Congress Begins to Tackle Transit Legislation

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If you're watching the major news media, it might seem like infrastructure discussions between Congressional leaders and the White House are advancing at a slow pace. But if you train your eyes on Capitol Hill, you'll see that legislative action is starting to happen.

It's too soon to predict quite what or when concrete actions will occur, but it's important to note that the two Congressional committees charged most closely with transit legislation – the House Transportation and Infrastructure Committee and the Senate Banking, Housing and Urban Affairs Committee – have started holding FAST Act reauthorization hearings and have begun circulating and drafting legislative language.

In the House, Congressman Peter DeFazio (D-Ore.), chair of the Transportation and Infrastructure Committee, has introduced the majority leadership's initial draft legislation to reauthorize federal highway, transit, and other surface transportation programs through 2026. Known as the "INVEST in America Act," this is an updated version of identically named legislation the committee approved last year, and which the full House passed.

As with last year's version, this latest edition of the INVEST Act is an ambitious, far-reaching piece of legislation that speaks to many of the priorities that have been raised by CTAA and our partners in public transportation.

Before digging into this bill's details, let's remember that everything in this bill is just a first draft, and many things will happen along the way to reauthorizing the FAST Act (which is set to expire on Sept. 30, 2021).

If you want summary information, section-by-section details, or even the full 1,383-page draft bill, those things can be found at https://transportation.house.gov/invest-in-america. If you like – or don't like – what you see, contact your representatives in Congress, and let them know your views; it's important that they hear from their constituents.

This year, one of the new, attention-grabbing features is a list of nearly 1,500 "member-designated projects," often termed as "earmarks," that House members have specifically directed to be funded; this list includes dozens of proposed large and small transit projects. It's been quite a few years since legislation was allowed to include project earmarks; if past experience is any indication, expect this list to grow and change as it advances through the House and Senate.

Below is CTAA's analysis of the INVEST in America Act's major transit provisions. If you want a reminder of CTAA's legislative priorities, take a look at https://ctaa.org/wp-content/uploads/2020/01/2020_Legislative_Priorities.pdf.

Increased overall growth in federal transit spending

The largest portion of FTA spending has been, and would continue to be, funds derived from the Mass Transit Account of the federal Highway Trust Fund, most of which would continue to be distributed in formula-based grants to urban areas and to states. Current spending from the Mass Transit Account is $10.2 billion a year, with a healthy "plus-up" in general revenues that have further boosted formula grants. The INVEST in America Act would maintain these levels in FY 2022, then bump up trust fund spending to $17.9 billion in Fiscal Year 2023, and would increase steadily to $18.9 billion in FY 2026. These are all record levels of funding.

- The Section 5310 program (currently authorized at $285.6 million) would jump to $434.8 million in FY 2023, and keep growing to $455.7 million in FY 2026.
- The Section 5311 authorization (currently $673.3 million) jumps to $1.0 billion in FY 2023, and increases to $1.1 billion in FY 2026. Additional Section 5311 funds would continue to be derived from Section 5340, as currently is the case.
- Within Section 5311, formula grants for tribal transit (currently $30.0 million per year) would jump to $45.7 million in FY 2023, growing steadily to $47.9 million in FY 2026.
- The annual set-aside of $20.0 million within Section 5311 for public transit in Appalachia would be terminated, but there'd be a new program of supplemental rural transit funding to areas of persistent poverty, starting at $50.8 million in FY 2023, and growing to $53.2 million in FY 2026. This heightened emphasis on addressing areas of persistent poverty is found in many other sections of the INVEST in America Act.
- Section 5307 urban transit formula grants (currently authorized at $4.9 billion), would jump to $7.5 billion in FY 2023, increasing to $7.9 billion in FY 2026. Section 5307 apportionments would continue to be supplemented by the urban share of Section 5340 authorizations.
- In addition to increasing overall funding for Section 5307, the INVEST in America Act would allocate 3.0 percent of small-urban Section 5307 funding on the basis of these STIC factors, which is more than the 2.0 percent of funds currently set aside for STIC.
- For both the Section 5307 and 5311 programs, the formula funding mechanisms would be tweaked in ways that are aimed to direct greater shares of transit funds on the basis of low-income and high-poverty populations. There also is a dramatic re-working of how the "incentive tier" of Section 5307 formula grants would be calculated.
- Section 5339 bus and bus facilities grants, currently authorized at $808.7 million (not including generous supplemental appropriations from general revenues),

would be $2.1 billion in FY 2023, and would increase steadily to $2.2 billion in FY 2023.

