

SECTION 1

**TRANSIT-RELATED GOVERNMENTAL
INSTITUTIONS**

A. INTRODUCTION

Both federal and state laws are important to the practice of Transit Law. Federal agencies provide major funding, and federal law establishes major obligations, as described throughout this treatise and listed in the Appendix in this section. Transit agencies are typically creatures of state and local law, from whence they derive both their existence and their core power. Hence, the U.S. Congress, federal agencies, federal courts, state legislatures, state agencies, city and county governments, and state courts may all be sources of Transit Law.

B. SURFACE TRANSPORTATION ENABLING LEGISLATION

The Federal Transit Laws are codified at 49 U.S.C. §§ 5301 *et seq.*, though other legislation that affects transit are located in scattered provisions of the U.S. Code and Public Laws.¹

In the decade prior to enactment of the Urban Mass Transportation Act of 1964² [now known as the Federal Transit Act], 243 private transit companies were sold and another 194 were abandoned. Transit employment had fallen from 242,000 employees in 1945 to 156,000 in 1960.³ Many cities became increasingly concerned about the financial difficulties faced by commuter rail and transit services. But it was not until 1961 that Congress approved a program of urban mass transit assistance to state and local governments. The Housing Act of 1961⁴ inaugurated a small, low-interest loan program for acquisitions and capital improvements for mass transit systems.

Faced with the continued collapse of privately owned bus, transit, and rail commuter systems across the country, Congress established the first comprehensive program of federal assistance for transit.⁵ It included a program of matching grants based on a two-thirds federal and one-third state and local share for the preservation, improvement, and expansion of urban mass transportation systems.⁶ The purpose of the legislation was “to encourage the planning and establishment of area-wide mass transportation systems needed for eco-

nomical and desirable urban development.”⁷ It established a program of research, development, and demonstration projects to be administered by the Housing and Home Finance Agency (HHFA), later folded into the U.S. Department of Housing and Urban Development (HUD).⁸ Congress also imposed obligations upon public transit operators to protect the interests and wages of employees (popularly known as Section 13(c), from its former location in the Urban Mass Transportation Act of 1964).⁹ Over the years, Congress also imposed several additional unfunded mandates for transit operators, including federally mandated labor rates (under the Davis-Bacon Act), limitations on foreign content in transit vehicles, restrictions against charter and school bus service in competition with the private sector, and with the more recent promulgation of the Americans with Disabilities Act, access by disabled patrons.¹⁰

The Urban Mass Transportation Assistance Act of 1970¹¹ provided the first long-term commitment of federal funds to transit. The legislation supported advance acquisition of rights-of-way and an enhanced role for state governments, and required public hearings to assure public input to and acceptability of the programs under consideration.¹² It also provided for public hearings on the economic, social, and environmental aspects of a proposed project, as well as its consistency with the comprehensive plan for the area, and for an analysis of the environmental impact of the project.¹³

The Federal-Aid Highway Act of 1973¹⁴ opened up the Highway Trust Fund for urban mass transportation projects for the first time (though significant funds were not available for transit until the Mass Transit Account was established in the Highway Trust Fund in 1982 and The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) expanded flexibility in 1991). The federal share was increased from two-thirds to 80 percent of the net project cost. (Though statutorily authorized at 80 percent, the steadily increasing demand for federal transit funding has forced the Federal Transit Administration (FTA) to trim recent worthy new start projects to around 50 percent federal funding.) This enabled federal highway funds to be used for such purposes as exclusive high-occupancy vehicle (HOV) lanes,

¹ Note, for example, TEA-21 (112 Stat. 107, 105 Pub. Law 178) contains a provision at Section 3037 that authorizes the Job Access and Reverse Commute Grants Program, but this section has not been codified in chapter 53 of Title 49, U.S.C.

² Pub. L. No. 88-365, 78 Stat. 302.

³ Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302. H.R. Rep. No. 204, 88th Cong., 1st Sess., at 9 2571 (1963).

⁴ Pub. L. No. 87-70, 75 Stat. 149.

⁵ William Mahoney, *The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroads' Obligations*, 24 *TRANSP. L.J.* 241, 254–55 (1997).

⁶ PAUL DEMPSEY & WILLIAM THOMS, *LAW & ECONOMIC REGULATION IN TRANSPORTATION* 312 (Quorum, 1986).

⁷ U.S. DEPT OF TRANSP., *URBAN TRANSPORTATION PLANNING IN THE UNITED STATES: AN HISTORICAL OVERVIEW* 46 (3d ed. 1988).

⁸ EDWARD WEINER, *URBAN TRANSPORTATION PLANNING IN THE UNITED STATES* 42 (Praeger, 2d ed. 1999).

⁹ 39 U.S.C. § 5333(b) (2000).

¹⁰ Dennis Gardner, *Federal Assistance for Local Public Transit*, 27 *URB. LAW.* 1015 (1995); Paul Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans With Disabilities Act and Related Legislation*, 19 *TRANSP. L.J.* 309 (1991).

¹¹ Pub. L. No. 91-453, 84 Stat. 962.

¹² *Id.* DEMPSEY & THOMS, *supra* note 6, at 313.

¹³ U.S. DEPT OF TRANSP., *supra* note 7, at 85–6.

¹⁴ Pub. L. No. 93-87, 87 Stat. 250.

bus shelters, and parking facilities.¹⁵ 1973 became the first year since 1926 when more people rode public transit than in the year before; patronage continued to climb thereafter. The legislation also created incentives for the preparation of metropolitan transportation plans.¹⁶ The 1973 Act dedicated a small portion of each state's funding (one half of 1 percent) from the Highway Trust Fund for the creation of Metropolitan Planning Organizations (MPOs) in metropolitan areas with more than 50,000 inhabitants.¹⁷ The Act also increased the role of local officials in selecting urban highway projects, allowing the local officials to choose routes with the concurrence of state highway departments.¹⁸ The Department of Transportation (DOT) could not approve the projects unless it concluded that they were based on the 3-C planning process and developed cooperatively by the states and local communities.¹⁹

The National Mass Transportation Assistance Act of 1974²⁰ made federal money available for transit operating expenses for the first time. In 1975–1980, \$7.3 billion was made available for urban mass transportation, and \$500 million was available for planning, demonstration projects, and capital projects in non-urban areas.²¹ Capital expenditures for transit enjoyed an 80 percent federal matching share, while operating expenses were eligible for a 50 percent federal matching share. Operating assistance was based on a formula, but the program was never fully funded by Congress, and was subsequently abolished. Highway and transit projects were subjected to the same long-range planning process, thereby formalizing the requirement for multimodal transportation planning.²²

The Surface Transportation Assistance Act of 1978²³ was the first federal Act to combine highway, public transportation, and safety authorizations in a single piece of legislation.²⁴ Energy conservation was included as a new goal in the planning process, while alternative transportation system management strategies were also required to be considered. Under the Act, MPOs were to be designated by agreement among the general purpose units of local governments in cooperation with the state governor.²⁵

The 1980s were marked by decentralization of authority and responsibility, reduced federal involve-

ment, and increased flexibility for state and local governments.²⁶

ISTEA²⁷ established new national priorities in the areas of economic progress, cleaner air, energy conservation, and social equity, requiring that the intermodal transportation system be “economically efficient and environmentally sound...,” as well as “energy efficient....”²⁸ In the legislation, Congress declared that it is in the “national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner which will efficiently maximize mobility of people and goods within and through urbanized areas and minimize transportation-related fuel consumption and air pollution.”²⁹ What was formerly known as the Urban Mass Transportation Administration (UMTA) was renamed the Federal Transit Administration on Dec. 18, 1991.

ISTEA authorized \$156 billion for fiscal years 1992–1997, but not just for highways. ISTEA shifted federal transportation policy from traditional highway funding for automobiles to an approach that integrates highways, rail, and mass transit in a comprehensive system, with seamless connectivity between modes.³⁰ ISTEA enhanced state and local governmental flexibility in redirecting highway funds to accommodate other modes and pay for transit and carpool projects, as well as bicycle and pedestrian facilities, research and development, and wetland loss mitigation.³¹ It created flexible guidelines that cut across traditional boundaries in allowing expenditures on highways, transit, and nontraditional areas (e.g., vehicle emission inspection and maintenance).³² According to DOT, “This flexibility will help State and local officials to choose the best mix of projects to address air quality without being influenced by rigid federal funding categories or different matching ratios that favor one mode over the other.”³³ Hence, a major boost for transit was in its provisions allowing certain highway dollars to “flex” to eligible transit projects. Historically, the use of Federal Highway Administration (FHWA) dollars for transit projects, or the reverse, was strictly prohibited by statute, though states

¹⁵ *Id.* DEMPSEY & THOMS, *supra* note 6, at 313.

¹⁶ MARK SOLOF, *HISTORY OF METROPOLITAN PLANNING ORGANIZATIONS*, pt. II 4 (1998).

¹⁷ *Id.* at pt. III 7.

¹⁸ U.S. DEPT OF TRANSP., *supra* note 7, at 97-98.

¹⁹ *County of Los Angeles v. Adams*, 574 F.2d 607 (1978).

²⁰ Pub. L. No. 93-503, 88 Stat. 1565.

²¹ DEMPSEY & THOMS, *supra* note 6, at 313.

²² U.S. DEPT OF TRANSP., *supra* note 7, at 100.

²³ Pub. L. No. 95-599, 92 Stat. 2689.

²⁴ WEINER, *supra* note 8, at 109.

²⁵ U.S. DEPT OF TRANSP., *supra* note 7, at 128.

²⁶ U.S. DEPT OF TRANSP., *supra* note 7, at 185–86.

²⁷ Pub. L. No. 102-240, 105 Stat. 1914.

²⁸ See Joseph Thompson, *ISTEA Reauthorization and the National Transportation Policy*, 25 TRANSP. L.J. 87, 99 (1997). 49 U.S.C. § 101 (2000).

²⁹ 23 U.S.C. § 134(a) (2000).

³⁰ Jayne Daly, *Transportation and Clean Air: Making the Land Use Connection*, 1995 PACE L. REV. 141, 148 (1995).

³¹ Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 N.Y.U. ENVTL. L.J. 156, 180 (1994).

³² U.S. FEDERAL HIGHWAY ADMINISTRATION, *A GUIDE TO THE CONGESTION MITIGATION AND AIR QUALITY IMPROVEMENT PROGRAM 1* (1994).

³³ U.S. FEDERAL HIGHWAY ADMINISTRATION, *AIR QUALITY PROGRAMS AND PROVISIONS OF THE INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991*, at 6 (1993).

could spend highway dollars on such things as HOV lanes.

