1) Public Transportation Safety Program and Plans

References: 49 USC 5329 (statutory basis); regulations at 49 CFR Part 670 and proposed 49 CFR Part 673.

Description of Burden: MAP-21's 2012 amendments to the Federal Public Transportation Act included requirements for the Federal Transit Administration (FTA) to create and implement a national public transportation safety plan, to establish a public transportation safety certification training program, and to establish rules concerning public transportation agencies' safety plans. Those statutory requirements took effect on October 1, 2012. While the regulations for the national public transportation safety plan requirement were issued on August 11, 2016 (codified at 49 CFR Part 670), and "final interim provisions" for the safety certification training program were published on February 27, 2015 (but not codified in regulation), the public transportation agency safety plan rule has yet to be finalized.

The proposed rules for what may become 49 CFR Part 673 were published on February 5, 2016. These would be the guiding regulations for public transportation agency safety plans. In their proposed form, these rules would indeed help assure and document the safe operation of our nation's public transportation services. CTAA noted a number of burdens associated with the proposed rule that did not seem commensurate with the anticipated benefits of the rule, but without a final rule on the books, it's hard to say whether this regulation will help transit agencies advance the safety of their operations. For instance, FTA's own estimates are that the industry-wide cost of compliance with its proposal would be $74.2 million per year, of which the greatest cost burden –$33.7 million, or 45.5 percent of all costs associated with this rule – would be borne solely by the rural transit systems receiving funding under FTA's state-managed Section 5311 program. According to National Transit Database statistics, there are an average of 9.3 fatalities per year, nationwide, connected in some way with Section 5311-funded rural public transit programs. Furthermore, it's not at all clear that FTA's proposed transit agency safety planning regime would yield measurable reductions in rural transit's already low number of fatalities, injuries and incidents, bringing into question the wisdom of making this $33 million commitment of federal resources, especially since compliance with the proposed transit agency safety plan would consume a noticeable 5.2 percent of all federal spending on public transit in rural areas. The safety of rural public transit might actually be better served by using that $33 million to purchase new

buses and vans (these funds could support the purchase of as many as 400 new vans or small buses for rural transit), thus assuring a more timely replacement of outdated, possibly unsafe, buses in rural communities.

Another burden in the proposed transit agency safety plan rule is the confusing regulatory treatment that FTA would give to subrecipients of its Section 5310 program of grants to enhance the mobility of seniors and individuals with disabilities; the proposed rule would apply to some Section 5310 subrecipients, but not others, depending on whether the particular agency's operations are available only to particular clienteles, which is too vague a standard to be enforceable or understandable. CTAA, among other commenters to the proposed rule, expressed a desire for FTA to determine that Section 5310 subrecipients may uniformly be excluded from the scope of the public transportation agency safety plan requirement. Given that FTA estimated the cost of compliance within the Section 5310 network to be $2.7 million, for which there is no history of reported fatalities, and few (if any) reported injuries or incidents, it's hard to see the benefits that are able to accrue to such a cost burden.

At this point in time, one of the greatest burdens associated with FTA's public transportation safety regulatory regime is that of uncertainty: it's been nearly five years since the statutory language at 49 USC Section 5329 took effect, and major parts of the safety regulation have yet to bee seen in their final form. To this day, transit agencies don't know what to expect of any possible FTA requirements, and don't know when – or even whether – they will have to comply with some new FTA safety requirements. FTA would have been within its rights to issue interim requirements for transit agency safety plans as early as MAP-21's enactment in 2012, but did not do so, which suggests a question about the actual necessity of these requirements.

Description of Less Burdensome Alternatives: Inasmuch as there are not yet any regulations at 49 CFR Part 673, a less burdensome approach to guiding public transit agencies through the confusion of what currently is or is not part of FTA's safety regulatory program would be an immediate suspension of the regulatory language at 49 CFR Part 670, and the interim final guidance published on February 5, 2016, delaying the effective dates of these requirements until such time as the requirements proposed at 49 CFR Part 673 actually take effect.

2) **Transit Asset Management**

References: 49 USC 5326 (statutory basis); regulations at 49 CFR Part 625.

Description of Burden: Acknowledging a industry-wide backlog of transit vehicles, facilities and equipment, Congress required FTA to create a rule requiring transit agencies to maintain or achieve a state of good repair through transit asset management, as part of MAP-21's 2012 amendments to the Federal Public Transportation Act. FTA finalized the rules for its National Transit Asset Management System on July 26, 2016, and the provisions of this regulatory regime are just starting to take effect. When establishing the national transit asset management program, FTA embarked on approach that may prove to be a useful model for many of its other regulations and policies: rather than tie regulatory requirements to specific funding streams, FTA created a two-tier structure in which the largest transit agencies and the operators of rail transit services are "Tier I" public transit agencies, with a more robust and rigorous regulatory regime, while all smaller transit agencies, Indian tribes and subrecipients of state-managed FTA grant programs are "Tier II" agencies, with more simplified regulatory requirements. For both Tier I and Tier II transit agencies, the mandatory reporting is limited to the submission of pertinent data and performance targets to the National Transit Database (NTD).

