

May 9, 2025

Docket Operations,
U.S. Department of Transportation,
West Building, Ground Floor, Room W12-140, Routing Symbol M-30,
1200 New Jersey Avenue SE,
Washington, DC 20590

**Re: Notice of Modification of Airport Improvement Program Grant Assurances;
Docket Number FAA 2025-0605**

*** Submitted electronically via regulations.gov ***

Dear Secretary Duffy:

The City and County of San Francisco (“San Francisco”), which owns and operates San Francisco International Airport (“SFO”) through its Airport Commission, provides the following comments, as an airport sponsor, regarding the proposed modifications to the Airport Improvement Program (“AIP”) Grant Assurances, 90 Fed. Reg. 17501 (Apr. 24, 2025).

SFO is the largest airport in the Bay Area engaged in domestic and international passenger and cargo transportation. San Francisco recognizes the important role of FAA guidance and funding in ensuring that the nation’s airports, including SFO, are safe and efficient centers for American travelers and commerce, and appreciates the decades-long working relationship between SFO and FAA.

As explained in further detail below, however, San Francisco is concerned that the proposed modifications to the Grant Assurances lack sufficient clarity and are unlawful. San Francisco therefore respectfully requests that FAA (1) make the proposed clarifications and changes suggested below; (2) extend the comment period for this docket by at least thirty (30) days to allow for sufficient review and input on this critical program; and (3) explicitly provide that grant agreements are not subject to the proposed modified Grant Assurances during this comment and review period, and preferably extend the effective date of the Grant Assurances no earlier than the start of fiscal year 2026.

I. SFO Urges Clarifications to the Applicability of the Proposed Grant Assurances.

Airport sponsors, like any federal grant recipients, must be able to accept grant assurance conditions “voluntarily and knowingly,” which cannot happen when recipients are “unaware” or “unable to ascertain” what the conditions are. *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451

U.S. 1, 17 (1981)). To that end, the proposed AIP Grant Assurances would benefit from several clarifications.

First, FAA states that the proposed grant assurances “will be in effect for grants issued in fiscal year 2025 and beyond.” But fiscal year 2025 is already underway, and the new assurances cannot apply until they are final; the current draft assurances are only a proposal. *See* 49 U.S.C. § 47107(h) (requiring notice and comment before modifying an assurance). FAA should clarify that any changes will only apply after comments are submitted, meaningfully reviewed, and the AIP Grant Assurances finalized (preferably with the below changes incorporated). The new Grant Assurances should apply to projects funded no earlier than the start of fiscal year 2026.

Second, FAA proposes to update the introduction to Grant Assurance 1 (“General Federal Requirements”) to state:

Performance under this agreement shall be governed by and in compliance with the following requirements, as applicable, to the type of organization of the Sponsor and any applicable sub-recipients.

It is not clear what this language, particularly the phrase “governed by and in compliance with” is intended to add to the existing language in Grant Assurance 1, which already states that “[t]he Sponsor will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance, and use of Federal funds for this Grant.” San Francisco cannot glean from this new language if and how the nature of its compliance with various federal obligations is expected to change. This language is unnecessary and should be removed.

II. The Executive Orders Proposed to be Included in the Grant Assurances by Reference Fail to Adequately Advise Airports that Accept AIP Grants of their Obligations.

FAA proposes to incorporate by reference Executive Orders 14149, 14151, 14154, 14168, and 14173 (the “EOs”) in the AIP Grant Assurances and require airport sponsors to comply with them. But these EOs, like any executive orders, provide direction only to executive agencies, officers, and employees—not private parties or state and local governments. *See* U.S. Dep’t of Justice, Executive Orders, <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/executive-orders> (executive orders are “official documents . . . through which the President of the United States manages the operations of the Federal Government”) (available permanently at <https://perma.cc/A6AR-QMF6>).

Accordingly, it does not make sense to require third parties, including airport sponsors, to comply with the EOs, and it is unclear whether this provision purports to do so, rendering the condition ambiguous in violation of the Spending Clause. *Pennhurst, supra*, 451 U.S. at 17. Moreover, this purported requirement fails to either (1) provide a “person of ordinary intelligence a reasonable opportunity to know what is prohibited” or (2) “provide explicit

standards for those who apply” it, thereby encouraging “arbitrary and discriminatory application,” all in violation of constitutional Due Process. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).¹

Conclusion

Given the concerns addressed above, San Francisco strongly urges FAA to announce an extension of the comment period, immediately, and clarify that no changes to the Grant Assurances will apply until well after that date, preferably the next fiscal year to provide sufficient time. This will provide an opportunity for careful review and reconsideration of the proposed Grant Assurances, and ensure other that SFO, other airport sponsors, and the public have a meaningful opportunity to participate in this process.

We appreciate your consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mike Nakornkhet".

Mike Nakornkhet

Airport Director

On behalf of the City and County of San Francisco

¹ San Francisco reserves any arguments as to the EOs themselves, which are unconstitutionally vague and suffer other constitutional infirmities.