ISTEA discouraged continued reliance on the automobile and expanded highways while encouraging the seamless movement of people and goods between modes of transportation.³⁴ The federal transit match was set at 80 percent to achieve parity in matching ratios between the modes, though with congressional “earmarking” of funds to specific projects, and the widespread demand for transit assistance, available funds are oversubscribed and the 80 percent federal funding goal has been rarely achieved.³⁵ ISTEA also gave the states greater authority by exempting a large number of projects from “full” FHWA oversight.³⁶

ISTEA also gave MPOs additional power over designating projects eligible to receive certain federal funds, and increased MPO planning responsibility. Under ISTEA, the MPO’s planning process, at minimum, had to consider the following factors:

- efficient use of existing transportation facilities;
- energy conservation goals;
- methods to reduce and prevent traffic congestion;
- effect on land use and land development;
- programming of expenditures for transportation enhancement activities;
- effects of all transportation projects regardless of sources of funds;
- international border crossings and access to major traffic generators such as ports, airports, intermodal transportation facilities, and major freight distribution routes;
- connectivity of roads within the metropolitan area with roads outside the metropolitan area;
- transportation needs identified by management systems;
- preservation of transportation corridors;
- methods to enhance efficient movement of commercial vehicles;
- life-cycle costs in design and engineering of bridges, tunnels, and pavement; and
- social, economic, and environmental effects.³⁷

ISTEA also established additional funding sources for addressing air quality issues.³⁸

³⁴ Theodore Taub & Katherine Castor, *ISTEA—Too Soon To Evaluate Its Impact*, ALI-ABA Land Use Institute (Aug. 16, 1995).

³⁵ U.S. FEDERAL HIGHWAY ADMINISTRATION, *supra* note 33, at 9–10 (1992).

³⁶ U.S. GENERAL ACCOUNTING OFFICE, *TRANSPORTATION INFRASTRUCTURE: MANAGING THE COSTS OF LARGE-DOLLAR HIGHWAY PROJECTS* (Feb. 1997). Available at 222.gao.gov/GAO/RCED-97-48 at p. 30-36.

³⁷ Intermodal Surface Transportation Efficiency Act of 1991, Conference Report, H.R. No. 404, 102d Cong., (Nov. 27, 1991).

³⁸ The Intermodal Surface Transportation Efficiency Act of 1991 established a Congestion Mitigation and Air Quality Improvement (CMAQ) Program, which allocates funds to states for use for transportation control measures (TCMs) in helping them implement their transportation/air quality plans and attain national standards for carbon monoxide, ozone, and

The Transportation Equity Act for the 21st Century of 1998 (TEA-21)³⁹ reaffirms and retains the planning provisions and MPO structure of ISTEA, with its emphasis on federal-state-local cooperation and public participation, though significant changes were made in funding levels.⁴⁰ For example, under the \$217 billion authorization bill (the largest infrastructure bill in U.S. history), funding was significantly increased for the Congestion Mitigation and Air Quality Program⁴¹ (by 35 percent), as well as for transit (by 50 percent).⁴² TEA-21 replaced ISTEA’s factors to be considered in Transportation Improvement Program (TIP) preparation with seven:

1. Support the economic vitality of the metropolitan area, particularly by enhancing global competitiveness, productivity, and efficiency;
2. Increase the safety and security of the transportation system for motorized and nonmotorized users;
3. Increase the accessibility and mobility options available to people and freight;
4. Protect and enhance the environment, promote energy conservation, and improve the quality of life;
5. Enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;

small particulate matter. Both the MPO long-range plan and the TIP must conform to the state’s plan to achieve conformity with air quality standards. Conformity requires that no project may be included in the state or MPO transportation program if it causes new violations of the air quality standards, exacerbates existing violations, or delays attainment of air quality standards. Jayne Daly, *Transportation and Clean Air: Making the Land Use Connection*, 1995 PACE L. REV. 141, 148 (1995). In urbanized areas with more than 200,000 in population (known as transportation management areas, or TMAs), MPOs devise and guide projects in cooperation with state governments. Taub & Castor, *supra* note 34. For federally-funded transportation projects, MPOs within TMAs must develop a congestion management system (CMS), which requires consideration of “travel demand reduction and operational management strategies.” 23 U.S.C. § 134(i)(3). With respect to TMAs classified as nonattainment areas for ozone or carbon monoxide pursuant to the Clean Air Act, federal funds may not be allocated to any highway project that will result in a significant increase in carrying capacity for single occupancy vehicles unless the project is part of an approved CMS. *Clairton Sportsman’s Club v. Pennsylvania Turnpike Commission*, 882 F. Supp. 455, 478 (W.D. Pa. 1995); U.S. FEDERAL HIGHWAY ADMINISTRATION, *supra* note 33, at 13.

³⁹ Pub. L. 105-178, 112 Stat. 107.

⁴⁰ William Vantuono, *TEA 21: Uncomplicated Answers for Complicated Questions*, RAILWAY AGE, Sept. 1, 1998, at 16; AMERICAN PUBLIC TRANSIT ASS’N, *TEA 21: A SUMMARY OF TRANSIT RELATED PROVISIONS* 6 (1998).

⁴¹ ISTEA established a CMAQ Program, which allocates funds to states for use for TCMs, in helping them implement their transportation/air quality plans and attain national standards for carbon monoxide, ozone, and small particulate matter.

⁴² Bud Shuster, *Shuster Applauds Gore’s “Better America Bonds,”* Press Release (Jan. 11, 1999).

6. Promote efficient system management and operation; and

7. Emphasize the preservation of the existing system.

Local land issues also became important. FTA New Starts grading criteria, for the first time, required a specific evaluation of local transit-supportive land policies.⁴³ In addition to considerations of air quality, an important agency focus under TEA-21 has been the use of transit as a part of a comprehensive planning and environmental tool.

As was the case with ISTEA, TEA-21 requires MPOs to develop TIPs. The MPO is responsible for designating all federally-funded highway, transit, alternative mode, and management projects, in consultation with the state and transit agencies. State transportation agencies have primary responsibility for projects undertaken with National Highway System, Bridge, and Interstate Maintenance funds (in cooperation with the MPO), and for areas outside the Transportation Management Associations (TMA). The TIP must contain a priority list of proposed federally-supported projects and strategies to be carried out within each 3-year period. TEA-21 also requires that TIPs be fiscally constrained to funds expected to be reasonably available. Once a TIP is prepared and approved by an MPO, it must be approved by the state Governor and incorporated into the state TIP.

The Act also continues ISTEA's policy of permitting the shifting of highway funds to other uses aimed at alleviating congestion.⁴⁴ Though it gives States and MPOs greater flexibility to select transportation projects that best address their needs, TEA-21 provides that MPOs should emphasize alternatives to additional highway capacity in areas that have not achieved air quality attainment goals. "Preventive maintenance" was also added by TEA-21 to the list of capital expenditures permissible under the formula program.⁴⁵ TEA-21 requires that MPOs and state and transit agencies cooperate in the development of financial estimates that support the plan and TIP development. It also modifies the procedures for designating multiple MPOs in urbanized areas, adding a requirement for concurrence by the MPO and the Governor.⁴⁶

The remainder of this section attempts to divide the issues discussed here along subject matters. And the Appendix to this section sets forth a compendium of currently applicable laws and regulations.

⁴³ 62 Fed. Reg. 12266 (Mar. 14, 1997).

⁴⁴ See Matthew W. Ward, Kenneth A. Brown, & David B. Lieb, *National Incentives for Smart Growth Communities*, 13 NAT. RESOURCES & ENV'T 325, 328 (1998).

⁴⁵ Vantuono, *supra* note 40.

⁴⁶ *Federal Highway Administration, TEA-21—Transportation Equity Act for the 21st Century* (1998), P.L. 106-159, 23 U.S.C. § 104.

C. THE FEDERAL TRANSIT ADMINISTRATION

In 1968, UMTA (since renamed FTA)⁴⁷ was created within DOT.⁴⁸ FTA is one of the DOT's 12 modal divisions and operating administrations.⁴⁹

Individual citizens have a right to travel, which derives from the United States Constitution.⁵⁰ Regardless of the organization's structure, public transportation providers derive their existence and core powers from state and local law. However, since 1964—with passage of the Urban Mass Transportation Act—public transportation providers have relied heavily upon substantial grants of financial assistance from UMTA, now known as FTA. Federal capital grants have funded as much as 85 percent of a capital project's cost. Demonstration grants fund as much as 100 percent of the cost of a demonstration project. Until abolished, federal operating assistance grants covered as much as 50 percent of a recipient's operating budget.

The acceptance of federal funds requires a grant recipient to be bound by a wide range of federal laws, federal regulations, Executive Orders, and administrative and policy requirements of the DOT and FTA. For example, a municipal transit authority receiving federal transit assistance is often unable to implement a project in exactly the same manner as would a sister municipal agency because of either federal legal requirements (e.g., Buy America) or administrative requirements (e.g., method of selection of architect/engineer). Thus, to accept the benefit of federal funds, grant recipients must comply with numerous federal legal requirements, some of which are not included in and others of which differ significantly from state and local law and practice.

FTA is primarily a funding agency, implementing congressional power under the Spending Clause of the Constitution.⁵¹ Though it enforces a multitude of unfunded mandates⁵² that have been imposed by Congress

⁴⁷ As noted above, UMTA was re-named FTA with the promulgation of the Intermodal Surface Transportation Efficiency Act of 1991. Pub. L. No. 102-240, 105 Stat. 1914.

⁴⁸ A particularly useful Web site for the transit lawyer is <http://www.fta.dot.gov>, which includes a rich posting of relevant governmental documents.

⁴⁹ 49 C.F.R. § 601.2(a) (1999); § 9, Department of Transportation Act (49 U.S.C. §§ 1657, 1659); Reorganization Plan No. 2 of 1968 (82 Stat. 1369); and 49 C.F.R. 1.5; Urban Mass Transportation Assistance Act of 1970 (91 Pub. L. 453, 84 Stat. 962).

⁵⁰ See, e.g., *United States v. Guest*, 383 U.S. 745, 758, 86 S. Ct. 1170 (1966).

⁵¹ Under the Spending Clause of the U.S. Constitution, Congress is authorized "to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. See *San Antonio Metro. Transit Auth. v. Donovan*, 557 F. Supp. 445, 451-2 (W.D. Tex. 1983).

⁵² Unfunded mandates include such things as federally mandated labor rates (under the Davis-Bacon Act), limitations on foreign content in transit vehicles, restrictions against charter and school bus service in competition with the private sector, and with the more recent promulgation of the Americans With Disabilities Act, access by disabled patrons.

on FTA recipients, and which significantly increase the cost of doing business, it is not a regulatory agency *per se*. Nonetheless, it does promulgate a wide array of regulations and imposes certain legal obligations via contractual agreement (a Master Agreement and various compliance statements are required),⁵³ with the possibility of suspending or terminating funds for non-compliance. However, local transit providers can avoid some (but not all) of them simply by declining to accept federal dollars. For example, certain civil rights nondiscrimination requirements are imposed irrespective of receipt of federal funds,⁵⁴ whereas labor protection provisions are required only upon receipt of FTA funds.⁵⁵ But FTA does not “govern” transit providers—that is the responsibility of the state and local authorities.

An FTA project is not a federal project that is being implemented locally; if it were, federal workers would implement the project with federal employees supervising. Rather, an FTA project is a local project assisted with federal financial assistance. The grant recipient is responsible for designing, implementing, operating, and maintaining an FTA-assisted project.

