



AMERICAN
PUBLIC
TRANSPORTATION
ASSOCIATION

July 17, 2017

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

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Richard A. White

RE: OST- 2017-0057

Dear Docket Clerk:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comments on the Office of the Secretary's Transportation Infrastructure (OST): Notice of Review of Policy, Guidance, and Regulation published on June 8, 2017 at 82 FR 26734.

About APTA

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including public transit systems; high-speed intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation.

General Comments

APTA has been surveying its member organizations to develop regulatory reform recommendations, and APTA's Board of Directors approved the attached recommendations document. APTA is grateful for this opportunity and is in the process of developing other recommendations for consideration. While we are providing the attached document now (Appendix A), we expect to have additional recommendations by October after our annual meeting. Recommendations under consideration include areas such as Buy America, accessible transportation, performance management measures, requirements for small and mid-size transit properties, labor regulations, and oversight activities. We hope the Department will also give those recommendations due consideration.

Docket Operations

July 17, 2017

Page 2

We appreciate the opportunity to assist OST in this important endeavor. For additional information, please contact Linda Ford, APTA's Chief Counsel, at (202) 496-4808 or lford@apta.com.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Richard A. White". The signature is written in a cursive, flowing style.

Richard A. White
Acting President & CEO

APPENDIX A

Invest in Public Transportation for a Stronger America

Appendix: Regulatory Reform Recommendations



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***The American Public Transportation Association
Stands Ready to Work with the Trump Administration
and Congress to Streamline and Improve Federal Regulations
to Enable Better and Expanded Public Transportation Services
for Americans and Drive Economic Growth Across the Nation.***

APTA Infrastructure Initiative Recommendations Appendix: Regulatory Reform Recommendations

Since the election in November 2016, both the Trump Administration and Members of the U.S. Congress have been looking for ways to reduce regulatory burdens and streamline the federal regulatory process. President Trump has directed federal agencies to find ways to minimize regulatory delays, and congressional committees have asked for stakeholder input on regulatory streamlining. Additionally, on June 8, 2017, the Department of Transportation published a notice in the Federal Register requesting public input for options to eliminate or revise existing federal regulations.

The APTA Legislative Subcommittee on Federal Procedures and Regulations has been soliciting and developing recommendations from APTA members over a period of months. APTA's Legislative Committee has been briefed and consulted on the subcommittee deliberations throughout the process. In May, the Legislative Committee developed a process for considering recommendations by the subcommittee. Proposals that were approved by the subcommittee, and other proposals that were designated for further discussion, were subsequently sent to members of the full APTA Legislative Committee, members of the Bus and Rail CEO Committees, the Legal Affairs Committee, and the Access Committee for review and comment. After that process, this first tranche of recommendations was approved by APTA's Board of Directors on June 10, 2017. APTA continues to review additional proposals and has established a working group to consider policy related to Buy America requirements.

APTA and its more than 1,500 members stand ready to engage in a productive dialogue with the Administration and Congress to reform federal statutes and regulations to enhance our industry's ability to deliver high-quality, safe, and efficient public transportation services. APTA's members pride themselves on serving communities of all sizes across the country. Thus, it is important that any regulatory reform not come at the expense of transparent and open communication including sound community engagement and continuation of the protections afforded under environmental justice and other civil rights requirements.

Title of Regulation, Statute or Policy Guidance:

Project Delivery

MAP-21, Public Law No. 112-141, Title I, Subtitle C
FAST Act, Public Law No. 114-357, Title I, Subtitle C and others

Citation/Dates of Issuance:

Various

Description:

- Both MAP-21 and the FAST Act included a number of provisions designed to improve efficiency in the development of projects, reduce delays in the planning and environmental review process, and generally accelerate project delivery.
- The Department of Transportation has implemented some, but not all, of these provisions. In some cases DOT must revisit previous actions to comply with new requirements in the FAST Act.
- Additionally, under the current process, federal oversight is applied not only to the federally funded portion of projects, but also to the state and local shares. This can limit the ability of local decision makers to influence the part of the project that is not financed with federal funds.

