Transit Cooperative Research Program

**Selected Studies in Transportation Law**

Volume 5

# Transit Law

TRANSPORTATION RESEARCH BOARD

*OF THE NATIONAL ACADEMIES*

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Volume 5

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# TRANSIT LAW

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## NOTICE

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The members of the Project Committee selected to monitor this project and to review this report were chosen for recognized scholarly competence and with due consideration for the balance of disciplines appropriate to the project. The opinions and conclusions expressed or implied are those of the researchers, and, while they have been accepted as appropriate by the Project Committee, they are not necessarily those of the Transportation Research Board, the National Research Council, The National Academies, or the program sponsors.

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# Transit Cooperative Research Program

## Project Committee J-5



## Cooperative Research Programs Staff

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# PREFACE

The Transit and Intermodal Transportation Law Project "Legal Aspects of Transit and Intermodal Transportation Law" started in 1993. Since that time, the project has published 19 *Legal Research Digests* on many aspects of Transit Law. After all of this, however, the project committee did not believe that there existed a comprehensive analysis of laws pertaining to transit development and operations. The Committee commenced this project in 2000 to develop a comprehensive analysis of laws and practices with which transit attorneys should be familiar.

This study has initial input from members of the TRB Technical Activities Division's Transit and Intermodal Transportation Law Committee and the Cooperative Research Program's TCRP J-5, Legal Aspects of Transit and Intermodal Transportation Law Committee. Richard Bacugalupo, who was chair of the latter committee, and Bruce Smith, who was chair of the Transit Law Committee, were both instrumental in developing the format for this report. Bruce Smith, Apperson, Crump & Maxwell, PLC; Shelly Brown, Shelly Brown Associates; Marla Lien, Denver Regional Transit District; and Bonnie Prosser Elder, VIA Transit, provided valuable suggestions to the author and editor that improved the accuracy and quality of this report.

It was decided to present this material in 11 sections as follows:

| | |
|---|---|
| Section 1: | Transit-Related Government Institutions |
| Section 2: | Transportation Planning |
| Section 3: | Environmental Law |
| Section 4: | Transit Funding & Finance |
| Section 5: | Procurement |
| Section 6: | Ethics |
| Section 7: | Safety |
| Section 8: | Operational Limitations |
| Section 9: | Labor Law |
| Section 10: | Civil Rights |
| Section 11: | Liability |

Those who are interested in a more detailed analysis on a particular topic may wish to consult the relevant Legal Research Digest.

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 1964[2] [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 1961[4] 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 economical 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 1970[11] 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 1973[14] 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,

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[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 State 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. DEP'T 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. DEP'T 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 1974[20] 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 1978[23] 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 involvement, and increased flexibility for state and local governments.[26]

ISTEA[27] 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. DEP'T 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. DEP'T 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. DEP'T OF TRANSP., *supra* note 7, at 128.

[26] U.S. DEP'T OF TRANSP., *supra* note 7, at 185–86.

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

[28] *See* Joseph Thompson, *ISETEA 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]

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 Program[41] (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;

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[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 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 mandates[52] 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 noncompliance. 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

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[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]

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[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).

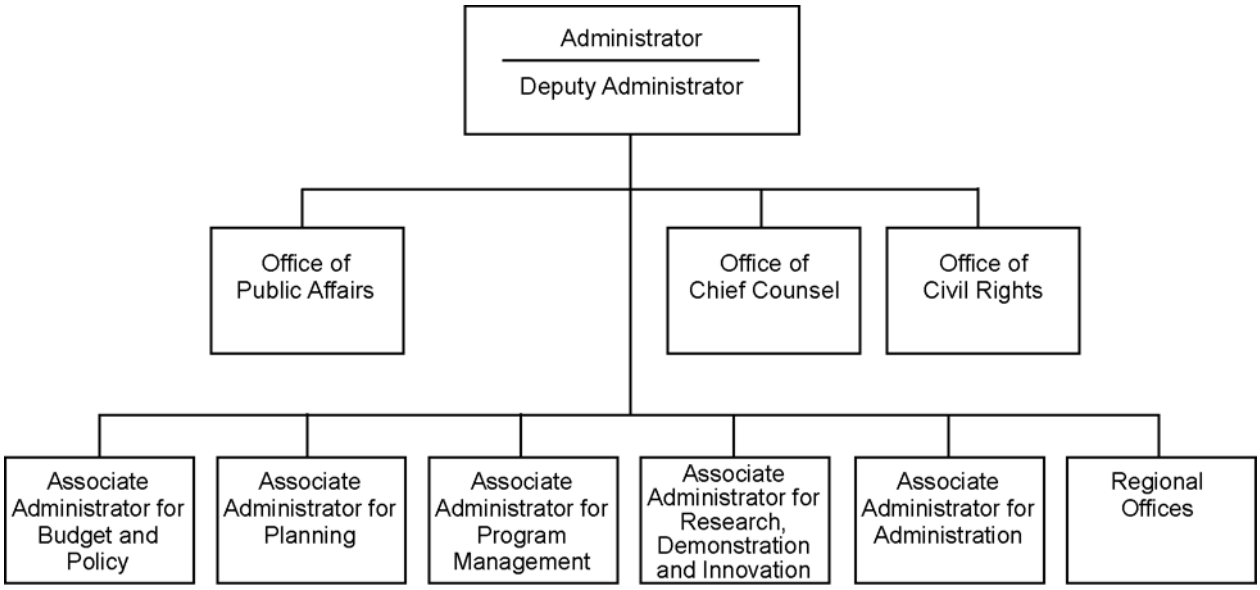
[67] 49 U.S.C. § 5312 (2000), formerly Section 6(a) of the Act; 49 C.F.R. § 601.3(h) (1999).

[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 terrorism, 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.

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[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 1970[84] 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 component 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,

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[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).

[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

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 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 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

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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).

[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 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-

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[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.

[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]

ISTEA[130] 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 23[133] 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]

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[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 SERVICE**[135]

| 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;
- 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

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[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).

[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

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[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/statues/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), Noncompetitive 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*.

SECTION 2

# TRANSPORTATION PLANNING

## A. METROPOLITAN TRANSPORTATION PLANNING: AN OVERVIEW

Transportation planning in metropolitan areas cannot be done by the local transit provider in isolation. Instead, federal law requires that all transportation planning must be done comprehensively, in coordination and cooperation with other governmental institutions, and the public, on a regional basis.[1] These requirements have become far more meaningful since federal legislation passed in 1991, as Congress recognized that transportation, congestion, land use, and environmental pollution are issues that transcend municipal boundaries and therefore have to be addressed on a regional scale. Transit agencies are a participant in that larger comprehensive planning process, along with other state and local governmental institutions.

The process of coordinating transportation planning with other governmental institutions, as required by federal law, is the subject of this Section. Transportation planning in the environmental context is described in Section 3—Environmental Law. Transportation planning for "new starts" is also discussed in Section 4—Transportation Funding and Finance;[2] further, certain planning considerations are woven into Section 5—Procurement, as they are integral to issues surrounding the acquisition and disbursement of federal funds. The focus here is on the *legal* requirements. The practical dimensions of planning are described in other federal documents, many of which may be accessed from the DOT, FTA, and FHWA Web sites.[3]

### 1. Metropolitan Planning Organizations

In communities with a population of 50,000 or more, the forum for planning is the MPO.[4] The Clean Air Act inaugurated a process whereby Congress vested MPOs with primary responsibility for planning transportation projects and designating eligibility for certain transportation dollars within their regions. MPOs do not actually design, build, or operate transportation projects; they merely designate those eligible for federal assistance.

Federally-funded transportation projects within a metropolitan planning boundary must be included on a long-range transportation plan (LRP) and TIP developed and approved by the MPO.[5] The LRP and TIP must be fiscally constrained, subject to a locally adopted public involvement procedure, and in nonattainment areas, must conform with the state Air Quality Implementation Plan. The TIP must also be approved by the Governor, at which time it becomes part of the STIP.[6]

### 2. ISTEA

As the 43,000-mile Interstate Highway System neared completion, congressional attention turned to alternatives other than the single-occupancy vehicle (SOV) to satiate the public's desire for mobility. Concerns over congestion, sprawl, and pollution, all of which defied political jurisdictional boundaries, emerged as political issues. Congress also recognized that the separate and isolated modal networks were not linked together well. Seamless connectivity between modes might well allow Americans to enjoy the inherent advantages of all modes. With a conclusion that the Interstate Highway System would not be further expanded, transportation development would transition to a more regional or local focus. Devolution of power, from the federal government to the states, the regions, and the local jurisdictions, would empower institutions closer to the people.

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[1] Robert Jay Dilger, *ISTEA*: *A New Direction for Transportation Policy,* PUBLIUS: THE J. FEDERALISM, Summer 1992, at 67–78; Robert W. Gage & Bruce D. McDowell*, ISTEA and the Role of MPO's in the New Transportation Environment: A Midterm Assessment,* PUBLIUS: THE J. FEDERALISM, Summer 1995, at 133–54; John Prendergast, *MPO's Become VIP's,* CIV. ENGINEERING, April 1, 1994, at 40, 40–44; PAUL G. LEWIS & MARY SPRAGUE, PUBLIC POLICY INSTITUTE OF CALIFORNIA, FEDERAL TRANSPORTATION POLICY AND THE ROLE OF THE METROPOLITAN PLANNING ORGANIZATIONS IN CALIFORNIA (1997); TED D. ZOLLER & JEFFREY A. CAPIZZANO, EVOLUTION AND DEVOLUTION: A NATIONAL PERSPECTIVE ON THE CHANGING ROLE OF METROPOLITAN PLANNING ORGANIZATIONS IN AREAWIDE INTERMODAL PLANNING (Virginia Transportation Research Council Report No. VTRC 97-R19, 1997); TRANSP. RESEARCH BD., TRANSP. RES. REC. No. 1617, Land Use and Transportation Planning and Programming Applications 118–29 (1998); James H. Andrews, *Metro Power,* PLAN., June 1996, at 8–12; JACK D. HELTON, INTERMODAL PARTNERSHIPS UNDER ISTEA 138-148 (Transp. Research Bd. Special Report No. 240, 1992); Robert W. Gage, *Sector Alignments of Regional Councils: Implications for Intergovernmental Relations of the 1990's*, 22 AM. REV. PUB. ADMIN., 207–26 (1992); TRANSP. RESEARCH BD., TRANSP. RES. REC. No. 1552, Transportation Planning and Land Use at State, Regional, and Local Levels, 71–78, 171–76 (1996); Hank Dittmar, *A Broader Context for Transportation Planning—Not Just an End in Itself*, 61 J. AM. PLAN. ASS'N, 7–13 (1995); TRANSP. RESEARCH BD., Transportation Research Circular No. 450, INSTITUTIONAL ASPECTS OF METROPOLITAN TRANSPORTATION PLANNING 37–38, 40–44 (1995); Paul G. Lewis, *Regionalism and Representation: Measuring and Assessing Representation in Metropolitan Planning Organizations*, 33 URB. AFF. REV. 839–53 (1998); Seth B. Benjamin et al*., MPOs and Weighted Voting*, 20 INT'L PERSP. 31–35 (1994); ANTHONY DOWNS, THE DEVOLUTION REVOLUTION: WHY CONGRESS IS SHIFTING A LOT OF POWER TO THE WRONG LEVELS (1996); Mark Baldassare, *Regional Variations in Support for Regional Governance*, 30 URB. AFF. Q. 275–84 (1994).

[2] *New Starts, Planning, Development, and Funding for New Starts Projects* (visited July 8, 2003), http://www.fta.dot.gov/library/policy/ns/ns.htm.

[3] *See, e.g.*, http://www.dot.gov/; http://www.fhwa.dot.gov/; http://www.fta.dot.gov/.

[4] 23 C.F.R. pt. 450; 49 C.F.R. pt. 613, 58 Fed. Reg. 58040 (Oct. 28, 1993). The MPO is a forum for transportation planning in which the state, local cities and counties, the local transit provider, and the public participate.

[5] Projects that are wholly locally funded need not be included in the TIP or LRP.

[6] 23 U.S.C. §§ 134, 135 (2003).

Enactment of the ISTEA reflected these concerns. Significantly, it was one of the few highway bills in the nation's history to have expunged the word "highway" or "roads" from its title. This legislation provided enhanced flexibility for state and local governments to redirect highway funds to accommodate nonhighway modes and modal connections. Most importantly, for present purposes, ISTEA significantly enhanced the role of MPOs in transportation planning. Larger MPOs[7] were given principal authority, in consultation with the state, to select projects as eligible for certain "pots" of federal money, while requiring the state to cooperate with the MPO on allocating federal money in those "pots" over which the state had primary jurisdiction. The MPO has responsibility for allocating STP-regional, and in some states, Congestion Mitigation and Air Quality (CMAQ)[8] and enhancement (e.g., bicycle, pedestrian) funds in "consultation" with the state DOT. These are the so-called "flex" funds, which allow highway dollars to "flex" to transit projects in a particular region with agreement by the interested parties. CMAQ funds projects that promote transit ridership, clean-fuel development, and emissions maintenance and inspection programs.[9] It has been used to fund such projects as alternative fuels, transit, traffic flow improvements, auto emissions inspections, ridesharing, and bicycle and pedestrian projects.

The state has jurisdiction over the National Highway System, Bridge, and Interstate Maintenance funds, which it selects in "cooperation" with the MPO. The MPO was required to engage in formalized planning of two types—a 20-year long-range plan, and a short-term TIP, covering transportation projects to be implemented over at least a 3-year period. The TIP must be updated at least every 2 years.

ISTEA made two important structural changes in the planning process. First, it required MPOs to include several new types of stakeholders (including transportation providers and the public) in the planning process. Second, it required an expansion of the boundaries of the planning area to include space for the next 20 years of expected urban growth, and to encompass the area in the air quality region (if the region experiences air quality problems). ISTEA also established new national priorities in areas of economic progress, cleaner air, energy conservation, and social equity,[10] requiring that the intermodal transportation system be "economically efficient and environmentally sound…," as well as "energy efficient…."[11] 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."[12]

### 3. TEA-21

TEA-21[13] (at this writing, the most recent of the 6-year transportation authorization bills) further enhanced the importance of the MPOs by increasing the amount of federal money over which they have primary responsibility. TEA-21 also gives states and local governmental institutions significant flexibility for projects on any federal-aid highway, bridge projects on any public road, transit capital projects, and public bus terminals and facilities. The Act also expands and clarifies that STP funds may be devoted to environmental programs, modifications to sidewalks to meet the requirements of the Americans with Disabilities Act, and intercity bus terminals and facilities.[14]

TEA-21 replaced ISTEA's numerous factors to be considered in TIP preparation with seven:

1. Support the economic vitality of the metropolitan area, particularly by enhancing global competitiveness, productivity, and efficiency;

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[7] Those classified as Transportation Management Areas, or generally, those with a population of 200,000 or more.

[8] CMAQ = Congestion Mitigation and Air Quality Improvement. CMAQ fund allocation is the responsibility of the state DOT. Project selection should occur cooperatively between the MPO and the state DOT.

[9] There are no regulations in effect for implementing CMAQ. The program's requirements are those expressed in the statute.

[10] 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.

Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, H.R. 2950, 102d Cong. (1991). As explained below, these were replaced with seven factors in TEA-21.

[11] 49 U.S.C. § 101 (2003). *See* Joseph R. Thompson, *ISTEA Reauthorization and the National Transportation Policy,* 25 Transp. L.J. 87, 99 (1997).

[12] 23 U.S.C. § 134(a)(i) (2003).

[13] Pub. L. 105-178, 112 Stat. 107 (June 9, 1998).

[14] Christina Nystrom, *TEA Time for the Nation's Roads,* AM. CITY & COUNTY, Sept. 1999, at 58, 72.

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;

6. Promote efficient system management and operation; and

7. Emphasize the preservation of the existing system.[15]

In this Section, we review both the statutory planning requirements promulgated by Congress and the resultant regulatory requirements issued by the relevant administrative agencies. At this writing, the relevant regulations were those promulgated pursuant to ISTEA; FHWA and FTA have not yet updated those regulations to address TEA-21.[16] Nonetheless, FTA field offices have been instructed to work with MPOs, state DOTs, and local transit operators to ensure compliance with TEA-21's requirements.[17]

## B. MPO BOUNDARIES, STRUCTURE, AND DESIGNATION

### 1. Federal Requirements

In 1968, Congress required that regional planning agencies be established under state law. An MPO is designated for each urbanized area with a population of more than 50,000 people, by agreement between the Governor of the state and the local government officials that together represent at least 75 percent of the affected population (including the central city).[18] Such agreement must be in accordance with procedures established by applicable state or local law.[19] The MPO's policy board must consist of local elected officials,[20] officials of public transportation agencies, and appropriate state officials.[21] A designation of an MPO will remain in effect until it is redesignated.[22]

An MPO may be redesignated by agreement between the Governor and units of local government that represent at least 75 percent of the affected population (including the central city).[23] MPOs may also be redesignated when requested by a unit(s) of local government representing at least 25 percent of the affected population in any urban area (1) whose population is more than 5,000,000 but less than 10,000,000, or (2) which is an extreme nonattainment area for ozone or carbon monoxide as defined under the Clean Air Act, provided there is agreement between the Governor and local government representing at least 75 percent of the affected population.[24] More than one MPO may be designated within a metropolitan planning area when the Governor and the existing MPO determine that the size and complexity of the existing area make a single MPO inappropriate.[25]

Where a public agency with multimodal transportation responsibilities was operating under state law at the time 23 U.S.C. § 134 was enacted, such agency may continue its statutory duties.[26] These duties may include developing plans and programs, developing long-range capital plans, coordinating transit services and

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[15] TEA-21 also strengthened the linkage between land use and transportation planning.

[16] As explained below, the FHWA and FTA regularly engage in a joint certification review of the transportation planning process of MPOs.

[17] Proposed regulations were published at 65 Fed. Reg. 33922 (May 25, 2000). A version of the final rules was sent to the Office of Management and Budget during the closing days of the Clinton Administration. But they were caught in the web of pending regulations by the George W. Bush administration for review. Daily Report for Executives (Feb. 15, 2001).

[18] 23 U.S.C. § 134(b)(1) (2003); 49 U.S.C. § 5303(c)(1) (2003).

[19] To the extent possible, only one MPO should be designated for each UZA [census-defined urbanized area] or group of contiguous UZAs. More than one MPO can be established only if the Governor(s) conclude that the size and complexity of the UZA makes designation of more than one appropriate. 23 C.F.R. § 450.306(a) (2003). However, TEA-21 changed the statutory basis of this provision, adding the existing MPO to this determination. To the extent possible, the MPO should be designated under state legislation or interstate compact, and be authorized to carry out metropolitan planning.

[20] Federal regulations require that the MPO policy body must include within its voting members local elected officials; officials of agencies that administer or operate major modes of transport (e.g., transit operators, airports, rail operators); and state officials. 23 C.F.R. § 450.306(i) (2003). Where a city council member has been appointed to an MPO board, that council member may be removed from the board upon refusal to vote in accordance with the council's wishes. This removal does not violate a First Amendment freedom of expression because the council member was appointed to represent the council. Capacity as an elected official is not compromised by removal from the MPO board. Rash-Aldrich v. Ramirez, 96 F.3d 117 (5th Cir. 1996).

[21] 23 U.S.C. § 134(b)(2)(c) (2003); 49 U.S.C. § 5303(c)(2) (2003).

[22] 23 U.S.C. § 134(b)(4) (2003); 49 U.S.C. § 5303(c)(4), (c)(5)(D) (2003).

[23] 23 U.S.C. § 134(b)(5)(A) (2003); 49 U.S.C. § 5303(c)(5)(A) (2003). Stated differently, a new MPO may be designated to replace an existing MPO only upon agreement by the Governor and affected local governments representing 75 percent of the metropolitan population, including the local government representing the central city. 23 C.F.R. § 450.306(d) (2003).

[24] 23 U.S.C. § 134(b)(5)(B) (2003); 49 U.S.C. § 5303(5)(B) (2003).

[25] 23 U.S.C. § 134(b)(6) (2003); 49 U.S.C. § 5303(c)(3) (2003).

[26] This section was enacted in 1962, though it has been amended on numerous occasions since then. Pub. L. No. 87-866, § 9(a), 76 Stat. 1148 (Oct. 23, 1962). An MPO may not impose legal requirements on any transportation facility, provider, or projects not eligible under Title 23 or chapter 53 of Title 49 of the U.S. Code. 23 U.S.C. § 134(m) (2003).

projects, and other activities to which it has been charged.[27]

Boundaries of an MPO are determined by agreement between the MPO and the Governor, but must encompass at least the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period.[28] The area may encompass the entire, or consolidated, metropolitan statistical areas as defined by the Census Bureau. When an urbanized area is in nonattainment for ozone or carbon monoxide, as defined by the Clean Air Act, the boundaries of the MPO in existence as of the date of the enactment of 23 U.S.C. § 134 are ordinarily retained.[29] The area may, however, be adjusted by agreement of the Governor and the affected MPO in the method described above.[30] If an urbanized area is designated as a nonattainment area for ozone or carbon monoxide after the enactment of 23 U.S.C. § 134, the boundaries will be established as they would under a new MPO designation.[31]

If more than one MPO has authority within a metropolitan area or an area that is designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act, each MPO must consult with the other MPO and the state when coordinating plans and programs.[32] If a specific project is located within the boundaries of more than one MPO, again, all involved MPOs must consult one another and must coordinate plans regarding the project.[33]

The scope of planning by an MPO may extend beyond its own boundaries. The Governor and the MPOs are encouraged to coordinate planning within the entire metropolitan area and the state.[34] Congress authorizes cooperation between any number of states to enter into agreements or compacts and to establish agencies in the advancement of mutual support and assistance in carrying out transportation plans.[35]

Federal regulations provide that MPO boundaries shall, at a minimum, include the UZA(s) and contiguous geographic area(s) likely to become urbanized within the 20-year forecast period covered by the transportation plan. Before determining the MPO's boundaries, the planning areas in use for all transport modes must be reviewed, and adjustments made to foster an effective planning process that assures intermodal connectivity, reduces modal disadvantages, and promotes efficient transportation investment strategies.[36] The boundaries selected need not be approved by the FHWA or FTA.

For geographic areas designated as nonattainment or maintenance areas under the Clean Air Act Amendments of 1990, the MPO boundaries must include at least the boundaries of the nonattainment or maintenance areas, unless a contrary agreement has been reached between the MPO and the Governor.[37] Where the MPO boundaries do not include the entire nonattainment or maintenance areas, there should be an agreement between the MPO and the state DOT, the state air quality agency, and affected local agencies describing the process for cooperative planning and analysis of projects outside the metropolitan planning area, but within the nonattainment or maintenance area; the agreement should indicate how the total transportation-related emissions will be treated for purposes of determining conformity with EPA regulations.[38] Proposals to exclude a portion of the nonattainment or maintenance area from the planning area boundary must be coordinated with the FHWA, FTA, EPA, and state air quality agency before a final decision is made.[39]

### 2. State Requirements

The foregoing summarizes the *federal* statutory and regulatory requirements for MPO formation. State legislation also impacts the formation, structure, and responsibilities of MPOs. There is enormous diversity between states in the way MPOs are formed, and the responsibilities they hold. In many jurisdictions, the composition of the MPO and who represents local jurisdictions on the Board and important committees can be highly politicized. In others, rural and suburban districts have greater representation than the central core city, which may have the largest share of vehicle miles traveled (VMTs) and tax contribution. This can be particularly troublesome where suburban sprawl is a divisive issue, or where providing infrastructure to fast growing regions is a controversial topic. Here, we review four states as examples of state requirements—Arizona, Colorado, Texas, and Washington.

Arizona law provides for the creation of tax-levying regional public improvement districts—a regional public transportation authority (RPTA) in areas of a population of 1.2 million or more,[40] and the creation of a regional transportation authority (RTA) in a county of between 400,000 and 1.2 million.[41] The RTA board must develop a regional public transportation system plan that defines public transportation goals for each corri-

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[27] 23 U.S.C. § 134(b)(3)(B) (2003); 49 U.S.C. § 5303(c)(6) (2003).

[28] 23 U.S.C. § 134(c)(1)(2) (2003); 49 U.S.C. § 5303(d)(2) (2003).

[29] 23 U.S.C. § 134(c)(3) (2003); 49 U.S.C. § 5303(d)(3) (2003).

[30] 23 U.S.C. § 134(b)(5), (c)(3) (2003); 49 U.S.C. § 5303(c)(5), (d)(3) (2003).

[31] 23 U.S.C. § 134(b)(1), (c)(2), (c)(4) (2003); 49 U.S.C. § 5303(d)(4) (2003).

[32] 23 U.S.C. § 134(e)(1) (2003); 49 U.S.C. § 5303(e)(3) (2003).

[33] 23 U.S.C. § 134(e)(2) (2003); 49 U.S.C. § 5303(e)(5) (2003).

[34] 23 U.S.C. § 134(d)(1) (2003); 49 U.S.C. § 5303(e)(1) (2003).

[35] 23 U.S.C. § 134(d)(2) (2003); 49 U.S.C. § 5303(e)(2) (2003). One example of such interstate planning is the *Tahoe Regional Planning Compact.*

[36] 23 C.F.R. § 450.308(c) (2003).

[37] 23 C.F.R. § 450.308(a) (2003).

[38] 40 C.F.R. pt. 51 (2003).

[39] 23 C.F.R. § 450.310(f) (2003).

[40] A.R.C. § 48-5102 (2003).

[41] A.R.C. §§ 48-5301, 48-5302 (2003).

dor, prioritizes corridors for development, selects appropriate public transportation technology, and determines operating performance criteria and costs for public transportation systems.[42] The RTA board, comprised of representatives of member jurisdictions of the regional council of governments, develops and submits proposals for a 10-year transportation plan to the electorate for approval.[43]

In Colorado, state law imposes specific requirements for transportation planning by MPOs. The MPO must cooperate with the state and other governmental agencies in carrying out 3-C transportation planning.[44] (As explained below, federal law requires that transportation planning be cooperative, comprehensive, and continuing—hence the term "3-C Planning"). Colorado MPOs must prepare 20-year regional transportation plans that include the following:

- New and expanded transportation facilities and services required to meet the estimated demand for transportation in the region over the 20-year period;
- Time schedules for completion of the projects included in the transportation plan;
- Funding needs and sources;
- Expected environmental, social, and economic impacts of the recommendations in the plan, including an evaluation of "the full range of reasonable transportation alternatives," including traffic system and travel demand management strategies and other modes of transport "in order to provide for the transportation and environmental needs of the area in a safe and efficient manner";
- Assistance to other agencies in developing transportation control measures to satisfy federal requirements and comport with the state implementation plan, and achieve clean air objectives; and
- Fiscal needs and constraints assessment to identify mobility measures that can reasonably be implemented when anticipated.[45]

The plan may also prioritize transportation improvements. The Colorado Department of Transportation (CDOT) must integrate the regional transportation plan into its comprehensive statewide transportation plan, which must include the following:

- An emphasis on multi-modal transportation, with connectivity between modes;
- Coordination with county and municipal land use planning, with an examination of the impact of land use decisions on transportation needs, and the preservation of transportation corridors; and
- Development of areawide multi-modal management plans.[46]

The first state requirements for transportation planning in Colorado were enacted in 1991.[47] Among other things, the legislation established Transportation Planning Regions (TPRs), specifying that the state's MPOs constitute five of the 15 TPRs allowed by law, apparently grandfathering them in as they existed in 1991.

Under Colorado law, the metropolitan Denver transit authority, RTD [the "Regional Transportation District"], may take no action relating to the construction of a fixed guideway mass transit system until that system has been approved by the designated MPO (the Denver Regional Council of Governments (DRCOG)), which must approve each component part or corridor of the system, as well as its financing and technology.[48] CDOT is required to cooperate with the MPO to develop a procedure for the fair and equitable distribution of funds distributed under the Urban Mass Transportation Act of 1964[49] and progeny.[50]

Pursuant to federal regulations that required such an agreement, in 1977, DRCOG, RTD, and the state of Colorado entered into a Memorandum of Agreement Regarding the Urban Transportation Planning Process [1977 MOA].[51] More than 2 decades later, this Agreement still governed the 3-C transportation and comprehensive land use planning process for the Denver-Boulder Standard Metropolitan Area.[52] The 1977 MOA designated DRCOG as the MPO and charged it with ensuring cooperative planning among the staffs of

[42] A.R.C. § 48-5121B (2003).

[43] A.R.C. § 48-5304, 48-5309 (2003).

[44] COLO. REV. STAT. § 43-1-1103(3)(a) (2002).

[45] COLO. REV. STAT. § 43-1-1103(1)(2) (2002).

[46] COLO. REV. STAT. § 43-1-1103(4)(5) (2002).

[47] COLO. REV. STAT. § 43-1-1102(7) (2002).

[48] COLO. REV. STAT. § 32-9-107.7 (2002).

[49] Pub. L. No. 880365; 49 U.S.C. § 1601 *et seq*.

[50] COLO. REV. STAT. § 43-1-901 (2002).

[51] *Memorandum of Agreement Between the Denver Regional Council of Governments and the State Department of Highways and the Regional Transportation District Regarding the Urban Transportation Planning Process of January 28, 1977* [hereinafter 1977 MOA]. The purposes of the 1977 MOA are:

- To satisfy the transportation planning requirements established by federal law so as to qualify for federal capital and operating assistance;
- To integrate transportation planning with other elements of comprehensive areawide planning;
- To develop, update, and adopt transport plans to reflect changing needs; and
- To translate these plans into action items with priority recommendations for transportation system improvement.

1977 MOA, at 5–6.

[52] At this writing, the 1977 MOA is being revised and updated. The MOA requires that the planning process must be consistent with the state of Colorado's *Action Plan*, approved March 22, 1974, as amended. 1977 MOA, at 5–6. The *Action Plan* established a process for transportation planning with a philosophy of planning from the local level upward through the structures of government. 1977 MOA, at 2–3. The federal requirement for an "Action Plan" has lapsed, however, and no state "Action Plan" currently exists. There are several other anachronisms in the MOA reflecting the fact that it has not been updated since originally drafted in 1977, despite the promulgation of major federal legislation in the field. For example, FTA is referred to as FHWA. Federal public involvement requirements have changed considerably since 1977. Freight planning is now recognized as a priority, and is nowhere discussed in the 1977 MOA.

DRCOG, the CDOT, and the RTD through the Transportation Committee (TC).[53] To facilitate and coordinate comprehensive planning and land use, the 1977 MOA outlined a 19-step process.[54]

In Texas, local governments can form Regional Planning Commissions (RPC).[55] The participating governmental units may determine the number and qualifications of the governing body, though at least two-thirds of the members must be elected officials of the participating governmental institutions.[56] The RPC must maintain a comprehensive development planning process to assess the needs and resources of the region and formulate goals, objectives, policies, and standards to

[53] 1977 MOA at 6–7. The TC must consist of the following voting members:

- DRCOG
  - Council Chairman
  - Chairman of the Program Committee
  - Executive Director
  - Council's Designee
- State of Colorado
  - Chairman of the Highway Commission
  - Member of the Highway Commission designated by the Governor
  - Executive Director CDH
- RTD (Regional Transportation District)
  - Chairman of the Board
  - Executive Director
  - Board's Designee

[54] 1. *Planning Meeting.* First, the MPO staff calls a planning meeting of the Regional Review Team and all other agencies or organizations expected to participate in preparation or review of the reports being prepared.

2. *Schedule and Responsibility.* At the planning meeting, the MPO staff proposes a timetable and responsibilities for preparation of the document.

3. *Agreement on Approach*. If at the Planning Meeting the agencies involved are unable to agree on a proposed schedule and responsibilities, the disputed issues are presented to the TC, which resolves them.

4. *Resolve Schedule/Responsibility Differences*. Where such an agreement cannot be reached, the MPO staff must generate a report outlining the grievances, and at least one representative from each aggrieved agency shall be present at the subsequent TC meeting. The TC then makes a final resolution and distributes a ruling to all parties for implementation.

5. *Minor Revisions.* Whether there are or are not disputed issues to be resolved, the TC determines whether suggested changes or modifications to any document are "major" or "minor." If major revisions are contemplated, the full comprehensive planning process proceeds. If minor revisions are involved, the MPO staff prepares appropriate material for TC review and approval.

6. *Staff Input.* Based on the schedule and responsibilities determined above, the staff of each participating agency carries out the necessary planning studies and submits the results to the MPO staff.

7. *First Draft.* The MPO assembles the information provided by the agencies and prepares a first draft of the report. The MPO staff submits the draft to each participating agency for their staffs' review and comment.

8. *Staff Review.* The MPO staff compiles and summarizes the written comments and proposes revisions to the second draft.

9. *Second Draft.* Based on the comments received, the MPO staff revises the first draft and prepares a second.

10. *Agency Review.* The MPO staff then distributes the second draft to each participating agency for a second round of review and comment. Comments must be submitted to the MPO in writing.

11. *Summarize Comments and Propose Resolutions of Differences.* All submitted comments are summarized by MPO staff, and proposed revisions to the second draft, in response to those comments, are developed.

12. *TC Review and Resolution.* The TC must review agency comments and the proposed resolution of differences that were summarized by MPO staff. The TC directs the staff in its revisions of the second draft until a final draft is approved by the TC. Where seven members do not vote affirmatively for a document after 90 days, that draft receiving the highest number of votes will be approved and submitted to the MPO.

13. *MPO Staff Assemble Final Draft*. The MPO staff assembles the final draft. Upon its receipt and review by the MPO policy body, that Body may approve it or direct its revision.

14. *MPO Policy Board Approval/Endorsement*. The MPO policy body reviews the final draft during regularly scheduled monthly meetings until final approval is achieved.

15. *Review of Policy Board Revisions.* If the document is approved without revision, it is submitted to the appropriate state and federal agencies for their review or action. If revisions are made, copies are sent to all participating agencies for their review.

16. *Participating Agency Concurrence*. The agencies shall forward their concurrence or nonconcurrence in writing to the MPO for its review.

17. *Final MPO Review*. The MPO reviews written comments filed by the participating agencies. Where an agency formally objects to an item in the Final Document, that document shall not be submitted for state or federal review until the item is removed or issue resolved between the MPO Policy Body and the dissenting agency.

18. *Submit Documents*. The MPO staff submits the approved/endorsed document to appropriate state or federal agencies for review and action. All planning documents submitted to the FHWA must be routed through CDH.

19. *Federal Review/Action*. After receipt of the Final Document from the MPO, the relevant federal agency will review it and take appropriate federal action consistent with its regulations.

In addition to the requirements outlined in the 19-step planning process, the MOA requires citizen involvement at all levels of planning. This includes appropriate provisions for citizen advisory committees, presentations, and public hearings that must be incorporated into the Prospectus and Unified Work Program.

[55] TEX. LOCAL GOV'T CODE ch. 391 (2002). These are sometimes known as Councils of Government.

[56] TEX. LOCAL GOV'T CODE § 391.006 (2002).

guide the long-range physical, economic, and human resource development of a region.[57]

In the state of Washington, local governments within a county or within geographically contiguous counties may join together as a regional transportation planning organization (RTPO).[58] A RTPO must prepare and update a regional transportation strategy and a regional transportation plan.[59] It must review the plan biennially and forward it to the state department of transportation which, in cooperation with the RTPO, must establish minimum standards for development of the plan and facilitate cooperation among RTPOs.[60]

Space does not permit an examination of each state's legislative gloss on MPO formulation, organization, and powers, but this succinct review provides a few representative examples of the ways in which state law establishes the metes and bounds of MPO operation. Many appear to track the federal requirements, though some with greater fidelity to those federal requirements than others.[61] The reader is encouraged to peruse the relevant state statutes to see precisely how these issues are handled locally.[62]

## C. TRANSPORTATION MANAGEMENT AREAS (TMAS)

Transportation Management Areas (TMAs) are designated by the Secretary of Transportation for each urbanized area with a population of over 200,000 people.[63] The Secretary must designate any additional TMAs on the request of the Governor and the MPO designated for the area.[64]

In the event that a metropolitan area is not designated as a TMA, the Secretary may provide for the development of an abbreviated LRP and TIP (unless the area is in nonattainment for ozone or carbon monoxide under the Clean Air Act), taking into account the complexity of transportation problems in the area.[65]

For TMAs, or areas within an MPO classified as nonattainment areas for ozone or carbon monoxide pursuant to the Clean Air Act,[66] federal funds may not be given for any highway project that will result in a significant increase in carrying capacity for single-occupant vehicles unless the project is part of an approved congestion management system.[67] Individual projects included in the plans and programs within the TMA are reviewable under the National Environmental Policy Act of 1969. Under that Act, however, any decision by the Secretary of Transportation concerning a plan or program is not considered to be a federal action subject to review.[68]

Transportation plans and programs in a TMA must be based on a continuing and comprehensive planning process that the MPO carries on in cooperation with both the state and the local transit operators.[69] That planning process for a TMA must include a congestion management system that provides for effective management (through travel demand reduction and operational management strategies) of federally-funded transportation facilities under Chapter 53 of Title 49, U.S.C. (transit), and Title 23, U.S.C. (highways).[70]

## D. PLANNING: GENERAL CONSIDERATIONS

### 1. Public Input and Acceptance

In most communities, transit planning transcends technical engineering and design issues. It is a complex and politically sensitive public process. Many different users and diverse interests must be accommodated. Consensus building collaboration of affected interests is required on a regional basis.[71] As discussed below and in Section 3, legal (including environmental) restrictions influence decisionmaking. Political considerations must be understood. The business community and the press can also be highly influential in molding governmental and public opinion. Several constituencies must be involved early and throughout—the politicians; the various governmental agencies (federal, state and local); the tenants; the nearby residents; the business community; and the general public.[72] Their involvement avoids unnecessary surprises and helps build consensus. Therefore, the transit planning process should be characterized by consultation and cooperation among various constituencies. The planning organization must seek the advice and input of interest groups and interested citizens prior to and during the preparation of the short- and long-term plans. The process should be undertaken in a way that ensures that the plan thereby produced will receive acceptance by the appropriate governmental officials and the general public.[73]

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[57] TEX. LOCAL GOV'T CODE § 391.012(b) (2002).

[58] WASH. REV. CODE ch. 47.80.011 (2003).

[59] WASH. REV. CODE ch. 47.80.023 (2003).

[60] WASH. REV. CODE ch. 47.80.030 (2003).

[61] *See, e.g.,* FLA. STAT. § 339.175 (2003), which appears to follow the federal requirements with greater fidelity than some.

[62] *See, e.g.,* HAW. REV. STAT. § 279E-2 (2003), ME. REV. 23 STAT. § 3502 (repealed 1975).

[63] The Secretary of Transportation must designate as transportation management areas (TMA) all UZAs with populations greater than 200,000. The TMA designation applies to the entire metropolitan area boundary. 23 C.F.R. § 450.312(f) (2003).

[64] 23 U.S.C. § 134(i)(1) (2003); 49 U.S.C. § 5305(a) (2003).

[65] 23 U.S.C. § 134(j) (2003); 49 U.S.C. § 5305(g) (2003).

[66] 42 U.S.C. § 7401 *et seq*. (2003).

[67] 23 U.S.C. § 134(l) (2003); 49 U.S.C. § 5305(f) (2003).

[68] 49 U.S.C. § 5305(h) (2003).

[69] 49 U.S.C. § 5305(b) (2003).

[70] 49 U.S.C. § 5305(c) (2003).

[71] *See generally* NATIONAL ASSOCIATION OF REGIONAL COUNCILS, WORKING TOGETHER ON TRANSPORTATION PLANNING: AN APPROACH TO COLLABORATIVE DECISIONMAKING (1995).

[72] *Id*.

[73] *Id*.

The requirement is a meaningful public participation process—a meaningful opportunity to comment, but without the Administrative Procedure Act requirement to "accommodate or explain" all comments received during the public participation process. Moreover, a planning process without meaningful public participation will not withstand legal challenge. At the outset of the planning process, transit planners must (1) develop a public participation process that identifies (2) the phases and/or stages at which public participation is either legally required or solicited for political reasons to engender public support, (3) the constituencies that will be solicited, and (4) the outreach methods necessary to ensure meaningful participation.[74] The transit planner must address each of these issues, and how to overcome or work through them.

### 2. The Planning Organization

In the preplanning stage, the transit organization ordinarily undertakes the study, develops a work program, and provides a means for financing the work.[75] The organization should establish policy that is acceptable to the community; bring together for advisory and coordinating purposes the relevant interests (particularly the MPO, the state DOT, the FTA, and, depending on the project, the FHWA); and provide a process that is both technically sound and responsive to transportation policy and the coordination of the various constituencies. Thus, in pursuing large projects (particularly those requiring environmental review) the planning organization should perform several functions including policy formulation, advice and coordination, and technical planning (and for air quality conformity, modeling). Failure to do this properly may result in fragmented public support for the transit plan's recommendations, unrealistic recommendations unacceptable to the community, and a completed study with little utility that is difficult to implement. For complex projects, formal policy, technical, and review committees meet regularly. They must decide whether to open their meetings to the public. Initially, they must determine whether they are legally required to conduct the meeting in public. If not so required, a policy decision must be made whether to open the meeting to the public. As a practical matter, some meetings are better and more efficiently handled if not open to the public. Frequently, once the project has been properly scoped, consultants are hired to provide data, plan development, assess alternatives, and the like.[76]

Once a systems plan is developed and the community planning process is begun, specific proposals for new projects are considered under what is termed "project planning" or "master plan development." For large projects, several basic phases can be involved, including purpose and needs assessment, facilities assessment, facilities design, environmental assessment, and financial planning.[77] Each should be done on a short-term, intermediate term, and long-term planning horizon. Of course, smaller projects do not go through such a complicated planning process. Some projects, such as simple fleet procurements, are categorically exempt from the rigorous planning process.[78]

### 3. Needs Assessment and Demand Forecasting

Needs assessment usually requires forecasting of anticipated passenger movements. Forecasting requires an expert judgment, or estimate, of future traffic and demand. Such forecasts are based on the assumption that assessment of historical data and trends (e.g., vehicle movements) may have a predictive relationship vis-à-vis events in the future. An array of transportation, socioeconomic, and demographic information will form the basis of the forecast. Forecasters must analyze such information as historical trends in highway and transit movements and volume, population, employment, economic growth characteristics of the region, trends in traffic, congestion, geographic factors, technology dynamics, government regulation, and travel patterns (typically including vehicle miles traveled between residential and employment centers).[79] Also examined are demand/delay relationships and the capability of existing roads and transit lines to satiate present and projected future demand with existing capacity.[80] Since promulgation of the Clean Air Act Amendments in 1990, pollution modeling has also been an integral part of the transportation planning process.[81]

The purpose of forecasting is not to predict the future with precision, but to provide data that can be useful in reducing uncertainty. If overly optimistic forecasts prompt investments in infrastructure too early, then premature capital costs and unnecessary operating expenses can be incurred. On the other hand, if overly pessimistic forecasts dissuade infrastructure expansion, efficiency costs can be high. Thus, the purpose of forecasting is to provide a framework for gauging the timing of investments in a way that minimizes forecasting error costs in either the excessively optimistic or pessimistic direction.

Though historical annual and seasonal data are useful, peak demand defines capacity needs.[82] Thus, the

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[74] *See* 49 C.F.R. pt. 450 (2003).

[75] As we shall see below, federal requirements insist that the plan be financially constrained by available economic resources.

[76] 42 U.S.C. §§ 4321–4370d (2002).

[77] James Spensley, *Airport Planning, in* AIRPORT REGULATION, LAW & PUBLIC POLICY 69-71 (Robert M. Hardaway, ed., 1991).

[78] *See* Section 5—Procurement, below.

[79] ROBERT HORONJEFF & FRANCIS MCKELVEY, PLANNING AND DESIGN OF AIRPORTS (McGraw Hill, 4th ed. 1994). PAUL S. DEMPSEY ET AL., DENVER INTERNATIONAL AIRPORT: LESSONS LEARNED 34 (McGraw Hill 1997).

[80] Spensley, *supra* note 78 at 63, 69.

[81] *Supra* note 72.

[82] INTERNATIONAL CIVIL AVIATION ORGANIZATION, AIRPORT PLANNING MANUAL 1-17 (2d ed. 1987).

annual capacity capability of transportation networks measured in passengers or volumes of freight is a relatively less helpful number than the system capacity on a peak day at a peak hour. By and large, transit systems tend to have greater ridership in congested corridors. Therefore, forecasts are most useful when converted into peak period data for passenger movements—typically the commuting "rush hour."

Numerous forecasting techniques have emerged, including forecasting by judgment; trend extrapolation; market share models; econometric models such as multiple regression or logit models[83] for trip generation; trip distribution and modal choice analysis; trend projection; and linear, exponential, and logistic curve extrapolation.[84] Nonetheless, forecasting remains an extremely subjective process that can result in widely differing predictions depending on the assumptions made and techniques used.[85]

### 4. Alternatives Analysis, Engineering, and Design

Once the baseline data have been analyzed and growth projected, a Major Investment Study is ordinarily undertaken for major projects.[86] This will assess all the transportation alternatives: (1) doing nothing; (2) highway expansion; (3) bus routes; (4) light rail; (5) commuter rail; (6) bicycle; or (7) pedestrian. With respect to each, cost, community preferences, congestion and delay, technology, alignment (corridors), life style, land use, development, environmental pollution, and environmental justice will be considered.

Once this is completed, the alternative(s) will be selected that satisfies this cost/benefit analysis. Preliminary engineering and design will be performed, and environmental study undertaken, followed by funding and contracting for the project.

It should be emphasized that the foregoing describes the planning process for major projects. The level of planning can vary greatly, and often becomes much more complex if there are negative environmental impacts. Or it can be less complex. For example, fleet procurements are subject to a categorical exclusion, and may forego the elaborate process described above.

### 5. New Starts Planning and Project Development Process

The FTA's "new starts" program supports locally planned, implemented, and operated transit "guideway" capital projects.[87] FTA has developed a New Starts Planning and Project Development Process that requires local agencies to engage in:

- *Alternatives Analysis*—evaluate several modal and alignment options for addressing mobility needs, and select a locally-preferred alternative to implement;
- *Preliminary Engineering*—refine project costs, benefits, and impacts; complete federal environmental studies; and secure local funding commitments; and
- *Final Design*—secure commitment of nonfederal funding; identify rights-of-way to be acquired and utility relocation needed, and develop final construction plans.

FTA must evaluate and approve each step in the process. Once final design has been completed, FTA may enter into a full funding grant agreement [FFGA] with the local agencies, and construction then may begin.[88] "New starts" procedures are discussed in greater detail in Section 4—Transportation Funding and Finance.

### 6. Zoning and Land Use Issues

In an attempt to assure appropriate population density to support transit, and in order to arrest suburban sprawl, which places enormous demands upon transportation resources, many jurisdictions are beginning to address the relationship between transportation planning and land use. Since promulgation of ISTEA, MPOs have begun to focus more strongly on land use and growth boundary issues. Many local governments have adopted zoning ordinances that facilitate development densities to support transit. Some states have passed Growth Management Acts.[89] Zoning is discussed in greater detail in Section 5—Procurement. Some have also effectively used transit oriented development or joint public/private development.[90] In fact, private enterprise participation is encouraged "to the maximum extent feasible" by law.[91]

## E. COOPERATIVE, COMPREHENSIVE, AND CONTINUOUS (3-C) PLANNING

Congress initially mandated that transportation planning be a condition of receiving federal funds in 1962. At that time, Congress also insisted the planning process be continuing, comprehensive, and cooperative (since known as "3-C Planning"). Federal regulations defined "continuing" as requiring periodic reevaluation and updating of the plan. "Comprehensive" planning requires consideration of a variety of factors, including economics; population; land use; transit; travel patterns; terminal and transfer facilities; traffic control;

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[83] Logit models are logistic models used in statistical analysis.

[84] HORONJEFF & MCKELVEY, *supra* note 80.

[85] PAUL S. DEMPSEY ET AL., *supra* note 80, at 35.

[86] *See* 23 U.S.C. § 134 (2003).

[87] 49 U.S.C. § 5309 (2003). TEA-21 authorized $8.44 billion in New Starts funding through 2003.

[88] FTA, THIS IS THE FEDERAL TRANSIT ADMINISTRATION 7-8 (2000).

[89] See D. Brennan Keene, *Transportation Conformity and Land-Use Planning: Understanding the Inconsistencies,* 30 U. RICH. L. REV. 1135 (1996). S. MARK WHITE, THE ZONING AND REAL ESTATE IMPLICATIONS OF TRANSIT-ORIENTED DEVELOPMENT (Transit Coop. Research Program Legal Research Digest No. 12, 1999).

[90] *See, e.g.*, San Diego Metro. Dev. Bd. v. Handlery Hotel, 73 Cal. App. 4th 517 (1999).

[91] 49 U.S.C. § 5306(a) (2003).

zoning; financial resources; and social, environmental and aesthetic issues. The "cooperative" requirement of the 3-C Planning process mandates cooperation between federal, state, and local governmental agencies, as well as between agencies at each level of government. Moreover, empirical research has shown that transportation coordination can result in significant cost reductions per passenger and vehicle hour.[92] So there are practical reasons to faithfully implement the statutory requirements.

Federal law requires that development of plans and programs is to occur on a continuing, cooperative, and comprehensive basis, to a degree dependent upon the complexity of the transportation problems to be addressed.[93] The 3-C process includes four technical phases: (1) collection of data; (2) analysis of data; (3) forecasts of activity and travel; and (4) evaluation of alternatives. ISTEA added intermodalism to the comprehensive dimension of the planning process.

### 1. Cooperative Planning

Even after Congress mandated cooperative transportation planning in 1962, many state highway departments resisted cooperation with local governmental agencies and planning organizations. So in 1970, in order to reaffirm the requirement of "cooperative" transportation planning, Congress required that no transportation project could be constructed unless local officials had been consulted.[94]

The Secretary of Transportation is charged with encouraging MPOs to coordinate the design and delivery of transportation services with all recipients of funding under Title 49 of the U.S. Code (including transit providers), governmental agencies, and nonprofit organizations (and their representatives) that receive governmental assistance from sources other than the DOT to provide nonemergency transportation services for the MPO's metropolitan area.[95]

Federal regulations provide that the responsibilities for cooperatively carrying out transportation planning should be clearly identified in a memorandum of understanding between the MPO and the state and public transit operators.[96] In nonattainment or maintenance areas, where the MPO is not designated as the air quality planning agency under the Clean Air Act,[97] the MPO should have an agreement with the designated air quality agency describing their respective roles in areas of air quality related transportation planning.[98] Ideally, there should be one cooperative agreement containing these understandings between the MPO and state, local transit, and air quality agencies.[99]

Federal regulations provide that the metropolitan transportation planning shall be carried out by the MPO in cooperation with the state and the local transit operator, who shall cooperatively determine their responsibilities in the planning process, the Unified Planning Work Program (UPWP),[100] the transportation plan, and the TIP. The development of the plan and the TIP must also be coordinated with other providers of transportation (e.g., airports and rail freight operators).[101] There must be a proactive public involvement process.[102] The MPO must also involve traffic, ridesharing, parking, transportation safety, and enforcement agencies, commuter rail operators, toll authorities, and where appropriate, private transportation providers, city officials, and environmental resource and permit agencies.[103] The state must cooperatively participate in development of the metropolitan transportation plan.[104] The MPO must approve the metropolitan transportation plan and its periodic updates. The MPO and the Governor must approve the TIP and amendments thereto.[105]

Within the TMA, plans and programs must be based on a continuing and comprehensive transportation planning process carried out by the MPO in cooperation with the state and transit operators.[106] The planning process must include a congestion management system that provides for effective management of new and existing transportation facilities eligible for funding under Titles 23 and 49 of the U.S. Code, through the use of travel demand reduction and operational management strategies.[107]

In general, projects within the TMA are selected from the approved TIP by the MPO designated for the area, in *consultation* with the state and any affected public

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[92] U.S. GAO, TRANSPORTATION COORDINATION: BENEFITS AND BARRIERS EXIST, AND PLANNING EFFORTS PROGRESS SLOWLY (1999).

[93] 23 U.S.C. § 134(a)(4) (2003); 42 U.S.C. § 7504 (2003); 49 U.S.C. § 5303(a)(3) (2003).

[94] Coordination of planning a corridor project must be carried out by the states and MPOs along the corridor and, to the extent appropriate, with transportation planning being carried out by federal land management agencies, by tribal governments, or by government agencies in Mexico or Canada. *National Corridor Planning and Development Program,* Pub. L. No. 105-178, tit. I, Subtit. A, § 1118(f), 112 Stat. 161 (1998).

[95] 49 U.S.C. § 5303(e)(4) (2003).

[96] 23 C.F.R. § 450.310(a)(b) (2003).

[97] 42 U.S.C. § 7504 (2003).

[98] 23 C.F.R. § 450.310(c) (2003).

[99] 23 C.F.R. § 450.310(d) (2003).

[100] UPWPs discuss the planning priorities facing the metropolitan planning area, transportation related air quality planning activities anticipated within the next 1- or 2-year period, and activities to be performed with federal funds. 23 C.F.R. § 450.314(a) (2003). *See* Southwest Williamson Community Ass'n v. Slater, 243 F.3d 270 (6th Cir. 2001).

[101] 23 C.F.R. § 450.312(a) (2003).

[102] 23 C.F.R. § 450.316(b) (2003).

[103] 23 C.F.R. § 450.316(b)(4)(5) (2003).

[104] 23 C.F.R. § 450.312(h) (2003).

[105] 23 C.F.R. § 450.312(b) (2003).

[106] 23 U.S.C. § 134(i)(2) (2003); 49 U.S.C. § 5305(b) (2003).

[107] 23 U.S.C. § 134(i)(3) (2003); 49 U.S.C. § 5305(c) (2003).

transit operator.[108] The exception to this rule is that National Highway System projects and bridge program projects within the TMA are selected by the state in *cooperation* with the MPO.[109] The term "consultation" suggests sharing information, while "cooperation" suggests achieving consensus. All selected projects must comply with the established priorities of the TIP for the area.[110] These requirements help ameliorate the problem that emerged in many regions where priorities developed based on established planning criteria in a detailed planning process could be disregarded by politicians participating in the MPO process on the basis of political considerations or expediency. These newer requirements better ensure that projects are developed in accordance with proven planning criteria, and ranked based on established criteria.

In nonattainment or maintenance areas, the MPO must coordinate development of the transportation plan with the State Implementation Plan (SIP)[111] development process, and develop transportation control measures.[112] The MPO may not approve a transportation plan or program that does not conform with the SIP.[113]

### 2. Comprehensive Planning

Federal funds must only be used to support balanced and comprehensive transportation planning that considers the relationships among land use and all transportation modes.[114] The content of the plans and programs for each metropolitan area must provide for the development, integration, and management of all forms of transportation, allowing the metropolitan transportation system to function as an integral part of an intermodal transportation system serving the metropolitan area, the state, and the United States.[115]

During the planning process, an MPO must consider projects and strategies that serve the following objectives:

- Support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;
- Increase the safety and security of the transportation system for motorized and nonmotorized users;
- Increase the accessibility and mobility options available to people and for freight;
- Protect and enhance the environment, promote energy conservation, and improve quality of life;
- Enhance the integration and connectivity of the transportation system, and across and between modes, for people and freight;
- Promote efficient system management and operation; and
- Emphasize the preservation of the existing transportation system.

Failure to consider these factors, however, is not reviewable by any court in any matter affecting a transportation plan, a TIP, a project strategy, or the certification of the planning process.[116]

Both pedestrian and bicycle transportation are emphasized as alternatives to transportation by automobile. MPOs must give due consideration to these alternate forms in creating comprehensive transportation plans. Where appropriate, such plans and projects must include safety measures, such as contiguous routes for bicyclists and pedestrians and audible traffic signs and signals at street crossings.[117]

The following factors must be explicitly considered in all planning process products:

1. Preservation of existing transportation facilities and use of existing facilities more efficiently;
2. Energy conservation;
3. The need to relieve congestion and prevent congestion from occurring;[118]
4. The effect of transportation policy decisions on land use and development;
5. Transportation enhancement activities;[119]
6. The effects of all transportation projects to be undertaken within the metropolitan planning area;
7. International border crossings and access to ports, airports, intermodal transport facilities, freight distribution routes, national parks, recreational areas, monuments, historical sites, and military installations;
8. Connectivity of roads within the metropolitan planning area with those outside it;
9. Transportation needs identified through the use of management systems;[120]
10. Preservation of rights-of-way to meet future transportation needs;
11. Efficient movement of freight;
12. The use of life-cycle costs in the design and engineering of bridges, tunnels, and pavement;
13. The overall social, economic, energy, and environmental effects of transportation decisions;[121]
14. Expansion, enhancement, and increased use of transit services;
15. Security in transit systems; and

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[108] 23 U.S.C. § 134(i)(4)(A) (2003); 49 U.S.C. § 5305(d)(1)(A) (2003).

[109] 23 U.S.C. § 134(i)(4)(B) (2003); 49 U.S.C. § 5305(d)(1)(B) (2003).

[110] 49 U.S.C. § 5305(d)(2) (2003).

[111] *See, e.g.,* Council of Commuter Organizations v. Thomas, 799 F.2d 879 (2d Cir. 1986); Action for Rational Transit v. West Side Highway Project*,* 699 F.2d 614 (2d Cir. 1983).

[112] 23 C.F.R. § 450.312(c) (2003).

[113] 23 C.F.R. § 450.312(d) (2003); 40 C.F.R. pt. 51 (2003).

[114] 49 U.S.C. § 5303(h) (2003).

[115] 23 U.S.C. §§ 134(a)(3), 217(g)(1) (2003); 49 U.S.C. § 5303(a)(2) (2003).

[116] 23 U.S.C. § 134(f) (2003); 49 U.S.C. § 5303(b) (2003); TEA-21, Pub. L. No. 105-178 (1998).

[117] 23 U.S.C. § 217(g)(1)(2) (2003).

[118] To be considered are congestion management strategies that improve the mobility of people, and in TMAs, a congestion management system that reduces travel demand.

[119] *See* 23 U.S.C. § 133 (2003).

[120] *See* 23 U.S.C. § 303 (2003).

[121] *See* 23 U.S.C. § 109(h) (2003); 49 U.S.C. § 1610 (2003); 49 U.S.C. § 303 (2003); 42 U.S.C. § 7504(b) (2003).

16. Recreational travel and tourism.[122]

### 3. Intermodal Transportation Planning

Early federal funding of transit was largely an effort to prop up and revive failing transit systems, whose fare box revenues and ridership levels were insufficient to cover fully allocated costs. With ISTEA, "comprehensive planning" now includes a requirement that fostering all transport modes and intermodal connectivity must be an integral part of the transportation planning process.

In the Transportation Act of 1940, Congress set forth a Statement of National Transportation Policy, which included an obligation that the ICC (which then regulated the surface modes of transportation) shall "provide for a fair and impartial regulation of all modes of transportation…all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States…."[123] Though Congress would embrace intermodal facilitation as an important policy goal in several subsequent legislative acts, and consolidate all the modes into a single Department of Transportation in 1967, several decades would pass before intermodalism would take center stage in national policy.[124]

ISTEA provided enhanced flexibility for state and local governments to redirect highway funds to accommodate other modes and modal connections.[125] In ISTEA's legislative history, Congress concluded:

> An intermodal transportation system…to enhance efficiency will be the key to meeting the economic, energy and environmental challenges of the coming decades. The nation will not be able to meet all of those demands through continued reliance on separate, isolated modes of transportation.
>
> Development of an intermodal transportation system will result in increased productivity growth the nation needs to compete in the global economy of the 21st Century. We can no longer rely on a transportation system designed for the 1950s to provide the support for American industry to compete in the international marketplace.126

By placing the word "intermodal" (as opposed to the historical "highway" term) in the title of the bill, Congress sought "to bring the need for intermodalism to the forefront of the nation's transportation and economic debate."[127] TEA-21[128] reaffirms and retains the intermodal emphasis of ISTEA, with a requirement that transportation planning, *inter alia,* "Enhance the integration and connectivity of the transportation system, across and between modes, for people and freight."

Congress has declared that among the transportation policies of the United States is "to encourage and promote development of a national intermodal transportation system…to move people and goods in an energy-efficient manner, provide the foundation for improved productivity growth, strengthen the Nation's ability to compete in the global economy, and obtain the optimum yield from the Nation's transportation resources." [129] Congress created the U.S. Department of Transportation to "make easier the development and improvement of coordinated transportation service…."[130] The Secretary of Transportation is required to coordinate federal policy on intermodal transportation, and promote creation and maintenance of an efficient U.S. intermodal transportation system.[131] He is also obliged to consult with the heads of other federal agencies to establish policies "consistent with maintaining a coordinated transportation system…."[132]

Among the aviation statutes is a recognition that it is the policy of the United States "to develop a national intermodal transportation system that transports passengers and property in an efficient manner."[133] Congress has declared that,

> A national intermodal transportation system is a coordinated, flexible network of diverse but complimentary forms of transportation that transports passengers and property in the most efficient manner. By reducing transportation costs, these intermodal systems will enhance the ability of the industry of the United States to compete in the global marketplace.134

Further, Congress has recognized that,

> An intermodal transportation system consists of transportation hubs that connect different forms of appropriate transportation and provides users with the most efficient means of transportation and with access to commercial centers, business locations, population centers, and the vast rural areas of the United States, as well as providing links to other forms of transportation and intercity connections.135

The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century amended this provision to provide for the encouragement and development "of intermodal connections on airport property between aeronautical and other transportation modes to serve air transportation passengers and cargo efficiently and

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[122] 23 C.F.R. § 450.316(a)(16) (2003).

[123] 49 U.S.C. § 13101(a)(2) (2003).

[124] An Interagency Committee on Intermodal Cargo was created in 1973 to coordinate the activities of the DOT, ICC, CAB, and FMC on intermodal issues.

[125] Though ISTEA emphasized a national policy of promoting a seamless system of intermodal transportation, facilitation of intermodalism may be proceeding sluggishly in certain regions.

[126] Intermodal Surface Transportation Efficiency Act of 1991, Conference Report, H.R. 2950 No. 404, 102d Cong. (Nov. 27, 1991).

[127] *Id*.

[128] Pub. L. No. 105-178.

[129] 49 U.S.C. § 302(e) (2003).

[130] 49 U.S.C. § 101(b)(2) (2003).

[131] 49 U.S.C. § 301(3) (2003).

[132] 49 U.S.C. § 301(7) (2003).

[133] 49 U.S.C. § 47101(b)(1) (2003).

[134] 49 U.S.C. § 47101(b)(3) (2003).

[135] 49 U.S.C. § 47101(b)(5) (2003).

effectively and promote economic development."[136] Congress also has decided that the United States "must make a national commitment to rebuild its infrastructure through development of a national intermodal transportation system."[137]

In ISTEA, Congress set forth a detailed national policy to establish a National Intermodal Transportation System "that is economically efficient and environmentally sound, provides the foundation for the United States to compete in the global economy, and will move individuals and property in an energy efficient way."[138] The National Intermodal Transportation System shall:

- "consist of all forms of transportation in a unified, interconnected manner…to reduce energy consumption and air pollution while promoting economic development and supporting the United States' preeminent position in international commerce";[139]
- include the Interstate highway system and the principal arterial roads;[140]
- include public transportation;[141]
- provide improved access to seaports and airports;[142]
- give special emphasis to the role of transportation in increasing productivity growth;[143]
- give "increased attention to the concepts of innovation, competition, energy efficiency, productivity, growth and accountability";[144]
- be adapted to new technologies wherever feasible and economical, giving special emphasis to safety considerations;[145] and
- be the centerpiece of a national investment commitment to create new national wealth.[146]

All DOT employees are required to be given a copy of the National Intermodal Transportation System Policy, and it is required to be posted prominently in all offices of the Department.[147]

In the Amtrak Reform and Accountability Act of 1997, Congress declared that, "intercity rail passenger service is an essential component of a national intermodal passenger transportation system," and that Amtrak and intercity bus providers should work together to "develop coordinated intermodal relationships promoting seamless transportation services which enhance travel options and increase operating efficiencies."[148] Amtrak provides commuter rail service on behalf of several states.

The states' long-range 20-year transportation plan must provide for the development and implementation of the intermodal transportation system of the state.[149] The Secretary of Transportation shall make grants to the states to develop model state intermodal transportation plans, which shall include systems for collecting data related to intermodal transportation.[150] States are required to allocate up to 2 percent of federal highway appropriations to planning and research of, *inter alia*, "highway, public transportation, and intermodal transportation systems."[151] Emphasizing the importance of highway, public transport, and intermodal systems, Congress mandated that not less than 25 percent of such funds expended by the state shall be devoted to research and development of these systems.[152] In ISTEA, Congress also required DOT to promulgate regulations for state development, establishment, and implementation of a system for managing its intermodal transportation facilities and systems.[153] A state's intermodal management system "shall provide for improvement and integration of all of a state's transportation systems and shall include methods of achieving the optimum yield from such systems, methods for increasing productivity in the state, methods for increasing use of advanced technologies, and methods to encourage the use of innovative marketing techniques, such as just-in-time deliveries.[154]

### 4. Continuous Planning

As is explained in the next section, federal law requires that MPOs, in cooperation with the states, transit operators, and the public, prepare and update their TIP at least every 2 years, as well as their 20-year long-range plan. The states are required to prepare plans and programs along the same time horizons, and to update them periodically.

## F. TYPES OF PLANS

MPOs are charged with developing, or assisting in the development of, a number of different transportation plans. These include the long-range plan, the TIP, the SIP, plans for a TMA, transportation control measures (TCMs), national corridor project plans, and other project plans. The state must also produce a statewide transportation plan, and a STIP, into which the TIP must be incorporated. Before approving these plans, citizens, affected public agencies, transit unions, freight shippers and carriers, private transportation providers,

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[136] 106 Pub. L. 106-181; 114 Stat. 61 (137)(a)(5) (Apr. 5, 2000).

[137] 49 U.S.C. § 47171(b)(8).

[138] 49 U.S.C. § 5501(a) (2003).

[139] 49 U.S.C. § 5501(b)(1) (2003).

[140] 49 U.S.C. § 5501(b)(2) (2003).

[141] 49 U.S.C. § 5501(b)(3) (2003).

[142] 49 U.S.C. § 5501(b)(4) (2003).

[143] 49 U.S.C. § 5501(b)(5) (2003).

[144] 49 U.S.C. § 5501(b)(6) (2003).

[145] 49 U.S.C. § 5501(b)(7) (2003).

[146] 49 U.S.C. § 5501(b)(9) (2003).

[147] 49 U.S.C. § 5501(c) (2003).

[148] Pub. L. 105-134 (Dec. 2, 1997), 111 Stat. 2570.

[149] 23 U.S.C. § 135(e)(1) (2003).

[150] 49 U.S.C. § 5504(a) (2003).

[151] 23 U.S.C. § 505(a)(5) (2003).

[152] 23 U.S.C. § 505(b)(1) (2003).

[153] 23 U.S.C. § 303(a) (2003).

[154] 23 U.S.C. § 303(e) (2003). Paul S. Dempsey, *The Law of Intermodal Transportation: What it Was, What it Is, What it Should Be,* 27 TRANSP. L.J. 367 (2000).

and other interested parties must be given a reasonable opportunity to comment.[155] The plans and programs must also be developed in cooperation with the state, the MPO, and the local transit provider.[156] The local transit provider must engage in project selection in cooperation with the MPO.[157]

It may be useful to think of it as a three-step process: (1) the preparation (by the state and the MPO) of a long-term 20-year Plan; (2) the preparation of a short-term Program; and (3) the implementation of the foregoing through implementation of a Project.[158] Planning does not stop with the completion of a Plan or a Program; periodic assessment and updating are required.

### 1. Long-Range (20-Year) Transportation Plans

Each MPO must prepare, and update periodically as determined by the Secretary of Transportation, a long-range plan for its metropolitan area, with a minimum 20-year forecast period.[159] Federal regulations require that the metropolitan transportation planning process include a long-term transportation plan addressing at least a 20-year planning horizon, including both short- and long-range strategies leading to the development of an integrated intermodal system that facilitates the efficient movement of goods and people. The MPO must consider the seven general planning objectives described above.[160] Taking these factors into account, the long-term plan must, at a minimum, contain the following:[161]

- Identification of transportation facilities that function as an integrated metropolitan transportation system, emphasizing those facilities that serve important national and regional transportation functions. In formulating this plan, the objectives listed in the following section must be observed as they relate to a 20-year forecast period.
- A financial plan that shows how the long-range plan can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan, and recommends additional financing strategies for needed projects and programs. The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted long-range plan if reasonable additional resources beyond those identified were available.[162] The MPO and the state must cooperatively develop the estimated funds available to support the plan.[163]
- Assess capital investment and other measures necessary to (1) ensure the preservation of the existing metropolitan transportation system, including requirements for operational improvements, resurfacing, restoration, and rehabilitation of existing and future major roadways, and (2) ensure the operation, maintenance, modernization, and rehabilitation of existing and future transit facilities.
- Indicate as appropriate proposed transportation enhancement activities.
- Identify transportation strategies necessary (1) to ensure preservation, including requirements for management, operation, modernization, and rehabilitation, of the existing and future transportation system; and (2) to use existing transportation facilities most efficiently to relieve congestion, to efficiently serve the mobility needs of people and freight, and to enhance access within the metropolitan planning area.[164]

The regulations require that the long-term plan must:

1. Identify projected demand;
2. Identify adopted congestion management strategies;
3. Identify pedestrian walkway and bicycle transportation facilities;[165]
4. Identify SOV projects that result from a congestion management system;[166]
5. Assess capital investment and other measures necessary to preserve the existing transportation system and make the most efficient use of existing transportation facilities to relieve vehicular congestion and enhance the mobility of people and goods;
6. Identify proposed improvements in sufficient detail to develop cost estimates;[167]
7. Reflect a multimodal evaluation of the transportation, socioeconomic, and financial impact of the overall plan;
8. Identify the major transportation investments for which analyses are not yet complete;
9. Reflect the area's comprehensive long-range land use plan;
10. Indicate proposed transportation enhancement activities;[168] and
11. Include a financial plan that demonstrates consistency of the transportation plan with available and projected sources of revenue.[169]

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[155] 49 U.S.C. §§ 5303(f)(4), 5304(d) (2003).

[156] 49 U.S.C. § 5305(b) (2003).

[157] 49 U.S.C. § 5304(c)(1)(B) (2003).

[158] SARAH J. SIWEK ET AL., STATEWIDE TRANSPORTATION PLANNING UNDER ISTEA: A NEW FRAMEWORK FOR DECISIONMAKING (1996).

