of "permissible uses" at section II(b)(iii) of this notice.

FTA disagrees with the comment that its grantees should not use Federal transit funds for the maintenance and/or construction of HOT lane facilities. The commenter did not indicate whether it referred to the use of grant funds or program income. While FTA recognizes both HOV and HOT lanes as permissible incidental uses of FTA-funded assets, FTA grant funds shall not be used to construct a HOT lane facility beyond what is allowed by 49 U.S.C. 5302(a)(4), as implemented by FTA's regulations, as amended from time to time.²¹ Any facility that converts from an HOV to a HOT facility, and retains its classification as a fixed guideway by satisfying the conditions of this policy statement, may use program income in accordance with this final policy

²¹ 49 U.S.C. 5302(a)(4) defines "fixed guideway" as "a public transportation facility (A) using and occupying a separate right-of-way or rail for the exclusive use of public transportation and other high occupancy vehicles; or (B) using a fixed catenary system and a right-of-way usable by other forms of transportation."

statement, the Department's regulation at 49 CFR part 18.25, and other applicable statutes, regulations and requirements. Similarly, FTA disagrees with the comment that it should limit the use of HOT lane toll revenues to transit. In many cases, a HOT lane facility may have received (or receives) funding from FTA and another Federal agency, such that use of the facility's program income is governed by more than one Federal program. In these instances, FTA's restrictions concerning permissible use shall not apply to more than transit's allocable share of the facility's program income, as described in section II of this notice. FTA will not require recipients to assign priority in payment to any permissible use.

Federal transit law requires FTA to disburse certain funds to the designated recipient. The designated recipient for FTA formula funds shall not be changed because the grantee converted an HOV facility to a HOT facility, in accordance with the final policy statement. FTA shall not prevent such designated recipients from using the funds for eligible activities in accordance with the process for programming transit funds described at 23 CFR part 450.324(l) of the joint FTA-FHWA planning regulations.

(e) *Transit Fares and Tolls.* In its notice describing the proposed policy, FTA requested comments on transit fares and tolls on HOT lane facilities. FTA stated that it would not condition the receipt of Federal transit funds by a qualifying HOT lane facility on the tolling authority's adoption of policies concerning the price of transit services on the HOT lane facility or the tolls payable by single occupant vehicles. FTA would allow grantees and tolling authorities to develop their own fare structures for transit services and tolls on HOT lane facilities. FTA received sixteen comments on this topic. Without further comment, five commenters agreed with FTA's proposed policy not to regulate toll prices. Ten commenters stated that transit vehicles should be exempt from tolls charged on Federally-funded HOT lane facilities for its lanes to be classified as fixed guideway miles for purposes of the funding formulas administered by FTA. One commenter asked FTA to require that transit fares and tolls remain competitive.

FTA Response: Federal transit law prohibits FTA from regulating the "rates, fares, tolls, rentals, or other charges prescribed by any provider of public transportation." 49 U.S.C. 5334(b)(1). Accordingly, FTA shall not condition the receipt of Federal transit funds by a qualifying HOT lane facility on the tolling authority's adoption of

policies concerning the price of transit services on the HOT lane facility or the tolls payable by single occupant vehicles. FTA will allow grantees and tolling authorities to develop their own fare structures for transit services and tolls, respectively, on HOT lane facilities. Transit fares shall remain subject to 49 U.S.C. 5332 (Nondiscrimination) and 49 U.S.C. 5307 (Urbanized area formula grants), however.

(f) *Return of Funds under Full Funding Grant Agreements.* In its notice describing the proposed policy, FTA requested comments on its proposal that, in the event that an HOV facility is converted to a HOT facility and the HOV facility has received funds through FTA's New Starts program, FTA would not require the grantee to return such funds, so long as the facility complied with the conditions set forth in the proposed policy. FTA received one comment on this topic. The commenter expressed concern that, when the grantee is not also the tolling authority, the tolling authority may make business decisions contrary to the interest of the grantee/transit provider, thus forcing the grantee/transit provider to repay New Starts funding to FTA.