FTA is headed by the Administrator, and carries out such duties and powers as are prescribed by the Secretary.⁵⁶ The Administrator is responsible for the planning, direction, and control of the activities of FTA, and has authority to approve urban public transportation grants, loans, and contracts.⁵⁷ The FTA Administrator or the Administrator’s designee also serves on the Intermodal Transportation Advisory Board.⁵⁸

FTA is comprised of 10 regional offices and 10 headquarters offices, which function under the overall direction of the Federal Transit Administrator and Deputy Administrator:

1. *The Office of the Associate Administrator for Administration* provides general administrative support services for FTA, including organization and management planning; contracting and procurement; administrative services; financial management; personnel administration; and audit, procurement, logistical, and management information systems services.⁵⁹

2. *The Office of Chief Counsel* (Office Acronym: TCC) provides legal advice and support to the Administrator, FTA management, grantees, state and local officials, industry, special interest groups, and the public at large regarding the applicability of federal transit laws, regulations, and policies to FTA programs. Legal issues

often include those involving project planning, environmental, and grantmaking matters. FTA’s Chief Counsel’s Office also coordinates with and supports the Department of Transportation General Counsel on FTA legal matters having significant policy implications. This office is responsible for reviewing the development and management of FTA-sponsored projects, representing the Administration before civil courts and administrative agencies, and drafting and reviewing legislation and regulations to implement the Administration’s programs.

3. *The Office of Public Affairs* advises and assists the Administrator in the area of public relations and in the dissemination to the public and the news media of information about FTA programs, projects, and activities.⁶⁰

4. *The Office of the Associate Administrator for Budget and Policy* advises and assists the Administrator in the development and evaluation of policies and plans and engages in policy development, strategic and program planning, program evaluation, budgeting, and accounting. Implementing and managing the overall policy process within FTA, the Office of Budget and Policy provides policy direction on legislative proposals (in particular, legislative reauthorization); prepares and coordinates statutory reports to Congress; manages the development, implementation, and evaluation of the FTA strategic and program plans; develops and justifies FTA budgets to other agencies and Congress; ensures that funds are properly and lawfully expended; and performs accounting for all FTA funds.

5. *The Office of Associate Administrator for Transit Assistance* reviews and processes all applications for urban transit capital and operating assistance grants and loans.⁶¹ It executes grant contracts, loan agreements, and amendments with respect to approved capital and operating grants, loans, and advanced land acquisition loans projects.⁶² The Office of Program Management administers a national program of capital and operating assistance by managing financial and technical resources and by directing program implementation through the Regional Offices. It also assists the transit industry and state and local authorities in facilitating safety and security for transit passengers and employees through technical assistance and training and dissemination of information.

6. *The Office of the Associate Administrator for Planning* assists the Administrator in directing, coordinating, and controlling FTA’s transportation planning assistance and reviews planning activities. It also

⁵³ See the Appendix hereto for a list of the statutory and regulatory obligation with which compliance must be certified.

⁵⁴ The Civil Rights Restoration Act of 1987, 100 Pub. L. 259, restored institution-wide protection of the Civil Rights Act if any part of the institution received federal funds.

⁵⁵ See the Appendix hereto for a list of requirements triggered by receipt of FTA funds, and those not contingent on receipt of federal money.

⁵⁶ 49 U.S.C. § 107 (2000).

⁵⁷ 49 C.F.R. § 601.4 (1999).

⁵⁸ 49 U.S.C. § 5502 (2000).

⁵⁹ 49 C.F.R. § 601.3(a) (1999).

⁶⁰ 49 C.F.R. § 601.3(c) (1999).

⁶¹ Such reviews are conducted under former Sections 3, 4, 5, 16, and 17 of the Act. 49 U.S.C. §§ 5309, 5310, 5311, 5335, 5336, and 5338 (2000); 49 C.F.R. § 601.3(e) (1999).

⁶² Such reviews are conducted under former Sections 3, 4, 5, 16, and 17 of the Act. 49 U.S.C. §§ 5309, 5310, 5311, 5335, 5336, and 5338 (2000); 49 C.F.R. 601.10(9)(1) (1999).

administers grants to states and local public bodies.⁶³ This office has two organizational components: the Office of Planning Assistance and the Office of Planning Methodology and Technical Support.⁶⁴ The Associate Administrator for Transportation Planning executes and amends grant contracts and interagency agreements for planning, engineering, architectural feasibility, and operational improvement study projects under the formula grant program.⁶⁵ This Office also reviews and approves grant applications and grant amendments requested by urbanized areas of less than 500,000 population.⁶⁶

7. *The Office of the Associate Administrator for Research, Demonstration and Innovation* is responsible for developing and administering a program of research, development, testing, evaluation, operational demonstration, product qualification, standardization, analysis, and information exchange concerning new products intended for use in transportation systems assisted by FTA. The office is also responsible for FTA's safety and system assurance function. It administers research, development, and demonstration projects.⁶⁷ The Associate Administrator has authority to execute and amend grant contracts and procurement requests for approved projects.⁶⁸

8. *The Office of Civil Rights* advises and assists the Administrator and other FTA officials in implementing compliance with applicable statutes, regulations, Executive Orders,⁶⁹ formal guidance,⁷⁰ and directives pertaining to civil rights and equal employment opportunity.⁷¹

⁶³ Such grants fall under Section 9 of the Act, "Block Grants." 49 U.S.C. § 5307 (2000).

⁶⁴ 49 C.F.R. § 601.3(f) (1999).

⁶⁵ 49 U.S.C. § 5307 (2000), formerly Section 9 of the Act.

⁶⁶ 49 C.F.R. § 601.10(a)(4) (1999); 49 U.S.C. § 5311 (2000).

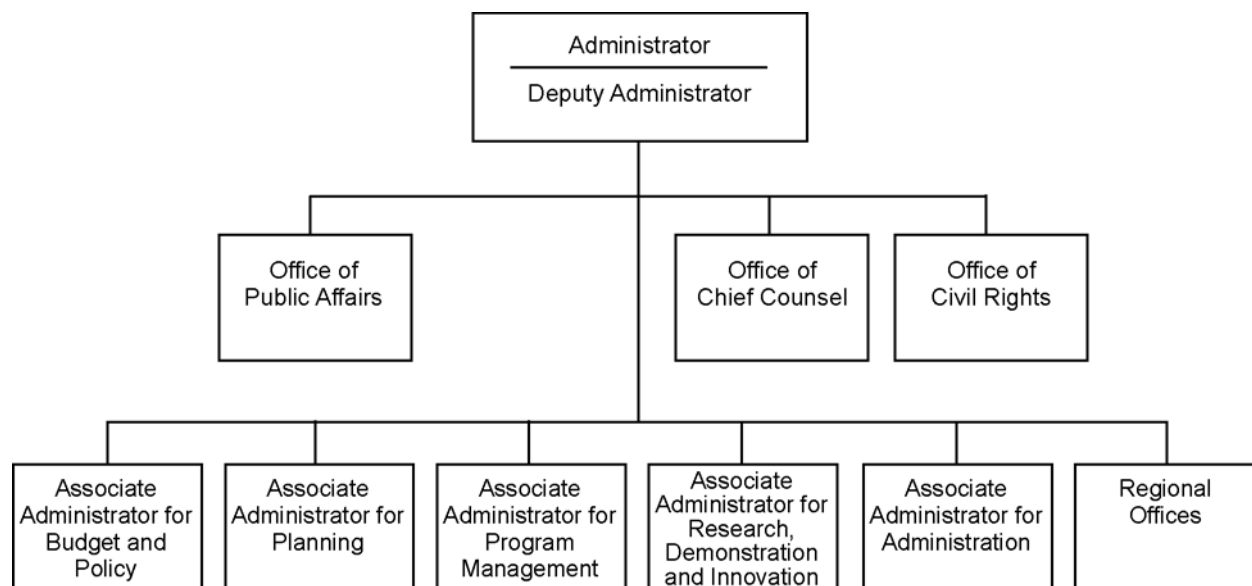
⁶⁷ 49 U.S.C. § 5312 (2000), formerly Section 6(a) of the Act; 49 C.F.R. § 601.3(h) (1999).

⁶⁸ 49 U.S.C. § 5312 (2000), formerly Section 6(a) of the Act; 49 C.F.R. § 601.10(a)(3) (1999).

⁶⁹ See, e.g., Executive Order 11346, and the Executive Order on Environmental Justice issued by President Clinton.

⁷⁰ The Office of Civil Rights provides written guidance as to the DOT Disadvantaged Business Enterprise Regulations, 49 C.F.R. ch. 1, pt. 26 (1999), issued by the Office of the Secretary and approved by the DOT General Counsel.

⁷¹ 49 C.F.R. § 601.3(i) (1999).



The state and local transit providers interact primarily with the regional offices, and look to them for technical guidance in all areas, as well as advice, support, championing of their grant application, and approval on regulatory compliance issues. Each recipient has a transit representative in the regional office. To ensure uniformity of decisionmaking, however, some important decisions can only be made by headquarters, though the recipient may submit the paperwork initially to the regional office.

FTA has 10 regional offices.⁷² They are located in: Cambridge, Mass.; New York, N.Y.; Philadelphia, Pa.; Atlanta, Ga.; Chicago, Ill.; Fort Worth, Tex.; Kansas City, Mo.; Denver, Colo.; San Francisco, Cal.; and Seattle, Wash.:

Region I: Cambridge. States served: Maine, New Hampshire, Vermont, Connecticut, Rhode Island, and Massachusetts.

Region II: New York. States served: New York, New Jersey, and Virgin Islands.

Region III: Philadelphia. States served: Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and District of Columbia.

Region IV: Atlanta. States served: Kentucky, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, and Puerto Rico.

Region V: Chicago. States served: Minnesota, Wisconsin, Michigan, Illinois, Indiana, and Ohio.

Region VI: Ft. Worth. States served: Arkansas, Louisiana, Oklahoma, Texas, and New Mexico.

Region VII: Kansas City. States served: Missouri, Iowa, Kansas, and Nebraska.

Region VIII: Denver. States served: Colorado, Utah, Wyoming, Montana, North Dakota, South Dakota.

Region IX: San Francisco. States served: California, Hawaii, Guam, Arizona, Nevada, American Samoa, and the Northern Mariana Islands.

Region X: Seattle. States served: Idaho, Oregon, Washington, and Alaska.

⁷² 49 C.F.R. § 601.2(b) (1999).

D. OTHER RELEVANT FEDERAL AGENCIES

In addition to the foregoing, transit organizations find themselves dealing with several other major federal agencies, including:

Department of Homeland Security—The tragic events of September 11, 2001, revealed that the airport and airway security umbrella was far more porous than theretofore widely recognized. Within weeks of that catastrophe, Congress passed two pieces of legislation—the Air Transportation Safety and System Stabilization Act and the Aviation and Transportation Security Act. The former provided an immediate \$15 billion bail out of the industry designed to avoid its economic collapse. Economic assistance came in the form of (1) direct grants, (2) loans, (3) a limitation on carrier liability for the four crashes that day, and (4) federal war risk insurance for the industry. The latter imposed 91 new mandates, the most significant of which included federalizing the airport security function, imposing minimum job qualifications upon them, imposing background checks on airport employees, requiring impregnable cockpit doors, and establishing a new multimodal Transportation Security Administration (TSA) within DOT.