[159] 23 U.S.C. §§ 134(f), 135(e); 49 U.S.C. § 5303(b), (f)(2); TEA-21, Pub. L. No. 105-178 (1998).

[160] 49 U.S.C. § 5303(f)(2) (2003).

[161] 23 U.S.C. § 134(g)(2) (2003); 49 U.S.C. § 5303(f)(1) (2003).

[162] A state or MPO will not be required to select any project from the illustrative list of projects should additional resources become available. 23 U.S.C. § 134(g)(6) (2003); 49 U.S.C. § 5303(f)(6) (2003).

[163] 49 U.S.C. § 5303(f)(2) (2003).

[164] 23 U.S.C. § 134(g)(2)(C) (2003); 49 U.S.C. § 5303(f)(1)(C) (2003).

[165] *See* 23 U.S.C. § 217(g) (2003).

[166] *See* 23 C.F.R. 500.109 (2003).

[167] In nonattainment and maintenance areas, additional requirements are imposed to assure conformity with 40 C.F.R. pt. 51 (2003).

[168] *See* 23 U.S.C. § 101(a)(3)(H)(35) (2003).

[169] 23 C.F.R. § 450.322(b)(ii) (2003).

In metropolitan areas that are in nonattainment for ozone or carbon monoxide under the Clean Air Act, the MPO must coordinate the development of the long-range transportation plan with the process for development of the TCMs of the SIP (a requirement of the Clean Air Act).[170] In nonattainment and maintenance areas for transportation related pollutants, the MPO, FHWA, and FTA must make a Clean Air Act conformity determination of any new or revised plan.[171]

During both the process of formulation and prior to approval of the long-range plan, each MPO must provide all interested parties and citizens with a reasonable opportunity to comment on the plan.[172] Each plan prepared by an MPO must be published or otherwise made available for public review and must be submitted to the Governor.[173]

The plan should be reviewed and updated at least triennially in nonattainment areas and every 5 years in attainment areas to confirm its validity and its consistency with current and projected transportation and land use conditions and trends during the forecast period. After an adequate opportunity for public official and citizen involvement in the development of the plan,[174] it must be approved by the MPO.[175]

### 2. Transportation Improvement Program

In cooperation with the state and any affected public transportation operator, MPOs must develop a TIP for their designated metropolitan area.[176] The plan must be consistent with the long-range transportation plan[177] and include funding estimates reasonably expected to be available to support TIP implementation.[178] The TIP must be updated at least once every 2 years, and be approved by both the MPO and the Governor.[179] As with the long-term transportation plan, citizens and all interested parties must be afforded the reasonable opportunity to comment on the proposed TIP.[180]

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[170] 23 U.S.C. § 134(g)(3) (2003); 49 U.S.C. § 5303(f)(3) (2003).

[171] 23 C.F.R. § 450.322(d) (2003); *see* 40 C.F.R. pt. 51.

[172] 23 U.S.C. § 134(g)(4) (2003); 49 U.S.C. § 5303(f)(4) (2003).

[173] 23 U.S.C. § 134(g)(5)(ii) (2003); 49 U.S.C. § 5303(f)(5) (2003).

[174] 23 C.F.R. § 450.322(c) (2003).

[175] 23 C.F.R. § 450.322(a) (2003).

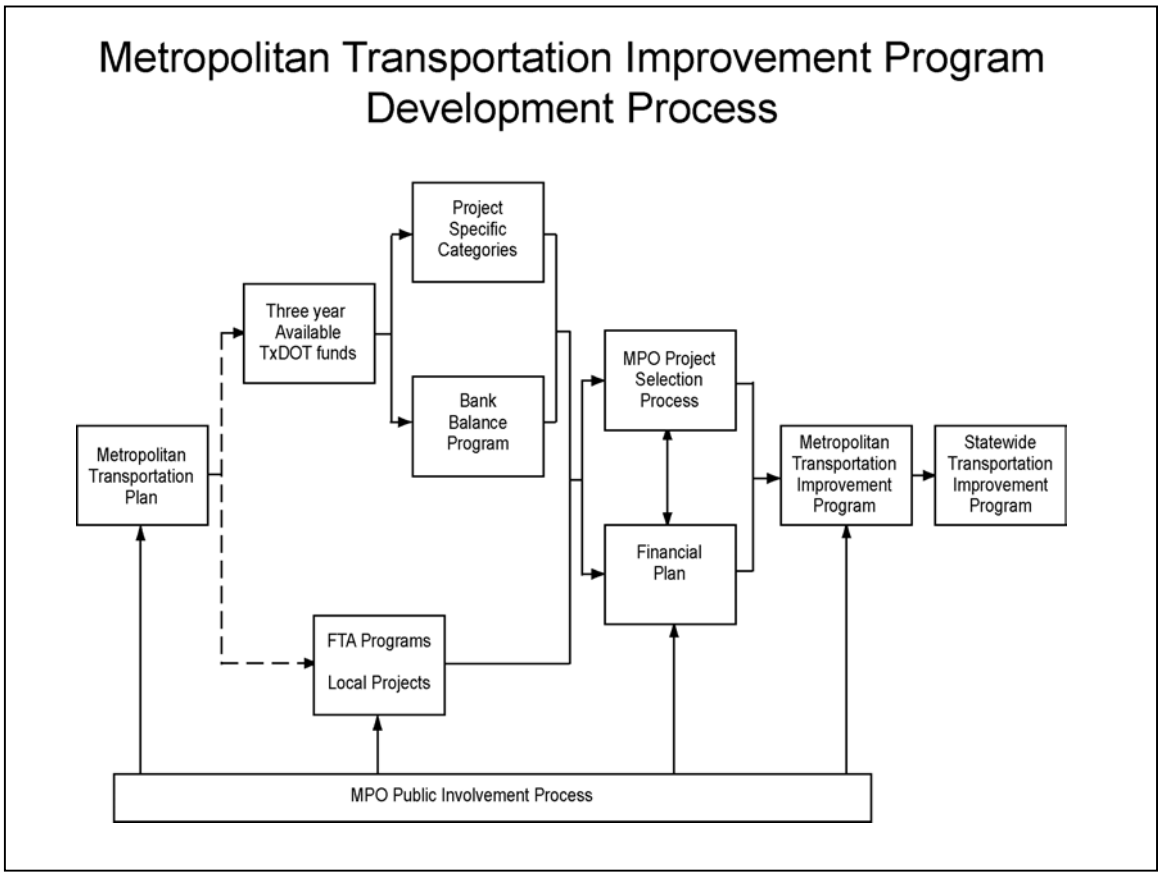
[176] 23 U.S.C. §§ 134(h)(1)(A), 135(f)(1)(B) (2003); 49 U.S.C. § 5304(a)(1) (2003).

[177] 23 U.S.C. § 134(h)(3)(C) (2003); 49 U.S.C. § 5304(c)(2)(A) (2003).

[178] 23 U.S.C. § 134(h)(1)(C) (2003); 49 U.S.C. § 5304(a)(2), (c)(2)(B) (2003).

[179] 23 U.S.C. § 134(h)(1)(D) (2003); 49 U.S.C. § 5304(a)(1) (2003). In cooperation with the state and local transit provider, the MPO must prepare a transportation improvement plan (TIP) for the metropolitan planning area. 23 C.F.R. § 450.324(a) (2003). The TIP shall cover a period of at least 3 years. 23 C.F.R. § 450.324(d) (2003). It must be updated at least every 2 years, and be approved by the MPO and the Governor.

[180] 23 U.S.C. § 134(h)(1)(B), (h)(4) (2003); 49 U.S.C. § 5304(a)(1), (d) (2003). "Interested parties" include the following: citizens, affected public agencies, representatives of transportation agency employees, private providers of transportation, and other interested parties.




The TIP must include the following:

- A priority list of proposed federally supported projects, parts of projects, and strategies to be carried out within each 3-year period after the initial adoption of the TIP; and
- A financial plan that (1) demonstrates how the TIP can be implemented; (2) indicates resources from public and private sources that are reasonably expected to be available to carry out the program; (3) identifies innovative financing techniques to finance projects, programs, and strategies; and (4) may include, for illustrative purposes, additional projects that would be included in the approved TIP if reasonable additional resources beyond those identified in the financial plan were available.[181]

[181] 23 U.S.C. § 134(h)(2); 49 U.S.C. § 5304(b) (2003). The applicable regulations require that the TIP include the following:

1. All transportation projects or phases thereof within the metropolitan area proposed for federal highway or transit funding;

2. Only projects that are consistent with the long-term transportation plan;

3. All regionally significant transportation projects for which FHWA or FTA approval is required, whether or not federally funded;

4. In nonattainment and maintenance areas, all regionally significant transportation projects not covered above; and

5. For each project above, sufficient descriptive material to identify the project or phase; the estimated total cost; the amount of federal funds proposed to be obligated in each year; the agency or agencies to be responsible for carrying it out; the projects that are identified as TCMs in nonattainment or maintenance areas; also in nonattainment or maintenance areas, project description in sufficient detail to permit EPA air quality analysis; and projects that will implement Americans with Disabilities Act-required paratransit and key station plans.

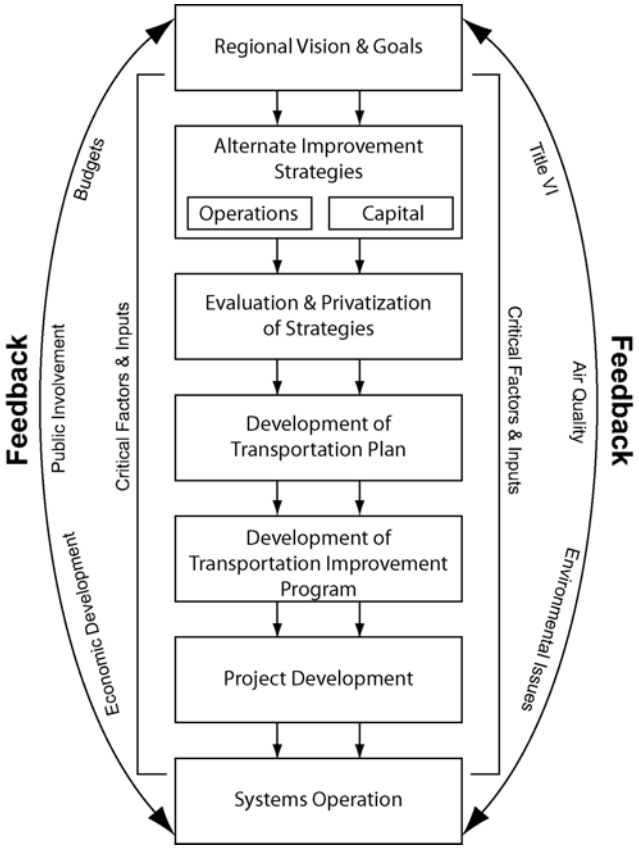
23 C.F.R. § 450.324(f)-(h) (2003). TIPs must also:

1. Identify the criteria and process for prioritizing implementation of the elements of the transportation plan for inclusion in the TIP and any changes in priorities from prior TIPs and reasons therefor;

2. List major projects included in the previous TIP that were implemented as well as any significant delays in their implementation; and

3. In nonattainment and maintenance areas, list the progress in implementing required TCMs, including reasons for significant delays and strategies for ensuring their completion as soon as possible, as well as a list of all projects found to conform in previous TIPs and that are a part of the base case for air quality conformity analysis.

23 U.S.C. § 134(h)(3)(A) (2003). The rules differ from the statute for, at the time this research was done, the rules were left over from the days of ISTEA, and new TEA-21 regulations had not been promulgated.




Projects designated in the TIP include all projects and strategies within the area proposed for funding under chapter 1 of Title 23 and chapter 53 of Title 49 of the U.S. Code. Individual projects may be funded under chapter 2 of Title 23, however, if they are determined to be regionally significant or if identified in the TIP.[182] Only those projects for which full funding can reasonably be expected shall be listed in the TIP.[183]

The TIP must be financially constrained by year, and include a financial plan that specifies which projects can be implemented using available revenue, and which are to be implemented using projected revenue sources. The state and local transit provider shall cooperate with the MPO in developing the financial plan, and provide the MPO with estimates of available state and federal funds. Only those projects for which construction and operating fund availability can reasonably be anticipated may be included in the TIP. For transit systems without a dedicated funding source, this requirement raises difficult issues of how to prove sufficient operating funds for a large or long-term capital project. For transit funding, the federal share may not exceed levels of funding committed to the area in the first year of the TIP, and in subsequent years, may not exceed funds committed or reasonably expected to be available to the area.[184] In nonattainment and maintenance areas, projects included in the first 2 years of the TIP must have funds available or committed.[185]

Selection of federally-funded projects in metropolitan areas listed in the TIP shall be carried out in cooperation with the MPO by the state, if funded under Title 23, or by the designated transit funding recipients, if funded under Title 49 of the U.S. Code.[186] Modification of the priority list may be made at any time.[187] A state or an MPO will not be required to choose a project from the illustrative list should additional funds become available, but if the state or MPO does wish to add a project from that list, approval must be obtained from the Secretary of Transportation.[188] The DOT Secretary is not obligated to approve a project added by the state or the MPO.

The MPO must publish, or make otherwise publicly available, the TIP. Additionally, the MPO must publish an annual listing of projects for which federal funds have been obligated in the preceding year. That list must be consistent with the categories identified in the TIP.[189]

Section 176(c) of the Clean Air Act places additional statutory requirements regarding air quality conformity

[182] 23 U.S.C. § 134(h)(3)(B) (2003); 49 U.S.C. § 5304(c)(6) (2003).

[183] 23 U.S.C. § 134(h)(3)(D) (2003).

[184] 23 C.F.R. § 450.324(m) (2003).

[185] 23 C.F.R. § 450.324(e) (2003).

[186] 23 U.S.C. § 134(h)(5)(A) (2003); 49 U.S.C. § 5304(c)(1) (2003).

[187] 23 U.S.C. § 134(h)(5)(B) (2003); 49 U.S.C. § 5304(c)(3) (2003).

[188] 23 U.S.C. § 134(h)(6) (2003); 49 U.S.C. § 5304(c)(4) (2003).

[189] 23 U.S.C. § 134(h)(7) (2003); 49 U.S.C. § 5304(c)(5) (2003).

on both the long-range plan and the TIP.[190] Once approved by the MPO and the Governor, the TIP is included in the STIP without modification, unless the TIP covers a nonattainment or maintenance area. The MPO cannot adopt the TIP unless it makes a conformity designation.[191] The TIP becomes part of the STIP only after a conformity finding by the FHWA and FTA.[192] The frequency and cycle of the TIP process must be compatible with the STIP development and approval process. A copy of the TIP must be submitted to the FHWA and FTA, though neither federal agency need approve the TIP.[193] However, the FHWA and FTA must jointly find that the TIP is based on a continuing, comprehensive transportation process carried out cooperatively by the MPO, the state, and the local transit operator.[194] In nonattainment or maintenance areas, the FHWA and FTA, as well as the MPO, must also jointly conclude that the TIP conforms with the adopted SIP and that priority has been given to the timely implementation of TCMs contained in the SIP.[195] The process for TIP preparation must provide a reasonable opportunity for public comment, and in nonattainment TMAs, an opportunity for at least one formal public hearing. Both the proposed and final TIP must be published or otherwise made readily available to the public.[196]

### 3. Unified Planning Work Programs

In TMAs, the MPO, in cooperation with the state and local transit operator, must develop UPWPs that discuss the planning priorities facing the metropolitan planning area, transportation related air quality planning activities anticipated within the next 1- or 2-year period, and activities to be performed with federal funds.[197] In areas not designated as TMAs, the MPO, in cooperation with the state and the local transit provider, and with the approval of the FHWA and FTA, may prepare a simplified statement of work submitted as part of the statewide planning work program, in lieu of a UPWP.[198]

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[190] *See, e.g.,* EDF v. EPA, 82 F.3d 541 (D.C. Cir. 1996), and Atlanta Coalition on Transp. Crisis v. Atlanta Regional Comm'n, 599 F.2d 1333 (5th Cir. 1979).

[191] Conformity requires that no program 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.

[192] 23 C.F.R. § 450.328(a) (2003).

[193] 23 C.F.R. § 450.324(b) (2003).

[194] 23 C.F.R. § 450.330(a) (2003).

[195] 23 C.F.R. § 450.330(b) (2003); *see* 40 C.F.R. pt. 51 (2003).

[196] 23 C.F.R. § 450.324(c) (2003).

[197] 23 C.F.R. § 450.314(a) (2003).

[198] 23 C.F.R. §§ 450.314(d), 450.316(c) (2003).


**4. Statewide Transportation Plan**

Each state must carry out an intermodal statewide transportation planning process, including the development of a STIP and TIP that facilitate the efficient, economic movement of people and goods in all areas of the state.[199] The STIP should provide a long-term (at least 20-year) vision of the state's transportation system.[200] It should be linked to the economic goals and environmental objectives of the state. It should be coordinated with all modes and transportation providers, identify the existing and desired linkages between modes, and address existing gaps in connections.[201] It should emphasize managing existing assets.[202] Its preparation should include public input. It should be realistic and financially sound.[203] In *Environmental Defense Fund v. Environmental Protection Agency,* the D.C. Circuit provided a succinct summary of these requirements:

> Under 23 U.S.C. § 135 (1994), states must prepare statewide transportation plans and improvement programs similar to those required of metropolitan planning organizations. The [DOT] transportation regulations require that metropolitan planning organization's transportation plans and programs conform to the relevant SIP, but do not require conformity determinations for state transportation plans or programs…. Petitioners challenge the exclusion of state transportation planning from the Clean Air Act's conformity requirements, arguing that the Agency has improperly circumscribed a broad statutory provision. Section 176(c)(2), after all, requires conformity determinations to be made for "any transportation plan or program."
>
> We agree with the Agency that it reasonably defined "transportation plan or program" to be only those plans or programs adopted by metropolitan planning organizations and that not requiring state plans or programs to conform in no way works to reduce the protections afforded air quality under the statute. A state transportation plan or program must include the plans or improvement programs adopted by metropolitan planning organizations within that state. Before any plan or improvement program can be included in the state's plan or program, it must be found by the relevant metropolitan planning organization to conform to the SIP. A state may well include both areas that have and areas that have not attained the national ambient air quality standards. The conformity requirements, however, apply only to nonattainment areas. The Agency concluded, therefore, that little was to be gained by requiring state plans and programs to conform. An area inside a state that was covered by the conformity rules—a nonattainment area—and contained a metropolitan planning organization would necessarily already have a conforming plan or improvement program…. We further agree with the Agency that the information yielded by conformity determinations at the state level is of minimal additional value—we are told, and petitioners do not dispute, that analyses for purposes

[199] 23 U.S.C. § 135 (2003), and Sections 3, 5, 8, 9, and 26 of the Federal Transit Act, 49 U.S.C. §§ 1602, 1604, 1607, 1607a, and 1622 (2003), since recodified under Chapter 53 of Title 49, U.S.C., 23 C.F.R. pt. 450, subpt. B (1999); 49 C.F.R. § 613.200 (2003); 58 Fed Reg. 58079 (Oct. 28, 1993).

[200] 49 U.S.C. §§ 5303, 5304, 5305, and 5323(1) (2003).

[201] States are encouraged to develop model intermodal transportation plans. 49 U.S.C. § 5504 (2003).

[202] Management and monitoring systems are set forth in Joint FHWA/FTA Regulations, 23 C.F.R. pt. 500 (2003), and 49 C.F.R. pt. 614 (2003).

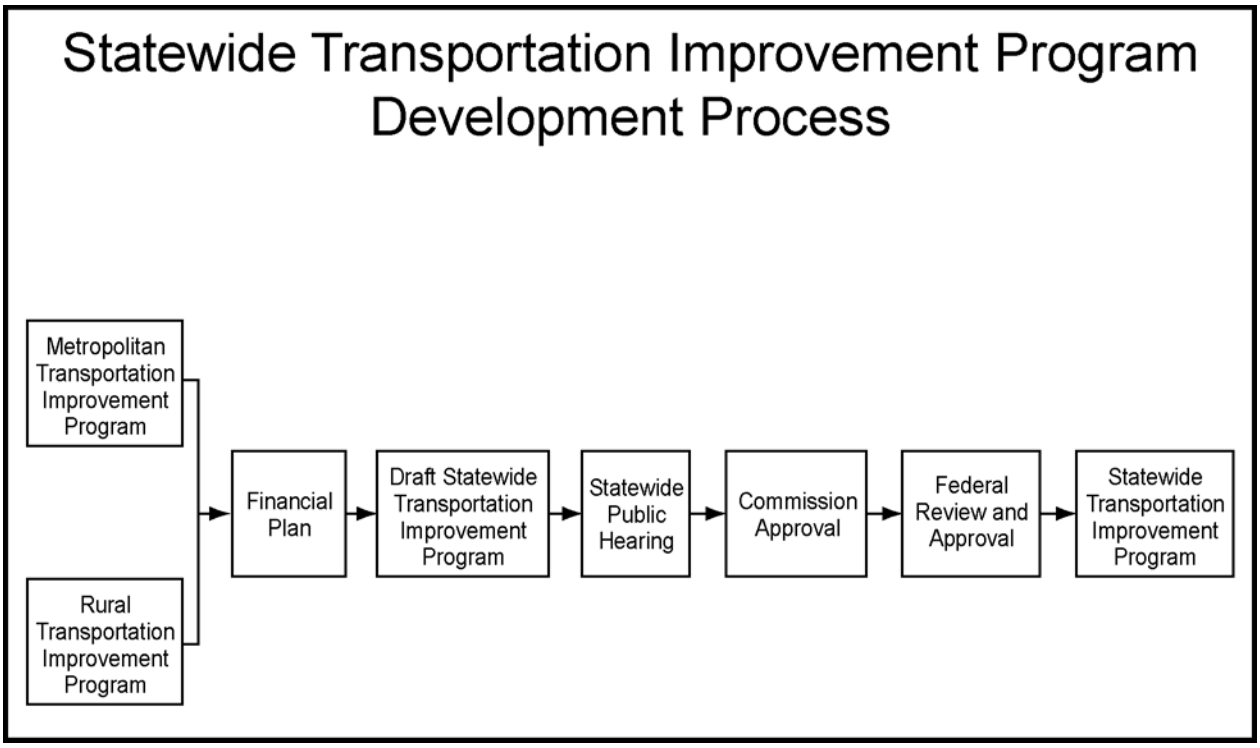
[203] Planning assistance and standards are identified in Joint FHWA/FTA Regulations, 23 C.F.R. pt. 450 (2003), and 49 C.F.R. pt. 613 (2003).

of determining conformity are performed by region, not by state.[204]

### 5. Statewide Transportation Improvement Program

The STIP is a complete list and description of all FTA/FHWA-funded projects for the forthcoming 3-year period (projects beyond 3 years may be included for informational purposes only). STIP projects must be consistent with the statewide plan. Each state must submit its STIP to the FTA and FHWA for joint approval at least every 2 years, though amendments may be submitted at any time.

[204] EDF v. EPA, 82 F.3d 451, 460–61 (D.C. Cir. 1996) [citations omitted].




The STIP should include all capital and non-capital (such as transit operations) projects, or phases of projects, designated to use FTA or FHWA funding. It must also include all regionally significant transportation projects[205] requiring federal approval or permits that do not involve federal funding. The public must have an opportunity to participate in STIP development. The STIP must be financially constrained by year — it must identify the source of funding for new projects while ensuring the continued operation and maintenance of the existing transportation system.[206]

## G. AIR QUALITY CONFORMITY REQUIREMENTS

Air quality conformity is an important part of the planning process, for designation as "nonattainment" results in a more complex set of statutory and regulatory requirements for a region, and may result in a loss of federal funds. Moreover, once a plan or program commits to build or expand the transit system in order to meet air quality attainment requirements, these commitments may be judicially enforceable.[207] The relevant environmental issues such as these are sufficiently complex that they are discussed in their own Section, Section 3—"Environmental Law." The reader is advised to view Sections 2 and 3 as companions in identifying the full panoply of planning requirements.

## H. NATIONAL AND INTERNATIONAL PLANNING

An MPO will be involved with national planning to the extent that it is involved with the maintenance and improvement of the Interstate Highway System and in planning corridors to promote economic growth and interregional trade. On an international level, those

[205] A regionally significant project is defined as a project on a facility that serves regional transportation needs.

[206] *Supra* note 159.

[207] *See* McCarthy v. City of Tucson, 27 F.3d 1363 (9th Cir. 1994).

MPOs lying on the border areas with Canada or Mexico are charged with developing plans to facilitate international trade and border operations.

Allocations to states and MPOs may only be used in a border region for the following types of projects:

- Improvements to existing transportation and supporting infrastructure that facilitate cross-border vehicle and cargo movements;
- Construction of highways and related safety and safety enforcement facilities that will facilitate vehicle and cargo movements related to international trade;
- Operational improvements, including improvements relating to electronic data interchange and use of telecommunications, to expedite cross border vehicle and cargo movement;
- Modifications to regulatory procedures to expedite cross border vehicle and cargo movements;
- International coordination of planning, programming, and border operation with Canada and Mexico relating to expediting cross border vehicle and cargo movements; and
- Activities of federal inspection agencies.[208]

## I. FEDERAL REVIEW AND CERTIFICATION OF MPOS

FHWA and FTA jointly perform periodic certification reviews of the MPO transportation planning process.[209] Not less than every 3 years, the Secretary of Transportation must certify that the metropolitan planning process in each TMA is being carried out in accordance with applicable federal law.[210] In addition, certification requires that there is a TIP for the area that has been prepared in accordance with statutory requirements,[211] and that it has been approved by both the MPO and the Governor.[212]

Certification reviews consist of a desk audit by FHWA/FTA field staff of documentation pertaining to the planning process, a site visit, a public meeting, and preparation of a report on the certification review. The U.S. General Accounting Office (GAO) has described the certification reviews as "by far the most in-depth assessments of the MPOs' performance in transportation planning."[213] However, not until 1998 did the FHWA and FTA develop a standard format for assessing or reporting MPO compliance with its statutory and regulatory obligations, and neither agency collects such certification documents in a single location for purposes of analyzing compliance. The form of certification reviews of MPOs was left largely to the discretion of the local federal review team, to tailor the certification review to the particular characteristics of the MPO.

If a metropolitan planning process is not certified, the Secretary of Transportation may withhold up to 20 percent of the apportioned funds attributable to the TMA.[214] Withheld funds, however, shall be restored upon certification.[215] The Secretary may not withhold certification based on the policies and criteria established by an MPO or transit grant recipient,[216] and shall provide for public involvement appropriate to the metropolitan area under review in making a certification determination.[217]

In addition to the FHWA/FTA joint certification documents, on occasion, the U.S. DOT's John A. Volpe National Transportation Systems Center [Volpe Center] has prepared formal, comprehensive "enhanced planning reviews" of selected MPOs. These are designed to be less judgmental and regulatory focused than certification reviews, but nonetheless provide a more comprehensive and thorough analysis of MPO performance.

Several other reviews of the urban transportation planning process exist. Since 1983, urban transportation planning regulations have required that the state and MPO "self-certify" that they are in compliance with the 3-C (continuing, cooperative, and comprehensive) process mandated by statute and regulation. Moreover, the DOT reviews and approves planning work programs for all metropolitan areas, assesses the TIP and TIP amendments for conformity with the state's air quality plan in meeting federal air quality requirements, and reviews and approves state TIPs.[218]

## J. THE ROLE OF MPOS IN TRANSPORTATION PLANNING

With the promulgation of ISTEA in 1991, MPOs were transformed from advisory institutions into institutions

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[208] *Coordinated Border Infrastructure Program.* Pub. L. No. 105-178, tit. I, subtit. A, § 1119, 112 Stat. 163 (1998).

[209] These reviews have been described by the U.S. General Accounting Office as "by far the most in-depth assessments of the MPOs' performance in transportation planning." Though these certification reviews contain useful information about how well MPOs are performing their enhanced mission, they are nowhere centrally collected and analyzed. Since 1998, such reviews have performed under a standard format developed by FHWA and FTA.

[210] 23 U.S.C. § 134(i)(5)(A)(i) (2003); 49 U.S.C. § 5305(e)(1) (2003).

[211] 23 U.S.C. § 134 (2003).

[212] 23 U.S.C. § 134(i)(5)(B)(ii) (2003); 49 U.S.C. § 5305(e)(l) (2003).

[213] U.S. GENERAL ACCOUNTING OFFICE, URBAN TRANSPORTATION: METROPOLITAN PLANNING ORGANIZATIONS' EFFORTS TO MEET FEDERAL PLANNING REQUIREMENTS 30 (1996).

[214] Should an MPO fail to be certified, the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) may withhold all or a part of its federal highway and transit funds, or withhold approval for certain projects.

[215] 23 U.S.C. § 134(i)(5)(C) (2003); 49 U.S.C. § 5305(e)(2) (2003).

[216] 23 U.S.C. § 134(i)(5)(C)(iii) (2003); 49 U.S.C. § 5305(e)(3) (2003).

[217] 23 U.S.C. § 134(i)(5)(D) (2003); 49 U.S.C. § 5305(e)(4) (2003).

[218] U.S. GENERAL ACCOUNTING OFFICE, *supra* note 214, at 30–31.

that actually have direct influence over the distribution of money—from voluntary planning organization to organizations that have their fingers on some of the purse strings. In ISTEA, and expanded in TEA-21, MPOs were empowered with the ability to directly authorize projects eligible for the federal dollars under their primary jurisdiction. Though the "pots" of federal money over which the MPOs exercise jurisdiction are small relative to those controlled by the state, it is clear that such empowerment over money caused many local jurisdictions to take the MPO process and their participation in that process far more seriously than they had prior to the passage of ISTEA and TEA-21. Many began to send more senior politicians and staff to participate in MPO committees, for example.

All this gave transportation planning a new perspective. The interstate and inter-regional "top-down" highway planning process of the federal and state governments, respectively, and the localized "bottom-up" street and road planning process of the cities and counties would now be coupled with a third regional process that was a bit of both, expanded beyond highways, streets, and roads into a comprehensive transportation planning process that took into account all modes, as well as a number of related social, economic, and environmental issues.

It is important to note what federal legislation has done and what it has not. Clearly, it has formalized the regional transportation planning process, involving all stakeholders, including the local cities and counties, the state DOT, the local transit provider, and the public. These procedures are even more stringent and formalized in regions that have air quality attainment problems. Congress recognized that transportation and environmental issues cross jurisdictional lines, and therefore need a regional approach to resolving problems of mobility, congestion, air pollution, and sprawl. MPOs might be described as small group democracy engaged in a process that attempts to build consensus between and among various constituencies. In fact, an MPO is essentially a coalition of local governments, the state DOT, and the local transit provider, ideally working together to solve regional transportation needs.

Beyond the short-term fiscal resource allocation of TIP development, participation in the MPO planning processes may yield other significant benefits. These include access to longer-term policy development and consensus building, sharing of information resources, technical assistance from the MPO staff in corridor or subarea studies, and structured access to a forum of elected peers for coordination and exchange of ideas and political goals. Such collaboration may also move the region to coalesce on issues such as land use planning (which are inextricably intertwined with issues of transportation adequacy), equity issues surrounding the state's allocations of transportation fiscal resources, or even common social and economic issues unrelated to transportation. The ability of the MPO to facilitate such regional planning depends in large part on the technical competence of its staff, the ability of its leadership to build consensus among diverse participants, and the leadership of local officials and the business community. An important role for MPOs is to build "partnerships" of jurisdictions and constituencies for moving forward on solving regional problems. If done well, the regional planning framework provided by MPOs can provide the technical studies and consensus-building processes among local officials, enabling support for using state and federal funds from a variety of programs, along with local funds, to achieve broader community goals. If done poorly, the regional planning framework can devolve into turf wars pitting suburban areas against one another in contests for needed infrastructure improvements, or suburban growth areas against the core city that provides the lion's share of the tax base.

Consensus-building between large and small, central and suburban, counties and cities can consume considerable time and energy. State and local coordination and cooperation on transit vis-à-vis highway allocations can also be challenging. Consensus-building can be a particularly acute problem for fast-growing regions, where transportation needs can outpace existing infrastructure and available funding. MPOs typically have no power to regulate growth. Fast-paced housing and commercial development can overwhelm available infrastructure. The formal procedural structure of LRP and TIP development, exacerbated by a need to achieve consensus among diverse participants, necessarily can slow the ability of the MPO to respond quickly to rapidly changing transportation needs. The TIP cycle is formalized on a 2- to 3-year planning horizon, though it can be amended midstream. The 20-year long range plan is manifestly at odds with a local zoning process that may consume only a few months. The planning horizon for shopping centers and housing developments is significantly shorter than the planning horizon for new transportation corridors, or even major expansion of existing corridors, once such corridors have been designated and funded. Thus, there is a disjunction between the metropolitan transportation planning process and land development.[219]

MPOs do not create resources; they allocate resources. It is for the federal, state, and local governments to create the necessary tax resources to meet transportation needs (though the MPO could attempt to influence resource creation). In many (perhaps most) jurisdictions, needs outpace resources. MPOs also do not design and build transportation projects, pour asphalt, or purchase transportation infrastructure or rolling stock. MPOs (in a collaborative process driven by their member jurisdictions, the state, the transit provider, and the public) designate which projects shall be

[219] For purposes of better coordination between transportation and land use, it is useful to consider the experience of rapidly-growing metropolitan areas and states. For example, the state of Washington enacted a Growth Management Act in the early 1990s that has served as a framework within which transportation decisions are made.

built with the economic resources within their jurisdictional ambit.

The empowerment of MPOs sought to be achieved by Congress also included a requirement that the state engage in "cooperative" transportation planning with the local jurisdictions. ISTEA took this long-standing requirement a step further by requiring that the state DOT submit its projects for approval in the TIP. Theoretically, a state that refused to engage in cooperative planning, or pursued priorities significantly different from those of the MPO, could have its projects vetoed by the MPO, for unless they were included in the TIP, they could not be federally funded. But then, the Governor has an equally potent veto over the TIP, for he or she must sign off on the TIP, and it must be included in the STIP, or the MPO's projects will not be federally funded. The state could also retaliate by devoting its resources to projects outside any metropolitan area whose MPO or its members challenged the state's priorities. Because either side could "checkmate" the other, it has been rare that either side has exercised its veto over the other's projects, no matter how they may disagree with the other's priorities. In this sense, there is a balkanized disconnect between one set of projects (the larger set) that do not have to satisfy the criteria that have been developed by the collective will of the jurisdictions in whose areas the infrastructure will be built. The formalized federal requirement of putting the state's projects in the TIP is meaningless if the state may ignore the objective criteria of project prioritization developed in the TIP.

Because the state controls most of the transportation dollars spent in a metropolitan area (in many areas, the state controls two-thirds or more of the regional transportation dollars; the regional transit provider also controls a sizable amount), it is difficult to assess the success or failure of MPOs in transportation planning. In fact, metropolitan transportation planning is a complex process in which the MPO process is only a component part, for the state DOT, the counties, and cities each play a primary role with respect to those projects within their fiscal and jurisdictional realm.

Moreover, relative to needs, in most regions financial resources are chronically inadequate. Thus, the competition for scarce resources may be viewed as a "zero sum game," in which some jurisdictions are perceived "winners" at the expense of others, perceived as "losers." The MPO may be blamed for an inadequate transportation infrastructure, whose inadequacy may be a product of circumstances beyond its control, including the inadequacy of economic resources to keep pace with needs for infrastructure maintenance or expansion.

Any particular participant may blame the MPO for not funding projects it has prioritized as essential for its jurisdiction. But some players are better at game-playing than others, no matter what the rules of the game. All else being equal, better game-players will do better in a competition for limited dollars. A participant who wants projects in his or her jurisdiction funded will need to see that those projects are included on the long-range plan. She or he will have to participate in development of the TIP criteria and submit projects for funding fashioned in a way to score higher on the TIP criteria adopted. Perhaps only the larger jurisdictions can devote the full-time staff to ensuring their project proposals are well crafted. Others may be better at the state's more political process of project prioritization, and prefer that to the more formalized, less (but not entirely non-) politicized MPO process.

Participation in the MPO process consumes considerable time. Typically, the individuals who participate on the key committees of the MPO wear two hats — they may be a Mayor, city council member, city planner, or county commissioner in the jurisdiction they represent, and a board or committee member at the MPO. Because the process and substance of TIP criteria development are complex, these representatives may have to rely on the MPO staff to guide them through. The staff in all large and complex organizations tends to have considerable influence on the development of the organization's work. But the point here is that effective participation by a jurisdictional representative in the MPO's work will enhance its jurisdiction's ability to get a larger piece of the pie. Those who fail to bring home a larger slice may be replaced by the jurisdiction, which may send one who is more capable of representing its interests to serve on the MPO board or committee.

That, of course, begs the question of whether "getting a larger piece of the pie" is what MPO participation should be about. Shouldn't the primary focus of the MPO, and its participants, be about meeting regional transportation needs? Aren't all jurisdictions "winners" when regional transportation needs are met? That may mean prioritizing projects in a way that puts the region's most pressing transportation needs at the top of the list, even when such prioritization may not satiate a particular jurisdiction's parochial needs.[220]

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[220] *See generally* Andrew Goetz et al., *Metropolitan Planning Organizations: Findings and Recommendations for Improving Transportation Planning,* PUBLIUS: THE J. FEDERALISM, Winter 2002, at 87.

SECTION 3

# ENVIRONMENTAL LAW

## A. THE STATUTORY REGIME: AN OVERVIEW

Today, transit agencies are subject to a myriad of environmental laws and regulations.[1] Principally, these include environmental quality control measures under the National Environmental Policy Act of 1969,[2] Section 4(f) of the Department of Transportation Act,[3] the Clean Air Act,[4] the Federal Water Pollution Control Act (commonly referred to as the "Clean Water Act"),[5] the Resource Conservation and Recovery Act,[6] and the Comprehensive Environmental Response, Compensation, and Liability Act.[7] Additional requirements are imposed on contractors using federal transit funds.[8]

Environmental law is highly regulatory in nature, and therefore includes more acronyms than most. To assist the reader, a list of the principal acronyms used in this Section follows:

AAQS—ambient air quality standards
CERCLA—Comprehensive Environmental Response, Compensation, and Liability Act
CEQ—Council on Environmental Quality
CMAQ—Congestion Mitigation and Air Quality Improvement
CMS—congestion management system
DFP—Dredge or Fill Program
DOJ—Department of Justice
DOT—Department of Transportation
EA—environmental assessment
EIS—environmental impact statement
EPA—Environmental Protection Agency
ESA—Endangered Species Act of 1973
FIP—federal implementation plan
FERC—Federal Energy Regulatory Commission
FHWA—Federal Highway Administration
FONSI—finding of no significant impact
FTA—Federal Transit Administration
HOV—high-occupancy vehicle
HRS—Hazard Ranking System
HWM—Hazardous Waste Management Program
ISTEA—Intermodal Surface Transportation Efficiency Act
MPO—Metropolitan Planning Organization
NAAQS—National Ambient Air Quality Standards
NCP—National Consistency Plan
NEPA—National Environmental Policy Act of 1969
NHRP—National Hazardous Response Plan
NPDES—National Pollutant Discharge Elimination System
NPL—National Priorities List
NRC—National Response Center
PCB—polychlorinated biphenyl
PRP—potentially responsible party
PSD—prevention of significant deterioration
RI/FS—Remedial Investigation and Feasibility Study
RCRA—Resource Conservation and Recovery Act of 1976
ROD—Record of Decision

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[1] Executive Order No. 11738, 38 F.R. 25161 (Sept. 10, 1973), "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.

[2] National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. (2000).

[3] 49 U.S.C. § 303 (2000) (Section 4(f) of the DOT Act). Protections for a park, recreation area, or wildlife or waterfowl refuge of national, state, or local significance or any land from a historic site of national, state, or local significance used in a transit project is required by 49 U.S.C. § 303 (2000).

[4] Clean Air Act, 42 U.S.C. §§ 7401 *et seq*. (2000) and scattered sections of 29 U.S.C (2000).

[5] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq*. (2000).

[6] Solid Waste Disposal Act, 42 U.S.C. §§ 6901 *et seq.* (2000).

[7] Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq*. (2000). Additional requirements include Executive Order No. 11514, 35 F.R. 4247 (Mar. 7, 1970) as amended, "Protection and Enhancement of Environmental Quality," 42 U.S.C. § 4321 note; 49 U.S.C. § 5324(b); Council on Environmental Quality Regulations, 40 C.F.R. pt. 1500 *et seq*.; joint FHWA/FTA regulations, "Environmental Impact and Related Procedures," 23 C.F.R. pt. 771 and 49 C.F.R. pt. 622. 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. Recipients of FTA funds are required to comply with the following:

1. Institution of environmental quality control measures under the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 *et seq*. and Executive Order No. 11514, as amended, 42 U.S.C. 4321 note;

2. Notification of violating facilities pursuant to Executive Order No. 11738, 42 U.S.C. 7606 note;

3. Protection of wetlands pursuant to Executive Order No. 11990, 42 U.S.C. 4321 note;

4. Evaluation of flood hazards in floodplains in accordance with Executive Order 11988, 42 U.S.C. 4321 note;

5. Assurance of project consistency with the approved State management program developed pursuant to the requirements of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq*.;

6. Conformity of Federal actions to State (Clean Air) Implementation Plans under Section 176(c) of the Clean Air Act of 1955, as amended, 42 U.S.C. 7401 *et seq*.;

7. Protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. 300h *et seq*.; and

8. Protection of Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq*.

[8] Third Party Contracts, and Subgrants exceeding $100,000, must have provision requiring compliance with the following acts and have requirements to report the use of facilities considered to be placed on EPA's "List of Violating Facilities," must 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, 42 U.S.C. § 7414 (2000); and

2. Section 308 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1318 (2000).

SARA—Superfund Amendments and Reauthorization Act
SHPO—State Historic Preservation Officer
SIP—state implementation plan
SOV—single-occupancy vehicle
STP—Surface Transportation Program
STIP—state transportation improvement program
TEA-21—Transportation Equity Act for the 21st Century
TIP—Transportation Improvement Program
TCM—transportation control measure
TSCA—Toxic Substances Control Act
TSD—treatment, storage, and disposal facilities
UAO—the Unilateral Administrative Order
UIC—Underground Injection Control Program

Environmental law is sometimes best understood in factual context. Also, to assist the reader, two case studies in the areas of transportation impacts on air and surface pollution are presented below—metropolitan Atanta's failure to comply with air quality obligations, and ground contamination at Paoli Rail Yards.

## B. The National Environmental Policy Act (NEPA)

Comprehensive federal environmental regulation began with the National Environmental Policy Act of 1969 (NEPA)[9] (signed into law on January 1, 1970), which required that an environmental assessment (EA)[10] or an environmental impact statement (EIS)[11] be prepared, the latter for any "major federal action significantly affecting the quality of the human environment."[12] The EA determines whether potential impacts are significant, explores alternatives and mitigation measures, and provides essential information as to whether an EIS must be prepared. The EA focuses attention on potential mitigation measures during the planning process, at a time when they can be incorporated without significant disruption and at lower cost.[13] If the agency concludes that there are no significant adverse environmental impacts, or that with appropriate prevention or mitigation efforts they will be minimized, it issues a "finding of no significant impact" (FONSI).[14] If, however, the agency concludes the impacts are significant, it prepares an EIS.[15] The EIS must include an assessment of the environmental impacts, evaluate reasonable alternatives, and suggest appropriate mitigation measures.[16] The environmental impacts must be recognized, summarized, and where appropriate, monitored.[17] The EIS must review such issues as the impact of the project on noise, air quality, water quality, endangered species, wetlands, and flood plains. It must also be prepared with the required engineering design studies necessary to complete the document.[18]

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[9] 49 U.S.C. § 4331 *et seq*.

[10] *See, e.g.,* 66 Fed. Reg. 37721 (July 19, 2001) for an example of how this arises in the transit context.

[11] *See, e.g.,* 67 Fed. Reg. 10796 (Mar. 8, 2002).

[12] The EIS must include an assessment of the environmental impacts, evaluate reasonable alternatives, and suggest appropriate mitigation measures. 49 U.S.C. § 4332(c) (2000). It must review such issues as the impact of the project on noise, air quality, water quality, endangered species, wetlands, and flood plains. However, the thrust of the statute is process and not substantive regulation. *See* Stryckers Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227, 100 S. Ct. 497, 62 2 Ed. 2d 433 (1980). Joint FHWA/FTA regulations, "Environmental Impact and Related Procedures," 23 C.F.R. pt. 771 and 49 C.F.R. pt. 622 (1999).

[13] 23 C.F.R. § 771.119(b) (1999).

[14] 23 C.F.R. § 771.131 (1999).

[15] 23 C.F.R. pt. 1420 (1999); 23 C.F.R. §§ 771.115, 771.125 (1999); 40 C.F.R. § 1508.27 (1999). *See also* 65 Fed. Reg. 33922 (May 25, 2000).

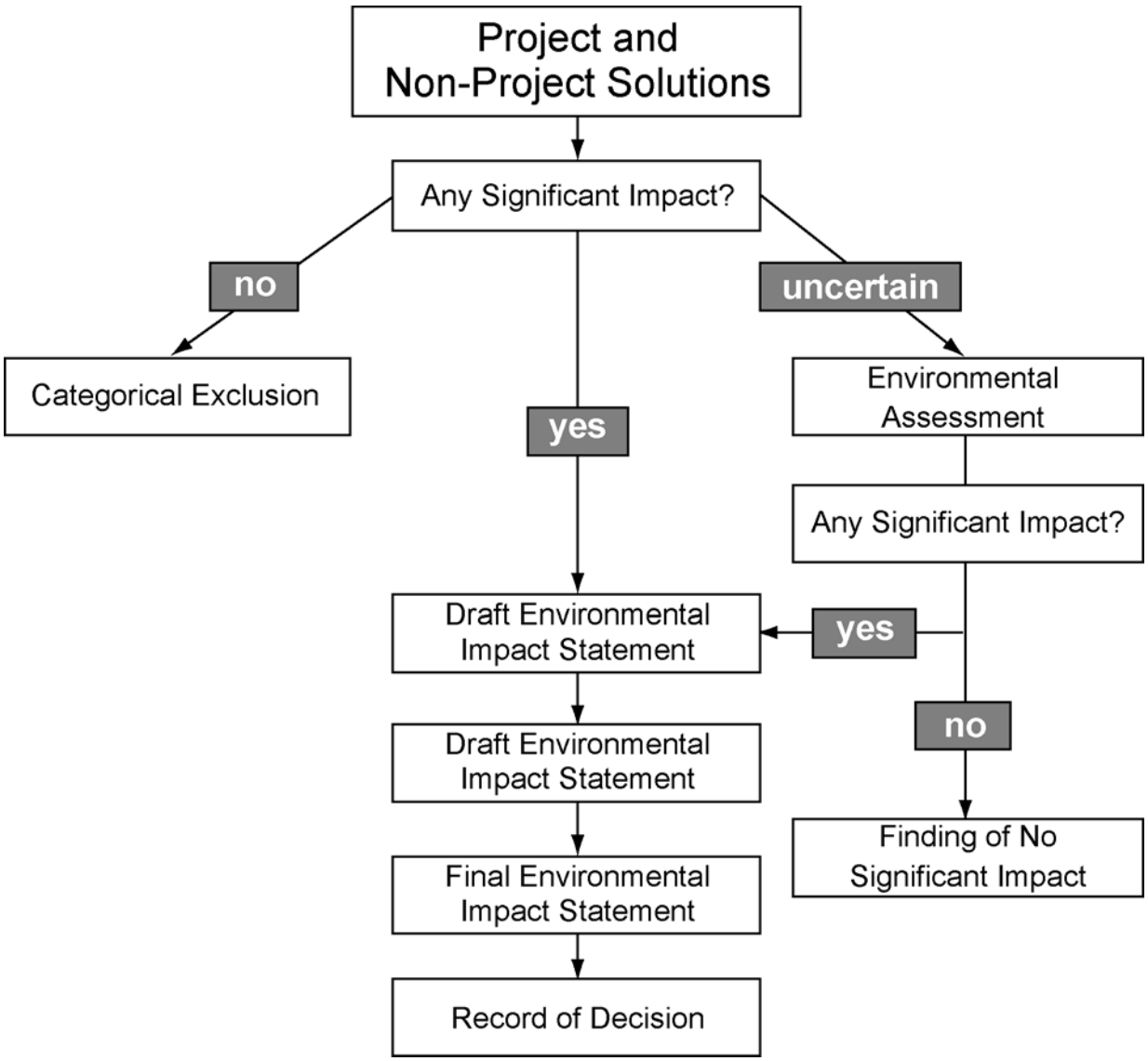
[16] 42 U.S.C. § 4332(c) (2000). The environmental effects of proposed transit projects must be documented and environmental protection must be considered before a decision can be made to proceed with a project. 42 U.S.C. 4321. Where adverse environmental effects are likely to result, alternatives must be considered to avoid those effects. If there is no feasible and prudent alternative, all reasonable steps must be taken to minimize those effects. 49 U.S.C. § 5324(b)(3)(iii), 23 C.F.R. pt. 771, Environmental Impact & Related Procedures, 49 U.S.C. § 5324(b), Economic, Social, and Environmental Interests (formerly § 14 of the Federal Transit Act). Mitigation of Adverse Environmental Effects—49 U.S.C. § 5324(b) (2000), 23 C.F.R. pt. 771, 49 C.F.R. pt. 622 (1999). However, the U.S. Supreme Court has held that

> NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan.... [I]t is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action.... [I]t would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed mitigation plan before the agency can act.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333 108 S. Ct. 1835, 104 L. Ed. 2d 351(1989).

[17] FHWA/FTA regulations state "Management and Monitoring Systems," 23 C.F.R. pt. 500 (1999) and 49 C.F.R. pt. 614 (1999). RICHARD CHRISTOPHER & MARGARET HINES, ENFORCEMENT OF ENVIRONMENTAL MITIGATION COMMITMENTS IN TRANSPORTATION PROJECTS: A SURVEY OF FEDERAL AND STATE PRACTICE (National Cooperative Highway Research Program Legal Research Digest 3, 1999).

[18] *See, e.g*., 64 Fed. Reg. 72139 (Dec. 23, 1999).




The thrust of the statute is process; there is no mandatory obligation to implement mitigation measures, even if they are feasible.[19] However, the FHWA/FTA policy is that "measures necessary to mitigate adverse impacts be incorporated" into the project.[20] Mitigation is also important to gain public acceptance for building transit facilities. Moreover, as noted below (in § 3.030), Congress has explicitly mandated measures for protection of public parks, recreation areas, wildlife and waterfowl refuge, and historical sites.[21]

NEPA[22] was among the first major environmental laws passed by Congress. In order to ensure that ap-

[19] *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227, 100 S. Ct. 498, 62 L. Ed 2d 433 (1980).

[20] 23 C.F.R. § 771.105(d) (1999).

[21] 49 U.S.C. § 303 (2000); 23 C.F.R. § 771.135 (1999).

[22] National Environmental Policy Act of 1969, codified at 42 U.S.C. §§ 4321–4370(e) (1994 & Supp. 2000); NEPA implementing regulations are at 40 C.F.R. § 1500.1 *et seq*. (2000). DOT regulations implementing NEPA are at 23 C.F.R. §§ 771.101 *et seq*. (2000) and 49 C.F.R. §§ 520.1 *et seq*. (2000).

As of this writing, the DOT is considering updating and revising its NEPA implementing regulations for projects funded or approved by the FHWA and the FTA. The current regulation was issued in 1987 and experience since that time, as well as changes in the legislation, most recently TEA-21 (Pub. L. 105-178, 112 Stat. 107), calls for an updated approach to the implementation of NEPA for FHWA and FTA projects and actions. Under the proposed rulemaking, the FHWA/FTA regula-

propriate consideration is given to the environmental impacts of major federal actions, NEPA mandates that all federal agencies (including the Department of Transportation) comply with certain procedures before taking actions that will affect the environment.[23] NEPA was enacted to

> declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation…."[24]

Federal transportation projects must comply with NEPA requirements to receive federal transportation funds. NEPA review is the process by which federal transportation agencies consider the potential environmental effects of proposed transportation projects. Through the NEPA process, the FHWA and the FTA evaluate a transportation project's compliance with the many single-purpose federal environmental statutes, such as the Clean Water Act, the Endangered Species Act, and the National Historic Preservation Act. This 'one-stop' review process is part of the Department of Transportation's attempts to streamline environmental review.

NEPA has three main sections. The first sets forth a series of goals and establishes the policy of the Federal Government, "to use all practicable means and measures…to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[25]

The second section of NEPA requires all federal agencies to prepare a detailed statement, commonly known as an EIS, for any proposed major federal action significantly affecting the quality of the human environment.[26] The EIS provides a thorough evaluation of potential environmental effects of a proposed project.[27] The EIS requirement allows the federal agencies to gather information on potential environmental impacts in a single document. The EIS constitutes a discussion of all relative environmental impacts of a proposed project, which shows that the agency has given all pertinent environmental matters a "hard look" and has made a "good faith, objective, and reasonable presentation of the subject areas mandated by NEPA."[28]

The EIS includes consideration of (i) the environmental impact of the proposed action, (ii) any adverse environmental affects that cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action (including a "no action" alternative),[29] (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources that could be involved in the proposed action should it be implemented.[30]

An EIS is only required when there is "major federal action" expected to have a significant effect on the environment. If it is not clear that a proposed project will have a significant effect, a less comprehensive environmental analysis known as an EA may be prepared.[31] An EA can either provide a basis for a FONSI or it may lead to the conclusion that the project will have a significant effect on the environment, in which case an EIS needs to be prepared before the project goes forward.[32]

The Council on Environmental Quality (CEQ) regulations that govern the preparation of EIS's require consideration and disclosure of "appropriate mitigation measures" and "means to mitigate the adverse environmental impacts."[33] In transportation projects, five methods may be used to avoid, reduce, or compensate

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tion for implementing NEPA would be revised to further emphasize using the NEPA process to facilitate effective and timely decision-making. *See* Proposed Rules, Department of Transportation, 65 Fed. Reg. 33960 (2000).

[23] *See* Associations Working for Aurora's Residential Env't v. Colo. Dep't of Transp., 153 F.3d 1122, 1126 (10th Cir. 1998).

[24] 42 U.S.C. § 4321 (1994 & Supp. 2000).

[25] 42 U.S.C. § 4331(a) (1994 & Supp. 2000).

[26] 42 U.S.C. § 4332 (1994 & Supp. 2000).

[27] Under NEPA regulations, "effects" includes both direct and indirect effects, including growth inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems. Effects include ecological, aesthetic, historic, cultural, economic, social, or health ones and may include beneficial and detrimental effects. 40 C.F.R. § 1508.8 (2000).

[28] *See* Environmental Defense Fund, Inc. v. Andrus, 619 F.2d 1368, 1375 (10th Cir. 1980), quoting from Manygoats v. Kleppe, 558 F.2d 556, 560 (10th Cir. 1977).

[29] A "no-action" Alternative typically serves as a baseline for environmental analysis, and includes the existing transit and highway infrastructure and all projects contained in the region's TIP. *See* 49 Fed. Reg. 72140 (Dec. 23, 1999). Though NEPA does not require consideration of any specific alternative other than "no action," the FHWA/FTA calls for evaluation of "alternative courses of action…in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation…." 23 C.F.R. § 771.105(b) (1999). As a practical matter, FHWA and FTA carry out this rule by calling for a *reasonable range of alternatives* in NEPA documents with respect to both *mode* (e.g., highway or transit), and *alignment*. Moreover, insofar as major capital investment ("new starts") projects in the FTA capital program, the FTA new starts rule requires an examination of a "baseline alternative" in the NEPA document. A "baseline alternative" is one that features "transit improvements lower in cost than the new start [project] which results in a better ratio of measures of transit mobility compared to cost than the no build alternative." 49 C.F.R. §§ 611.5, 611.7 (2000). The "new starts" process is described in greater detail in Section 4.

[30] 42 U.S.C. § 4332(c) (1994 & Supp. 2000).

[31] 40 C.F.R. § 1508.9 (2000); 23 C.F.R. § 771.119 (2000).

[32] 23 C.F.R. § 771.119(a) (2000).

[33] 40 C.F.R. §§ 1502.14(f) and 1502.16(h) (1999). Specific mitigation findings are also required under Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303 (2000), and the Clean Air Act, 42 U.S.C. § 7410 (2000).

for the adverse environmental effects for the location, construction, or operation of transit facilities: (1) location modification; (2) design modification; (3) construction measures; (4) right-of-way measures; and (5) replacement land.[34]

The third section of NEPA establishes a central agency, the CEQ, to coordinate agencies' compliance with NEPA.[35] The CEQ has developed guidelines to aid federal agencies in implementing NEPA.[36] The guidelines detail many of the steps in the NEPA process, including identifying when and how to prepare an EIS and describing the method of receiving comments on an EIS, as well as defining many of the terms used in NEPA. The CEQ guidelines also direct agencies to adopt specific guidelines for implementation of NEPA. The CEQ also assists the President of the United States in preparing an annual Environmental Quality Report,[37] gathering information on trends in environmental quality,[38] and developing and recommending to the President national policies to foster and promote the improvement of environmental quality.[39]

The DOT has developed regulations for implementing NEPA for highway and mass transit projects.[40] These regulations only apply to actions where the federal agency exercises sufficient control to condition the permit or project approval. Actions that do not require federal approval are not subject to these regulations. The regulations establish as the policy of the transportation agencies that:

> (a) To the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental document required by [the] regulation; (b) Alternative courses of action be evaluated and decisions be made in the best overall public interest…; (c) Public involvement and a systematic interdisciplinary approach be essential parts of the development process for proposed action; [and] (d) measures necessary to mitigate adverse impacts be incorporated into the action….[41]

The regulations establish three classes of actions, which prescribe the level of documentation required in the NEPA process.[42] Class I actions are those projects that significantly affect the environment, and thus require the preparation of an EIS.[43] The EIS is the "detailed statement" used to analyze environmental impacts and all reasonable alternatives and to evaluate measures necessary to mitigate adverse impacts where they are likely to result from the proposed action.[44] Examples of actions that normally require an EIS are:

> (1) A new controlled access freeway, (2) A highway project of four or more lanes on a new location, (3) New construction or extension of fixed rail transit facilities…[and] (4) New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility.[45]

An EIS is only required when a "major federal action" significantly affects the quality of the human environment. The CEQ regulations define "major federal action" as "actions with effects that may be major and which are potentially subject to Federal control and responsibility," but really provide little guidance as to what constitutes a "major federal action."[46]

The courts have been more helpful in determining what is or is not a major federal action." In *Macht v. Skinner*, the U.S. Court of Appeals for the District of Columbia held that federal funding for preliminary engineering studies and EIS's for proposed extensions to a light rail project, which was completely state funded, did not constitute "major federal action" within the meaning of NEPA.[47] The court also held that the issuance of a wetlands permit by the Army Corps of Engineers did not "federalize" the project, subjecting it to the requirements of NEPA, where the Corps had discretion over only a negligible portion of the project.[48] That the state planned to request a federal UMTA grant to build the extensions did not constitute major federal action because "there is a wide gulf between what a state may want and what the federal government is willing to provide."[49] Also, in *Save Barton Creek Ass'n. v. Federal Highway Administration*, the court explained that federal involvement requires the "ability to influence or control the outcome in material respects."[50] That the state structures a project so as to preserve its eligibility for future federal funding does not render its project a major federal action, and an EIS will not be required until there is a "proposal" for federal funding.[51]

When preparing an EIS, an agency must consider alternatives to the proposed transit project. However, the agency is not required to evaluate any alternatives it in good faith rejects as too remote or impractical, but need

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[34] CHRISTOPHER & HINES, *supra* note 17, at 3.

[35] 42 U.S.C. §§ 4341–4347 (1994 & Supp. 2000).

[36] 40 C.F.R. pts. 1500–1517 (1998).

[37] 42 U.S.C § 4344(1) (2000).

[38] *Id.* at § 4344(2).

[39] *Id.* at § 4344(4).

[40] 23 C.F.R. § 771.109(a)(1) (2000).

[41] 23 C.F.R. § 771.105 (2000).

[42] 23 C.F.R. § 771.115 (2000).

[43] 23 C.F.R. § 771.115(a) (2000).

[44] *See* 42 U.S.C. § 4332(C) (1994 & Supp. 2000); 40 C.F.R. § 1508.11 (2000).

[45] 23 C.F.R. § 771.115 (2000).

[46] 40 C.F.R. § 1508.18 (2000).

[47] Macht v. Skinner, 916 F.2d 13, 17 (D.C. Cir. 1990).

[48] *Id*. at 18–19.

[49] *Id*. at 16 n.3, 22.

[50] 950 F.2d 1129, 1134 (5th Cir. 1992) (quoting from W. RODGERS, ENVIRONMENTAL LAW § 7.6, at 763 (1997)); *see also* Southwest Williamson County Community Ass'n v. Slater, 67 F. Supp. 2d 875, 884–86 (M.D. Tenn. 1999), where the court held that accepting federal funding for early transportation studies and complying with eligibility requirements for federal funding to maintain the possibility of receiving future funding did not convert a highway project into a major federal action.

[51] *Id*. at 1135.

only evaluate alternatives that are feasible.[52] A "no action" alternative must be considered in every EIS; but other than this, there are no specific alternatives that NEPA requires.[53] In *Piedmont Heights Civic Club, Inc., v. Moreland*, the court had to decide whether an agency must consider mass transit as an alternative to building a highway.[54] Piedmont Heights sought an injunction to halt projects to widen Interstate highways around Atlanta, Georgia, because the environmental analysis of the project did not consider the proposed Metropolitan Atlanta Rapid Transit Authority (MARTA) rail system as an alternative to highway expansion.[55] The court held that, where a mass transit system is already planned and approved, the highway agency need not consider mass transit as a formal alternative.[56] However, the agency should consider whether highway expansion is necessary in light of the existing mass transit system.[57]

EIS's are prepared in two stages, a draft EIS and then a final EIS, and may be supplemented if conditions surrounding the proposed project change substantially.[58] Before preparing an EIS, the agency and the project sponsor conduct a scoping process, inviting appropriate federal, state, and local agencies to participate in the determination to be addressed in the EIS. A draft EIS is then prepared that encompasses the identified issues and evaluates all reasonable alternatives to the proposed project. The draft EIS is then circulated for at least 45 days for public comment and review.[59] After circulation of the draft EIS and consideration of comments received, a final EIS is prepared.[60] The final EIS discusses comments received and identifies the preferred alternative and evaluates all reasonable alternatives and Executive Orders.[61] The final EIS should also document compliance with all applicable environmental laws.[62] A final decision will be made no sooner than 30 days after publication of the final EIS in the Federal Register or 90 days after publication of a notice for the draft EIS, whichever is later.[63]

A draft, final, or supplemental EIS may be supplemented at any time when it is determined that:

> (1) Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or (2) New information or circumstances relevant to the environmental concerns and bearings on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.[64]

Class II actions are known as "categorical exclusions" (CE).[65] These are projects that do not individually or cumulatively have a significant environmental effect and are thus excluded from the requirement to prepare either an EA or EIS. The DOT regulations enumerate 20 CEs.[66] Additional actions that meet the criteria for a CE may be designated as CE's only after agency approval.[67]

Class III actions are those in which the significance of the environmental impact is not clearly established.[68] Actions in this class require the preparation of an EA to determine whether the preparation of the more comprehensive EIS is required. If the agency determines at

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[52] 40 C.F.R. § 1502.14 (2000); *See also* Associations Working for Aurora's Residential Env't v. Colo. Dep't of Transp., 153 F.3d 1122, 1130 (10th Cir. 1998).

[53] 40 C.F.R. § 1502.14(d) (2000).

[54] 637 F.2d 430, 435–36 (5th Cir. 1981).

[55] *Id.*

[56] *Id*. at 436.

[57] *Id.*

[58] 40 C.F.R. § 1502.9 (2000).

[59] 23 C.F.R. § 771.123(i).

[60] 23 C.F.R. § 771.125(a)(1) (2000).

[61] *Id.*

[62] *Id*.

[63] 23 C.F.R. § 771.127(a) (2000).

[64] 23 C.F.R. § 771.130(a) (2000); *See* 40 C.F.R. § 1502.9(c)(1) (2000); *see also* Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197, 209–10 (1st Cir. 1999).

[65] *See* 23 C.F.R. § 771.115(b) (2000).

[66] The following actions meet the criteria for CEs in the CEQ regulation…and normally do not require any further NEPA approvals by the Administration:

> (1) Activities which do not involve or lead directly to construction, such as planning and technical studies; grants for training and research programs; research activities as defined in 23 U.S.C. 307; approval of a unified work program and any findings required in the planning process pursuant to 23 U.S.C. 134; approval of statewide programs under 23 C.F.R. part 630; approval of project concepts under 23 C.F.R. part 476; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system. (2) Approval of utility installations along or across a transportation facility. (3) Construction of bicycle and pedestrian lanes, paths, and facilities. (4) Activities included in the State's "*highway safety plan*" under 23 U.S.C. § 402. (5) Transfer of Federal lands pursuant to 23 U.S.C. 317 when the subsequent action is not an FHWA action. (6) The installation of noise barriers or alteration to existing publicly owned buildings to provide for noise reduction. (7) Landscaping. (8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur. (9) Emergency repairs under 23 U.S.C. 125. (10) Acquisition of scenic easements. (11) Determination of payback under 23 C.F.R. part 480 for property previously acquired with Federal-aid participation. (12) Improvements to existing rest areas and truck weigh stations. (13) Ridesharing activities. (14) Bus and rail car rehabilitation. (15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons. (16) Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand. (17) The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a [categorical exclusion]. (18) Track and railhead maintenance and improvements when carried out within the existing right-of-way. (19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site. (20) Promulgation of rules, regulations, and directives.
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> 23 C.F.R. § 771.117(c) (2000).

[67] 23 C.F.R. § 771.117(d) (2000).

[68] 23 C.F.R. § 771.115(c) (2000).

any time in the EA process that the action is likely to have a significant impact on the environment, the regulations direct that an EIS will be required.[69] If no significant impacts are identified, the administration will issue a revised EA and FONSI.[70] The FONSI will briefly present the reasons why an action will not have a significant impact on the human environment and for which preparation of an EIS therefore is not required.[71]

The Secretary of Transportation may only approve federal funding for projects that have adequately evaluated potential environmental effects.[72] Thus, agency staff must review transcripts of hearings to ensure that all parties were given an opportunity to present their views and that the project application discusses the environmental impact and explores alternatives of the proposal. Before approving an application for financial assistance, the Secretary must make written findings that:

> (i) an adequate opportunity to present views was given to all parties with a significant economic social or environmental interest; (ii) the preservation and enhancement of the environment, and the interest of the community in which a project is located, were considered; and (iii) no adverse environmental effect is likely to result from the project, or no feasible and prudent alternative to the effect exists and all reasonable steps have been taken to minimize the effect.[73]

Agencies generally have a great deal of discretion to make decisions under NEPA. Courts will only overturn agency decisions in the most rare and extreme circumstances. In *Township of Belleville v. Federal Transit Administration*, citizens in Belleville, New Jersey, challenged the FTA's issuance of a FONSI for construction of a storage facility for light rail vehicles.[74] The Newark subway system was modernizing its light rail vehicles to comply with the Americans with Disabilities Act and needed a new facility to house the new vehicles and an extension of the subway line to reach it. The proposed action would be located in the municipalities of Belleville, Bloomfield, and Newark. An EA was prepared and a FONSI was subsequently issued for the project. While citizens of Bloomfield and Newark favored the project, a citizens group in Belleville filed suit arguing that the project would have substantial environmental impacts on the township, and that the FTA should have developed an EIS to evaluate these impacts.[75] In its decision, the court recognized that the project would have impacts on the township, but that the FTA had analyzed the impacts through an EA, which concluded that the impacts were not significant enough to require an EIS, thus resulting in a FONSI.[76] "Although reasonable minds can disagree over the degree of 'significance' produced by the project, it would be an overreach for [a] Court to interject its own personal value system on the agencies charged with making the appropriate determinations."[77]

Similarly, in *Council of Commuter Organizations v. Gorsuch*,[78] the Second Circuit upheld EPA's tardy approval of New York's undetailed transit improvement program, and the failure of New York to follow its transit improvement program's fare stabilization program. Some suits have also been filed to roll back transit fare increases on clean air grounds.[79] Injunctions have been sought against highway projects[80] and bridge construction.[81] Citizen groups have objected to a variety of projects, including subways.[82]

However, an agency may not divide a project into smaller parts, each with less significant impacts, in order to avoid compliance with NEPA.[83] A rule against 'segmentation' has been developed to ensure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions. In *Taxpayers Watchdog, Inc. v. Stanley*, a taxpayers' association sought to enjoin the FTA from disbursing federal funds for a construction of a 4-mile rail system in Los Angeles, claiming that the project had been improperly segmented.[84] An early proposal for the rail system had anticipated the construction of an 18-mile rail system, but plans for the more extensive system were set aside due to financial considerations. However, the agency decided to build the first 4 miles of the rail project, finding this would be preferable to not building a rail system at all. Certain taxpayers sought an injunction claiming that the 4-mile system was not an independent project but was part of the larger plan for a more extensive rail system and thus, the smaller system had been improperly segmented. The court articulated four factors that need to be considered when determining whether a project has been improperly segmented: whether the proposed segment (1) has logical termini, (2) has substantial independent utility, (3) does not foreclose the opportunity to consider alternatives, and (4) does not irretrievably commit fed-

[69] 23 C.F.R. § 771.119 (2000).

[70] *Id.* at § 771.121(a).

[71] 40 C.F.R. § 1508.13 (2000); 23 C.F.R. § 771.121 (2000).

[72] 49 U.S.C.A. § 5324(b) (2000).

[73] 49 U.S.C. § 5324 (2000).

[74] 30 F. Supp. 2d 782 (D. N.J. 1998).

[75] *Id.*

[76] *Id*. at 804.

[77] *Id.* at 804.

[78] 683 F.2d 648, 659 (2d Cir. 1982).

[79] *See, e.g.,* Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976).

[80] *See, e.g.,* Southwest Williamson County Community Ass'n v. Slater, 67 F. Supp. 2d 875 (M.D. Tenn. 1999); Conservation Law Found. v. Federal Highway Admin., 827 F. Supp. 871 (D. R.I. 1993).

[81] *See, e.g.,* Citizens for Mass Transit, Inc. v. Adams, 492 F. Supp. 304 (E.D. La. 1980).