While this is still a new rule, the two-tier structure and modest reporting requirements suggest a relatively easy implementation that imposes a manageable burden on most FTA grantees and subrecipients. The ease of this burden is further illustrate by FTA's development of simplified reporting templates for Tier II agencies, which are readily accessed from the FTA website.

There is one area, though, where this rule presents an unnecessary burden: the resources of FTA's Section 5310 program are used primarily to help local agencies (largely, but not exclusively, local nonprofit social services agencies) purchase vans and small buses for the purpose of providing transportation for seniors and persons with disabilities. Section 5310 funding helps these entities purchase a few thousand small vehicles per year. This is a small portion of the FTA-supported fleet of transit vehicles, but FTA's interpretation of its asset management rule treats Section 5310 in an inconsistent fashion. The rule itself (49 CFR Part 625) is silent on Section 5310, but FTA's explanatory comments in the Federal Register of July 26, 2016, state that the rule applies to those Section 5310 subrecipients whose operations are open to the public, but does not apply to those Section 5310 subrecipients whose operations are "closed-door" operations limited to

serving only particular client groups. While this delineation within Section 5310 might make some philosophical sense, it's highly subjective, and creates confusion among Section 5310 subrecipients and the state and metropolitan agencies that fund them.

Description of Less Burdensome Alternatives: Because neither the statute nor regulation on transit asset management call for FTA to incorporate Section 5310-funded equipment in the national transit asset management system, FTA can provide this small amount of necessary clarity simply by issuing a policy statement that entities whose only receipt of FTA funding is through Section 5310 are not required to participate in the national transit asset management system.

3) **Reviews & Audits**

References: 49 USC 5307(f)(2), et al. (statutory basis); regulations at 2 CFR Parts 180, 200, 225, 230 and 1201, 23 CFR Part 450, 31 CFR Part 205, 48 CFR Part 2, 49 CFR Parts 18, 20, 21, 26, 27, 32, 37, 38, 39, 40, 382, 571, 602, 604, 605, 609, 639, 655, 661, 663 and 665, 51 CFR Part 552, et al.; FTA guidance includes Circulars 4220.1F, 4702.1B, 4703.1, 4704.1, 4710.1, 5010.1D, 5100.1, 7008.1A, 7050.1, 8100.1C, 9030.1E, 9040.1G, 9045.1, 9050.1, 9070.1G, 9300.1B, et al.

Description of Burden: The only recurring review of grantees that FTA is required by law to perform are the triennial reviews of Section 5307 grantees specified at Section 5307(f)(2). Other statutes and regulations give FTA the authority to investigate and review as necessary, but none specify routinely scheduled reviews, regardless of need. However, FTA's website at https://www.transit.dot.gov/regulations-and-guidance/safety/oversight-reviews shows that FTA's oversight office carries out not only triennial reviews of Section 5307 grantees, but also routine state management reviews, procurement reviews, and financial management reviews. In addition, FTA conducts regular reviews of grantees' ADA and Title VI compliance, drug and alcohol program compliance, and anticipates conducting regular reviews of transit agencies' safety plans and processes. Despite FTA's efforts to coordinate the schedules of these many reviews, transit agencies frequently report having to prepare for concurrent reviews on different topics, being carried out by different contractors, yet requiring the same senior transit agency staff, and sometimes even the same documents, to be made available to these various and sundry contractors at the same time.

Furthermore, FTA's reliance on outside contractors has led to a situation in which contractors are free to make their own interpretations of regulatory compliance, often inconsistent from the interpretations of other contractors or FTA's own staff. Sometimes, grantees even report that contractors carrying out different reviews at the same time will look at a particular issue, and arrive at totally different, conflicting, conclusions as to what is being found, and what corrective action the transit agency may need to take.

Description of Less Burdensome Alternatives: As a matter of routine oversight, FTA should rely solely upon its triennial and state management reviews to assure grantees' compliance with FTA requirements. These reviews already are comprehensive, as the current 295-page triennial and state management review manual (https://www.transit.dot.gov/oversight-policy-areas/fy17-comprehensive-review-guide) illustrates. All other reviews should be conducted only when these reviews have specific findings that require additional investigation, monitoring or oversight.

4) **Procurement**

References: 49 USC 5325, et al. (statutory basis); FTA guidance at Circular 4220.1F.