Fourteen months after the terrorist attacks on the World Trade Center and Pentagon, Congress passed the Homeland Security Act of 2002 (HSA),⁷³ which established a new cabinet-level executive branch agency, the Department of Homeland Security (DHS),⁷⁴ headed by a Secretary of Homeland Security.⁷⁵ It was the most sweeping overhaul of federal agencies since President Harry Truman asked Congress to create the Central Intelligence Agency and unify the military branches under the Department of Defense in 1947.⁷⁶

In creating DHS, Congress consolidated 22 existing agencies that had combined budgets of approximately \$40 billion and employed some 170,000 workers.⁷⁷ Several of the agencies historically have been involved in airport and airline passenger and cargo review, including the Customs Service, Immigration and Naturalization Service, Animal and Plant Inspection Service of the Department of Agriculture, and the nascent Transportation Security Administration.⁷⁸

The DHS's primary mission is to prevent domestic terrorist attacks, minimize U.S. vulnerability to terror-

ism, and minimize the danger and assist in recovery from domestic terrorist attacks that do occur.⁷⁹ It is also to establish countermeasures for chemical, radiological, biological, and nuclear threats and incidents.⁸⁰ The Undersecretary for Border and Transportation Security has the responsibility, *inter alia*, to prevent the entry of terrorists and implements of terrorism into the U.S., securing the borders, ports, and air transportation systems, and to administer the immigration and naturalization laws (including issuing visas), and the customs and agricultural laws. In so doing he must ensure, “the speedy, orderly, and efficient flow of lawful traffic and commerce.”⁸¹ This will be a daunting task, for approximately 500 million people, more than 11 million trucks, 51,000 foreign ships, and 2.2 million rail cars enter the U.S. each year. The new agency will likely direct its attention to transit security over time.

Environmental Protection Agency—Under the National Environmental Policy Act of 1969,⁸² an environmental impact statement must be prepared for any major federal action significantly affecting the quality of the human environment, under the supervision of the Environmental Protection Agency (EPA). Typically, large airport projects require such environmental review. In the ensuing years, Congress has added specific areas of environmental protection to which all federal agencies are subject, under EPA oversight, including the Clean Air Act, the Federal Water Pollution Control Act, and legislation governing wetlands and soil contamination clean-up.

The National Labor Relations Board—Transit is a labor intensive industry, with 80 percent of operating costs consisting of labor and fuel cost. The National Labor Relations Board (NLRB) is an independent agency that enforces the National Labor Relations Act.⁸³ Created in 1935, the NLRB conducts secret-ballot elections to determine whether employees want to form a union. It investigates and imposes sanctions against unfair labor practices. The NLRB has jurisdiction over all modes of transportation except railroads and airlines, whose employment laws are regulated by the National Mediation Board.

National Mediation Board—The National Mediation Board (NMB) has jurisdiction under the Railway Labor Act to certify unions, attempt to settle management-labor disputes, and enforce collective bargaining agreements in the airline and railroad industries.

⁷³ 107 Pub. L. 296, 116 Stat. 2135 (Nov. 25, 2002) [hereinafter *Homeland Security Act of 2002*]. In November 2002, legislation approving creation of DHS passed in the House of Representatives, 299-121, and in the Senate 90-9.

⁷⁴ *Homeland Security Act of 2002*, 6 U.S.C. §§ 101 *et seq.* (2002).

⁷⁵ Several Under Secretaries are created as well, including an Under Secretary for Border and Transportation Security. *Id.* at 6 U.S.C. § 113(a)(4) (2004).

⁷⁶ Mimi Hall, *Deal Set on Homeland Department*, USA TODAY, Nov. 13, 2002, at 1, col. 2.

⁷⁷ *Id.*

⁷⁸ *Homeland Security Act of 2002* § 402, 6 U.S.C. § 202 (2002).

⁷⁹ The new agency's primary mission is to prevent terrorist attacks in the United States, reduce its vulnerability to terrorism, minimize the danger, and assist in the recovery from terrorist attacks that do occur. *Homeland Security Act of 2002* § 101, 6 U.S.C. § 111 (2002).

⁸⁰ *Homeland Security Act of 2002* §§ 301-03, 6 U.S.C. §§ 181-83 (2002).

⁸¹ *Homeland Security Act of 2002* § 402(8), 6 U.S.C. § 202(8) (2002).

⁸² Pub. L. No. 91-190, 83 Stat. 852.

⁸³ Pub. L. No. 74-198, 49 Stat. 449.

The U.S. Department of Labor—The Department of Labor must certify that, when a public transit agency takes over a private transit operator, labor protective provisions are imposed.

National Railroad Passenger Service Corporation [Amtrak]—The National Railroad Passenger Service Act of 1970⁸⁴ created Amtrak in 1971 to replace the failing passenger railroad industry. For many years, it performed certain commuter rail operations on behalf of state departments of transportation or local transit agencies.⁸⁵

Surface Transportation Board—Created pursuant to the Interstate Commerce Commission (ICC) Termination Act of 1995,⁸⁶ the Surface Transportation Board (STB) is an independent agency housed within DOT whose three members are appointed for 5-year terms by the President with the advice and consent of the Senate.⁸⁷ It assumed many of the most important regulatory functions of the ICC, which was sunset by that legislation. (Other ICC functions were transferred to the FHWA or the DOT's Bureau of Transportation Statistics). The STB has broad regulatory powers, *inter alia*, over railroad rate reasonableness, car service and interchange, mergers and acquisitions, line acquisitions, and construction and abandonment.⁸⁸

E. STATE AUTHORITY OVER TRANSPORTATION

1. State Departments of Transportation

In the 1980s, states moved to convert their highway departments to departments of transportation along the federal model. A reason for the name change was to remind the public of the duties of these state departments beyond the construction and maintenance of highways, and also for the administration of federal grants-in-aid dispensed by DOT.

Overseeing, maintaining, and regulating local and regional transportation systems historically has been a state responsibility.⁸⁹ These functions are matters of a "peculiarly local nature."⁹⁰ State oversight of roads and plans and transit have been deemed governmental activities traditionally within the state's domain "from time immemorial."⁹¹ Mass transit is an integral compo-

nent of a state's transportation system.⁹² Transit agencies are creatures of state law, with their enabling legislation specifying their structure and authority (including eminent domain and taxing and borrowing authority, if any).⁹³ But not every public transportation provider is an agency of the state. Many are divisions of municipal or county government, or are regional transportation authorities.⁹⁴ For those providers, the state's role is limited to providing funding, and the state DOT does not regulate the transit provider. Some state DOTs directly operate mass transit service, often in rural areas, or provide commuter rail service. But not all transit providers are housed in or draw their legal authority from state DOTs.

Formerly known as state highway departments,⁹⁵ state departments of transportation have been created as the principal state agencies "for development, implementation, administration, consolidation, and coordination of state transportation policies, plans and programs."⁹⁶ Some are explicitly directed to encourage the development of public or mass transportation and rapid transit.⁹⁷

Under federal law, states are required to establish a Statewide Transportation Improvement Program (STIP). The STIP usually covers a time frame of about 3 years and describes specific projects or project segments, as well as their scope and estimated cost. States must also prepare a long-range transportation plan that identifies the state's transportation needs and proposed projects over a period of 20 years.⁹⁸ Both must be prepared in cooperation and coordination with local governmental institutions and MPOs.

In many states, the state department of transportation has been given specific authority over transit and transit organizations. Some have created specific divisions within the state DOT to address transit.⁹⁹ In most,

⁹² *San Antonio Metro. Transit Auth. v. Donovan*, 557 F. Supp. 445 (W.D. Tex. 1983).

⁹³ *See, e.g.*, 74 PA. STAT. ANN. § 1503.

⁹⁴ For example, the San Francisco Municipal Railway has been owned and operated by the City and County of San Francisco since 1912. Article XI, § 9 of the California Constitution authorizes municipal corporations to operate transportation systems for their inhabitants.

⁹⁵ *See, e.g.*, S.C. CODE ANN. § 1-30-105 (1999); TENN. CODE ANN. § 4-3-104 (2000). In some states, DOTs still function as highway departments, though some have embraced their intermodal mission more seriously.

⁹⁶ MINN. STAT. § 174.01 (2000).

⁹⁷ *See, e.g.*, TEX. TRANSP. CODE § 455.001 (2000).

⁹⁸ U.S. GENERAL ACCOUNTING OFFICE, TRANSPORTATION INFRASTRUCTURE: MANAGING THE COSTS OF LARGE-DOLLAR HIGHWAY PROJECTS (GAO/RCED-97-47), at 14-15 (Feb. 1997). *See* note 122 *supra* for Web site. Many state laws also require the state DOTs and local governments to prepare regular transportation plans. *See, e.g.*, WASH. REV. CODE § 35.58.2795 (2000).

⁹⁹ *See, e.g.*, LA. REV. STAT. § 36:508.3 (2000) (transit is under the jurisdiction of the Office of Public Works and Intermodal Transportation); S.C. CODE ANN. § 57-20 (1999) (transit is

⁸⁴ Pub. L. No. 91-518, 84 Stat. 1327.

⁸⁵ 105 Pub. L. 134, 111 Stat. 2570 (1977) repealed the authority of Amtrak Commuter established under 49 U.S.C. § 24501 (formerly 45 U.S.C. § 581).

⁸⁶ 104 Pub. L. No. 88, 109 Stat. 803 (1995).

⁸⁷ 49 U.S.C. § 701.

⁸⁸ 49 U.S.C. §§ 13101-14914. SURFACE TRANSPORTATION BOARD, 1996/1997 ANNUAL REPORT (1998).

⁸⁹ *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979).

⁹⁰ *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523-24, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959).

⁹¹ *Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841, 845-46 (1st Cir. 1982).

the state DOT is authorized to apply for federal transit funds.¹⁰⁰ Some state statutes require the state DOT to prepare a public transit plan.¹⁰¹ Among the smorgasbord of requirements are the following:

- Transit operators must secure state DOT approval for construction on state highways;¹⁰²
- Planning for transit systems must be coordinated with the state DOT;¹⁰³
- Municipalities must secure state DOT approval before providing transportation services;¹⁰⁴ and
- Regional railroad authorities must secure state DOT approval before engaging in transit services.¹⁰⁵

Some states also provide rail operations either as subsidiaries of their state DOTs or as special transit organizations (sometimes named transit authorities), acquiring roadbed and rolling stock to serve the needs of commuter passengers in urban and suburban areas.¹⁰⁶ Some of the underlying or motive-power services are provided by Amtrak or freight railroads with state subsidies.¹⁰⁷ States such as Connecticut, Delaware, New Jersey, and Rhode Island are also owners and operators of local public transportation services. However, most states serve as major funding partners with local transit providers, and participate in transit planning, programming, and resource allocation.¹⁰⁸

Most transit operations are performed by local (city- or county-owned) divisions or regional transit authorities. They derive their power from state statute or local ordinance. Typically, the state role is limited to funding rather than direct supervision. Some entities are created by an Interlocal Cooperation Agreement. Two (the Bi-State Development Authority and the Washington Metropolitan Metropolitan Transportation Authority) are the result of Interstate Compacts approved by Congress.¹⁰⁹

2. State Police Power

The regulation, subsidization, or operation of a transit system falls within the police power of the state or its municipal subdivisions. On occasion, state activities in the realm of intrastate transportation have been challenged on commerce clause or due process under

under the Division of Mass Transit); W. VA. CODE § 17-16C-2 (2000) (transit is under the Division of Public Transit).