- Over that period, formula-based Section 5339(a) grants (currently authorized at $464.6 million) jump to $1.2 billion in FY 2023, growing to $1.3 billion in FY 2026;
- Section 5339(b) competitive grants (currently authorized at $344.0 million) jump to $437.1 million in FY 2023, but would decrease every year thereafter, winding down to $351.1 million in FY 2026. Bus replacement no longer would be an eligible use of these funds; instead, there'd be a carve-out within the Section 5339(a) formula program prescriptively targeted to bus replacement.
- The Section 5339(c) program, which currently carves out $55.0 million from Section 5339(b) for low- and no-emission buses and bus facilities, becomes a separate line-item within Section 5339, starting at $890.0 million in FY 2023, and growing to $1.2 billion in FY 2026; note, though, that this program would focus solely on zero-emission vehicles under the INVEST in America Act. This is one of many examples throughout the INVEST in America Act in which there's a clear priority on the promotion of electric and other non-emitting vehicles.

Regulatory Amendments

- The INVEST in America Act would clarify that the charter service restriction applies only within urbanized areas, does not apply to transit agencies whose only FTA funding is received under Section 5310, and is not triggered by a transit agency's receipt of social services funding that's being used as the non-federal share of Section 5307- or 5311-funded projects.
- A current provision that gives flexibility to the required pre-award and post-delivery audits for rural and small-urban transit systems' bus procurements would be removed.
- A new tier would be added to the "100-bus rule" under which transit systems in larger urbanized areas can use some of their Section 5307 funds toward operating costs. Under the INVEST in America Act, large-urban areas' transit systems with between 101 and 125 vehicles operated in maximum service would be able to use up to 25 percent of their Section 5307 funds toward operating costs.
- The INVEST in America Act would add a provision, applicable to Section 5307, 5310 and 5311 recipients, under which capital assets that have reached the end of their useful life, but are still worth more than $5,000, can be sold off at their current market value, with the transit agency and FTA sharing the proceeds of that sale. This may not sound like the perfect deal, but it's better for transit agencies than current federal regulations' requirement that 100 percent of all such sale proceeds must go to the US Treasury, even if there's no remaining federal financial interest in the asset.

- The INVEST in America Act would maintain all current categories of eligible sources for the non-federal share of Section 5307, 5310 and 5311 programs, and would clarify that transportation development credits (formerly called "toll credits") are among eligible sources of non-federal matching funds.
- The INVEST in America Act would add a mechanism under which volunteer hours could be counted toward the non-federal share of Section 5311 projects.
- The INVEST in America Act would make some potentially extensive modifications to FTA's Buy America and bus procurement requirements, and would call for bus procurements to be conducted using open-market, performance-based specifications, around which there'd be a negotiated rulemaking aimed at establishing a list of specific components deemed eligible for inclusion in bus procurements. Further, it would require FTA to conduct rolling stock Buy America certifications to remove the burden from transit agencies. This would enable rolling stock to be certified once, rather than with every single contract, with the objective of removing variation in Buy America compliance.
- The INVEST in America Act would add more components to the FTA public transportation safety program, but does not address the current administrative deferrals that excuse Section 5310 and 5311 recipients from being required to participate in this regulatory safety regime.
- While the INVEST in America Act has a number of provisions addressing autonomous vehicles, and a number of provisions to accelerate the use of new technologies in public transit, the only item specific to the use of autonomous vehicles by public transit agencies is a restriction on these deployments unless the transit agency has a DOT-approved workforce development program looking at affected jobs and resulting job retraining needs.
- FTA would be required to apportion state-managed formula funds under Sections 5307, 5310 and 5311 no later than December 15 each year.
- There are provisions in the motor carrier safety title of the INVEST in America Act that would specifically include "stretch limousines" among the vehicles for which a commercial driver's license (CDL) with a passenger endorsement would be required. Last year's proposed language that sought to require CDLs of all vehicles with capacities of as low as 9 passengers has been **removed** from this latest legislation.