Recommendations for Modification, Elimination:

- DOT should move expeditiously to implement statutory project delivery reforms including rulemaking and guidance for more efficient environmental reviews, expanded use of categorical exclusions, limitations of claims for judicial review, and guidance on accelerating complex projects.
- APTA supports implementing the Program of Interrelated Projects which will enable simultaneous development of different projects.
- Congress should pursue commonsense reforms that support further streamlining of the transportation project delivery process, including planning and environmental work and expanded flexibility for early property acquisition for public transportation projects, to reduce delays and costs associated with delays and harmonize federal regulations for all surface transportation modes, including transit, rail, and highways.
- FTA should simplify, streamline and expedite the current federal grant approval process to speed project delivery and reduce costs of projects. This would include exempting routine activities (i.e., bus replacement, preventive maintenance and equipment) from the regional office approval process.

- Funds transferred to FTA from other programs, such as the FHWA Surface Transportation Block Grant Program (STBG) and Congestion Mitigation and Air Quality Improvement Program (CMAQ), involve the same approval process as traditional FTA eligible activities. The administrative requirement to develop and submit separate grants adds additional review and approval resulting in project delay and increased costs. DOT should review its policies on requiring separate grants for STBG flex or CMAQ to provide greater flexibility to agencies for transfers from FHWA to FTA programs. Any policy to provide greater flexibility to combine transferred funds should be an option, not a requirement, and should not result in delaying fund availability or slowing project delivery.
- FTA should expand the use of warrants, where a project can pre-qualify for a satisfactory rating on particular requirements if certain conditions are met. For example, projects with a capital cost of greater than \$500 million should be eligible for warrants.
- Capital funding comes from a variety of state and local sources in addition to the federal contribution. In many cases the federal share is a minority share of the total project costs. This is particularly the case for major bus facility and/or rail construction projects. These construction projects can be broken down into various phases. To mitigate the overall cost of the project and allow for local participation, only those phases of the project that are federally funded should be subject to federal oversight.

Title of Regulation, Statute or Policy Guidance:

Transit Asset Management

49 USC § 5326

Citation/Dates of Issuance:

49 CFR 625 [Docket No. FTA–2014–0020] September 30, 2015; Final Rule July 26, 2016

Description:

- Under MAP-21, and continued in the FAST Act, DOT is required to establish a national Transit Asset Management (TAM) system to monitor and manage public transportation assets to improve safety and increase reliability and performance.
- Recipients and sub-recipients of funding are required to develop a transit asset management plan and use an asset management system to develop capital asset inventories and condition assessments, and report on the condition of their system as a whole, with descriptions of the change in condition since the last report.
- Grantees must establish performance targets to prioritize investments that improve the state of good repair of capital assets, and integrate these performance targets and the investments necessary to achieve them into State and Metropolitan Planning Organizations' performance targets.
- The APTA Standards Development Program has published documents providing recommended practices for TAM.

Recommendations for Modification, Elimination:

- APTA believes that proper asset management evaluations and procedures support regional transportation goals and are important to understanding how agencies invest, monitor, improve safety, and reduce risks to service.
- However, because of the interconnected nature of FTA safety and TAM rules, Congress should give FTA discretion to delay implementation of TAM requirements until a final rule has been established for Public Transportation Agency Safety Plans.
- FTA must take all possible actions to safeguard sensitive information related to condition and risk. Any compromise of data will hinder an agency's motivation to fully embrace strong self-analysis. Similar to protections afforded to the Federal Aviation Administration and the Federal Railroad Administration, APTA also strongly supports legislation to protect safety-sensitive data from state and federal Freedom of Information Act (FOIA) requests and from admissibility into evidence in state and federal courts.

Title of Regulation, Statute or Policy Guidance:

Consistency and Transparency in FTA Oversight

Citation/Dates of Issuance:

Various

Description:

- APTA members have noted a number of policy changes in FTA oversight in triennial review enforcement without notice and comment, as well as inconsistencies in enforcement across agencies. For example, some contractors are interpreting FTA issued best practices as requirements. This happens frequently in the Americans with Disabilities Act and drug and alcohol testing arenas.
- Consistent and transparent enforcement of federal rules leads to the more efficient use of taxpayer dollars, and agencies and FTA alike are better able to achieve our shared commitment to providing greater mobility opportunities for Americans.