¹⁰⁰ See, e.g., COLO. REV. STAT. 43-1-901 (2000).

¹⁰¹ FLA. STAT. § 341.051 (2000).

¹⁰² CAL. PUB. UTIL. CODE § 29031 (2000).

¹⁰³ CAL. PUB. UTIL. CODE § 130256 (2000).

¹⁰⁴ 35-A ME. REV. STAT. ANN § 3502 (1999).

¹⁰⁵ MINN. STAT. § 398A.04 (2000).

¹⁰⁶ See, e.g., N.Y. TRANSP. LAW § 14-c (Consol. 2000), which authorizes the New York Department of Transportation to contract with Amtrak for any intercity rail service deemed necessary.

¹⁰⁷ See generally, DEMPSEY & THOMS, *supra* note 6, at 277-88.

¹⁰⁸ TRANSPORTATION RESEARCH BOARD, *New Paradigms for Local Public Transportation Organizations* Task 1 report, *Transit Cooperative Research Project*, at 2-9 (1999).

¹⁰⁹ 89 Pub. L. 774, 80 Stat. 1324 (1966).

Article I, Section 8, or the 5th or 14th Amendments of the Constitution, respectively. As one state court described it, "The police power is an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union and is not a grant derived from or under any written Constitution."¹¹⁰ Another said,

The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and under our system of government is vested in the Legislatures of the several States of the Union, the only limit to its exercise being that the statute shall not conflict with any provision of the State Constitution, or with the federal Constitution, or laws made under its delegated powers.¹¹¹

The U.S. Supreme Court described the police power as "the power of the State...to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."¹¹²

Historically, the states have held certain inherent power to regulate activities designed to improve the health, safety, and welfare of their inhabitants.¹¹³ As the U.S. Supreme Court has noted:

[While a] State may provide for the security of the lives, limbs, health and comfort of persons and [property] yet a subject matter which has been confided exclusively to Congress...[is] not within the...police power of the State, unless placed there by congressional action. The power to regulate commerce among the States is [conferred by the Constitution to Congress], but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs....The power to pass laws in respect to internal commerce...[belongs] to

¹¹⁰ Ex parte Tindall, 102 Okla. 192 229 P. 125, 198 (Okla. 1924).

While the term "police power" has never been specifically defined nor its boundaries definitely fixed, yet it may be correctly said to be an essential attribute of sovereignty, comprehending the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal.

Id.

¹¹¹ Bagg v. Wilmington, Columbia & Augusta Railroad Co., 109 N.C. 279, 14 S.E. 79, 80 (N.C. 1891).

So long as the State legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce and to expedite instead of hindering the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the Constitution....

Id. at 80.

¹¹² Barbier v. Connolly, 113 U.S. 27, 31, 5 S. Ct. 358, 28 L. Ed. 923 (1885); New York City Transit Auth. v. Beazer, 440 U.S. 568, 593, 99 S. Ct. 1355, 59 2 Ed 587 (1979).

¹¹³ See Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 7 L. Ed. 412 (1829).

the class of powers pertaining to the locality,...[and to] the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to general government....¹¹⁴

In *South Carolina Highway Department v. Barnwell Brothers, Inc.*,¹¹⁵ the U.S. Supreme Court found that

there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states....¹¹⁶

The court held that "few subjects are so peculiarly of local concern as is the use of state highways."¹¹⁷ In determining whether a state regulation is constitutional, the test is "whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."¹¹⁸ In resolving the latter inquiry, "the courts do not sit as legislatures...[in] weighing all the conflicting interests."¹¹⁹ "[F]airly debatable questions as to [a regulation's] reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body...."¹²⁰ The court must assess, "upon the whole record whether it is possible to say that the legislative choice is without rational basis."¹²¹

In *Southern Pacific Co. v. Arizona*,¹²² the Supreme Court observed

the states [have] wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which

¹¹⁴ *Leisy v. Hardin*, 135 U.S. 100, 108, 105 Ct. 681, 34 L. Ed. 128 (1890).

¹¹⁵ 303 U.S. 177, 185, 58 S. Ct. 510, 82 L. Ed. 734 (1938). In this case, the matter at issue was state size and length restrictions on trucks.

¹¹⁶ "[T]he Court has been most reluctant to invalidate under the Commerce Clause 'state regulation in the field of safety where the propriety of local regulation has long been recognized [citing cases]. In no field has this deference to state regulation been greater than that of highway safety regulation.'" *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 443, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978).

¹¹⁷ *Id.* at 187.

¹¹⁸ *Id.* at 190.

¹¹⁹ *Id.* at 190.

¹²⁰ *Id.* at 191.

¹²¹ *Id.* at 191–92.

¹²² 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945). This was a case in which the Supreme Court held that state limitations on train lengths were an unreasonable burden on interstate commerce.

uniformity of regulation is of predominant national concern.

The Court noted that in *Barnwell*, "The fact that [the regulation of highways] affect alike shippers in interstate and intrastate commerce in great numbers, within as well as without the state, is a safeguard against regulatory abuses."¹²³ However, most state DOTs only fund (rather than regulate or supervise) local transit providers.

In *Kassel v. Consolidated Freightways Corp.*,¹²⁴ the Supreme Court acknowledged that a

State's power to regulate commerce is never greater than in matters traditionally of local concern. For example, regulations that touch upon safety—especially highway safety—are those that "the Court has been most reluctant to invalidate." Indeed "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with the related burdens on interstate commerce." Those who would challenge such bona fide safety regulations must overcome a "strong presumption of validity."¹²⁵

This deference to state action in regulating its internal transportation system stems from a recognition that the states shoulder primary responsibility for their construction, maintenance and policing, and that highway conditions can vary from state to state.¹²⁶ "The power of a State to regulate the use of motor vehicles on its highways has been...broadly sustained" by the U.S. Supreme Court.¹²⁷ State regulation of the highways has long been recognized as "an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens...."¹²⁸

F. METROPOLITAN PLANNING ORGANIZATIONS

The process for designation or redesignation of MPOs in each urbanized area of more than 50,000 in population requires agreement of officials representing at least 75 percent of the affected population as well as the central city or cities, and the Governor. Metropolitan area boundaries must at minimum encompass the existing urbanized area and the area expected to be urbanized within the forecast period. For areas designated as non-

¹²³ *Id.* at 783.

¹²⁴ 450 U.S. 662, 101 S. Ct. 1309, 68 L. Ed. 2d 530 (1981). In this case, the Supreme Court struck down truck length regulations on grounds that they failed to advance safety concerns and were therefore an unreasonable burden on interstate commerce.

¹²⁵ *Id.* at 670. Citing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978), and *Bibb v. Navajo Freight Lines, Inc.* 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1033 (1959).

¹²⁶ *Bibb v. Navajo Freight Lines, Id.* at 523–24 (1959).

¹²⁷ *Kane v. State of N.J.*, 242 U.S. 160, 167, 37 S. Ct. 30, 61 L. Ed. 222 166 (1916).

¹²⁸ *Hendrick v. State of Md.*, 235 U.S. 610, 622, 35 S. Ct. 140, 59 L. Ed. 385 (1915).

attainment for carbon monoxide or ozone, the boundaries must be coterminous with the non-attainment area.¹²⁹

ISTEA¹³⁰ gave MPOs expanded funding for planning purposes and authority to select projects for funding, thereby significantly expanding their jurisdiction by authorizing MPOs to designate projects eligible to receive federal highway and transit funds. Under ISTEA, the MPO, in *consultation* with the state, selects all federal highway, transit, and alternative transportation projects to be implemented within its boundaries, except for projects undertaken on the National Highway System and pursuant to the Bridge and Interstate Maintenance programs. Projects on the National Highway System and pursuant to the Bridge and Interstate Maintenance Programs are selected by the state in *cooperation* with the MPO. ISTEA also required MPOs to “begin serious, formal transportation planning,” and to “fiscally constrain” their long range plans and short-term TIPs, requiring MPOs to create realistic, multi-year agendas of projects that could be completed with available funds (*i.e.*, the projects must be fiscally constrained).¹³¹ A major reason for this restriction was that local elected officials previously were free to rearrange priorities and add or delete projects at will, or include a “wish list” of potential projects for which financial resources were inadequate. An opportunity for public comment must be provided in preparation of both the long-range plan and the TIP.¹³² Prepared in cooperation with the state and the local transit operator, and updated every 2 years, TIPs must include all projects in the metro area to be funded under Title 23¹³³ and the Federal Transit Act, and be consistent with the long-range plan and the STIP. The MPO planning process will be discussed in greater detail in Section 2—Transportation Planning.

G. TRANSIT AGENCY ORGANIZATION

Local transit agencies have been established in many municipalities to build, maintain, and subsidize bus and rail transit facilities, usually in cooperation with FTA. The following data elucidate the number and activities of transit agencies:¹³⁴

¹²⁹ Intermodal Surface Transportation Efficiency Act of 1991, Conference Report, H.R. No. 404, 102d Cong. (Nov. 27, 1991); U.S. FEDERAL HIGHWAY ADMINISTRATION, *supra* note 33, at 12.

¹³⁰ Pub. L. No. 102-240, 105 Stat. 1914 (1991).

¹³¹ SOLOF, *supra* note 16, pt. IV 5.

¹³² U.S. FEDERAL HIGHWAY ADMINISTRATION, *supra* note 33, at 14.

¹³³ 23 U.S.C. § 134.

¹³⁴ See also FEDERAL TRANSIT ADMINISTRATION, THIS IS THE FEDERAL TRANSIT ADMINISTRATION 3 (Sept. 2000).

TRANSIT OPERATING AGENCIES AND SCOPE OF SERVICE¹³⁵			
Agency Type	Number of Agencies /Organizations	Annual Passenger Trips (million)	Percent
Urbanized	554	8,278	96.7
Small Urban & Rural	1,074	280	3.3
Specialized	3,594	n.a.	--
Other	753	n.a.	--
Total	5,975	8,558	100

¹³⁵ [See www.apta.com.] AMERICAN PUBLIC TRANSPORTATION ASSOCIATION, 1999 FACT BOOK 26-28, 68-72 (1999).