FTA Response: It appears that the commenter misunderstood the scope of FTA's proposed policy, which states that "in the event that an HOV facility is converted to a HOT facility and the HOV facility has received funds through FTA's New Starts program, FTA would not require the grantee to return such funds so long as the facility complied with the conditions set forth in this guidance." If a grantee wishes to convert an existing HOV facility to a HOT lane facility and maintain the classification of its facility as a fixed guideway for purposes of FTA's funding formulas, it must comply with the conditions set forth in the final policy statement. To the extent that the facility is subject to a Full Funding Grant Agreement, the grantee is obligated to abide by the requirements thereof, just as it is bound to any other contractual or legal obligation.

(g) *Miscellaneous Comments.* FTA received seven miscellaneous comments in response to its proposed policy. One commenter asked FTA to address a circumstance in which a previously eligible HOV lane (or a portion of an HOV lane) is temporarily or permanently taken out of service in order to be reconstructed and expanded into an improved HOT lane facility in the same corridor. A second commenter requested that FTA indicate whether it would classify as fixed guideway miles bus-only shoulders converted to HOT

lanes when the bus-only shoulders are currently classified as fixed guideway miles. Another commenter asked FTA to clarify its policy with respect to variable-priced express lanes. Two commenters asked FTA to require coordination between privately operated HOT lane facilities and public transportation agencies. One commenter asked FTA to connect this policy with transit supportive land use. And another commenter argued that FTA's policy should not affect New Starts project eligibility criteria.

FTA Response: FTA recognizes that it may be necessary to temporarily remove an HOV lane from service in order to convert it into a HOT lane facility. Such a HOT lane facility will not lose its classification as a fixed guideway so long as it satisfies the conditions set forth in the final policy statement.

FTA agrees with the proposal that it classify as fixed guideway miles bus-only shoulders converted to HOT lanes as long as the bus-only shoulders are currently classified as fixed guideway miles and satisfy the conditions of this final policy statement. Accordingly, FTA has included the following language at footnote (16) in section II(b)(i) of this notice:

FTA shall classify HOT lane facilities converted from bus-only shoulders as fixed guideway miles, so long as such HOT lanes satisfy conditions (ii) and (iii) of this final policy statement and were bus-only shoulders previously reported in the National Transit Database as fixed guideway miles for purposes of the funding formulas administered by FTA under 49 U.S.C. 5307 and 5309.

The commenter that asked FTA to consider variably-priced express lanes did not provide enough information for FTA to determine whether such facility could satisfy the conditions set forth in the proposed policy. FTA responds by reiterating its statement at section II(b)(i) of this notice, that with the exception of bus-only shoulders, "neither non-HOV facilities nor facilities constructed as HOT lanes would be eligible for classification as fixed guideway miles."

The comment requesting that FTA require coordination between privately operated HOT lane facilities and public transportation is beyond the scope of this notice. FTA's Planning and Assistance Standards are located at 49 CFR part 613.

Similarly, the comments requesting that FTA connect this policy with transit supportive land use and that this policy not affect FTA's New Starts project eligibility criteria are beyond the scope of this notice, which is limited to the classification of HOT lane facilities

as fixed guideway miles for purposes of FTA's funding formulas.

Issued on January 8, 2007.

James S. Simpson,
Administrator.

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket No. 06-17]

Office of Thrift Supervision

[Docket No. 2006-55]

FEDERAL RESERVE SYSTEM

[Docket No. OP-1254]

FEDERAL DEPOSIT INSURANCE CORPORATION

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55043; File No. S7-08-06]

Interagency Statement on Sound Practices Concerning Elevated Risk Complex Structured Finance Activities

AGENCIES: Office of the Comptroller of the Currency, Treasury ("OCC"); Office of Thrift Supervision, Treasury ("OTS"); Board of Governors of the Federal Reserve System ("Board"); Federal Deposit Insurance Corporation ("FDIC"); and Securities and Exchange Commission ("SEC") (collectively, the "Agencies").

ACTION: Notice of final interagency statement.