[82] *See, e.g.,* Phila. Council of Neighborhood Orgs. v. Coleman, 437 F. Supp. 1341 (E.D. Pa. 1977).

[83] The Clairton Sportsmen's Club v. Pa. Turnpike Comm'n, 882 F. Supp. 455, 470 (W.D. Pa. 1995); Town of Huntington v. Marsh, 859 F.2d 1134, 1140–43 (2d Cir. 1988).

[84] 819 F.2d 294, 297 (D.C. Cir. 1987).

eral funds for closely related projects.[85] After considering these factors, the court held that the project had not been improperly segmented and that the agency needed only to consider environmental impacts of the 4-mile rail system rather than potential impacts of the more extensive rail system that may be built in the future.[86]

The federal agency (FHWA or FTA) and the applicant (state DOT or transit agency) manage preparation of the NEPA environmental review process.[87] MPOs have the primary responsibility for transportation planning, into which the NEPA process will be integrated.[88] MPOs are required to develop both a long-range transportation plan and a short-term TIP for metropolitan areas. The transportation plan is a 20-year plan, which identifies long- and short-term actions to be carried out by the MPO in the development of an efficient intermodal transportation system. The TIP is short-term, covering at least 3 years, which prioritizes projects to be carried out during the 3-year period. The TIP must be updated at least every 2 years. The NEPA process focuses on projects after they have been included in the transportation plan and TIP. The metropolitan and state transportation planning processes are discussed in greater detail in Section 2.

## C. PUBLIC PARK AND RECREATION LANDS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORICAL SITES

In response to the public's interest in preserving nature and history, Congress enacted Section 4(f) of the Department of Transportation Act.[89] Transportation projects that receive any form of federal approval or funding must comply with Section 4(f).[90] Section 4(f) requires that transportation plans and programs include measures to maintain or enhance public parks, recreation areas, wildlife and waterfowl refuges, and historical sites that will be crossed by transportation activities or facilities.[91] However, the preservation goals of Section 4(f) often conflict with the government's desire to build and maintain transportation infrastructure.[92]

The trigger for Section 4(f) is when federally-funded projects "use" public or private historic sites or public parkland.[93] Once this threshold is met, the Secretary of Transportation may only approve transportation projects if certain conditions are met.[94] First, the Secretary must be satisfied that there is no prudent or feasible alternative to using that land. Second, the project must also include all possible planning to minimize harm to the land resulting from the use.[95] To determine whether an alternative site minimizes harm, the Secretary must balance and assess the harm to the historic site or park caused by each alternative and choose the least harmful alternative.[96]

These requirements apply to the permanent use of land. Certain temporary uses do not fall within the ambit of 4(f), such as minor work not adverse to the statute's preservationist purposes. However, constructive uses trigger its requirements. A constructive use may occur when impacts due to proximity of the transportation project substantially impair the activities, features, or attributes of the protected resource.[97]

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[85] *Id.* at 298–9.

[86] *Id*. at 300.

[87] 23 C.F.R. § 771.109(c) (1999).

[88] MPOs have jurisdiction over transit and highway transportation projects, but not over airports, seaports, or interstate railroads. Environmental Defense Fund v. EPA, 82 F.3d 451, 461–62 (D.C. Cir. 1996).

[89] Barbara Miller, *Department of Transportation's Section 4(f): Paving the Way Toward Preservation*, 36 AM. U. L. REV. 633, 638–39 (1987).

[90] 49 U.S.C. § 303 (2000) (Section 4(f) of the DOT Act). Protections for a park, recreation area, or wildlife or waterfowl refuge of national, state, or local significance or any land from a historic site of national, state, or local significance used in a transit project is required by 49 U.S.C. § 303 (2000).

[91] 49 U.S.C. § 303 (2000). Section 4(f) authorizes the use of land for a transportation project from a significant publicly-owned park, recreational area, wildlife or waterfowl refuge, or any significant historic site only when the Administration has determined (1) there is no feasible and prudent alternative to such use, and (2) the project includes all possible planning to minimize harm to the property resulting from such use. *Id.*

[92] *See* Miller, *supra* note 89, at 633.

[93] *Id*. at 639. The circuit courts have given "use" an expansive reading and held it to include land affected by "noise, pollution, visual intrusion, and increased traffic." *Id*. at 638.

[94] 49 U.S.C. § 303(c) (2000).

[95] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 411, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971); Adler v. Lewis, 675 F.2d 1085, 1093–94 (9th Cir. 1982). CHRISTOPHER & HINES, *supra* note 17, at 10–11.

[96] Concerned Citizens Alliance, Inc. v. Slater, 176 F.3d 686, 694 (1999).

[97] Constructive use occurs when the transportation project does not incorporate land from a section 4(f) resource, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the resource are substantially diminished.

23 C.F.R. § 771.135(p)(2) (1999). A constructive use occurs when:

> (i) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a resource protected by section 4(f)…;
> (ii) The proximity of the proposed project substantially impairs esthetic features or attributes of a resource protected by section 4(f)…;
> (iii) The project results in a restriction on access which substantially diminishes the utility of a significant publicly owned park, recreation area, or a historic site;
> (iv) The vibration impact from operation of the project substantially impairs the use of a section 4(f) resource…; or
> (v) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project….

23 C.F.R. § 771.135(p)(4) (1999). A constructive use does *not* occur when:

Compliance with Section 4(f) can result in additional costs and time to transportation projects. However, it is a valuable means to achieve preservation and thoughtful consideration of transportation alternatives.[98]

## D. AIR QUALITY

### 1. Evolution of Federal Air Pollution Control

Statutes are sometimes like barnacles. Barnacles tend to grow on the legs of a pier within months after it is built. New barnacles eventually grow on top of the older, earlier layers, only partially covering them up. So it is with legislation, which tends to address a problem in an evolutionary, growing, and changing manner. This section provides a historical overview of federal air pollution legislation.

The Air Pollution Control Act of 1955 was an early attempt of the federal government to address the air pollution problem.[99] While recognizing that states have the primary responsibility for controlling air pollution, the Act gave the federal government responsibility for some research and technical assistance. The Act authorized the Secretary of Health, Education, and Welfare (HEW) to undertake research programs for air pollution control in an attempt to come to a better understanding of the causes and effects of air pollution. The Act also allowed the Surgeon General to investigate local pollution problems upon the request of any state or local government.

The Clean Air Act of 1963 was the first federal regulatory program to control air pollution.[100] This Act expanded the research role of the federal government and authorized the Secretary of HEW to develop air quality criteria based on scientific studies. The Secretary was also authorized to convene conferences of government officials where interstate pollution threatened to endanger health or welfare. However, only a court order could lead to actual abatement and the issuance of a cease and desist order; thus the Act was not very effective in controlling air pollution.

In 1967, Congress introduced a more comprehensive scheme for controlling air pollution in the Air Quality Act.[101] It required HEW to designate "air quality control regions." The statute also mandated that states adopt ambient air quality standards within the control regions and develop implementation plans, subject to HEW approval, to meet these standards. The program did not provide for any national air pollution control standards and the only enforcement mechanism remained the conference procedure introduced in the Clean Air Act of 1963. The Air Quality Act of 1967 required HEW to list air pollutants and publish air quality criteria for various regions. Under it, the EPA developed National Ambient Air Quality Standards (NAAQS) for six pollutants: CO, sulfur dioxide, NOx, ozone, PM10, and lead.[102] But it left to individual states the requirement to establish specific emission goals by designating ambient air quality standards (AAQS).

In 1970, Congress enacted the first of what would be several major environmental bills, which would require transportation planning focused on arresting the problem of automobile air pollution.[103] Environmental issues became a strong focus of transportation planning. (Today, in nonattainment areas, air quality issues have become among the dominant concerns of metropolitan transportation planning.) A long-term commitment of federal support to transit was also begun that year,[104]

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(i) Compliance with the requirements of section 106 of the National Historic Preservation Act and 36 C.F.R. part 800 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register of Historic Places, results in an agreement of "no effect" or "no adverse effect";
(ii) The projected traffic noise levels of the proposed highway project do not exceed [applicable] noise abatement critieria…;
(iii) The projected noise levels…when compared with the projected noise levels if the project is not built, is barely perceptible (3 dBA or less);
(iv)…[A] governmental agency's right-of-way acquisition, an applicant's adoption of project location, or the Administration approval of a final environmental document, established the location for a proposed transportation project before the designation, establishment, or change in the significance of the resource…;
(v)…[T]he proposed transportation project and the resource are concurrently planned or developed…;
(vi) Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a resource for protection under section 4(f);
(vii) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur under a no-build scenario;
(viii) Change in accessibility will not substantially diminish the utilization of the section 4(f) resource; or
(ix) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of the section 4(f) resource.

23 C.F.R. § 771.135(p)(5) (1999). *See* 56 Fed. Reg. 13269 (Apr. 1, 1991).

[98] Miller, *supra* note 89, at 633, 667.

[99] Air Pollution Control Act of 1955, 69 Pub. L. 84-159 Stat. 322 (1955).

[100] Clean Air Act of 1963, 42 U.S.C. §§ 1857–1857l (1964).

[101] Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967).

[102] The Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4821 *et seq*. (2000), prohibits the use of lead-based paint in construction or rehabilitation of residence structures.

[103] Various regulations have been promulgated to deal with the problem. These include U.S. EPA regulations: "Control of Air Pollution from Mobile Services," 40 C.F.R. pt. 85; "Control of Emissions from New and In Use Highway Vehicles and Engines," "In-Use Motor Vehicle Engines: Certification and Test Procedures," 40 C.F.R. pt. 86; and "Fuel Economy of Motor Vehicles," 40 C.F.R. pt. 600. U.S. EPA regulations—"Control of Air Pollution from Mobile Services," 40 C.F.R. pt. 85.

[104] The Federal Transit Assistance Act was passed in 1970. Some might argue that the first long-term federal commitment to transit was the Urban Mass Transportation Act of 1964, while others might argue it didn't begin until promulgation of the National Mass Transportation Assistance Act of 1974, or UMTA's incorporation into the nascent DOT with the Department of Transportation Act of 1966. These statutes, and the

and subsequently expanded with both an increase in the federal share for transit construction as well as opening the Highway Trust Fund for transit, HOV lanes, bus shelters, and parking facilities.

In 1970, the federal government overhauled the air pollution control program that was in place and adopted major amendments to the 1963 Clean Air Act, in part to address the lack of TCMs in earlier legislation.[105] For the first time, Congress acknowledged that transportation was a major contributor to the air pollution problem that must be addressed in order to effectively control air pollution. The 1970 Clean Air Amendments required the states to: (1) develop an inspection and maintenance program for motor vehicles in affected Air Quality Control Regions; (2) develop a retrofit program applicable to several classes of older vehicles to minimize certain emissions; (3) designate and enforce preferential bus and carpool lanes; and (4) develop a program to monitor actual emissions as affected by the foregoing programs.[106] The failure of a state to meet these requirements led to the filing of a citizens' enforcement action in which the federal courts were asked to impose an injunction upon the DOT to refrain from approving any projects or awarding highway grants except for projects for purposes of safety, mass transit, or air quality improvement.[107] Citizen complaint litigation enforcing air quality laws has become more and more prevalent against federal, state, and local environmental and transportation agencies.[108]

In the 1970 Amendments, the federal government developed national standards for regulating air pollution, thus replacing the state air quality standards mandated in the Air Quality Act. NAAQS's were promulgated by the EPA in an effort to restrict concentrations of six common air pollutants: sulphur dioxide, ozone, CO, lead, nitrogen dioxide, and PM10. The NAAQS's are numerical standards that specify the maximum permissible concentration of the pollutant in the ambient air. The states then were responsible for developing implementation plans that detailed how they intended to meet or attain the NAAQS's, including programs for periodic inspection and testing of motor vehicles.[109] The Amendments also strengthened enforcement and articulated deadlines by which NAAQS's were to be met in order for states to be in compliance with the Act.

When deadlines for meeting NAAQS's went unmet, Congress extended them and implemented new measures to reach attainment by passing the Clean Air Act Amendments of 1977.[110] The 1977 Amendments introduced the conformity requirement mandating that federal agencies not support any activities, including transportation programs, that do not conform to an SIP. Conformity is a determination made by the MPO and DOT that the transportation plan and program in air quality nonattainment and maintenance areas meet the purpose of the SIP—reducing pollution emissions to meet the NAAQS.[111] The transportation plan and program must contribute to reducing motor vehicle emissions, and may not create new NAAQS violations, increase the frequency or severity of existing NAAQS violations, or delay attainment of NAAQS.[112] These amendments also introduced the prevention of significant deterioration (PSD) program, which prevents areas with air quality better than mandated by the NAAQS's from causing further deterioration to the air quality in the area until it reached the maximum allowed by the NAAQS's.

Further amendments were introduced in 1990 that were intended to correct deficiencies in earlier federal clean air legislation.[113] The 1990 Amendments imposed new requirements for areas that were not in compliance with the NAAQS's.[114] Six categories of "nonattainment"

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historical development of transit in the United States, are discussed in Section 1.

[105] Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

[106] EPA v. Brown, 431 U.S. 99, 100-01, 975 S. Ct. 1635, 52 L. Ed. 2d 166 (1977); Delaware Valley Citizens' Council for Clean Air v. Pa., 755 F.2d 38, 40-2 (3d Cir. 1985).

[107] Delaware Valley Citizens' Council for Clean Air v. Pa., 755 F.2d 38, 41 106 S. Ct. 3088, 92 L. Ed. 2d 439 (3d Cir. 1985); Pa. v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 551 (1986).

[108] *See, e.g.,* Council of Commuter Orgs. v. Metropolitan Transp. Auth., 683 F.2d 663 (2d Cir. 1982).

[109] 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. pt. 51, § 51.390 subpt. T; "Determining Conformity of Federal Actions to State or Federal Implementation Plans," 40 C.F.R. pt. 93.

When setting NAAQS's, the EPA may not consider the costs of implementing air quality standards because there is no explicit authorization to do so in the Clean Air Act. Under the Act, the EPA is only required to set air quality standards at levels "requisite to protect public health." *See* Whitman v. American Trucking Assocs., 531 U.S. 457, 465, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001).

[110] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

[111] Conformity determinations must be made at least every 3 years, or as changes are made to plans, TIPs, and projects. SIP revisions that establish or revise a transportation related budget or add or delete TCMs also require a new conformity determination. 40 C.F.R. pts. 51 and 93 (1999). U.S. DEP'T OF TRANSPORTATION, A GUIDE TO METROPOLITAN TRANSPORTATION PLANNING UNDER ISTEA — HOW THE PIECES FIT TOGETHER (1993). "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. pt. 51, § 51.390 subpt. T (1999); and "Determining Conformity of Federal Actions to State or Federal Implementation Plans," 40 C.F.R. pt. 93 (1999).

[112] U.S. DEP'T OF TRANSP., *supra* note 111, at 24.

[113] Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended at 42 U.S.C. §§ 7401-7671q) (1995 & Supp. 2000).

[114] The Clean Air Act Amendments of 1990 made air pollution policy an overriding factor in transportation policy. Inter-

areas were introduced with additional control measures required for each classification and new compliance deadlines.[115] The new amendments maintained the conformity requirement for transportation plans and also implemented more stringent federal emissions standards for new motor vehicles, with new controls on motor vehicle fuels.[116]

### 2. The Clean Air Act

The Clean Air Act[117] was developed to "protect and enhance the quality of the Nation's air resource so as to promote the public health and welfare and the productive capacity of its population."[118] With this purpose in mind, the Act requires the EPA to establish air quality standards for pollutants that may reasonably be anticipated to endanger public health or welfare.[119] Primary responsibility for attaining these standards was left to the states. States may adopt stricter standards than those required by the Act.[120] Each state must promulgate a SIP that details the measures, including TCMs, the state intends to implement in order to attain national air quality standards.[121] TCMs are strategies designed to reduce pollution by limiting or controlling motor vehicle use. Public transportation improvement measures are strategies designed to improve or expand the transit system. Public transportation improvement indirectly reduces motor vehicle usage and its pollution externalities.[122] To assist the states, the EPA is required to publish information on various TCMs that may be used to reduce motor vehicle pollution.[123] States need

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modal Surface Transportation Efficiency Act of 1991, Conference Report, 102d Cong., House Rep. No. 404 (Nov. 27, 1991). It imposed stricter automobile emission standards, and required transportation plans be designed to achieve clean air goals. If a region is not in compliance, it is designated a "nonattainment area," and the state must adopt measures to bring it into compliance. The amendments encourage federal investment in alternatives that reduce automobile use, and mandate employer-based transportation programs in nonattainment areas to reduce commuting. Robert Yuhnke, *The Amendments To Reform Transportation Planning in the Clean Air Act Amendments of 1990*, 5 TUL. ENVTL. L.J. 239, 240 (1991). Each state must submit a State Implementation Plan to the EPA, which sets forth its program to achieve or maintain national air quality standards. A state that fails to meet such goals risks losing billions of dollars in federal funding. Section 176 of the Act provides that no federal financial assistance of any kind may be provided if a transportation program fails to achieve conformity with the state's plan to achieve federal air quality standards. "Conformity" means that a plan or project advances a SIP's purpose of expeditiously eliminating or reducing violations of NAAQS. Citizens for a Better Env't v. Deukmejian, Nos. C89-2044 TEH, C89-2064 TEH, 1991 WL 424981 at *1 1990 U.S. Dist Lexis 17976 (N.D. Cal. 1990). A "conforming project" must not cause or contribute to any new violation, increase the frequency or severity of any violation, or delay attainment. Environmental Defense Fund v. Browner, No. C92 1636 TEH, 1995 WL 91324 at *1994 U.S. Dist. Lexis 20914 (N.D. Cal 1994). Moreover, federal highway funds for any project can be withheld if the EPA deems it appropriate and reasonable.

[115] *Supra* note 139.

[116] *See* Clean Fuels Formula Grant Program, 49 U.S.C. § 5308 (2000). The 1990 Amendments also required employers in areas experiencing serious air quality problems to encourage their employees to car pool during heavy traffic periods. Five years after this mandate, Congress repealed it due to pressure from states and disgruntled employers. *See generally* Craig N. Oren, *Detail and Implementation: The Example of Employee Trip Reduction*, 17 VA. ENVTL. L.J. 123 (1998); Craig N. Oren, *How a Mandate Came From Hell: The Making of the Federal Employee Trip Reduction Program*, 28 ENVTL. L. 267 (1998); Patricia A. Leonard, *The Clean Air Act's Mandate of Employer Trip-Reduction Programs: Is This a Workable Solution to the Country's Air Pollution Problems*, 49 U. MIAMI L. REV. 827 (1995).

[117] 42 U.S.C. §§ 7401 *et seq.* (1995 & Supp. 2000).

[118] 42 U.S.C. § 7401(b)(1) (1995 & Supp. 2000).

[119] 42 U.S.C. § 7408 (1995 & Supp. 2000).

[120] *See* Exxon Mobil Corp. v. United States EPA, 217 F.3d 1246, 1250–51, 1256 (2000), where the Ninth Circuit U.S. Court of Appeals held that states may set stricter standards for oxygen content standards for fuels than that which is required by the Clean Air Act. In this case, Nevada required gasoline sold in the wintertime have a minimum oxygen content of 3.5 percent, though the Clean Air Act only required a 2.7 percent minimum oxygen standard.

[121] 42 U.S.C. § 7410 (1995 & Supp. 2000).

[122] Council of Commuter Organizations v. Gorsuch, 683 F.2d 648, 652 n. 3 (2d Cir. 1982). An externality is a positive or negative impact upon a person not a party to the transaction. Environmental pollution is an example of a negative externality. Paul S. Dempsey, *Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition,* 46 WASH. & LEE L. REV. 1, 17–21 (1989).

[123] The Administrator shall publish…information prepared…regarding the formulation and emission reduction potential of [TCMs] related to criteria pollutants and their precursors, including, but not limited to—(i) programs for improved public transit; (ii) restriction of certain roads or lanes to, or construction of such roads or lanes for use by, passenger buses or high occupancy vehicles; (iii) employer-based transportation management plans, including incentives; (iv) trip-reduction ordinances; (v) traffic flow improvement programs that achieve emission reductions; (vi) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit service; (vii) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use; (viii) programs for the provision of all forms of high-occupancy, shared-ride services; (ix) programs to limit portions of road surfaces or certain sections of the metropolitan area to the use of non-motorized vehicles or pedestrian use, both as to time and place; (x) programs for secure bicycle storage facilities and other facilities, including bicycle lanes, for the convenience and protection of bicyclists, in both public and private areas; (xi) programs to control extended idling of vehicles; (xii) programs to reduce motor vehicle emissions, consistent with Title II, which are caused by extreme cold start conditions; (xiii) employer-sponsored programs to permit flexible work schedules; (xiv) programs and ordinances to facilitate non-automobile travel, provision and utilization of mass transit, and to generally reduce the need for single-occupant vehicle travel, as part of transportation planning and development efforts of a locality, including programs and ordinances applicable to new shopping centers, special events, and other centers of vehicle activity; (xv) programs for new construction and major reconstructions of paths, tracks or areas solely for the use by

not include all of the EPA's recommended TCMs in their SIP,[124] but can tailor the measures to those that may be reasonably available in their area.[125] These plans must be approved by the EPA for a state to fulfill its obligations under the Act and become enforceable.[126] If a state does not develop an adequate implementation plan, the EPA may be forced to develop a federal implementation plan (FIP)[127] for the state or employ sanctions such as withholding federal transportation funding from the state.[128]

States are subdivided into air quality regions.[129] These regions are designated as "attainment," "nonattainment," or "unclassifiable" for particular pollutants.[130] When the EPA designates an area as nonattainment, the state must modify its implementation plan to include stricter pollution controls to bring the area into compliance with federal standards.[131] States that fail to submit new SIPs or fail to implement approved plans within 18 months risk having sanctions placed on them, including having federal transportation funds withheld.[132] The Clean Air Act prohibits the federal government from providing assistance to programs that do not conform to an approved implementation plan.[133] The 1977 Clean Air Act Amendments established the NAAQS. The combined impact of this legislation, as well as the 1990 Clean Air Act Amendments and the 1991 ISTEA, is that nonattainment can result in ineligibility to receive federal matching funds for new transportation projects.[134]

### 3. Transportation Planning for Clean Air

Transportation planning begins with development of statewide and metropolitan long-range plans, which must conform to the relevant state SIP.[135] The transportation sector is responsible for "mobile source" emissions as one component of the determination of an entire SIP—the other, larger component being the emissions budget for a state's "stationary sources." The SIPs need to include "reasonably available" TCMs, such as programs to improve public transportation and programs to promote ride-sharing or increased bicycle use.[136]

In *Trustees for Alaska v. Fink*, the city of Anchorage was classified as a nonattainment area for CO, largely due to vehicle emissions.[137] Alaska revised its SIP, as required, and included in its revised plan a proposal for the expansion of the Anchorage bus system to alleviate vehicle traffic and reduce CO emission. A citizen's group brought suit against the city, claiming it violated their commitment to TCMs in the SIP when they failed to fund the bus expansion. The court held that the city did not violate its obligation because the city had made a conditional commitment to the bus expansion program contingent on the availability of funding, which is allowable under the Clean Air Act.[138] Though the city was eligible for state and federal grants, the bus expansion would still have an operating deficit of $25 million and voters had rejected proposals to raise funding for the bus expansion, and the city's charter barred the city from raising taxes to cover operating costs.[139] Thus, due to the lack of funding, the bus expansion was not a "reasonably available" TCM.[140] Though Anchorage was under a continuing obligation to seek out funding for the expansion, the city did not violate Alaska's SIP as a result of its failure to locate funding.

As did Alaska, Arizona included TCMs in its original SIP submitted to the EPA.[141] In 1978, the EPA desig-

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pedestrian or other non-motorized means of transportation when economically feasible and in the public interest. For purposes of this clause, the Administrator shall also consult with the Secretary of the Interior; and (xvi) program to encourage the voluntary removal from use and the marketplace of pre-1980 model year light duty vehicles and pre-1980 model light duty trucks.

42 U.S.C. § 7408(f)(l)(A) (1995 & Supp. 2000).

[124] Clean Air Act of 1955, Section 176(c), 42 U.S.C. §§ 7401 *et seq*.

[125] *See* Ober v. United States EPA, 84 F.3d 304, 308 (1996), which held, "that local circumstances vary to such a degree from city-to-city that it is inappropriate to presume that all [transportation control measures] are reasonably available in all areas." However, states must address the reasonableness of all control measures based on local circumstances and then either implement them or provide a justification for their rejection.

[126] 42 U.S.C. § 7410 (1995 & Supp. 2000).

[127] *Id.* at § 7410(c).

[128] *Id.* at § 7506( )( ).

[129] *Id.* at § 7407.

[130] *Id*. at § 7407(d).

[131] *Id*. at § 7502(b).

[132] For examples of the types of sanctions that may be imposed, *see* the case study of Atlanta's environmental problems in Section 3.E.5 below. *See also* Bayview Hunters Point Community Advocates v. Metropolitan Transp. Comm'n, 177 F. Supp. 2d 1011, 1033 (N.D. Cal. 2001), in which the court ordered the parties to negotiate appropriate remedies.

[133] 42 U.S.C. § 7506.

[134] Federal funds may not be programmed in transportation management areas classified as nonattainment for ozone or carbon monoxide pursuant to the Clean Air Act for any highway project that will result in a significant increase in carrying capacity for SOVs unless the project is part of an approved congestion management system. Intermodal Surface Transportation Efficiency Act of 1991, 23 U.S.C § 134( ) (2000). Conservation Law Found. v. Federal Highway Admin., 827 F. Supp. 871, 885 (D. R.I. 1993).

[135] 42 U.S.C. § 7410. 23 C.F.R. pt. 450 (1999).

[136] *See generally* Philip Weinberg, *Public Transportation and Clean Air: Natural Allies*, 21 ENVTL. L. 1527 (1991) (discussing how public transportation should be used to achieve the goals of the CAA).

[137] 17 F.3d 1209, 1218 (9th Cir. 1994).

[138] *Id.* at 1212.

[139] *Id.* at 1212–13.

[140] *Id*. at 1211–12.

[141] McCarthy v. Thomas, 27 F.3d 1363, 1365 (9th Cir. 1994).

nated portions of Pima and Maricopa Counties in Arizona as nonattainment areas for CO.[142] The following year, Arizona responded by submitting proposed revisions to the state's SIP for both counties to comply with CO NAAQS for the state.[143] The SIP proposed an expansion of the mass transit systems in Pima and Maricopa Counties, including significant additions to both counties' bus fleets.[144] These mass transit provisions became a subject of contention between the EPA, Arizona, and private citizens, and were not resolved until 1994 by the Ninth Circuit United States Court of Appeals.[145]

In 1982, the EPA conditionally approved the CO attainment provisions of the SIP for Pima and Maricopa Counties.[146] By 1986, Arizona had yet to correct the CO attainment deficiencies in the SIP, and the EPA formally disapproved the CO attainment provisions for both Pima and Maricopa Counties.[147] In 1987 and 1988, Arizona once again submitted CO attainment proposals for Pima and Maricopa Counties. The EPA approved the new attainment measures in the SIP. Notably, there was no mention in the new proposals of the previously approved measures.[148]

In *Delaney v. EPA*, the Court of Appeals for the Ninth Circuit reviewed the EPA's approval of the SIP for Maricopa and Pima Counties.[149] Residents of both counties petitioned the court to vacate the EPA's approval because the approved SIP did not comply with the attainment timing requirements of NAAQS under the CAA.[150] The court held for the petitioners and directed the EPA to vacate the 1988 SIP for the two counties and to implement a FIP to achieve attainment NAAQS for CO.[151]

Subsequent to the *Delaney* decision, citizens of Pima and Maricopa Counties sought an injunction in the Arizona federal district court to require both counties to implement the mass transit provisions from the approved 1982 SIP.[152] The issue was whether a conditionally approved provision of a state's SIP is later binding as part of the final SIP.[153] The district court held that the conditionally approved portions were not enforceable as part of the final SIP or FIP because they were never mentioned or referenced for incorporation into the final document.[154] Therefore, the court held that the mass transit provisions were not enforceable and the injunction was denied.

On appeal, the court reversed the district court's decision and remanded the case to allow the injunction requiring implementation of the 1982 mass transit provisions.[155] The court rejected the district court's conclusion that no conditionally approved provision of a SIP or FIP is enforceable until the final document is ultimately approved.[156] The court held that all approvals prior to the EPA's 1988 decision were incorporated into the transforming SIP as enforceable provisions because they were never deleted and were left intact in the EPA's subsequent approvals.[157]

Both *McCarthy* and *Fink* were decided by the Court of Appeals for the Ninth Circuit. The outcomes reached by the court may have muddled the area of SIP compliance and TCMs, but there are distinctions between the cases that explain the divergent results.[158] In *McCarthy*, the court required Arizona to comply with its previously approved TCMs. Arizona stated that it did not timely implement the mass transit provisions partially because of the uncertainty created by the *Delaney* decision. Arizona—and specifically the cities of Tucson and Phoenix—argued that the *Delaney* decision discharged the state's prior obligations under its SIP for CO attainment. However, Arizona never asserted that the mass transit measures were economically unfeasible or

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[142] *Id*. Tucson is located in Pima County and Phoenix is located in Maricopa County.

[143] *Id.*

[144] *Id.* In 1979, the Tucson bus fleet consisted of 59 buses. The 1979 SIP proposed expanding the fleet to 199 buses, which would increase the number of riders to 14.5 million annually by 1986. In Phoenix, the 1979 SIP proposed 400 buses by 1982, with almost 4 million riders annually. *Id*.

[145] *See generally* McCarthy v. Thomas, 27 F.3d 1363 (9th Cir. 1994); Delaney v. EPA, 898 F.2d 687 (9th Cir. 1990), and *cert. denied sub nom.* Reilly v. Delaney, 498 U.S. 998 (1990).

[146] McCarthy v. Thomas, 27 F.3d at 1365. The approvals were conditional due to deficiencies in the SIP that were not related to the mass transit provisions.

[147] *Id*. at 1366. The EPA approved other portions of the SIP and recognized that portions approved prior to 1986 would remain intact.

[148] *Id*.

[149] Delaney v. EPA, 898 F.2d 687, 689 (9th Cir. 1990); Frank W. Moskowitz, *The Clean Air Act: Post-1987 Attainment Deadlines for the Carbon Monoxide Ambient Air Quality Standards in Arizona's Maricopa and Prima Counties: Delaney v. EPA, 898 F.2d 687 (9th Cir), Cert. Denied, 111 S. Ct. 556 (1990)*, 23 ARIZ. ST. L.J. 675 (1991) (discussing Delaney and the implementation of a FIP by the EPA subsequent to the decision).

[150] Delaney, 898 F.2d at 689.

[151] *Id*. at 695.

[152] *See* Assoc. Press, *Pollution Agency May Lose Funds*, ARIZONA REPUBLIC, Oct. 31, 1992, at B5 (describing the EPA's belief that Maricopa County was not making serious efforts to improve air quality); Kathleen Ingley, *Air-cleanup Plan Ignores Mass Transit*, ARIZONA REPUBLIC, Sept. 2, 1993, at A1 (discussing the lack of mass transit in Maricopa Valley and the difficulties with reaching EPA attainment levels); H. Josef Hebert, *States Face Sanctions Over Lack of Smog-Reduction Plans*, July 22, 1994, available in 1994 WL 10131797 (identifying Arizona as one of the nine states facing federal sanctions, including the loss of federal highway construction funds, due to the state's noncompliance with the CAA).

[153] McCarthy, *supra* note 172 at 1373.

[154] *Id*. at 1367.

[155] *Id.* at 1373.

[156] *Id.* at 1370.

[157] *Id*.

[158] *See* Geoffrey E. Bishop, *Are Mandatory Transportation Control Measures Mandatory? A Look at Ninth Circuit Judicial Enforcement of TCMs*, 37 SANTA CLARA L. REV. 731 (1997) (discussing the possible rationales for the contrary decisions by the Ninth Circuit in Alaska v. Fink and McCarthy v. EPA.

would cause the state economic hardship to enforce, as was the case in *Fink*. In *Fink,* the court found that Alaska made a good faith claim that the lack of funding for the bus expansion made compliance with the SIP in Anchorage impracticable. Economic unfeasibility, according to the Ninth Circuit, is a valid reason for noncompliance with previously approved TCMs in the state's SIP.[159]

Yet another case in this litany is *Bayview Hunters Point Community Advocates v. Metropolitan Transportation Commission,*[160] which held that the San Francisco MPO violated the SIP by failing to achieve a 15 percent increase in transit ridership over 5 years as contemplated by a TCM set forth in a 1982 Bay Area Quality Plan, a part of the SIP. The court dismissed defendant's argument that the TCM only requires adoption of a target increase, and not implementation of that increase, as "disingenuous."[161] Though the court was sympathetic to defendants' arguments that outside forces (e.g., changing work patterns or individual preferences in choosing to use transit or not), might prevent them from achieving the 15 percent ridership increase goal, it found that "States have an unwavering obligation to carry out federally mandated SIPs; thus where a SIP is violated, liability attaches, regardless of the reasons for the violation."[162]

When areas of the state are designated as nonattainment for ozone, CO, or small PM10, the Clean Air Act requires that certain additional TCMs be taken in order for the area to be in compliance with the Clean Air Act.[163] When an area is designated nonattainment, the SIP must be revised to include additional control measures.[164] For example, the Act mandates strict motor vehicle inspection and maintenance programs in areas that are nonattainment. The Act also requires that nonattainment areas implement clean fuels programs—one for reformulated gasoline to aid areas in reaching attainment goals for ozone and one for oxygenated gasoline to assist areas in reaching attainment for CO. Nonattainment areas are classified based on the level of degradation in the area, with each classification having different requirements that need to be fulfilled to reach compliance with the Act.[165] Nonattainment areas may be redesignated to attainment when certain clean air criteria are met.[166] Areas that are designated nonattainment cannot receive federal transportation funds.

A state that does not conform to the statutory requirements of the Clean Air Act risks losing federal support for transportation programs. The conformity provision of the Act mandates that no agent of the federal government may in any way engage in, support, provide financial assistance for, license or permit, or approve, any activity that does not conform to an implementation plan.[167] Conformity to an implementation plan means:

> (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of such standards; and (B) that such activities will not—(i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.[168]

The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel, and congestion estimates as determined by the MPO or other agency authorized to make such estimates.

All federally-funded projects must come from a currently conforming plan or program.[169] Projects not from a currently conforming plan must be considered to-

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[159] On April 25, 2000, the EPA announced that Tucson was now an attainment area for the NAAQS for carbon monoxide. Pima Association of Governments, *EPA Declares Tucson in Compliance with Clean Air Act Standards* (last modified July 26, 2001), http://www.pagenet.org/AQ/PressReleases/epaairstandards2000-04-25.html.

[160] 177 F. Supp. 2d 1011 (N.D. Cal. 2001).

[161] 177 F. Supp. 2d at 1027.

[162] 177 F. Supp. 2d at 1027–28, quoting from *Citizens for a Better Env't v. Deukmejian*, 731 F. Supp. 1448, 1458 (N.D. Cal. 1990).

[163] *See* 42 U.S.C. § 7511a (1995 & Supp. 2000) for ozone nonattainment measures; 42 U.S.C. § 7512a (1995 & Supp. 2000) for carbon monoxide nonattainment measures; 42 U.S.C. § 7513 (1995 & Supp. 2000) for PM10.

[164] 42 U.S.C. § 7502 (1995 & Supp. 2000).

[165] 42 U.S.C. § 7511 (1995 & Supp. 2000) for ozone, which has five classifications of nonattainment: marginal, moderate, serious, severe, and extreme; 42 U.S.C. § 7512(a) (1995 & Supp. 2000) for carbon monoxide, which has two classifications for nonattainment: moderate and serious.

[166] *See* Southwestern Pa. Growth Alliance v. Browner, 121 F.3d 106, 110 (3d Cir. 1997), which listed five criteria, all of which must be met, in order for a state to be redesignated from nonattainment to attainment.

> EPA Administrator "may not promulgate a redesignation…unless" the following five criteria are met: (i) the Administrator determines that the area has attained the national ambient air quality standard; (ii) the Administrator has fully approved the applicable implementation plan for the area…; (iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent enforceable reductions; (iv) the Administrator has fully approved a maintenance plan for the area…; and (v) the State containing such area has met all requirements applicable to the area….

[167] 42 U.S.C. § 7506(c)(l) (1995 & Supp. 2000).

[168] *Id*. at § 7506(c)(l)(A).

[169] *See* Environmental Defense Fund v. EPA, 167 F.3d 641, 647 (D.C. Cir. 1999), where the court held that a project that at one time appeared in a conforming plan did not satisfy the statute's requirement, because the CAA requires a project come from a *currently* conforming plan to be eligible for federal funding.

gether with other transportation plans and programs and it must be determined that the plan would not cause such plans and programs to exceed emissions reduction projections.[170] When Congress amended the Act in 1990, it allowed some ongoing projects to be "grandfathered" and continue despite not coming from a currently conforming plan.[171] However, certain conditions needed to be met for a project to be grandfathered, and it is very unlikely any of today's projects would fulfill any of the conditions.[172]

Conformity determinations are primarily made by MPOs before they approve a transportation plan and before the DOT can distribute funds. MPOs are regional agencies in areas with populations of greater than 50,000 and are responsible for developing regional transportation plans that allow for "continuing, cooperative, and comprehensive" development.[173] To be eligible for federal funds, MPOs must develop a long-range transportation plan and a short-range TIP. Transportation plans are 20-year plans that describe the long-term goals and policies of the MPO for improving air quality.[174] TIPs identify transportation projects to be developed in the region for which the MPO will provide federal funds.[175] TIPs must conform to the SIP and give priority to TCMs included in the SIP.

At this writing, and as discussed in detail in Section 4, the primary source for federal transportation funding is TEA-21,[176] successor to ISTEA.[177] Under TEA-21, TCMs may be funded through the CMAQ program or the STP. CMAQ is the largest of the two, providing $8.1 billion to promote clean air through fiscal year 2003. The funds are allocated to projects that comply with a SIP, are included in the TIP, and are likely to contribute to the attainment of NAAQS.

[170] 42 U.S.C. § 7506(c)(2) (1995 & Supp. 2000).

[171] *See* City of L.A. v. Federal Aviation Admin., 138 F.3d 806, 808–9 (9th Cir. 1998).

[172] Projects were allowed to be grandfathered where (1) NEPA was completed as evidenced by a final EA, EIS, or FONSI that was prepared prior to January 31, 1994; or (2)(i) Prior to January 31, 1994, an environmental analysis was commenced or a contract was awarded to develop the specific environmental analysis; (ii) Sufficient environmental analysis is completed by March 15, 1994, so that the federal agency may determine that the federal action is in conformity with the specific requirements and the purposes of the applicable SIP pursuant to the agency's affirmative obligation under Section 176(c) of the CAA (Act); and (iii) A written determination of conformity under Section 176(c) of the Act has been made by the federal agency responsible for the federal action by March 15, 1994. 40 C.F.R. § 93.150(c) (2000).

[173] 49 U.S.C. § 5303( )( ) (1995 & Supp. 2000).

[174] 23 C.F.R. § 450.214 (2000).

[175] 23 C.F.R. § 450.324 (2000).

[176] TEA-21, Pub. L. No. 105-178, 112 Stat. 107 (1998).

[177] ISTEA, Pub. L. No. 102-240, 105 Stat. 1914 (1991).

### 4. Nonattainment and Conformity

ISTEA established the CMAQ and STP programs, which allocate funds to states for use by TCMs to help them implement their transportation/air quality plans and attain national standards for CO, ozone, and small PM10.[178] 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 program 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.[179] In urbanized areas with more than 200,000 in population (known as transportation management areas, or TMAs), MPOs develop TIPs in cooperation with state

[178] *Id*. 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 TCMs in helping them implement their transportation/air quality plans and attain national standards for carbon monoxide, ozone, and small PM10. 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. 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. Theodore Taub & Katherine Castor, *ISTEA—Too Soon To Evaluate Its Impact*, ALI-ABA Land Use Institute (Aug. 16, 1995). 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) (2000). With respect to TMAs classified as nonattainment areas for ozone or carbon monoxide pursuant to the CAA, 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. Pa. Turnpike Comm'n, 882 F. Supp. 455, 478 (W.D. Pa. 1995); U.S. FEDERAL HIGHWAY ADMINISTRATION: A SUMMARY: AIR QUALITY PROGRAMS AND PROVISIONS OF THE INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991, at 13 (1992). In nonattainment areas for transportation-related pollutants, the MPO must coordinate the development of its long-range transportation plan with the process for development of transportation measures in the SIP required by the CAA. *Intermodal Surface Transportation Efficiency Act of 1991*, Conference Report, H.R. No. 404, 102d Cong. (Nov. 27, 1991). The DOT may prescribe abbreviated requirements for development of transportation plans and programs for urbanized areas not designated as TMAs, unless they are designated as nonattainment for ozone or carbon monoxide under the CAA. The DOT must certify the process in each TMA at least every 3 years. *Intermodal Surface Transportation Efficiency Act of 1991*, Conference Report, H.R. No. 404, 102d Cong. (Nov. 27, 1991). *See generally* Paul Dempsey, *The Law of Intermodal Transportation: What It Was, What It Is, What It Should Be,* 27 TRANSP. L.J. 367 (2000).

[179] *Id*.

governments.[180] For federally-funded transportation projects, MPOs within TMAs must develop a congestion management system (CMS) that requires consideration of "travel demand reduction and operational management strategies."[181] For TMAs classified as nonattainment areas for ozone or CO pursuant to the Clean Air Act, federal funds may not be allocated to any highway or transit project that will result in a significant increase in carrying capacity for single occupancy vehicles unless the project is part of an approved CMS.[182] In nonattainment areas for transportation-related pollutants, the MPO must coordinate the development of its long-range transportation plan with the process for development of transportation measures in the SIP required by the Clean Air Act.[183] The DOT may approve a proposal for abbreviated requirements for development of transportation plans and programs for urbanized areas not designated as TMAs, unless they are designated as nonattainment for ozone or CO under the Clean Air Act. The DOT must certify the process in each TMA at least every 3 years.[184]

An MPO has an affirmative responsibility to reject any project, program, or plan that does not conform to an approved implementation plan[185] and that is in a nonattainment area as defined in the Clean Air Act.[186] Conformity means that the purpose of eliminating or reducing the severity and number of violations of the NAAQS, and achieving expeditious attainment of such standards, is not compromised.[187] Specifically, it means that activities will not

> (i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard or any required interim emission reduction or other milestones in any area.[188]

Conformity is determined by reviewing recent estimates of emissions. Those estimates are determined from recent population, employment, travel, and congestion estimates as determined by the MPO or other agency authorized to make such estimates.[189]

An MPO may not adopt a TIP or other transportation plan until a final determination has been made that such plan meets this definition of conformity.[190] Additionally, emissions expected from implementation of a project, program, or plan must be consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan.[191] Further, an MPO may not adopt a TIP until it determines that the program provides for timely implementation of TCMs that are consistent with schedules in the applicable implementation plan.[192]

An MPO may only adopt a transportation project if it meets the following criteria: (1) the project is from a conforming plan and program; (2) the design concept and scope of the project has not changed significantly since the conformity finding regarding the plan and program from which the project was derived; and (3) the design concept and scope of the project at the time of the conformity determination for the program was adequate to determine emissions.[193]

Any project failing to meet the above criteria may still be treated as conforming if it is demonstrated that the projected project emissions will not cause accepted plans and programs under an approved implementation plan to exceed their assigned emission reduction projections and schedules.[194] In CO nonattainment areas, transportation projects may demonstrate conformity if the project eliminates or reduces the severity and number of such violations in the area substantially affected by the project.[195]

When an implementation plan revision is pending approval, conformity of its plans, programs, and projects may be demonstrated by showing the following: (1) consistency with the most recent estimates of mobile source emissions; (2) provisions for the expeditious implementation of TCMs in the applicable implementation plan; and (3) a reduction in annual emissions in ozone and CO nonattainment areas.

Conformity determinations for transportation plans, TIPs, and projects are based on EPA transportation conformity regulations, and are summarized as follows:

TRANSPORTATION PLANS AND PROGRAMS

- The transportation plan and program must be fiscally constrained.
- The transportation plan and program must use the most recent estimates of mobile source emissions and latest planning assumptions.
- The transportation plan and program must provide for expeditious implementation of TCMs in the SIP.
- The transportation plans and programs of MPOs for areas designated as nonattainment and maintenance areas for ozone or CO must contribute to annual emissions reductions and/or meet emission budgets.
- The transportation plan and programs for MPOs for areas designated nonattainment or maintenance areas

[180] ISTEA, Pub. L. No 105-178, 112 Stat. 107 (1998). Taub & Castor, *supra* note 178.

[181] 23 U.S.C. § 134(i)(3).

[182] Clairton Sportsman's Club v. Pa. Turnpike Comm'n, 882 F. Supp. 455, 478 (W.D. Pa. 1995); U.S. FEDERAL HIGHWAY ADMINISTRATION, *supra* note 178.

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

[184] *Id*.

[185] 42 U.S.C. § 7506(c)(1) (2000).

[186] 42 U.S.C. § 7506(c)(5) (2000).

[187] 42 U.S.C. § 7506(c)(1)(A) (2000).

[188] 42 U.S.C. § 7506(c)(1)(B) (2000).

[189] 42 U.S.C. § 7506(c)(1) (2000).

[190] 42 U.S.C. §§ 7506(c)(1), (c)(2)(A) (2000).

[191] 42 U.S.C. § 7506(c)(2)(A) (2000).

[192] 42 U.S.C. § 7506(c)(2)(B) (2000).

[193] 42 U.S.C. § 7506(c)(2)(C) (2000).

[194] 42 U.S.C. § 7506(c)(2)(D) (2000).

[195] 42 U.S.C. § 7506(c)(3)(B) (2000).

for PM10 and NOx must contribute to emission reductions or must not increase emissions.

TRANSPORTATION PROJECTS

- Transportation projects must come from the conforming transportation plan and TIP.
- The design concept and scope of the project that was in place at the time of the conformity finding must be maintained throughout implementation.
- Project design and scope must be sufficiently defined to determine emissions at the time of the conformity determination for the TIP.
- A project in CO nonattainment areas must show a reduction in the number and severity of CO violations in the area substantially affected by the project.[196]

If the transportation plan, TIP, or project do not meet the conformity requirements, the transportation officials must either modify it to offset the emissions, or work with the state to modify the SIP to offset the plan, TIP, or project emissions. If neither can be accomplished, the plan, the TIP, or project may not move forward.[197] In other words, federally-funded projects may not proceed unless there is a currently conforming transportation plan and program at the time of project approval.[198] The projected emissions of a project, when considered with emissions projected from the applicable plan and program within the nonattainment area, must not cause such plan and program to exceed the emission reduction projections and schedules delineated in the SIP.[199]

Citizen suits are permitted under the Clean Air Act.[200] Commuter organizations have turned to the courts to force states to give transit a higher priority and enhanced financial support in the preparation of SIPs,[201] or to comply with their SIPs.[202] Clean air conformity determinations have also been challenged.[203] Some courts have ordered governmental institutions to take such TCMs as will bring their region into conformity with its environmental obligations, and often they do include enhanced transit support.[204] For example, serious PM10 problems in Phoenix led the courts to force the government to adhere to its original plan and purchase more buses.[205]

### 5. Gridlock in Atlanta: A Case Study

Atlanta's environmental problems were the first of any major American metropolitan area to have triggered the loss of federal transportation funds under the Clean Air Act. It is for that reason that it is addressed here as a case study, as an example of how transportation planning can go awry, and how the state and local governmental institutions addressed the crisis.

Atlanta began to grow in the 1960s. Several of the nation's fastest growing counties have been suburban Atlanta counties. As it grew, Atlanta became regional headquarters of everything, and national headquarters to several of the Fortune 500 firms. As the metropolitan area grew in population, more and wider roads were laid, penetrating deep into north Georgia, which was transformed from rural countryside into the suburban megalopolis of Atlanta.

As in many states, the Georgia DOT was in reality a Georgia Highway Department. A beltway surrounding Atlanta was completed in the late 1960s, with development at the interchanges transforming I-285 from a transportation corridor into a destination point of shopping, manufacturing, and office facilities.[206] Residents and businesses moved farther and farther from the central business district. Lax zoning allowed strip malls, gasoline stations, and fast food restaurants to be built along nearly every linear foot of the major transportation arteries.

Two million additional people were added to the Atlanta metropolitan region after 1970, spread across 21 counties.[207] Sprawl, pollution, and congestion were the inevitable result. By the end of the 20th century, metropolitan residents were driving an average of 33 miles a day, surpassed by only Nashville, Birmingham, and Houston. Atlanta's drivers were delayed 53 hours by traffic annually, second only to Los Angeles's 56 hours. It was not uncommon for Atlanta's expressways to grind to 10 lanes of gridlock during rush hours.[208] Geor-

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[196] U.S. DEP'T OF TRANSP., A GUIDE TO METROPOLITAN TRANSPORTATION PLANNING UNDER ISTEA—HOW THE PIECES FIT TOGETHER at 35 (1993), available at http://ntl.bts.gov/docs/424mtp.html. If these criteria cannot be met, it must be demonstrated "that the project emissions, when considered with the emissions projected for the conforming transportation plan and TIP, do not cause the plans and programs to exceed the emissions budget in the SIP." *Id*. at 35.

[197] *Id*. at 36.

[198] Environmental Defense Fund v. EPA, 167 F.3d 641, 647 (D.C. Cir. 1999),

[199] 42 U.S.C. § 7506(c)(2)(D) (2000).

[200] 42 U.S.C. § 7604 (2000).

[201] *See, e.g.,* Council of Commuter Organizations v. Thomas, 799 F.2d 879 (2d Cir. 1986); Action for Rational Transit v. West Side Highway Project, 699 F.2d 614 (2d Cir. 1983); Action for Rational Transit v. West Side Highway Project, 536 F. Supp. 1225, 1232–33 (S.D. N.Y. 1982); Council of Commuter Organizations v. Metropolitan Transp. Auth., 683 F.2d 663 (2d Cir. 1982).

[202] *See, e.g.*, American Lung Ass'n v. Kean, 670 F. Supp. 1285 (D. N.J. 1987); Coalition Against Columbus Center v. N.Y., 967 F.2d 764 (2d Cir. 1992).

[203] *See, e.g.*, Environmental Council of Sacramento v. Slater, 184 F. Supp. 2d 1016 (E.D. Cal. 2000).

[204] *See, e.g.*, Citizens for a Better Env't v. Deukmejian, 731 F. Supp. 1448 (N.D. Cal. 1990).

[205] *See* Ober v. Whitman, 243 F.3d 1190 (9th Cir. 1991); Ober v. EPA, 84 F.3d 304 (9th Cir. 1996).

[206] Christine Kreyling, *Getting the Runaround*, PLANNING MAGAZINE, Nov. 2000, at 4, and primary source/statute.

[207] Leon Eplan, *Atlanta Airs Its Options*, PLANNING MAGAZINE, Nov. 1999, at p. 14.

[208] Lee Anderson, *Shutting Down Atlanta?,* CHATTANOOGA TIMES FREE PRESS, June 7, 2001, at B7.

gians consumed 24 percent more gasoline than the national average, and this figure was growing at twice the national rate.[209] Atlanta had the nation's sixth worst ozone pollution (created when tailpipe NOx and other VOCs absorb sunlight),[210] surpassed only by five California cities and Houston.[211] The amount of NOx and VOCs in Atlanta's air weighed as much as six Boeing 747 aircraft. Motor vehicles were responsible for more than 60 percent of the air pollution in the region. Before 1998, the state DOT's response to congestion was to build and widen highways.[212] According to Catheryn McCue of the Southern Environmental Law Center, "Atlanta is the poster child for sprawl, polluted air and poor land-use planning."[213] The *Wall Street Journal* ran a front page story with the headline, "Is Traffic-Clogged Atlanta the New Los Angeles?," while *Newsweek* made Atlanta the lead story on an issue devoted to sprawl.[214]

Yet there were a few positive signs. Highway gridlock had improved transit ridership. MARTA experienced a 5.3 percent improvement in rail ridership, and a 3.5 percent growth in bus ridership between 1999 and 2000.[215] MARTA had been born in the 1960s in the two counties in which the city of Atlanta lays partial claim—Fulton and DeKalb Counties. An expanded rail network was one of the major means of handling the influx of visitors during the 1996 Atlanta Olympic Games. MARTA's rail network also serves Hartsfield International, the world's busiest airport.

But concerns over Atlanta's air quality and automobile dependence have been long-standing. As early as 1975, citizens and environmental groups were filing litigation against the Atlanta Regional Commission (ARC) (the regional MPO), the DOT, and MARTA alleging that their transportation plans failed to fulfill federal environmental obligations.[216] By and large, such lawsuits were unsuccessful until the 1990s.

Atlanta fell out of compliance with federal ozone standards in 1995, and was designated in "serious" nonattainment.[217] The ARC failed to submit an updated plan conforming to the air quality requirements by the December 31, 1997, deadline, and lost federal funding for new transportation projects.[218] In 1998, the federal government cut off highway money to 13 counties in the Atlanta nonattainment area. [219] The freeze on federal funding cost the area $153 million per year.[220] The region would remain in noncompliance and ineligible for new federal transportation funds for more than 2 years.

In November 1998, Roy Barnes, a suburban Atlanta state Senator, was elected Governor of Georgia, declaring Atlanta's air pollution problems his highest priority.[221] In January 1999, newly elected Governor Barnes proposed creation of a super-agency to keep the region mobile while restricting asphalt-intensive sprawl, and rein in local development.[222] In response, in April, both houses of the state legislature overwhelmingly passed legislation creating the Georgia Regional Transportation Authority [GRTA], giving it broad powers to manage transportation projects, air quality, and land use in nonattainment areas.[223] Effectively controlled by the Governor, GRTA was given authority to deny funds for infrastructure and enjoin access from private property to state and local highways.[224] It was given power to

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[209] Georgia's fuel tax was only 7.5 cents per gallon, compared to a national average of 19 cents. Russell Grantham, *Atlanta's Gas Habit*, ATLANTA JOURNAL AND CONSTITUTION, May 10, 2001, at 1E.

[210] Combustion from fuel in cars, coal-fired plants, and other gas-powered engines are primarily responsible for the nitrogen oxide in the environment. Combustion engines in various vehicles and vapors from paint, dry cleaning, and lawn chemicals contribute to the VOCs in the environment. The Clean Air Campaign, *Air Quality & Health* (visited Sept. 14, 2001), http://www.cleanaircampaign.com/sec04_a2.asp.

[211] *Georgia Wins Road Program Lawsuit*, CHATTANOOGA TIMES FREE PRESS, June 7, 2001, at B2. Machine engines and industrial smokestacks also produce NOx. Kelly Simmons, *Smog Season*, ATLANTA JOURNAL AND CONSTITUTION, Apr. 30, 2001, at 1C; The Clean Air Campaign, *Air Quality & Health* (visited Sept. 14, 2001), http://www.cleanaircampaign.com/sec04_a.asp.

[212] Eplan, *supra* note 207.

[213] Betty Liu, *Lawsuit On Atlanta Road Plans*, FINANCIAL TIMES, June 6, 2001, at 6; Southern Environmental Law Center, *Citizens Sue EPA in Ongoing Effort to Clean Up Air*, Jan. 17, 2001, http://www.selcga.org/res_news2001-01-17.shtml.

[214] Eplan, *supra* note 207, at 14–15.

[215] Simmons, *supra* note 211.

[216] *See, e.g.,* Piedmond Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 433 (5th Cir. 1981) (affirming the district court's denial of the plaintiffs' motion for preliminary injunction to enjoin highway construction around Atlanta for failure to comply with NEPA); Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n, 599 F.2d 1333, 1347–49 (5th Cir. 1979) (holding that the state planning process is not a major federal action within NEPA); Hatmaker v. Ga. Dep't of Transp., 973 F. Supp. 1047, 1058 (M.D. Ga. 1995) (granting the plaintiffs' preliminary injunction to prohibit the Georgia DOT from constructing a roadway that would destroy a historic oak tree); Inman Park Restoration, Inc. v. Urban Mass Transp. Admin., 414 F. Supp. 99 (N.D. Ga. 1976) (denying plaintiffs' motion for declaratory and injunctive relief based on the various transportation agencies' failure to comply with NEPA).

[217] James Pilcher, *Environmental Groups Settle Georgia Road Suit*, CHATTANOOGA TIMES FREE PRESS, June 22, 1999, at B5.

[218] *Federal Appeals Court Strikes Down EPA Grandfathering of Road Projects*, 10 GA. ENVTL. L. LETTER (Mar. 1999).

[219] David Firestone, *Collapse of Atlanta Talks Keeps Road Builders Idle*, N.Y. TIMES, Jan. 4, 2001, at 18A.

[220] *Flawed ARC Plan Will Haunt Us All,* ATLANTA JOURNAL AND CONSTITUTION, July 28, 2000, at 22A.

[221] Eplan, *supra* note 207.

[222] *Environmentalist Plaintiffs Are Only Hope for Clean Air*, ATLANTA JOURNAL AND CONSTITUTION, Apr. 9, 2001, at 8A.

[223] *Testimony of DOT Secretary Rodney Slater Before the U.S. Senate Committee on Commerce, Science and Transportation* (Dec. 2000); Tom Arrandale, *Smart Air*, GOVERNING MAGAZINE 88 (July 2000).

[224] Kreyling, *supra* note 206, at 8; Eplan, *supra* note 207, at 16.

resolve disputes between state DOT and regional agencies, approve or disapprove transportation plans, establish targets for air quality improvements, exercise eminent domain, issue bonds, control access to state and local roads, and overrule commuter rail projects recommended by the Georgia Rail Passenger Authority.[225] The 15 GRTA members also sit on the Governor's Development Council, which has jurisdiction to formulate a systematic land use plan.[226] The Act also included a provision dividing the state's federal and state transportation funds equally among the state's congressional districts.[227]

John Hankinson, Jr., of the EPA's regional office wanted to prohibit the use of federal funds for highway construction in the region until the state adopted an acceptable plan for cleaning up the air. However, FHWA urged leniency, allowing the metro area to proceed simultaneously with the implementation of several "grandfathered" road projects, despite little progress in reducing smog, while the tardy plan for cleaning up the air was being completed. The CEQ intervened, trying to resolve the differences on how many regional transportation projects should proceed while the region was in violation of air pollution laws. The EPA compromised by allowing a number of highway projects to go forward as the plan was being completed and submitted for review and approval.[228]

In 1999, a coalition of environmental groups brought suit accusing state and federal transportation departments and the ARC of trying to slip through 61 Atlanta regional road and highway projects, totaling $700 million, before the EPA's 1998 deadline. Plaintiffs claimed the grandfather provisions of the Clean Air Act were intended only for projects that had received environmental approval, let contracts, or begun construction, or if unsafe conditions required immediate construction.[229] Plaintiffs also claimed that the projects violated the federal Clean Air Act by not conforming to the SIP.[230] Meanwhile, in a lawsuit brought by the Sierra Club to block 81 grandfathered road projects, the D.C. Circuit U.S. Court of Appeals issued a decision striking down the EPA's "conformity" and "grandfather" rules on grounds that they violated the 1990 Amendments to the Clean Air Act prohibiting MPOs from approving and DOT from funding any transportation project unless it emanates from a plan and program that conform to state-level air quality standards.[231]

The Clinton Administration chose not to appeal the decision, and subsequently issued guidelines allowing only projects already funded and under construction to proceed.[232] Because of the chance of adverse precedent and the resounding implications for transportation in every nonattainment area throughout the land, the FTA was heavily involved in intense, comprehensive negotiations with the Atlanta parties. The lawsuit led to a settlement in June of 1999, under which the state agreed to forego all but 17 of the 61 "grandfathered" projects. Other terms of the settlement included (1) a comprehensive study of the north metro-Atlanta transportation needs, (2) a panel of experts appointed to oversee the ARC's use of computer models to assess the impact of its transportation plan on air quality, and (3) an analysis of the impact of transportation funds on minority and poor populations.[233] The suit was predicated on the EPA's approval of the region's 25-year transportation plan, alleging it was based on flawed data and did little to clean up the air.[234]

On March 22, 2000, ARC approved a $36 billion 25-year regional transportation plan, and a $1.9 billion 3-year TIP. It would have to be approved by GRTA before being forwarded to DOT for approval.[235] On July 18, 2000, the 11th Circuit granted a petition blocking federal approval of Atlanta's TIP and Regional Transportation Plan (RTP). Environmental groups had argued that the data upon which the state calculated its motor vehicle emissions budget was flawed and underestimated emissions from mobile sources. (Once the budget is established, the state uses computer models to estimate how much stationary source pollution it must reduce to achieve federal ozone standards).[236]

But on July 25, 2000, the FHWA and FTA, in consultation with EPA, approved Atlanta's RTP and TIP, lifting the ban on federal dollars for highway construction. DOT sidestepped the 11th Circuit decision on grounds that the transportation plan conformed to a motor vehicle emissions budget that the ARC had submitted in 1998 as part of the nonattainment area's rate of progress plan.[237] DOT argued that the new "transportation conformity determination" for the Atlanta area was based on a more stringent air quality standard

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[225] Eplan, *supra* note 207, at 16.

[226] *GRTA Board Is Set to Tackle Atlanta's Sprawl,* 11 GA. ENVTL. L. LETTER (Oct. 1999).

[227] Donald Biola, *Georgia Regional Transportation Authority Acts: Provide for a Regional Transportation Authority*, 16 GA. ST. U. L. REV. 233, 236–38 (1999).

[228] Charles Seabrook, *EPA Regional Chief Leaving Many Irons In the Fire*, ATLANTA CONSTITUTION, Jan. 22, 2001, at 1B.

[229] Eplan, *supra* note 207, at 14–15.

[230] Mark Murray, *A Bumpy Ride for New Highways,* 31 NAT'L J. 1898 (June 26, 1999).

[231] Environmental Defense Fund v. E.P.A, 167 F.3d 641, 651 (D.C. Cir. 1999).

[232] Murray, *supra* note 230; *Road Builders Seek Involvement In Lawsuit Challenging Atlanta Road Projects,* 10 GA. ENVTL. L. LETTER (June 1999).

[233] *Environmental Groups and DOT Settle Lawsuit on Road Projects*, 11 GA. ENVTL. L. LETTER (July 1999).

[234] Seabrook, *supra* note 228.

[235] *ARC Approves 25-Year Transportation Plan*, 11 GA. ENVTL. L. LETTER (Apr. 2000).

[236] *Federal Court Blocks Latest Motor Vehicle Emissions Budget*, 12 GA. ENVTL. L. LETTER (Aug. 2000).

[237] *Federal DOT Approves Atlanta's Regional Transportation Plan,*12 GA. ENVTL. L. LETTER (Aug. 2000).

than that derailed by the 11th Circuit a week earlier.[238] The TIP directed 40 percent of funds to transit, 10 percent to bicycle and pedestrian improvements, 21 percent to safety and bridge and intersection improvements, and 26 percent to highways, including HOV lanes.[239] The Atlanta regional transportation plan had been in "conformity lapse" since January 1998. But the environmental groups claimed the plan would "not reduce tailpipe emissions, and [was] based on faulty data and land use assumptions."[240] When several environmental groups threatened litigation, the state began to negotiate with them, holding all highway projects in abeyance during the negotiations.[241]

After 2 months of negotiations, four environmental groups reached a tentative settlement with the state in December 2000, in which the state committed to requiring cleaner heavy-duty diesel engines and fuels and additional emissions controls, accelerating the building of HOV lanes and express bus service, and providing funding for a set of bikeways and walkways. "The state also agreed to make an increasing share percentage of jobs and activities accessible by mass transit by setting annual goals" and funding commitments to achieve them, and to offer rewards and penalties to encourage jurisdictions to reduce traffic.[242] Specifically, the state proposed to:

- Fully fund GRTA's regional bus program and pay part of the cost of MARTA's request for natural gas buses and paratransit vehicles, while committing up to $120 million over 5 years to implement transit strategies to meet greater mobility goals;
- Make greater efforts to reduce SOV travel;
- Build more bike and pedestrian projects;
- Adopt a new mobility goal that "ensures equal access to all places of employment, housing, worship and public facilities, including access by populations that do not own or operate personal vehicles," and commit to annual progress in meeting the goal;
- Complete an HOV project on Interstate-75 between I-285 and I-575; and
- Adopt criteria for land use planning and density around commuter rail stations.[243]

In return for the ability to proceed with the $36 billion, 25-year transportation plan, the state wanted the environmental groups to withdraw all pending suits against state and federal agencies challenging the transportation plan.[244] Among the suits was one pending before the 11th Circuit Court of Appeals, which sought to declare illegal the EPA's extension from 1999 to 2003, the date by which Atlanta had to comply with NAAQS for ozone. Plaintiffs sought to have the EPA immediately declare Atlanta a "severe" ozone nonattainment area. Under Section 181 of the Clean Air Act, any area designated as a serious nonattainment area had until November 15, 1999, to demonstrate compliance or be elevated to the next highest nonattainment category, which in Atlanta's case is "severe."[245]

In negotiations with the state, the environmental groups sought the right to go back to federal court to enforce the agreement, while the state insisted that the Georgia courts should handle the enforcement.[246] The environmental groups wanted the state to achieve ozone-reduction goals by 2003, while the state wanted a year longer.[247] The state also wanted the right to terminate the agreement if any other group or individual filed suit. [248] The deal collapsed the following month when the state abruptly announced it would move forward on road projects in the $36 billion transportation plan, which had been on hold during the negotiations.[249] Governor Barnes insisted, "[t]he state has offered you far more than any previous administration ever did and far more than any court is likely to require…I urge you to accept our offer of Dec. 29. We will make no further changes to it…."[250]

The *Atlanta Constitution* weighed in on the side of the environmentalists, blaming Governor Barnes for keeping GRTA caged; for failing to keep promises to identify funds for expanding suburban bus service, commuter rail, and other transit lines; for championing a massive borrowing campaign to build "'developmental' highways"; and for pulling "the plug on an eminently reasonable settlement that could have avoided the current legal action." According to the newspaper:

> The agreement would have sped up construction of express lanes for commuter buses and required cleaner

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[238] U.S. Dep't of Transp., *U.S. Transportation Secretary Slater Says Atlanta Can Move Forward,* Presswire, July 27, 2000.

[239] U.S. Dep't of Transp., *Transportation Secretary Slater Says Atlanta Can Move Forward*, PR Newswire, Jan. 26, 2000. Before the Congress, DOT Secretary Slater testified that nearly 55 percent of regional transportation funds would go to transit and commuter rail projects. *Testimony of DOT Secretary Rodney Slater Before the U.S. Senate Committee on Commerce, Science and Transportation* (Dec. 2000).

[240] Kelly Simmons, *Pact Delays Road Projects*, ATLANTA JOURNAL AND CONSTITUTION, Oct. 6, 2000, at 3B.

[241] Firestone, *supra* note 219; Charles Seabrook, *Suit Threatened on Transport Plan*, ATLANTA JOURNAL AND CONSTITUTION, Dec. 2, 2000, at 4G.

[242] *Barnes Has Come Too Far To Scuttle Talks on Lawsuit*, ATLANTA JOURNAL AND CONSTITUTION, Jan. 4, 2001, at 14A; *Kudos All Around on Clean-Air Pact*, ATLANTA JOURNAL AND CONSTITUTION, Dec. 14, 2000, at 26A.

[243] Kathey Pruitt, *State Offers Settlement on Highways*, ATLANTA JOURNAL AND CONSTITUTION, Dec. 9, 2000, at 1G.

[244] Kelly Simmons, *Environmental Groups Conditionally Accept State Plan on Roads*, ATLANTA JOURNAL AND CONSTITUTION, Dec. 12, 2000, at 3D.

[245] *Georgia SIP Still Up in the Air*, 12 GA. ENVTL. L. LETTER (Oct. 2000).

[246] Firestone, *supra* note 241.

[247] *Id*.

[248] *Id*.

[249] Kelly Simmons, *State Mulling Ideas From Failed Transportation Plan Talks*, ATLANTA JOURNAL AND CONSTITUTION, Jan. 8, 2001, at 5C.

[250] Firestone, *supra* note 241.

> heavy-duty diesel engines and fuels. But at the last minute, Barnes responded to pressure from the Department of Transportation and local officials on the Atlanta Regional Commission, the same bunch that got us into the tangle with the Clean Air Act in the first place.
>
> Time and again, government officials have demonstrated that they will revert to smog-and-sprawl business as usual the second the pressure is off.[251]

A coalition of environmental groups responded by filing suit against state and federal agencies, including DOT and ARC.[252] It was a unique approach, seeking to freeze 137 highway projects (13 of which were under construction, 14 of which were approved for right-of-way acquisition, and the rest in planning or engineering stages),[253] while allowing environmentally benign projects (including transit, rail, bicycle, and pedestrian projects) to move forward.[254] Gov. Barnes testified that shutting off $400 million in federal transportation funds would create traffic "chaos" that would "[stop] many projects that are absolutely necessary. This would be a disaster transportation-wise and a disaster politically."[255] Southern Environmental Law Center attorney David Farren responded, "It's a little bit Chicken Little to say there will be dire consequences for the region" when the 2-year loss of federal funds resulted in no such chaos.[256]

The federal judge refused to issue an injunction shelving the state's highway projects. One issue was whether the court-if it concluded that the state still had not met federal environmental requirements-would engage in a Solomon-like dissection, eliminating 137 road projects from the plan while allowing the other projects to move forward, or instead reject the entire plan.[257] Barnes testified that if the federal courts began to amend SIPs, "There would never be an end game. The courts should not be involved in the administrative weighing and balancing of a plan. There would be no end to it."[258] The Sierra Club's Bryan Hager said, "just like in the 1950s and 1960s when we were dealing with segregation, we have to turn to the federal courts to get our officials to comply with the law….We have a fundamental human right to breathe that's being threatened….We will continue to look to the courts."[259] It was anticipated that the losing party would appeal to the 11th Circuit.[260]

In May 2001, the state Environmental Protection Division issued a revised SIP postponing to November 2004 the state's deadline for satisfying federal limits on ground-level ozone, the principal ingredient of smog. Originally the target was November 1999, and it was subsequently moved to November 2003. A federal court had given Georgia and 21 other states an additional year to reduce air pollution.[261] The environmental coalition appealed that decision as well.

At this writing, the courts are considering several suits brought by the environmental groups seeking to derail Georgia from proceeding with its highway projects.