Other Features

- Formula funding determinations in FY 2022 and FY 2023 would be based on transit data for the 2019 reporting year, thus avoiding impacts from many transit systems' dramatically reduced operations during the current COVID-19 pandemic.
- The INVEST in America Act adds some provisions in response to how the 2020 census will influence public transit:
    - Technical assistance to help impacted grantees becomes an eligible use Section 5314 funds;

    - States could use up to 5 percent of their Section 5311 funds to provide up to two years of continuing assistance to currently-rural areas that become classified as urban areas as a result of the 2020 census;
    - Under certain conditions, urban areas whose populations fall below 50,000 in a decennial census enumeration following the declaration of a major disaster would continue to be included in Section 5307 apportionments and allocations, using the data associated with the most recent census enumeration preceding their disaster declaration; and
    - There would be a gradual phase-out of STIC-based formula funding otherwise lost to current urban areas that become no longer eligible for STIC on the basis of their population in the 2020 census.
- A new program of competitive capital grants to promote increased bus service frequency and ridership among urban areas with populations greater than 500,000 would be established at Section 5308. This program would receive $101.5 million in FY 2023, with authorizations increasing to $106.4 million in FY 2026.
- There would be opportunities under which some CMAQ-funded transit operations could continue using those funds with no time limitation, instead of the firm 3-year time limit under current law.
- Language would be added (at Section 5316) that would somewhat incentivize the use of Section 5307, 5310 and 5311 funds for mobility-as-a-service and mobility-on-demand projects.
- There would be a carve-out of Section 5310 funds to support a program of competitive "one-stop paratransit grants." This Section 5310(j) carve-out starts at $5.1 million in FY 2023 and grows to $5.3 million in FT 2026.
- There would be a new program of competitive "Access to Jobs Grants" aimed at providing reduced-fare transit for persons in targeted categories of low-income households. Funding for these Section 5312(j) grants would begin at $10.1 million in FY 2023, growing to $10.3 million in FY 2026.
- There would be a wide range of FTA technical assistance activities. Among many other items, these technical assistance provisions would include:
    - An expanded authorization, at Section 5310(k), for "Innovative Coordinated Access and Mobility" grants, starting at $20.3 million in FY 2023, and growing to $21.3 million in FY 2026; and
    - A codification of the current National Center for Applied Transit Technology at Section 5314(a)(2)(I), funded at $1.5 million per year.

What's not in this bill?

The most important thing to note is that the House Transportation & Infrastructure Committee does not have jurisdiction over taxation and revenue measures. Therefore, the INVEST in America Act remains silent on big picture items such as how the funds for its programs are generated, as well as being silent on comparatively modest issues, such as whether to amend transit aspects of the qualified transportation fringe benefit at Section 132(f) of the Internal Revenue Code, or whether to adjust which entities are exempt from payments of federal motor fuel excise taxes.

What else? What next?

As mentioned earlier, there's a lot more in the INVEST in America Act's 1,383 pages that you may find interesting, not just in the transit title, but also in its highway reauthorizations, its transportation research title, and elsewhere.

But before we allow ourselves to become too absorbed in these details, let's keep an eye on where this bill moves, and what the Senate does for transit reauthorization on its side of Capitol Hill. CTAA has heard from many members of Congress, from both the Republican and Democratic sides of the aisle, about potential amendments to this or substitute pieces of legislation, so the June 9-10 mark-up at which the bill is amended in committee will be important to watch, as will whatever amendments arrive along the way of this bill's likely journey to eventual consideration on the House floor. Follow CTAA for the latest details.

Meanwhile, the Senate Banking committee probably will begin finalizing its version of transit legislation this summer, which would then become fused with highway provisions that are emerging from the Senate Environment and Public Works Committee, along with rail, highway safety and motor carrier reauthorizations that would emanate from the Senate Commerce, Science and Transportation Committee.

Separately from all this, there is the looming wildcard of any large-scale infrastructure initiatives that may emerge from the discussions the president is having with Congressional leaders and negotiators over his proposed "American Jobs Plan."

All told, this is one summer in which all the eyes of the transportation community should be trained on our nation's capital. Stay tuned, to see how it all unfolds.