1. Formation of the Transit Organization

Public transit agencies, authorities, districts, councils, and commissions (hereinafter referred to as “transit organizations”) usually are creatures of state law, though some have been created by city or county governments, and a few by Interstate Compacts.¹³⁶ They are formed and organized in a variety of ways. In some states, transit organizations are formed by an act of the state legislature.¹³⁷ In others, a transit organization may be formed after a petition is filed by a specified number of registered voters for a public referendum supervised by the courts.¹³⁸ In still others, municipalities or counties are empowered to create transit districts within their boundaries, or to perform transit operations without creating a district.¹³⁹ Since metropolitan areas and traffic patterns sometimes straddle state lines, a few have been created by Interstate Compacts approved by Congress.¹⁴⁰ In urban areas, most transit service is provided by independently constituted regional authorities or by local governments. Regardless of which model is adopted, public entities own and operate nearly all urban transit services, with funding provided by the federal, state, and local partnership. In nonurbanized areas, transit is provided via a mix of publicly owned and operated and private, nonprofit agencies, often using private contractors to operate them.¹⁴¹

In summary, public transportation is provided at the local level, most frequently by:

- A division of municipal or county government;
- Transit authority organized and existing under and by virtue of local law, under authority granted by state statute,¹⁴²
- A regional transportation authority, under authority granted by a state statute or authorized by referendum;

¹³⁶ See generally, DEMPSEY & THOMS, *supra* note 6, at 336–40.

¹³⁷ See, e.g., GA. CODE ANN. § 32-9-9 (2000).

¹³⁸ See, e.g., 70 ILL. COMP. STAT. ANN. § 3610/3.1 (2000).

¹³⁹ See, e.g., OHIO REV. CODE ANN. § 306.01 (Anderson 2000); 30-A ME. REV. STAT. ANN. § 3502 (1999).

¹⁴⁰ Perhaps the first of these was the New York-New Jersey Transportation Agency, which was given authority to deal “with matters affecting public mass transit within and between the two States” in 1959. *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977). Another major contemporary example is the Washington Metropolitan Area Transit Authority (WMATA). MD. CODE ANN. TRANSP. § 10-204 (2001); VA. CODE ANN. § 33.1-221.1:3 (2000).

¹⁴¹ TRANSPORTATION RESEARCH BOARD, *supra* note 108 at 2-6.

¹⁴² For example, the Memphis Area Transit Authority was organized and exists under and by virtue of Tennessee Code Annotated 7-56-101 *et seq.* (2000), and Memphis City Code Sections 2-336 *et seq.* (2000).

- A state department of transportation, primarily operating service in rural areas;
- A state agency;¹⁴³ or
- Interstate compact.¹⁴⁴

2. The Governing Board

Usually, transit organizations are headed by an appointed board of directors, which sets policy and hires a manager or Administrator (hereinafter referred to as a “general manager”) to run the day-to-day operations of the transit organization. In some states, directors are appointed by the municipal officers of the affected municipalities,¹⁴⁵ by transit or transportation commissions,¹⁴⁶ or by the Governor.¹⁴⁷ At this writing, only three major transit providers (RTD in Denver and BART and AC Transit in Oakland) have elected boards, while others (such as Austin) have mixed boards comprised of both elected and appointed members.

Transit providers with elected boards must be mindful of the “one person/one vote” doctrine of *Reynolds v. Sims*.¹⁴⁸ In *Cunningham v. Metropolitan Seattle*, a federal district court found that the organization of the governing Council of Metro (an operator of the mass transit system and water pollution abatement facilities in King County, Washington) violated the Equal Protection Clause of the U.S. Constitution because 24 of its 42 members were elected rather than appointed officials and they represented jurisdictions with differing populations, resulting in a disproportionate representation of voters.¹⁴⁹ The selection of Metro Council members through a process of regional grouping of nonequal population districts was found to have resulted in impermissibly distorted representation.¹⁵⁰

In many states, directors serve staggered terms of office.¹⁵¹ In some, no more than a simple majority may be a member of a single political party. Some statutes require that board members reside in the districts they

¹⁴³ For example, New Jersey Transit is such an institution.

¹⁴⁴ For example, the WMATA and Bi-State Development Agency are chartered by Congress and the laws of the relevant states.

¹⁴⁵ See, e.g., 30 ME. REV. STAT. § 3504 (2000); OHIO REV. CODE ANN. § 747.01 (Anderson 2000); WIS. STAT. § 66.943 (1999).

¹⁴⁶ For example, the Directors of WMATA are appointed by the Northern Virginia Transportation Commission, the Council of the District of Columbia, and the Washington Suburban Transit Commission. MD. TRANSP. CODE ANN. § 10-204 (2001); VA. CODE ANN. § 33.1-221.1:3 (2000).

¹⁴⁷ See, e.g., OR. REV. STAT. § 267.090 (1999).

¹⁴⁸ 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

¹⁴⁹ 751 F. Supp. 885 (W.D. Wash. 1990).

¹⁵⁰ *Id.* See also *Jackson v. Nassau County Board of Supervisors*, 818 F. Supp. 509, 535 (E.D. N.Y. 1993).

¹⁵¹ See, e.g., OHIO REV. CODE ANN. § 747.01 (Anderson 2000); 30 ME. REV. STAT. ANN. § 3504 (2000).

represent.¹⁵² And some states require that board members serve without compensation.¹⁵³ In some states, directors can be removed by the appointing official at will;¹⁵⁴ in others, they can only be removed for malfeasance or nonfeasance in office.¹⁵⁵ Many have "government in the sunshine" (also known as "open meeting") requirements, which require that all formal meetings of the board must be open to the public.

Among the duties that have been specified in state statutes for such boards are the following:

- To determine mass transit guideways to be acquired and constructed, the means to finance them, and whether to operate such systems or contract them out;
- To promulgate regulations;
- To adopt an annual budget and fix compensation for the officers and employees;
- To adopt By Laws governing its procedures and the rights, duties, and responsibilities of the general manager;
- To audit the financial transactions and records;¹⁵⁶
- To enter into contracts for the improvement, maintenance, and operation of the transit system.

3. The General Manager

Some state statutes require that the person appointed general manager possess certain skills. For example, in California the general manager must be someone "who has had experience in the construction or management of transit facilities."¹⁵⁷ Many statutes provide that the general manager serve at the pleasure of the board,¹⁵⁸ meaning essentially that he or she can be removed from office at any time the board becomes dissatisfied with his or her performance. The powers and duties of a general manager are variously defined in state statutes, and include such things as:

- To manage the properties of the transit organization;
- To attend to the day-to-day administration, fiscal management, and operation of the transit organization;
- To appoint, supervise, suspend, or remove lesser employees;
- To supervise and direct preparation of the annual budget;
- To formulate and present to the board plans for transit facilities and the means to finance them;
- To supervise the planning, acquisition, construction, maintenance, and operation of the transit facilities;
- To attend all meetings of the board, and implement its policy decisions;

- To prepare an administrative code organizing and codifying the policies, resolutions, rules, and regulations of the board; and

- To perform such other duties as prescribed by the board.¹⁵⁹

Some statutes grant to the board the power to grant to the director such powers and responsibilities as it deems appropriate.¹⁶⁰ Some statutes give the General Manager authority to award and execute contracts up to specified dollar levels.

4. The General Powers of the Transit Organization

State statutes typically vest specific governmental powers in transit organizations. Typically among the powers so specified are the following:

- To sue or be sued;
- To acquire, use, hold, and dispose of equipment and other property;
- To apply for, receive, and accept grants of property, money, and services;
- To make rules and regulations for its organization and internal management;
- To plan, design, develop, construct, acquire, renovate, improve, extend, rehabilitate, repair, finance, and cause to be operated transit facilities;
- To prepare, revise, alter, or amend a mass transit plan;
- To appoint officers and employees, assign powers and duties to them, and fix their compensation;
- To make rules governing the conduct and safety of the public;
- To construct, maintain, and operate a transit facility, and fix fares;
- To rent space and grant concessions;
- To issue notes, bonds, and other obligations secured by the revenue of the authority, or to issue general obligation bonds;
- To levy sales, excise, business, property, and/or occupational taxes;
- To exercise the power of eminent domain to acquire rights-of-way and other property; and
- To enter into such contracts and other agreements or to issue such rules and regulations as are necessary to carry out its authorized responsibilities.¹⁶¹

One source summarized the variety of functions of the Regional Public Transit Authority of the Phoenix area:

Authorized by state statute in 1986, the authority is empowered to provide planning, operate service and seek regional taxing authority. Stymied in two regional elections (1989 and 1994), the authority board (made up of an elected official from each of its 10 city or town members, usually the mayor, and a county supervisor) has since

¹⁵² See, e.g., OR. REV. STAT. § 267.090 (1999).

¹⁵³ See, e.g., N.Y. PUB. LAW A § 1201(3) (1999).

¹⁵⁴ See, e.g., OR. REV. STAT. § 267.090 (2000); 24 VT. STAT. ANN. § 5107 (2000).

¹⁵⁵ See, e.g., OHIO REV. CODE ANN. § 747.01 (2000).

¹⁵⁶ See, e.g., CAL. PUB. UTIL. CODE 120105 (2000).

¹⁵⁷ CAL. PUB. UTIL. CODE §§ 24927, 50096 (2000).

¹⁵⁸ See, e.g., CAL. PUB. UTIL. CODE § 24930 (2000).

¹⁵⁹ See, e.g., 74 PA. CONS. STAT. § 1719 (2000); CAL. PUB. UTIL. CODE § 100100 (2000); MINN. STAT. § 473.125 (2000).

¹⁶⁰ 24 VT. STAT. ANN. § 5107 (2000).

¹⁶¹ See, e.g., N.Y. PUB. AUTH. LAW §§ 1204, 1266 (1999); MD. TRANSP. CODE ANN. § 10-204 (2001); *Cunningham v. Seattle*, 751 F. Supp. 885, 889-90 (W.D. Wash. 1990).

chosen a more parochial path of seeking taxing authority at a municipal level.... The regional role of the authority is already clearly defined. It includes: development and maintenance of the regional identity (Valley Metro), fare structures, customer services and communications programs; regional level planning in all modes of transit, including express, local bus, Dial-a-Ride, rail and van pool services; coordinated administration of federal, state and local grants, federal formula and discretionary funds, CMAQ (air quality) and STP (flexible) federal funds, and state funding from LTAFII in partnerships with its members; data collection, management and reporting on behalf of the region's transit providers; program development/management for the Light Rail Transit program; management of the East Valley Dial-a-Ride and local and express bus services throughout the region; and partnerships with members and non-members, including the Arizona Department of Transportation and the Maricopa Association of Governments in the development of new transit programs throughout Maricopa County. Additionally, the agency is responsible for the Clean Air Campaign and transportation Demand Management programs, including ride sharing and telecommuting programs.¹⁶²

¹⁶² Ginny Chin, *Back Existing Transit Board*, ARIZ. REPUBLIC, June 23, 2001, at 4.