## E. THE ENDANGERED SPECIES ACT (ESA)

The Endangered Species Act of 1973[262] (ESA) is concerned with protecting species of plants and animals threatened with extinction.[263] In this Act, Congress recognized the aesthetic, ecological, historical, and scientific value of various species of plants and animals and the importance of protecting biodiversity.[264] To achieve its purpose, the Act provides for listing of species determined to be "endangered" or "threatened," requires federal agencies to carry out programs to conserve these identified species, and makes it unlawful to "take" an endangered animal species. The Act also has provisions for the protection of critical habitat of endangered species.

Under the ESA, the Secretary of Commerce or Secretary of the Interior is required to determine whether a species is "threatened" or "endangered" and to designate critical habitat of such species.[265] A species is "endangered" if it is in danger of extinction throughout all or a significant portion of its range.[266] A species is "threatened" if it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.[267] The Secretary is to determine whether to list a species as endangered because of any of the following factors: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial,

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[251] *Environmentalist Plaintiffs Are Only Hope for Clean Air*, ATLANTA JOURNAL AND CONSTITUTION, Apr. 9, 2001, at 8A.

[252] Betty Liu, *Lawsuit on Atlanta Road Plans*, FINANCIAL TIMES (London), June 6, 2001, at 6.

[253] *Group Asks Judge to Halt Atlanta Road Projects*, CHATTANOOGA TIMES FREE PRESS, June 6, 2001, at B10.

[254] *Group Wants Road-Work Halt*, ORLANDO SENTINEL, June 6, 2001, at A9; Kelly Simmons, *Anti-Road Suit Goes to Court Today*, ATLANTA JOURNAL AND CONSTITUTION, June 5, 2001, at 1B.

[255] *Legal Theatrics Get Activists Nowhere*, ATLANTA JOURNAL AND CONSTITUTION, June 7, 2001, at 20A.

[256] John McCosh, *Judge Refuses to Halt Funding of Atlanta Transportation Plan*, ATLANTA JOURNAL AND CONSTITUTION, June 7, 2001, at 1A.

[257] Bryan Hager, *Transportation Litigation Update*, GTA TRANSPORTATION VOICE (Summer 2001).

[258] *Legal Theatrics Get Activists Nowhere*, ATLANTA JOURNAL AND CONSTITUTION, June 7, 2001, at 20A.

[259] *Georgia Wins Road Program Lawsuit*, CHATTANOOGA TIMES FREE PRESS, June 7, 2001, at B2.

[260] John McCosh, *Roadwork Goes On, Foes Undaunted*, ATLANTA JOURNAL AND CONSTITUTION, June 18, 2001, at 1E.

[261] Charles Seabrook, *State Eases Deadline to Limit Ozone*, ATLANTA JOURNAL AND CONSTITUTION, May 31, 2001, at 1A.

[262] 16 U.S.C. §§ 1531 *et seq*. (1985 & Supp. 2000).

[263] *Id*.

[264] *Id*. § 1531.

[265] *Id*. § 1533(a) (1995 & Supp. 2000).

[266] *Id*. § 1532(6).

[267] *Id*. § 1532(20).

recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or man-made factors affecting its continued existence."[268] Once a species is listed, it is protected under the Act and entitled to all the benefits of that protection.

An early case brought under the ESA is *TVA v. Hill*.[269] The Tennessee Valley Authority (TVA) had begun constructing the Tellico Dam when a species of perch, called the snail darter, was discovered in the area where the dam was being built. The respondent in this case petitioned the Secretary of the Interior to list the snail darter as an endangered species. After receiving comments, the Secretary found that the snail darter habitat would be totally destroyed if the Tellico Dam project was completed and thus, the species was listed as endangered and the species critical habitat was designated for protection. The respondents filed for an injunction to halt the construction of the dam. The Court of Appeals issued the injunction and the U.S. Supreme Court affirmed. The Supreme Court found that the ESA was clear—the Act indicated beyond a doubt that Congress intended endangered species be afforded the highest of priorities.

All federal agencies are required to ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such species.[270] If an action is likely to violate the Act's jeopardy prohibition, the agency can apply for an exemption from the Endangered Species Committee [Committee], also known as the "God Squad" because of its control over the fate of a species.[271] Once an application for exemption is received, the Committee decides whether or not to grant an exemption from the jeopardy requirements.[272]

Under the "takings" provision of the Act, any person, whether public or private, is prohibited from "taking" any endangered animal species.[273] "Take" is defined broadly to prohibit people "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[274] "Harm" includes any "act that actually kills or injures wildlife."[275] Such act may include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[276] This provision also prohibits anyone from selling, importing, or exporting any protected species.[277] In addition to protecting animal species, the takings provision also prohibits removal or damage of endangered plant species in knowing violation of any law.[278]

The takings provision was tested in *Palila v. Hawaii Department of Land and Natural Resources*.[279] In *Palila*, the Ninth Circuit required the removal of sheep and goats from the critical habitat of an endangered bird, the Palila. The sheep and goats were harming trees that the Palila relied on for food. The court found that "harm" to a species under the ESA does not require death to individual members of the species, nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents recovery of the species by affecting essential behavior patterns causes actual injury to the species and effects a taking under the Act. Thus, if an act causes habitat modification that would prevent an endangered population from recovering, it is a taking in violation of the ESA.

To provide some flexibility to the strict takings requirements, Congress added an "incidental takings" clause to the ESA.[280] This clause authorizes the Secretary to issue permits that allow takings incidental to the carrying out of otherwise lawful activities.[281] A permit will not be issued unless the applicant submits a conservation plan that specifies the likely impact of the incidental taking and details steps the applicant will take to minimize and mitigate these impacts.[282] A taking must not appreciably reduce the likelihood of survival and recovery of the species in order to be considered incidental.[283]

## F. WATER QUALITY

### 1. Introduction

Four major federal programs govern water pollution: (1) the National Pollutant Discharge Elimination System (NPDES), which regulates the discharge of pollutants into navigable streams;[284] (2) the Dredge or Fill Program (DFP), which regulates the discharge of dredged or fill material into streams;[285] (3) the Underground Injection Control Program (UIC), which regulates injection of fluids into the ground in order to pro-

[268] *Id*. § 1533(a).

[269] 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).

[270] 16 U.S.C. § 1536(a)(2) (1985 & Supp. 2000).

[271] *Id*. § 1536(e).

[272] *Id*. § 1536(e)(2).

[273] *Id*. § 1538(a)(1).

[274] *Id*. § 1532(19).

[275] 50 C.F.R. § 17.3 (1999).

[276] *Id*.

[277] 16 U.S.C.A. § 1538(a)(1)(A) (1985 & Supp. 2000).

[278] *Id*. § 1538(a)(2)(B).

[279] 639 F.2d 495, 497 (9th Cir. 1981); 852 F.2d 1106 (9th Cir. 1988).

[280] *Id*. § 1539.

[281] *Id*. § 1539(a)(1) (1985 & Supp. 2000).

[282] *Id*. § 1539(a)(2).

[283] *Id*. § 1539(a)(2)(B)(iv).

[284] *See* Federal Water Pollution Control Act (FWPCA or Clean Water Act), 33 U.S.C. §§ 1251–1387 (1986 & Supp. 2000); 40 C.F.R. §§ 124–25, 129, 133 (2000). *See* text accompanying notes 6-47 *infra*.

[285] *See* Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. (1986 & Supp. 2000); 40 C.F.R. §§ 230–233 (2000).

tect drinking water aquifers;[286] and (4) the Hazardous Waste Management Program (HWM), which regulates the generation, transportation, treatment, storage, and disposal of hazardous waste.[287] The permits required under each of these four programs are usually referred to as NPDES, Section 404, UIC, and RCRA, respectively.[288]

### 2. The NPDES Permit Program

The intent of Congress in promulgating the Federal Water Pollution Control Act (FWPCA)[289] was to eliminate the discharge of pollutants into the navigable waters of this nation.[290] Such pollution, originating from "point sources [of conventional pollutants and existing plants]…shall require the application of the best practicable control technology currently available" by July 1, 1977,[291] and the "best available technology economically achievable,"[292] under regulations established by the EPA.[293] The legislation provides for a cooperative federal-state effort to eliminate water pollution, consisting of the EPA's promulgation of effluent limitations,[294]

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[286] *See* Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j(26) (1991 & Supp. 2000); 40 C.F.R. § 146 (2000).

[287] *See* Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (1995 & Supp. 2000); 40 C.F.R. §§ 260–265 (2000). RCRA is discussed below in § 3.070.

[288] The requirements for such permits were consolidated in 40 C.F.R. §§ 122–125 (2000). Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq*. Safe Drinking Water Act of 1974. 42 U.S.C. §§ 300h *et seq*. Protection of underground sources of drinking water. Executive Order No. 11738, 38 F.R. 25161 (Sept. 10, 1973), "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. *See generally* Paul S. Dempsey, *Oil Shale and Water Quality: The Colorado Prospectus Under Federal, State & International Law,* 58 DENVER L.J. 715 (1981).

[289] 33 U.S.C. §§ 1251–1387 (1986 & Supp. 2000).

[290] *Id*. § 1251(a)(1).

[291] *Id*. § 1311(b)(1)(A). In determining what constitutes the best practicable control technology, the EPA shall evaluate, *inter alia*,

> the total cost of application of technology in relation to effluent reduction benefits to be achieved from such application…the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements)….

*Id*. § 1314(b)(1)(B). *See* Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 630 (2d Cir. 1976). In making this determination, the EPA is not limited to an evaluation of the average technology employed in the involved industry, but may instead base its regulations on data collected from those members of industry using the best technology available. American Petr. Inst. v. EPA, 540 F.2d 1023, 1034 (10th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977). Indeed, the technology required in the EPA regulations may be deemed "available" even though no plant in the industry has yet adopted it. Hooker Chems. & Plastics Corp. v. Train, 537 F.2d at 636.

The EPA also need not evaluate the competitive impact of its regulations. American Petr. Inst. v. EPA, 540 F.2d at 1036. The EPA regulations, which permitted consideration only of "technical and engineering factors, exclusive of cost," however, were held excessively restrictive in Appalachian Power Co. v. Train, 545 F.2d 1351, 1359 (4th Cir. 1976). Variance provisions must provide for consideration of the total cost of pollution control, Weyerhauser Co. v. Costle, 590 F.2d 1011, 1036 (D.C. Cir. 1978), and must compare the cost to the benefits of effluent reduction. BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 658-9 (1st Cir. 1979). This principle is consistent with the intent of Congress that there "be a reasonable relationship between costs and benefits if there is to be an effective and workable program." American Petr. Inst. v. EPA, 540 F.2d at 1037 (quoting from Senate Committee History). Such benefits, however, need not be quantified in monetary terms. *Id*.

Once promulgated, such requirements may be modified by the Administrator of the EPA, with the concurrence of the involved state. *See* 33 U.S.C. A. § 1311(g) (1986 & Supp. 2000). *See also id*. § 1319(a)(5)(B).

[292] *Id*. § 1311(b)(2)(A). The factors to be evaluated by the Administrator in assessing what might constitute the "best available technology" include "the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, [and] non-water quality environmental impact." *Id*. § 1314(b)(2)(B). *See also id*. § 1314(b)(4)(B). The Administrator also holds broad authority to promulgate regulations "to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage…." *Id*. § 1314(e).

[293] *Id*. § 1314. *See generally* J.T. Begley & John P. Williams, *Coal Mine Water Pollution: An Acid Problem With Murky Solutions*, 64 KY. L.J. 507, 514–15 (1976); Comment, *The Application of Effluent Limitations and Effluent Guidelines to Industrial Polluters: An Administrative Nightmare*, 13 HOUS. L. REV. 348, 349–53 (1976) [hereinafter cited as *Effluent Limitations and Guidelines*].

[294] Effluent limitations are defined as "any restriction…on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources…." 33 U.S.C. § 1362(11) (1986 & Supp. 2000). The EPA is required by the FWPCA to establish national effluent limitation guidelines for every major industry. *Id*. § 1311(b)(1)(A). Such guidelines restrict the amount of specified pollutants that may lawfully be discharged from a point source. Begley & Williams, *supra* note 293. The purpose of this requirement is to enable the EPA to apply effluent standards uniformly to classes and categories of enterprises rather than on an ad hoc basis. *See Effluent Limitations and Guidelines*, at 348, 354 (1976). Once promulgated, such regulations are presumed to be applicable and controlling unless the permit applicant convincingly rebuts such application. American Petr. Inst. v. EPA, 540 F.2d 1023, 1030 (10th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977). A permit may nevertheless be issued on the basis of "sound engineering judgment as to appropriate limitations necessary to carry out the requirements of the Act." Hall, *The Clean Water Act of 1977*, 11 NAT. RESOURCES L. 343, 344 (1978). *See also* United States Steel Corp. v. Train, 556 F.2d 822, 844 (7th Cir. 1977); Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 709–10 (D.C. Cir. 1974).

Although the EPA effluent limitations, which embrace variance clauses, have been disapproved for new sources, they have been approved for existing sources. *See, e.g.,* Natural Resources Defense Council, Inc. v. EPA, 537 F.2d 642 (2d Cir. 1976). Variance clauses allow the grantor of the permit (either the state or the EPA) to exempt individual point sources from the

state development of water quality standards,[295] and initially federal (but ultimately state) administration of the NPDES permit program.[296]

The legislation also distinguishes between effluent limitations for existing sources[297] and those for new sources.[298] The standard for new point sources is similar to that imposed on existing sources in that new sources must employ the "best available demonstrated control technology process, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants."[299]

The regulatory scheme requires that a point sources operator secure an NPDES permit as a condition precedent to discharging into a navigable stream.[300] The courts have taken a strict view of the permit process, recognizing that it is the principal means of enforcing the legislative intent[301] and refusing to allow the EPA to exempt categories of point sources from the permit requirements of the FWPCA.[302]

*Point Source Discharges*. The threshold question of whether a particular pollutant originates from a point source is an important one in the determination of the jurisdictional limits of the FWPCA, as no NPDES permit is required for a nonpoint source discharge. Nonpoint sources, such as oil and gasoline runoff created by rainfall on highways, are difficult to ascribe to a single polluter; therefore, no permit system was deemed feasible for them.[303]

The FWPCA does not precisely define the term "point source," referring only to "discernable, confined and discrete conveyance…from which pollutants are or may be discharged."[304] The federal courts have held that the EPA is vested with the authority to define point and nonpoint sources and the definition should be reviewed only after full agency examination.[305] The EPA has taken quite a liberal view of point sources, insisting that they consist of any flow containing concentrated pollutants caused by man, regardless of whether the conveyance is man-made or natural.[306]

Other federal cases have construed the term "point source" more liberally. For example, the case of *United States v. Oxford Royal Mushroom Products, Inc.*,[307] addressed the issue of whether a spray irrigation system, which had been designed to spray wastewater into fields in sufficiently small quantities so as to be absorbed into the ground, constituted a point source where, because of an inadvertent introduction of more water than the system was designed to accommodate, waste water ran into a nearby stream through a break in a berm around the fields. The court found itself unable to conclude as a matter of law that such a discharge did not originate from a point source.

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involved effluent limitations. In determining whether a particular point source is entitled to a variance from effluent limitations, such considerations as the promulgation by a state of water quality standards more stringent than those of the EPA have been held not to be a sufficient justification to support a variance. United States Steel Corp. v. Train, 556 F.2d at 847.

[295] 33 U.S.C.A. § 1313 (1986 & Supp. 2000).

[296] *Id*. § 1342(b). States, however, may leave such regulation under exclusive federal administration, if they so choose, or if they fail to establish a regulatory program approved by the EPA.

[297] 33 U.S.C. § 1311( ) (1986 & Supp. 2000).

[298] *Id*. § 1316(a)(2).

[299] *Id*. § 1316(a)(1). In promulgating regulations governing new sources, the EPA must consider the cost of achieving compliance thereunder, the nonwater environmental quality impact of the regulations, and the energy requirements of compliance. *Id.* at § 1316(b)(1)(B). *See* Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 639, 641 (2d Cir. 1976). Once new point source regulations have been published, all affected industries are deemed to have constructive notice thereof, and such regulations are applicable to all construction commenced after such promulgation. Pennsylvania v. EPA, 618 F.2d 991, 1000 (3d Cir. 1980).

In contrast to the statutory standard governing existing sources, the provision concerning new point sources does not permit variances from the regulatory standards established by the EPA. The Supreme Court has emphasized that such a variance provision would be inconsistent with the congressional intent of "national uniformity and 'maximum feasible control of new source.'" E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 138, 97 S. Ct. 965, 51 L. Ed. 2d 204 (1977). In promulgating regulatory standards, however, the EPA may "distinguish among classes, types, and sizes within categories of new sources." *Id.* at 137.

[300] *See* 33 U.S.C. §§ 1251(a)(1), 1311(a), 1342(a) (1986 & Supp. 2000).

[301] *See* Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 706-8 (D.C. Cir. 1975).

[302] Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977); American Iron & Steel Inst. v. EPA, 568 F.2d 284, 307-B (3d Cir. 1977). The District of Columbia circuit court has generally approved the use of a general permit to accomplish essentially the same result. *See* 568 F.2d at 1382–83. The court has also acknowledged that the "existence of uniform national effluent limitations is not a necessary precondition for incorporating into the NPDES program pollution from agricultural, silvicultural, and storm water runoff point sources." *Id.* at 1379. *But see* 33 U.S.C. § 1311(g) (1986 & Supp. 2000). The NPDES regulations may, however, include variance provisions for permits. Frank F. Skillern, *Environmental Law Issues in the Development of Energy Resources*, 29 BAYLOR L. REV. 739, 776 (1977).

[303] United States v. Earth Sciences, Inc., 599 F.2d 368, 371 (10th Cir. 1979). The FWPCA, however, does establish some EPA responsibility over nonpoint sources. Each state must specify regions having "substantial water control problems," 33 U.S.C. § 1288(a)(2), and must operate an area wide "waste treatment management planning process," subject to EPA approval. *Id*. § 1288(b)(1). *See* Begley & Williams, *supra* note 293, at 507, 527–28.

[304] 33 U.S.C. § 1362(14) (1986 & Supp. 2000).

[305] Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1382 (D.C. Cir. 1977).

[306] Note, *The Federal Water Pollution Control Act Amendments of 1972 As Applied to the Surface Mine in West Virginia — Pollutant Discharge Permit Requirements,* 78 W. VA. L. REV. 213, 215 (1976) [hereinafter cited as *FWPCA Discharge Requirements*].

[307] 487 F. Supp. 852 (E.D. Pa. 1980).

Similarly, the Tenth Circuit U.S. Court of Appeals, in *United States v. Earth Sciences, Inc.*,[308] was confronted with a discharge from a 168,000-gallon reserve sump located in Colorado, which was designed to catch excess leachate or runoff in emergencies and to be a closed system without any pollutant discharge.[309] The overflow arose when unusually warm spring temperatures melted snow that filled the reserve sumps to capacity. This overflow and the pollution that resulted from it were deemed by the court to have originated from a point source. Both *Oxford Royal Mushrooms* and *Earth Sciences* demonstrate that a standard of strict liability is applicable to such discharges, irrespective of intent or forseeability.[310] The EPA, however, has no jurisdiction to require the removal of pollutants that are already present in the water prior to its use. It may insist only that companies treat and reduce pollutants that have been added to the water by the plant processes.[311]

*Navigable Waters.* The FWPCA regulates discharges into "navigable" waters, which are defined as "the waters of the United States, including the territorial seas."[312] Congress intended that the term "be given the broadest possible constitutional interpretation,"[313] and the courts have generously acceded to this request.[314] In *Earth Sciences*, for example, the pollution in question was discharged into the Rio Seco, a stream located wholly within Costilla County, Colorado, and neither navigable in fact nor used to transport commodities in either interstate or intrastate commerce.[315] The court concluded that the only characteristic essential to making a stream "navigable" within the meaning of the FWPCA is that "at least some interstate impact" result therefrom.[316] The stream need not be "navigable in fact."[317] The necessary impact was found in the fact that the water collected from the stream was used for agricultural irrigation, with the resulting products sold in interstate commerce.[318]

In *United States v. Texas Pipe Line Co.*,[319] it was not even clear whether the polluted stream was, at the time of the spill, actually feeding a navigable river. The Tenth Circuit court, nevertheless, held that the polluted stream fell within the FWPCA's definition of "navigable waters." The court reasoned that the tributary was within the intended coverage of the FWPCA because, at least during periods of heavy rainfall, the flow would continue in the Red River.[320] The court emphasized that it was the intent of Congress that the coverage of the FWPCA be extended "as far as permissible under the Commerce Clause."[321] Thus, presumably, any tributary that is a part of a major river basin would meet the FWPCA's notion of "navigable stream."

*Acquisition of the NPDES Permit*. The standard imposed under the FWPCA for an unauthorized discharge of pollutants into a navigable stream is one of strict liability regardless of whether, for example, a reserve sump unexpectedly overflows due to spring snow melting at an unusual rate,[322] or whether a third party inadvertently ruptures an oil pipeline.[323] Moreover, willful or negligent violation of the Act can result in criminal fines ranging between $2,500 and $25,000 per day of violation or imprisonment for not more than 1 year, or both.[324]

The FWPCA provides that, after an opportunity for a public hearing, the EPA may issue such a permit for the discharge of any pollutant into navigable waters and include therein such conditions as are necessary to ensure compliance with the requirements of the legislation.[325] The FWPCA also provides that administration of

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[308] 599 F.2d 368 (10th Cir. 1979).

[309] *Id*. at 370.

[310] *See* United States v. Texas Pipe Line Co., 611 F.2d 345, 347 (10th Cir. 1979); United States v. Earth Sciences Inc., 599 F.2d 368, 374 (10th Cir. 1979). Willful or negligent violations are subject to criminal penalties under 33 U.S.C. § 1319(c)(1) (1976). In fact, the statute imposes penalties for each *day* of unlawful discharge. *Id. See* United States v. Oxford Royal Mushrooms Prods, Inc., 487 F. Supp. 852, 856 (E.D. Pa. 1980).

[311] *See* Appalachian Power Co. v. Train, 545 F.2d 1351, 1377 (4th Cir. 1976). *See also* United States Steel Corp. v. Train, 556 F.2d 822, 842–43 (7th Cir. 1977); American Petr. Inst. v. EPA, 540 F.2d 1023, 1034–35 (10th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977). *But see* Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977), where the court held that if precise effluent limitations are infeasible, the EPA may instead impose gross pollution discharge requirements. *Id.* at 1380.

[312] 33 U.S.C. § 1362(7) (1986 & Supp. 2000). The EPA has expanded that definition to include waters, lakes, rivers, and streams that flow interstate or flow intrastate and are used in interstate commerce. 40 C.F.R. § 401.11(l) (2000).

[313] S. REP. NO. 1236, 92d Cong., 2d Sess. *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3776, 3822. *See FWPCA Discharge Requirements*, at 213, 215–16.

[314] *See* United States v. Oxford Royal Mushroom Prods., Inc., 487 F. Supp. at 855, and cases cited therein.

[315] 599 F.2d at 374–75.

[316] *Id*. at 375.

[317] *See* United States v. Oxford Royal Mushroom Prods., Inc., 487 F. Supp. at 854–55.

[318] United States v. Earth Science, Inc. 2 ___, 599 F.2d 368 (10th Cir. 1976).

[319] 611 F.2d 345 (10th Cir. 1979).

[320] *Id.* at 346–7.

[321] *Id.* at 347.

[322] United States v. Earth Sciences, Inc., 599 F.2d at 374.

[323] United States v. Texas Pipe Line Co., 611 F.2d at 346–7.

[324] 33 U.S.C. § 1319(c) (1986 & Supp. 2000). A second conviction can result in fines of up to $50,000 per day of violation, or 2 years imprisonment, or both. *Id*. Federal courts have been held to have broad powers to evaluate whether a defendant in a criminal prosecution has violated an "emission standard" in an analogous context. *See* Adamo Wrecking Co. v. United States, 434 U.S. 275, 285, 98 S. Ct. 566, 54 L. Ed. 2d 538 (1978).

[325] 33 U.S.C. § 1342(a) (1986 & Supp. 2000). Exclusions from the NPDES permit requirements are set forth in 40 C.F.R. § 122.3 (2000). Ordinarily, the permit will specify maximum permissible levels of various pollutants. *Id.* at § 122.45 (2000). If the imposition in permits of numerical limitations of effluent discharges is not feasible, the EPA may prescribe gross reduc-

the permit process may be assumed by the state for discharges into navigable streams within its jurisdiction.[326] NPDES permits are effective for a fixed term of up to 5 years.[327] Once a permit has been issued, "any facility changes, production increases, or changes in character of the discharge necessitate reapplication for a new permit."[328] If the permit is violated, it can either be revoked or amended,[329] or the violator may be prohibited from continuing the discharge.

### 3. The Dredge or Fill Permit Program

The Clean Water Act is the primary authority for federal wetlands regulation.[330] Under Section 404, a permit is required to discharge dredged or fill material into wetlands.[331] Section 404 of the Clean Water Act gives the U.S. Army Corps of Engineers jurisdiction over wetlands management.

The acquisition of a Section 404 permit is a condition precedent to the lawful discharge of dredged or fill material into waters of the United States.[332] The Section 404 permit process is simultaneously governed both by Army Corps of Engineers regulations[333] and EPA regulations.[334] The FWPCA prohibits discharge of dredged or fill material into navigable waters where the EPA concludes that such discharge will adversely affect municipal water supplies; shellfish beds; or fishery, wildlife, or recreational areas.[335] Such discharges are prohibited if there is a practicable alternative that would have a less deleterious impact upon the ecosystem, taking into account the construction cost, technology, and logistics in light of the project's overall purposes.[336]

The term "dredged material" is defined as "material that is excavated or dredged from waters of the United States."[337] The waters to which such legislation is applicable are broadly defined as "waters of the United States," which includes all waters that are currently or were in the past used for interstate or foreign commerce or may be susceptible to such use; all interstate waters; and all other waters, including, intrastate lakes, rivers, streams, and wetlands.[338]

Federal wetland protection has taken a number of forms. Since 1989, the U.S. government has embraced a "no-net-loss" policy toward wetlands, requiring wetland loss be mitigated by upgrading wetlands elsewhere. Executive Order 11990 directs federal agencies to avoid possible adverse impacts associated with the destruction or modification of wetlands and to avoid undertaking or providing assistance for new construction located in wetlands.[339] The FHWA regulations have established a preference for wetland mitigation banking in mitigating wetlands impacts caused by federally-funded highway transportation projects.[340] In mitigation banking, wetlands are restored, created, or enhanced in order to provide compensatory mitigation for unavoidable impacts to wetlands caused by current or past federally-funded highway projects.[341]

## G. THE RESOURCE CONSERVATION AND RECOVERY ACT

The Resource Conservation and Recovery Act of 1976 (RCRA) is a waste management regime aimed at controlling hazardous and solid wastes from cradle to grave or from generation to disposal.[342] RCRA employs cradle-

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tions in pollution discharges. Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1380 (D.C. Cir. 1977). *See generally* Hall, *The Clean Water Act of 1977*, 11 NAT. RESOURCES L. 343, 365–69 (1978).

[326] 33 U.S.C. § 1342(b) (1986). In fact, the states are encouraged to assume administration of the NPDES program. *See Effluent Limitations and Guidelines*, at 348, 352; *FWPCA Discharge Requirements*, at 213. Prior to assuming such administration, however, the state must first create a water pollution control program, which satisfies the standards established by the FWPCA. 33 U.S.C. § 1342(b) (1986). *See generally* Frank F. Skillern, *Environmental Law Issues in the Development of Energy Resources*, 29 BAYLOR L. REV. 739, 772 (1977).

The state is prohibited from issuing an NPDES permit if certain specified circumstances exist. *See* 40 C.F.R. § 122.4 (2000). Among such conditions is the circumstance where a new discharger would cause or contribute to the violation of water quality standards. *Id.* at § 122.4(a) (2000). Additionally, the EPA may veto the issuance of any state NPDES permit if the EPA feels that the granting of such permit would be inconsistent with the FWPCA. If the state's water quality standards are more stringent than those standards that are specified in the EPA's applicable effluent limitations, then the more stringent state standards must be incorporated into the NPDES permit. 33 U.S.C. § 1341(a)(1) (1986 & Supp. 2000). Begley & Williams, *supra* note 293, at 507, 519. In fact, no NPDES permit may be issued without either the state's certification or its waiver thereof. 33 U.S.C. § 1341(d). *FWPCA Discharge Requirements*, at 213, 221.

[327] 40 C.F.R. § 122.46(a) (2000).

[328] Begley & Williams, *supra* note 293, at 507.

[329] 33 U.S.C. §§ 1319, 1342(b)(1); 40 C.F.R. §§ 122.62, 122.64 (2000).

[330] Conservation Law Found. v. Federal Highway Admin., 827 F. Supp. 871, 881, 885–86 (D. R.I. 1993).

[331] 33 U.S.C. § 1344 (1986 & Supp. 2000).

[332] 40 C.F.R. § 232.3(a) & (b) (2000).

[333] 33 C.F.R. pts. 320–29 (1999).

[334] 40 C.F.R. pt. 230 (1999). Conservation Law Found. v. Federal Highway Admin., 827 F. Supp. 871, 885–86 (D. R.I. 1993).

[335] 33 U.S.C.A. § 1344(c) (1986 & Supp. 2000); *see* 40 C.F.R. §§ 230.10(b) & (c) (2000).

[336] Sylvester v. U.S. Army Corps of Eng'rs, 882 F.2d 407, 409–10 (9th Cir. 1989); La. Wildlife Fed'n v. York, 761 F.2d 1044, 1047–48 (5th Cir. 1985);

[337] 40 C.F.R. § 232.2 (2000).

[338] 40 C.F.R. § 230.3(s) (2000).

[339] 42 Fed. Reg. 26961 (May 24, 1977).

[340] 65 Fed. Reg. 82913 (Dec. 29, 2000).

[341] *Id*. at 82915.

[342] 42 U.S.C.A. §§ 6901 *et seq.* (1995 & Supp. 2000). The implementing regulations are at 40 C.F.R. pts. 124, 260–272 (1999). RCRA was enacted as a replacement of the Solid Waste Disposal Act. In 1984, RCRA was comprehensively amended to

to-grave regulations that govern the generation, transportation, storage, and disposal of waste products and aim to prevent releases of waste into the environment. RCRA is particularly aimed at controlling land-based environmental contamination.

Congressional concern about unsound solid waste management practices led to the promulgation of the RCRA.[343] The basic structure of RCRA was established in 1976 and continues to the present. The Act established a system for identifying and listing hazardous wastes; a cradle-to-grave tracking system; standards for generators and transporters of hazardous wastes and for operators of treatment, storage, and disposal facilities (TSD); a permit system to enforce these standards; and a procedure for delegating to states the administration of the permitting program.[344] Under RCRA, waste may be controlled under one of two programs—the Hazardous Waste Management Program or the Solid (nonhazardous) Waste Disposal Program.[345]

### 1. The Hazardous Waste Management Program

The Hazardous Waste Management Program requires the EPA to promulgate regulations that establish criteria for identifying hazardous waste and to list particular wastes that are found to be hazardous based on characteristics such as toxicity, persistence, flammability, corrosiveness, and other characteristics.[346] Once a waste is identified, anyone who generates, transports, treats, stores, or disposes of that waste is subject to the requirements of the RCRA Hazardous Waste Management Program.

Generators are responsible for determining if their waste is hazardous.[347] Any shipments of hazardous waste are given an identification number for the waste to ensure that the waste can be traced and that it reaches its intended destination.[348] Generators are also subject to recordkeeping requirements to identify the quantities and constituents of hazardous waste that may be harmful to human health.[349]

Transporters are required to keep records of any shipments of hazardous waste they transport.[350] Transporters must ensure that any wastes they transport are properly labeled.[351] Transporters of hazardous waste are not only subject to RCRA requirements but must also comply with the Hazardous Materials Transportation Act[352] and any regulations promulgated by the Secretary of Transportation.[353]

The EPA is required to set standards for TSD facilities.[354] Such standards include recordkeeping requirements and provisions for reporting, monitoring, and inspection to ensure that proper steps are being taken to ensure the waste is handled safely.[355] The Hazardous Materials Transportation Act also prohibits land disposal of certain specified hazardous wastes.[356] Operators of TSD facilities must obtain a permit from the EPA.[357]

Certain reclaimable waste products are exempt from RCRA, including proper reclamation of several generated by transit providers, such as spent lead-acid batteries, industrial ethyl alcohol, and used motor oil.[358] RCRA also allows states to operate and enforce their own hazardous waste management program. For example, many states regulate aboveground and underground storage tanks through registration requirements. Many transit providers use such tanks to store fuel and oil for their vehicles. Leaks can contaminate the soil or groundwater or surface water near the tank site.[359]

### 2. The Solid Waste Disposal Program

The objective of the Solid Waste Disposal Program is to assist in developing and encouraging methods for the disposal of solid (nonhazardous) waste that are envi-

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address the handling and disposal of hazardous waste. The Emergency Planning and Community Right to Know Act of 1986 requires that facilities report the storage of hazardous chemicals to various state and community agencies. MARTIN COLE & CHRISTINE BROOKBANK, STRATEGIES TO MINIMIZE LIABILITY UNDER FEDERAL AND STATE ENVIRONMENTAL LAWS (TCRP Legal Research Digest, 1998).

[343] 42 U.S.C. §§ 6901 (1995 & Supp. 2000). Solid waste is defined by the RCRA as: "any garbage, refuse, sludge…and other discarded material…resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include…domestic sewage,…irrigation return flows or industrial discharges which are point sources subject to permits under § 402 of the Federal Water Pollution Control Act…." *Id*. § 6903(27) (1998). Hazardous waste is defined as any solid waste that may: "(A) cause, or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitation reversible illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." *Id*. at § 6903(5).

The EPA is directed to establish criteria for designating the characteristics of hazardous waste, "taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." 42 U.S.C. § 6921(a) (1995 & Supp. 2000).

[344] ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION 209 (2d. ed. 1996).

[345] The Resource Conservation and Recovery Act of 1976. Pub. L. 94-580, 90 Stat. 2795 (Oct. 21, 1976); 40 C.F.R. pts. 124, 260–272.

[346] 42 U.S.C.A. § 6921(a) (1995).

[347] *Id*. § 6922.

[348] *Id*. § 6922(a)(2).

[349] *Id*. § 6922(a)(1).

[350] 42 U.S.C. § 6923 (1995).

[351] *Id*. at 36923(a)(2).

[352] Pub. L. 93-633, 88 Stat. 2156 (1975).

[353] 42 U.S.C. § 6923 (1995).

[354] 42 U.S.C. § 6924 (1995 & Supp. 2000).

[355] *Id*. § 6924(a)(1).

[356] *Id*. § 6924( ) ( ).

[357] 42 U.S.C. § 6925 (1995 & Supp. 2000).

[358] 40 C.F.R. § 266.80 (1999). Cole & Brookbank, *supra* note 342, at 5.

[359] *Id*. at 7.

ronmentally sound and maximize valuable resources.[360] The Program requires the EPA to establish guidelines for the development of state waste disposal plans, including prohibiting open dumping, except in landfills, and establishing criteria for sanitary landfills to protect human health and the environment from potential adverse effects from disposal of solid waste.[361]

### 3. Hazardous Materials Transportation

The Hazardous Materials Transportation Act[362] regulates the movement of hazardous materials, imposing specific requirements upon the classification, packaging, transportation, and handling of such materials, as well as incident reporting.[363] Usually, transit providers are not engaged in the transportation of hazardous material, but they may be shippers or receivers of such material.

## H. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

### 1. Overview of CERCLA

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[364] as a companion to RCRA. While RCRA is aimed at prospectively regulating the treatment, storage, and disposal of hazardous wastes, CERCLA is primarily a retroactive statute intended to impose strict liability on parties responsible for the release or threat of release of hazardous substances.[365] Its purpose is to create a broad definition of parties strictly liable for cleanup costs.[366] The EPA has regulatory jurisdiction over CERCLA.[367] The statute can be divided into four basic elements: information collection, federal authority to respond and clean up hazardous substances, the Hazardous Substance Response Trust Fund [Superfund], and liability for responsible parties.[368]

CERCLA requires any person in charge of a "facility" to notify the National Response Center (NRC) of any hazardous substance release in excess of those permitted by the statute.[369] This notification requirement allows the EPA to monitor problem areas throughout the country and develop suitable response plans.[370] CERCLA also gives the EPA broad authority to request and access information relevant to the release or threat of release of hazardous substances.[371] This authority allows the EPA to enter facilities and obtain samples of suspected hazardous substances or other pollutants.[372] The access and information provisions of CERCLA are the first steps leading to the removal and remediation of hazardous substances.

Response and cleanup of hazardous wastes begins with the authority Congress granted to the President, and subsequently delegated to the EPA, to remove or take remedial action in response to the release or threatened release of hazardous substances.[373] Federal action to clean up hazardous substances must be consistent with the National Consistency Plan (NCP), the EPA's guide for cleanup activities.[374] The NCP includes the National Hazardous Response Plan (NHRP), which establishes "procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants…."[375] The NCP also includes the Hazard Ranking System (HRS), which assesses the degree of

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[360] 42 U.S.C. § 6941 (1995).

[361] 42 U.S.C. § 6944 (1995).

[362] 49 U.S.C. § 5101 *et seq*. (2000).

[363] *Id*., 49 C.F.R. subtit. B, ch. 1, subch. C, pts. 171–180 (1999).

[364] 42 U.S.C. §§ 9601 *et seq.* (2000).

[365] Cole & Brookbank, *supra* note 342. Hazardous Substance is defined as:

> (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [38 U.S.C. § 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of this Act [42 U.S.C. § 9602], (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. §1317], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to Sections of the Toxic Substances Contract Act [15 U.S.C. § 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).
>
> 42 U.S.C.A. § 9601(14) (2000).

[366] Cole & Brookbank, *supra* note 342, at 7.

[367] STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 302 (Aspen 1997).

[368] *Id*.

[369] 42 U.S.C. § 9603(a) (2000). Facility is defined as:

> (A) any building, structure, installation, equipment, pipe or pipeline…well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.
>
> 42 U.S.C. § 9601(9) (2000).

[370] FERREY, *supra* note 367, at 303.

[371] 42 U.S.C. § 9604(e) (2000); FERREY, *supra* note 367, at 303.

[372] 42 U.S.C. § 9604(e)(4) (2000).

[373] 42 U.S.C. § 9604(a) (2000).

[374] 42 U.S.C. § 905 (2000); FERREY, *supra* note 367, at 307. The NCP is also referred to as the National Oil and Hazardous Substances Pollution Contingency Plan. The NCP was originally enacted to provide a guide to the federal government for responding to oil spills and releases of hazardous substances. The NCP has expanded over the years to include responsive strategies consistent with the Clean Water Act of 1972 and the Oil Pollution Act of 1990.

[375] 42 U.S.C. § 9605(a) (2000).

risk to the environment and human health at facilities and contaminated sites.[376] The HRS screening process is the mechanism by which the EPA ultimately lists uncontrolled waste sites on the National Priorities List (NPL).[377] The NPL is a listing of facilities posing health and environmental threats that may warrant the EPA's further examination.[378] These provisions granting the EPA federal authority to address the releases or potential releases of hazardous substances lead to the mechanisms to fund cleanups and enforcement against liable parties.

CERCLA established the Superfund, which finances the costs of governmental response actions and the cleanup costs of private parties where the responsible party cannot be identified or is unable to act.[379] The trust was originally funded primarily by direct taxes on sales from petroleum and some chemical companies.[380] In 1986, Congress amended CERCLA through the Superfund Amendments and Reauthorization Act (SARA),[381] which:

- [S]tressed the importance of permanent remedies and innovative treatment technologies in cleaning up hazardous waste sites;
- [R]equired Superfund actions to consider the standards and requirements found in other state and federal environmental laws and regulations;
- [P]rovided new enforcement authorities and settlement tools;
- [I]ncreased state involvement in every phase of the Superfund program;
- [I]ncreased the focus on human health problems posed by hazardous waste sites;
- [E]ncouraged greater citizen participation in making decisions on how sites should be cleaned up; and
- [I]ncreased the size of the trust fund to $8.5 billion.[382]

CERCLA authorizes the EPA to use Superfund monies when there is a release or "substantial threat" of release of any hazardous substance into the environment.[383] Monies may be spent to "remove" or "provide for remedial action" in response to the hazardous substance.[384]

Pursuant to the NCP, the EPA's process for cleaning up hazardous wastes initially requires that the contaminated site be listed on the NPL.[385] Next, the EPA must follow a three-step process to determine the proper remedy for the listed site: (1) prepare a Remedial Investigation and Feasibility Study (RI/FS) to determine the degree of contamination and possible remedial alternatives;[386] (2) develop a plan to remedy the contaminated site;[387] and (3) review public comments and consult with affected state and other agencies.[388] After complying with this process, the EPA makes its final decision entitled the Record of Decision (ROD), which is available for public comment prior to implementation of the decided remedial action.[389]

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[376] 42 U.S.C. § 9605(c) (2000); EPA, *Introduction to the HRS, Superfund Program* (last modified Mar. 28, 2001), http://www.epa.gov/superfund/programs/npl_hrs/hrsint.htm. The HRS uses a scoring system to rank potentially harmful sites. Numerical values are assigned to a site based upon factors in three categories:

- likelihood that a site has released or has the potential to release hazardous substances into the environment;
- characteristics of the waste (e.g., toxicity and waste quantity); and
- people or sensitive environments (targets) affected by the release.

*Id*.

[377] EPA, *Introduction to the HRS, Superfund Program* (last modified Mar. 28, 2001), http://www.epa.gov/superfund/programs/npl_hrs/hrsint.htm.

*Id*.

[378] EPA, *NPL Site Listing Process* (Last updated on Tuesday, October 21, 2003), http://www.epa.gov/superfund/sites/npl/npl_hrs.htm. Listing on the NPL does not necessarily mean the EPA will order a cleanup response at the site. Rather, the NPL is primarily an informational tool, which allows states and the public to monitor the listed sites and determine if a cleanup response is necessary.

[379] 42 U.S.C. § 9611–9612 (2000); FERREY, *supra* note 367, at 310.

[380] John C. Cruden, *CERCLA Overview,* ALI-ABA 397, 399 (June 25–29, 2001); FERREY, *supra* note 367, at 310. Total funding was set at $1.6 billion in 1981.

[381] EPA, *SARA Overview* (last modified Mar. 28, 2001), http://www.epa.gov/superfund/action/law/sara.htm. Congress also increased the trust to $8.5 billion.

[382] *Id*. SARA also requires the EPA to adjust the HRS to more accurately reflect risk to the environment and human health. *Id*.

[383] 42 U.S.C. § 9604(a)(1) (2000).

[384] *Id*. Removal actions are defined as:

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which would otherwise result from a release or threat of release….

42 U.S.C. § 9601(23) (2000).

Remedial action is defined as:

> Those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so they do not migrate to cause substantial danger to present or future public health or welfare or the environment….

42 U.S.C.A. § 9601(24) (2000).

[385] Cruden, *supra* note 380, at 397, 405.

[386] *See* 40 C.F.R. 300.430(a), (d), and (e), for a discussion of the purpose of the RI/FS.

[387] 40 C.F.R. 300.430(a)(2).

[388] Cruden, *supra* note 380, at 397,405.

[389] 42 U.S.C. § 9617(a); 40 C.F.R. 300.430(f)(1)(ii).

CERCLA authorizes three means of cleaning up a contaminated site: (1) the EPA may conduct its own cleanup using Superfund money; (2) the EPA may order the responsible parties to carry out the cleanup, or (3) third parties may clean up the site and recover costs incurred from potentially responsible parties (PRPs), or file a claim from reimbursement from the Superfund.[390] The EPA may order PRPs to clean up hazardous substances when there "may be an imminent and substantial endangerment to the public health or welfare or the environment because of the actual or threatened release of hazardous substance from a facility…."[391] This order is called the Unilateral Administrative Order (UAO) and failure to comply with a UAO without "sufficient cause" can result in fines, damages plus interests, and further orders to conduct the cleanup.[392]

CERCLA liability is essentially based on four requirements: (1) the release or substantial threat of release; (2) of a hazardous substance; (3) from a vessel or facility; and (4) caused by a responsible party (i.e., PRP).[393] PRPs consist of four classes of persons: (1) current owners and operators of facilities where hazardous substances are released or threatened to be released, (2) owners and operators of facilities at the time substances were disposed, (3) persons who arranged for transportation or disposal or treatment of such substances,[394] and (4) persons who accepted such substances for transport for disposal or treatment.[395] These parties will be held jointly and severally liable for the costs of responding to the release or threat of release of a hazardous substance.

Transit providers are more likely to be named as a PRP in CERCLA litigation as a generator, typically for problems surrounding the disposal of used lead-acid batteries or used motor oil.[396] However, transportation companies have also been held liable as owners and operators.[397] The Fifth Circuit U.S. Court of Appeals held several transportation companies liable under CERCLA for the cleanup costs resulting from the rupture of the companies' tanker truck, holding that a tanker truck and the truck terminal is a facility within the CERCLA definition.[398] The court based its analysis upon CERCLA's statutory history and congressional intent to extend liability beyond waste disposal sites to include mere owners or operators of CERCLA facilities.[399] The court also emphasized that congressional intent was to extend CERCLA to hazardous substance releases, not just disposals at toxic waste facilities.[400]

Though liability is strict, a transit provider may avail itself of certain affirmative defenses if applicable, such as an act of God, an act of war, or an act or omission of a third party.[401] CERCLA also excludes from its definition of hazardous substances "petroleum, including crude oil" so long as the use of petroleum does not result in elevated levels of hazardous substances.[402] Some transit providers may be eligible to take advantage of the service station dealers exemption for the release of recycled oil.[403] Under the condemnation defense, CERCLA also exempts from liability a governmental entity that acquires contaminated property involuntarily.[404] Under the "due diligence" or "innocent landowners" defense, a landowner may be shielded from liability if it can prove (1) another party was the sole cause of

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[390] The Penn Central R.R. Corp. v. United States, 862 F. Supp. 437 (Special Court 3R Act 1994); EPA, *Superfund (CERCLA) Enforcement* (last modified Thursday, Oct. 16, 2003), http://www.epa.gov/compliance/cleanup/superfund/getdone/index.html.

[391] 42 U.S.C. § 9606(a) (2000); EPA, *Superfund (CERCLA) Enforcement* (last modified Thursday, Oct. 16, 2003), http://www.epa.gov/compliance/cleanup/superfund/getdone/index.html. "Imminent" in the statute refers to the risk of harm and not the actual harm itself. "[T]he imminence of a hazard does not depend on the proximity of the final effect but may be proven by the setting in motion of a chain of events which would cause serious injury." United States v. Hardage, Civ-80-1031-W slip op. at 3, 4 (W.D. Okla. Dec. 2, 1982), 1982 U.S. Dist. Lexis 17854.

[392] 42 U.S.C. § 9606(a)(b) (2000); EPA, *Superfund (CERCLA) Enforcement* (last modified Thursday, Oct. 16, 2003), http://www.epa.gov/compliance/cleanup/superfund/getdone/index.html. Sufficient cause can be an "[o]bjectively reasonable, good faith belief that one has a valid defense." United States v. Vertac. Chem. Corp., 480 F. Supp. 870, 885 (E.D. Ark. 1980), quoting, Reserve Mining Co. v. EPA, 514 F.2d. 492, 529 (8th Cir. 1975).

[393] Cruden, *supra* note 380, at 397, 409–10.

[394] Liability is extended to any person who arranges for the disposal or treatment of hazardous substances that the person owned or possessed, or who by contract or agreement otherwise arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of hazardous substances owned or possessed by such person. 42 U.S.C. § 9607(a)(3) (2000). Cole & Brookbank, *supra* note 342, at 9–10.

[395] 42 U.S.C. § 9607(a) (2000). Liability is extended to any person who accepts any hazardous substance for transport to a disposal or treatment facility or sites selected by such a person from which there is a release or threatened release. *Id*. at § 9607(a)(4).

[396] Cole & Brookbank, *supra* note 342, at 11.

[397] *See* Uniroyal Chem. Co. v. Deltech Corp., 160 F.3d 238 (5th Cir. 1998).

[398] *Id*. at 240.

[399] *Id.* at 257.

[400] *Id.* at 249–50.

[401] 42 U.S.C. § 9607(b) (2000). The third party defense is applicable only if it has no connection, contractual or otherwise, with the party seeking to avoid liability. *Id*. Cole & Brookbank, *supra* note 342, at 12.

[402] Natural gas is not excluded. 42 U.S.C. § 9601(14) (2000).

[403] A service station dealer is "any person…where a significant percentage of the gross revenue of the establishment is derived from the fueling, repairing, or servicing of motor vehicles." 42 U.S.C. § 9614(c)(1) (2000).

[404] The rationale is that unlike private parties, a transportation agency may have little choice as to which property to acquire for expansion. The defense is available to a governmental entity that has the power of eminent domain, whether or not condemnation proceedings took place. Cole & Brookbank, *supra* note 342, at 14.

the contamination, (2) the other responsible party must not have caused the contamination via a contractual agency or employment relationship with the owner, and (3) the owner must have exercised due care to guard against the foreseeable acts of the third party.[405] Transit providers that are state agencies may also be eligible for the 11th Amendment shield against a federal court claim brought by a private individual.[406]

If the defenses do not provide immunity from liability, the defendant must then defend itself in the apportionment phase of the litigation. The cleanup costs of a heavily contaminated site may run into the several millions of dollars, for which any single defendant will try to shift to other PRPs. CERCLA allows any PRP to seek contribution from any other PRP.[407] Though liability under CERCLA may be joint and several, the court may allocate costs among liable parties using equitable factors. The following are some of the factors that have been used by courts to apportion liability:

- The ability of a party to prove that its contribution to the release or disposal of a hazardous substance can be distinguished from those of other parties;
- The amount of the hazardous substance involved in cleanup at the site;
- The toxicity of the hazardous substance;
- The degree of involvement by the parties in the generation, transportation, treatment, storage, or the disposal of hazardous substance;
- The degree of care exercised by the parties in handing the hazardous substance;
- The degree of cooperation by the parties with governmental officials to prevent harm to public health or the environment;
- The financial resources of the party;
- The party's knowledge of the environmental problems at the facility;
- The party's knowledge of the environmental risks;
- The party's financial interest in the site;
- The party's efforts to prevent harm to the public; and
- The party's good faith attempts to reach a settlement.[408]

The EPA has a strong interest in encouraging settlement between PRPs and cleaning up hazardous substance releases as timely and as efficiently as possible. One mechanism the EPA uses to achieve this end is Orphan Funding.[409] In cases involving numerous PRPs, such as industrial dumps or landfills, the EPA provides "orphan share funding" in place of the insolvent or obsolete PRPs.[410] The EPA uses Superfund monies to reflect the portion of orphan shares and the identifiable and solvent PRPs can settle for a more equitable and realizable amount for cleanup.

Because CERCLA liability is strict, joint, and several, and triggered by mere land ownership, environmental due diligence must be integrated into all potential real property transactions.[411] The scope of a due diligence investigation may depend on the size of the transaction but "it is important to keep in mind that even a relatively small transaction where the target company seems free from environmental concerns may result in substantial and unanticipated costs if potential liabilities are not properly assessed." [412] Environmental due diligence can be divided into two components: (1) the document and file review, and (2) the environmental audit.[413]

The document and file review should determine whether the real property has any history of noncompliance with environmental regulations or whether internal documents describe any potential environmental problems.[414] The environmental audit can consist of several phases depending on potential or known environmental problems.[415] The Phase-One audit is a simple onsite investigation to discover potential environmental liabilities.[416] If the Phase-One audit results in the discovery of environmental issues, a subsequent Phase-Two and Phase-Three audit should be completed to determine the extent of the problem and whether the transaction should proceed.[417] Transit providers would be well advised to carefully examine any real property before acquiring it.

### 2. The Paoli Railroad Yard: A Case Study

The cost and complexity of CERCLA litigation is illustrated in the lawsuits filed against the Southeastern Pennsylvania Transportation Authority (SEPTA), the National Railroad Passenger Corporation (Amtrak), and the Consolidated Rail Corporation (Conrail) [collectively referred to as the defendants] in the Paoli Yards dispute, heard multiple times by the federal district court for the eastern district of Pennsylvania and the Third Circuit U.S. Court of Appeals.[418] The Paoli Railroad

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[405] Courts examine whether the landowner followed commercially reasonable and customary practices, the special knowledge or experience of the landowner, the relationship between the purchase price and the actual fair market value of the property, the information that was reasonably ascertainable, and how easily the contamination was detectable. Cole & Brookbank, *supra* note 342, at 14.

[406] Cole & Brookbank, *supra* note 342, at 12.

[407] 42 U.S.C. § 9613(f)(1) (2000).

[408] Cole & Brookbank, *supra* note 342, at 16–17.

[409] John C. Cruden, *CERCLA Overview*, ALI-ABA 397, 430 (June 25–29, 2001).

[410] *Id*.

[411] Allan J. De Lorme and Joyce S. Schlesinger, *Environmental Due Diligence for Business Transactions*, Practicing Law Institute: Real Estate Law and Practice Course Handbook Series (2000).

[412] Gary M. Lawrence, *Overview of Environmental Due Diligence*, Due Diligence in Business Transactions (2001).

[413] *Id*.

[414] *Id*.

[415] *Id*.

[416] *Id*.

[417] *Id*.

[418] *See, e.g.,* In Re: Paoli R.R. Yard PCB Litig., 221 F.3d 449 (3d Cir. 2000); Brown v. SEPTA (In Re: Paoli R.R. Paoli Yard

Yard [the Yard] dates back to 1915, when a facility to repair steam-powered locomotives was built on the site.[419] Beginning around 1940, polychlorinated biphenyls (PCBs) were handled and spread on the ground in the course of maintaining electric cars and servicing train transformers.[420] The Yard was owned and operated by the Pennsylvania Railroad from 1939 to 1967. In 1967, that company merged with the New York Central to become Penn Central, which fell into bankruptcy in 1970 and was reorganized with several other northeastern railroads to become Conrail.[421] SEPTA, Amtrak, and Conrail all owned or operated at the Yard beginning in 1976. Amtrak had owned the Yard since 1976; Conrail operated the Yard between 1976 and 1983; and SEPTA had operated the Yard since 1983. In 1982, Conrail and SEPTA entered into an agreement that transferred Conrail's right to operate the Yard to SEPTA. The transfer agreement provided that Conrail would indemnify SEPTA for any liability it incurred for "'any injury or damage to any person or property' or 'contamination of the environment.'"[422] In its 1983 settlement agreement with Conrail, SEPTA agreed it would "indemnify and hold Conrail harmless from any and all liability…arising out of the environmental conditions at Paoli Shop or Paoli Yard."[423] Due diligence should have revealed that Pennsylvania environmental authorities had discovered PCBs at Paoli Yards in 1979, 3 years before SEPTA acquired it.

The Commonwealth of Pennsylvania first discovered PCBs and other contaminants in the Yard in 1979.[424] By that time, PCBs had leached into the ground, contaminating groundwater and nearby streams.[425] The Commonwealth of Pennsylvania issued an Administrative Order, which essentially ordered Amtrak, Conrail, and SEPTA to inspect the Yard, determine the level of contamination, and correct the problem.[426] In 1985, the EPA became concerned when its representatives observed unrestricted access to the contaminated property by pedestrians and children.[427] The EPA representatives also noted that runoff from the Yard flowed directly to residential neighborhoods.[428] The following year, in order to pursue remediation of the Yard through Superfund, the EPA brought suit against the defendants under CERCLA, RCRA, and Section 7 of the Toxic Substances Control Act (TSCA)[429] to compel cleanup of the Yard.

Between 1986 and 1988, the EPA conducted a removal action at the Yard and surrounding homes. EPA's removal action included the construction of sedimentation and erosion control facilities, including stormwater collection basins on site, the excavation of 671 cubic yards of soil, and covering over of some 10,000 square yards of soil with a tarpaulin off-site.[430] In addition, the EPA removed 3,500 cubic yards of contaminated soil from 35 properties in the neighborhoods surrounding the Yard.[431] The EPA also closed the nearby Valley Creek to fishing because of PCBs found in the fish and the creek sediment.[432]

Since the EPA initiated this action, the parties have signed "five partial preliminary consent decrees" outlining remediation measures for the defendants at the Yard and surrounding areas.[433] In 1990, the EPA placed the Yard on the NPL. In 1992, the EPA issued an ROD requiring extensive excavation and treatment of soil at both the Yard and nearby streams and residential properties.[434] The ROD estimated the cost to remedy the contamination at $28 million.[435] In 1992, 1994, and

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PCB Litig)., 113 F.3d 444 (3d Cir. 1997); In Re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994), *cert. denied sub nom*. General Electric. Co. v. Ingram, 513 U.S. 1190 (1995); In the Matter of Penn Central Transp. Co., 944 F.2d 164 (3d Cir. 1991); In Re Paoli R.R Yard PCB Litig., 916 F.2d 829 (3d Cir. 1990); Consolidated Rail Corp. v. United States, 883 F. Supp. 1565 (Special Court 3R Act 1995). American Premier Underwriters, Inc., formerly known as The Penn Central Corporation, was the only Defendant not to settle with the EPA pursuant to the 1999 consent decree. United States v. SEPTA, 235 F.3d 817, 821–22 (2000).

[419] United States v. AMTRAK, No. Civ. A. 86-1094, 1999 WL 199659 at *1, 1999 U.S. Dist. Lexis 4781 (E.D. Pa. Apr. 6, 1999).

[420] *Id*.

[421] *Id*.; Paul Dempsey, *Antitrust Law & Policy in Transportation: Monopoly I$ the Name of the Game*, 21 GA. L. REV. 505, 565 (1987); PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 288–93 (Quorum 1986).

[422] Consolidated Rail Corp. v. United States, 883 F. Supp. 1565, 1572 (Special Court 3R Act 1995).

[423] *Id*.

[424] United States v. National R.R. Passenger Corp. ("Amtrak"), No. Civ. A. 86-1094, 1999 WL 199659 at *1, 1999 U.S. Dist. Lexis 4871 (E.D. Pa. Apr. 6, 1999); *Paoli Rail Yard — General Site Information* (last modified August 6, 2003), http://epa.gov/reg3hwmd/super/PA/paoli-rail/pad.htm; *$28M Remedy Planned for Paoli Rail Yard*, Superfund Week, Aug. 8, 1997, *available in* 1997 WL 12955967 (Soil at the Yard was contaminated with PCBs and VOCs. The PCBs were found 3 feet below the surface and the VOCs were found as deep as 10 feet. PCBs are linked to cancer, immune system deficiencies, liver damage, birth defects, and impairment of reproductive systems. Penn Central Corp. v. United States, 862 F. Supp. 437, 444 (Special Court 3R Act 1994)).

[425] *Id*. The PCBs from the Yard contaminated the Valley Creek and its tributaries.

[426] 1999 WL 199659 at 1-2.

[427] *Id*. at 2.

[428] *Id*.

[429] *Id*.; 15 U.S.C. § 2606 (2000); 1999 U.S. Dist. Lexis 4781.

[430] *Id*., 1999 WL 199659 at *3.

[431] *Paoli Rail Yard—General Site Information* (last modified August 6, 2003), http://epa.gov/reg3hwmd/super/PA/paoli-rail/pad.htm.

[432] *Id*.

[433] United States v. SEPTA, 235 F.3d 817, 820 (3d Cir. 2000)

[434] *Id.* at 821. The ROD is a record decision by the EPA involving public comment. STEVEN FERREY, ENVIRONMENTAL LAW, EXAMPLES AND EXPLANATIONS 308 (1997).

[435] *Id*.; *Paoli Rail Yard—General Site Information* (last modified August 6, 2003), http://epa.gov/reg3hwmd/super/PA

1995, the EPA attempted to settle with all of the defendants collectively.[436] Settlement attempts were unsuccessful due to the lack of cooperation between the defendants and their disagreement over apportionment and the extent of liability.[437] Finally in 1999, the federal court approved a consent decree, which settled liability and contribution issues for the Yard.[438] Pursuant thereto, the defendants jointly agreed to pay $500,000 to the EPA and $100,000 to the Pennsylvania Department of Environmental Protection.[439] In addition, they agreed to pay "$850,000 to federal and state trustees to settle claims for environmental damage."[440] The defendants had already expended approximately $12 million on the cleanup pursuant to previous consent orders.[441] The EPA apportioned liability in the consent decree based upon the number of years of ownership and the possibility of contamination during those years.[442] The consent decree also gives "contribution protection" to the defendants and "protection for all remedial actions they have performed or will perform at the [Yard]…."[443] The Third Circuit U.S. Court of Appeals upheld the fairness and validity of the consent decree in 2000.[444]

Also in 1986, 38 plaintiffs who lived or worked in the vicinity of the Yard brought suit in the Eastern District of Pennsylvania against the corporations that maintained the Yard and sold the PCBs.[445] The plaintiffs sought to recover present and future actual and emotional damages for various severe and unusual illnesses caused by exposure to PCBs, and also for property damage.[446] After 14 years of contentious litigation, the defendants ultimately prevailed.[447] The jury found that no property damage resulted from the PCB contamination, and that the contamination caused no actual personal injury.[448] The jury also found that the medical monitoring tests were unnecessary and "excessive."[449] Despite this victory for the defendants, the litigation had not concluded. In 2001, the case was on remand from the Third Circuit U.S. Court of Appeals with re-

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/paoli-rail/pad.htm. *$28M Remedy Planned for Paoli Rail Yard*, Superfund Week, Aug. 8, 1997, *available in* 1997 WL 12955967.

[436] United States v. National R.R. Passenger Corp. ("Amtrak"), No. Civ. A. 86-1094, 1999 WL 199659 at *4-6 (E.D. Pa. Apr. 6, 1999).

[437] *Id*. at 5–6.

[438] *Id*. at 15; American Premier Underwriters, Inc. (formerly The Penn Central Corp.) did not participate in the settlement. *Court OKs $1.45 Million Settlement Over Paoli Rail Yard Cleanup*, Associated Press Newswires at 18:41 (Apr. 13, 1999).

[439] *Court OKs $1.45 Million Settlement Over Paoli Rail Yard Cleanup*, Associated Press Newswires at 18:41 (Apr. 13, 1999); *Rail Companies Pay $1.45 Million to Government for Paoli Rail Yard Superfund Cleanup*, U.S. Water News Online (May 1999) (visited Sept. 24, 2001), http://www.uswaternews.com/archives/arcrights/9raicom5.html.

[440] *Court OKs $1.45 Million Settlement Over Paoli Rail Yard Cleanup*, Associated Press Newswires, Apr. 13, 1999, at 18:41.

[441] *Rail Companies Pay $1.45 Million to Government for Paoli Rail Yard Superfund Cleanup*, U.S. Water News Online (May 1999) (visited Sept. 24, 2001), http://www.uswaternews.com/archives/arcrights/9raicom5.html.

[442] United States v. SEPTA, 235 F.3d 817, 823–4 (3d Cir. 2000).

[443] *Id*. at 821–22.

[444] *Id*. at 823–26. American Premier Underwriters, Inc., challenged the validity and fairness of the consent decree based upon the apportionment equation and the indemnify protections. The Third Circuit U.S. Court of Appeals affirmed the district court's approval of the consent decree and held that the indemnity protections were permissible under CERCLA and that the apportionment equation was fair. *Id*. The EPA issued American Premier Underwriters, Inc., a UAO, which requires it to perform according to the requirements of the ROD at an estimated expense of $6.8 million. National Association of Attorney Generals, *Court Affirms Paoli RR Consent Decree, Including Contribution Protection*, 2 NAAG NAT'L ENV'T ENFORCEMENT J. 14 (Mar. 2001). In addition, American Premier Underwriters, Inc., may have to reimburse the EPA for past and future natural resource costs at an estimated $11 million. *Rail Companies Pay $1.45 Million to Government for Paoli Rail Yard Superfund Cleanup*, U.S. Water News Online (May 1999) (visited Sept. 24, 2001), http://www.uswaternews.com/archives/arcrights/9raicom5.html.

[445] In Re: Paoli RR Yard PCB Litig., 113 F.3d 444, 451 (3d Cir. 1997). The defendants included Monsanto Company, General Electric Corporation, Westinghouse Corporation, SEPTA, and the City of Philadelphia. In Re: Paoli RR Yard PCB Litig., 113 F.3d at 444; *Defense Verdict Returned in Paoli Rail Yard Case*, 17 Mealey's Litigation Reports: Superfund, Dec. 1999, at 16. SEPTA filed third-party complaints against Westinghouse Electric, which manufactured some of the transformers used in the Yard; against the Budd Company, manufacturer of some of the rail cars; and against Penn Central. In the Matter of Penn Central Transp. Co., 944 F.2d 164, 166 (3d Cir. 1991). The plaintiffs also named Amtrak as a defendant but the parties settled prior to trial. *U.S. Jury Rejects Longstanding Claim of PCB Damage from Paoli Rail Yard*, Air/Water Pollution Report's Environment Week, Dec. 8, 1995, *available in* 1995 WL 2404539.

[446] In Re: Paoli RR Yard PCB Litig., 221 F.3d 449, 454 (3d Cir. 2000).

[447] In Re: Paoli RR Yard PCB Litig., 221 F.3d at 454. In this landmark decision, the Third Circuit U.S Court of Appeals' recognized the tort of medical monitoring The tort allows plaintiffs to recover for potential, future injuries. The Third Circuit U.S. Court of Appeals established the following criteria for a successful medical monitoring claim:

(1) Plaintiff was significantly exposed to a proven hazardous substance though the negligent actions of the defendant.

(2) As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.

(3) The increased risk makes periodic examinations reasonably necessary.

(4) Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

In Re: Paoli RR Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990)

[448] *U.S. Jury Rejects Longstanding Claim of PCB Damage From Paoli Rail Yard*, Air/Water Pollution Report's Environment Week, Dec. 8, 1995, *available in* 1995 WL 2404539.

[449] *Id.*

spect to the issue of damages.[450] SEPTA settled with most of the plaintiffs for their state tort and Federal Employers Liability Act claims in 2000.[451] However, at this writing approximately 290 actions are still pending in the Pennsylvania state courts with respect to the Paoli Rail Yard.[452]

In acquiring property, the transit attorney should keep two words in mind at all times: due diligence.

## I. THE SAFE DRINKING WATER ACT

The Safe Drinking Water Act[453] establishes a program designed to protect underground sources of drinking water from any waste disposal or other operations that might endanger public drinking water supplies. The Act also authorizes the EPA to promulgate regulations to limit contaminants in drinking water systems that have at least 15 service connections or that regularly serve at least 25 individuals. The EPA is required to set maximum goals for any contaminants determined to have an adverse effect on human health and that may occur in public water systems with a frequency and at levels that may threaten human health.[454] States are given the primary responsibility for enforcing the standards and ensuring that maximum contaminant levels are not exceeded.[455] The states also have authority to issue monetary penalties for violations of the Safe Drinking Water Act.[456]

## J. WILD AND SCENIC RIVERS

The Wild and Scenic Rivers Act[457] was enacted to preserve river systems in their natural, free-flowing condition and to protect these rivers and their immediate environment.[458] To be protected under the Act, the river must "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values."[459]

The wild or scenic river designation protects these rivers from federal actions that may interfere with the river. The Act forbids the Federal Energy Regulatory Commission (FERC) from licensing any project, specifically dam building, that would directly affect a designated river.[460] Further, the Act forbids all federal agencies from assisting (by loan, grant, license, or otherwise) in the construction of any water resource project that would have a direct and adverse effect on the river.[461]

## K. COASTAL ZONE MANAGEMENT ACT AND FLOODPLAINS

The Coastal Zone Management Act[462] provides financial assistance to states that develop federally approved coastal management plans.[463] The Secretary of Commerce may make grants to any coastal state for the purpose of administering that state's management program if it is approved by the Secretary and includes certain elements, including: (1) an identification of the boundaries of the coastal zone subject to the management program; (2) a definition of what shall constitute permissible land uses and water users within the coastal zone; and (3) an identification of how the State will exercise control over the coastal management program.[464] The Act was amended in 1990 to require states to adopt management measures for controlling nonpoint source pollution of coastal waters.[465] To be eligible for the state grants, all federal projects must be consistent with the approved state management program.

Executive Order 11988 also requires each agency to evaluate potential effects of any actions it may take on a floodplain; to ensure that its planning programs and budget request reflect consideration of flood hazards and floodplain management (in order to reduce the risk of flood loss and minimize the impact of floods on human safety, health, and welfare); and to restore and

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[450] *See* In Re: Paoli Yard PCB Litig., 221 F.3d at 453–54. The plaintiffs appealed the district court's award of costs in the amount of $154,129.30. The Court of Appeals remanded the case because the district court failed to consider the plaintiffs' indigency when determining the costs. *Id*.

[451] In Re: Paoli R.R. Yard PCB Litig., No. 86-2229, 87-3227, 87-1190, 87-1258, 2000 WL 1279922 at *1 (E.D. Pa. Sept. 6, 2000).

[452] In Re: Paoli Yard PCB Litig. 221 F.3d at 454 & n.2.

[453] 42 U.S.C. §§ 300f to 300j-26 (1991 & Supp. 2000).

[454] *Id*. § 300g-1.(b).

[455] *Id*. § 300g-2.(a).

[456] *Id*. § 300 g-2(a)(6).

[457] 16 U.S.C. §§ 1271 *et seq.* (1985 & Supp. 2000).

[458] Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271 *et seq*., enacted to protect components of the national wild and scenic rivers systems.

[459] *Id*. at 1271.

[460] *Id*. § 1278(a) (1985 & Supp. 2000).

[461] *Id*. § 1278(b).

[462] *Id*. §§ 1451 *et seq*. (1985 & Supp. 2000).

[463] The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq*., provides assurance of project consistency with the approved state management program.

[464] *Id*. § 1465 (1985 & Supp. 2000). Other elements required to be included in a management program include: (1) An inventory and designation of areas of particular concern within the coastal zone; (2) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority; (3) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, area wide, State, regional, and interstate agencies in the management process; (4) A definition of the term 'beach' and a planning process for the protection of, and access to, public beaches and other public coastal areas of environment, recreational, historical, esthetic, ecological, or cultural value; (5) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting for such facilities; (6) A planning process for assessing the effects of, and studying and evaluating ways to control, or lessen the impact of, shoreline erosion, and to restore areas adversely affected by such erosion. *Id*.