SUMMARY: The Agencies are adopting an Interagency Statement on Sound Practices Concerning Elevated Risk Complex Structured Finance Activities ("Final Statement"). The Final Statement pertains to national banks, state banks, bank holding companies (other than foreign banks), federal and state savings associations, savings and loan holding companies, U.S. branches and agencies of foreign banks, and SEC-registered broker-dealers and investment advisers (collectively, "financial institutions" or "institutions") engaged in complex structured finance transactions ("CSFTs"). In May 2004, the Agencies issued and requested comment on a proposed interagency statement ("Initial Proposed Statement"). After reviewing the comments received on the Initial Proposed Statement, the Agencies in May 2006 issued and requested

comment on a revised proposed interagency statement ("Revised Proposed Statement"). The modifications to the Revised Proposed Statement, among other things, made the statement more principles-based and focused on the identification, review and approval process for those CSFTs that may pose heightened levels of legal or reputational risk to the relevant institution (referred to as "elevated risk CSFTs"). After carefully reviewing the comments on the Revised Proposed Statement, the Agencies have adopted the Final Statement with minor modifications designed to clarify, but not alter, the principles set forth in the Revised Proposed Statement. The Final Statement describes some of the internal controls and risk management procedures that may help financial institutions identify, manage, and address the heightened reputational and legal risks that may arise from elevated risk CSFTs. As discussed further below, the Final Statement will not affect or apply to the vast majority of financial institutions, including most small institutions, nor does it create any private rights of action.

EFFECTIVE DATE: The Final Statement is effective January 11, 2007.

FOR FURTHER INFORMATION CONTACT:

OCC: Kathryn E. Dick, Deputy Comptroller, Credit and Market Risk, (202) 874-4660; Grace E. Dailey, Deputy Comptroller, Large Bank Supervision, (202) 874-4610; or Ellen Broadman, Director, Securities and Corporate Practices Division, (202) 874-5210, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

OTS: Fred J. Phillips-Patrick, Director, Credit Policy, (202) 906-7295, and Deborah S. Merkle, Project Manager, Credit Policy, (202) 906-5688, Examinations and Supervision Policy; or David A. Permut, Senior Attorney, Business Transactions Division, (202) 906-7505, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Board: Sabeth I. Siddique, Assistant Director, (202) 452-3861, or Virginia Gibbs, Senior Supervisory Financial Analyst, (202) 452-2521, Division of Banking Supervision and Regulation; or Kieran J. Fallon, Assistant General Counsel, (202) 452-5270, or Anne B. Zorc, Senior Attorney, (202) 452-3876, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. Users of Telecommunication Device for Deaf (TTD) only, call (202) 263-4869.

FDIC: Jason C. Cave, Associate Director, (202) 898-3548; Division of Supervision and Consumer Protection; or Mark G. Flanagan, Counsel, Supervision and Legislation Branch, Legal Division, (202) 898-7426, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

SEC: Mary Ann Gadziala, Associate Director, Office of Compliance Inspections and Examinations, (202) 551-6207; Catherine McGuire, Chief Counsel, Linda Stamp Sundberg, Senior Special Counsel (Banking and Derivatives), or Randall W. Roy, Branch Chief, Division of Market Regulation, (202) 551-5550, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

Financial markets have grown rapidly over the past decade, and innovations in financial instruments have facilitated the structuring of cash flows and allocation of risk among creditors, borrowers, and investors in more efficient ways. Financial derivatives for market and credit risk, asset-backed securities with customized cash flow features, specialized financial conduits that manage pools of assets, and other types of structured finance transactions serve important purposes, such as diversifying risk, allocating cash flows and reducing cost of capital. As a result, structured finance transactions, including the more complex variations of these transactions, now are an essential part of U.S. and international capital markets.

When a financial institution participates in a CSFT, it bears the usual market, credit, and operational risks associated with the transaction. In some circumstances, a financial institution also may face heightened legal or reputational risks due to its involvement in a CSFT. For example, a financial institution involved in a CSFT may face heightened legal or reputational risk if the customer's regulatory, tax or accounting treatment for the CSFT, or disclosures concerning the CSFT in its public filings or financial statements, do not comply with applicable laws, regulations or accounting principles.¹

In some cases, certain CSFTs appear to have been used in illegal schemes

¹ For a memorandum on the potential liability of a financial institution for securities laws violations arising from participation in a CSFT, see Letter from Annette L. Nazareth, Director, Division of Market Regulation, Securities and Exchange Commission, to Richard Spillenkothen and Douglas W. Roeder, dated December 4, 2003 (available at <http://www.federalreserve.gov/boarddocs/srletters/2004/> and <http://www.occ.treas.gov>).