APPENDIX

The Federal Transit Administration publishes the federal legislation applicable to FTA recipients at http://www.fta.dot.gov/legal/statutes/441_eng.html (visited March 10, 2004). It formerly produced a checklist of laws that are potentially germane in the realm of federal legislation and regulation, though it is no longer displayed on the FTA Web site. That summary is reproduced, in an edited version here:

1. Enabling Legislation.

- a. Federal transit laws codified at 49 U.S.C. §§ 5301 *et seq.*
- b. Title 23, U.S.C. (Highways).
- c. Transportation Equity Act for the 21st Century, Pub. L. 105-178, June 9, 1998, 23 U.S.C. § 101 note, as amended by the TEA-21 Restoration Act, Pub. L., 105-206, July 22, 1998, 23 U.S.C. § 101 note, and other further amendments (TEA-21).
- d. Loans and Loan Guarantees — Transportation Infrastructure Finance and Innovation Act of 1998, as amended, 23 U.S.C. § 181.
- e. State Infrastructure Banks.
 - (1) Section 350 of the National Highway System Designation Act of 1995, Pub. L. No. 104-59 as amended, (NHS Act), 23 U.S.C. § 101 note.
 - (2) Section 1511 of TEA-21, Pub. L. 105-178 23 U.S.C. § 181 note.

2. Eligibility for Award.

- a. Various provisions of FTA enabling legislation.
- b. U. S. DOT Regulations on Debarment and Suspension at 49 C.F.R. Part 29 implementing Executive Orders Nos. 12549 and 12689, "Debarment and Suspension," 31 U.S.C. § 6101 note.

3. U.S. DOT Administrative Requirements for Grants and Cooperative Agreements, with: (procurement, property management, program income, record-keeping, audit, enforcement)

- a. State and Local Governments — U.S. DOT regulations, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," 49 C.F.R. Part 18.
- b. Universities and Private Nonprofits — U.S. DOT regulations, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 49 C.F.R. Part 19.

4. Lobbying — U.S. DOT Regulations, "New Restrictions on Lobbying," 49 C.F.R. Part 20, implementing and modified as necessary by 31 U.S.C. § 1352.

5. Fraud.

- a. Civil — U.S. DOT Regulations, "Program Fraud Civil Remedies," 49 C.F.R. Part 31, implementing the Program Fraud Civil Remedies Act of 1986, Pub. L. 99-509 as amended, 31 U.S.C. §§ 3801 *et seq.*
- b. Criminal — FTA Statute — 49 U.S.C. § 5307(n) applies 18 U.S.C. § 1001 to the urbanized area formula program, 49 U.S.C. § 5307.

6. Costs and Audit Issues.

- a. FTA Statute — "Net Project Cost" defined by 49 U.S.C. § 5302(a)(8).

- b. FTA Statute — May not use a grant or loan to pay ordinary governmental or nonproject operating expenses — 49 U.S.C. § 5323(h)(1).
- c. Cost Principles for Grants and Cooperative Agreements with For-Profit Organizations — DOT Order 4600.17 applies Federal Acquisition Regulation, 48 C.F.R. Chapter I, Subpart 31.2, "Contracts with Commercial Organizations."
- d. Audit Requirements — U.S. DOT A-133 Compliance Supplement, May, 1998, implementing Single Audit Amendments of 1996, 31 U.S.C. §§ 7501 *et seq.*, and OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

7. Civil Rights.

- a. FTA Nondiscrimination Statute — 49 U.S.C. § 5332, which prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity.
- b. U.S. DOT Regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation — Effectuation of Title VI of the Civil Rights Act of 1964," 49 C.F.R. Part 21, implementing Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d.
- c. U.S. DOT Regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 C.F.R. Part 26.

(Above replaces U.S. DOT financial assistance programs, at 49 C.F.R. Part 23 cited in Current Master Agreement.)

- d. FTA Regulations, "Transportation for Elderly and Handicapped Persons," 49 C.F.R. Part 609, implementing 29 U.S.C. § 794 and 49 U.S.C. 5301(d).
- e. U.S. DOT Regulations, "Nondiscrimination on the Basis of Disability in Programs and Activities Receiving or Benefiting from Federal Financial Assistance," 49 C.F.R. Part 27 implementing 29 U.S.C. § 794 and 49 U.S.C. 5301(d).

8. Protection of Private Enterprise.

- a. General Protections — FTA Statute — 49 U.S.C. § 5306.
- b. Private Charter Bus Operators — FTA Regulations, "Charter Service," 49 C.F.R. Part 604, implementing 49 U.S.C. § 5323(d).
- c. Private School Bus Operators — FTA Regulations, "School Bus Operations," 49 C.F.R. Part 605, implementing 49 U.S.C. § 5323(f).

9. Employee and Labor Protections.

- a. Transit Employee Protective Requirements.
 - 1. FTA Statute — 49 U.S.C. § 5333(b).
 - 2. U.S. DOL Guidelines, "Section 5333(b), Federal Transit Law," 29 C.F.R. Part 215.
- b. Prevailing Wage (Davis-Bacon) — FTA Statute — 49 U.S.C. § 5333(a).
- c. Hatch Act Exemption for Nonsupervisory Employees — FHWA Statute — 23 U.S.C. § 142(g).

10. State and Metropolitan Planning and Transportation Improvement Programs.

- a. FTA Statutes — 49 U.S.C. §§ 5303, 5304, 5305, and 5323(l).

- b. Joint FHWA/FTA Regulations, "Planning Assistance and Standards," 23 C.F.R. Part 450 and "Transp. Infrastructure Management," 49 C.F.R. Part 613.
- c. Joint FHWA/FTA Regulations, "Management and Monitoring Systems," 23 C.F.R. Part 500 and 49 C.F.R. Part 614.

11. Procurement.

- a. FTA Requirements — FTA Circular 4220.1D, "Third Party Contracting Requirements."
- b. Prohibition on Exclusionary and Discriminatory Specifications — FTA Statute — 49 U.S.C. § 5323(h)(2), Architectural, Engineering, and Design Contracts, no Federal assistance awarded by FTA may be used to support procurements using exclusionary or discriminatory specifications.
- c. Qualifications-Based Architectural and Engineering Procurement Requirements — FTA Statute — 49 U.S.C. § 5325(b) — must procure under Title IX of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §§ 541 *et seq.* or qualifications-based State law.
- d. May consider long-term efficiency and lower long-term costs — FTA Statute — 49 U.S.C. § 5325(c), Efficient Procurement.
- e. Audits of Noncompetitive Capital or Improvement Contracts — FTA Statute — 49 U.S.C. § 5325(a), Non-competitive Bidding.
- f. Standards for Acquiring Rolling Stock — FTA Statute — 49 U.S.C. § 5326(c).
- g. Multi-Year Rolling Stock Procurements — FTA Statute — 49 U.S.C. § 5326(b).
- h. Bus Passenger Seat Functional Specifications — FTA Statute — 49 U.S.C. § 5323(e).
- i. Procuring Associated Capital Maintenance Items — FTA Statute — 49 U.S.C. § 5326(d).
- j. Pre-Award and Post-Delivery Reviews of Rolling Stock Purchases.
 - (1) FTA Statute — 49 U.S.C. § 5323(m).
 - (2) FTA Regulations, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases," 49 C.F.R. Part 663.
- k. Bus Testing.
 - (1) FTA Statute — 49 U.S.C. § 5323(c), Acquiring New Bus Models.
 - (2) FTA Regulations, "Bus Testing," 49 C.F.R. Part 665.
- l. FTA Guidance — FTA *Best Practices Procurement Manual*.

12. Leasing.

- a. FTA Regulations, "Capital Leases," 49 C.F.R. Part 639.
- b. FTA Circular 7020.1, "Cross-Border Leasing Guidelines," April 26, 1990.

13. Relocation and Land Acquisition — U.S. DOT regulations, "Uniform Relocation and Real Property Acquisition for Federal and Federally Assisted Programs," 49 C.F.R. Part 24, implementing the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. §§ 4601 *et seq.*

14. Major Construction Projects — FTA Regulations, "Project Management Oversight," 49 C.F.R. Part 633.

15. Buy America.

- a. FTA Statute — 49 U.S.C. 5323(j).
- b. FTA Regulations, "Buy America Requirements," 49 C.F.R. Part 661.
- c. Reviewing Buy America Compliance in Rolling Stock Acquisitions:
 - (1) FTA Statute — 49 U.S.C. § 5323(m).
 - (2) FTA Regulations, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases," 49 C.F.R. Part 663.

16. Property Management.

- a. Maintain Project Property — FTA Statutes — 49 U.S.C. §§ 5307(d)(1)(C) and 5309(d)(2).
- b. Transfer of Project Property — FTA Statutes — 49 U.S.C. §§ 5334(g)(1) and (2).

17. Environmental Matters.

- a. FTA Environmental Statute — 49 U.S.C. § 5324(b).
- b. DOT Statute protecting Public Park and Recreations Lands, Wildlife and Waterfowl Refuges, etc. — 49 U.S.C. § 303 (Section 4"f" of the DOT Act).
- c. Joint FHWA/FTA regulations, "Environmental Impact and Related Procedures," 23 C.F.R. Part 771 and 49 C.F.R. Part 622.

18. Safety.

- a. Seismic Safety — U.S. DOT regulations, "Seismic Safety," 49 C.F.R. Part 41 § 41.117.
- b. Substance Abuse.
 - (1) Drug-Free Workplace — U.S. DOT regulations, "Drug-Free Workplace Requirements (Grants)," 49 C.F.R. Part 29, Subpart F, as modified by 41 U.S.C. § 702 *et seq.*, "Government-wide Disbarment and Suspension (Nonprocurement) and Government-wide Requirements for Drug-Free Workplace (Grants)." 49 C.F.R. Part 29.
 - (2) FTA Alcohol and Controlled Substances Testing statute — 49 U.S.C. § 5331.
 - (3) FTA regulations, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations," 49 C.F.R. Part 655.
 - (4) FTA "Procedures for Transportation Workplace Drug and Alcohol Testing Programs," 49 C.F.R. Part 40.
- c. Rail Safety Oversight.
 - (1) FTA Rail Safety Oversight Statute — 49 U.S.C. § 5330, Withholding Amounts for Noncompliance With Safety Requirements.
 - (2) FTA regulations, "Rail Fixed Guideway Systems; State Safety Oversight," 49 C.F.R. Part 659.