[465] 16 U.S.C. § 1455b(g) (Supp. 2000).

preserve the natural and beneficial values served by floodplains.[466]

## L. NATIONAL HISTORIC PRESERVATION ACT

"Highways and historic districts mix like oil and water, and when a new highway must go through an historic area, historic preservationists and federal and state highway officials are likely to clash over the preferred route."[467] It is important that a transit agency thoroughly review the history of a construction site before it acquires it, or begins construction. In addition to the requirements imposed under Section 4(f) of the Department of Transportation Act (discussed above), Section 106 of the National Historic Preservation Act[468] requires the DOT, in consultation with the State Historic Preservation Officer (SHPO), to consider a transportation project's potential effects on historic properties.[469] The agency must also give the Advisory Council on Historic Preservation [Council] and other interested parties an opportunity to comment on the proposed project.[470] Transportation funds cannot be approved without the agency's consideration of a project's potential effects on a historic site.[471] However, this does not prevent an agency from undertaking planning activities before it has finished considering a project's effects on historic properties.[472]

If, after consultation, a property is identified as a historic place, the federal transportation agency must determine what kind of effects a proposed transportation project or plan would have on the property. If there are either no historic properties present, or if there are historic properties present but the project will have no effect on them, the agency must provide documentation of the findings to the SHPO.[473] If there is no objection within 30 days, then the agency has fulfilled its obligations under the National Historic Preservation Act.[474] However, if a project is likely to have effects on a historic property, the agency must invite comments and assess effects.[475] If an effect is found to be adverse,[476] the agency and the SHPO must develop alternatives to the project that could avoid, minimize, or mitigate adverse effects on historic properties.[477] The agency and the SHPO then execute an MOA incorporating the mitigation measures, with the agreement of the Council.[478] If historical artifacts are discovered during construction, the work comes to a halt until the necessary plans are changed and approved. Like Section 4(f), Section 106 has significant impacts on transit operators during the environmental process.[479]

## M. ENERGY CONSERVATION

Congress promulgated the Energy Policy and Conservation Act[480] to encourage a more efficient use of our limited energy resources.[481] As part of this policy, states are encouraged to develop state energy conservation plans with the goal of reducing the rate of growth of energy demand and minimizing adverse effects of increased energy consumption.[482] As an incentive, the federal government will provide financial and technical assistance to states in support of energy conservation programs.[483] Moreover, FTA assistance for the construc-

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[466] 42 Fed. Reg. 26951 (May 24, 1977). Executive Order No. 11990, 42 F.R. 26961 (May 24, 1979), as amended, "Protection of Wetlands," 42 U.S.C. § 4321 note. Executive Order No. 11988, "Floodplain Management," 42 U.S.C. § 4321 note.

[467] Concerned Citizens Alliance, Inc. v. Slater, 176 F.3d 686, 690 (3d Cir. 1999) (holding under Section 4(f) that the Secretary's choice of a highway location through a historic district was not arbitrary and capricious).

[468] Section 106 of the National Historic Preservation Act, as amended, 16 U.S.C. § 470f (2000). *See also* Executive Order No. 11593 36 F.R. 8921 (May 13, 1971), "Protection and Enhancement of the Cultural Environment," 16 U.S.C. § 470 note (2000); the Archaeological and Historic Preservation Act of 1974, 16 U.S.C. §§ 469a-1 *et seq*. (2000); Advisory Council on Historic Preservation regulations, "Protection of Historic and Cultural Properties," 36 C.F.R. pt. 800 (1999).

[469] 16 U.S.C. § 470f (2000).

[470] *Id*.

[471] 36 C.F.R. § 800.1(c) (2000).

[472] *Id.*

[473] 36 C.F.R. § 800.4(d) (2000).

[474] *Id.*

[475] *Id.*

[476] Adverse effects on historic properties include, but are not limited to:

> (i) Physical destruction of or damage to all or part of the property; (ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 C.F.R. part 68) and applicable guidelines; (iii) Removal of the property from its historic location; (iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance; (v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features; (vi) Neglect of a property which causes deterioration except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and (vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

36 C.F.R. § 800.5(a)(2) (2000).

[477] 36 C.F.R. § 800.6(a) (2000).

[478] 36 C.F.R. § 800.6(c) (2000).

[479] *See also* the Archaeological and Historic Preservation Act of 1974, 16 U.S.C. § 469a-1 (2000).

[480] Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, 42 U.S.C. §§ 6201, 6321 (2000).

[481] *See generally* Paul S. Dempsey, *Economic Aggression & Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto,* 9 CASE W. RES. J. INT'L L. 253 (1977).

[482] 42 U.S.C. § 6321 (1995 & Supp. 2000).

[483] *Id*. § 6321(b).

tion, reconstruction or modification of buildings requires completion of an energy assessment.[484]

In developing state conservation plans, there are some TCMs that a plan is required to have in order for the state to receive federal funding to implement the plan. A state conservation plan must include programs to promote the availability and use of carpools, vanpools, and public transportation. A state must have at least one of the following programs in at least one urban area with a population of at least 50,000 or in the largest urban area in the state: (i) a carpool/vanpool matching and promotion campaign; (ii) park and ride lots; (iii) preferential traffic control for carpoolers and public transportation patrons; (iv) preferential parking for carpools and vanpools; (v) variable work schedules; (vi) improvement in transit level of service for public transportation; (vii) exemption of carpools and vanpools from regulation carrier statutes; (viii) parking taxes, parking fee regulations, or surcharge on parking costs; (ix) full-cost parking fees for State and/or local government employees; (x) urban area traffic restrictions; (xi) geographical or time restrictions on automobile use; or (xii) area or facility tolls. [485] Also, a program may include programs to increase transportation energy efficiency, including programs to accelerate the use of alternative transportation fuels for government vehicles, fleet vehicles, taxis, mass transit, and privately owned vehicles.[486]

In their traffic mitigation program, the 1990 Amendments to the Clean Air Act included the promotion of carpooling and ridesharing to reduce pollution.[487] The 1990 Amendments attempted to transform the voluntary nature of carpooling into a mandated element of an integrated environmental policy.[488] The Amendments spawned state and regional legislation that requires employers to reduce VMT by commuting employees. Typically, this is accomplished by ridematching, carpooling, and vanpooling.[489] Though the principal focus of the Clean Air Act is environmental protection, like the Energy Policy and Conservation Act, it too encourages conservation of energy resources.

Furthering the conservation goals of earlier legislation, the Energy Policy Act of 1992 established a goal of having alternative fuels replace 10 percent of the petroleum consumed by 2000, and 30 percent by 2010, in part by mandating that a portion of new vehicles purchased by federal and state agencies be alternative fuel vehicles.[490] By 1999, however, only 0.4 percent of all vehicles were alternative fuel vehicles; in 1998, alternative fuels had replaced only 3.6 percent of all highway gasoline use, far short of Congress's objective.[491]

The EPA, DOT, and the Department of Energy have adopted programs to encourage the use of alternative fuels in vehicles, including transit buses. TEA-21 established a Clean Fuels Formula Grant Program, which authorized up to $200 million a year to finance the purchase or lease of clean diesel buses and facilities in nonattainment areas. However, FTA has not implemented the program due to a lack of funding. By 1997, 5 percent of the nation's 50,000 transit buses operated on an alternative fuel system, most typically compressed natural gas.[492]

## N. USE OF RECYCLED PRODUCTS

Federal transportation agencies are encouraged to use items composed of the highest possible percentage of recovered materials practicable, if the agency purchases more than $10,000 worth of the product in a fiscal year.[493] For transportation projects, such materials include: "(a) traffic barricades and traffic cones used in controlling or restricting vehicular traffic; (b) parking stops made from concrete or containing recovered plastic or rubber; (c) channelizers containing recovered plastic or rubber; (d) delineators containing recovered plastic, rubber, or steel; (e) flexible delineators containing recovered plastic."[494] In addition, transportation agencies are encouraged to use road signs containing recovered aluminum and sign supports and posts containing recovered plastic and steel.[495]

## O. ENVIRONMENTAL JUSTICE

In 1994, President Clinton signed Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" [the Proclamation].[496] Its purpose was to ensure

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[484] 49 C.F.R. § 622.301 (1999). The energy assessment must analyze the total energy requirements of a building, including overall design; materials and techniques used in construction; conservation features that may be used; fuel requirements for heating, cooling, and operations; and the kind of energy to be used. *Id*.

[485] 10 C.F.R. § 420.15(b) (2000).

[486] *Id*. § 420.17(a)(2) (2000).

[487] Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970), *as amended,* 42 U.S.C. §§ 7401 *et seq*. (2000).

[488] Matthew Gagelin, *Employer Trip Reduction—Who Is Responsible for Organizing the Carpool?,* 1 ENVT'L L. 203 (1994).

[489] RUSSELL LIEBSON & WILLIAM PENNER, SUCCESSFUL RISK MANAGEMENT FOR RIDESHARE AND CARPOOL-MATCHING PROGRAMS (TCRP Legal Research Digest, 1994).

[490] *See* Perry Goldschein, *Going Mobile: Emissions Trading Gets a Boost From Mobile Source Emission Reduction Credits,* 13 UCLA J. ENVTL L. & POL'Y 225 (1994).

[491] U.S. GENERAL ACCOUNTING OFFICE, ENERGY POLICY ACT OF 1992: LIMITED PROGRESS IN ACQUIRING ALTERNATIVE FUEL VEHICLES AND REACHING FUEL GOALS at 9 (Feb. 2000).

[492] U.S. GENERAL ACCOUNTING OFFICE, MASS TRANSIT: USE OF ALTERNATIVE FUELS IN TRANSIT BUSES at 2 (Dec. 1999).

[493] 42 U.S.C. § 6962 (1995 & Supp. 2000). The use of recycled products is required by EPA guidelines at 40 C.F.R. pt. 247 (1999), implementing Section 6002 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6962 (2000).

[494] 40 C.F.R. § 247.13 (2000).

[495] *Id*. § 247.17(f) (2000).

[496] *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994).

that each federal agency identify and address disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.[497] The Proclamation required that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations…."[498] Although the Proclamation does not define "environmental justice," it creates a list of procedures that all federal agencies must follow to accomplish it.[499]

In 1992, the EPA created the Office of Environmental Justice [the Office].[500] The Office manages and supervises the incorporation of environmental justice into the EPA's programs and policies.[501] The Office also works with the other federal agencies that comprise the "Interagency Federal Working Group on Environmental Justice" to ensure that all federal programs consider and integrate environmental justice policy.[502] The administrators of each major federal agency or their designees comprise the Interagency Working Group."[503] This group, guided by the Administrator of the EPA, develops the strategies and procedures for all federal agencies to follow to achieve environmental justice.[504] Each federal agency must achieve environmental justice by:

> at a minimum: (1) identifying and addressing disproportionately high and adverse human health or environmental effects of agency programs, policies, and activities on minority populations and low-income populations; (2) promoting enforcement of all health and environmental statutes in areas with minority or low-income populations; (3) ensuring greater public participation; (4) improving research and data collection relating to the health and environment of minority and low-income populations; and (5) identifying differential patterns of consumption of natural resources among minority and low-income populations.[505]

Pursuant to the Proclamation, the EPA created permitting regions.[506] Within each region, the EPA collects, "census data, source location data, data reporting the quantity of toxic chemical releases from the most recent toxic release inventory, …data from the Region's own permitting compliance system…location of the proposed facility, the existence of other facilities, and maximum emission data…."[507] An analysis of all these factors determines whether there is a disparate impact on the community resulting in discrimination.[508] Inherent problems arise from determining disparate impact through the above analysis. Foremost is the ability of EPA to collect accurate data and the community challengers' ability to assess the correctness of the technical and scientific collections.

The DOT developed an Environmental Justice Strategy to comply with the Executive Order in 1995.[509] The DOT's compliance with the Environmental Justice Strategy [strategy] is accomplished primarily within the framework of NEPA.[510] Environmental justice concerns must be addressed in the DOT's preparation of every EIS.[511] The strategy involves the consideration of adverse effects on minority and low-income populations during the transportation planning process, and relies heavily on public involvement from members of the subject populations. If a transportation project is identified as likely to have disproportionately high adverse effects on subject populations, the transportation agency must propose measures to avoid, minimize, or

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[497] *Id*.

[498] *Id*.

[499] *Id*.

[500] *EPA: Frequently Asked Questions*, http://epa.gov/compliance/environmentaljustice/index.html. The EPA, through the Office of Compliance and Enforcement, defines "environmental justice" as follows:

> Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. *Fair treatment* means that no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies….

[501] *Id*.

[502] *Id*. Due to concern over the proper implementation and consideration of environmental justice in federal agency decisions, the EPA created the National Environmental Justice Advisory Council in 1993. Twenty-five members of "stakeholder" groups comprise the Council. Stakeholders include, "community-based organizations; business and industry; academic and educational institutions; state and local government agencies; tribal government and community groups; non-governmental organizations and environmental groups." *Id.* The purpose of the Council is to act as an independent source of criticism and advice to the EPA regarding implementation and consideration of environmental justice. *Id.*

[503] *Id*. (providing a complete list of federal agencies in the working group).

[504] *Id*.; Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVT'L L. REP. 10681 (Sept. 2000).

[505] *Id*. *See* 536.

[506] *See* Sheila R. Foster, *Meeting the Environmental Justice Challenge: Evolving Norms in Environmental Decisionmaking*, 30 ENVT'L L. REP. 10992 (Nov. 2000). *See* 535/36.

[507] *Id*.

[508] *Id*.

[509] *Department of Transportation (DOT) Order To Address Environmental Justice in Minority Populations and Low-Income Populations*, Executive Order 12898, 62 Fed. Reg. 18377 (1997).

[510] *Id.* at 18379.

[511] *Id*. at 18380; *see also* United States Dep't of Transp., *Environmental Justice and Mass Transit Projects* (visited Aug. 31, 2001), http://www.fta.dot.gov/office/planning/ep/subjarea/envjust.html (explaining the DOT's policies and procedures for complying with the Proclamation).

mitigate the adverse effects and consider alternatives to the proposed project.[512]

Environmental justice is a legal and policy tool that has been raised in environmental planning disputes and relocation issues. The goal of the DOT in addressing environmental justice issues is to improve the overall transportation decision-making process.[513] If appropriately implemented, environmental justice in conjunction with transportation decision-making will:

- Make better transportation decisions that meet the needs of all people.
- Design transportation facilities that fit more harmoniously into communities.
- Enhance the public-involvement process, strengthen community-based partnerships, and provide minority and low-income populations with opportunities to learn about and improve the quality and usefulness of transportation in their lives.
- Improve data collection, monitoring, and analysis tools that assess the needs of and analyze the potential impacts on minority and low-income populations.
- Partner with other public and private programs to leverage transportation-agency resources to achieve a common vision for communities.
- Avoid disproportionately high and adverse impacts on minority and low-income populations.
- Minimize and/or mitigate unavoidable impacts by identifying concerns early in the planning phase and providing offsetting initiatives and enhancement measures to benefit affected communities and neighborhoods.[514]

In addition to the agency requirements and remedies for environmental justice concerns, there are constitutional and statutory remedies under the Equal Protection Clause and Title VI of the 1964 Civil Rights Act [Title VI].

Environmental justice litigation under the Equal Protection Clause relies primarily on the holdings of *Washington v. Davis*[515] and *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[516] In *Washington*, the court held that disproportionate impact on racial minorities by a governmental action is relevant to prove intent or purpose to discriminate based on race, but that alone it is not enough for a Equal Protection Clause violation.[517] The court in *Village of Arlington Heights* established a five-part test to determine whether the government acted with the intent or purpose to racially discriminate.[518]

The five factors a court will examine to determine if there is illegal racism are:

1. whether the impact of the official action falls more heavily on one race than another and cannot be explained in any other way besides race;
2. the historical context of the decision;
3. the sequence of events immediately preceding the contested decision;
4. deviations from normal decision-making processes; and
5. the legislative and administrative history of the particular decision.[519]

This intent test has proven very difficult for plaintiffs to meet, and only those cases with the most obvious and unequivocal discrimination are provided a remedy under the Equal Protection Clause.[520] Along with the Constitutional protections, Title VI also provides remedies for discrimination within the environmental justice framework.

In 1994, the NAACP Legal Defense & Educational Fund, Inc., (LDF) initiated the first civil rights class action lawsuit to challenge a transportation agency decision under Title VI.[521] The Los Angeles County Metropolitan Transportation Authority (MTA) planned to increase its bus fare by 25 cents and discontinue its unlimited $42 monthly bus pass.[522] The federal district court in Los Angeles certified the class action and designated the plaintiffs as the "poor minority and other riders of MTA buses who are denied equal opportunity to receive transportation services because of the MTA's operation of a discriminatory mass transportation system."[523] In October 1996, the parties signed a consent decree that settled the suit. The settlement included the reduction of overcrowding on MTA buses and a contin-

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[512] 62 Fed. Reg. at 18380.

[513] United States Dep't of Transp., *An Overview of Transportation and Environmental Justice* (last modified May 2000), http://www.fhwa.dot.gov/environment/ej2000.htm.

[514] *Id*.

[515] Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 594 (1976) (rejecting a challenge to a test used for police hiring where Whites passed more often than African-Americans).

[516] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 94 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (holding that the denial of zoning for low-income housing that would benefit mostly minorities did not violate the Equal Protection Clause because plaintiffs failed to prove racial discrimination was the motivating factor for the zoning decision).

[517] Washington v. Davis, 426 U.S. 229.

[518] Village of Arlington, 429 U.S. 252.; Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 121, 125 (1994).

[519] Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 125 (1994).

[520] Edward Patrick Boyle, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 949, 952–53 (1993).

[521] *See* Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth., 263 F.3d 1041 (9th Cir. 2001), *see also* Environmental Defense, *Fighting for Equality in Public Transit: Labor Community Strategy Center v. MTA* (visited Aug. 31, 2001) (providing an in-depth overview of the conditions and proceedings leading up to the consent decree).

[522] Environmental Defense, *Fighting for Equality in Public Transit: Labor Community Strategy Center v. MTA* (visited Aug. 31, 2001).

[523] *Id*.

ued low monthly fare and daily fare and set specific target dates for the MTA to accomplish these goals.[524]

Fourteen months after the court approved the consent decree, the MTA had not yet met the target goals, specifically the overcrowding on the buses.[525] The federal district court ordered the MTA to add 248 additional buses to its fleet to prevent overcrowding.[526] The MTA appealed the order, arguing that the court misinterpreted the consent decree and acted beyond its authority in ordering the purchase of additional buses.[527] The Ninth Circuit Court of Appeals held that the MTA violated the consent decree and had the opportunity to submit its own remedial plan to correct the violation.[528] Therefore, the Court of Appeals affirmed the District Court's decision and order requiring MTA to purchase 248 additional buses to reduce transit overcrowding.[529] As much as this decision was a victory for environmental justice proponents, the following United States Supreme Court decision has caused concern within the movement.[530]

On April 24, 2001, the United States Supreme Court dealt a strong blow to the environmental justice movement.[531] In *Alexander v. Sandoval*, Martha Sandoval [Sandoval], a Mexican immigrant, brought a class action lawsuit under Title VI challenging Alabama's English-only policy for administration of its driver's license tests.[532] Title VI, § 2000(d), prohibits any program or activity that receives federal financial assistance from excluding participants based on race, color, or national origin.[533] Further, Title VI, § 2000(d)-1, directs federal agencies and departments authorized to provide federal monetary assistance to pass rules and regulations to comply with the anti-discrimination section.[534] In furtherance of this directive, the Department of Justice [DOJ] promulgated a regulation prohibiting funding recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin…."[535]

Sandoval argued that Alabama's English-only policy for driver's license exams violated the DOJ's regulation because it discriminated against non-English speakers based on their national origin.[536] She further requested that the court enforce the DOJ regulation and order the DOJ to "accommodate non-English speakers."[537] The case proceeded to the U.S. Supreme Court under the central issue of whether Sandoval, as a private citizen, had a private cause of action to enforce the DOJ regulation.[538] The court held that private individuals could sue to enforce § 2000(d) of Title VI, but that § 2000(d) only prohibits intentional discrimination.[539] Therefore, because the English-only policy created a "disparate impact" based on national origin and race and did not involve intentional discrimination, there is no private right of action to enforce regulations promulgated under § 2000(d).[540] Civil rights advocates consider this decision to be a significant setback to the environmental justice movement as the standard private citizens must meet to remedy discrimination is the very high and often unattainable threshold of intentional discrimination.[541]

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[524] *Id*.

[525] Labor/Community Strategy Center v. Los Angeles County Metro Transp. Auth., 263 F.3d 1041, 1045–6.

[526] *Id*. at 1047.

[527] *Id*. at 1048.

[528] *Id*. at 1051.

[529] *Id*.

[530] Jonathan Ringel, *Rulings a Double Whammy for Civil Liberties Groups*, THE RECORDER, Apr. 25, 2001, at 3.

[531] *Id*.

[532] 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001); 42 U.S.C. § 2000(d) – 2000(d)-1 (2000).

[533] 42 U.S.C. § 2000(d).

[534] 42 U.S.C. § 2000(d)-1.

[535] 28 C.F.R. § 42.104(b)(2)(1999). *See also* 49 C.F.R. § 21.5 (2000), for a similar regulation promulgated by the DOT. The Court assumed that both the DOJ and DOT regulations prohibited activities with a disparate impact based on race and that such regulations are valid. Sandoval, 532 U.S. at 281–2.

[536] Sandoval, 532 U.S. at 279.

[537] *Id.* at 278.

[538] *Id*. at 279–80.

[539] *Id.* at 280.

[540] *Id*. at 282, 293.

[541] Ringel, *supra* note 530.

SECTION 4

# TRANSIT FUNDING & FINANCE

## A. INTRODUCTION

In 2000, some 9.4 billion rides were taken on public buses and trains, the highest number of trips taken by Americans in 40 years, since the inauguration of federal transit funding under President Kennedy.[1] In fact, as of 2000 transit usage is growing faster than highway usage.[2] Between 1995 and 2000, public transportation trips grew 21 percent, a growth rate faster than the U.S. population (4.8 percent), highway use (11 percent), and domestic air transportation (19 percent).[3] According to former FTA Acting Administrator Nuria Fernandez, "I believe the biggest challenge facing transit agencies all across the country…is finding the resources to meet the increased demand for transit and assuring that transit infrastructure is up to the task."[4] Since the fare box covers only a portion of operating and capital expenses, the funding of transit is of critical importance to its sustainability.[5]

Before the San Francisco Bay Area Rapid Transit (BART) system opened in 1972, the last major transit system had been built in Cleveland in the 1920s. BART was followed by several New Starts, including the Washington Metropolitan Transit Authority (WMATA) in 1976, and then Atlanta, Miami, Buffalo, and Baltimore.[6]

Section 3 of the Urban Mass Transportation Act of 1964[7] authorized discretionary federal grants and loans to states or local public agencies for up to 80 percent of the cost of (1) construction, acquisition, or improvement of mass transit facilities and equipment, (2) coordination of mass transit services with highways and other transportation, and (3) establishment and organization of public transit corridor development corporations.[8] The Federal Highway Act of 1973 opened up the Highway Trust Fund for urban mass transportation projects for the first time, and increased the federal share from two-thirds to 80 percent of the net project cost. ISTEA authorized states to transfer National Highway System funds to the Surface Transportation Program, which can include, *inter alia,* construction and rehabilitation of transit and capital projects eligible under Chapter 53 of Title 49 of the United States Code.

Most of transit's federal funding now comes from the Mass Transit Account of the Highway Trust Fund and is derived from 2.86 cents of the 18.4 cent per gallon tax on gasoline and the 24.4 cent per gallon tax on diesel fuel.[9] ISTEA provided some $600 million annually for new transit starts.

Under TEA-21,[10] a $217 billion authorization bill (the largest infrastructure bill in U.S. history), Congress significantly increased funding for CMAQ (by 35 percent), as well as for transit (by 50 percent). TEA-21 authorized $36 billion through 2003 in guaranteed funding for a variety of transit programs, including financial assistance to states and local governments to develop, operate, and maintain transit systems. Other federal funds are available to develop, plan, or construct transit facilities through DOT's highway and transit formula and federal loan programs.[11] For fiscal year 2001, FTA had some $6.3 billion available for transit programs, of which $60 million was earmarked for the 2002 Winter Olympic Games in Utah, primarily for the construction of temporary transportation facilities.[12]

Relative to demand, however, transit remains severely underfunded. The FTA estimates that the $5 billion in transit capital investment from all sources is approximately $2 billion less than required to maintain current conditions. One-third of public transport facilities are in fair or poor condition. Federal gasoline taxes and general funds support 47 percent of transit costs nationwide. State sales taxes and general funds cover less than a third of operating expenses. Approximately

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[1] One of the most authoritative sources on the subject of transit finance is MARY COLLINS, REPORT ON INNOVATIVE FINANCING TECHNIQUES FOR TRANSIT AGENCIES (Transit Cooperative Research Program, Legal Research Digest No. 13, 1999), a publication highly recommended to the reader.

[2] *Testimony of FHWA Administrator Kenneth Wykle Before the U.S. House Comm. on Transportation & Infrastructure* (Mar. 8, 2000).

[3] *Public Transportation Ridership on the Rise for Fifth Straight Year,* U.S. NEWSWIRE, Apr. 16, 2001.

[4] *Testimony of Nuria Fernandez Before the Subcomm. on Gov't Management, U.S. House Comm. on Government Reform* (Oct. 6, 2000).

[5] *See, e.g.,* WAYNE BOYLE, EIGHT WAYS TO FINANCE TRANSIT: A POLICYMAKER'S GUIDE (1994). PAUL MARX, THE VALUE OF INNOVATIVE FINANCING TO TRANSIT IN THE U.S. (Global Mass Transit Systems 101, 1999). COLLINS, *supra* note 1; FED. TRANSIT ADMIN., FINANCIAL INNOVATIVE FINANCING HANDBOOK (1995); INST. FOR URBAN TRANSPORTATION, INDIANA UNIV., FINANCIAL MANAGEMENT FOR TRANSIT: A HANDBOOK (1985).

[6] *Testimony of Gladys Mack Before the Subcomm. on Gov't Management, Comm. on Government Reform* (Oct. 6, 2000).

[7] Currently 49 U.S.C. § 5309 (2003).

[8] 49 U.S.C. § 5309 (2003); PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 314 (Quorum 1986).

[9] Thomas Howard, *Highway Finance Information,* PUB. ROADS, Nov. 1, 1999, at 40.

[10] Pub. L. No. 105-178 (1998).

[11] GEN. ACCOUNTING OFFICE, MASS TRANSIT: CHALLENGES IN EVALUATING, OVERSEEING AND FUNDING MAJOR TRANSIT PROJECTS 3 (2000).

[12] Department of Transportation and Related Agencies Appropriations Act for Fiscal Year 2001, Pub. L. 106-346 (2001). 66 Fed. Reg. 4900 (Jan. 18, 2001). The actual transfer of funds is handled under U.S. Department of Treasury regulations, "Rules and Procedures for Funds Transfers," 31 C.F.R. pt. 205 (2003), that implement Section 5(b) of the Cash Management Improvement Act of 1990, as amended, 31 U.S.C. § 6503(b) (2003). U.S. Department of the Treasury Circular 1075, pt. 205, "Withdrawal of Cash from the Treasury for Advances Under Federal Grants and Other Programs." 31 C.F.R. § 102.13(i)(2) (1999).

42–44 percent of operating costs are covered by the fare box in conventional buses,[13] while only 27 percent is recovered on light rail.[14] This shortfall requires innovative financing techniques.[15] Leveraged funding, as a bridge financing mechanism, becomes increasingly necessary as the arrival of federal dollars fails to keep pace with the current needs and expansion of the transit system.[16]

At the outset, a distinction must be drawn between capital expenses and operating expenses. Capital funds fund capital projects. The operating expense shortfall from farebox revenues is entirely the responsibility of the transit system, and is typically covered by either a subsidy from the transit system's general fund or from a dedicated funding source, such as a percentage of the state/local gas tax or sales tax. Except for paratransit operations, the FTA does not permit capital funds to be used for most operating expenses—capital cost of maintenance and capital leases notwithstanding.[17]

## B. PLANNING

Federal financial support for transit planning is available from several sources, including the Metropolitan Planning Program[18] and the State Planning and Research Program,[19] as well as flexible funding available through the planning programs administered by FHWA.[20] Additionally, FTA Urbanized Formula Funds[21] and flexible funding under the STP and the CMAQ may also be allocated to certain planning activities.[22]

However, FTA does not support the use of New Starts funding[23] for initial planning activities.[24] In assessing New Starts applications, FTA considers the degree to which initial planning was supported with funding from sources other than the New Starts program.[25] Moreover, Congress has specified that no more than 8 percent of New Starts funding may be used for purposes other than final design and construction.[26]

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[13] MARX, *supra* note 5, at 101; Maya Bell, *Elusive Goal, Rail Line that Works,* ORLANDO SENTINEL, Mar. 5, 2000, at A1. The percentage of operating costs recovered by transit providers at the fare box differs significantly between jurisdictions. In London, London Transport covers 66 percent of conventional service and 12 percent of paratransit from the fare box. Chip Martin, *Bus Service Deserves Budget Hike*, LONDON FREE PRESS, Nov. 29, 1999, at A3. In San Diego, fare box recovery is estimated to be 50 percent. *Transportation Planning is Misguided*, SAN DIEGO BUS. J., Aug. 27, 2001, at 39. Milwaukee's trolleys are estimated to cover 12 percent from the fare box. *Transit: Don't Let Cute Cars Take You for a Ride,* MILWAUKEE J. SENTINEL, Aug. 14, 2001, at 14A. Denver's fare box recovery is reported to be 20 percent. Kevin Flynn, *RTD Pushes 4-Year Fare Increase,* ROCKY MOUNTAIN NEWS, July 24, 2001, at 16A. In California, Santa Clara's VTA recovers 17 percent, while "SamTrans, the public transit agency for San Mateo County, has a fare box recovery of about 27 percent; Alameda Contra Costa Transit District, less than 25 percent; and San Francisco Municipal Railway, 33 percent. Bay Area Rapid Transit is one of the most efficient in the nation, operating at about 64 percent." Alastair Goldfisher, *VTA Bus, Light Rail Fares Expected to Increase in July,* BUS. J., Dec. 19, 1998, at 16.

[14] Stacey Higgenbothem, *Light Rail Can Reap Many Benefits, Despite Risks,* BOND BUYER, June 21, 2000, at 30. However, San Diego's South Line covered 90 percent of operating costs in its inaugural years from the fare box. Marlon Boarnet & Nicholas Compton, *Transit Oriented Development in San Diego County,* J. AM. PLAN. ASS'N, Jan. 1, 1999, at 80, 81.

[15] As we shall see below, FTA has embraced innovative financing techniques to leverage federal funds and federally-funded assets. 60 Fed. Reg. 24682 (May 9, 1995).

[16] Yvette Shields & Mary Wisneiwski, *Are Leveraged Federal Grants the Future of Transit Projects?*, BOND BUYER, Apr. 10, 2001, at 36.

[17] *But see* note 57, *infra,* for a complete list of eligible capital projects.

[18] 49 U.S.C. § 5303 (2003). This program supports funding to support the cooperative, continuous, and comprehensive planning program in metropolitan areas, as required by 49 U.S.C. §§ 5303–5306 (2003). State DOTs and MPOs may receive funding to support the economic vitality of the metropolitan area. Funds are apportioned according to a formula that takes into consideration, *inter alia,* the state's urbanized area population in proportion to the urbanized area population for the United States as a whole. Each state can receive no less than .5 percent of the amount apportioned. These federal funds are sub-allocated by the state to MPOs under a formula that considers each MPO's urbanized area population, their planning needs, and a minimum distribution. FED. TRANSIT ADMIN., THIS IS THE FEDERAL TRANSIT ADMINISTRATION 10 (2000).

[19] 49 U.S.C. § 5313(b) (2003). This program provides funding to states for statewide planning and other technical activities; planning support for nonurbanized areas; research, development and demonstration projects; fellowships for training in the public transportation field; university research; and human resource development. Funds are allocated under a formula based on the last census, and the state's urbanized areas compared with the urbanized areas of all states. A state must receive not less than .5 percent of the amount apportioned under this program. FED. TRANSIT ADMIN., *supra* note 18, at 11.

[20] Unless highway funds are actually "flexed," they are prohibited by law from being used on highway projects.

[21] 49 U.S.C. § 5307 (2003).

[22] 65 Fed. Reg. 76868 (Dec. 7, 2003). CMAQ funds may be used for project planning or other activities that lead directly to the construction of facilities or new programs improving air quality, such as preliminary engineering, major investment studies, preparation of environmental NEPA documents, and related air quality development activities. However, general planning or environmental activities or documents, such as economic or demographic studies, that do not directly support air quality improvement, are ineligible for CMAQ funding. 61 Fed. Reg. 50884 (May 9, 1995).

[23] 49 U.S.C. § 5309 (2003).

[24] New Starts funding is discussed in greater detail below. For present purposes, New Starts are FTA capital investments or loans for fixed guideway systems or extensions to existing systems. 49 C.F.R. § 611.1 (1999).

[25] 65 Fed. Reg. 76868 (Dec. 7, 2000); 49 U.S.C. § 5309 (2003).

[26] 49 U.S.C. § 5309(m)(2) (2003).

## C. URBANIZED AREA FORMULA PROGRAM

The Urbanized Area Formula Grants Program allocates funds to urbanized areas[27] for capital, operating, and planning costs associated with mass transit.[28] Eligible projects include planning, engineering design and evaluation of transit projects, capital investments in bus and bus-related projects, construction and maintenance of passenger facilities, capital investments in new and existing fixed guideway systems, preventive maintenance, and some ADA complementary paratransit service costs.[29] Under this program, 9.32 percent is allocated to small urbanized areas (population 50,000 to 199,999), while the remaining 90.68 percent is allocated to large urbanized areas (population 200,000 and above).[30] For small urbanized areas, the formula apportionments are based on two factors: (1) population, and (2) population times population density. For larger urbanized areas, the formula also breaks down into two tiers: the Fixed Guideway[31] Tier (33.29 percent) and the Bus Tier (66.71 percent).[32] Operating assistance is not an eligible expense for large urbanized areas under this program. In these areas, not less than 1 percent of program funding must be dedicated to transit enhancement activities, such as historic preservation, landscaping, public art, pedestrian access, bicycle access, and enhanced access for the disabled.[33]

Large urbanized areas receive their formula apportionments directly from the federal government, through a designated recipient agency within the urbanized area. But for small urbanized areas that are not in a TMA,[34] the Governor of their respective state acts as the designated recipient.[35] FTA publishes an annual notice of apportionments and allocations in the Federal Register. The notice also includes program guidance and any requirements imposed by Congress.[36]

The grantee must adhere to certain public participation requirements[37] and specified reporting requirements,[38] and must submit to an annual review, audit, and evaluation to determine whether the recipient has carried out the project in a timely and effective way, and has used federal funds in a lawful way. Moreover, at least every 3 years, FTA reviews and evaluates the recipient's performance in carrying out the funded program, and its compliance with statutory and regulatory requirements.[39] Triennial Review is a comprehensive review of the performance of the grantee as well as a review of its compliance with FTA's program requirements.

## D. NONURBANIZED AREA FORMULA PROGRAM

The Nonurbanized Area Formula Program provides assistance to states to support public transportation in

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[27] An "urbanized area" is an incorporated area of 50,000 or more that is so designated by the U.S. Census Bureau.

[28] 49 U.S.C. § 5307 (2003). Grants may be made "for capital projects and to finance the planning and improvement costs of equipment, facilities, and associated maintenance items for use in mass transportation, including the renovation and improvement of historic transportation facilities with related private investment." 49 U.S.C. 5307(b)(i) (2003).

[29] FED. TRANSIT ADMIN., *supra* note 18, at 11–12. Unless it has determined that it is not necessary to expend 1 percent of the amount of federal assistance it receives for the fiscal year for transit security projects in accordance with 49 U.S.C. § 5336, a recipient of FTA funds must expend at least 1 percent of the amount of that assistance for transit security projects, including increased lighting in or adjacent to a transit system, increased camera surveillance of an area in or adjacent to that system, emergency telephone line or lines to contact law enforcement or security personnel in an area in or adjacent to that system, and any other project intended to increase the security and safety of an existing or planned transit system. 49 U.S.C. § 5307(d)(1)(J) (2003). Capital grant funds are also available for crime prevention and security. 49 U.S.C. § 5321 (2003).

[30] 49 U.S.C. § 5307 (2003) (formerly Section 9 of the Federal Transit Act).

[31] Fixed guideway system means a mass transportation facility which utilizes and occupies a separate right-of-way, or rail line, for the exclusive use of mass transportation and other high occupancy vehicles, or uses a fixed catenary system and a right of way usable by other forms of transportation. This includes, but is not limited to, rapid rail, light rail, commuter rail, automated guideway transit, people movers, ferry boat service, and fixed-guideway facilities for buses (such as bus rapid transit) and other high occupancy vehicles. A new fixed guideway system means a newly-constructed fixed guideway system in a corridor or alignment where no such system exists.

49 C.F.R. § 611.5 (1999). 49 U.S.C. §§ 5309(e), 5304(2) (2003).

[32] 49 U.S.C. § 5336 (2003).

[33] FED. TRANSIT ADMIN., *supra* note 18, at 12. Recipients of funds apportioned under Section 5336 that serve a population of 200,000 or more must make 1 percent of their funds available for transit enhancement activities. 49 U.S.C. § 5307(k) (2003).

[34] Transportation management area (TMA) means an urbanized area with a population over 200,000 (as determined by the latest decennial census) or other area when TMA designation is requested by the Governor and the MPO (or affected local officials), and officially designated by the Administrators of the FHWA and the FTA. The TMA designation applies to the entire metropolitan planning area(s).

23 C.F.R. 500.103 (2003). TMAs are discussed in greater detail in Section 2—Transportation Planning.

[35] 64 Fed. Reg. 37193 (July 9, 1999).

[36] The FY 2001 notice of apportionments and allocations can be found at 66 Fed. Reg. 4958 (Jan. 18, 2001), and is also listed on the FTA Web site at www.fta.dot.gov (visited April 21, 2003).

[37] 49 U.S.C. § 5307(c) (2003).

[38] 49 U.S.C. §§ 5307, 5335(a), FTA Regulations, "Uniform System of Accounts and Records and Reporting System," 49 C.F.R. pt. 630 (2003).

[39] 49 U.S.C. § 5307(i) (2000). Failure to adhere to applicable legal requirements may result in the imposition of criminal sanctions. 49 U.S.C. §§ 1001, 5307 (2000). However, grantees work hard to maintain good standing with FTA. In the overwhelming number of Triennial Reviews, the grantee is informed of shortcomings, and is provided technical assistance that will enable the grantee to return to compliance.

areas of less than 50,000 in population.[40] These funds may be used for capital, operating, administration, and project administration expenses for state agencies, local public bodies, and nonprofit organizations, as well as operators of public transportation services. Funds are apportioned so that each state receives an amount equal to the total appropriation multiplied by a ratio equal to the population of nonurbanized areas divided by the population in nonurbanized areas in the United States.[41] A state must also use 15 percent of its annual apportionment under this program to support intercity bus service, unless the Governor certifies that such needs are being adequately satisfied.[42] Projects dedicated to ADA compliance, the Clean Air Act, or bicycle access, may be funded at 90 percent federal match, but operating expenses may be funded only at the 50 percent level.[43]

## E. THE RURAL TRANSIT ASSISTANCE PROGRAM

The Rural Transit Assistance Program[44] (RTAP) provides assistance for projects involving the design and implementation of training and technical assistance projects, as well as other support services designed to meet the needs of transit operators in nonurbanized areas. The program provides an annual allocation to each state to develop and implement technical assistance and training programs, and provides funds to support the development of information and materials for use by states and local transit operators and to support research and technical assistance projects of national interest. There is no requirement for a local match.[45]

## F. THE RURAL TRANSPORTATION ACCESSIBILITY INCENTIVE PROGRAM

The Rural Transportation Accessibility Incentive Program funds incremental capital and training expenses incurred in meeting the requirements of the DOT's Over-the-Road Bus Accessibility Rule.[46] It may be used to fund wheelchair lifts for new or existing vehicles and for training. The federal share is 90 percent.[47]

## G. THE ELDERLY AND PERSONS WITH DISABILITIES FORMULA PROGRAM

The Elderly and Persons with Disabilities Program provides formula funding and loans[48] to states[49] to assist nonprofit organizations and governmental authorities[50] in meeting the transportation needs[51] of individuals who are elderly or who have disabilities, whenever existing transportation services are inadequate to their needs.[52] Funds are apportioned according to a formula that takes into consideration each state's share of the population of the elderly and disabled.[53] States submit statewide grant applications identifying the projects for which funding is sought. Upon FTA approval, the state administers the program and allocates funds to subrecipients (including private nonprofit transportation providers and certain public bodies) within the state.[54] The federal share for this program is 80 percent.

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[40] 49 U.S.C. § 5311 (2003) (formerly § 18 of the Federal Transit Act). (DEMPSEY & THOMS, *supra* note 8, at 318.) Transportation projects must be embraced within a state program of mass transportation service projects. 49 U.S.C. § 5311(d) (2003). State procedures are set forth in FTA Circular 9040.1E. DOT may approve such programs only if "the Secretary finds that the program provides a fair distribution of amounts in the State, including Indian reservations, and the maximum feasible coordination of mass transportation service assisted under this section with transportation service assisted by other United States Government sources." 49 U.S.C. § 5311(b) (2003).

[41] 49 U.S.C. § 5311(c) (2003). No more than 15 percent of a state's funds may be spent on administration and technical assistance to a recipient. 49 U.S.C. § 5311(e) (2003).

[42] A recipient of FTA funds must spend at least 15 percent of its funds authorized for 49 U.S.C. § 5311 for intercity transportation projects, unless the State's chief executive officer has certified to FTA that the State's intercity bus service needs are being adequately met.

[43] FED. TRANSIT ADMIN., *supra* note 18, at 12. *See* FTA Circular 9040.1E, available at FED. TRANSIT ADMIN., NON-URBANIZED AREA FORMULA PROGRAM GUIDANCE AND GRANT APPLICATION INSTRUCTIONS (Oct. 1, 1998), http://www.fta.dot.gov/library/policy/circ9040_1E/9040face.htm.

[44] 49 U.S.C. § 5311(b)(2) (2003). This statute is discussed at http://www.fta.dot.gov/research/implem/rtap/rtap.htm (visited April 21, 2003).

[45] 49 U.S.C. § 5311(b) (2003). FED. TRANSIT ADMIN., *supra* note 18, at 13.

[46] 49 C.F.R. pt. 37 (1999). 64 Fed. Reg. 6165 (Feb. 8, 1999); 64 Fed. Reg. 46224 (Aug. 24, 1999); 66 Fed. Reg. 8060 (Jan. 26, 2001). Incremental capital costs eligible for funding include adding lifts, tie downs, moveable seats, doors, and installation thereof, as well as retrofitting vehicles with such components. 65 Fed. Reg. 2772 (Jan. 18, 2000).

[47] FED. TRANSIT ADMIN., *supra* note 18, at 21. Rural transit assistance is discussed at Fed. Transit Admin., *Rural Transit Assistance Program* (visited Aug. 13, 2003), http://www.fta.dot.gov/research/implem/rtap/rtap.htm.

[48] 49 U.S.C. § 5310(e) (2003).

[49] State procedures are set forth in FTA Circular 9070.1E.

[50] Eligible recipients are defined in 49 U.S.C. § 5310(a)(2) (2003).

[51] Among such needs that may be funded is meal delivery service to homebound individuals. 49 U.S.C. § 5310(h) (2003).

[52] 49 U.S.C. § 5310 (2003) (formerly § 16 of the Federal Transit Act).

[53] 49 U.S.C. § 5310(b) (2003).

[54] FED. TRANSIT ADMIN., *supra* note 18, at 13–14; Transit Express v. Ettinger, 246 F.3d 1018 (7th Cir. 2000), held that a complaint brought by a private transportation provider that it was unlawfully excluded from participating in this program does not raise present federal question jurisdiction.

## H. THE CAPITAL INVESTMENT PROGRAM

The Capital Investment Program provides assistance for three activities: (1) new and replacement buses and facilities; (2) modernization of existing rail systems, and (3) new fixed guideway systems. (The latter program is discussed in a separate section below). Eligible recipients are public bodies and agencies (such as transit authorities), including states and their political subdivisions, and certain public entities created under state law.[55] Federal funding may cover up to 80 percent of the net project cost[56] of an eligible capital project.[57] "Net project cost" is the part of the cost that cannot be financed with revenue.[58] Most of these funds are allocated by FTA on a discretionary basis.[59] FTA may also make loans for such purposes.[60] Although this program has been called discretionary, in reality it has been entirely earmarked by Congress in recent years. The New Starts program has seldom provided more than 50 percent of project costs in recent years and may be statutorily set at 50 percent in the next Congressional reauthorization.

### 1. Bus and Bus-Related Projects

Eligible bus projects include

> fleet and service expansion, bus maintenance and administrative facilities, transfer facilities, bus malls, transportation centers, intermodal terminals, park-and-ride stations, acquisition of replacement vehicles, bus rebuilds, bus preventive maintenance, passenger amenities such as passenger shelters and bus stop signs, accessory and miscellaneous equipment such as mobile radio units, supervisory vehicles, fareboxes, computers, shop and garage equipment, and costs incurred in arranging innovative financing for eligible projects.[61]

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[55] 49 U.S.C. § 5309 (2003).

[56] 49 U.S.C. §§ 5307(e), 5309(h) (2003).

[57] Eligible capital projects are:

> (A) acquiring, constructing, supervising, or inspecting equipment or a facility for use in mass transportation, expenses incidental to the acquisition or construction (including designing, engineering, location surveying, mapping, and acquiring rights-of-way), payments for the capital portions of rail trackage rights agreements, transit-related intelligent transportation systems, relocation assistance, acquiring replacement housing sites, and acquiring, constructing, relocating, and rehabilitating replacement housing; (B) rehabilitating a bus; (C) remanufacturing a bus; (D) overhauling rail rolling stock; (E) preventive maintenance; (F) leasing equipment or a facility for use in mass transportation, subject to regulations that the Secretary prescribes limiting the leasing arrangements to those that are more cost-effective than purchase or construction; (G) a mass transportation improvement that enhances economic development or incorporates private investment, including commercial and residential development, pedestrian and bicycle access to a mass transportation facility, and the renovation and improvement of historic transportation facilities, because the improvement enhances the effectiveness of a mass transportation project and is related physically or functionally to that mass transportation project, or establishes new or enhanced coordination between mass transportation and other transportation, and provides a fair share of revenue for mass transportation that will be used for mass transportation—(i) including property acquisition, demolition of existing structures, site preparation, utilities, building foundations, walkways, open space, safety and security equipment and facilities (including lighting, surveillance and related intelligent transportation system applications), facilities that incorporate community services such as daycare or health care, and a capital project for, and improving, equipment or a facility for an intermodal transfer facility or transportation mall, except that a person making an agreement to occupy space in a facility under this subparagraph shall pay a reasonable share of the costs of the facility through rental payments and other means; and (ii) excluding construction of a commercial revenue-producing facility or a part of a public facility not related to mass transportation; (H) the introduction of new technology, through innovative and improved products, into mass transportation; or (I) the provision of nonfixed route paratransit transportation services in accordance with section 223 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12143 (2003), but only for grant recipients that are in compliance with applicable requirements of that Act, including both fixed route and demand responsive service, and only for amounts not to exceed 10 percent of such recipient's annual formula apportionment under sections 5307 and 5311.

49 U.S.C. § 5302(a)(1)(i) (2003). They also include the following:

> (A) capital projects for new fixed guideway systems, and extensions to existing fixed guideway systems, including the acquisition of real property, the initial acquisition of rolling stock for the systems, alternatives analysis related to the development of the systems, and the acquisition of rights of way, and relocation, for fixed guideway corridor development for projects in the advanced stages of alternatives analysis or preliminary engineering; (B) capital projects, including property and improvements (except public highways other than fixed guideway facilities), needed for an efficient and coordinated mass transportation system; (C) the capital costs of coordinating mass transportation with other transportation; (D) the introduction of new technology, through innovative and improved products, into mass transportation; (E) capital projects to modernize existing fixed guideway systems; (F) capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities; (G) mass transportation projects planned, designed, and carried out to meet the special needs of elderly individuals and individuals with disabilities; and (H) the development of corridors to support fixed guideway systems, including protecting rights of way through acquisition, construction of dedicated bus and high occupancy vehicle lanes and park and ride lots, and other nonvehicular capital improvements that the Secretary may decide would result in increased mass transportation usage in the corridor.

49 U.S.C. § 5309(a)(1)(h) (2003).

[58] 49 U.S.C. § 5309(h) (2003). "Net Project Cost" is defined by 49 U.S.C. § 5302(a)(8) (2003). Certain expenses must be applied to reduce the net project cost. For example, if the recipient sells a building built in 1912 and deposits the funds in a reserve account, when it subsequently selects the site on which to build a new facility with FTA financial assistance, it must apply the sales proceeds to reduce the net project cost, notwithstanding that the city may still owe bond indebtedness on the original purchase of the 1912 building.

[59] FED. TRANSIT ADMIN., *supra* note 18, at 14.

[60] 49 U.S.C. § 5309(b) (2003). Loan purposes may include acquiring rights-of-way, station sites, and related purposes, as well as reconstruction, renovation, property management, and relocation costs if the property is required for a transit system and will be used for such purpose within a reasonable period of time. *Id*.

[61] FED. TRANSIT ADMIN., *supra* note 18, at 15.

### 2. Fixed Guideway Modernization

A fixed guideway is

> any transit system that uses exclusive or controlled rights-of-way or rails, entirely or in part. The term includes heavy rail, commuter rail, light rail, monorail, trolleybus, aerial tramway, inclined plane, cable car, automated guideway transit, ferryboats, that portion of motorized bus service operated on exclusive or controlled rights-of-way, and high-occupancy-vehicle (HOV) lanes.[62]

Eligible purposes are capital projects that are designed to improve or modernize existing fixed guideway systems. Such projects include the purchase and rehabilitation of rolling stock, track, equipment, signals, power equipment, substations, passenger stations and terminals, security equipment and systems, maintenance facilities and equipment, computer hardware and software, system extensions, and preventive maintenance. These funds are allocated according to a formula to urbanized areas with rail systems in operation for 7 years or longer.[63]

## I. THE NEW STARTS PROGRAM

The major Capital Investment Program is the New Starts Program.[64] This program funds major new fixed guideway (separate and exclusive rights-of-way) rail, bus, or trolley transit systems, or extensions to existing fixed guideway systems.[65] Eligible projects include construction or extension of light rail, heavy rail, commuter rail, monorail, automated fixed guideway systems, and busway/high-occupancy vehicle corridors.[66] TEA-21 authorized $8.2 billion in New Starts transit projects through FY 2003.[67] FTA was authorized to make New Starts funding commitments for nearly $10 billion during fiscal years 1998–2003.

### 1. Historical Development of the New Starts Program

In 1976, in its first policy statement on the subject, the FTA introduced a process-oriented approach requiring that New Starts projects be subjected to an analysis of alternatives, including a Transportation System Management (TSM) alternative that used no-capital and low-capital measures to make optimum use of the existing transportation system. The statement also required that projects be cost effective.[68]

The Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA)[69] set forth criteria New Starts projects had to meet in order to be eligible for federal discretionary grants. Projects had to be "cost-effective" and "supported by an adequate degree of local financial commitment." In evaluating the local commitment, FTA must determine whether: (1) the proposed plan provides for contingencies in order to cover unanticipated cost increases; (2) each proposed local source of capital and operating funds is stable, reliable, and available within the timetable for the proposed project; and (3) local resources are available to operate the overall proposed mass transit system without requiring a reduction in existing services.[70] ISTEA expanded the original requirement that a project be "cost-effective" by specifying that projects be "justified, based on a comprehensive review of its mobility improvements, environmental benefits, cost-effectiveness, and operating efficiencies."[71]

In 1994, President Clinton issued an Executive Order requiring a systematic analysis of the costs and benefits of proposed investments, and calling for efficient management of infrastructure, including a focus on the operation and maintenance of facilities, as well as the use of pricing to manage demand.[72]

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[62] FED. TRANSIT ADMIN., *supra* note 18, at 15. A fixed guideway is a mass transportation facility "(A) using and occupying a separate right-of-way or rail for the exclusive use of mass transportation and other high occupancy vehicles; or (B) using a fixed catenary system and a right-of-way usable by other forms of transportation." 49 U.S.C. § 5304(2) (2003). 49 C.F.R. § 611.5 (2003). 65 Fed. Reg. 76864 (Dec. 7, 2000). It falls under the capital investment grants and loans program of 49 U.S.C. § 5309 (2003).

[63] FED. TRANSIT ADMIN., *supra* note 18, at 15; Circular 9300.1A, ch. IV, available at: http://www.fta.dot.gov/library/policy/9300.1A/chp4.htm (visited April 21, 2003).

[64] 49 U.S.C. § 5309 (2000). "New start means a new fixed guideway system, or an extension to an existing fixed guideway system." 49 C.F.R. § 611.5 (1999). *See* FTA Circular 9300.1A, ch. V, available at: Fed. Transit Admin., *Capital Program: Grant Application Instructions* (visited Aug. 13, 2003), http://www.fta.dot.gov/library/policy/9300.1A/toc.htm.

[65] 49 U.S.C. §§ 5309(e), 5304(2) (2000). 49 C.F.R. § 611.5 (2003). Proposed projects are exempt from these requirements if the amount of Section 5309 assistance being sought for the project is less than $25 million. 49 U.S.C. § 5309(e)(8) (2003); 49 C.F.R. 611.7 (2003). Projects of less than $25 million in total funding under 49 U.S.C. § 5309, and projects specifically exempt by statute, do not have to satisfy the New Starts regulatory criteria. However, they still must satisfy the planning requirements of 23 C.F.R. pt. 450 (1999), and the environmental review requirements of 23 C.F.R. pt. 771 (1999).

[66] FED. TRANSIT ADMIN., *supra* note 18, at 16.

[67] U.S. GEN. ACCOUNTING OFFICE, FTA'S PROGRESS IN DEVELOPING AND IMPLEMENTING A NEW STARTS EVALUATION PROCESS (1999).

[68] 41 Fed. Reg. 41512 (Sept. 22, 1976). This was followed by a *Policy on Rail Transit,* which reiterated the alternatives analysis requirement, imposed requirements for local financial commitments, established the Full Funding Grant Agreement, and required that local governments take land use actions. 43 Fed. Reg. 9428 (Mar. 7, 1978). This, in turn, was followed by a *Statement of Policy on Major Urban Transportation Capital Investments,* which established a rating system for making comparisons between competing projects. 49 Fed. Reg. 21284 (May 18, 1984).

[69] Pub. L. 100-17 (1987).

[70] 67 Fed. Reg. 76864 (Dec. 7, 2000).

[71] 49 U.S.C. § 5309(e) (2003).

[72] Executive Order 12893, 59 Fed. Reg. 4233 (Jan. 31, 1994).

TEA-21[73] left much of past law and policy regarding New Starts intact, including the basic project justification criteria and the multiple-measure method of project evaluation. However, significant changes were introduced:

• *Major Investment Study*—Integration of the Major Investment Study (MIS) requirement into the FTA/FHWA planning and environmental regulations,[74] elimination of the MIS as a separate requirement,[75] and streamlining of the environmental process.[76]

• *Project Ratings*—The requirement for FTA to establish overall project ratings of "highly recommended," "recommended," or "not recommended." FTA must submit a report annually to Congress of projects with their respective ratings.[77]

• *FTA Approval*—The requirement for FTA approval for a project to advance to the final design stage of the project development process; TEA-21 requires that at the completion of the alternative analysis phase,[78] the local project sponsor must submit the locally preferred alternative New Starts project justification to FTA, and request FTA's approval to enter into the preliminary engineering[79] phase. Only when preliminary engineering is completed may a local project sponsor request FTA approval to enter into final design.[80]

• *Regulations*—FTA must publish regulations on the manner in which proposed projects will be evaluated and rated; and

• *Other changes* included a required evaluation of the cost of sprawl, infrastructure cost savings due to compact land use, population density and current transit ridership in a corridor, and the technical capacity of the grantee to undertake the project. TEA-21 expressly prohibits FTA from considering the dollar value of mobility improvements.[81]

## 2. Criteria for Approval

The FTA uses several criteria to evaluate candidate New Starts projects[82] and to determine which projects to propose to Congress for funding.[83] They are:

*1. Mobility improvements*—The forecast time savings from the New Start project vis-à-vis the baseline alternative predicated on a multi-modal measure of perceived travel times faced by all users of the transportation system, as well as the number of low income

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[73] Pub. L. No. 105-178 (June 9, 1998).

[74] 23 C.F.R. pt. 450 and 23 C.F.R. pt. 771 (2003).

[75] *See* Section 1308 of TEA-21.

[76] *See* Section 1309 of TEA-21. A multimodal MIS must be prepared for all major transit and highway expansions before they are included in the transportation plan or TIP. 61 Fed. Reg. 67094 (Dec. 19, 1996). The transportation planning process is described above, in Section 2—Transportation Plannning.

[77] 67 Fed. Reg. 76864 (Dec. 7, 2000).

[78] "Alternatives analysis is a corridor level analysis which evaluates all reasonable mode and alignment alternatives for addressing a transportation problem, and results in the adoption of a locally preferred alternative by the appropriate State and local agencies and official boards through a public process." 49 C.F.R. § 611.5 (2003). Moreover,

> (1) To be eligible for FTA capital investment funding for a major fixed guideway transit project, local project sponsors must perform an alternatives analysis.
> (2) The alternatives analysis develops information on the benefits, costs, and impacts of alternative strategies to address a transportation problem in a given corridor, leading to the adoption of a locally preferred alternative.
> (3) The alternative strategies evaluated in an alternatives analysis must include a no-build alternative, a baseline alternative, and an appropriate number of build alternatives. Where project sponsors believe the no-build alternative fulfills the requirements for a baseline alternative, FTA will determine whether to require a separate baseline alternative on a case-by-case basis.
> (4) The locally preferred alternative must be selected from among the evaluated alternative strategies and formally adopted and included in the metropolitan planning organization's financially-constrained long-range regional transportation plan.

49 C.F.R. § 611.7 (2003).

[79] "Preliminary Engineering is the process by which the scope of the proposed project is finalized, estimates of project costs, benefits and impacts are refined, NEPA requirements are completed, project management plans and fleet management plans are further developed, and local funding commitments are put in place." 49 C.F.R. § 611.5 (2003). Moreover,

> 1) A proposed project can be considered for advancement into preliminary engineering only if:
> (i) Alternatives analysis has been completed;
> (ii) The proposed project is adopted as the locally preferred alternative by the Metropolitan Planning Organization into its financially constrained metropolitan transportation plan;
> (iii) Project sponsors have demonstrated adequate technical capability to carry out preliminary engineering for the proposed project; and
> (iv) All other applicable Federal and FTA program requirements have been met.

49 C.F.R. § 611.5 (2003).

[80] This requirement enables FTA to control the bottleneck in enabling projects to proceed to a full funding grant agreement [FFGA].

[81] *See* Section 3010 of TEA-21.

[82] 49 U.S.C. § 5309(e)(1)(B) (2003). These measures have been developed according to the considerations identified at 49 U.S.C. § 5309(e)(3) (2003), and Executive Order 12893. 49 C.F.R. § 611 App. A (1999).

[83] U.S. GEN. ACCOUNTING OFFICE, *supra* note 11, at 1. In making annual funding proposals to Congress, the FTA gives highest priority to projects having federal grant agreements, and secondary preference to projects rated highly recommended, or recommended and ready to proceed to final design and a FFGA within the forthcoming fiscal year. For example, in the 2001 fiscal year budget process, FTA evaluated 48 projects, rated 32 as highly recommended or recommended, and proposed that 15 receive FFGAs. *Id*. at 2. In FY 2002, FTA evaluated 40 new projects, and developed ratings for 26 of them. Twenty-three rated "highly recommended" or "recommended," but only four received FTA's recommendation for an FFGA because they met the agency's "readiness" criteria. The majority of the remaining 19 did not meet the FTA's "readiness" or technical capacity criteria. U.S. GEN. ACCOUNTING OFFICE, MASS TRANSIT: FTA COULD RELIEVE NEW STARTS PROGRAM FUNDING CONSTRAINTS 3 (2001).

households and existing jobs within a half mile radius of the boarding points;

*2. Environmental benefits*—The anticipated change in pollutant and greenhouse gas emissions and energy consumption attributable to the New Start vis-à-vis the baseline alternative;

*3. Operating efficiencies*—The forecast change in operating cost per passenger mile for the entire transit system compared to the baseline;

*4. Cost-effectiveness*—The transportation system user benefits[84] based on a multimodal measure of travel times for the forecast year divided by the incremental cost of the proposed project;

*5. Land Use*—Existing and transit supportive land use policies and future patterns must be rated according to how likely the project is to foster transit supportive land use;[85] and

*6. Other Factors*—Including the extent to which the policies and programs are in place as specified in the forecasts, project management capability, and additional factors relevant to local and national priorities and the project's success.[86]

Each of the first five criteria is ranked by FTA as "high," "medium-high," "medium," "low-medium," or "low." Factors identified in the last criterion are reported as appropriate.[87]

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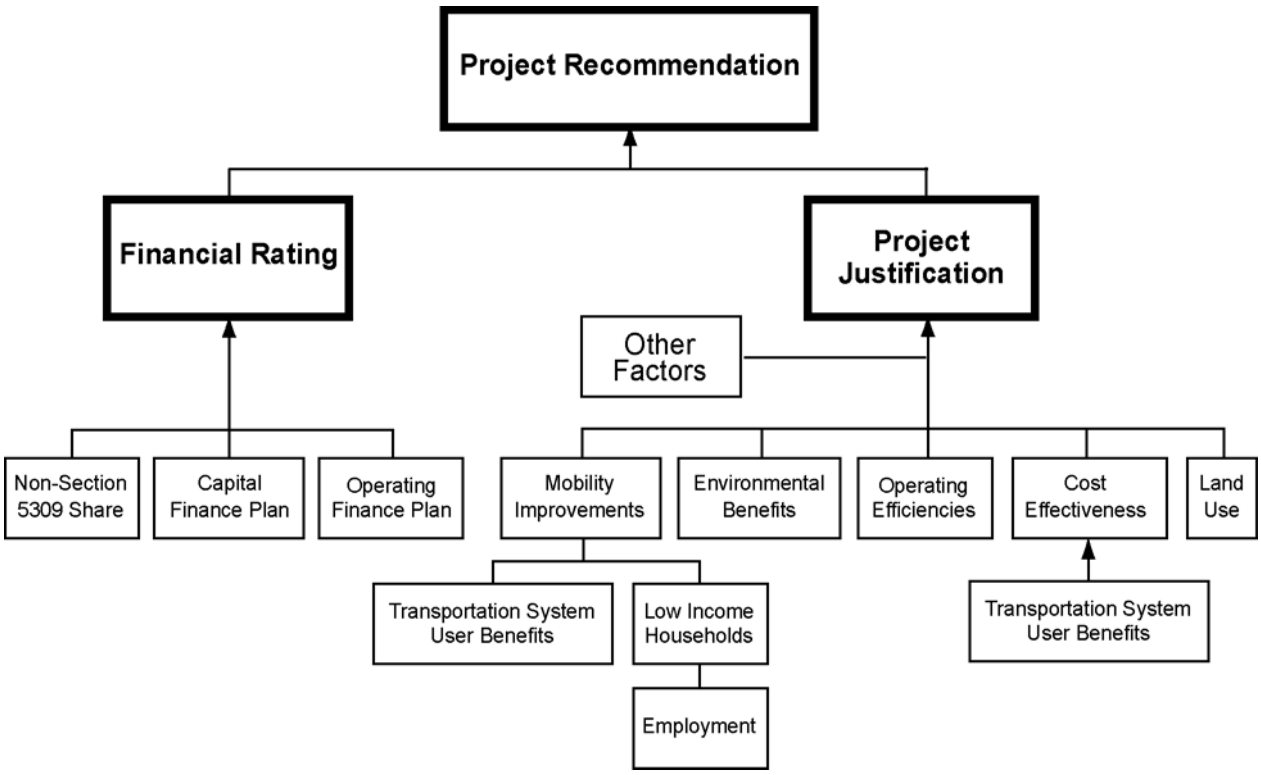
[84] Formerly, the FTA evaluated the "cost per new rider" as a measurement of cost effectiveness. The "transportation system user benefits" focuses on the potential reduction in travel time and out-of-pocket costs that riders would incur in taking a trip. U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 2.

[85] According to FTA, "Transit-supportive land use, whether it is a factor of existing patterns, existing local policies, or planned future development which targets development around the Federally-assisted project, has been an important indicator of future project success. Additionally, TEA-21 added two new land-use-related considerations to the project evaluation process: The reduction in local infrastructure costs achieved through compact land use development, and the cost of suburban sprawl." 65 Fed. Reg. 76872 (Dec. 7, 2000) (citing 49 U.S.C. §§ 5309(e)(3)(B), (C) (2003)). In evaluating land use, FTA looks at eight factors: (1) existing land use; (2) impact of proposed New Starts project on land use; (3) growth-management policies; (4) transit-supportive corridor policies; (5) supportive zoning regulations near transit stations; (6) tools to implement land use policies; (7) the performance of land use policies; and (8) existing and planned pedestrian facilities, including access for pedestrians with disabilities. 65 Fed. Reg. 76884 (Dec. 7, 2000).

[86] 49 C.F.R. pt. 611, App. A (1999). Other factors given consideration include multimodal emphasis of the project; environmental justice; opportunities for increased access by low-income persons; livable community initiatives; alternative land use development scenarios; innovative financing; procurement and construction techniques; and empowerment zones. *Id*.

[87] 65 Fed. Reg. 76871 (Dec. 7, 2000).

Figure 4.1—New Starts Rating Process




New Starts projects must be carried out under an FFGA[88] executed by FTA based on the results of a rating and evaluation process,[89] the technical capability of the sponsor, and a determination that no outstanding issues might interfere with successful completion of the project.[90] FFGAs are negotiated between FTA and recipients. As the name implies, in the event of cost overruns, the recipient is contractually and legally obligated to complete the project and may not request additional funds from FTA. The FFGA covers the project's scope and schedule, the length of the system, number of stations, and its cost.[91] FFGAs are used in all New Start projects requiring more than $25 million in Section 5309 New Start funds.

To obtain New Start funding, the grantee must first perform a local or regional review of alternatives, develop preliminary engineering plans, and secure FTA approval for final design.[92] The ratings developed by FTA for each of the project justification criteria and for local financial commitment form the basis for the overall rating for each project. FTA assigns overall ratings of "highly recommended," "recommended," and "not

[88] A Full Funding Grant Agreement (FFGA) is an instrument that defines the scope of the project, the FTA contribution to it, and other terms and conditions. 49 C.F.R. § 611.5 (2003). An FFGA "establishes the terms and conditions for federal participation, including the maximum amount of federal funds available for the project, which cannot exceed 80 percent of its estimated net cost. The grant agreement also defines a project's scope, including the length of the system and the number of stations; its schedule, including the date when the system is expected to open for service; and its cost. To obtain a grant agreement, a project must first progress through a local or regional review of alternatives, develop preliminary engineering plans, and obtain FTA's approval for final design." (U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 4).

*See* FTA Circular 5200.1.

[89] To be funded, the project must be rated by FTA as "recommended" or "highly recommended." 49 C.F.R. § 611.7(d)(3)(i) (2003).

[90] 49 C.F.R. § 611.7(d) (2003).

[91] U.S. GEN. ACCOUNTING OFFICE, MASS TRANSIT: STATUS OF NEW STARTS TRANSIT PROJECTS WITH FULL FUNDING GRANT AGREEMENTS 2 (1999).

[92] U.S. GEN. ACCOUNTING OFFICE, *supra* note 11, at 4.

recommended," to each proposed project.[93] FTA submits an annual report to Congress of project ratings. Note, however, that a rating of "recommended" or higher does not ensure a federal funding recommendation. Those proposals that have been rated "highly recommended" or "recommended," and have been sufficiently developed for consideration of an FFGA are eligible for FTA recommendation to Congress of funding.[94] The purpose of the project rating process is to bring greater uniformity to the New Start grantmaking process. Historically, FTA lacks sufficient appropriations to fully fund all of the projects that are ready for New Starts designation; in many instances, the then existing grantmaking process was circumvented by "earmarks." "Earmarks" are provisions contained in legislation by which Congress directs that federal funds be directed, or "earmarked," for a specific local project. Congress became concerned that implementation of transit projects depended too greatly upon the Congressional delegation of the local project sponsor to earmark funds and too little upon an objective grantmaking process.

Proposals for FTA capital investment funds[95] for new transit fixed guideway systems and extensions to existing systems must be based on the results of alternatives analysis and preliminary engineering.[96] The *alternatives analysis* (also known as an MIS or multimodal corridor analysis) evaluates several modal and alignment options for satisfying mobility demands in a corridor, and examines information on the costs, benefits, and impacts of alternative strategies to address a transportation problem in a particular corridor.[97] The alternative analysis is performed by a contractor; it includes a public participation process and is submitted to FTA. The alternative strategies evaluated must include a no-build alternative, a baseline alternative, and build alternatives.[98] Local funding sources for building and operating the project must be identified. Competition for New Starts funds is sharp; hence, FTA looks very closely at the proposed local match. Despite the much enhanced transit funding provided by Congress, New Starts funding remains a competition for very scarce federal funds. The lower the proposed federal share, the better position a grantee is in to obtain

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[93] 49 U.S.C. § 5309(e)(6) (2003); 49 C.F.R. § 611.13 (2003).

[94] 46 Fed. Reg. 87687 (Dec. 7, 2000).