Description of Burden: FTA does not have any specific regulations for its grantees' procurement policies, practices and procedures, relying instead on DOT's uniform administrative requirements, as well as the government-wide requirements set forth by the Office of Management and Budget. FTA's reference document for procurement is its Third-Party Procurement circular (C. 4220.1F), the most current version of which was issued in November 2008. One result of having a nine-year-old guidance document is that many of its citations and policy provisions are outdated.

There also is a problem in that the FTA guidance specifically states, "FTA is taking the position that the [Federal Acquisition Regulation] definition of 'simplified acquisition threshold, …[of] $150,000, does not apply to FTA's federally assisted programs." Elsewhere, FTA's procurement manuals, and the procurement training FTA makes available through its National Transit Institute, provide information on the use of federally allowable simplified acquisition procedures; while that is the right thing to do, this creates conflict with FTA's stated (albeit outdated) policy, and creates opportunities to sow confusion in the conduct of FTA procurement system reviews.

A third area of burden is that grantees frequently report that FTA project officers require specific approval by FTA of all procurements being made by grantees, even when these are routine expenditures of allowable, appropriate expenses that are consistent with already-approved FTA project budgets. That level of review makes sense in cases where FTA has found deficiencies in a grantee's procurement system and is awaiting corrective action by the grantee, but should not be a matter of routine FTA business, at least not with respect to grantees' expenditures of FTA formula grants.

Description of Less Burdensome Alternatives: There are three steps that FTA can take:

(1) A review and revision of FTA's procurement policy guidance to bring this policy up to date is critically necessary, and may go far to alleviate procurement-related burdens.

(2) FTA needs to provide specific guidance and training to help its grantees make effective and appropriate use of federally allowed simplified acquisition processes.

(3) FTA grantees with approved budgets for their formula-funded projects (primarily the funds that states, tribal governments and urban transit agencies receive through Sections 5307, 5310 and 5311) should be able to carry out procurements that are consistent with these budgets without requiring additional stages of approval from FTA, except when there are identified deficiencies in their procurement processes.

5) **National Transit Database**:

References: 49 USC 5335 (statutory basis); regulations at 49 CFR Part 630, which incorporate (by reference) all of the on-line documents at https://www.transit.dot.gov/ntd.

Description of Burden: The reporting of data to FTA's National Transit Database (NTD) is important, and is necessary in order for FTA to make its formula-based allocations of Section 5307 and 5311 funds to states, tribes and urban transit agencies. For state and tribal governments' Section 5311 rural transit projects, there is a simplified level of required NTD reporting, but every urban transit agency must comply with the full range of NTD reporting, no matter how large or small they may be, regardless of the size or mode of operation. The NTD reporting burdens are especially onerous for the

many transit agencies that receive both Section 5307 and 5311 funding, and for those transit agencies in urban areas that use their Section 5307 funds solely to provide demand-response transit services.

Description of Less Burdensome Alternatives: In its transit asset management rule, and in its proposed public transportation agency safety plan rule, FTA has established a useful model through the identification of "Tier I" and "Tier II" transit agencies, determined by the size of their fleets, rather than the funding they receive. Using a similar approach, FTA can provide appropriately scaled gradations of NTD reporting, in which the most extensive reporting can be for the largest urban transit systems, including operators of rail systems and bus services with at least 100 vehicles; a simpler level of NTD reporting, modeled on the current process used for Section 5311 transit agencies, can be used for all Section 5311 systems (both states and tribes), for all transit agencies whose sole mode of service is demand-response public transit, and for all operators of fixed-route transit with fewer than 100 vehicles, regardless of whether they operate in rural or urban areas.

In addition, FTA should reaffirm that those transit agencies whose sole source of FTA funds are Section 5310 grants are not required to participate in NTD reporting.

6) **Charter Service Restrictions:**

References: 49 USC 5323(d) (statutory basis); regulations at 49 CFR Part 604.

Description of Burden: An important statutory provision exists to ensure that federal transit funding is not used in ways that prevent private charter bus operators from carrying out their business. Specifically, Section 5323(d)(1) requires that an FTA funding recipient "will not provide charter bus transportation service outside the urban area in which it provides regularly scheduled public transportation service" unless there is a DOT-approved agreement to provide such charter bus service. Properly carried out, this helps assure that federal dollars aren't being used by public agencies to compete unfairly against private sector transportation providers. However, the rules implementing this statute have suffered from "mission creep" over the decades, so that they now are applied to all FTA grantees, both urban and rural, and that all sorts of transportation, frequently including transportation that's provided to clients of human services programs, are swept up under

the aegis of the charter service regulation. Following enactment of SAFETEA-LU in 2005, FTA convened a formal negotiated rulemaking that led to a comprehensive rewriting of the regulations at 49 CFR Part 604, which were published in January 2008. Despite a number of provisions in the revised rule that were designed to safeguard much of the transit that's provided in rural areas and to specific populations from the scope of these requirements, most rural public transit systems find that FTA and the private charter bus industry are demanding their full participation in all the provisions of Part 604.