**Cross-Cutting Requirements
Required for Federal Funding Relationship**

1. Eligibility for Award — Executive Orders Nos. 12549 and 12689, "Debarment and Suspension," 31 U.S.C. § 6101 note and OMB's government-wide rule.
2. Type of Award.
 - a. Requirement to Use a Grant — 31 U.S.C. § 6304.
 - b. Requirement to Use a Cooperative Agreement — 31 U.S.C. § 6305.
3. Administrative Requirements for Grants and Cooperative Agreements, with: (procurement, property management, program income, record-keeping, audit, and enforcement)
 - a. State and Local Governments — OMB's common grant rule (Part 18).
 - b. Universities and Private Nonprofits — OMB Circular A-110 (Part 19).
4. Cost Principles for Grants and Cooperative Agreements with:
 - a. State and Local Governments — OMB Circular A-87, Revised, "Cost Principles for State and Local Governments."
 - b. Educational Institutions — OMB Circular A-21, Revised, "Cost Principles for Educational Institutions."
 - c. Nonprofit Organizations — OMB Circular A-122, Revised, "Cost Principles for Non-Profit Organizations."
5. Transfers of Federal Funds.
 - a. U.S. Department of Treasury regulations, "Rules and Procedures for Efficient Federal–State Funds Transfers," 31 C.F.R. Part 205 that implement Section 5(b) of the Cash Management Improvement Act of 1990, as amended, 31 U.S.C. § 6503(b), Intergovernmental Cooperation.
 - b. U.S. Department of the Treasury Circular 1075, "Withdrawal of Cash from the Treasury for Advances Under Federal Grants and Other Programs," regulations at 31 C.F.R. Part 205, §____.
6. Single Audit Amendments of 1996, 31 U.S.C. §§ 7501 *et seq.*, in accordance with OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations."
7. Land Acquisition and Relocation.
 - a. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. §§ 4601 *et seq.*
 - b. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.*, in the course of providing for housing required for relocation.
 - c. Section 102(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4012a. "The National Flood Insurance Act of 1968."
8. Seismic Safety in Construction of Buildings.
 - a. Seismic Safety, 49 U.S.C. §§ 7701 *et seq.*
 - b. Executive Order No. 12699, "Seismic Safety of Federal and Federally-Assisted or Regulated New Building Construction."
9. Patent Rights Requirements.

- a. For Universities, Small Businesses, and Nonprofit Organizations — "Bayh-Dole Act," 35 U.S.C. §§ 200 *et seq.*
- b. For ALL recipients receiving Federal Assistance — U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements," 37 C.F.R. Part 401.

10. Labor Requirements.

- a. Construction Labor/Prevailing Wage — if program requires adherence to the Davis-Bacon Act, 40 U.S.C. §§ 276a(1) – (7).
- b. Nonconstruction Labor/Wage and Hour — Section 102 of the Contract Work Hour and Safety Standards Act, 40 U.S.C. §§ 327 through 332. Replaced by 40 U.S.C. § 3142. Section Numbers revised Aug. 21, 2002, see Pub. L. 107-217.
- c. U.S. DOL regulations on Prevailing Wage and Overtime Requirements — "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)," 29 C.F.R. Part 5.
- d. Prohibition against Kickbacks — Copeland "Anti-Kickback" Act — 18 U.S.C. § 874 and 40 U.S.C. § 3145 (Restated August 21, 2002).
- e. U.S. DOL regulations prohibiting "kickbacks" — "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States," 29 C.F.R. Part 3.
- f. Safety Standards at Worksite — Section 107 of the Contract Work Hour and Safety Standards Act, 40 U.S.C. § Restated § 3701 *et seq.*
- g. U.S. Occupational Safety and Health Administration/DOL regulations, "Safety and Health Regulations for Construction," 29 C.F.R. Part 1926.
- h. U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. Parts 60 *et seq.*

11. Environmental.

- a. Major Federal Action Affecting the Environment.
 - (1) National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321 *et seq.*
 - (2) Executive Order No. 11514, as amended, "Protection and Enhancement of Environmental Quality," 42 U.S.C. § 4321 note.
 - (3) Executive Order No. 11738, "Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans," 42 U.S.C. § 7606 note.
 - (4) Council on Environmental Quality regulations on compliance with the National Environmental Policy Act of 1969, as amended, 40 C.F.R. Part 1500 *et seq.*
- b. Violating Facilities — Third Party Contracts, and Subgrants exceeding \$100,000 must have provision requiring compliance with the following acts and requirements to report the use of facilities considered to be placed on EPA's "List of Violating Facilities," refrain from using violating facilities, report violations to FTA and the Regional EPA Office, and comply with the inspection and other requirements of:
 - (1) Section 114 of the Clean Air Act, as amended, Pub. L. ___, 42 U.S.C. § 7414.

- (2) Section 308 of the Federal Water Pollution Control Act, Pub. L. _____ as amended, 33 U.S.C. § 1318.
- c. Use of Recycled Products — U.S. Environmental Protection Agency (U.S. EPA) guidelines at 40 C.F.R. Parts 247 through 253, implementing Section 6002 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6962.
 - d. Wetland Protection — Executive Order No. 11990, as amended, "Protection of Wetlands," 42 U.S.C. § 4321 note.
 - e. Floodplains — Executive Order No. 11988, as amended, "Floodplain Management," 42 U.S.C. § 4321 note.
 - f. Environmental Justice — Executive Order No. 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 42 U.S.C. § 4321 note.
 - g. Preservation — Archaeological and Historic Preservation Act of 1974, as amended, 16 U.S.C. §§ 469a-1 *et seq.*
 - h. Preservation — Advisory Council on Historic Preservation regulations, "Protection of Historic Properties," 36 C.F.R. Part 800.

12. Metric Usage.

- a. Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act, 15 U.S.C. §§ 205a *et seq.*
- b. Executive Order No. 12770, "Metric Usage in Federal Government Programs," 15 U.S.C. § 205a note.

13. Lobbying Restrictions — 31 U.S.C. § 1352 (Byrd "Anti-Lobbying" statute) and OMB's government-wide rule.

14. Research Safety — National Research Award Act, 1974 Pub. L. 93-348, 88 Stat. 342 July 12, 1974, as amended.

15. Drug-Free Workplace Act of 1968, as amended, 41 U.S.C. § 702 *et seq.* and OMB's new subpart to its government-wide debarment and suspension rule.

16. Fly America.

- a. International Air Transportation Fair Competitive Practices Act of 1974, as amended, 49 U.S.C. § 40118.
- b. U.S. General Services Administration regulations, "Use of United States Flag Air Carriers," 41 C.F.R. §§ 301-131 through 301.143.

(ABOVE replaces U.S. General Services Administration (U.S. GSA) regulations pertaining to the use of United States flag air carriers, 41 C.F.R. § 301-3.61(b), and any later regulations at 41 C.F.R. § 301-10.131 *et seq.* cited in Master Agreement.)

17. Cargo Preference — U.S. Maritime Administration regulations, "Cargo Preference — U.S. — Flag Vessels," 46 C.F.R. Part 381.

Cross-Cutting Requirements FTA Funding Relationship NOT Required

1. Fraud.

- a. Civil Fraud (False Claims) — Program and Civil Fraud Remedies Act of 1986, as amended, 31 U.S.C. §§ 3801 *et seq.*
- b. Criminal Fraud — 18 U.S.C. § 1001.

2. Interest Provisions.

- a. Exemption for State Governments — Debt Collection Act of 1982, as amended, 31 U.S.C. §§ 3701 through 3720.
- b. Interest Requirements for Governmental Bodies — Section 5(b) of the Cash Management Improvement Act of 1990, as amended, 31 U.S.C. § 6503(b), Intergovernmental Financing.
- c. Federal Claims Collection Standards, Interest, Penalties, and Administrative Costs, 31 C.F.R. 901.9.

3. Labor — Employees.

- a. Wage and Hour — Fair Labor Standards Act, as amended, 29 U.S.C. §§ 206 and 207.
- b. Safety at Worksite — U.S. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 657, 667.
- c. Safety at Worksite — U.S. Occupational Safety and Health Administration, DOL, regulations on safety standards, 29 C.F.R. Parts 1900 - 1910.1000.

4. Political Activity (Hatch Act).

- a. 5 U.S.C. §§ 1501 — 1508.
- b. Office of Personnel Management regulations, "Political Activity of State or Local Officers or Employees," 5 C.F.R. Part 151.

5. Civil Rights.

- a. Equal Protection — Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d.
- b. Equal Employment Opportunity —
 - (1) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e.
- c. Prohibition Against Sex Discrimination in Education — Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1680 *et seq.*
- d. Prohibition Against Age Discrimination — Age Discrimination Act of 1975, as amended, 42 U.S.C. §§ 6101 *et seq.*
- e. Prohibition Against Discrimination on the Basis of Handicaps — Section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 as amended, 29 U.S.C. § 794.
- f. Accessibility Requirements for Persons with Handicaps.
 - (1) Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*
 - (2) U.S. DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. Part 37.
 - (3) Joint U.S. Architectural and Transportation Barriers Compliance Board/U.S. DOT regulations, "Americans With Disabilities Act (ADA) Accessibility Guidelines for Transportation Vehicles," 36 C.F.R. Part 1192 and 49 C.F.R. Part 38.
 - (4) U.S. DOJ regulations, "Nondiscrimination on the Basis of Disability in State and Local Government Services," 28 C.F.R. Part 35.
 - (5) U.S. DOJ regulations, "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 28 C.F.R. Part 36.

- (6) U.S. GSA regulations, "Accommodations for the Physically Handicapped," 41 C.F.R. Subpart 101-19.6
- (7) U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. Part 1630.
- (8) U.S. Federal Communications Commission Regulations, "Telecommunications Relay Services and Related Customer Premises Equipment for Persons with Disabilities," 47 C.F.R. Part 64, Subpart F.
- (9) U.S. DOT Regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. Part 37, Subpart H, "Over-the-Road Buses," and joint U.S. Architectural and Transportation Barriers Compliance Board/U.S. DOT Regulations, "Americans With Disabilities (ADA) Accessibility Guidelines for Transportation Vehicles," 36 C.F.R. Part 1192 and 49 C.F.R. Part 38.

6. Environmental Requirements.

- a. Clean Air Act, as amended, 42 U.S.C. §§ 7401 *et seq.* and scattered sections of 29 U.S.C.
- b. Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq.*
- c. Safe Drinking Water Act of 1974, as amended, 42 U.S.C. §§ 300f to 300j-26.
- d. Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901 *et seq.*
- e. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.*
- f. U.S. EPA regulations, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws," 40 C.F.R. Part 51, Subpart T; and "Determining Conformity of Federal Actions to State or Federal Implementation Plans," 40 C.F.R. Part 93.
- g. U.S. EPA regulations, "Control of Air Pollution from Mobile Services," 40 C.F.R. Part 85.
- h. "Control of Emissions from New and In-Use Highway Vehicles and Engines," 40 C.F.R. Part 86.
- i. U.S. EPA regulations, "Fuel Economy of Motor Vehicles," 40 C.F.R. Part 600.
- j. Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. §§ 490(a) and 470f.
- k. Executive Order No. 11593, "Protection and Enhancement of the Cultural Environment," 16 U.S.C. § 470 note.
- l. Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. §§ 1271 *et seq.*
- m. Coastal Zone Management Act of 1972, as amended, 16 U.S.C. §§ 1451 *et seq.*
- n. Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531 *et seq.*
- o. Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 59 Fed. Reg. 7629 (1994).

7. Energy — Energy Policy and Conservation Act, Policy and Conservation Act, 42 U.S.C. §§ 6321 *et seq.*

8. Safety.

- a. Lead-Based Paint — Section 401(b) (Pub. L. 91-695, 84 Stat. 2079) of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. § 4831(b).

- b. Transporting Hazardous Materials — Research and Special Programs Administration, "Shippers — General Requirements for Shipments and Packagings," 49 C.F.R. Part 173.

9. Animal Welfare — Laboratory Animal Welfare Act of 1966, as amended, 7 U.S.C. §§ 2131 *et seq.*