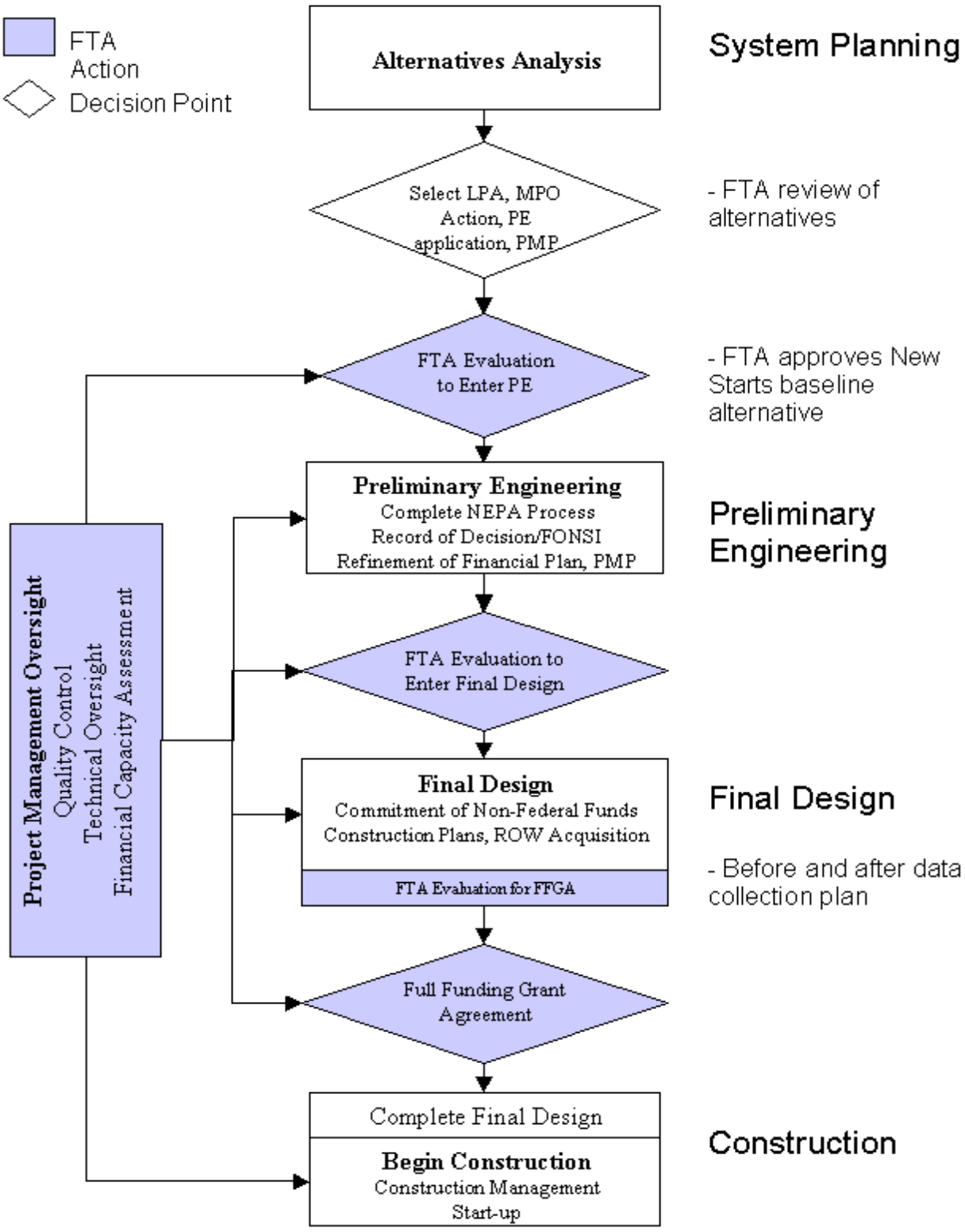
[95] 49 U.S.C. § 5309 (2003).

[96] 49 C.F.R. § 611.7 (2003).

[97] 65 Fed Reg. 76868 (Dec. 7, 2000). "During the preliminary engineering phase, project sponsors refine the design of the proposal, taking into consideration all reasonable design alternatives—which results in estimates of costs, benefits, and impacts." U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 2.

[98] ALI TOURAN, RISK ASSESSMENT IN FIXED GUIDEWAY TRANSIT SYSTEM CONSTRUCTION (1994).

Figure 4-2—FTA New Starts Planning and Project Development Process



approval. FTA looks for ways to stretch/leverage the funds provided by Congress, and a project with a proposed 51 percent federal share has a better chance of advancement than does a proposed project with a 59 percent federal share. A wide range of stakeholders, including the public, should be involved in the process. The alternatives analysis may include preparation of a Draft EIS or EA. The alternatives analysis is complete when local decisionmakers settle on a locally preferred alternative and it is included in the MPO's[99] financially constrained long-range regional transportation plan.[100]

At this point, the project sponsor may ask the FTA regional office for permission to initiate preliminary engineering. The proposal must include information that proves the project's readiness to proceed, including adoption of the project in the metropolitan transportation plan, and the programming of the preliminary engineering study in the TIP,[101] as well as the sponsor's technical ability to undertake the preliminary engineering. The proposal must also address project justification and local financial commitment. At this point in the process, it may be sufficient merely to demonstrate a reasonable financial plan that identifies potential sources of local funds adequate to construct the project.[102] As a practical matter, a financial plan that does not include a dedicated funding source sufficient both to maintain and operate the completed New Start project is doomed. However, FTA approval[103] to move the project to preliminary engineering does not constitute a commitment to federal funding of either the final design or construction.[104]

The *preliminary engineering* may proceed only after the transit agency has completed the alternatives analysis, the MPO has adopted the proposed project into its long range plan, FTA has determined that the sponsor has adequate technical ability to carry out the preliminary engineering, and all other statutory and regulatory requirements have been met.[105] Preliminary engineering is ordinarily funded with 49 U.S.C. §§ 5303 and 5307 funds, local revenue, and flexible funding under CMAQ[106] and STP.[107] During preliminary engineering, the sponsors refine the project's design, taking into account all reasonable design alternatives. They estimate the project's cost, and complete the EIS, if necessary,[108] and project and fleet management plans, and secure local funding commitments. At this point, nearly all of the local funds should have been committed, and provisions should have been made for cost overruns. FTA will not issue a final approval and will not enter into an FFGA until it is satisfied that the grantee has arrangements in place to complete and operate the project, even in the face of cost overruns.

The evidence of a local funding commitment should include identification of stable and dependable funding sources to construct, maintain, and operate the proposed project.[109] The sponsor's Finance Plan must identify the amounts to be funded by the New Starts funding,[110] as well as federal formula and flexible funds. It should identify both the 20 percent local match required by federal law as well as additional nonfederal capital funding ("overmatch"), and the degree to which initial planning has been concluded without New Starts funds.[111]

"Overmatch" was added as a statutory consideration by TEA-21. An abundance of "overmatch" can help tilt the scales in favor of a project, since FTA seeks to fund a large number of New Starts projects with limited economic resources, and enhanced funding suggests a project will not encounter financial problems jeopardizing the federal contribution. In recent years, the average prevailing federal share has been around 50-55 percent, which demonstrates the extent to which local sponsors are willing to put up their own funds in order to obtain federal funds. Hence, in many ways, it is a bidding war among applicants seeking FTA funding. Sponsors are also encouraged by FTA to consider policies and actions that would advance the benefits, the financial feasibility, and the safety of the project.[112]

After the NEPA process has been completed, the project sponsors have demonstrated adequate technical capability to carry out the final design, and all other legal requirements have been satisfied, the FTA may authorize the project sponsor to proceed to a final design of the project.[113] At this point, the FTA issues an ROD.[114] As noted above, in Section 3—Environmental

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[99] In Section 2—Transportation Planning, we discuss the critical role of the MPO. Also included in that discussion are two critical facts: (1) no project can be funded unless it is included in the long-range regional transportation plan; and (2) projects must be implemented in the priority listed in the planning process.

[100] 49 C.F.R. § 611.7(a)(4) (2003); 65 Fed. Reg. 76868-69 (Dec. 7, 2000).

[101] The TIP is described in detail in Section 2—Transportation Planning, above.

[102] 65 Fed. Reg. 76870 (Dec. 7, 2003).

[103] 49 U.S.C. § 5309(e)(6) (2003).

[104] 65 Fed. Reg. 76869 (Dec. 7, 2000).

[105] 49 U.S.C. §§ 5309(e)(6), 5328(a)(2) (2003); 49 C.F.R. § 611.7(a) (2003).

[106] 23 U.S.C. § 149 (2003).

[107] 23 U.S.C. § 133 (2003). 65 Fed. Reg. 76869 (Dec. 7, 2000). The Surface Transportation Program (STP) is the largest source of funds available from FHWA. The federal share is up to 80 percent, and funds may be used for all FTA programs except operating assistance.

[108] *See* Section 3—Environmental Law, above.

[109] 49 U.S.C. § 5309(e)(1)(C) (2003).

[110] 49 U.S.C. § 5309 (2003).

[111] 65 Fed. Reg. 76874-75 (Dec. 7, 2000).

[112] 65 Fed. Reg. 76869 (Dec. 7, 2000).

[113] 49 C.F.R. § 611.7(c) (2003). "Final design is the last phase of project development before construction and may include right-of-way acquisition, utility relocation, and the preparation of final construction plans and cost estimates." (U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 4.)

[114] 65 Fed. Reg. 76869 (Dec. 7, 2000).

Law, in order for the project to go forward, where appropriate, an EIS must be prepared, or a FONSI made.

The last phase of the project, *final design,* includes acquisition of the necessary rights-of-way, relocation of the utilities, and preparation of final construction plans (including construction management plans), detailed specifications, cost estimates, and bid documents.[115] Final design is eligible for New Starts funding.[116]

Federal funding may cover no more than 80 percent of the estimated total net cost of the project (though because New Starts funds are oversubscribed, and dependent on annual Congressional appropriations, they rarely reach the 80 percent ceiling). State or local sources must augment the federal share to cover the total project cost.[117] The grantee is responsible for covering all cost overruns,[118] unless the funding agreement is amended.[119] Examples of projects that have exceeded their budgets include:

- The South Boston Piers transitway project was 28 percent over budget, primarily because of the project's early design, which subsequently required modification, as well as unanticipated construction delays.
- The BART's extension to San Francisco International Airport was 27 percent over budget, primarily because of higher than anticipated construction costs due to an overheated Bay Area economy.
- San Juan's Tren Urbano rapid transit line was 34 percent over budget because of major scope changes and higher than anticipated contract costs.[120]

Various projects have had to restructure their funding in order to avoid collapse.

An example is the Massachusetts Bay Transportation Authority's (MBTA) 1.5-mile underground transitway to connect its existing transit system with the South Boston Piers area. In 1994, FTA entered into an FFGA with MBTA under which the federal government would pay $331 million (80 percent) of the projected total first phase cost of $413 million. But by 2000, schedule delays and design changes had put the project 3 years behind schedule, and projected costs had bloated to $601 million, or 46 percent more than the original cost. Congressional concern over the project's cost was expressed in the Conference Report accompanying the Department of Transportation and Related Agencies Appropriations Act of 2000, which made funds contingent on MBTA's completion of a finance plan. MBTA proposed to use the original $331 million in New Starts funding to cover 55 percent of the project's cost, supplemented with $150 million from the Formula Grant Program to cover 25 percent, putting the federal share back up to 80 percent of the project's new projected cost. The remaining $120 million, or 20 percent, would be covered in state or MBTA bonds; to cover unanticipated expenses, MBTA established a $50 million capital reserve bond fund.[121]

### 3. Project Management Plans

The statute requires a grantee under the Federal Transit Act or the National Capital Transportation Act to prepare and utilize a "project management plan" approved by the Secretary if it is undertaking a "major capital project."[122] The plan must contain a wide variety of items that are intended to demonstrate the grantee's ability to carry out the project efficiently and cost-effectively.[123] The FTA will notify the grantee as to

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[115] 65 Fed. Reg. 76869 (Dec. 7, 2000).

[116] 49 U.S.C. § 5309 (2003). *See* 65 Fed. Reg. 76864 (Dec. 7, 2000); 64 Fed. Reg. 17062 (Apr. 7, 1999).

[117] In assessing the stability of a project's local financial commitment, FTA assesses the project's finance plan for evidence of stable and dependable financing sources to construct, maintain, and operate the proposed system or extension. In evaluating this commitment, FTA is required to determine whether (1) the proposed project's finance plan incorporates reasonable contingency amounts to cover unanticipated cost increases; (2) each proposed local source of capital and operating funds is stable, reliable, and available within the timetable for the proposed project; and (3) local resources are available to operate the overall proposed mass transportation system without requiring a reduction in existing transportation services.

(U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 5).

[118] Cost overruns typically are caused by higher than anticipated construction costs, schedule delays, and/or project scope changes and system enhancements. (U.S. GEN. ACCOUNTING OFFICE, *supra* note 91, at 2.)

[119] U.S. GEN. ACCOUNTING OFFICE, *supra* note 11, at 4.

[120] U.S. GEN. ACCOUNTING OFFICE, *supra* note 91, at 3–4.

[121] Letter from GAO Director Phyllis Scheinberg to Hon. Richard Shelby and Hon. Frank Wolf (Nov. 9, 2000).

[122] 49 U.S.C. § 5327(a) (2003). Strangely, the statute does not require recipients of funds under 23 U.S.C. § 103(e)(4) to submit a plan, although it does permit the Secretary to use funds for oversight of a project developed under 23 U.S.C. § 103(e)(4). 49 U.S.C. § 5327(c) (2003). The FTA's own regulations, however, mandate that a 23 U.S.C. § 103(e)(4) funding recipient provide such a plan. 49 C.F.R. § 633.3(b) (2003). The regulation defines a "major capital project" as a project that: (1) involves the construction of a new fixed guideway or extension of an existing fixed guideway; (2) involves the rehabilitation or modernization of an existing fixed guideway with a total project cost in excess of 100 million dollars; or (3) the Administrator determines is one for which a project management oversight program will benefit the FTA or the recipient. 49 C.F.R. § 633.5(1) through (3) (2003). Projects that fall within the latter point will typically be any expected to have a total cost in excess of $100 million or that are of a sort that have previously been shown to benefit from the program. 49 C.F.R. § 633.5(3)(i) (2000). This particularly includes projects using new technologies or that are of a "unique nature" for the grantee. 49 C.F.R. § 633.5(3)(ii) through (iv) (2003). Also, if "past experience" with the grantee "indicates…the appropriateness" of applying the program, the Administrator may choose to employ it. 49 C.F.R. § 633.5(3)(v) (2003).

[123] The items that must be included or shown are: (1) adequate staff organization with well-defined reporting relationships, statements of functional responsibilities, job descriptions, and job qualifications; (2) a budget covering the project management organization, appropriate consultants, property acquisition, utility relocation, system demonstration staff, audits, and miscellaneous payments the recipient may be prepared to justify; (3) a construction schedule for the project; (4) a document control procedure; (5) a change order procedure that includes a documented, systematic approach to the handling of construction change orders; (6) organizational structures,

when it should submit the project management plan.[124] This notification will usually be made during the grant review process, but may come at any time once the grantee has initiated a federally financed project.[125] The regulations offer some finesse on the statute's description of the review process, giving the Administrator the power to ask the grantee to modify its plan to address any concerns the FTA may have, rather than simply accepting or rejecting the entire plan.[126]

Once the plan has been submitted, the Secretary has 60 days to approve or deny it.[127] In the event that the Secretary rejects the plan, an explanation for the reasons behind the rejection must be given to the grantee.[128] A grantee submitting a plan must agree to give the FTA or its chosen contractor access to the relevant construction sites and records pertaining to the project to the extent reasonably necessary.[129]

Finally, once the Administrator approves the plan, the grantee must begin its implementation.[130] If a grantee makes modifications to an already approved plan, it is required to submit the proposed changes, and an explanation for their necessity, to the Administrator for approval.[131] A grantee is obligated to provide periodic updates of the plan to the Administrator.[132] It is important that the grantee prepare the periodic reports carefully, for in the event of a cost overrun that results in a request to the FTA for additional funds, the FTA will scrutinize the reports to determine whether the grantee properly managed the project, could or should have detected the possibility of the overrun, and took appropriate measures to prevent or minimize the additional costs.

### 4. Project Management Oversight

In the 1980s, a number of FTA New Starts projects encountered quality, cost, and schedule problems.[133] Because it was vulnerable to fraud, waste, abuse, and mismanagement, the FTA's federal grants oversight program was placed on the U.S. General Accounting Office's high-risk list, though it has since been removed.[134] Congress addressed this concern in a periodic transit reauthorization bill, STURAA,[135] which authorized the FTA's project management oversight (PMO) program and established a funding mechanism for overseeing major capital projects.[136] PMO consists of monitoring major capital projects to determine whether they are on time, on budget, in conformity with design criteria, constructed according to approved plans and specifications, and are otherwise being efficiently and effectively implemented.[137] By 2000, the PMO program was overseeing construction of more than 100 major capital projects (defined by FTA as those costing more than $100 million) totaling more than $47 billion.[138]

The Secretary ordinarily may use only one-half of 1 percent of the project's funding to finance a contract for overseeing a construction project within the statute's purview.[139] The duties of a PMO contractor may include reviews or audits for purposes of determining safety,

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management skills, and staffing levels required throughout the construction phase; (7) quality control and quality assurance functions, procedures, and responsibilities for construction, system installation, and integration of system components; (8) materials testing policies and procedures; (9) internal plan implementation and reporting requirements; and (10) criteria and procedures to be used for testing the operational system or its major components. 49 U.S.C. § 5327(a)(1) through (10) (2003).

[124] 49 C.F.R. § 633.21(b)(1) (2003).

[125] *Id*. In either instance, once notification has been given, the grantee has a minimum of 90 days to prepare and submit the plan. 49 C.F.R. § 633.21(b)(2) (2003).

[126] 49 C.F.R. § 633.21.

[127] 49 U.S.C. § 5327(b)(1) (2003). If the Secretary is unable to completely review the plan in that time, the recipient must be notified of the reason for the delay and be provided an estimate of when the review will be completed. 49 U.S.C. § 5327(b)(1) (2003).

[128] 49 U.S.C. § 5327(b)(2) (2003).

[129] 49 U.S.C. § 5327(d) (2003).

[130] 49 C.F.R. § 633.27(a) (2003).

[131] 49 C.F.R. § 633.27(b) (2003).

[132] These shall include, but not be limited to: (1) the project budget; (2) the project schedule; (3) the status of both operating and capital financing; (4) ridership estimates with an operating plan; and (5) the status of local efforts to enhance ridership when estimates are contingent upon the success of such efforts. 49 C.F.R. § 633.27(c)(1) through (5) (2003). In addition to the aforementioned updates, the recipient must submit a report to the Administrator on a monthly basis, reflecting the project's status in regard to budget and schedule. 49 C.F.R. § 633.27(d) (2003).

[133] In 1983, the UMTA (now the FTA) conducted a review of the manner in which it provided oversight for grantees' major capital projects. This review led to the development of a national project management oversight program [the PMO program] that relied on independent contractors for its administration. However, because Congressional appropriations had not been allocated to support it, funding the PMO program proved difficult. Thus UMTA was obliged to divert funds from other activities to perpetuate the PMO program. Eventually, UMTA was able to convince Congress of the benefits of the system in terms of reducing costs and increasing efficiency in its grantees' project. After stopgap funding, a 1987 reauthorization bill included project management oversight as a regular part of the UMTA grant program. 54 Fed. Reg. 36708 (1989). The legislation amending the Act was the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17 (1987). Since 1987, the PMO program has been effectively unchanged. 49 C.F.R. § 633.1 (2000).

[134] U.S. GEN. ACCOUNTING OFFICE, *supra* note 11, at 2.

[135] Pub. L. 100-17.

[136] Funding is described in 49 C.F.R. § 633.19 (2003).

[137] 49 C.F.R. § 633.5 (2003).

[138] U.S. GEN. ACCOUNTING OFFICE, MASS TRANSIT: PROJECT MANAGEMENT OVERSIGHT BENEFITS AND FUTURE FUNDING REQUIREMENTS 4 (2000).

[139] 49 U.S.C. § 5327(c)(1) (2003). An additional one-quarter of 1 percent of funding may be used if the project is being developed under 49 U.S.C. § 5309 (principally fixed guideway systems and related projects).

procurement, management, or financial compliance with the approved plan, as well as providing technical assistance to the grantee to correct deviations from the approved project management plan.[140] The federal government must cover the entire cost of the PMO contract.[141] The statute requires grantees whose projects have an estimated cost of $1 billion or more to submit an annual financial plan for the project to the Secretary.[142] The plan is to be based on "detailed annual estimates" of the cost to complete the remaining parts of the project and on reasonable assumptions of future increases in costs necessary to bring the project to completion.[143]

Once the FTA has determined the program is applicable, project management oversight services should be initiated as soon as is practical.[144] The program will thus be ordinarily put into effect during the preliminary engineering phase, but the Administrator has the ability to determine at any time that a project is a "major capital project."[145] Any person or entity may be used to render project management oversight services, with only two significant exceptions: (1) a grantee may not provide such services for its own project, and (2) a person or entity may not provide such services where a conflict of interest exists.[146] The FTA must use ordinary federal procurement procedures for obtaining PMO transit services.[147]

The FTA lacks sufficient personnel to perform PMO in-house. Accordingly, PMO is performed by third party contractors retained and trained by FTA. PMO usually begins during the preliminary engineering phase of the project. The PMO program is designed to assure that grantees that are constructing major capital projects have the qualified staff and procedures necessary to successfully complete the project according to accepted engineering principles. FTA contracts with engineering firms, which provide PMO services under the guidance of the FTA, to augment its technical staff.[148] The oversight contractor reviews the grantee's plan for managing and constructing the project as early as the project design phase. The process measures how well projects remain on schedule and budget once FFGAs have been signed, and the success of New Starts projects once they are up and running.[149]

From the practical perspective of the grantee, PMOs can be trouble. They justify their existence by finding problems, and they tend to find them. Though not involved in the "acceptance" of project elements, PMOs can recommend that FTA not accept the project for payment until they're satisfied, sometimes making life difficult for both the grantee and its contractors, and subjecting the grantee to delay claims because, at the PMO's insistence, the grantee will not accept the work as satisfactorily completed. Even where a transit recipient's counsel insists there is no basis for a contractor claim, the FTA may hold up grant funds because the PMO is unhappy with how the project is proceeding. Hence, PMOs have enormous discretion that transit recipients may be powerless to resist.

Once the PMO plan has been approved, the oversight contractor monitors the project to assess whether it is being performed on schedule, within budget, and according to approved plans and specifications.[150] As a result of its less-than-satisfactory experience with the Los Angeles subway project,[151] in 1998 the FTA ex-

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[140] 49 U.S.C. § 5327(c)(2) (2003).

[141] 49 U.S.C. § 5327(c)(3) (2003).

[142] 49 U.S.C. § 5327(f) (2003).

[143] *Id*.

[144] 49 C.F.R. § 633.13 (2003).

[145] *Id*. Factors that may lead to the conclusion that something is a "major capital project" include: (1) the construction of a new fixed guideway or extension of an existing fixed guideway; (2) the rehabilitation or modernization of an existing fixed guideway with a total project cost in excess of 100 million dollars; or (3) the Administrator determines the project is one for which a project management oversight program will benefit the FTA or the recipient. 49 C.F.R. § 633.5(1) through (3) (2003). Projects that fall within the latter point will typically be any that might be expected to have a total cost in excess of $100 million or which are of a sort that have previously been shown to benefit from the program. 49 C.F.R. § 633.5(3)(i) (2003). This especially includes projects using new technologies or that are of a "unique nature" for the grantee. 49 C.F.R. § 633.5(3)(ii) through (iv) (2003). Also, if "past experience" with the grantee "indicates…the appropriateness" of applying the program, the Administrator may choose to employ it. 49 C.F.R. § 633.5(3)(v) (2003).

[146] 49 C.F.R. § 633.17(a)(1) and (2) (2003).

[147] 49 C.F.R. § 633.17(b) (2003). See Section 5—Procurement, for a discussion of general federal procurement procedures.

[148] These contractors are selected through the competitive bidding process. Typically, these PMO contracts authorize 5 years and 90,000 hours of work. (U.S. GEN. ACCOUNTING OFFICE, *supra* note 138, at 5).

[149] U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 2.

[150] FTA requires that the oversight contractor provide monthly reports containing any corrective action that may be needed. (U.S. GEN. ACCOUNTING OFFICE, *supra* note 138, at 5.)

[151] In 1997, management and financial difficulties with the Los Angeles subway project caused FTA to require the grantee to prepare a recovery plan. FTA's review of that plan found that the grantee's revenues projected in the plan would be much lower than expected and insufficient to complete the project and operate the rest of the transportation system. Subsequently, the grantee had to suspend the construction of two planned extensions to the subway for which FTA had already committed funds through a full funding grant agreement.

(U.S. GEN. ACCOUNTING OFFICE, *supra* note 138, at 8). By 2001, two segments of the Los Angeles New Starts project had been suspended for more than 3 years, and the FTA informed the project's sponsors that it no longer had sufficient funding to cover the suspended segments. (U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 3). "After opening almost 60 miles of rail lines in the last decade and being forced by a federal court consent decree to improve its long-neglected bus service, the MTA faces a massive $438-million operating deficit over the next decade." Jeffrey Rabin, *MTA Strike Has Deep Roots in Agency's Past Mistakes,* LOS ANGELES TIMES, Sept. 19, 2000, at A24.

panded its review to include an assessment of a grantee's current and future financial ability to undertake and complete a new project and cover operating costs, and the financial impact of the project on the recipient's total transit system.[152] For fiscal year 2002, the FTA more strictly scrutinized the ability of the grantees to build and operate proposed projects in an attempt to assure that there were no outstanding issues that might jeopardize the project once an FFGA is signed.[153] However, FTA is not involved in the inspection and acceptance of construction work; that is the responsibility of the grantee.[154]

## J. THE JOB ACCESS AND REVERSE COMMUTE PROGRAM

An unconventional provision of TEA-21, Section 3037, creates a special grant system for "job access" and "reverse commute" projects by transit agencies.[155] The motivation behind this new grant system was the broad reform of federal welfare programs in 1996, which would require many aid recipients to find employment following the termination of government benefits.[156] As a result of changes in urban development in the preceding decades, the majority of new job growth took place in suburban areas, while the majority of aid recipients lived in urban areas.[157] Compounding the problem further, a sizeable portion of aid recipients neither owned cars nor had access to transit service that would enable them to reach sites of new job creation.[158] Consequently, Congress decided to formulate a system designed to compensate for these imbalances.[159]

The Act authorizes the formation of a grant system for "job access" and "reverse commute" projects.[160] A job access project is designed to transport welfare recipients and other eligible low-income individuals[161] to and from jobs and activities related to their employment.[162] A reverse commute project is designed to transport the general public to suburban employment venues.[163] Grants funded under these programs may not be used for planning and coordination activities, and may not supplant existing funding sources.[164] Funds are provided on a discretionary basis as follows: 60 percent to urbanized areas above 200,000 in population; 20 percent to areas under 200,000 in population; and 20 percent to nonurbanized areas. These caps were removed by appropriations laws beginning in fiscal year 2001.

Grants for these types of projects may only be given to "qualified entities."[165] Qualified entities are required to submit applications for funding to the Secretary, who must evaluate them in light of a number of factors for consideration.[166] Grantees are to be selected on a competitive basis.[167] A grant given for either type of project may not exceed 50 percent of the total project cost.[168]

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[152] U.S. GEN. ACCOUNTING OFFICE, *supra* note 138, at 2.

> In assessing financial condition, the financial consultants consider historical trends and current financial information contained in the grantees' audited financial statements and other relevant reports. In assessing financial capacity, the consultants consider the nature of funds pledged to support the grantees' operating deficits and capital programs while considering the grantees' capital, operating, and maintenance costs. These assessments are also designed to identify issues that could affect projects in the future.

*Id*. at 8–9.

[153] U.S. GEN. ACCOUNTING OFFICE, *supra* note 83, at 2.

[154] U.S. GEN. ACCOUNTING OFFICE, *supra* note 138, at 4.

[155] Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998).

[156] TEA-21 § 3037(a)(7).

[157] TEA-21 § 3037(a)(1).

[158] TEA-21 § 3037(a)(2) and (5).

[159] Information on the job access and welfare-to-work program can be found at Fed. Transit Admin., *Job Access/Reverse Commute Program* (visited Aug. 13, 2003), http://www.fta.dot.gov/library/reference/statsum01/jarc.html.

[160] TEA-21 § 3037(b)(2)(A).

[161] An "eligible low-income individual" is a person whose family income is at or below 150 percent of the poverty line as defined by 42 U.S.C. § 9902(2). TEA-21 § 3037(b)(1).

[162] TEA-21 § 3037(b)(2)(B). Such grants may be used for capital projects and operating expenses related to offering transit service, promoting the use of transit by workers with nontraditional schedules, and encouraging use of transit vouchers and employer-provided bus passes. TEA-21 § 3037(b)(2)(B)(i) through (iv).

[163] TEA-21 § 3037(b)(2)(C). These grants may be used for subsidizing the cost of operating a reverse commute route, purchasing or leasing a vehicle specifically for the purpose of transporting employees to a particular site, and otherwise facilitating the provision of mass transportation services to suburban employment opportunities. TEA-21 § 3037(b)(2)(C)(i) through (iii).

[164] 63 Fed. Reg. 60168 (Nov. 6, 1998).

[165] The term "qualified entity" embraces two categories: (1) applicants that have proposed an eligible project in an urbanized area with a population of at least 200,000, and have been selected by the appropriate metropolitan planning organization, that meets the requirements of TEA-21; or (2) applicants that have proposed an eligible project in an urbanized area with a population of at least 200,000 or an area other than an urban area, and have been selected by the chief executive officer of the state in which the area is located, that meets the requirements of TEA-21. TEA-21 § 3037(b)(4)(A) and (B).

[166] Factors include, but are not limited to: (1) the percentage of the population in the area to be served by the applicant that are aid recipients; (2) if the application is for a job access project, the need for additional services in the area to be served by the applicant to transport welfare recipients and eligible low-income individuals to and from specified jobs, training, or other employment support services, and the extent to which the proposed services will address those needs; (3) the extent to which the applicant demonstrates an innovative approach that is responsive to identified service needs; and (4) the extent to which the applicant demonstrates that the community to be served has been consulted in the planning process. TEA-21 § § 3037(f)(1), (2), (5), and (7).

[167] TEA-21 § 3037(g).

[168] TEA-21 § 3037(h)(1).

The remainder of the project's cost must be provided by cash sources other than farebox revenue, but may include amounts received under a service agreement or from a department or agency of the federal government other than the DOT.[169] All conditions on grants and planning that otherwise apply to funds made available under Section 5307 of the Federal Transit Act also apply to funds provided for either sort of project.[170]

The Job Access and Reverse Commute Program is designed to develop transport services that transport low income individuals and welfare recipients to and from jobs, and facilitate suburban employment opportunities. These funds may be used to finance capital projects and operating costs of equipment, facilities, and capital maintenance expenditures incurred in providing access to employment, promoting use of transit with employees having nontraditional work schedules, promoting use of transit vouchers for welfare recipients and eligible low income individuals, and promoting employer-provided transportation. Under this program, the federal share is 50 percent.[171]

## K. THE FLEXIBLE FUNDING PROGRAM

ISTEA provided for flexible funding to support multimodal planning and project development. Stated in simplest terms, "flexible funding" means that FHWA funds can be used by FTA grantees for certain eligible projects, and FTA funds can likewise be "flexed" by FHWA grantees for certain eligible projects. To date, significantly more highway funds have been transferred for transit projects than have transit funds for highway projects. Though only $6 million was transferred from the highway trust funds to transit in the year preceding promulgation of ISTEA, by 1995, transfers grew to $802 million, and a record $1.6 billion was transferred to transit in 2000.[172] TEA-21 continued the flexible funding program. Many transit projects are eligible for flexible funding programs, including the CMAQ,[173] STP,[174] and, in some instances, the National Highway System Program (NHS).[175]

ISTEA tied use of CMAQ funds to projects designed to improve air quality and manage traffic congestion.[176] The principal purpose of the CMAQ program is to fund improvement projects that will enable nonattainment and maintenance areas to reduce transportation emissions.[177] Projects are funded that reduce transportation-related emissions in air quality nonattainment and maintenance areas under the Clean Air Act of 1990 for ozone, CO, and PM10.[178] CMAQ funds are apportioned to states according to a formula that takes into account the severity of their air pollution problems.[179] States are required to use CMAQ funds in nonattainment and maintenance areas.[180] More than $1 billion in CMAQ funding is authorized each year.

Projects and programs eligible for CMAQ funding must be derived from a conforming transportation plan and TIP and be included in the statewide program. The projects must be consistent with the air quality conformity provisions of the Clean Air Act[181] and NEPA, be included in the statewide program, and meet the eligibility requirements for funding set forth in Titles 23 and 49 of the U.S. Code.[182] FTA gives highest priority to those projects and programs set forth in the SIP as a TCM[183] likely to produce air quality benefits.[184]

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[169] TEA-21 § 3037(h)(2)(A)(1) and (2).

[170] TEA-21 § 3037(i) and (j).

[171] FED. TRANSIT ADMIN., *supra* note 18, at 18. Revenue from service agreements constitutes an eligible match, but revenue derived from fares is ineligible for match. Non-DOT federal transportation funding may serve as local match. 63 Fed. Reg. 60168 (Nov. 6, 1998).

[172] U.S. DEP'T OF TRANSPORTATION, INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT: FLEXIBLE FUNDING OPPORTUNITIES FOR TRANSPORTATION INVESTMENTS 4 (1996).

[173] 23 U.S.C. § 149 (2003).

[174] 23 U.S.C. § 133 (2003).

[175] 23 U.S.C. § 103(b) (2003).

[176] RUSSELL LEIBSON & WILLIAM PENNER, LEGAL ISSUES ASSOCIATED WITH INTERMODALISM (Transit Cooperative Research Program, Legal Research Digest No. 5, 1996).

[177] 61 Fed. Reg. 50891 (Sept. 27, 1996).

[178] PM10 are fine particulate matters that may be inhaled deeply into the lungs. States wishing to use CMAQ funds in PM10 nonattainment or maintenance areas must consult with and consider the views of the relevant MPOs and obtain their concurrence, and the concurrence of the EPA regional office. 61 Fed. Reg. 50891 (May 9, 1995). These issues are discussed in greater detail above in Section 3—Environmental Law.

[179] Fed. Transit Admin., *supra* note 18, at 17.

[180] 61 Fed. Reg. 50891 (Sept. 27, 1996).

[181] Clean Air Act § 176(c) (2000).

[182] Decisions over which programs and projects to fund should be made cooperatively by the state Department of Transportation, the relevant MPOs, and state and local air quality agencies. They must be included in TIPs developed by the MPO in cooperation with the state and the local transit provider. 61 Fed. Reg. 50899 (Sept. 27, 1996). 23 C.F.R. § 450.300 (2003).

[183] These issues are discussed in greater detail in Section 3—Environmental Law.

[184] 61 Fed. Reg. 50891, 50892 (Sept. 27, 1996). TCMs set forth in the Clean Air Act of 1990, § 108(f)(1)(a), are the types of projects intended for CMAQ funding. They include:

- Programs for improved public transit;
- Restricted lanes for passenger buses or HOVs;
- Employer-based transportation management plans;
- Trip-reduction ordinances;
- Traffic flow improvement plans that reduce emissions;
- Fringe and transportation corridor parking facilities serving multiple-occupancy vehicle programs or transit service;
- Programs that limit or restrict vehicle use in downtown areas or other areas of emission concentration, particularly during peak periods;
- Provision of high-occupancy, shared-ride services;
- Nonmotorized or pedestrian corridors;
- Bicycle lanes and storage facilities;
- Programs to control extended idling of vehicles;

CMAQ funds may be used for new or expanded air quality improvement projects for the good of the general public. In most instances, this will consist of a capital investment in transportation infrastructure or creation of a new demand management strategy, though operating assistance is also available under certain circumstances.[185]

Examples of eligible projects include Intelligent Transportation Systems [ITS], improved transit, cleaner fuels, and bicycle and pedestrian programs.[186] CMAQ funds also may be used to create HOV lanes, provide ridesharing incentives,[187] and improve transit facilities. CMAQ eligibility hinges on whether the transit project represents an expansion or enhancement—if it is a system/service expansion, it is eligible; if it is a reconstruction or rehabilitation, it is not.[188] Eligible capital projects include new transit stations, terminals, centers, malls, intermodal transfer facilities, bus/HOV lanes, and park-and-ride facilities adjacent to a transit stop.[189] New transit buses, vans, locomotives, and rail cars for fleet expansion and augmented service, and alternative fuels refueling infrastructure are also eligible.[190] Public/private initiatives, such as joint ventures, and other innovative activities designed to improve air quality may also be eligible for CMAQ funding.[191] The determination of eligibility is handled by FTA on a case-by-case basis.[192] Among examples of how transit agencies have used CMAQ funds are:

- On smog alert days, the Rhode Island Public Transit Authority puts bags over the fare collection boxes in its buses and provides free service;[193]
- In Chicago, an additional vessel has been added to the RiverBus fleet;[194]
- In Worchester, Mass., the Union Station was renovated;[195]
- In Milwaukee, Freeway Flyer service has been provided to ethnic festivals, and the Milwaukee County Transit System purchased 10 trolleys;[196]

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- Employer-sponsored flexible work schedule programs;
- Programs and ordinances to facilitate non-automobile travel and mass transit, and to reduce SOV travel; and
- Pedestrian and other nonmotorized paths, tracks, or areas.

[185] Operating assistance must be limited to new or expanded services. It should not displace other funding mechanisms, such as fees for services. Operating assistance should be limited to start up viable new services that improve air quality, and will eventually be able to cover their costs from other sources. In any event, CMAQ funding is available for operating assistance only for a maximum period of 3 years. 61 Fed. Reg. 50891, 50893 (Sept. 27, 1996). Examples include shuttle service feeding a transit station, circulator service in an activity center, and fixed-route service linking an activity center. According to FTA, "The intent is to support demonstrations of new transit or paratransit service to try to tap new markets and increase transit use. Service demonstrations will usually involve buses or vans since the service should be relatively low-cost and easily terminated if sufficient ridership is not achieved." 61 Fed. Reg. 50893-94 (Sept. 27, 1996). Operating assistance may be used for the start up of major new infrastructure projects (e.g., rail lines, bus/HOV lanes, and extensions to existing systems). Operating assistance under CMAQ is funded at an 80 percent federal share, though CMAQ funds may not replace previously committed funding from other sources. 61 Fed. Reg. 50894 (Sept. 27, 1996).

[186] *Testimony of FHWA Administrator Kenneth Wykle Before the U.S. House Comm. on Transportation & Infrastructure* (Mar. 8, 2000).

[187] "New or expanded rideshare programs, such as new locations for matching services, upgrades for computer matching software, etc. continue to be eligible and may be funded for an indefinite period of time." Moreover, the purchase price of a publicly-owned vehicle for a vanpool service need not be repaid to the federal government. 61 Fed. Reg. 50895 (Sept. 27, 1996).

[188] FTA notes that there are "gray areas," such as, for example, the reconstruction of an underutilized railroad terminal in conjunction with a new park-and-ride. In such circumstances, FTA focuses on whether it is reasonable to expect a significant increase in ridership as a result of the project. 61 Fed. Reg. 50893 (Sept. 27, 1996).

[189] In the latter instance, in CO or PM10 nonattainment or maintenance areas, air quality analysis may be required to ensure that no local "hot spot" violations are likely to occur. 61 Fed. Reg. 50893 (Sept. 27, 1996).

[190] One-for-one vehicle replacements are also eligible in CO and PM10 nonattainment and maintenance areas. Automobiles used by the transit provider are ineligible for CMAQ funding. 61 Fed. Reg. 50893 (Sept. 27, 1996). The conversion of individual conventionally-powered vehicles to alternative fuels is not eligible for CMAQ funding, unless the conversion or replacement is of centrally-fueled fleets, and provided that the fleet conversion is in response to a specific Clean Air Act requirement (e.g., the clean fuel program required of "serious" and worse ozone nonattainment areas), or the fleet conversion is identified in the SIP as an emissions reduction strategy in a nonattainment area of the maintenance plan. 61 Fed. Reg. 50894 (Sept. 27, 1996).

[191] 61 Fed. Reg. 50894 (Sept. 27, 1996).

[192] For example, "Major system-wide upgrades, such as advanced signal and communications systems which improve speed and/or reliability of transit service will likely be eligible, whereas in-kind replacements will not be." Generally speaking, transit-oriented development (retail and other services located in or around transit facilities) is ineligible for CMAQ funding. However, a child-care center adjacent to a transit stop could be funded as an experimental pilot project. 61 Fed. Reg. 50893 (Sept. 27, 1996). Proposals for CMAQ funding should include a precise description of the proposed project (including its size, scope, and timetable), and an assessment of the proposal's anticipated emissions reduction. States must also submit annual reports specifying the activities conducted under the CMAQ program during the preceding fiscal year. 61 Fed. Reg. 50898 (Sept. 27, 1996).

[193] Brian Jones, *Ride Out the Heat for Free,* PROVIDENCE J. BULL., Jul. 23, 2001, at 1A.

[194] *Chicago River Provides Alternative to Wacker Drive Construction,* PR NEWSWIRE, Jan. 31, 2001.

[195] Andi Esposito, *Mission Remains Clouded,* SUNDAY TELEGRAM, Dec. 10, 2000, at E1.

[196] Linda Spice, *County May Cut Festivals,* MILWAUKEE J. SENTINEL, Dec. 7, 2000, at 3B.

• Dallas and Fort Worth converted their public sector vehicles to alternative fuels;

• The Philadelphia Bicycle Network designed and constructed a city-wide network of bicycle routes; and

• New York City purchased a ferry and provides operating assistance for freight operations to remove 54,000 truck trips annually from the New York and New Jersey streets.[197]

The STP provides for the greatest flexibility in the use of funds. STP funds may be used for public transportation capital improvements, carpool and vanpool projects, fringe and corridor parking facilities, intercity and intracity bus terminals, enhancement related transit capital costs, bicycle and pedestrian facilities, safety, and facility enhancement, as well as transit research and development.[198] They may also be used for wetland mitigation and environmental analysis, as well as most TCMs. Some STP funds are made directly available to MPOs in urbanized areas; some are set aside for nonurbanized areas.[199] STP funds have been used to fund a wide variety of projects. Examples include:

• Chicago built the Main Street Rebuilding Project;[200]

• Little Rock has funded trails, sidewalks, and an electric streetcar system;[201]

• The Los Angeles MTA received STP funds to cover 13 percent of the cost of building the Union Station Gateway Center, a multimodal transfer facility;[202] and

• Norman, Oklahoma, upgraded its railroad station.[203]

## L. INTERMODAL FACILITIES AND EQUIPMENT

Congress has declared that among the transportation policies of the United States is "to encourage and promote development of a national intermodal transportation system…to move people and goods in an energy-efficient manner, provide the foundation for improved productivity growth, strengthen the Nation's ability to compete in the global economy, and obtain the optimum yield from the Nation's transportation resources." [204] In creating the U.S. Department of Transportation, Congress gave it a mission to "make easier the development and improvement of coordinated transportation service…."[205]

In ISTEA, Congress set forth a detailed national policy to establish a National Intermodal Transportation System "that is economically efficient and environmentally sound, provides the foundation for the United States to compete in the global economy, and will move individuals and property in an energy efficient way."[206]

ISTEA required that the state and MPO planning process include consideration of facilitating intermodal transportation. [207] TEA-21[208] reaffirmed and retained the

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[197] U.S. ENVTL. PROTECTION AGENCY, DOMESTIC PROGRESS ON CLIMATE CHANGE: INTELLIGENT COMMUTING (2000).

[198] TRANSP. RESEARCH BD., FUNDING STRATEGIES FOR PUBLIC TRANSPORTATION, VOLUME 2, CASEBOOK 69 (Transit Cooperative Research Program Report No. 31, 1998).

[199] FED. TRANSIT ADMIN., *supra* note 18, at 16.

[200] Denise Linke, *Main Street Funds Could Come Early,* CHI. TRIB., Jun. 28, 2001, at 6D.

[201] Jake Sandlin, *Money Jumps from Roads to River Rail,* ARK. DEMOCRATIC-GAZETTE, Apr. 26, 2001, at A1.

[202] TRANSP. RESEARCH BD., *supra* note 198, at 13.

[203] *City Earns Depot Grant,* SUNDAY OKLAHOMAN, Feb. 25, 2001, at 1.

[204] 49 U.S.C. § 302(e) (2003). Congress has decreed that,

> A national intermodal transportation system is a coordinated, flexible network of diverse but complimentary forms of transportation that transports passengers and property in the most efficient manner. By reducing transportation costs, these intermodal systems will enhance the ability of the industry of the United States to compete in the global marketplace.

49 U.S.C. § 47101(b)(3) (2003). Further, Congress has recognized that,

> An intermodal transportation system consists of transportation hubs that connect different forms of appropriate transportation and provides users with the most efficient means of transportation and with access to commercial centers, business locations, population centers, and the vast rural areas of the United States, as well as providing links to other forms of transportation and intercity connections.

49 U.S.C. § 47101(b)(5) (2003). Congress also has decided that the U.S. "must make a national commitment to rebuild its infrastructure through development of a national intermodal transportation system." 49 U.S.C. § 47171(b)(8) (2003).

[205] 49 U.S.C. § 101(b)(2) (2003). The Secretary of Transportation is required to coordinate federal policy on intermodal transportation, and promote creation and maintenance of an efficient U.S. intermodal transportation system. 49 U.S.C. § 301(3) (2003). The Secretary is also obliged to consult with the heads of other federal agencies to establish policies "consistent with maintaining a coordinated transportation system…." 49 U.S.C. § 301(7) (2003).

[206] 49 U.S.C. § 5501(a) (2000). The National Intermodal Transportation System shall:

• "consist of all forms of transportation in a unified, interconnected manner…to reduce energy consumption and air pollution while promoting economic development and supporting the United States' preeminent position in international commerce";

• include the Interstate highway system and the principal arterial roads;

• include public transportation;

• provide improved access to seaports and airports;

• give special emphasis to the role of transportation in increasing productivity growth;

• give "increased attention to the concepts of innovation, competition, energy efficiency, productivity, growth and accountability";

• be adapted to new technologies wherever feasible and economical, giving special emphasis to safety considerations; and

• be the centerpiece of a national investment commitment to create new national wealth.

49 U.S.C. § 5501(b)(8) (2003). All DOT employees are required to be given a copy of the National Intermodal Transportation System Policy, and it is required to be posted prominently in all offices of the Department. 49 U.S.C. § 5501(c) (2003).

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

[208] Pub. L. No. 105-178.

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.[209] TEA-21 established seven factors to be considered in TIP preparation, one of which is to "Enhance the integration and connectivity of the transportation system, across and between modes, for people and freight."[210]

In ISTEA, Congress also required DOT to promulgate regulations for state development, establishment, and implementation of a system for managing its intermodal transportation facilities and systems.[211] States are required to devote 2 percent of federal highway appropriations to planning and research of, *inter alia*, "highway, public transportation, and intermodal transportation systems."[212] Emphasizing the importance of highway, public transport, and intermodal systems, Congress decreed that not less than 25 percent of such funds expended by the state shall be devoted to research and development of these systems.[213]

Intermodal transfer facilities and equipment explicitly are included within the term "capital project" for which federal money may be spent for mass transportation.[214] The Secretary is also instructed to encourage various governmental and private institutions to develop plans to convert rail passenger terminals into intermodal transportation terminals.[215] Grants may also be made to preserve existing rail terminals if such facilities are reasonably capable of conversion to intermodal facilities.[216] DOT may provide financial assistance to states seeking to build rail intermodal freight terminals.[217] Loans and loan guarantees may be made by DOT to finance the acquisition, improvement, rehabilitation, development, or establishment of intermodal equipment or facilities,[218] or to preserve or enhance intermodal service to small communities or rural areas.[219] DOT may provide up to 50 percent of the costs incurred by a public agency for high-speed rail corridor planning.[220] Among the eligible corridor planning activities are intermodal terminals.[221]

The promotion of rail passenger terminal conversion projects is at least as much one of historic preservation as it is one of facilitating transportation. The Secretary is to provide financial, technical, and advisory assistance for:

1. Conversion of rail passenger terminals into intermodal transportation terminals on a feasibility demonstration basis;

2. Preservation of rail passenger terminals that are reasonably likely to be converted to other uses pending preparation of plans for their reuse;

3. Acquisition and use of space in suitable buildings of historic or architectural significance, but only where use of the space is feasible and prudent in comparison to available alternatives;[222] or

4. Encouragement of state and local governments, transportation authorities, common carriers, philanthropic organizations, and others to develop plans to convert rail passenger terminals into intermodal transportation terminals and civic and cultural activity centers.[223]

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[209] William Vantuono, *Uncomplicated Answers for Complicated Questions,* RAILWAY AGE, Sept. 1, 1998, at 16; AMERICAN PUB. TRANSIT ASS'N, TEA 21: A SUMMARY OF TRANSIT RELATED PROVISIONS 6 (1998). 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 Program (by 35 percent) as well as for transit (by 50 percent). Bud Shuster, *Shuster Applauds Gore's "Better America Bonds,"* PRESS RELEASE, Jan. 11, 1999.

[210] Metropolitan planning organizations are required to develop transportation systems and facilities "that will function as an intermodal transportation system for the metropolitan area and as an integral part of the intermodal transportation system for the state and the United States." 23 U.S.C. § 134(a)(3), 49 U.S.C. § 5303(a)(2) (2003). State plans and programs must do the same. 23 U.S.C. § 135(a)(3) (2003). The states' long-range 20-year transportation plan must provide for the development and implementation of the intermodal transportation system of the state. 23 U.S.C. § 135(e)(i) (2003). The Secretary of Transportation shall make grants to the states to develop model state intermodal transportation plans, which shall include systems for collecting data related to intermodal transportation. 49 U.S.C. § 5504(a) (2003).

[211] 23 U.S.C. § 303(a) (2003).

[212] 23 U.S.C. § 505(a)(5) (2003).

[213] 23 U.S.C. § 505(b)(1) (2003). A state's intermodal management system

> shall provide for improvement and integration of all of a state's transportation systems and shall include methods of achieving the optimum yield from such systems, methods for increasing productivity in the state, methods for increasing use of advanced technologies, and methods to encourage the use of innovative marketing techniques, such as just-in-time deliveries.

23 U.S.C. § 303(e) (2003).

[214] 49 U.S.C. § 5302(i) (2003). ISTEA also allocated resources for federal funding of up to 80 percent of at least three demonstration projects for conversion of rail passenger terminals into intermodal transportation terminals. 49 U.S.C. § 5562(a)(1) (2003). To be eligible for federal funding, such terminals needed to include, as appropriate, facilities to handle motorbus transportation, mass transit, and airline ticket offices and passenger terminals providing direct access to area airports. 49 U.S.C. § 5563(a)(1) (2003).

[215] 49 U.S.C. § 5562(a)(4) (2003).

[216] 49 U.S.C. § 5564(c)(1)(A) (2003).

[217] 49 U.S.C. § 22101(a)(3) (2003).

[218] 45 U.S.C. § 822(b)(1) (2003).

[219] 45 U.S.C. § 822(c)(6) (2003).

[220] 49 U.S.C. § 26101(a) (2003).

[221] 49 U.S.C. § 26101(b)(1)(J) (2003). Amtrak was given eminent domain power to build an intermodal transportation terminal at Washington, D.C.'s Union Station. 49 U.S.C. § 24311(a)(1)(B) (2003).

[222] The Secretary may only acquire this type of space after consulting with the Advisory Council on Historic Preservation and the Chairman of the National Endowment for the Arts. 49 U.S.C. § 5562(c) (2003).

[223] 49 U.S.C. § 5562(a)(1) through (4) (2003). "Civic and cultural activities" are defined as including, *inter alia*, libraries, musical and dramatic presentations, art exhibits, adult education programs, public meeting places, and other facilities for

The Secretary may provide funds for conversion of a rail passenger terminal to an intermodal transportation terminal only if certain conditions are met.[224] Funding is permissible where the terminal is capable of being converted to accommodate other modes of transportation the Secretary "decides are appropriate."[225] If its transportation use can be combined with other "civic and cultural activities," the Secretary is also given discretion to finance the terminal's conversion.[226] Where a terminal conversion is to be funded on the grounds of architectural preservation or civic activities, the Secretary is obligated to employ independent architectural consultants for the purpose of evaluating the conversion plan.[227] Only if the consultants agree that the conversion will meet the desired goal may the Secretary release funds for the project.[228] FTA funds may not make up more than 80 percent of the total cost of converting the terminal to intermodal transportation use.[229]

The Secretary may provide financial assistance to a person or entity[230] for the preservation of a terminal where the Secretary has determined that the terminal has a reasonable likelihood of being converted to intermodal transportation use, [231] and/or a civic/cultural center, [232] and planning activity for such conversion has commenced and is "proceeding in a competent way."[233] If the Secretary does decide to fund a conversion project under these guidelines, the grant may not be for more than 80 percent of the total cost of maintaining the terminal for a period no longer than 5 years.[234]

Among the aviation statutes is a declaration that it is the policy of the United States "to develop a national intermodal transportation system that transports passengers and property in an efficient manner."[235] The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century of 2000 amended this provision to provide for the encouragement and development "of intermodal connections on airport property between

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carrying on an activity any part of which is supported under federal law. 49 U.S.C. § 5561 (2003). The designation of a terminal for conversion under this section does not bar the allocation of funds for the same purpose from other programs. 49 U.S.C. § 5562(b) (2003). Regardless of percentage spending caps identified below, the Secretary may not allocate more than $15 million for demonstration conversions or acquiring space in historical/architecturally significant buildings, $2.5 million for maintenance of terminals pending conversion, or $2.5 million for encouraging conversion of terminals to dual transportation/civic activity use. 49 U.S.C. § 5568(a)(1) through (3) (2003). These amounts, once appropriated, will persist until expended. 49 U.S.C. § 5568(b) (2003).

[224] 49 U.S.C. § 5563(a) (2003).

[225] 49 U.S.C. § 5563(a)(1) (2003). Types of "appropriate" transportation include motorbuses, mass transit via rail or rubber, and airline ticket offices and passenger terminals providing transportation to area airports. 49 U.S.C. § 5563(a)(1)(A) through (C) (2003). If the terminal is listed on the National Register of Historic Places, the "architectural integrity" of the terminal is to be preserved. 49 U.S.C. § 5563(a)(2) to (3) (2003).

[226] 49 U.S.C. § 5563(a)(2) through (4) (2003). In the case of using the terminal for civic and cultural activities, the Secretary must make that determination only after consulting with the Advisory Council on Historic Preservation and the Chairman of the National Endowment for the Arts to develop criteria for the conversion. 49 U.S.C. § 5563(a)(5) (2003).

[227] 49 U.S.C. § 5563(b) (2003).

[228] 49 U.S.C. § 5563(b) (2003).

[229] 49 U.S.C. § 5563(c) (2003).

[230] The funding recipient must be a party that is "qualified, prepared, committed, and authorized by law" to preserve the terminal. This includes being able to prevent the demolition or dismantling of the terminal. 49 U.S.C. § 5564(a) (2003).

[231] 49 U.S.C. § 5565(c)(2) (2003). Recipients of financial assistance under any of the terminal conversion categories must keep records as required by the Secretary. 49 U.S.C. § 5566(a) (2003). At minimum, these records must show: (1) the amount and disposition of the funds received; (2) the total cost of the project for which the funds were given or used; (3) the amount of the project cost that was supplied by other sources; and (4) any other records that will "make an effective audit easier." 49 U.S.C. § 5566(a)(1) through (4) (2003). For 3 years following the completion of a project, the Secretary and the Comptroller General may audit and inspect any records of the recipient that the Secretary or Comptroller General decides may be relevant to the financial assistance. 49 U.S.C. § 5566(b) (2003).

[232] The intended recipient must: (1) be prepared to develop practicable plans that meet zoning, land use, and other applicable requirements of the state and locality where the terminal is located; (2) incorporate into the proposed designs and plans for the conversion features that "reasonably appear likely" to attract private investment for the planned conversion and its subsequent operation and maintenance; and (3) complete the designs and plans for the conversion within the period of time prescribed by the Secretary. 49 U.S.C. § 5565(a)(1) through (3) (2003). The Secretary is required to give preference to applicants whose designs and plans will be implemented within 3 years after their completion. 49 U.S.C. § 5565(b) (2003).

[233] 49 U.S.C. § 5564(b)(1) and (2) (2003). This statute is actually in contradiction with the statute under which it purports to be giving guidance. According to 49 U.S.C. § 5562(a)(2) (2003), the Secretary may provide financial assistance to "preserve rail passenger terminals that reasonably are likely to be converted or maintained *pending preparation of plans for their reuse*." [emphasis supplied]. Yet 49 U.S.C. § 5564 (2003), while stating that it gives guidelines "to preserve a rail passenger terminal under section 5562(a)(2) of this title," also requires that "planning activity directed toward conversion or reuse *has begun and is proceeding in a competent way*." 49 U.S.C. § 5564(b)(2) (2003) [emphasis supplied]. As of March 7, 2001, this contradiction has not been the subject of litigation, but it would appear to be rife with possibilities. This discrepancy can be resolved, however, if 49 U.S.C. § 5562(a)(2) is interpreted as permitting assistance pending *completion* of plans for the terminals' reuse. Funds appropriated for this purpose are to be allocated in the manner most likely to maximize the preservation of rail passenger terminals that are: (1) reasonably capable of conversion to intermodal transportation terminals; (2) listed in the National Register of Historic Places; or (3) recommended on the basis of architectural integrity or quality by the Advisory Council on Historic Preservation or the Chairman of the National Endowment for the Arts. 49 U.S.C. § 5564(c)(1)(A) through (C) (2003).

[234] 49 U.S.C. § 5564(c)(2) (2003).

[235] 49 U.S.C. § 47101(b)(1) (2003).

aeronautical and other transportation modes to serve air transportation passengers and cargo efficiently and effectively and promote economic development."[236]

The Federal Aviation Act requires that public airports accepting Airport Improvement Program (AIP) funding agree that all revenue generated by the airport be used exclusively for the capital or operating costs of the airport, the local airport system, or facilities owned or operated by the airport directly and substantially related to the air transportation of persons or property.[237] The question has arisen whether airport funds spent on building or operating transit or rail lines or stations are to be owned or operated by the airport and directly and substantially related to the air transportation of passengers.[238]

Federal Aviation Administration (FAA) regulations provide that airport access projects must preserve or enhance the capacity, safety, or security of the national air transportation system, reduce noise, or provide an opportunity for enhanced competition between carriers.[239] Such projects must also be for exclusive use of the airport patrons and employees, be constructed on airport-owned land or rights-of-way, and be connected to the nearest public access of sufficient capacity.[240] The FAA insisted that AIP funds be limited to the airport landside area, "which encompasses the area from the airport boundary where the general public enters the airport property to the point where the public leaves the terminal building to board the aircraft. Typical eligible landside development items include such things as terminal buildings, entrance roadways and pedestrian walkways."[241] As we shall see, more recent interpretations by the FAA have liberalized this rather constricted view of the types of landside projects that are appropriate for federal airport funding.

In 1996, the FAA approved the request of the Port Authority of New York and New Jersey to use Passenger Facility Charges (PFC) funds to extend Newark Airport's light-rail line 4,400 feet to an Amtrak/New Jersey Transit station off airport grounds.[242] The airlines opposed this decision on grounds that the funds should only be used for direct airport and terminal projects, not to benefit off-site transportation. The fact that the FAA expanded its perspective as to what were legitimate off-airport uses of aviation trust funds made this a landmark policy change. Among the largest intermodal projects approved by the FAA for PFC funding was a 1998 rail line that cost $1.5 billion linking New York's John F. Kennedy International Airport with the Long Island Rail Road and the E, J, and Z subway lines to Manhattan at Jamaica Station, and to Howard Beach.[243] The FAA concluded that PFC expenditures on the JFK rail link would satisfy its statutory and regulatory requirements by alleviating ground congestion on airport roadways and terminal frontages, by enhancing the efficient movement of airport employees, by freeing up capacity on the roadways for additional passengers, and by improving the airport's connection to the regional transportation network. The FAA noted that, "Where ground access is shown to be a limiting factor to an airport's growth, a project to enhance ground access may qualify as preserving or enhancing capacity of the national air transportation system."[244] The FAA found that the rail line would enable an additional 3.35 million passengers to use JFK annually by the year 2013, and "therefore must be construed to have a substantial capacity enhancement effect on JFK, as measured in air passengers accommodated by the airport."[245] The FAA concluded that the rail link would "serve to preserve or enhance the capacity of JFK and the national air transportation system…."[246] The $3 per ticket PFC would generate about $45-50 million a year, enabling the airport to pay off the cost of the line in 20 years.[247]

Rail lines at Atlanta, Chicago, Cleveland, and Washington, D.C., airports have been financed by transit systems rather than airports. The ISTEA legislation included a special appropriation for extension of BART to San Francisco International Airport (SFO). The FTA committed $750 million, or about 64 percent of the $1.2 billion project. The remaining $417 million comes from state and local funding sources.[248] The FAA approved airport funding for construction of a BART station at

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[236] 106 Pub. L. 181; 114 Stat. 61 (Apr. 5, 2003).

[237] 49 U.S.C. § 47107(b) (2003).

[238] 49 U.S.C. § 47107(b) (2003); 14 C.F.R. pt. 158 (2003); FAA Order 5100.3A, para. 553(a), AIP HANDBOOK (Oct. 24, 1989); PHILIP S. SHAPIRO, INTERMODAL GROUND ACCESS TO AIRPORTS: A PLANNING GUIDE 16, 202 (1996). More recent interpretations by the FAA have liberalized this rather constricted view of the types of landside projects that are appropriate for federal airport funding. Federal funding of an airport with the surrounding highway, rail, or transit networks can come from the FAA, FHWA, or FTA.

[239] 14 C.F.R. pt. 158.

[240] FAA Order 5100.3A, para. 553(a), AIP HANDBOOK (Oct. 24, 1989).

[241] *Quoted in* SHAPIRO, *supra* note 238.

[242] *Stalled Train to Kennedy Airport,* N.Y. TIMES, Jan. 30, 1998, at A20. Letter from FAA Associate Administrator Susan Kurland to Port Authority Executive Director George Marlin (Nov. 6, 1996).

[243] The Port Authority of New York and New Jersey alleged that the line would create "a more efficient vehicular flow at the airport by removing buses, shuttle vans, and private autos currently used by air passengers, airport visitors, and airport employees at JFK…," and that without the line, "ground access congestion would constrain projected O&D passenger growth at JFK and adversely affect the national air transportation system." Letter from FAA Associate Administrator Susan Kurland to Port Authority Executive Director Robert Boyle of Feb. 9, 1998, at 20.

[244] *Id*. at 21.

[245] *Id*. at 24.

[246] *Id*.

[247] Matthew L. Wald, *U.S. Approves Plan To Build Kennedy Airport Rail Link*, N.Y. TIMES, Feb. 10, 1998, at A20.

[248] U.S. GEN. ACCOUNTING OFFICE, SURFACE INFRASTRUCTURE: COSTS, FINANCING, AND SCHEDULES FOR LARGE-DOLLAR TRANSPORTATION PROJECTS 18 (1998).

SFO.[249] The 8.7-mile extension, the largest since BART was built in the early 1970s, will have four stations. About 68,000 riders a day are expected to use the line.[250]

FTA also committed to 72 percent of the construction costs of the $399 million extension of the St. Louis Metrolink to Mid-America Airport in St. Clair County, Illinois. This light rail system already connects to St. Louis Lambert International Airport.[251]

As noted above, ISTEA and TEA-21 provided for flexible funding to support multimodal planning and project development.[252] Flexible funding allowed the various federal, state and local transportation units to coordinate development of the Miami Intermodal Center, for example, which seeks to facilitate seamless passenger connections between air, rail, bus, and ferry modes.[253]

FHWA is financing 80 percent of the $11.6 billion, 7.5-mile highway/tunnel extension of the Interstate highway link to Boston Logan International Airport.[254] Federal and state highway departments have partnered successfully with airport authorities to connect road networks with airports at many cities, including Las Vegas and Pittsburgh. More than $300 million in PFC funding was approved for building an access road and tunnel at Las Vegas McCarran International Airport, while NHS funds were used to construct the highways outside the airport property.[255] In summary, federal funding of an airport with the surrounding highway, rail, or transit networks can come from the FAA, FHWA, or the FTA. ISTEA's effort to foster more cooperation among these agencies has had limited, but significant, success.

## M. AUDIT, ACCOUNTING, REPORTING, AND CERTIFICATION REQUIREMENTS

Recipients of federal funds are subject to a host of reporting,[256] accounting,[257] and auditing[258] requirements. They must also sign the FTA Master Agreement and Annual Certifications and Assurances for FTA Grants,[259] Part II of the grant contract between FTA and the recipient setting forth most of the legal obligations imposed upon the grantee.[260] Recipients of capital

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[249] Letter from FAA Associate Administrator Susan Kurland to SFO Airport Director John Martin (Oct. 18, 1996).

[250] Benjamin Pimentel, *BART's 4-Year Trip to SFO Starts Today,* SAN FRANCISCO EXAMINER, Nov. 3, 1997, at 1.

[251] U.S. GEN. ACCOUNTING OFFICE, *supra* note 248, at 40.

[252] U.S. DEP'T OF TRANSP., INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT: FLEXIBLE FUNDING OPPORTUNITIES FOR TRANSPORTATION INVESTMENTS 4 (1996).

[253] *Id*. at 13.

[254] U.S. GEN. ACCOUNTING OFFICE, *supra* note 248, at 57.

[255] SHAPIRO, *supra* note 238, at 16, 203.

[256] The Federal Transit Act provides that DOT shall "maintain a reporting system, by uniform categories, to accumulate mass transportation financial and operating information and a uniform system of accounts and records. The reporting and uniform systems shall contain appropriate information to help any level of government make a public sector investment decision." 49 U.S.C. § 5335(a) (2003). Prepared under the Uniform System of Accounts and Records, a recipient must file: (1) a capital report; (2) a revenue report; (3) an expense report; (4) nonfinancial operating data reports; (5) miscellaneous auxiliary questionnaires and subsidiary schedules; and (6) data declarations. 49 C.F.R. pt. 630 (2003). Grant reporting requirements are set forth in FTA Circular 5010.B, and require: (1) milestone/progress reports; (2) quarterly financial reports; (3) quarterly disadvantaged business enterprise reports; and (4) reports of significant events. FTA uses the Financial Status Report to monitor the use of federal funds through either the electronic grant making system or via SF-269A.

[257] FTA provides for two information-gathering analytic systems: a Uniform System of Accounts and Records, and a Reporting System for the collection and dissemination of public mass transportation financial and operating data. 49 C.F.R. pt. 630 (2003). Recipients of FTA funds must comply with Section 15, Uniform System of Accounts and Records. 49 C.F.R. § 430.4 (2003); 58 Fed. Reg. 4888 (Jan. 15, 1993); § 111, Pub. L. 93-503, 88 Stat. 1573 (49 U.S.C. § 1611 (2003)); § 303(a) and 304(c), Public Law 97-424, 96 Stat. 2141 (49 U.S.C. § 1607 (2000)); and 49 C.F.R. § 1.51 (1999). Congress earmarked funds for the Section 15 reporting system to be updated.

[258] U.S. DOT A-133 Compliance Supplement (May 1998). A recipient of FTA funds must perform the financial and compliance audits required by the Single Audit Act amendments of 1996, 31 U.S.C. 7501 *et seq*. (2000), and OMB Circular No. A-133, Audits of States, Local Governments, and Non-Profit Organizations and Department of Transportation Provisions of OMB A-133 Compliance Supplement, April 1999. The purpose of the audit is to determine whether the grantee has prepared financial statements that fairly present its financial position in accordance with generally accepted accounting principles, has in place internal accounting and other control procedures and systems to assure it is managing its financial assistance programs in compliance with federal law, and has complied with federal laws and regulations that may effect its financial statements and each of its federal assistance programs. Audit costs are described in OMB Circular A-87, Revised; OMB Circular A-21, Revised; OMB Circular A-122, Revised, or 48 C.F.R. ch. I, subpt. 31.2 (1999). As noted above, recipients of FTA urbanized formula grants must submit to a DOT audit at least every 3 years, during which FTA reviews and evaluates completely the recipient's performance in carrying out the funded program, and its compliance with statutory and regulatory requirements. Failure to adhere to applicable legal requirements may result in the imposition of criminal sanctions. 49 U.S.C. §§ 1001, 5307 (2003). Specific pre-award and post-delivery audits are required of rolling stock purchases, focusing on such issues as Buy America and safety certification. 49 C.F.R. pt. 663 (2003).

[259] The annual list of certifications and assurances is very important to transit lawyers, who must sign the certifications. *See, e.g., Federal Transit Administration Fiscal Year 2001 Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements.* The most recent list can be found at the FTA Web site at http://www.fta.dot.gov/library/legal/federalregister/2002/fr102302.html (visited April 21, 2003).

[260] Federal Transit Administration Master Agreement (FTA MA) (7) October 1, 2000; The Master Agreement applies to federal assistance authorized by federal transit laws codified at 49 U.S.C. §§ 5301 *et seq*. (2000); or Title 23, United States Code (Highways); or TEA-21, Pub. L. 105-178, June 9, 1998, 23

funds must certify that they have conducted a meaningful public participation process, for example.[261] Major capital projects require the submission of a project management plan.[262] Before FTA may award a Federal grant or cooperative agreement, the applicant must provide to FTA all certifications and assurances required by federal laws and regulations. These issues are addressed in greater detail in Section 5—Procurement.

## N. LOCAL FINANCIAL COMMITMENT

### 1. Introduction

As noted above, in order to approve a grant or loan under 49 U.S.C. § 5309, the FTA must find that the proposed project is supported by an acceptable degree of local financial commitment.[263] The federal commitment is up to 80 percent of capital expenses, while the local contribution is at least 20 percent (though in fact, most New Starts projects are funded only at about a 50 percent federal share). Typically, the local "match" for capital and operating expenses comes from four sources: (1) taxes (e.g., general fund appropriations, property taxes, sales taxes, gasoline taxes, utility taxes, special assessments); (2) fees (e.g., transit charges, parking charges, central area charges, impact fees, development exactions); (3) debt (e.g., bonds); and (4) operating revenue (e.g., advertising and concessions).[264] However, though farebox revenue can be used to back bonds financing transit improvements, it generally cannot be used as local match,[265] and nationally covers only about 36 percent of operating expenses.[266] In some instances, like-kind exchanges or services qualify as local match.[267] A significant contribution of funds or like-kind services by the private sector can impress FTA as to the extent of local commitment to a proposed project, and many recipients secured FTA discretionary funds or New Starts funds during the 1990s by forming "public-private partnerships." As discussed above, overmatch (i.e., the recipient's proposal to fund more than the 20 percent nonfederal share of eligible project costs) can be highly important in the competition for FTA New Starts discretionary funds.