Description of Less Burdensome Alternatives: The current rule already includes less burdensome alternatives. They can be addressed simply by having FTA issue "Dear Colleague" letters that clarify some established points in the rule, including:

(1) The criteria and process by which FTA recipients can seek the removal of charter bus operators who've acted in "bad faith," as per 49 CFR Section 604.26,

(2) The specific exemption from this rule for transportation provided by FTA grantees – both urban and rural – to human services organizations as provided in 49 CFR Section 604.7 and the appendix associated with that portion of the charter service rule, and

(3) The general exception stated at 49 CFR 604.2(e) under which nothing in 49 CFR Part 604 applies to FTA recipients who are using federal transit assistance solely for the "program purposes" of the Section 5310 or 5311 funds they receive.

In drafting communication to its grantees about the two well-established regulatory provisions cited above, FTA should examine how those entities receiving Section 5307 funding, in addition to the Section 5310 or 5311 funds they receive, may best comply with the charter service regulations at 49 CFR Part 604. That clarification may be easily addressed as part of a "Dear Colleague" communication from FTA, but if the agency determines revisions to the regulation are in order, an alternative approach might be to address this requirement through a two-tier approach similar to that used in the transit asset management rules at 49 CFR Part 625, and for the public transit agency safety plan rules proposed for 49 CFR Part 673.

7) **Buy America:**

References: 49 USC 5323(j) (statutory basis); regulations at 49 CFR Parts 661 and 663.

Description of Burden: In contrast to the government-wide provisions arising from the Buy American Act of 1933, FTA's "Buy America" requirements are specific and prescriptive requirements, in place since 1983, that pertain only to the steel, iron and manufactured goods used in major FTA-funded procurements. In general, anything funded by FTA must follow applicable Buy America requirements, regardless of the project or the funding stream. This creates complications for many smaller transit operators, especially if they seek standard production vans or minivans as part of their transit fleet, if they seek to achieve economies of scale by having several transit agencies' purchases bundled together into a larger, more cost-effective procurement, or when transit agencies are seeking to procure domestically produced vehicles or other capital assets for which the manufacturer refuses to certify the apparent domestic content of the assets being purchased. There are waivers and waiver processes under this rule, as allowed by statute, but these are not well-communicated or well-understood among FTA recipients.

Description of Less Burdensome Alternatives: The current rules already include less burdensome alternatives, which simply need to be reinforced:

(1) FTA needs to remind grantees of its September 16, 2016, "Dear Colleague" letter that stated the standing public interest waiver from Buy America of all procurements valued at or below $150,000.

(2) In general, the waiver provisions at 49 CFR Section 661.7 adequately address the issues facing transit agencies concerning public interest, non-availability and burdensome price differentials, but these waiver opportunities are not well-communicated to smaller transit agencies; FTA should consider preparing a streamlined Buy America waiver request procedure for use by "Tier II" transit agencies, as defined by its transit asset management rule.

(3) FTA can issue a "Dear Colleague" letter that reminds rural and small-urban areas' transit operators of the simplified requirements they enjoy (at 49 CFR Section 663.37(c)) for documenting the Buy America compliance of rolling stock they are acquiring with FTA assistance.

8) **Disadvantaged Business Enterprise (DBE):**

References: 42 USC 2000d (statutory basis); regulations at 49 CFR Part 26; FTA-specific guidance at https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/disadvantaged-business-enterprise.

Description of Burden: It is important that federal transportation investments be made in ways that encourage the use and participation of disadvantaged business enterprises. When the Department of Transportation issued DBE regulations in 1999 that sought to address the U.S. Supreme Court's 1995 ruling in Adarand v. Peña, it kept some arbitrary provisions that would not appear to honor the court's decision. One of these is a fixed dollar amount threshold of $250,000 in an FTA grantee's cumulative annual contracting opportunities that is the threshold above which the grantee is required to maintain a DBE program. That dollar value was not specified in any judicial or legislative action, and every year more and more small FTA grantees are swept up, into this rule's purview.

Description of Less Burdensome Alternatives: There are two simple steps DOT can take to apply these important DBE requirements to smaller FTA grantees:

1. Reset the baseline at 49 CFR Section 26.21(a)(2) that's used for determining which FTA grantees are required to have full DBE programs to $5,000,000 in cumulative annual contracting opportunities, and increase this amount annually to reflect inflation; and

2. DOT should create a simplified DBE program format for all FTA recipients in rural areas, and for FTA recipients in urban areas whose cumulative annual contracting opportunities are between $500,000 and $5 million, in which compliance with DBE-related aspects of Title VI of the Civil Rights Act of 1964, as well as the Supreme Court's "Adarand" decision is applied in an appropriate fashion to these smaller transit entities.