Recommendations for Modification, Elimination:

- FTA guidance and workbooks for reviews should be made available to the industry and published in the Federal Register, much like a proposed rule, for public comment. FTA guidance and workbooks must always be consistent with a current rule or a well-established interpretation and should not include new interpretations without going through the formal rule-making process. In addition, we recommend the development of a formal dispute resolution process or methodology when an agency disagrees with an auditor or contractor's findings.
- Congress should appropriate sufficient resources to FTA to improve program oversight. We note that FTA has been actively working to improve the review process, including an effort to "de-conflict" multiple review scheduling. APTA encourages continued engagement with our industry, including continued sharing of program oversight decision-making and data trends.
- Especially regarding FTA oversight contractors, there should be greater emphasis in enforcing rules consistently across every region. FTA should expeditiously overrule a contractor's finding when the finding does not have a basis in an existing rule or interpretation, and FTA should advise contractors that there is no requirement to make a deficiency finding during a review.

Title of Regulation, Statute or Policy Guidance:

Coordinating Council on Access and Mobility

Citation/Dates of Issuance:

FAST Act, Public Law No. 114-357, Section 3006(c)

Description:

- More than 80 programs across the federal government are authorized to fund transportation services for individuals with disabilities, older adults, and persons with lower incomes.
- The Coordinating Council on Access and Mobility (CCAM) is an intergovernmental organization that was established under Executive Order No. 13330 and led by the Department of Transportation that issues policy recommendations and implements activities that improve the availability, accessibility, and efficiency of transportation for targeted populations.
- CCAM spans several departments of the U.S. government, including the Departments of Transportation, Health and Human Services, Education, Labor, Veterans Affairs, Agriculture, Housing and Urban Development, Interior, and Justice.
- Section 3006(c) of the Fixing America's Surface Transportation (FAST) Act requires CCAM to develop a strategic plan.
- APTA is very involved in associated programs such as the National Center for Mobility Management and the Rides to Wellness program.

Recommendations for Modification, Elimination:

- Congress should ensure sufficient resources, including shared responsibility for coordination between human services and transportation agencies, to serve the mobility needs of our nation's seniors, veterans, and people with disabilities and others who require alternatives to traditional public transportation service.
- APTA supports continued engagement of CCAM with the public transportation industry to eliminate barriers that impede the availability, accessibility, and efficiency of transportation for targeted populations. In addition, APTA supports cost allocation/cost sharing policy to support the effort.
- APTA notes that the full benefits of a one-system family of services approach to coordination cannot be achieved if the only legislative requirement for coordination is found in the surface transportation act, Therefore, APTA supports the inclusion of similar coordination language requirements in all legislation that governs the CCAM member agencies.

Title of Regulation, Statute or Policy Guidance:

Training, Qualification, and Oversight of Safety-Related Railroad Employees

49 USC § 20162

Citation/Dates of Issuance:

49 CFR 243 [Docket No. FRA-2009–0033] Final Rule November 7, 2014

Description:

- FRA issued regulations establishing minimum training standards for each category and subcategory of safety-related railroad employee and the submission of training plans from railroad carriers, contractors, and subcontractors.
- The final rule, relying on statutory language, mandates that employers of each safety-related railroad employee be required to “qualify or otherwise document the proficiency of such employees in each such class and craft regarding their knowledge of and ability to comply with Federal railroad safety laws and regulation and railroad carrier rules and procedures promulgated to implement those Federal railroad safety laws and regulations.”
- In addition, the rule requires employers to submit training and qualification plans to FRA for approval.