The FTA uses the following three measures to evaluate the local financial commitment to a proposed capital project: (1) the proposed local share of project costs; (2) the strength of the proposed capital financing plan; and (3) the ability of the local transit agency to fund operation of the system as planned once the fixed guideway project is built.[268]

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U.S.C. § 101 note (2000), as amended by the TEA-21 Restoration Act, Pub. L., 105-206, July 22, 1998, 23 U.S.C. § 101 note (2000). Federal Transit Administration Grant Agreement (FTA G-7, October 1, 2000). Federal Transit Administration Supplemental Agreement (Attachment to FTA G-7, October 1, 2000), Federal Transit Administration Cooperative Agreement (FTA C-7, October 1, 2000). FTA issues a revised Master Agreement every year.

[261] An Applicant seeking federal assistance under 49 U.S.C. ch. 53 for a capital project that will substantially affect a community or the community's transit service must certify that it has, or before submitting its application, will have: (a) provided an adequate opportunity for a public hearing with adequate prior notice of the proposed project published in a newspaper of general circulation in the geographic area to be served; (b) held that hearing and provided FTA a transcript or detailed report summarizing the issues and responses, unless no one with a significant economic, social, or environmental interest requests a hearing; (c) considered the economic, social, and environmental effects of the project; and (d) determined that the project is consistent with official plans for developing the urban area. 49 U.S.C. § 5323(b) (2000).

[262] The project management plan is a document that identifies all the tasks necessary to complete a major capital project. 49 C.F.R. pt. 633 (1999). This is discussed in greater detail elsewhere in this Section.

[263] 49 U.S.C. § 5309(e)(1)(C) (2000); 49 C.F.R. § 611.11 (1999). A recipient may not use a grant or loan to pay ordinary governmental or nonproject operating expenses. 49 U.S.C. § 5323(h)(1) (2000).

[264] Operating revenue may be derived from several resources, including fare box receipts, advertising (revenue derived by leasing space for advertising or rights-of-way on transit property), and concessions on transit property.

[265] "All local and State revenues generally eligible for inclusion in the local match with the exception of farebox revenues." 45 Fed. Reg. 56742 (Aug. 25, 1980). With respect to fare increases or service reductions, local transit providers must have a locally developed process to solicit and consider public comment before raising fares or implementing a major reduction of transportation. There have been lawsuits over fare increases and service reductions. The initial lawsuits were brought under Section 5(i)(3) of the Urban Mass Transportation Act, which has since been repealed. In the mid 1990s, Los Angeles was one of two large urban transit properties embroiled in major litigation. The suit was based on Title VI, with the basic contention being that the transit agency was increasing fares illegally for bus riders in the inner city while providing rail/subway service to the affluent suburbs. There was also Title VI fare increase litigation in New York City, which in substantial part was based upon alleged shortcomings in the public participation process. In New York Urban League v. New York, 71 F.3d 1031 (2d Cir. 1995), the Second Circuit dismissed a Title VI complaint on grounds that plaintiff failed to prove disparate treatment. Summary judgment on these claims was also granted defendants in Committee for a Better North Phila. v. SEPTA, 1990 U.S. Dist. Lexis 10895 (E.D. Pa. 1990).

[266] Fed. Highway Admin., *Innovative Finance* (last modified Mar. 13, 2003), http://www.fhwa.dot.gov/innovativefinance. The farebox at Denver's RTD covers only 20 percent of operating costs. Jeffrey Leib, *Rate Hike in Works for Most RTD Fares,* DENV. POST, Jul. 24, 2001, at A1. All transit systems require an operating subsidy. Jennifer Dixon, *Tab for Detroit-Area Bus System Could Top $400 Million a Year,* DET. FREE PRESS, Jun. 4, 2001.

[267] Contributions, donations, and exchanges are assets (e.g., land, rights-of-way, or easements) given by a private entity to a transportation agency in exchange for a future benefit or access to transportation facilities.

[268] 49 C.F.R. § 611, App. A (1999).

The FTA permits grantees to defer payment of the local share of transit projects, as for example when the local funds are invested in a short-term security or otherwise encumbered. TEA-21 permits the local share to vary from year to year, so long as the final contribution of federal funds does not exceed the maximum level authorized for the project.[269] This "tapered match" (or delayed local match) allows the level of local match to vary over the course of the project. Thus, in its initial years, the federal share may be 100 percent, tapering off to zero as the project is completed. This may enable the project to begin before the local agency has secured bonds, capital market financing, or collected revenue from a recently enacted tax. The use of tapered match is confined to circumstances where project completion will be expedited and project costs will be reduced.

State and local governments may also use the fair market value of third party donated funds, locally funded contracts, land, material, or services as part of their local match.[270] The value of publicly-owned property donated to a project may also be used as local match.[271]

Toll revenues on public roads and bridges may also constitute the local match, provided that the toll revenues are used for capital investment and there is no carryover of toll revenue to subsequent years.[272] But this avenue is not applicable to most transit systems.

For transportation enhancement projects, the recipient may apply funds of federal agencies other than FTA to the nonfederal match.[273] Some transit recipients have used imaginative means of securing local matching funds. For example, the Pee Dee Regional Transportation Authority (PDRTA) attempted to dedicate $600,000 it received from the South Carolina Department of Social Services (DSS) (a U.S. Department of Health and Human Services recipient) as part of a $989,000 local match to secure nearly $4 million in federal money for 9 transit centers, 25 buses, and 100 vans. DSS agreed to pay the $600,000 during the 1998-99 fiscal year, though it would receive discounts on the bills it pays PDRTA for transportation of DSS clients over the next 5 years.[274] However, questions were raised as to the legitimacy of DSS funds as a local match. The state DOT offered to allow Pee Dee to use DOT operating funds as a match, and the FTA released $2.2 million it had held up while the state determined whether there were sufficient funds to provide the local match.[275]

### 2. Local Funding Sources

• *Dedicated funding sources.* A dedicated funding source is a tax or fee dedicated in whole or in part to a particular project or purpose. Unlike annual appropriations from a state or local government, which can vary greatly from year to year, dedicated local taxes provide a relatively stable funding source. The most common disadvantage of local taxes serving as a dedicated funding source is that the revenues may be static and may not keep track with inflation (e.g., a one-cent per gallon share of the gasoline tax generates about the same amount of revenue regardless of the cost of gasoline, unless the price rises so high or drops so low that the amount of gasoline sold significantly increases or decreases). Local taxes may be used to replace declining federal funding, build major capital projects, or cover operating revenue shortfalls. However, only about half of local transit providers receive dedicated local tax revenue.[276] This is particularly important as a greater number of recipients seek New Starts funds for commuter rail and similar projects. FTA's evaluation criteria make it clear that a recipient applying for New Starts funds has virtually no chance of achieving a "Highly Recommended" or "Recommended" rating without a dedicated funding source; FTA views a recipient without a dedicated funding source as not having a stable revenue stream to maintain and operate a New Starts project over its anticipated useful life. The categories of dedicated local taxes listed below are examples.

• *Sales taxes.* Several transit providers, such as BART, MARTA, and Denver's Regional Transportation District (RTD) have dedicated sources of funding. The most common type of locally dedicated revenue to support transit is a portion of the sales tax dedicated exclusively for use by transit. Sales and use taxes (commonly known as sales taxes) are applied to the gross revenue earned on goods and services sold in a specified area.[277]

For example, Atlanta's MARTA collects a one-cent sales tax in the two counties (i.e., DeKalb and Fulton) in which it operates. MARTA leverages the tax by using bonds to fund operations and construction projects. The tax has been extended by the Georgia legislature to run through 2047.[278] But a slowing economy can adversely impact a transit provider relying on sales taxes, as

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[269] TEA-21 § 1302. Prior to TEA-21, local match was required of each federal payment to the state. Removal of this requirement allowed FTA to adjust federal match during the life of the project. Beginning in 1992, the local share could be deferred.

[270] Section 322 of the NHS Designation Act of 1995; 23 U.S.C. § 323 (2000).

[271] TEA-21 §§ 1301, 1303.

[272] ISTEA § 1044; TEA-21 § 1111(c).

[273] TEA-21 § 1108(b)(2)(C)(ii).

[274] David Milstead, *PDRTA May Not Have Funds to Repay DSS,* ROCK HILL HERALD, Mar. 3, 2000, at 1B.

[275] Sarah O'Donnel, *U.S. Unfreezes PDRTA Grant to Build Transit Hub,* ROCK HILL HERALD, Aug. 18, 2000, at 1B. Pee Dee had its FTA funds suspended when it purchased $170,000 of buses on an Internet auction site, and then tried to collect full value reimbursement from the federal government. James Scott, *PDRTA Begins Payment on Federal Debt,* ROCK HILL HERALD, Dec. 16, 2000, at 1B.

[276] TRANSP. RESEARCH BD., *supra* note 198, at 33.

[277] TRANSP. RESEARCH BD., *supra* note 198, at 11.

[278] *Marta's Ford Shares Vision of Excellence,* PROGRESSIVE RAILROADING, Jul. 2001, at 36.

Denver's RTD learned when it was forced to trim its 2001 budget by $8 million as the recession emerged. RTD collects a 0.6 percent sales tax in its metro Denver operating area.[279] Thus, sales taxes receipts are related to the local cost of living and require a strong local retail base in order to serve as a reliable and effective funding source.[280] Moreover, such taxes often require voter approval, which may be difficult to attain.[281]

• *Utility taxes.* Because of the inability to levy an effective sales tax, Pullman, Washington, successfully sought state and voter approval for a ballot measure to impose a 2 percent tax on utility (telephone, water, electric, sewer, and garbage) bills. Because the state of Washington historically matched dedicated funding sources on a 1:1 basis with revenue derived from the State Motor Vehicle Excise Tax, Pullman was able to double the revenue generated by the utility tax.[282]

• *Ad valorem taxes.* Certain transit authorities have been authorized to collect a mill levy on real property. Others collect an ad valorem tax on automobile sales.[283] Mortgage recording taxes also have been dedicated to transit.[284]

• *Special assessment districts.* In a special benefit assessment district, transportation is supported by a special property tax in the area in which, for example, a transit stop is built. A benefit assessment is a tax levied upon the envelope of real property that benefits from public development. Nearly all states allow for tax-increment financing. In Washington, for example, the local government creates a special assessment district—as little as a few square blocks—and dedicates 75 percent of additional property tax increases over a specified period of years to finance public projects.[285] For example, Los Angeles used benefit assessment to fund Metro Rail on land around the transit stations.[286] As the stations are opened, the value of surrounding property increases, and that appreciation is, in turn, partially recaptured via the assessment.

• *Transit impact fees.* Transit impact fees are charges imposed on developers to compensate for the impact of the developer's project in terms of creating transportation infrastructure demand. For example, San Francisco passed an ordinance requiring the collection of a one-time Transit Impact Development Fee from developers of office space to compensate for the burden such development places on the San Francisco Municipal Railway (MUNI) transit system in terms of capital expansion and operating costs.[287] Such exactions have survived court challenges where the improvement paid for by the fee directly benefits the development.[288]

• *Fuel taxes.* The federal tax on gasoline and diesel fuel is diminishing in terms of real dollars, to such an extent that the DOT recognizes a serious shortfall in funds for FHWA projects. The Miami Dade Transit Authority (MDTA) depends on appropriations from the Florida and local governments, supplemented with a minor amount from a dedicated tax on gasoline. In Michigan, some transit providers have received state gasoline tax infusions.[289]

• *Mixed taxing sources.* A number of transit providers are able to generate local financial support from several different taxing sources. For example, BART funds its capital and operating programs from a myriad of formula or dedicated and discretionary federal, state, and local sources. The federal funds are for capital projects only. California supports BART with general taxes, transit-dedicated taxes, and a variety of activity-dedicated bond sources for such things as construction, vehicle acquisition, and rehabilitation. Locally, BART collects a half-cent sales tax in the three-county district, property assessments, and other locally programmed funds.[290] In Tampa, the operating expenses for the street car system were provided by a combination of rider fares, income from an endowment fund, and a special taxing district approved by the Tampa City Council, as well as a 3-year start-up grant from the FTA.[291]

• *General fund appropriations.* Sometimes a local or state government will appropriate money for transit from its general funds. The metropolitan St. Louis Bi-State Development Agency [Bi-State] enjoys a sales tax

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[279] Jeffrey Leib, *RTD to Cut Budget $8 Million,* DENV. POST, Aug. 22, 2001, at 36.

[280] TRANSP. RESEARCH BD., *supra* note 198, at 33, 51.

[281] For example, Tacoma, Washington's, Pierce Transit was funded by a 0.3 percent county sales tax. So as to avoid having to reduce service by 40 percent, it sought an increase in the sales tax by public referendum. *How High a Sales Tax for Pierce Transit?,* NEWS TRIB., Oct. 7, 2001, at B10. The increased tax was necessary because Pierce Transit lost 40 percent of its operating funds once the motor vehicle excise tax ended. Unfortunately, the increased sales tax would leave Tacoma and other Pierce County jurisdictions with the highest tax rate—8.9 percent—in the state. *Pierce County Sales Tax,* SEATTLE-POST INTELLIGENCER, Dec. 6, 2001, at B1.

[282] TRANSP. RESEARCH BD., *supra* note 198, at 47–49.

[283] Mark Uhlig, *Cuomo, In a Shift, Agrees a Tax Cut Should Begin in '87,* N.Y. TIMES, Mar. 10, 1987, at A1.

[284] *Cuomo Plans $700 Million for Highways,* BOND BUYER, Feb. 13, 1987, at 1.

[285] Howard Buck, *Legislature: Increment Taxing Plan Approved,* THE COLUMBIAN, Apr. 22, 2001, at C1.

[286] Nancy Zamora, *Comment: New Financing Strategy for Rapid Transit: Model Legislation Authorizing the Use of Benefit Assessments to Fund the Los Angeles Metro Rail,* 35 UCLA L. REV. 519 (1988).

[287] TRANSP. RESEARCH BD., *supra* note 198, at 12, 57–65. A TIDF can be found in the San Francisco Administrative Code, available online at http://www.amlegal.com (visited April 21, 2003).

[288] TRANSP. RESEARCH BD., *supra* note 198, at 57. *See, e.g.,* Russ Bldg. Partnership v. City and County of S.F., 199 Cal. App. 3d 1496 (1987); Russ Bldg. Partnership v. City of S.F., 44 Cal. 3d 839 (1988).

[289] Dixon, *supra* note 266.

[290] Testimony of Nuria Fernandez Before the Subcomm. on Gov't Management, Comm. on Gov't Reform (Oct. 6, 2000).

[291] Jan Smith, *Hart Seeks Route that Will Cause Least Pain,* TAMPA TRIB., Dec. 15, 2001, at 17.

in the City of St. Louis, but relies on appropriations from St. Louis County (capped at $33.5 million annually) and Missouri ($3.9 million).[292] But in 2001, though St. Louis increased its contribution, Missouri failed to pass a transportation bill extending funding.[293] WMATA has no dedicated funds, and relies on FTA funds for capital assistance and state and local jurisdictions for both capital and operating funds.[294] The federal government funded two-thirds of the $9.4-billion, 103-mile WMATA Metro rail subway (from direct appropriations from the general fund), while the District of Columbia and the states of Maryland and Virginia picked up the remaining third.[295] Usually a transit agency relies on the state legislature to pass a statute, or the city or county to pass a local ordinance either creating a taxing mechanism to fund transit, or allowing the transit agency to levy a tax. Most recipients do not have power to levy taxes, and in most instances the recipient is powerless to increase the tax rate.

## O. INNOVATIVE FINANCING: AN OVERVIEW

At the outset, it should be emphasized that the Transit Cooperative Research Program and the FTA have published several highly useful documents addressing innovative financing issues, which the transit attorney is encouraged to consult.[296]

The traditional "pay-as-you-go" system of tax collection following project inauguration has the advantages of simplicity and no interest costs. Nonetheless, it produces hidden costs in terms of inflation and foregone economic development, as well as costs associated with transportation congestion, delay, and environmental pollution.[297] In 1994, the FTA announced a policy of encouraging private-sector investment in transit infrastructure so as to bring market-oriented and results-driven management approaches to bear in satisfying the nation's transit infrastructure needs. Such a policy was designed to take maximum advantage of existing private capital markets and strategies for leveraging transit dollars.[298] The FTA supports the use of innovative financing techniques that enhance the effectiveness of transit investment either by generating additional financial resources or reducing project costs.[299] This includes leveraging federal funds received under the Urbanized Area Formula Program[300] and flex funding programs (CMAQ and STP). Usually, New Starts Program,[301] Nonurbanized Area Formula Program,[302] and Elderly and Persons with Disabilities Program[303] funds can also be leveraged in innovative financing forms. The FTA can issue Pre-award Authority to all formula and flexible funds, allowing transit recipients to undertake lease and debt transactions in anticipation of federal reimbursements for eligible project costs.[304]

Proposals for innovative financing should describe:

- *Project Specifics*—What is being purchased, constructed, and financed.
- *Project Funding*—Federal aid, by type, and other funding sources, including funding resulting from capturing external benefits from project financing;
- *Construction Financing*—The mechanisms being used to finance construction;
- *Intermodal Impacts/Benefits*—The degree to which transit innovations benefit or are enhanced by other modes of transportation;

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[292] *Going the Distance,* PROGRESSIVE RAILROADING, Jul. 2001, at 32.

[293] *The Road to Irrelevance,* ST. LOUIS POST-DISPATCH, Jun. 17, 2001, at B2.

[294] Testimony of Nuria Fernandez Before the Subcomm. on Gov't Management, Comm. on Gov't Reform (Oct. 6, 2000).

[295] Testimony of Gladys Mack Before the Subcomm. on Gov't Management, Comm. on Gov't Reform (Oct. 6, 2000).

> WMATA's funding comes from a variety of federal, state, and local sources. Unlike most other major urban transit systems, WMATA does not have dedicated sources of **tax** revenues, such as local sales tax revenues, that are automatically directed to the transit authority. WMATA receives grants from the federal government and annual contributions by each of the local jurisdictions that WMATA serves, including the District of Columbia and the respective local jurisdictions in Maryland and Virginia. For example, in its fiscal year 2002 proposed operating budget totaling $796.6 million (for rail, bus, and paratransit' services), WMATA projects that approximately 55 percent of its revenues will come from passenger fares and other internally generated revenues, and 45 percent will come from the local jurisdictions served by WMATA. In its capital program for infrastructure renewal, WMATA projects that about 47 percent of its proposed 2002 budget will come from federal government grants, 38 percent from federally guaranteed financing, and 15 percent from the local jurisdictions and other sources. WMATA has also, received funding directly through the congressional appropriations process over the past 30 years totaling about $6.9 billion—for construction of the originally planned subway system. WMATA did not have to compete against other transit agencies for this funding, which ended in fiscal year 1999.

Testimony of Jayetta Hecker Before District of Columbia Subcomm. of the U.S. House Comm. on Gov't Reform (Sept. 21, 2001).

[296] *See, e.g.,* COLLINS, *supra* note 1, at 6; BOYLE, *supra* note 5; MARX, *supra* note 5; INST. FOR URBAN TRANSP., INDIANA UNIV., *supra* note 5; TRANSP. RESEARCH BD., *supra* note 198, at 15, 81–84. There is also a highly useful Web site: http://www.fhwa.dot.gov/innovativefinance/ (visited April 21, 2003).

[297] Fed. Highway Admin., *supra* note 266.

[298] 59 Fed. Reg. 46878 (Sept. 12, 1994).

[299] Innovative financing is a broad term encompassing various techniques to augment traditional funding sources and methods. It includes such measures as new or nontraditional sources of revenue, new financing mechanisms designed to leverage existing resources, new funds management techniques, and new institutional arrangements. Fed. Highway Admin., *supra* note 297.

[300] 49 U.S.C. § 5397 (2003).

[301] 49 U.S.C. § 5309 (2003).

[302] 49 U.S.C. § 5311 (2003).

[303] 49 U.S.C. § 5310 (2003).

[304] 63 Fed. Reg. 34505 (June 24, 1998). Pre-award authority allows the project to proceed without securing a Letter of No Prejudice from FTA. However, it does not relieve the recipient of reporting or documentation requirements.

• *Clearances*—The status of federal and state sign-offs;

• *Innovation*—The financing innovation and how its use could apply to other regional or national projects;

• *Incentive*—The incentive required, such as fast-tracking, reprogramming, additional funding, or administrative or regulatory flexibility or relief;

• *Leverage*—How the proposal will leverage federal, state, local, and private transit investment; and

• *Timetable*—The timetable for advancing the project, including milestones.[305]

Projects are judged on the basis of their current project status (in planning, preliminary or final engineering, environmental clearance, or commencement of construction), the likelihood of near-term completion of the project, and the level of federal funding required.[306] However, the process of approval is largely unwritten, and can be political as well as legal. Typically, a proposal goes through multiple iterations in email exchanges, telephone conferences, and correspondence between the recipient and the FTA Chief Counsel's Office in Washington, which may bring changes to the loan agreement. The final legal opinion tends to mask the disagreements that led to the consensual result.

The FTA has identified the following as examples of innovative funding techniques it deems acceptable, several of which are discussed in greater detail below:

• *Leasing*—Urbanized Area Formula Program funds may be used to make lease payments, so long as leasing is more cost effective than purchasing.[307] On a case-by-case basis, FTA allows New Starts Program, Nonurbanized Area Formula Program, and Elderly and Persons with Disabilities funding to be used for lease payments.[308] Structured leasing, through Certificates of Participation or Grant Anticipation Notes, is encouraged, as are other mechanisms that generate net present benefits or cost reductions.[309]

• *Certificates of Participation*—These are bonds used to finance the purchase of transit assets that are paid from the lease of such assets to the transit provider.[310]

• *Joint Development*—New Starts Program, Urbanized Area Formula Program, STP, and CMAQ funding and assets previously acquired with FTA funding may be used to support joint development projects physically or functionally related to a transit project that enhance its effectiveness.[311]

• *Use of Proceeds from Sale of Assets in Joint Development Projects*—Surplus real estate may be sold and the proceeds applied to the purchase of other real estate for transit-supportive development. Proceeds from the sale of real property no longer needed for transit purposes have been authorized to be spent on other real property for a transit-supportive development. If the property is leased, the rental income may be used for any transit purpose. Air rights above land purchased with federal funds may be sold, and the proceeds retained as program income for use in transit projects. Land above or below property owned by the transit provider (such as a transit stop) may be sold or leased to a private business for commercial use. The proceeds may be retained for future use in mass transit.[312]

• *Cross Border Leases*—Transit providers can take advantage of foreign tax treatment by leasing equipment from foreign investors.[313]

• *Capital Cost of Contracting*—A portion of the costs of contracting with a private operator may be designated a capital cost for New Starts funding.[314]

• *Innovative Procurement Approaches*—Multi-year rolling stock procurements, creating consortia to take advantage of bulk or quantity purchases, or using design-build ("turnkey") are all encouraged.[315] "Super turnkey" projects—where a design/build contractor borrows funds for the project—may be paid off over time using federal funds.[316] In such a situation, a project management consortium undertakes to Build/Operate/Transfer (BOT) a facility to the purchasor. The consortium may also arrange financing.[317] However, the legal impediment to design/build in some state laws makes qualifications-based procurement, which is essential to successful design/build, illegal.

• *State Transit Finance Support*—If permitted under state law, FTA funds may be used to support transit-related state financial enterprises, such as transportation banks providing a range of financial options not otherwise available to transit providers, including cross border leases, certificates of participation, and joint procurement. New Starts funding may be used to cover the initial capitalization, but not the ongoing operating costs of the program.[318]

• *Revolving Loan Funds*—Federal funds may be used to support state or local revolving loan funds that could be used to provide loans to transit providers, or to acquire equipment or facilities leased back to it. Payments to retire the loans or service the interest would be used to fund other transit projects. FTA funds may

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[305] 59 Fed. Reg. 46878 (Sept. 12, 1994).

[306] *Id*.

[307] 49 C.F.R. pt. 639 (1999) defines the circumstances under which leasing may be eligible.

[308] 49 C.F.R. § 639.11 (1999).

[309] 59 Fed. Reg. 46878 (Sept. 12, 1994). See discussion below.

[310] See discussion in this Section, below.

[311] See discussion below, and in 62 Fed. Reg. 12266 (Mar. 14, 1997).

[312] *See* The Model Airspace Act. *See Testimony of Danny Alvarez Before the U.S. House Gov't Reform Comm.* (Oct. 6, 2000).

[313] See discussion below.

[314] *See Testimony of Dallas Area Rapid Transit Authority Executive Director Richard Snoble Before the U.S. Senate Comm. on Banking, Housing and Urban Affairs* (Apr. 25, 2000).

[315] 49 U.S.C. § 5326(a) (2003).

[316] *Testimony of FTA Acting Administrator Nuria Fernandez Before the U.S. House Appropriations Comm., Subcomm. on Transportation* (Mar. 8, 2000).

[317] ISTEA § 3019; 49 U.S.C. § 5326 (2003).

[318] See discussion in § 4.08, above.

be used to cover initial capitalization, but not operating costs.

• *Deferred Local Match*—With prior approval, FTA grantees may defer payment of the local share, drawing down 100 percent of the first 80 percent federal share of the project cost.

• *Transfer of Federal Interest*—FTA permits the concentration of the federal interest in a portion of assets acquired, leaving the remainder unencumbered by the federal interest. For example, if 100 buses were acquired with an 80 percent federal/20 percent local share, only 80 buses would be considered having a federal interest. The remaining 20 could be used to leverage additional funds, or to cover debt subordination, or be mortgaged, for example.[319]

• *Like-Kind Exchange*—FTA allows the transfer of the remaining federal interest in an asset to a new asset to facilitate early replacement. Tangible transit property (e.g., vehicles) may be sold before the end of their useful life, and the proceeds may be applied to the purchase of like property. For example, buses that have reached half their projected useful life may be sold and the proceeds dedicated to the cost of replacement vehicles.[320] However, prior FTA concurrence is required.

• *Incidental Nontransit Use*—Federally-funded transit facilities may be used for incidental nontransit purposes. For example, proportionate to the transit use of the facility, FTA funds may be dedicated to a Compressed Natural Gas facility used by transit and other nontransit public vehicles so long as the nontransit use does not detract from or interfere with the transit use of the facility.

• *Transfer of Federally-Assisted Assets*—If prior approval is conferred by the FTA, federally-funded assets may be transferred for another public use when they are no longer needed for transit purposes.[321] For example, a bus garage no longer needed for transit maintenance could be transferred to a local governmental entity in exchange for other local support for transit.

• *Coordinated Urban and Rural Services*—Assets acquired under the Urbanized Formula Program or New Starts Program may be used in a rural area together with assets funded under the Nonurbanized Area Formula Program as part of a coordinated urban/rural system.

• *Corridor Preservation/Advance Right-of-Way Acquisition*–Subject to two conditions,[322] FTA funds may be used to acquire and preserve existing transportation corridors and rights-of-way.[323] If the property value should increase, the property would be acceptable as local match for the federal grant.[324]

FTA emphasizes that these are only representative samples of the types of innovative financing that may be pursued. Recognizing that the demand for transit assistance outpaces the available federal economic resources, FTA welcomes all proposals that may leverage infrastructure investment, or will help reduce infrastructure costs over time, provided that the proposal meets FTA's basic criteria.

What follows elaborates on several of these approaches, and adds several more funding approaches to the list. It too, is far from an exhaustive review of innovative financing techniques.[325] New and different approaches are being designed by creative transit providers, lenders, contractors and manufacturers nearly every day. Such innovation is accelerating transit infrastructure development at a place unrealizable in its absence. Innovative financing may be daunting to those who have never ventured into it, and staff often meets resistance of "we can't afford New York bond counsel and won't make any money after we get through paying the lawyers, the accountants and our lost staff time." But it can be done, FTA really is there to help, and you do not need to be one of the nation's mega-transit systems in order to make good use of these funds.

## P. DEBT

### 1. Introduction

Debt can come in various flavors. Usually, a transit operator must secure authority to issue *general obligation debt* from the municipality or the state. Such bonds are backed by the "full faith and credit" of the issuing governmental institution, meaning that it guarantees to pay the debt to prevent default. *Revenue bonds* pledge repayment from a limited source of revenue, such as taxes or operating revenue.[326] Transportation bonds are

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[319] *See, e.g.,* 60 Fed. Reg. 24682 (May 9, 1995).

[320] 57 Fed. Reg. 39328 (Aug. 28, 1992).

[321] 49 U.S.C. § 5334(g) (2000).

[322] The conditions are that a Major Investment Study must be completed before the project may be programmed for construction funding, and no land acquisition may be made that may prejudice mode and alignment decisions prior to completion of NEPA requirements.

[323] John Keahy, *$150 Million Deal First Stop in Wasatch Transit Plan,* SALT LAKE TRIB., Oct. 18, 2001, at A1; Laurie Blake, *From Rail to Trail?,* MINNEAPOLIS STAR TRIB., Oct. 1, 2001, at 1B.

[324] 60 Fed. Reg. 24682-84 (May 9, 1995); 59 Fed. Reg. 46878 (Sept. 12, 1994).

[325] The reader is encouraged to visit two excellent Web sites for comprehensive information on innovative financing: Fed. Highway Admin., *supra* note 297; Fed. Highway Admin., *Tifia Transportation Infrastructure Finance* (last visited Aug. 13, 2003), http://tifia.fhwa.dot.gov.

[326] The principal legal instrument setting forth the revenue bond structure is the "indenture" or "master resolution," which identifies the revenue stream to pay principal and interest on the debt. A "rate covenant" requires system administrators to assess rates adequate to generate revenue at a designated threshold. The "additional bonds test" evaluates the ability of the issuer's revenue stream to pay existing and proposed debt service. The "debt service reserve fund" creates an adequate fiscal cushion to prevent default when revenue is inadequate to cover debt service. Linda Lipnick et al., *The Determinants of Municipal Credit Quality,* GOV'T FIN. REV., Dec. 1, 1999, at 35.

usually municipal bonds issued by state and local governments to finance projects and expenses. The interest earned is exempt from federal tax and, if issued in the investor's state of residence, exempt from state and local taxes as well. The savings realized by the tax exemption enables governmental institutions to borrow at rates lower than the market rate for private debt instruments. Bonds are written promises to repay borrowed capital on a fixed schedule.[327]

The debt instrument, such as a bond, is ordinarily rated by a bond-rating agency, which effectively determines the cost of capital, or in other words, the interest rate the issuing agency must pay. As noted, tax exempt bonds typically carry lower interest rates than taxable securities. In determining the credit rating for the debt instrument, the bond rating agency usually evaluates four areas:

- *Economic Factors*—Because the economic base generates the revenue to repay the debt, the economic cycle is an important part—but the least controllable—of the four factors;
- *Debt*—With every new debt issuance, the issuer's overall debt is reevaluated in order to determine its impact on credit quality. With the issuance of general obligation tax-supported or general-fund supported debt, all the debt for which the issuer's tax base or citizens are the source of repayment must be evaluated to determine the overall debt burden to taxpayers;
- *Financial Factors*—Beyond operating results and financial statements, an evaluation is made of numerous financial factors, including budgetary planning and projections; budgetary surpluses; the issuer's policies on spending growth, use of surpluses, and shortfall contingency plans; as well as general fund balance as a percentage of revenues; and
- *Management Strategies/Administrative Factors*—This requires an evaluation of such factors as the issuer's organization, its division of responsibilities, professional qualifications, and adequacy of power to perform its functions.[328]

Bonding authority is ordinarily granted by the state government. For example, in 1984, the Florida legislature created the Florida High Speed Rail Transportation Commission and gave it authority to issue tax-free revenue bonds to design, build, and operate a high-speed rail system linking Tampa, Orlando, and Miami.[329] New York's MTA has used its bonding authority to raise several billions of dollars.[330]

In requests for reimbursements of interest or other financing costs of capital projects, an applicant for federal funds must certify that it will not seek reimbursement for interest and other financing costs unless it demonstrates that it has used reasonable diligence in seeking the most favorable financing terms available.[331] In order to demonstrate this to the FTA, the grantee must have performed a financial analysis.

### 2. Certificates of Participation

The difficulty in securing voter approval for the issuance of general obligation debt coupled with the need to finance politically unpopular projects has led to the increased use of lease debt to finance various infrastructure projects. Because lease debt usually does not require voter approval or count toward debt limits, lease debt can be used as a vehicle to generate capital funds despite limits on the issuance of general obligation bonds.[332] Hence, projects can be financed without technically incurring long-term debt.[333]

Certificates of Participation (COPs) are securities (e.g., tax-exempt bonds) that represent interests in a stream of revenue from an underlying obligation (e.g., lease or installment sale agreement).[334] Typically, the COP process begins when the transit provider has ordered vehicles or contracted for construction of a facility that the Finance Corporation agrees to complete and finance. FTA grants allocated to such equipment or facilities are no longer needed for them, allowing the transit provider to reprogram the funds for other projects.[335] COPs are usually issued by a state-level entity used in financing transit equipment or other facilities (e.g., rolling stock, buses, or stations well suited to lease agreements), sometimes for several transit providers. They may be repaid with revenue derived from rental, lease, or installment sale payments (often from an equipment or facilities lease) from the local transit provider, sales taxes, grants, or any other available source of revenue. Typically, over the 7 to 12 year life of the bonds, title to the assets is held by a trustee as a security interest for the bond holders.[336] Section 308 of the STURAA authorized the use of Section 9 federal transit funds[337] at the 80 percent level when leasing is deemed more cost-effective than purchase or construction.[338] Both the lease payment and imputed interest are eligi-

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[327] Nat'l Coop. Highway Research Program, *Innovative Finance for Surface Transportation* (last visited Aug. 13, 2003), http://www.innovativefinance.org.

[328] Lipnick et al., *supra* note 326, at 35.

[329] Gil Klein, *High Speed Rail System for Florida Gets Boos from Lawmakers,* CHRISTIAN SCI. MONITOR, Jun. 4, 1984, at 12; Alberdo Valdez, *Financing High Speed Rail: Meeting the Challenges of the 1990s,* 18 TRANSP. L. J. 173 (1990). This project was subsequently terminated by Florida Governor Jeb Bush.

[330] BUS. WIRE, Apr. 15, 2002.

[331] 49 U.S.C. §§ 5307(g), 5309(g)(2)(B), 5309(g)(3)(A), and 5309(n) (2003).

[332] Linda Lipnick et al., *supra* note 326, at 35.

[333] COLLINS, *supra* note 1, at 6. The rationale for the proposition that leases do not constitute debt is because the lessee is not obligated to make rental payments throughout the entire term of the lease, but need only pay rent each year to the extent such property is available for use. *Id*.

[334] COLLINS, *supra* note 1, at 6.

[335] Fed. Highway Admin., *supra* note 297.

[336] 60 Fed. Reg. 24682 (May 9, 1995).

[337] 49 U.S.C. § 5207 (2000).

[338] 49 C.F.R. pt. 639; 60 Fed. Reg. (May 9, 1995).

ble for reimbursement at the rate of 80 percent for federal grants and 20 percent for local funds.[339]

As an example, using leases secured by the newly purchased buses, the California Transit Finance Corporation has used COPs to enable the Sunline Transit Commission to replace its entire fleet of diesel buses with buses that run on compressed natural gas. Similarly, transit agencies in Denver, Los Angeles, and New York have used COPs, Equipment Trust Certificates,[340] and Beneficial Interest Certificates[341] to finance bus purchases.[342] The Tri-County Metropolitan District of Oregon has engaged in a number of innovative financing methods. For example, it has issued COPs for lease financing projects and has sold bonds backed by lottery proceeds and payroll taxes.[343]

### 3. Tax-Increment Financing

Under tax-increment financing, bonds are issued based on projected additional tax revenue on property anticipated to increase in value because of transportation improvements. It allows a city or county to issue bonds on improvement projects it cannot afford in order to attract business. A special tax district is created for a specified geographic region—in some instances only a few city blocks—with the tax increases dedicated to paying down the bonds over a prescribed period of time.[344] For example, Arlington Heights, Ill., built a rail rapid transit station with a combination of funds from state and federal agencies, the local transit provider, and tax-increment financing.[345]

### 4. Fare Box Revenue Bonds

The issuance of debt by a transit provider secured by a pledge of operating revenue has also been a source of innovative financing. For example, in 2001 Las Vegas broke ground on a $650 million Strip monorail funded by contributions by casinos near transit stops and revenue bonds to be paid by fare box revenue over time.[346]

### 5. Revolving Loan Funds

Seeking to build on its participation in an FHWA lease-to-buy vanpool program in 1994, and in response to the FTA's request for proposed innovative financing programs, the Arkansas State Highway and Transportation Department (AHTD) submitted a proposal to FTA to establish a new revolving loan fund (RLF) program for transit vehicle purchases. The FTA approved the program, and FHWA allowed AHTD's previously allocated vanpool funds to be used for the RLF. AHTD purchases a large number of vehicles at a volume discount (saving between $2,000 and $5,000 per vehicle), and leases them to the local transit providers. The leases are interest free, require no down payment, last for the life of the vehicle, and have a monthly payment equal to the cost of the vehicle divided by its life. At the end of the lease period, title to the vehicle is transferred to the transit provider. U.S. Department of Health and Human Services funds can be used to lease the vehicles.[347]

### 6. Grant Anticipation Debt

Grant Anticipation Notes (GANs) involve pledging forthcoming federal formula grants as security to pay off tax-exempt bonds. This allows acceleration of project construction, paying the cost over a period of years, thereby saving inflation costs and acquiring debt at attractive rates. However, federal anti-deficiency requirements prohibit the grantee from providing an enforceable pledge against future federal receipts in advance of their congressional appropriation.[348] They may, however, promise to satisfy debt obligations first out of federal receipts. Creditors may also insist on a reserve fund, or a pledge of local or state revenue.

Tri-County Metropolitan District of Oregon completed the first anticipation financing in the nation.[349] New Jersey Transit (NJT) found that it was impossible to purchase a fraction of the equipment it needed on a "pay-as-you-go" basis, and instead became the first transit system of its kind to leverage federal grants.[350] With only limited debt power (it can only issue debt if backed by an FFGA)[351] and no taxing authority, its 2001 $1.1 billion capital program budget consisted of a $440 million contribution from the federal government, $570

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[339] "The cost of carrying out part of a project includes the amount of interest earned and payable on bonds issued by the State or local governmental authority to the extent proceeds of the bonds are expended in carrying out the part." 49 U.S.C. §§ 5307(g)(3), 5309(n)(2) (2003).

[340] An Equipment Trust Certificate is a lease/finance arrangement typically used for aircraft, rail equipment, and surface transportation equipment. *See* Paul Sweeney, *The Bigger, the Better,* INVESTMENT DEALERS DIGEST, Feb. 26, 2001.

[341] MTA used Beneficial Interest Certificates to lease/purchase 384 buses to be paid off with toll revenues. Aaron Pressman, *New York City's Triborough Authority Tries out Lease Deal with Ironclad Payment Guarantee,* BOND BUYER, Apr 5, 1993, at 1.

[342] Fed. Highway Admin., *supra* note 297.

[343] Deborah Firestone, *Northwest Transit Agencies Get Creative Capital Projects,* BOND BUYER, Nov. 21, 2000, at 4.

[344] Buck, *supra* note 285, at C1.

[345] James Andrews, *Downtown Arlington Heights,* PLAN., Mar. 1, 2001, at 10.

[346] Jan Moller, *City Oks $250,000 for Monorail-Downtown Studies,* LAS VEGAS REV. J., Aug. 16, 2001, at 8B.

[347] TRANSP. RESEARCH BD., *supra* note 198, at 15, 81–84.

[348] 31 U.S.C. §§ 1341, 1342, 1517 (2003).

[349] Deborah Firestone, *supra* note 343, at 4.

[350] Humberto Sanchez, *Fitch Expects More Debt Backed by FTA's New Starts Program*, BOND BUYER, Apr. 20, 2001, at 6.

[351] "Full-funding grant agreement-backed instruments 'provide transit authorities with the opportunity to advance construction and more quickly realize the benefits from new-starts transit projects than the traditional grant reimbursement approach.'" *Id*. at 6.

million from the state, and $120 million from local authorities. In order to accelerate its three new light rail systems, NJT issued two grant anticipation notes. Considering the cost of rights-of-way acquisition, had it waited 10 years to undertake the projects, the projected cost would have increased tenfold.[352] The Denver area's RTD used grant funds to back its debt instruments; the commercial paper portion of the Denver's southeast light-rail corridor is bridge financing for federal grant funds.

### 7. Tax-Anticipation Debt

Some transit providers have been able to leverage the revenue earned from authorized local taxes to accelerate projects. For example, Denver's RTD secured voter approval in a referendum allowing it to issue $324 million in bonds backed by its sales tax revenue stream in order to build a light rail corridor running along Interstate 25. RTD cooperated in the initiative with the Colorado Department of Transportation, which issued $680 million in GARVEE bonds (grant anticipation notes)[353] backed by future federal highway allocations and $115 million secured on future state sales and use tax revenue to widen Interstate 25.

### 8. TIFIA

TEA-21[354] created two new federal credit programs for surface transportation projects—the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA) and the Railroad Rehabilitation and Improvement Financing Program (RRIF).[355] TIFIA is designed to assist financial markets in developing the capability to supplement the federal government in financing the costs of large projects of national significance.[356] TIFIA does not create new federal funding. And it is a taxable program, unlike the tax-exempt debt offering authority enjoyed by many governmental institutions.[357] TIFIA simply gives transit providers additional flexibility by allowing them to borrow against federal funds under a line of credit guaranteed by the federal government.[358] TIFIA gives transit providers enhanced access to capital markets, flexible repayment terms, and often, more favorable interest rates than those available in private capital markets. These benefits may advance projects that might be jeopardized or delayed because of their size and complexity and the market's uncertainty over timing of funding.[359] DOT established a multi-agency Credit Program Steering Committee and Working Group to coordinate and monitor all policy decisions and implementation actions associated with this federal credit assistance program.[360]

Three types of credit instruments are permitted for public and private sponsors of eligible surface transportation projects under TIFIA: secured (direct) loans,[361] loan guarantees,[362] and lines of credit.[363] To be eligible for assistance under TIFIA, the project must have eligible costs of at least $100 million, or 50 percent of Federal-aid highway funds apportioned to the state. Projects principally involving the installation of an ITS must cost at least $30 million. However, the amount of federal credit assistance may not exceed 33 percent of the cost of the project.[364] To be eligible for assistance, projects must be classified within the following categories:

- *Surface transportation projects* as defined under Title 23 or chapter 53 of Title 49 of the United States Code;
- *International bridge or tunnel projects* for which an international entity is responsible;
- *Intercity passenger bus or rail facilities and vehicles*, including those owned by Amtrak; or
- *Publicly-owned intermodal surface freight transfer facilities,* provided they are located on or adjacent to the NHS, and are not seaports or airports.[365]

The application must be accompanied by a preliminary rating opinion letter from a nationally recognized credit rating agency that indicates the project's overall creditworthiness and the potential of the project's sen-

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[352] Yvette & Wisniewski, *supra* note 16, at 36.

[353] A GARVEE is a Grant Anticipation Revenue Vehicle. A GAN is a grant anticipation note.

[354] Public Law 105-178, 112 Stat. 107, 241.

[355] TIFIA, as amended by Section 9007, Public Law 105-206, 112 Stat. 685, 849, and codified at 23 U.S.C. §§ 181-189 (2000). RRIF authorizes loans and loan guarantees for the acquisition, improvement, development, or rehabilitation of intermodal or rail equipment or facilities. The loans may not exceed a period of 25 years, must be justified by present and future demand, must provide reasonable assurance that the facilities or equipment will be economically and efficiently utilized, and must be reasonably expected to be repaid. Fed. Highway Admin., *supra* note 297.

[356] 64 Fed. Reg. 5996 (Feb. 8, 1999).

[357] Ola Kinnader, *Transportation: TIFIA Aid to 5 Projects Demonstrates Program's Flexibility,* BOND BUYER, Nov. 19, 1999, at 5.

[358] Testimony of Gladys Mack Before the Subcomm. on Gov't Management, Comm. on Gov't Reform (Oct. 6, 2000).

[359] Fed. Highway Admin., *supra* note 297.

[360] 64 Fed. Reg. 29741 (June 2, 1999); 64 Fed. Reg. 5996 (Feb. 8, 1999).

[361] Direct loans offer flexible repayment terms and permit combined construction and permanent financing of the project's capital costs.

[362] Loan guarantees enjoy federal full-faith-and-credit guarantees to institutional investors that make loans for transportation projects.

[363] During the first 10 years of project operations, these standby loans of credit (representing secondary sources of funding in the form of contingent federal loans), may be drawn down to supplement project revenues. 23 U.S.C. §§ 183, 184 (2003).

[364] Fed. Highway Admin., *supra* note 297.

[365] *See* Notice of Availability of Funds Inviting Applications for Credit Assistance for Major Surface Transportation Projects, 65 Fed. Reg. 44941 (July 19, 2000).

ior debt obligations (i.e., those obligations having a lien senior to the TIFIA credit instrument) to achieve an investment grade rating.[366] Annual credit evaluations must also be submitted.[367] Unlike other innovative financing alternatives, TIFIA requires a competitive federal application process. Project selection is based on eight criteria:

- Whether the project is nationally or regionally significant (20 percent);
- How creditworthy is the project, and how secure is the financing (12.5 percent);
- Whether it would foster innovative public/private partnerships and attract private debt or equity (20 percent);
- Whether TIFIA assistance would enable the project to proceed more expeditiously (12.5 percent);
- Whether the project would use new technologies (5 percent);
- The amount of money required to fund the TIFIA instrument (5 percent);
- The extent the project helps to maintain or protect the environment (20 percent); and
- The extent to which TIFIA assistance would reduce federal grant assistance (5 percent).[368]

In 2000, WMATA became the first transit agency to receive a loan guarantee under TIFIA.[369] It devoted the $600 million guarantee to expedite upgrading of its original Metrorail segments (some of which were more than 20 years old), and rehabilitate the railcar fleet.[370] Previously, WMATA had to turn to commercial banks for its loans. Using TIFIA, WMATA saved 45 basis points over 10 years, or approximately $20 million.[371] Other examples of TIFIA guarantees include:

- The Tren Urbano rapid rail project in Puerto Rico;
- The Miami Intermodal Center near Miami International Airport; and
- The Farley/Penn Station in New York.[372]

The benefits are varied. The Tren Urbano project eased intense short-term capital needs. In the case of the $1.4 billion Miami Intermodal Center, TIFIA's $432 million guaranteed funding advanced the project by several years. Miami's $269 million TIFIA loan was secured by state fuel taxes, while its $164 million loan was secured by rental car fees.[373] TIFIA's loan and line of credit ensured that the Farley/Penn Station got off the ground.[374] In New York, Staten Island Ferries and Terminals used a $153 million TIFIA loan secured by revenue from the Tobacco Settlement Agreement of 1998 to acquire ferryboats and rebuild intermodal ferry terminals.[375]

States may use FTA funds to establish and operate Revolving Loan Funds to support public and private nonprofit transit providers. States may pool vehicle purchases and lease or sell them to transit providers, or make loans to them for facilities and vehicle acquisitions.[376]

## Q. STATE INFRASTRUCTURE BANKS

The National Highway System Designation Act of 1995[377] authorized DOT to enter into cooperative agreements with up to 10 states for the establishment of State Infrastructure Banks (SIBs) or multistate infrastructure banks for making loans to entities implementing eligible projects.[378] As of March 2001, 32 states had entered into 204 loan agreements totaling more than $2.4 billion.[379] Examples of use of SIBs to fund transit include Bi-State transit agency's $5.3 million loan from Missouri's State Infrastructure Bank.[380]

SIBs may use federal and state funds to provide loans; credit enhancements (e.g., loans, loan guarantees, letters of credit, grant anticipation notes, COPs); interest rate subsidies; leases; debt financing securities; and other debt financing mechanisms (when approved by the DOT). SIB support may enable the sponsor to attract private, local, or state financial resources, leveraging the SIB investment into a larger dollar investment. SIB investment may also be used as collateral to borrow in the bond market or create a guaranteed reserve fund.[381] States may capitalize SIBs by using up to 10 percent of their federal-aid highway or transit funding. States are required to match all federal funds, though they are free to fund SIBs at levels beyond the required local match. Once the money is allocated to a specific mode, it may not subsequently be reallocated to a different mode. All disbursements, plus interest, must

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[366] 65 Fed. Reg. 44936 (July 19, 2000).

[367] 49 C.F.R. § 80.11 (2003). Annual project performance reports and audited financial statements are also required. 49 C.F.R. § 80.19 (2003).

[368] 49 C.F.R. § 80.15 (1999).

[369] Testimony of Nuria Fernandez Before the Subcomm. on Gov't Management, Comm. on Gov't Reform (Oct. 6, 2000).

[370] *WMATA Awarded First TIFIA Loan Guarantee*, RAILWAY AGE, Apr. 1, 2000, at 6.

[371] Kinnader, *supra* note 357, at 5.

[372] *Testimony of FHWA Administrator Kenneth Wykle Before the U.S. House Comm. on Transportation & Infrastructure* (Mar. 8, 2000).

[373] Other funding included a state SIB loan, TEA-21 federal highway funds, and CMAQ funds.
Http://www.innovativefinance.org (visited April 21, 2003).

[374] Kinnader, *supra* note 357, at 5.

[375] Fed. Highway Admin., *supra* note 297.

[376] FED. TRANSIT ADMIN., *supra* note 5.

[377] 23 U.S.C. § 101 note (2003); Section 1511 of TEA-21, 23 U.S.C. § 181 note (2000).

[378] TEA-21 extended federal funding for SIBs to four states—California, Florida, Missouri, and Rhode Island.

[379] Fed. Highway Admin., *supra* note 297. *See, e.g.,* CAL. GOV'T CODE § 63010 (2003).

[380] Ken Leiser, *Transit Agency Faces Prospect of Cutting Bus, Light-Rail Service,* ST. LOUIS POST-DISPATCH, Mar. 29, 2001, at B1.

[381] Fed. Highway Admin., *supra* note 297.

be repaid, whereby SIB's capital is replenished and used for a new cycle of transportation projects.[382]

## R. LEASING

Section 308 of the STURAA[383] amended Section 9(j) of the Federal Transit Act to allow Section 9[384] recipients to use capital funds to finance the leasing of facilities and equipment on the condition that the leasing arrangements are more cost effective than purchase or construction. A recipient of FTA funds may not use federal assistance to finance the cost of leasing any capital asset until it performs calculations demonstrating that leasing would be more cost effective than purchasing or constructing a similar asset.[385] Though FTA must approve the use of discretionary funds for lease payments, pre-approval is not required for the use of formula funds. However, leases that include provision of maintenance and fuel would fall under the operating assistance cap, for such payments would be regarded as operating expenses.[386]

### 1. Capital Leases

TEA-21 amended the definition of "capital project" to allow transit recipients to use capital funds to finance the leasing of facilities and equipment whenever leasing is more cost effective than purchasing or construction.[387] Any leasing arrangement that provides for the recipient's use of a capital asset is eligible, irrespective of the classification given the leasing arrangement for tax purposes.[388] All costs directly attributable to the lease are eligible for capital assistance under former Section 9[389] of the Federal Transit Act.[390] In comparing the respective costs of leasing vis-à-vis purchasing, realistic estimates must be made of both the direct and indirect costs of either alternative.[391] If it does not establish a single grant fund from which lease payments are drawn down over the course of the lease, the recipient must certify it will have adequate funds to cover the lease payments should it not receive federal capital assistance funds.[392] If the lease is terminated early, federal funds covering the terminated period must be reimbursed to FTA.[393] If the recipient is unsure whether it qualifies under the leasing regulations, the recipient may request FTA to determine the eligibility of its proposal.[394]

### 2. Cross-Border Leasing

In 1986, Congress eliminated the safe harbor leasing provision in the Internal Revenue Code (whereby a transit agency arranged for a private sector third party to purchase vehicles and enjoy the depreciated tax benefit the public entity could not utilize). Nevertheless, investors in several nations (including Denmark, France, Germany, Japan, and Sweden) continued to

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[382] TRANSP. RESEARCH BD., *supra* note 198, at 75–77. Issues surrounding interest and other financing expenses are addressed in a number of statutes. For example, the exemption for state governments is set forth in the Debt Collection Act of 1982, as amended, 31 U.S.C. §§ 3701–3720 (2003). Interest requirements for governmental bodies is addressed in Section 5(b) of the Cash Management Improvement Act of 1990, as amended, 31 U.S.C. § 6503(b) (2003). Prejudgment common law interest is addressed by U.S. General Accounting Office/U.S. Department of Justice regulations at 4 C.F.R. § 102.13(i)(2) (1999).

[383] Pub. L. 100-17 (1987).

[384] 49 U.S.C. § 5307 (2003) (formerly Section 9 of the Federal Transit Act).

[385] "Capital Leases," 49 C.F.R. §§ 639.11, 639.15(b)(1), and 639.21 (2003). 49 U.S.C. § 5307 (2003); Section 3037 of TEA-21, 49 U.S.C. § 5309 note (2003); 56 Fed. Reg. 51794 (Oct. 15, 1991).

[386] The FTA provides the following guidance as to what constitutes capital maintenance:

> Preventive maintenance…was established as permanently eligible for FTA capital assistance under TEA-21; therefore, FY 1998 funds and subsequent fiscal year appropriations may be used for preventive maintenance**.** Preventive maintenance costs are defined as all maintenance costs. For general guidance regarding eligible maintenance costs, the grantee should refer to the definition of maintenance in the most recent National Transit Database reporting manual. A grantee may continue to request assistance for capital expenses under the FTA policies governing associated capital maintenance items (spare parts), vehicle overhaul as 20 percent of maintenance, maintenance of vehicle leased under contract, and vehicle rebuilds (major rework); or a grantee may choose to capture all maintenance under preventive maintenance**.** If a grantee purchases service instead of operating service directly, and maintenance is included in the contract for that purchased service, then the grantee may apply for preventive maintenance capital assistance under the capital cost of contracting policy.
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> 63 Fed. Reg. 60054 (Nov. 6, 1998).

[387] 49 C.F.R. §§ 639.3, 639.21 (2003); 49 U.S.C. § 5302 (2003).

[388] 49 C.F.R. § 639.13(a) (2003). However, lump sum leases require prior FTA approval. 49 C.F.R. § 639.13(c) (2003).

[389] 49 U.S.C. § 5307 (2003) (formerly Section 9 of the Federal Transit Act).

[390] Such costs include finance charges (including interest), delivery and installation charges, and maintenance costs. 49 C.F.R. § 639.17 (2003). However, an early termination of the lease may require partial reimbursement of federal funds used. 49 C.F.R. § 639.31 (2003).

[391] 49 C.F.R. §§ 639.23 – 639.27 (2003).

[392] 49 C.F.R. § 639.15 (2003).

> A recipient that wishes to enter into a lease which requires the draw down of a single lump sum payment at the inception of the lease (or payments in advance of the incurrence of costs) rather than periodic payments during the life of the lease must notify FTA prior to execution of the lease concerning how it will ensure satisfactory continuing control of the asset for the duration of the lease. FTA has the right to disapprove any arrangements where it has not been demonstrated that the recipient will have control over the asset. FTA may require the recipient to submit its cost-effectiveness comparison for review.
>
> 49 C.F.R. § 639.13(c) (2003).

[393] 49 C.F.R. § 639.31 (2003).

[394] 49 C.F.R. § 639.13(b) (2003).

enjoy such a depreciation tax benefit under their local law.[395]

By leveraging assets through use of foreign tax laws (whereby the investor enjoys non-U.S. tax benefits from depreciation on the assets), transportation equipment (rolling stock, usually rail cars) can be acquired on a purchase/lease basis. Cross-border leasing can save between 4 percent to 6 percent (3.89 percent on average) of the cost of buses and rail rolling stock. Some leases do not actually finance the purchase of equipment *per se.* Instead, a transaction is concluded under which a foreign entity will take ownership of the vehicles and pay the "lessee" a percentage of the cost of the vehicles to the transit agency for the privilege of entering into the transaction. The foreign entity enjoys favorable tax treatment in its country, and the transit provider enjoys unencumbered revenue that it may use for any purpose.[396] The transactions are usually linked to the country of manufacture.[397]

Typically, they are structured as follows:

- The foreign lessor borrows money from a bank on a nonrecourse note;
- Then the lessor uses the money to purchase the equipment either from the transit provider or the manufacturer; and
- Finally, the foreign lessor leases the equipment to the transit provider. As security for the loan, the lessor assigns sufficient lease payments to repay the loan to the lender.[398]

Examples of these types of transactions include the following:

- In 1991, King County, Washington, used FTA Section 9 funds to complete a $90 million purchase of 360 buses, which it sold to Japanese investors. The cross border lease saved King County 4.5 percent, or $4.24 million, off the original purchase price. FTA accepts cross-border leasing proposals so long as the net benefit exceeds the transaction cost.[399]
- In 1994, Denver's RTD entered into a $25 million leveraged lease financed by CS First Boston (Nederland) N.V. (the lender) from Deutsche Bank AG (the lessor) of 11 light rail vehicles manufactured by Siemens Duewag Corporation.
- In 1995, the San Diego Metropolitan Transit Development Board entered into a defeased[400] cross-border lease of 97 buses from JL Coronado Lease Co., Ltd. (the lessor), financed by the Dai-Ichi Kangyo Bank, Ltd. (the lender).[401]

### 3. Structural Domestic Lease Transactions

For some time, sale/leasebacks were deemed ineligible for investment tax credits in the United States. However, clever tax attorneys have come up with a sale/leaseback structure they believe results in domestic tax savings, and the FTA recently has approved several of them. This allows recipients to take advantage of tax provisions that treat physical assets as if they were sold by the grantee to third-party investors, and leased back. It involves a "head lease," or a conditional sales contract for tax purposes, and a "true lease," which is a leaseback of assets to the transit provider.

Often after the sale/leaseback, the lessee transit agency purchases defeasance instruments to ensure that the payment stream is available, and then assigns the payments or pledges the defeasance instruments to the lessor company. In this way, there is little to do after closing except make sure that the money is transferred twice a year.

Though the FTA usually requires return of a *pro rata* share of proceeds from the early sale of a transit asset, FTA has recognized that the transit provider is not actually disposing of the asset in a sale/leaseback transaction, and simply requires the transit provider to maintain "effective continuing control" of the asset.[402] From the FTA's perspective, the central issue is not who holds title to the assets, but the issue of continuing control—the grantee must have real and substantial physical control of federally-assisted assets that have a lifespan of more than a year. This includes all buses, trucks, vans, automobiles, tow trucks, emergency responders, light and commuter rail vehicles, and maintenance facilities, but does not include supplies. Thus, a grantee may sell, lease, or otherwise encumber an asset so long as it retains physical possession of it for transit purposes. What one must also remember is that once an asset is tied up in a lease, it is encumbered, and therefore almost impossible to be used for joint development. A sale/leaseback is an exception to FTA's position that the term of a contract shall not exceed 5 years. FTA will evaluate a proposed sale/leaseback on the basis of the rate of return and the grantee's continuing control of the transit asset over both the proposed term of the transaction and the useful life of the asset for transit purposes.

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[395] TRANSP. RESEARCH BD., *supra* note 198, at 109.

[396] COLLINS, *supra* note 1, at 16.

[397] FTA Circular 7020.1, "Cross-Border Leasing Guidelines" (April 26, 1990).

[398] COLLINS, *supra* note 1, at 16–17.

[399] TRANSP. RESEARCH BD., *supra* note 198, at 109–14.

[400] Depending on the jurisdiction and the needs of the lessee, the lease may be defeased or nondefeased. If defeased, the lessee pays an entity (usually the lending institution) an amount equal to that borrowed by the lessor. The lending institution then assumes responsibility for payment of all obligations to the lender. If nondefeased, the lessee has U.S. tax ownership of the equipment, and is ordinarily obliged only to repay the loan to terminate the lessor's interest in the equipment. The nondefeased structure is similar to a leveraged lease. COLLINS, *supra* note 1, at 17.

[401] The latter two studies are discussed in COLLINS, *supra* note 1, at 17.

[402] The statute requires that a grantee maintain "satisfactory continuing control over the use of [federally funded] equipment and facilities." 49 U.S.C. §§ 5307(d)(1)(B), 5309(d)(1), 5310(e)(g) (2003).

### 4. Lease-In/Lease-Out

Under a lease-in/lease out, the transit provider leases out rolling stock and facilities, then leases them back in a defeased structure maturing between 50–60 percent of the assets' useful life. Though the rules require a straight-line amortization, the investor realizes income statement benefits, while the transit provider enjoys a net present benefit from the defeased transaction.[403]

## S. JOINT DEVELOPMENT

Joint development and joint ventures are partnerships between transit providers and private entrepreneurs in the development of mixed-use construction projects, whereby the transit provider shares the risks and rewards of development. The FTA's "Livable Communities Initiative"[404] may support such ventures, so long as they are physically or functionally related to a transit project and they enhance its effectiveness.

Joint development consists of an income-producing activity related to a real estate asset in which FTA has an interest or obtains one as a result of FTA grants (also known as an Assisted Real Estate Asset). It is an income-producing activity involving a third party,[405] taking place on or with an Assisted Real Estate Asset. The FTA has adopted a policy favoring joint development.[406] Joint development projects must meet three tests: statutory definition, financial return, and highest and best transit use.

The statutory definition imposes a requirement that joint development be a transportation project that enhances economic development or the effectiveness of a mass transit project, and is physically[407] or functionally[408] related to that mass transit project (proximate to FTA-assisted capital projects), or establishes new or enhanced coordination between mass transportation and other transportation, and provides a fair share of revenue for mass transportation use. Proceeds derived from a joint development transfer are considered program income,[409] which may be retained by the grantee. In contrast, proceeds from a sale are not program income and must be returned to FTA.[410]

The highest and best use requirement is that the equitable return is based on the appraised market value as represented either by highest and best use of the property,[411] or by highest and best *transit* use of the property.[412]

The FTA offers the example of a rapid rail station that includes 6.3 acres for a "park and ride" area:

> A developer has been approved to build 160 residential units and 17,000 square feet of service retail space on a portion of this area. The transit operator transfers 3.4 acres to the developer for use in the joint development. The development will generate more transit trips and more non-fare revenue than the displaced parking spaces provided. The transit agency will retain the income generated from this land transfer as program income and will be assured of satisfactory continuing control through covenants running with the land. Should the developer re-sell the land in the future, the covenants bind the next owner to a transit-oriented use of the land.[413]

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[403] Internal Revenue Code § 467 (2000).

[404] Fed. Transit Admin., *Livable Communities* (visited Aug. 12, 2003), http://www.fta.dot.gov/research/polplan/susdev/livcom/livcom.htm.

[405] The third party is the source of the income to the grantee, and is the party to whom the property is transferred or the lessee who leases the space.

[406] 62 Fed. Reg. 12266 (March 14, 1997). FTA Circular 9300.1A, App. B.

[407] A joint development project is "physically related" to a capital project if it provides a direct physical connection with transit services or facilities. Physically related development may include projects using air rights over transit stations or projects built within or adjacent to transit facilities.

[408] A joint development project is "functionally related" to an FTA capital project if it is related by its activity and use, and is functionally linked to transit services or facilities, provides a beneficial service to the public, and enhances use of or access to the transit system. Usually, they are within reasonable walking distance to the transit entry point, or within a radius of 1,500 feet from it.

[409] 49 C.F.R. § 19.24 (2003). The FTA considers all "revenue derived from such joint development to be program income as defined in the Common Grant Rule at 49 C.F.R., subtit. A, § 18.25," 62 Fed. Reg. 12266 (Mar. 14, 1997). "Real property that is no longer needed for transit purposes may be sold and the proceeds may then be used to purchase other real property for a transit-supportive development. If the real property is leased, the proceeds are considered program income and may be used for any transit purpose." 60 Fed. Reg. 24683 (May 9, 1995).

[410] 49 C.F.R. § 18.31(c)(2) (2003).

[411] A property's "highest and best use" is the use that results in the highest anticipated selling price.

[412] "Highest and best transit use" consists of that combination of residential, commercial, retail, public, and/or parking space and amenities that will produce the highest level of social, economic, and financial benefit to the transit system and its community, irrespective of the selling price. It consists of that combination of such benefits as increasing ridership, reducing trip durations, or improving connections between trips, that maximizes the value of the asset to transit. 62 Fed. Reg. 12266 (Mar. 14, 1997).

[413] FTA also proffered an example of the transit agency building an "envelope," or rehabilitating an existing transit owned facility. The envelope or building shell consists of load bearing walls, roof, foundation, substructure improvement, site design, and engineering. "Tenant finishes," ineligible for FTA reimbursement, include partition walls, furniture, equipment, shelving, lighting, drapes, floor coverings, and other items specific to the business intended to be operated. FTA noted a case in which

> the local transit authority was allowed to convert an existing office building into a $3 million Neighborhood Travel Center. The center will serve as a terminal for bus lines to industrial jobs and will provide the focus for a downtown redevelopment "campus" including jobs training, child care facilities, and a privately-financed development bank. The tenant finishes for each of these ancillary activities will be paid for with non-grant funds, though grant funds were used to rehabilitate the building itself. The tenants will pay market rate rent to the transit authority.

Joint development does not have a dedicated funding source, but such activities are eligible for funding under all Title 49 capital programs, including the Capital Program,[414] the Urbanized Area Formula Program,[415] the Non-Urbanized Area Formula Program,[416] and the Elderly and Persons with Disabilities Program.[417] CMAQ and STP funds may also be used to support joint development projects.[418] As is the case in all innovative financing techniques, before undertaking a joint development project, transit recipients are encouraged to discuss the proposal with the FTA Regional Office.[419]

In *Town of Secaucus v. Dep't of Transportation*,[420] the Town of Secaucus sought to enjoin New Jersey Transit's construction of a $448 million transportation hub within its city limits. Secaucus argued that the use of $15.7 million to build a foundation upon which a 4.7-million square foot private commercial development would be built over the transit station was not related to mass transportation and was therefore an inappropriate use of federal funds. The court reviewed ISTEA's provisions on joint development and found to the contrary:

> Section 5309(a)(5)—the provision that § 5309(f)(2) supplements—specifically authorizes funding for joint transportation/commercial/residential development projects. By its very terms, § 5309(a)(5), along with § 5309(f)(2)(A), envisions that federal transit dollars will be used to fund such elements as property acquisition, building foundations and utilities to enable the contemplated joint development to get off the ground. Transportation projects that "incorporate private investment, including commercial and residential development" are expressly eligible for funding where they "enhance the effectiveness of a mass transportation project" and are related "physically or functionally" to a mass transportation project.[421]

*Woodham v. Federal Transit Administration*[422] addressed the issue of whether joint development triggers federal NEPA[423] and National Historical Preservation Act (NHPA)[424] requirements. In 1984, the FTA provided MARTA (Atlanta) nearly $4 million to purchase property for its Lindbergh transit station. Thirteen years later, the FTA granted MARTA an additional $1.6 million to purchase surrounding real estate and to develop and solicit plans for joint development. The FTA approved a plan whereby MARTA would lease 9.6 acres of federally-funded real estate to private developers for the development of office buildings, retail shops, apartments, and condominiums, and retain the lease proceeds as program income.

The court noted that the presence of federal funds does not turn a project into a "major federal action" triggering NEPA, saying

> the joint development plan proposed by MARTA is not a "major federal action" because the FTA had no control or responsibility over material aspects of the project. MARTA created, developed, and implemented the joint development plan, using funds received from private investors. While MARTA used FTA funding to purchase property (9.6 of the 48 total acres) and begin preliminary development of the project, these funds do not transform the joint development plan into a "major federal action."[425]

Neither did FTA's concurrence with the plan. The court also observed that jurisdiction under NHPA's "federal or federally assisted undertaking" requirement is coextensive with NEPA's "major federal action" requirement, and that neither were triggered by the FTA's action in approving this joint development project.[426]

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FTA Circular 9300.1A, App. B.

[414] 49 U.S.C. § 5309 (2003).

[415] 49 U.S.C. § 5307 (2003).

[416] 49 U.S.C. § 5311 (2003).

[417] 49 U.S.C. § 5310 (2003).

[418] Flexible funds are discussed at Fed. Transit Admin., *Flexible Funds* (visited Aug. 13, 2003), http://www.fta.dot.gov/library/reference/flex/ffi2.html.

[419] FTA Circular 9300.1A, App. B.

[420] 889 F. Supp. 779 (D. N.J. 1995).

[421] 889 F. Supp. at 779.

[422] 125 F. Supp. 2d 1106 (N.D. Ga. 2000).

[423] 42 U.S.C. § 4332 (2003).

[424] 16 U.S.C. § 470f (2003).

[425] 125 F. Supp. 2d at 1109. *See also* Town of Hingham v. Slater, 98 F. Supp. 2d 131 (D. Mass. 1999), which held that the FTA's discontinuance of preparation of an EIS for which no federal money would be used did not violate NEPA.

[426] Similarly, in South Bronx Coalition for Clean Air v. Conroy, 20 F. Supp. 2d 565 (S.D. N.Y. 1998), the court held that FTA's provision of funds and concurrence in MTA's sale of a bus depot and use of the proceeds to purchase a new facility did not trigger NEPA because FTA had no control over MTA's project decisions.

SECTION 5

# PROCUREMENT

## A. OVERVIEW

As discussed in previous sections, the principal agency that implements statutes and promulgates regulations pertaining to transit procurement is the FTA. FTA's specific powers (as opposed to those imposed generically on federal agencies) with respect to procurement come generally from three statutes and four regulations.[1] These seven principal legal instruments cover a smorgasbord of subjects, ranging from the conditions under which seat specifications for buses may be included in advertising for bids[2] to under what circumstances rolling stock may be purchased using federal funds without prior authorization from the Secretary of Transportation.[3] The subject is further complicated by the interplay of many other pieces of legislation, which while not specifically pertaining to transportation nevertheless have their own particular impact on U.S. transportation policy. For example, the Clean Air Act[4] and the Uniform Relocation Assistance and Real Property Acquisition Policies Act,[5] among others, all have effects on transit agencies or their contractors and suppliers. The dynamic interplay of these many disparate statutes and regulations serves to make procurement using federal funds not merely a pyramid, but a labyrinth as well.