Recommendations for Modification, Elimination:

- The American Short Line and Regional Railroad Association (ASLRRA) and the National Railroad Construction and Maintenance Association (NRC) are interested in repealing 49 C.F.R. Part 243 or substantially delaying the effective date of October 1, 2017.
- ASLRRA, NRC, and APTA filed a petition for reconsideration of the final rule in December 2014. While FRA denied the petition in 2015, it requested relief from the final rule by allowing small railroads to receive credit for the training programs they already have in place. The petition notes FRA’s failure to consider the Small Business Regulatory Enforcement Fairness Act of 1996, which specifically requires agencies like FRA to develop regulatory alternatives that have less economic impact on small businesses. Further, the final rule goes into detail in setting training standards beyond the minimum standards necessary and as required by statute.
- While training is valuable and necessary to ensure railroad safety, the training required should be scalable. Small railroads should not be required to have the same training in place as Class I railroads. Further, APTA and the other associations provided FRA with data regarding the costs and benefits of this regulation. What is more,

the associations have asked FRA repeatedly to identify the safety gaps this final rule will address and received no response from FRA. What is worse, when ASLRRA provided FRA with a model/template training program, FRA refused to review and comment on that model/template. Such a template program would save money and time while also clearly indicating the training needed for each category of employee. FRA should scale training not just based on the size and function of the railroad, but also based on the role and skill set required for the nature of the job function.

Title of Regulation, Statute or Policy Guidance:

State Safety Oversight

49 USC § 5329(e)

Citation/Dates of Issuance:

49 CFR 674 [Docket No. FTA–2015–0003] February 27, 2015; Final Rule April 15, 2016

Description:

- FTA proposed to require States to take on greater responsibility for ensuring the safety of rail fixed guideway systems in their State. In addition, FTA would review and certify each State Safety Oversight Agency (SSOA) program and certify the program as compliant with the requirements. For those States that are not certified, FTA is required by statute to withhold transit funds from the entire State.
- One of the primary requirements for SSOA certification is compliance with the yet to be finalized Public Transportation Agency Safety Plan rule. Further delay in the finalization of this rule could preclude states from being able to finalize their safety plans, and therefore impact their ability to receive certification.
- In the final rule, FTA revised the notification and reporting requirements by removing incidents from the types of events that require notification and an investigation, thus reducing the administrative burdens on both SSOAs and regional transportation authorities (RTA). In addition, FTA withdrew the proposal in the NPRM that required SSOAs to conduct an independent investigation of every accident and incident and instead will allow SSOAs to delegate that responsibility to an RTA, with the proviso that the SSOA conduct an independent review of the RTA's findings and conclusions.

Recommendations for Modification, Elimination:

- Congress must change the statute to delay the certification deadline for SSOAs because the requirements in the final rule are dependent upon FTA's Public Transportation Agency Safety Plan rule, which has been delayed due to the change in administration. Alternatively, Congress could amend the statute to give FTA the discretion to waive the requirement for States that have made substantial progress towards certification.
- FTA must revise the definition of serious injury. Under the final rule, the definition is too broad and can encompass simple fractures without regard to the causes of any injury. Alternatively, FTA could eliminate the definition of "serious injury" altogether and use "transport" or "non-transport" as classifications for injuries.
- The final rule did not contain a clarification regarding when a transit agency disagrees with an SSOA's safety finding. The final rule merely allows an SSOA "discretion" as to

whether it should reconsider a safety finding. A transit agency must have a realistic method for contesting a perceived incorrect finding or conclusion by an SSOA.

- FTA should also reinstate the incident reporting threshold, which was removed in the SSOA final rule, to at least \$25,000.



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APTA Legislative Proposal to Protect Safety-Sensitive Data

In the Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress directed the Federal Transit Administration (FTA) to establish a comprehensive Public Transportation Safety Program that will include implementation of Safety Management Systems (SMS). SMS is an organized set of programs, principles, processes, and procedures for the allocation of resources to achieve the condition where risks are identified and managed to acceptable levels of safety. Safety is the transit industry's most important mission, and APTA has been a leader in developing the standards to fully implement SMS across the country. SMS and other safety programs require the collection and analysis of sensitive safety information. To enable the effectiveness of the program, consistent with protections for other modes, APTA urges Congress to protect safety-sensitive transit data from state and federal Freedom of Information Act (FOIA) requests and from admissibility into evidence in state and federal courts.

Experts agree that in order to best protect the safety and security of public transportation riders, transit systems must be able to obtain comprehensive, confidential analyses of accidents without a looming threat of exposure to litigation. It is vitally important that this data not be subject to public disclosure in order to enable a strong culture of self-analysis that this program will require. Unwarranted exposure to liability and lawsuits would create perverse incentives for transit agencies to limit the scope of their SMS programs, ultimately defeating the purpose of the program.

Because of the safety-sensitive nature of the data being collected, it is necessary to safeguard this information in federal, state, and local forums. In its final rule on State Safety Oversight for rail fixed guideway systems (49 CFR Part 674), the FTA understood the importance of protecting data from public disclosure by stating that transit agencies should be able to prevent investigation reports from being introduced in evidence for litigation and that data should not be subject to public disclosure requirements. However, any protections made by administrative rule will not be binding as a statute would. Just as Congress has done for safety data of other modes, protections against disclosure in lawsuits or FOIA requests should be made in statute for transit safety data. This protection should also include federal preemption of any state sunshine laws so a safety regime can be fully effective.

APTA has drafted proposed legislative language to address these issues. First, the proposal explicitly states that safety data and other information related to the Public Transportation Safety Program are not subject to public disclosure by FOIA or state or local sunshine laws. Second, consistent with current law for Federal Aviation Administration SMS data protections, the proposal allows for public disclosure of information that does not identify the entity that produced that data. Third, the proposal ensures that safety-sensitive data will not be admissible as evidence in state or federal courts.

APTA stands ready to help in any way to assist Congress in passing strong protections for transit safety information to strengthen and improve the effectiveness of the Public Transportation Safety Program and provide greater safety and security for transit riders.

FOIA and Evidentiary Protection of Safety information

SEC. __. LIMITATION ON DISCLOSURE OF SAFETY INFORMATION.

(a) IN GENERAL.—Chapter 53 (as amended by this Act) is further amended by adding at the end the following:

“§ 5341. Limitation on disclosure of safety information

“(a) IN GENERAL.—Except as provided by subsection (c), a report, data, or other information described in subsection (b) shall not be subject to disclosure under section 552 of title 5, United States Code, or any other similar Federal, State or local law if the report, data, or other information is created by or on behalf of or submitted to the Federal Transit Administration, a State, a State Safety Oversight Agency or Transit Agency.

“(b) APPLICABILITY.—The limitation established by subsection (a) shall apply to the following:

“(1) Reports, surveys, schedules, lists, data, or other information developed under the Public Transportation Safety Program.

“(2) Reports, surveys, schedules, lists, data, or other information produced or collected under the National Public Transportation Safety Plan.

“(3) Reports, surveys, schedules, lists, data, or other information developed under the Public Transportation Safety Certification Training Program.

“(4) Reports, data, or other information developed under the Public Transportation Agency Safety Plan.

“(5) Reports, surveys, schedules, lists, data, or other information produced or collected for purposes of developing and implementing a safety management system acceptable to the Administrator.

“(6) Reports, analyses, and directed studies, based in whole or in part on reports, surveys, schedules, lists, data, or other information described in paragraphs (1) through (5).

“(c) EXCEPTION FOR DE-IDENTIFIED INFORMATION.—

“(1) IN GENERAL.—The limitation established by subsection (a) shall not apply to a report, data, or other information if the information contained in the report, data, or other information has been de-identified.

“(2) DE-IDENTIFIED DEFINED.—In this subsection, the term ‘de-identified’ means the process by which all information that is likely to establish the identity of the specific persons or related entities submitting reports, data, or other information is removed from the reports, data, or other information.”.

“(d) DISCOVERY AND ADMISSION AS EVIDENCE.— Notwithstanding any other provision of law, reports, surveys, schedules, lists, data, or other information produced or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, including but not limited to— hazardous conditions, railway- highway crossings, rail right-of-way, or rail platform train interfaces pursuant to section 5329 of this title or for the purpose of developing any public transportation safety program or safety management system which may be implemented shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

ABOUT THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION (APTA)

APTA is a nonprofit international association of 1,500 public and private sector organizations that are involved in the planning, building and operation of all modes of public transportation – bus, paratransit, light and commuter rail, intercity and high-speed passenger rail, subways and ferries. APTA members serve the public interest by providing safe, efficient and economical transit services and products.

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