## B. THE PROCUREMENT PROCESS

### 1. Procurement Procedures

#### *a. Best Practices Manual & FTA Master Agreement*

FTA maintains a periodically-updated *Best Practices Procurement Manual* [Manual].[6] The Manual offers guidance to grantees as to the "best practices" for complying with laws, regulations, and other FTA policies for third party procurement contracts.[7] The practices outlined in the Manual are not explicitly mandatory.[8] However since these practices are essentially FTA's interpretations of the appropriate way to fulfill relevant legal obligations (including, in particular, 49 C.F.R. Part 18), procedures deviating from them could be subjected to additional scrutiny in the event of an investigation, Procurement System Review, or Triennial Review. Consequently, it is advisable to follow the Manual's recommendations unless they conflict with procedures mandated by state/local laws or regulations.[9] Conditions imposed by federal statutes, federal regulations, FTA Circulars, the FTA Master Agreement (MA), FTA memoranda, and explicit grant provisions are mandatory unless they specifically state that they are discretionary or superseded by state or local authority.[10]

#### *b. Application of Grant Requirements*

The specific requirements for any grants or other funds awarded by FTA will be found in the FTA MA, which is incorporated into the Grant Agreement or Cooperative Agreement grantees are obligated to execute as part of the funding process.[11] However, there are many general requirements that apply to the use of FTA funds in the absence of contraindications by the MA.[12] It is important to understand that many of these requirements "flow down" to "subgrantees" (i.e., other agencies that receive funds for procurements through the initial grantee).[13] The Manual identifies five distinct

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[1] The statutes are 49 U.S.C. § 5323 (2000), 49 U.S.C. § 5325 (2000), and 49 U.S.C. § 5326 (2000), while the regulations are 49 C.F.R. pt. 18, 49 C.F.R. pt. 19, 49 C.F.R. pt. 663, and 49 C.F.R. pt. 665.

[2] 49 U.S.C. § 5323(e) (2000).

[3] 49 U.S.C. § 5326(d) (2000).

[4] 42 U.S.C. §§ 7401 *et seq*. (2000).

[5] 42 U.S.C. §§ 4601 *et seq*. (2000).

[6] Although a printed copy is issued annually, the FTA provides the *Best Practices Procurement Manual*, with its most recent updates, through the FTA's Web site at http://www.fta.dot.gov/library/admin/BPPM (visited April 21, 2003). The edition with updates through October 2001 was used for preparation of this book. It is strongly urged that the reader obtain a copy of the most up-to-date edition, as this is effectively the only comprehensive listing of current FTA policy in this area. *See also* 49 C.F.R. pt. 18 (2002).

[7] U.S. DEP'T OF TRANSP., FEDERAL TRANSIT ADMINISTRATION, BEST PRACTICES PROCUREMENT MANUAL preface (1999) [hereinafter MANUAL]. *See also* 49 C.F.R. pt. 18 (2002).

[8] MANUAL.

[9] While the sorts of contracts to which the Best Practices would apply may seem obvious, the Manual points out that many agencies fail to recognize the full potential of applying its practices and recommends a careful assessment of the types of procurement that could benefit from a thorough application of the practices. In particular, many agencies fail to consider using competitive bidding for such things as utility services, mailing/shipping services, telephone service, and other historically monopolized services. MANUAL § 1.2.4.

[10] *See* 49 U.S.C. § 5325 (2001) and 23 U.S.C. § 112 (2000) for the source of the FTA's regulatory authority in procurement matters. When county and municipal laws, state regulations, case law, and internal procedures adopted by transit agencies are considered as well, the complexity of transit procurements becomes extraordinary. The Los Angeles County Metropolitan Transportation Authority's (LACMTA) procurement manual lists numerous sources for guidance and restrictions on procurement procedures. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY PROCUREMENT MANUAL §§ 1.5–1.6 (2003) (hereinafter LA MANUAL).

[11] MANUAL § 1.3. The Manual distinguishes between "grantees," which receive grants, and "recipients," which receive any sort of funding from the FTA. MANUAL § 1.3.1. However, in practice there is virtually no difference in the sorts of restrictions that grantees and recipients face. Thus the term "grantee" will be used for both except where there is a distinction made between the treatment of the two categories.

[12] MANUAL § 1.3.

[13] MANUAL § 1.3.1. Unless otherwise indicated, it is presumed that all requirements or best practices are applicable to subgrantees.

rules created by FTA Circular 4220.1D concerning the applicability of procurement requirements to grantees:

> 1. If a transit authority is both a grantee of federal funds and a sub-grantee of a state government, the state may permit the transit authority to follow applicable FTA procurement guidelines rather than state procurement requirements; however the state is not under an obligation to so permit;
>
> 2. When a state government makes a procurement using FTA-provided funds, it must follow the same procedures that it ordinarily uses for such procurements, except where those procedures conflict with established FTA guidelines;
>
> 3. Unless otherwise indicated, subgrantees of a state must follow state procedures when awarding or administering contracts;
>
> 4. Regional transit authorities are not considered to be state agencies; and
>
> 5. Subgrantees of states that are institutions of higher education, hospitals, or other nonprofit organizations, and all other FTA grantees must use the procurement procedures of their state/locality except where those procedures conflict with federal law.[14]

State governments must comply with five requirements: (1) the state may not enter into contracts for rolling stock or replacement parts with a performance period greater than 5 years;[15] (2) the state must use "full and open competition" to make the procurement;[16] (3) the state shall not discriminate against bidders on the basis of geographic preference unless federal law for the particular type of procurement being undertaken expressly mandates or encourages geographic preference;[17] (4) the state must comply with the requirements of the Brooks Act for the procurement of architectural or engineering services;[18] and (5) the state must include all clauses required by federal law, executive orders, or regulations within any contracts or purchase orders made by it or any subgrantees.[19]

In general, a transit agency may avoid FTA procurement requirements if it is engaged in making a procurement without federal funds.[20] However, there are certain situations in which FTA requirements must be met, even if it appears there is no direct use of federal funds.[21] The first is where the agency receives operating assistance from FTA, in which case it must apply all relevant federal requirements to procurements except for capital projects undertaken wholly without federal funds.[22] For example, even if the operating assistance funds are used only for paying salaries, a procurement of diesel fuel must still be in conformance with federal requirements. Second, where a transit agency enters into an FFGA with FTA for a capital project, it will be assumed that federal funds are part of all aspects of the project in the same ratio as federal funds are to the overall budget for the project.[23] Ultimately, this has a similar effect to the operating assistance provision, in that it transforms the entire project (unless otherwise segregable into discrete parts) into a completely federally-funded project, thereby subjecting all parts of it to the federal requirements. If a project can be divided into discrete parts, this leads to the final manifestation of the taint principle—the need to identify the "minimal segment that can be feasibly operated independently."[24] In the absence of an FFGA, federal funds may be confined to particular parts of a capital project, but those

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[14] MANUAL § 1.3.1.

[15] 49 U.S.C. § 5326(b) (2002). Other contracts no longer need be limited to a term of 5 years. *See* Dear Colleague Letter from Jennifer Dorn of May 29, 2002, available at http://www.fta.dot.gov/office/public/2002/c0802.html (visited April 21, 2003). *See also* Federal Transit Administration Circular 4220.1E para. 7.m (2003) [FTA C. 4220.1E].

[16] FTA C. 4220.1E para. 8.a.

[17] FTA C. 4220.1E para. 8.b. The only specific discriminatory exception permitted at this time is for architectural and engineering services (A&E), provided that a sufficient number of local bidders will be available to result in a truly competitive procurement. FTA C. 4220.1E para. 8.b. However, this does not preclude a state from requiring licensing of the bidders. FTA C. 4220.1E para. 8.b. Grantees sometimes attempt to justify the use of geographic preferences for contracts other than A&E work by arguing that they need parts or services on a short lead-time basis and must therefore rely on local suppliers. While FTA is sympathetic to this need, it is still not a permitted reason for employing geographic preferences. An approach that is allowable, however, is for the grantee to require that contractors be able to supply parts or services by a specific time or within a specific timeframe. As long as the deadline/timeframe is reasonable, this does not constitute a geographic preference. MANUAL § 2.4.2.2.3.

[18] FTA C. 4220.1E para. 9.e. Note that the Manual erroneously refers to this requirement as being under paragraph 9.d of the Circular. The requirements of the Brooks Act (40 U.S.C. § 541 (2001)) are: (1) an offeror's qualifications must be evaluated; (2) price must be excluded as an evaluating factor; (3) negotiations must be conducted only with the most qualified offeror; (4) if there is a failure to agree on price, negotiations with the next most qualified offeror must be commenced until the contract is awarded to the most qualified offeror whose price is fair and reasonable to the grantee. FTA C. 4220.1E para. 9.e. For more on the procurement of architectural, engineering, and related services, see § 5.01.09 below.

[19] MANUAL § 1.3.1. 49 C.F.R. § 18.36 (2003).

[20] MANUAL § 1.3.2.

[21] This is often referred to as the "taint principle," i.e., federal dollars "contaminate" other funds and projects, leading to a proliferation of federal control.

[22] MANUAL § 1.3.2. As the Manual says, "FTA maintains that, one dollar of Federal operating assistance converts the operating funds of the [transit agency] so that all such funds of the [agency] therefore become subject to Federal requirements." MANUAL § 1.3.2. Although operating assistance was eliminated for most purposes some years ago, funds made available under the system of Formula Grants for Other than Urbanized Areas may still be used for operating assistance. 49 U.S.C. § 5311(h) (2001).

[23] MANUAL § 1.3.2. 49 C.F.R. § 633.5 (2003).

[24] MANUAL § 1.3.2.

parts must have independent utility.[25] For example, if a light rail station is to be constructed, federal funds could not be confined solely to the roof of the station or to the surfacing of the passenger platforms. However, it would be possible to exclude federal funds from the landscaping around the station, as it is not essential to operations.

FTA requirements also extend to such purchases as legal services and expert witnesses, so these services must be procured competitively and in the approved manner.[26] Regular employment contracts, such as for clerical staff, do not fall under the federal requirements.[27] Therefore, the agency is free to devise whatever procedures it wishes within the confines of relevant state/local laws and federal statutes governing employment in general.[28]

*c. The Three Stages of the Procurement Process*

The Manual provides a number of recommendations and requirements for the general procurement process. The first point the Manual raises is the importance of autonomy in procurements.[29] While recognizing that there is no uniform solution, the Manual recommends that the overall procurement process be divided into three stages: "requiring," "procurement," and "payment."[30] The requiring stage is represented by the program manager, who is responsible for determining the procurement needs, establishing specifications, and acting as a technical representative or advisor to the contracting officer.[31] The procurement stage is represented by the contracting officer, who is responsible for ensuring that specifications are not needlessly restrictive, preparing and distributing the bid advertisement, awarding the contract, and monitoring performance.[32] The payment stage is represented by the accounts payable officer, who ensures that all necessary approvals are obtained and that payments are kept within the price limits of the contract.[33]

*d. Employee Conduct*

Regardless of how the grantee chooses to arrange its procurement process, it must adopt a written code of standards governing the performance of employees engaged in the award and administration of contracts.[34] The standards must include a provision barring employees, officers, agents, and board members of the grantee, or immediate family members of any of these groups, from participating in the selection, award, or administration of any FTA-financed contract if a conflict of interest would be involved.[35] The grantee's employees, officers, agents, or board members must neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from potential contractors, active contractors, or other parties with agreements with the grantee.[36] The grantee must certify to FTA

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[25] MANUAL § 1.3.2.

[26] MANUAL § 1.3.3.2. However, where the grantee has pending litigation that might be compromised by a public procurement process, the grantee may validly seek to avoid using ordinary procurement procedures. In such an instance the grantee should submit a request to the FTA seeking a waiver of FTA requirements, particularly those governing the need to competitively select legal counsel in a formally advertised RFP MANUAL § 1.3.3.2.

[27] MANUAL § 1.3.3.3.

[28] MANUAL § 1.3.3.3.

[29] MANUAL § 2.1.2.

[30] MANUAL § 2.1.2. Using the major milestone event within each phase of a procurement as a point of reference, this could also be called "preparation of the IFB/RFP/Specifications," "selection and award to the successful vendor," and "contract administration."

[31] MANUAL § 2.1.2.

[32] MANUAL § 2.1.2. In LACMTA, the Chief Executive Officer (CEO) designates who will serve as contracting officers. *See* LA MANUAL § 2.1.B. The LA Manual provides a specific procedure for the appointment of contracting officers. *See* LA MANUAL § 2.5. The contracting officers have wide reaching powers and responsibilities on behalf of LACMTA, although the CEO may choose to limit the scope of their authority to less than that permitted by statute or regulation. The powers and responsibilities of a contracting officer include, but are not limited to: (1) entering into, administering, and terminating contracts; (2) ensuring that all applicable restrictions have been complied with and all requirements have been met; (3) ensuring contractors receive impartial and equitable treatment; (4) ensuring that there are sufficient funds to meet the terms of the contract; and (5) determining that offered prices are fair and reasonable prior to entering into a contract. *See* LA MANUAL § 2.4.A. The contracting officer is also responsible for: (1) soliciting bids and proposals and issuing amendments to those solicitations; (2) serving as the chairperson for prequalification hearings, pre-bid conferences, and proposal evaluation meetings; (3) conducting contract negotiations; (4) conducting investigations of contractors; (5) managing termination procedures where needed; and (6) managing nontechnical aspects of post-award contract administration, including maintaining all official contract files. *See* LA MANUAL § 2.4.A. Also assisting the contracting officer is the project manager, who is responsible for the day-to-day administration of the technical aspects of a contract, including monitoring the contractor's performance. The project manager should be familiar with the procedures and requirements of the department making the procurement. *See* LA MANUAL § 2.4.B. If the contractor fails to correct any problems in a timely or adequate manner, the project manager must notify the contract administrator that an apparent breach of the contract exists. The contract administrator and project manager must then take "any steps necessary and available" to enforce the Authority's rights under the contract. *See* LA MANUAL § 2.4.D.

[33] MANUAL § 2.1.2.

[34] FTA C. 4220.1E para. 7.c.

[35] The Circular defines "conflict of interest" as being when any of the following parties has a "financial or other interest" in the firm selected for the award: (1) an employee, officer, agent, or board member; (2) any member of his/her immediate family; (3) his/her partner (the Circular does not explain whether "partner" is intended in a business or relational sense); or (4) an organization that employs or is about to employ any of the above. FTA C. 4220.1E para. 7.c.

[36] FTA C. 4220.1E para. 7.c. Grantees may, however, set minimum rules where financial interests are not substantial or

that the standards are in place.[37] As a matter of best practices, the Manual recommends that the grantee require all employees to periodically sign a statement acknowledging that the employee has read and understood the grantee's code of conduct.[38] FTA has noted that despite requirements that grantees explicitly adopt penalties or sanctions for violations of their standards,[39] grantees consistently fail to do so.[40] A grantee should examine its disciplinary procedures and rectify this situation if it exists.[41] Issues of employee conduct are described in greater detail in Section 6—Ethics, below.

*e. Written Record*

Once standards and procedures are in place for making procurements, the grantee must begin building a written record of a procurement's history.[42] This is commonly called the "procurement file," "contract file," or "record of procurement."[43] At the very minimum, such a record is required to include:

1. The rationale for the method of procurement;
2. Selection of contract type;
3. Reasons for contractor selection or rejection; and
4. The basis for the contract price.[44]

The Manual also suggests a number of other items that, while not mandated by FTA, should be kept as part of the written procurement history.[45]

*f. Full and Open Competition*

Consistent with general federal procurement procedures, procurements using FTA funds must provide for "full and open competition."[46] Unlike state grantees where this term is largely undefined, other grantees are subject to a broad set of restrictions. Grantees must use sealed bids or competitive negotiations for procurements in excess of $100,000.[47] Practices that are barred as overly restrictive include:

1. Unreasonable qualifications requirements for firms to compete;

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the gifts are unsolicited items of "nominal intrinsic value." FTA C. 4220.1E para. 7.c.

[37] FTA C.4220.1.E para. 5.a.

[38] MANUAL § 2.1.3.

[39] FTA C. 4220.1E para. 7.c.

[40] MANUAL § 2.1.3.

[41] MANUAL § 2.1.3.

[42] MANUAL § 2.4.1; FTA Circular 4220.1E para. 7.i.

[43] *See, e.g.*, 49 C.F.R. § 19.45 (2003).

[44] FTA C. 4220.1E para. 7.i.; 49 C.F.R. § 18.36(b)(9).

[45] This includes, but is not limited to: (1) purchase requests, acquisition planning information, and other presolicitation documents; (2) evidence of availability of funds; (3) rationale for method of procurement; (4) list of sources solicited; (5) independent cost estimate; (6) statement of work/scope of services; (7) copies of published notices of proposed contract action; (8) copy of the solicitation, including all addenda and amendments; (9) liquidated damages determination; (10) an abstract of each offer or quote; (11) source selection documentation; (12) contractor's contingent fee representation and other certifications and representations; (13) contracting officer's determination of contractor responsiveness and responsibility; (14) cost or pricing data; (15) determination that the price is fair and reasonable including an analysis of the cost and price data and any required internal approvals for the award; (16) notice of award; (17) notice to any unsuccessful bidders and record of any debriefing; (18) record of any protest; (19) bid, performance, payment, or other bond documents, and notices to sureties; (20) required insurance documents; (21) notice to proceed. MANUAL § 2.4.1.

[46] MANUAL § 2.4.2.1.

[47] *Id*. This dollar amount is based on the federal government's own definition of "small purchases," as given at 41 U.S.C. § 403(11), but it is still established by the FTA itself, so a change in the statute will not necessarily herald a change in FTA guidelines.

By comparison, under state law (*see* CAL. PUB. UTIL. CODE §§ 130232 and 130050.2 (2001)), LACMTA is permitted to use simplified acquisition procedures for the procurement of supplies and equipment only where the aggregate cost of the procurement will be $40,000 or less, and for construction where the total dues do not exceed an aggregate amount of $25,000. LA MANUAL ch. 10. Within the simplified acquisition threshold of $25,000, different procedures apply for different cost levels and types of procurements. Where a procurement does not exceed $2,500, only a single price quotation is needed if the price is judged to be reasonable. LA MANUAL § 10.4.F. A procurement under $1,000 may also be made using a "check request" if the items to be procured are within the requesting department's regular budget (typically including books, trade publication subscriptions, conference/seminar registration fees, etc.). LA MANUAL § 10.21. Procurements that are greater than $2,500 and less than $40,000 and are of a nature that puts them under CAL. PUB. UTIL. CODE § 130232 may be obtained on the basis of three oral or written quotations. LA MANUAL § 10.7. One of the quotations must come from the previous supplier, if any (assuming that their performance record with LACMTA is acceptable and that they have not been debarred from bidding for federally-funded contracts). LA MANUAL § 10.9.A. Based on a variety of factors, the contracting officer may conclude that it is desirable to obtain quotes from more than three sources, and in any event should try to maximize the amount of competition. LA MANUAL § 10.10. The contracting officer has an affirmative duty to verify "price reasonableness" in two circumstances. The first is where the officer suspects, or otherwise has information, indicating the price may not be reasonable. The other is when there is no comparable pricing information readily available for the item or service to be procured, as when purchasing an item that is not the same as, or similar to, other items that have been recently procured using competitive procedures. LA MANUAL § 10.9.B. Regardless of whether the contracting officer has to investigate the pricing, he or she must make a finding in writing that the price to be paid is fair and reasonable. LA MANUAL § 10.11. If only one quotation is received or the quotations reflect a lack of price competition, the contracting officer must include in the procurement file a statement explaining the basis of the determination of fairness and reasonableness. LA MANUAL § 10.11. The determination may be based on competitive quotations, comparison of prices with previous purchases, price lists, catalogs, advertisements, the contracting officer's personal knowledge, or any other reasonable basis. LA MANUAL § 10.11. In event of inadequate competition or information for basing comparisons on, a cost analysis may be necessary to determine whether the offered price is reasonable.

2. Unnecessary experience and excessive bonding requirements;

3. Noncompetitive awards to any person or firm on retainer contracts;

4. Organizational conflicts of interest;[48] and

5. Any arbitrary action in the procurement process.[49]

This list is not definitive, and any other practice that interferes with full and open competition may also be found to have violated the terms of the FTA guidelines.[50] The grantee should always recall the two principal purposes of public procurements—to obtain the best quality and service at minimum cost, and to guard against favoritism and profiteering at public expense.[51] Thus, before adding any new requirements, specifications, or restrictions to a procurement, the grantee should question whether such changes are in harmony with those purposes.

### *g. Minimum Needs Doctrine*

The Manual stresses the importance of the "minimum needs doctrine" in procurements.[52] The doctrine provides that in preparing specifications for a product or service to be procured, the grantee should limit the specifications to those criteria most essential to meet its requirements.[53] Under current FTA requirements, the minimum needs doctrine is only mandatory where specifications make reference to a brand name product. In such an instance, the specifications must also include descriptions of the product's function so as to facilitate product substitutions or allow potential contractors to submit an alternate product ("approved equal") for prebid consideration by the grantee.[54] However, the Manual exhorts grantees to apply the logic of the minimum needs doctrine to all procurements where possible.[55] The Manual also encourages grantees to participate in intergovernmental procurement contracts for the purpose of reducing costs and increasing efficiency in procurements.[56]

### *h. Leasing*

Leases of equipment are considered to be third party contracts and thus fall under relevant federal laws, regulations, and FTA guidelines.[57] However, because leasing equipment is often less cost effective than purchasing the same sort of equipment, a lease versus purchase analysis should be made as part of the decision regarding the method of procurement.[58] The degree of analysis should be appropriate to the size and complexity of the procurement and must consider a wide range of factors.[59]

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[48] This is defined as a situation where because of other activities, relationships, or contracts, a contractor is unable, or potentially unable, to render impartial assistance or advice to the grantee; a contractor's objectivity in performing the contract is or might otherwise be impaired; or where a contractor has an unfair competitive advantage. FTA C. 4220.1E para. 8.a(5). The FTA considers the award of a transit management services contract as particularly susceptible to conflicts of interest. E.g., if the transit management firm will provide the general manager as part of its services, an organizational conflict of interest arises if any person who reports to the general manager is involved in the review of proposals, recommendation of the successful contractor, contract award, and/or contract administration. The reason is simple: the general manager will sign the reviewing employee's paycheck, have the authority to promote or terminate the employee, etc. To resolve the organizational conflict of interest, an outside government agency that does not report to the general manager may perform these procurement tasks, or the transit board can appoint a subcommittee to act as procurement staff to the board.

[49] FTA C. 4220.1E para. 8.a.

[50] FTA C. 4220.1E para. 8.a.

[51] MANUAL § 2.4.2.1.

[52] MANUAL § 2.3.

[53] *Id*.

[54] FTA Circular 4220.1E para. 8.c(1). Alternatively, if it would be too laborious or space consuming to describe the product's function fully, it is acceptable to follow the brand name product description with the words "or equal," "or approved equal," or "or similar in design, construction, and performance." However, the FTA strongly prefers that the function be described if at all possible. It should be noted that the use of brand names is strongly disfavored by the FTA. MANUAL § 2.4.2.2.1. An exception to this rule is where the grantee is obtaining an "associated capital maintenance item" from the original supplier. However, in that instance the grantee must first certify in writing to the FTA that the original supplier is the only source for the item and that the price of the item is no higher than that paid by similar customers. FTA C. 4220.1E para. 9.h(l)(e).

[55] MANUAL § 3.3.

[56] MANUAL § 1.3.3.5. However, before a grantee joins such a contract, it should take several steps to assure that it is not violating federal procurement requirements. The grantee should: (1) determine that the contract is still in effect or can be modified to permit sufficient lead time to make the required deliveries to the grantee; (2) determine that the specifications in the contract will meet its needs; (3) review the terms and conditions to determine that they are acceptable; (4) determine that the grantee's requirements will not exceed the scope of the existing contract, as modifying the scope of the contract may create a sole-source procurement situation that will need to be justified in accordance with federal procedures; (5) determine that the contract was awarded competitively, either through sealed bids or competitive proposals, as if it was a sole-source award then the grantee must justify the contract under the relevant federal procedures; (6) if original award was made some time ago, conduct a market survey or price analysis to determine whether the prices in the contract are reasonable; (7) determine that the award recipient has submitted all federally required certifications to the awarding agency (e.g., Buy America, etc.); and (8) prepare a "Memorandum for the Record" documenting the grantee's analysis of the items mentioned above. This will serve as the "Written Record of Procurement History" required by FTA guidelines. MANUAL § 1.3.3.5.

[57] MANUAL § 1.3.3.7.

[58] This decision should be documented in the procurement history. MANUAL § 1.3.3.7.

[59] The factors include: (1) estimated length of the period the equipment is required and the amount of time of actual equipment usage; (2) technological obsolescence of the equipment; (3) financial and operating advantages of alternative types and

*i. Qualified Products and Bidders Lists*

Grantees may opt to create lists of qualified products and/or qualified bidders to expedite and standardize their procurement processes.[60] A qualified products list catalogs products that have previously been tested and found to meet the grantee's requirements, while a qualified bidders list provides the names of bidders that manufacture complex items requiring sophisticated manufacturing and quality control procedures.[61] To be placed on a qualified bidders list, a firm should be reviewed carefully to ensure that its internal procedures and controls produce satisfactory end products.[62] Furthermore, the grantee must not prevent a supplier or bidder from qualifying for a list during the "solicitation period" (i.e., the time from the posting of the bid advertisement to the closing date).[63] Nevertheless, a grantee is neither expected nor required to delay an award

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makes of equipment; (4) total rental cost for the estimated period of use; (5) net purchase price; (6) transportation and installation costs; (7) maintenance and other service costs; (8) trade-in or salvage value costs; (9) imputed interest cost; and (10) availability of a servicing facility, especially for highly complex equipment. MANUAL § 1.3.3.7.

[60] MANUAL § 2.4.2.2.4.

In Los Angeles, LACMTA typically requires businesses interested in doing certain work for it to complete a prequalification procedure before being eligible to receive contracts from the Authority. LA MANUAL § 2.12.

Florida employs a prequalification process for SDOT contracts in excess of $250,000. FLA. STAT. § 337.14 (2000). To be eligible to bid on a contract, a contractor must annually file, in duplicate, with the SDOT an application for qualification accompanied by all required supporting documents. FLA. ADMIN. CODE ANN. 14-22.002(1)(a) (2000). The supporting documents include a financial statement (FLA. ADMIN. CODE ANN. 14-22.002(2) (2000), the financial statement must have been completed within the past 12 months in accordance with GAAP, FLA. ADMIN. CODE ANN. 14-22.002(2) (2000)); and a list of equipment (FLA. ADMIN. CODE ANN. 14-22.002(3) (2000)). The list must reflect each major item of equipment owned by the applicant that is utilized in performing the requested classes of work along with its book or salvage value, make, model, and description. Items held under capital lease agreements must be identified so that the book value of these items can be readily determined, FLA. ADMIN. CODE ANN. 14-22.002(3) (2000). Where the contractor has previously qualified within the past 2 years, the application must include a list of projects completed within the past 3 years as the prime or subcontractor stating the actual dollar amount of work executed and listing each class of work performed on those projects by its employees. The list may not include work sublet to others or performed with rented equipment and operators. Resumes must be submitted to show construction experience of personnel at superintendent level and above for each class of work for which the contractor is requesting qualification. FLA. ADMIN. CODE ANN. 14-22.002(4)(a) (2000). Newly established contractors, and contractors who last qualified more than 2 years previously, must provide letters of recommendation from at least two agencies or firms with direct knowledge of the contractor's key personnel and work performance in sufficient detail to assist in rating the applicant's ability to perform construction and related work. FLA. ADMIN. CODE ANN. 14-22.002(4)(b) (2000). The contractor must also indicate the classes of work for which it wishes to be qualified for. FLA. ADMIN. CODE ANN. 14-22.003(3)(a) (2000). The SDOT then applies a formula to the information to determine the contractor's "Maximum Capacity Rating" [MCR]. *See* FLA. ADMIN. CODE ANN. 14-22.003 (2000) for a complete discussion of the formula and how various elements are weighted. The MCR is the total aggregate dollar amount of uncompleted work that a bidder may have under contract as either a prime or subcontractor. FLA. ADMIN. CODE ANN. 14-22.003(2)(a) (2000). A bidder may increase its MCR if it furnishes a bond meeting certain requirements and exceeding its current MCR. FLA. ADMIN. CODE ANN. 14-22.003(2)(b) (2000). The SDOT will consider the contractor's MCR and other factors, such as prior convictions for contract crimes and the quality of past work done for the SDOT (*see* FLA. ADMIN. CODE ANN. 14-22.0041(1) (2000) for a complete listing of factors the SDOT must weigh in determining whether to qualify the contractor), and then make a determination as to whether to qualify the contractor. FLA. ADMIN. CODE ANN. 14-22.0041(2) (2000).

New York is unusual in that it is one of the few states to use a post-qualification system for evaluating bidders. Once a construction contractor has been notified that it was the lowest bidder for a contract, it must complete the New York State Uniform Contracting Questionnaire (NYSUCQ) to establish its ability to perform the contract. NEW YORK STATE DEP'T OF TRANSP., HOW TO DO BUSINESS WITH THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION 11. (www.dot.state.ny.us/cmb/consult/files/howtodob.pdf) (visited Nov. 30, 2003). If the contractor has submitted a NYSUCQ within the past 12 months and its information has not changed in that time, a copy of the earlier NYSUCQ may be submitted along with an affidavit stating that there has been no change. NYSUCQ Preamble, available on-line at http://www.dot.state.ny.us/cmb/contract/files/cca1.pdf (visited Apr. 21, 2003). The completed NYSUCQ must include a financial statement (NYSUCQ § 15), prior work experience (NYSUCQ § 10–14), and a disclosure of previous criminal or regulatory actions against the contractor. NYSUCQ § 16. The completed form is evaluated by the Contract Management Bureau of the SDOT (NYSUCQ Preamble), which will notify the contractor of whether it has been successfully qualified.

[61] MANUAL § 2.4.2.2.4.

[62] MANUAL § 2.4.2.2.4. Grantees are not required to document the construction of a qualified list, nor are they required to justify the placement of a product or bidder on such a list, but the Manual recommends that written records be kept in case a decision is challenged. MANUAL § 2.4.2.2.4. Once a list is assembled, however, the FTA does mandate that the list be kept current and include enough qualified sources to ensure full and open competition. FTA C. 4220.1E para. 8.d.

[63] 49 C.F.R. § 18.36(c)(4) (2003). FTA C. 4220.1E para. 8.d. Under LACMTA's prequalification process, a business must submit a "completed, executed, and notarized application" containing all required information no later than the date of bid opening or the due date for proposals for the business's bid or proposal to be considered. LA MANUAL § 2.12.B. LA MANUAL § 2.12.B., prequalification. If a prequalification application is denied, the firm has 10 days from the date of notification to file a written appeal with the LACMTA Review Panel. LA MANUAL § 2.12.3. The appellant may present new evidence to the Review Panel for consideration. LA MANUAL § 2.12.B. The decision of the Review Panel is final and may not be appealed. LA MANUAL § 2.12.B.

merely to give an interested party an opportunity to qualify.[64] A grantee considering use of either a qualified products list or a qualified bidders list should first examine whether the product or service would customarily be prequalified. This consideration is important, as while pre-qualification can be a useful filtering technique, it makes it more difficult for new firms to enter the field, thereby reducing competition.

*j. Procurement and Awards Process*

At this stage, the grantee should consider what sort of process to use for making the procurement: micro-purchase, small purchase, sealed bid, competitive proposal, or sole source.

A micro-purchase is a procurement of $2,500 or less.[65] Competitive quotations are not required if the grantee determines an offered price is fair and reasonable.[66] The purchase is exempt from "Buy America" requirements.[67] (See Section 5.C.3 below for a further discussion of "Buy America".) There should be an effort to equitably distribute such procurements among suppliers.[68] The only required documentation is a determination that the price is fair and reasonable and a showing of how this determination was reached.[69]

The principles governing a small purchase procurement (i.e., one between $2,500 and $100,000)[70] are similar to those concerning a micro-purchase. The key exception is that price/rate quotations must be obtained from an "adequate number" of sources.[71]

The use of sealed bids is recommended where the anticipated price will exceed the small purchase threshold (currently $100,000)[72] and the intent is to award a "firm fixed-price contract."[73] FTA Circular 4220.1E states that for the use of sealed bids, the following conditions should be met:

1. A complete, adequate, and realistic specification or purchase description is available;
2. Two or more responsible bidders are willing and able to compete effectively for the business;
3. The selection of the successful bidder can be made primarily on the basis of price; and
4. No discussion with the bidders is needed.[74]

Once the grantee has decided to make the award through the sealed bids process, it is obligated to meet a number of FTA requirements. The invitation for bids (IFB) must be publicly advertised in a manner calculated to produce an adequate number of bidders from amongst known suppliers.[75] As a practical matter, this does not limit publication of the legal notice to a single publication. For example, it would be imprudent for most transit systems to publish advertisements for the procurement of rolling stock solely in the local newspaper, for publication in trade journals is ordinarily more effective.

The solicitation period is required to be sufficiently long to permit interested parties time to prepare their bids.[76] The IFB, which may include pertinent attachments, shall provide specifications for the items or services sought, and those specifications must be sufficiently precise for bidders to be able to properly formulate bids based on the specifications or sources incorporated by them.[77] All bids are required to be opened publicly at the time and place advertised.[78] The lowest responsive and responsible bidder will be given a firm fixed-price contract.[79] Factors such as discounts, transportation costs, and life-cycle costs may be considered in determining which bid is lowest if the bid advertisement has specified that those factors would be so considered.[80] Any or all bids may be rejected if there is a sound documented business reason.[81]

The use of competitive proposals is recommended where the anticipated price will exceed the small purchase threshold (currently $100,000), the procurement is of a complex nature requiring discussion with the offerors or otherwise does not fall within the suggested parameters of the sealed bid process above, and the intent is to award a firm fixed-price contact or a "cost reimbursement type contract."[82] Cost reimbursement

[64] MANUAL § 2.4.2.2.4.

[65] FTA C. 4220.1E para. 9.a.

[66] FTA C. 4220.1E para. 9.a.

[67] FTA C. 4220.1E para. 9.a.

[68] FTA C. 4220.1E para. 9.a. LACMTA also requires that noncompetitive small purchases be distributed equitably among available suppliers when possible or appropriate. LA Manual 10.4.E.

[69] FTA C. 4220.1E para. 9.a.

[70] FTA C. 4220.1E para. 9.b.

[71] FTA C. 4220.1E para. 9.b. Circular 4220.1E does not expressly state that small purchase procurements are exempt from "Buy America" requirements; however, FTA has recognized such an exemption as a general public interest waiver to "Buy America." *See* 56 Fed. Reg. 932 (1991), as amended at 60 Fed. Reg. 37,930 (1995) and 61 Fed. Reg. 6300 (1996).

[72] *See* Manual § 2.4.2.1.

[73] 49 C.F.R. § 18.36 (d)(2) (2003). A firm fixed-price contract establishes a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. It is appropriate for procurements of commercial items or supplies and services that can be clearly defined with either performance/functional specifications or design specifications, and where performance uncertainties do not impose unreasonably high risks on the contractor. MANUAL § 2.4.3.1.

[74] FTA C. 4220.1E para. 9.c(1).

[75] 49 C.F.R. § 18.36(d)(2)(ii)(A) (2003). FTA C. 4220.1E para. 9.c(2)(a).

[76] FTA C. 4220.1E para. 9.c(2)(a).

[77] FTA C. 4220.1E para. 9.c(2)(b).

[78] FTA C. 4220.1E para. 9.c(2)(c).

[79] FTA C. 4220.1E para. 9.c(2)(d).

[80] FTA C. 4220.1E para. 9.c(2)(d). Payment discounts may only be used to determine the low bid if previous experience indicates that such discounts are ordinarily taken advantage of. FTA C. 4220.1E para. 9.c(2)(d).

[81] FTA C. 4220.1E para. 9.c(2)(e).

[82] FTA C. 4220.1E para. 9.d. A cost reimbursement type contract is one in which the grantee does not contract for the performance of a specified amount of work for a predetermined price, but agrees instead to pay the contractor's reasonable,

type contracts may be of either completion form or term form.[83] If competitive proposals are to be used, the RFP must be publicized in a similar manner as the sealed bid process, and all evaluation factors and their relative importance must be identified in the advertisement.[84] The grantee shall have a procedure in place prior to the advertisement for conducting technical evaluations of the proposals submitted and selecting a winning proposal.[85] Proposals should be solicited in a way that will produce a response from a sufficient number of offerors to achieve full and open competition.[86] Finally, awards are to be made to the responsible offeror whose proposal is most advantageous to the grantee's program with price and other factors considered.[87]

The last form of award process is the sole source procurement, sometimes called "procurement by noncompetitive proposal."[88] As its name implies, a sole source award is usually made through solicitation of a single firm, although it may also be made in the context of a sealed bid/competitive proposal procedure where there is only one responsible respondent.[89] The sole source procurement procedure is also used in the event of contract amendments or change orders that exceed the scope of the original contract,[90] or where options that were not evaluated as part of a sealed bid/competitive proposal procedure are now being exercised.[91] A sole source procurement may only be used where a contract is not feasible under micro/small purchases, sealed bids, or competitive proposals, and at least one of the following circumstances apply:

1. The item is available only from a single source;
2. There is a public exigency or emergency[92] for the requirement that will not permit a delay resulting from competitive solicitation;
3. The FTA authorizes noncompetitive negotiations;
4. After solicitation of a number of sources, competition is determined to be inadequate;[93] or
5. The item is an associated capital maintenance item as defined by 49 U.S.C. § 5307(a)(1) that is procured directly from the original manufacturer or supplier of the item to be replaced. The grantee must first certify in writing to FTA that such manufacturer or supplier is the only source for the item and that the price to be paid is no higher than that paid by similar customers.[94] A cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits is required once the procedure has been justified.[95]

There is also a third form of contract, aside from the firm fixed-price and cost reimbursement varieties—the "time-and-materials" contract.[96] The Manual treats this form of contract separately, as FTA strongly discourages its use.[97] A grantee may only use a time-and-materials contract after making a determination that no other sort of contract is suitable.[98] Furthermore, the contract must specify a price ceiling the contractor may not exceed except at its own expense or with a written contract modification from the grantee.[99] If a time-and-

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allocable, and allowable costs of performance, regardless of whether the work is completed. The grantee will consequently assume a high risk of incurring cost overruns, while the contractor is veritably shielded from financial loss. Contracts of this sort are appropriate when the grantee is unable to accurately describe the work to be done or where there is an inability to accurately estimate the costs of performance. A cost reimbursement type contract is best suited to large projects with many complex requirements. MANUAL § 2.4.3.2.

[83] MANUAL § 2.4.3.2. The completion form describes the scope of work by specifying an end product or definite goal to be achieved. This form obligates the contractor to finish the work and deliver the final item as a condition for payment of the entire fee. Failure to do so will permit the grantee to reduce the amount paid. Conversely, the term form defines the work in general terms and obligates the contractor to expend a specified level of effort for a stated time period. The fee is payable at the expiration of the stated time period if the contractor has met the required level of effort. Extension of the time period, unless the contractor had failed to use the required amount of effort, will constitute a new procurement and require the process to be repeated. MANUAL § 2.4.3.2. In the case of either type of cost contract, the grantee should verify that the contractor has an adequate accounting system to segregate project costs and reasonably apportioned overhead from other company activities. MANUAL § 2.4.3.2.

[84] FTA C. 4220.1E para. 9.d(1).

[85] FTA C. 4220.1E para. 9.d(3).

[86] FTA C. 4220.1E para. 9.d(2).

[87] FTA C. 4220.1E para. 9.d(4).

[88] 49 C.F.R. § 18.36(d)(4) (2003).

[89] FTA C. 4220.1E para. 9.h.

[90] FTA C. 4220.1E para. 9.h.

[91] FTA C. 4220.1E para. 9.i(l).

[92] "Emergency" generally means imminent danger to persons or property of such a nature that insufficient time exists for a formally advertised sealed bid or competitive negotiation procurement. Poor planning does not constitute an emergency.

[93] 49 C.F.R. § 18.36(d)(4)(i) (2003).

[94] FTA C. 4220.1E para. 9.f(1).

[95] FTA C. 4220.1D para. 9.h(l).

[96] 49 C.F.R. § 18.36(10) (2003). A time-and-materials contract is used for obtaining supplies or services, with provisions for the payment of labor costs on the basis of fixed hourly billing rates that must be specified in the contract. The rates include wages, indirect costs, general and administrative expenses, and profits. While the hourly rates are similar to a fixed-price contract, the overall price of the contract is determined in a manner similar to cost-type contracts, as the number of hours worked is flexible. Materials are to be billed at cost, unless the contractor ordinarily sells materials of the type needed in the course of its business. In the latter case, the cost should reflect the price of the materials as listed in catalogs or price lists in effect at the time the material is supplied. MANUAL § 2.4.3.3.

[97] FTA C. 4220.1E para. 7.j. The FTA finds this form of contract undesirable because it creates a perverse incentive for the contractor to work as slowly as possible, thereby maximizing the number of hours worked, and consequently diminishing productivity. MANUAL § 2.4.3.3.

[98] FTA C. 4220.1E para. 7.j(1).

[99] FTA C. 4220.1E para. 7.j(2).

materials contract is required, care must be taken to avoid inadvertently converting it into an illegal "cost plus percentage of cost" form of contract.[100] For example, a time-and-materials contract may be innocently transformed into the illegal "cost plus percentage of cost" form by simply breaking out overhead and profit from labor costs and billing them at separate rates based on labor costs incurred.[101] Because FTA so strongly disapproves of the use of time-and-materials contracts, such contract could conceivably be a target for both a bid protest and scrutiny during Triennial Review. Thus, grantees should pay particular attention to careful documentation in the procurement file of the decision and justification for the use of a time-and-materials contract.

*k. Payment Systems*

Having determined the form of contract to be used, the grantee should then assess what sort of payment system should be employed. There are three principal payment systems: (1) advance payments, (2) partial payments, and (3) progress payments. FTA ordinarily will refuse to authorize, or participate in, the funding of payments to a contractor before the contractor has incurred any costs.[102] However, FTA may give permission to use advance payments if certain criteria are met:

1. The contractor is considered essential to the public interest;[103]

2. There are no other forms of financing available; and

3. The contractor is unable to perform without advance payments.[104]

The partial payments system is FTA's preferred method of paying contractors and should be used whenever the contract can be structured in terms of incremental stages or deliveries and there are appropriate acceptance criteria for the items or services to be obtained.[105] In effect, the grantee is making a "final" payment for each part of the contract and the parts are treated as though they are quasi-independent.

The progress payments system may be appropriate if the contractor will not be able to bill for the first deliveries or performance milestones for a substantial period after beginning work, or where the contractor's expenditures prior to such "firsts" will have a significant impact on its working capital.[106] A grantee choosing to use progress payments must follow two major requirements:

1. Progress payments are to only be made to the contractor for costs incurred in the performance of the contract; and

2. The grantee must obtain title to property (materials, vehicles, etc.) for which the payments are made. Alternative security for progress payments by irrevocable letter of credit or equivalent means to protect the grantee's interests may be used in lieu of obtaining title.[107]

There are two types of progress payments—those based on costs and those based on completion of work.[108] While FTA does not impose specific restrictions on the use of the respective types of progress payments, the Manual does make a number of recommendations based on federal rules. Where the progress payments are to be conditioned on costs, the payment rate is usually 80 percent of costs for large businesses and 85 percent for small businesses, with total payments not to exceed 80 percent of the total contract price prior to completion.[109] While the method of conditioning payments on the percentage of work completed is permissible in most federal contracts,[110] FTA cautions grantees against using it, as there is a risk that the grantee may make payments to the contractor in excess of actual costs incurred to that point in time, creating a *de facto* advance payment.[111] Thus a grantee should use the cost-based type of progress payments unless it can ensure that the percentage of work completed will have a strong correlation to the contractor's actual costs.[112]

## 2. Advertisement for Bids and Proposals

FTA requires that all advertisements include a "clear and accurate description" of the requirements for the item or service sought, and may not contain any features that will unduly limit competition.[113] Furthermore, the advertisement may set forth the qualitative

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[100] A cost plus percentage of cost contract is generally defined as one where the contractor's compensation (or some fraction thereof) is calculated as a percentage of the cost of performance. This results in directly rewarding the contractor for cost overruns. MANUAL § 2.4.3.5.

[101] MANUAL § 2.4.3.3.

[102] FTA C. 4220.1E para. 12.a.

[103] *E.g.*, where it is essential to keep the contractor in operation for the purpose of maintaining a competitive market and the contractor is likely to fold without advance payment for the work.

[104] 49 C.F.R. §§ 18.3, 18.20(b)(7), 18.21, 18.52 (2003). MANUAL § 2.4.4.2. *E.g.*, where a contractor must incur substantial out-of-pocket expenses for supplies or must retool its factory prior to commencing work.

[105] As the Manual states

> Partial payments…*should be used* whenever the contract can be structured in terms of incremental stages or deliveries and there are appropriate acceptance criteria for the supplies, services or completed subsystems of a larger system. In other words, when the Agency can safely inspect, test and accept these units and make a "final" payment for those items delivered, without having to worry about their functioning as part of a larger system still under construction, then partial payments *should be established* in the contract.

MANUAL § 2.4.4.1 (emphasis added).

[106] MANUAL § 2.4.4.3.

[107] FTA C. 4220.1E para. 12.b.

[108] MANUAL § 2.4.4.3.

[109] *Id.*

[110] It is in fact standard for federal construction contracts. 48 C.F.R. § 52.232-5 (2001).

[111] MANUAL § 2.4.4.3.

[112] *Id.*

[113] FTA C. 4220.1E para. 8.c(1).

nature of the item or service and also give the minimum essential characteristics and standards to which it must conform to be satisfactory.[114] However, "[d]etailed product specifications should be avoided if at all possible."[115] If it is "impractical or uneconomical" to give clear and accurate descriptions of the requirements, a "brand name or equal" description may be used instead.[116] The bid advertisement may not contain any "exclusionary or discriminatory specifications."[117] Finally, there is also the peculiar provision enabling grantees to establish specifications for bus seats that exceed federally established standards, provided that such specifications are premised on a finding by a governmental authority of local requirements for safety, comfort, maintenance, and life-cycle costs.[118] While this summarizes the entire body of FTA bid advertising requirements,[119] the Manual has many recommendations on the subject.[120]

Generally, the more design details included in the advertisement, the more the grantee becomes responsible for the performance of the product. Conversely, the more the advertisement describes the performance or purpose of the product, the more responsible the contractor becomes for the functionality of the ultimate product.[121] Thus, a grantee should carefully consider what sort of specifications to include in the advertisement.[122] Unless a contract contains performance criteria that are shown to be impossible to attain, the grantee will not be liable for the additional costs a contractor incurs in attempting to meet those criteria.[123] Furthermore, if a specification is couched in terms of minimum performance (e.g., "must tolerate temperatures of at least 50° Celsius"), this does not convert the performance specification into one of design.[124] It is therefore desirable for the grantee to use performance, or minimum performance, criteria to the greatest extent feasible so as to diminish the risk of being forced to accept an unsatisfactory product that, nonetheless, meets the advertisement's design specifications. (However, the transit attorney must research state law on this topic prior to the specification being issued.) Advertisements may be posted generally and/or be sent directly to potential contractors as IFBs/Request for Proposals (RFPs), but must in either case be publicized in a manner calculated to encourage open competition.[125]

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[114] *Id*.

[115] *Id*.

[116] *Id*. See the "minimum needs doctrine" in § 5.01.01 above for a more complete discussion of the "brand name or equal" principle.

[117] FTA MA § 15.d (2000).

[118] 49 U.S.C. § 5323(e) (2001). Where a state or local government authority is using federal funds obtained under Title 49, Chapter 53 to acquire buses, the bid advertisement may feature passenger seat specifications that are equal to, or greater than, performance specifications prescribed by the Secretary. These specifications must be based on a finding by the state or local government authority about "local requirements" for safety, comfort, maintenance, and life-cycle costs. 49 U.S.C. § 5323(e) (2001).

[119] With respect to bids for vehicles, see 49 C.F.R. § 665.3 (2003).

[120] For purposes of comparison, LACMTA employs several different standards for bid advertisements, depending on the type of procurement being made. The general rule is that where a competitive procurement is being made, the advertisement must simply be made "in a manner reasonably likely to attract prospective bidders or proposers." LA MANUAL § 4.3.1.Q. This may be satisfied by advertising once or more in at least one newspaper of general circulation in the Los Angeles metropolitan area at least 10 days before bids or proposals are to be received. LA MANUAL § 102.1. Where an emergency situation exists, the 10-day minimum may be waived as long as proper justification is recorded in the procurement file. LA MANUAL § 11.9.

[121] MANUAL § 3.1.

[122] MANUAL § 3.1.1. Desired specifications should be divided into "design specifications" and "performance specifications," i.e., those that describe the actual product or service and those that describe the purpose/goal of the product or service. Wherever possible, performance specifications should be used, as this diminishes the likelihood of the grantee being found to have created an implied warranty that a particular design is satisfactory in and of itself. MANUAL § 3.1.1.

[123] MANUAL § 3.1.2.

[124] *Id*.

[125] For LACMTA, where sealed bidding is being used to make the procurement, an IFB must be issued. LA MANUAL § 7.2. An advertisement must be placed in accordance with the general advertising rule. LA MANUAL § 7.2.C. The user department and project manager will develop technical specifications for the IFB, which are subsequently reviewed by the contracting officer for completeness and accuracy prior to issuing the IFB. LA MANUAL § 7.2. The IFB must include instructions to bidders concerning submission requirements (including the time and date for delivery and the address to which the bids are to be delivered), the purchase description, delivery, or performance schedule, and a statement indicating whether the lowest bid price or lowest evaluated bid price will be used to determine the award. LA MANUAL § 7.4. If the lowest evaluated bid price will be used for the basis of the award, the criteria for determining the final price must be included in the IFB. LA MANUAL § 7.4.1 ("Lowest evaluated bid price" weighs price-related factors such as discounts, transportation costs, and life-cycle costs when determining which bid is lowest. LA MANUAL § 7.2.) Certain specifications must be included in all IFBs as appropriate for purchase (including quantities of items, quality assurance, warranty requirements, etc.) or public works contracts (including contact milestones, liquidated damages, and California prevailing wage and apprenticeship requirements). *See* LA MANUAL §§ 7.4.1, 7.5. Because of the more informal nature of competitively negotiated contracting, LACMTA's advertising requirements for RFPs are simpler than for sealed bids. The contracting officer has the discretion to determine whether a general advertisement prior to issuing a RFP is necessary. Factors that the contracting officer may consider in making this decision include: (1) developing or identifying interested sources; (2) requesting preliminary information from interested sources based on a general description of the supplies and services involved; (3) explaining complicated specifications and requirements; or (4) aiding interested sources in submitting proposals. LA MANUAL § 8.4. If a general advertisement is made, it must be made in a newspaper of general circulation and trade publications, if deemed appropriate. LA MANUAL § 8.4.8. The contracting officer must provide a copy of

While FTA does not specifically discourage grantees from using consultants to prepare specifications,[126] it imposes significant restrictions on the practice because doing so poses a potential risk of a prohibited "organizational conflict of interest."[127] If a consultant must be used, the grantee should determine whether the consultant has a financial or organizational relationship with a potential supplier, which could result in a slanting of specifications calculated to benefit that supplier.[128] If the consultant could compete for the grantee's procurement for which it designed the specifications, the consultant should be barred from doing so.[129] The Manual also recommends that the grantee obtain from the consultant a listing of all its past, present, or planned interests with any organizations that may compete directly or indirectly for the procurement or any related/similar procurements for which the consultant is providing services.[130] If the consultant does have such an interest, it is not immediately barred from rendering its services, but must explain why this will not result in an organizational conflict of interest, and the grantee shall carefully examine the consultant's subsequent work and interests to ensure that no such conflict is developing.[131]

As a matter of best practice, the transit attorney must keep three points in mind. First, the transit attorney should caution the grantee that selection of the consultant for the initial contract could result in the consultant being ineligible to submit a proposal for the primary project. Second, the transit attorney should carefully examine FTA's decisions as to conflicts of interest. Finally, the transit attorney must also consult state conflict of interest decisions (e.g., by state attorney general) and ethics statutes to ensure compliance by both the consultant and the grantee. These issues are developed in greater detail in Section 6—Ethics.

The Manual suggests that prior to drafting the actual advertisement, the grantee should conduct a market survey to determine what sources can potentially meet its essential requirements and prepare the advertisement's specifications in such a manner as to maximize the number of sources that could compete for the contract.[132] The market survey should be conducted as circumspectly as possible so as to avoid disclosing any information that could give a supplier an unfair advantage in bidding for the contract.[133] Having made a determination as to the possible sources for the procurement and the performance or design criteria that will be used, the grantee should consider various supplemental specifications that are normally advisable to include in bid advertisements.[134] For the actual drafting of the advertisement, the Manual recommends the use of concise sentences, decimals in place of fractions, and avoidance of colloquialisms or unfamiliar "jargon."[135] While not specifically mentioned in the Manual, the advertisement should consistently use the same measurement system (i.e., all specifications should be in metric or in standard units).[136] The Manual gives special, albeit very brief, consideration to the preparation of advertisements for construction projects.[137]

If a bidder believes the performance criteria are unrealistic, the bidder should notify the agency before the bids are due in; accordingly, the agency should have language in the bid package requesting that the bidders submit questions/requests for clarification by a certain date so that issues like this can be addressed before the bids are submitted.

Finally, where the advertisement includes services, the advertisement should feature a "statement of work."[138] The statement should include, but is not limited to, a detailed list of all data, property, and services that will be provided by the grantee to the contractor for assisting its performance; schedules for completion/submission of work; and all applicable standards with which the contractor must comply.[139] If the contract will be for services on a "level of effort basis," the statement should define the categories of labor sought, the number of hours for each, and the minimum years of experience and licensing requirements for each.[140]

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the RFP to all parties responding to the general advertisement and to any other parties upon their request, as well as contact an adequate number of prequalified suppliers to have maximum competition. LA MANUAL § 8.4.C.

[126] *Cf.* MANUAL § 3.2.

[127] FTA C. 4220.1E para. 8.a(5). The Circular defines an "organizational conflict of interest" as being where, because of other activities, relationships, or contracts, a contractor is potentially unable to render impartial assistance or advice to the grantee; a contractor's objectivity in performing the contract work is or might be otherwise impaired; or a contractor has an unfair advantage. FTA C. 4220.1E para. 8.a(5).

[128] MANUAL § 3.2.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] MANUAL § 3.3.

[133] *Id.*

[134] These include, but are not limited to: (1) reliability and quality assurance requirements; (2) criteria for inspecting/testing of product prior to acceptance; (3) comprehensive spare parts list; and (4) training services and/or maintenance manuals. MANUAL § 3.3.

[135] *Id.*

[136] The use of the metric system is, in fact, required for procurements made with FTA funds. FTA MA § 30.

[137] MANUAL § 3.4. After first characterizing construction contracting as "forbidding and exotic," the Manual recommends obtaining the text *Construction Contracting* and the *Construction Contract Administration Manual* (specifically written for transit agencies) before attempting to draft an advertisement for a construction contract. MANUAL § 3.4. Interested readers may also wish to consult volume 1 of SELECTED STUDIES IN TRANSPORTATION LAW.

[138] MANUAL § 3.5.

[139] *Id.*

[140] *Id.*

### 3. Submission of Bids and Proposals

The Manual recommends that first and foremost when considering bid submissions a grantee should establish procedures for dealing with the late submission of bids.[141] However, state and local law may control this determination and must be consulted by the grantee. The general rule is that late bid submissions should not be considered at all.[142] Yet, absent state and local provisions to the contrary, there may be certain circumstances where acceptance of late bids that have not been delayed by the bidder itself may be necessary in the interests of equity.[143] Where such exceptions are permitted (such as accepting a bid delivered by certified mail, which was sent some amount of time prior to the due date), the bid advertisement must clearly state what those exceptions are and how they may be applied.[144] Regardless of whether such exceptions are permitted, the Manual advises that in any instance where a late bid is received, the grantee's contracting officer should contact its legal advisor, as a significant risk of protest or litigation usually accompanies any decision that concerns a late bid.[145] The transit attorney should notify the contracting officer to consult with the attorney before accepting a late bid.

To be complete and responsive, a bid must contain all required pieces of information and certification requested in the bid advertisement or incorporated therein.[146] Most of these will be contingent upon the specifics of the particular contract (such as time for performance or price), while others are required by federal law (such as "Buy America" certification).[147] Those that are contingent upon the specifics of particular contracts are of course outside the scope of this volume, while those required by federal law are discussed elsewhere herein. However, there is one federal requirement that specifically concerns the submission phase: the bid guarantee[148] for a construction contract.

FTA regulations require that for all construction contracts that exceed the federal government's simplified acquisition threshold,[149] a bidder must supply three types of bonds: a bid guarantee, a performance bond, and a payment bond.[150] The latter two are discussed below, in conjunction with bonding issues. However, the bid guarantee is truly a creature of the submission process. Each bidder must include a bid guarantee equal to 5 percent of the bid price for the contract.[151] The bid guarantee serves as assurance that if the bid is accepted, the bidder will execute all contractual documents as may be required within the time specified by the grantee.[152] The bidder may provide the bid guarantee in the form of a bid bond, a certified check, or other negotiable instruments.[153] The grantee may elect to follow its state bid guarantee requirements provided that they offer at least as much protection as FTA's regulations.[154]

The Manual notes that any requirement for a bid guarantee must be stated in the bid advertisement.[155] If the contract is being awarded through competitive bidding, failure to include the bid guarantee is a fatal defect in the bid, as the bidder could always choose not to submit the guarantee if the award would be on terms unfavorable to it.[156] If, however, competitive proposals are used to make the award, the absence of a guarantee is of little significance, as the contractors have many opportunities to withdraw from the process prior to the award.[157] Indeed, the Manual suggests that bid guarantees are not even necessary in a competitive proposals award process, even if performance and payment bonds will be required upon award.[158] The Manual, however, does not forbid the use of bid guarantees in a competitive proposal award process and, if the project is complex or technically difficult, inclusion of a bid guarantee may be a prudent practice for a grantee utilizing the competitive proposal award method. Once bid guarantees have been received, they should be securely stored pending the award.[159] Guarantees may represent a substantial monetary inconvenience to the bidders, and as such they should be returned to unsuccessful bidders as soon as possible.[160] Once the low bidder has met all contingencies, such as providing the performance and payment bonds or obtaining any required insurance, its bid guarantee should be returned as well.[161]

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[141] MANUAL § 4.3.3.1.

[142] *Id*.

[143] *Id*.

[144] *Id*.

[145] *Id*.

[146] *Id*.

[147] MANUAL § 4.3.3.2.

[148] 49 C.F.R. § 18.36(h)(1) (2003) uses the spelling "guarantee." The Circular and the Manual use the spelling "guaranty."

[149] Currently $100,000. MANUAL § 4.3.3.3.2. Individual states and localities may have lower thresholds, which would have the effect of lowering the dollar level at which one or more of these bonds may be required. The FTA's requirements do not preempt more stringent state and local requirements in this area of procurement.

[150] 49 C.F.R. § 19.48 (2003).

[151] 49 C.F.R. § 18.36(h)(1) (2000).

[152] *Id*.

[153] *Id*. Interestingly, cash cannot be used for the bid guarantee, unlike in some states.

[154] MANUAL § 4.3.3.3.2.

[155] *Id*.

[156] *Id*.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] *Id*.

[161] *Id*.

### 4. Bid Mistakes and Withdrawals [162]

The Manual identifies four general categories of bid mistakes common to all forms of bids:[163]

1. Minor informalities or irregularities in bids discovered prior to award;

2. Obvious or apparent clerical mistakes discovered prior to award;

3. Mistakes other than the first two categories discovered prior to award; and

4. Mistakes discovered after award.[164]

Minor informalities or irregularities are typically those that are merely a matter of form and not of substance.[165] They are immaterial defects[166] that can be corrected or waived without being prejudicial to other bidders. A proper remedy is for the contracting officer to either give the bidder an opportunity to correct the defect or to waive it, whichever is in the best interests of the agency.[167]

Obvious or apparent clerical mistakes are the most common form of error that will be encountered in procurement situations, including such things as transposed numbers and typographical errors.[168] If a contracting officer knows or has reason to know that a mistake of this sort has been made, then it may not be possible to accept the bid in good faith.[169] The contracting officer should notify the bidder and request that it verify the terms of its bid, but the contracting officer should disclose as little information as possible to make sure the bidder does not "tailor" any correction to fit the award criteria.[170] Once verification has been received, the contracting officer may correct the mistake.[171] However, because of the risk of a bid protest, it is recommended that the contracting officer attach the verification to the original bid, reflect the correction in any award document, and place a note in the procurement file explaining the action.[172] A correction should only be allowed if the bid was otherwise responsive, and a correction may only permit displacing a lower bid if the evidence of the mistake and the "bid actually intended" are substantially determinable from the advertisement and bid itself, as opposed to evidence supplied by the bidder with the benefit of hindsight.[173] It is important that any "correction" or "supplemental information" be strictly limited to information that existed as of the due date for bids, so as to minimize the risk of a protest based upon a claim that the bidder had an unfair competitive advantage. Unless internal procedures have already been adopted by the grantee to define the scope of the contracting officer's authority in this situation, the grantee's legal advisor should notify all contracting officers that they should request legal guidance before undertaking any of the above actions.

Mistakes other than those described above that are discovered prior to award may give grounds for the award to be withdrawn.[174] The bidder should be allowed to withdraw if the mistake is clearly evident, but the intended correct bid is not, or if the bidder submits proof that clearly and convincingly demonstrates a mistake was made.[175] The contracting officer may decide to correct the bid and not permit it to be withdrawn if the mistake is clearly evident and the bid actually intended is evident as well, or where the bid, both as originally submitted and as corrected, is the lowest bid received.[176] Again, in the absence of preexisting policies defining the contracting officer's authority, the grantee's legal advisor should be contacted before the contracting officer proceeds.

The topic of mistakes discovered after award is particularly problematic, and the contracting officer should always contact the grantee's legal advisor before proceeding.[177] Both FTA requirements and state and local law will have bearing on the decision. Aside from that, the contracting officer is faced with two major options. In the first option, no correction may be permitted except where the contracting officer makes a written determination that it would be unconscionable not to allow the bidder to make the correction.[178] In the second option, a correction may be made by a contract amendment if correcting the mistake would be favorable to the grantee without changing the essential requirements of the contract.[179] However, a contract amendment under the guise of "correcting a mistake" cannot be used to award the contract to a bidder other than the low bid-

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[162] The Manual helpfully comments, "It may not be as certain as death and taxes, but inevitably and unfortunately, a mistake may be discovered in your low bid." MANUAL § 4.4.5.

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] A defect is "immaterial" when its effect on price, quantity, quality, or delivery is negligible when compared with the total cost or scope of the requirement being procured. MANUAL § 4.4.5. Examples would include failing to provide the proper number of copies of the bid or submitting the bid on legal-sized paper rather than letter-sized if the advertisement so instructed.

[167] MANUAL § 4.4.5.

[168] *Id*.

[169] *Id*.

[170] *Id*.

[171] *Id*.

[172] *Id*.

[173] *Id*.

[174] *Id*.

[175] *Id*. The term "clear and convincing" has a specific meaning in a legal context. It is unclear whether the FTA intends to suggest that grantees should rely on the legal definition or if it simply means the proof must be very strong. Thus it would be advisable to contact the appropriate regional FTA office for confirmation before proceeding on this matter.

[176] *Id*.

[177] *Id*.

[178] *Id*. "Unconscionable" is a very strong standard that leaves little room for doubt in the eyes of the objective reviewer.

[179] *Id*. This is the approach recommended in the Federal Acquisition Regulations, 40 C.F.R. §14.604–4 (a) and (b).

der or to make an otherwise nonresponsive bid into a responsive one. The Manual holds there is no "best practice" in this category of mistake.[180]

Other than for mistakes, bidders may have numerous other reasons for wishing to withdraw their bids. Where the bidder wishes to withdraw its bid before opening, it should be permitted to do so unless the bid advertisement has included a provision barring withdrawals after submission.[181] A provision barring withdrawals after submission should also specify a time range after the bid opening in which the grantee will accept one of the bids or reject all of them.[182] This precludes bidders from attaching "escape clauses" to their bids, whereby they dictate the circumstances under which they may withdraw a bid.[183]

### 5. Contract Awards and Rejections of Bids and Proposals

FTA's best practices for the award of contracts are quite basic. Where sealed bidding is employed, and a fixed-price contract is to be used, the contract must be awarded to the responsible bidder[184] whose bid is lowest in price and conforms to the terms and conditions of the invitation or advertisement.[185] If the advertisement has so stated, price-related factors may be considered, such as discounts and transportation costs, in determining the lowest priced bid.[186] If competitive proposals are used, the award must be made to the responsible offeror whose proposal is "most advantageous" to the grantee, considering price and all other factors that were identified in the advertisement for proposals.[187] Where possible, debriefings of unsuccessful offerors should be conducted in the same manner as is used for federal contracts.[188] For both forms of contracts, a cost or price analysis is required by FTA prior to award.[189] (This is in addition to the preparation of any independent estimates of the contract prior to receipt of bids or proposals.)[190] FTA Circular 4220.1E requires that if a public announcement of any procurement (including construction projects) having a value of $500,000 or more is made, the grantee must include the amount of federal funds used and the percentage of the total procurement cost those funds represent.[191] In practice, such information is usually only given where announcements are part of a regular procedure, although the Circular makes no allowance for that.

Despite the elaborate web of FTA regulations, for all intents and purposes there are virtually no court cases truly dealing with transit procurements in a federal context,[192] as FTA's procurement regulations do not give

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[180] *Id*.

[181] MANUAL § 4.4.6.

[182] *Id*. An example of such a clause is, "All bids shall remain in effect for sixty days following opening and may only be withdrawn upon one of the following occurrences: 1)…"

[183] For example, if the advertisement contains no reference to how long the grantee has to decide whether to accept a bid, a bidder may include a provision that states that its bid is only effective if accepted within 24 hours of being opened. If the grantee lets that time lapse, then under the principle of common law contracts, instead of being an acceptance, the grantee's response becomes a counter-offer, which the bidder is free to accept or reject at will.

[184] A bidder is generally considered responsible if it "possesses the ability to perform successfully under the terms and conditions of the proposed procurement." MANUAL § 4.4.4. This may include: (1) adequate financial resources to perform the contract; (2) the ability to meet the required delivery or performance schedule; (3) a satisfactory performance record; (4) a satisfactory record of integrity and business ethics; (5) the necessary organization, experience, accounting, and technical skills; (6) compliance with applicable licensing and tax laws; (7) the necessary production, construction, or technical equipment and facilities; (8) compliance with affirmative action and disadvantaged business program (DBE) requirements; and (9) any other qualifications or eligibility criteria necessary. MANUAL § 5.1.1. DBE requirements are discussed below, in Section 10.

[185] MANUAL § 4.4.0.

[186] *Id*. *See also* FTA C. 4220.1E para. 9.c.(2)(d) (stating "A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest.")

[187] MANUAL § 4.5.1.

[188] MANUAL §§ 4.5.8 and 5.3.2.

[189] FTA C. 4220.1E paras. 10.a and b. A "cost analysis" is the review and evaluation of the separate cost elements and proposed profit of a bidder's cost data. It is generally performed to determine the degree to which the proposed cost, including profit, represents what the performance of the contract should cost, assuming reasonable economy and efficiency. "Price analysis" concerns the examination and evaluation of a proposed price without evaluating its separate cost and profit elements. It is based on data that is verifiable independently from the bidder's data. MANUAL § 5.2. Cost analysis must be used whenever "adequate" price competition is lacking or for sole source procurements, including contract modifications, unless the rationality of the price can be determined on the basis of a catalogue or market price of a commercial product "sold in substantial quantities to the general public" or on the basis of a price fixed by statute or regulation. MANUAL § 5.2. The expenses must be allowable under federal guidelines. FTA C. 4220.1E para. 10.d. (See § 5.01.12 for more on allowable costs.)

[190] *See* Manual § 5.2 *and* FTA C. 4220.1E para. 10.

[191] FTA C. 4220.1E paras. 14.a and b.

[192] The exception is the Washington Metropolitan Area Transit Authority (WMATA), which, as an entity of Washington, D.C., is considered by courts to have a "special federal interest" that allows it to be treated as a federal agency whose procurement actions are therefore reviewable under the Administrative Procedure Act (APA). *See, e.g.*, Seal & Co., Inc. v. Washington Metro. Area Transit Auth., 768 F. Supp. 1150, 1155 (E.D. Va. 1991). *But see* Elcon Enterprises, Inc. v. Washington Metro. Area Transit Auth., 977 F.2d 1472, 1479 (D.C. Cir. 1992), where the court expressed doubts about whether WMATA truly should be treated as a federal agency, but that issue was not adequately disputed on appeal to be the subject of the court's decision. Some other courts have suggested that

rise to a federal private cause of action.[193] The most often cited case for the proposition that no such private cause of action exists is *24 Hour Fuel Corp. v. Long Island Railroad Co*.[194] In May 1995, the plaintiff, 24 Hour Fuel Corp., received an invitation to bid on a contract to supply the Long Island Railroad (LIRR) with diesel fuel for a 3-year period.[195] In preparing its bid advertisement, LIRR relied on an industry publication to establish the base prices it was willing to accept.[196] After bids were opened, and the plaintiff was found to have the low bid, another bidder discovered that the industry publication used by LIRR was improperly prepared.[197] Instead of giving an average price (as is ordinarily done), the publication quoted a single firm's price.[198] Concerned that the price was not representative and could expose it to unexpected price changes, LIRR cancelled the bidding process prior to formally awarding the contract to the plaintiff, recalculated the acceptable base price, and readvertised the contract.[199] The plaintiff won the second bid, but as a result of the recalculation of the base price, received the contract on less favorable terms.[200] Subsequently, the plaintiff filed suit against LIRR requesting that its original bid be reinstated on the grounds that LIRR violated FTA regulations, specifically 49 C.F.R. § 18.36 (1995), requiring an award to the low bidder, and for failing to give "a sound documented reason" for rejecting the original bids.[201]

The court assumed that federal question jurisdiction existed as the complaint was predicated on the alleged violation of a federal regulation.[202] From there the court had to determine whether a private right of action existed under the applicable regulation.[203] The court noted that rights to private causes of action must either be explicitly stated in a statute or regulation or implicit in that "the apparent intent of Congress or administrative agencies is to have individuals use them to litigate."[204] Since 49 C.F.R. Part 18 does not explicitly allow for a private cause of action, the court found it necessary to apply the four pronged *Cort v. Ash* test in order to determine whether a private cause of action existed:[205]

1. Is the plaintiff a member of the class for whose special benefit the statute was enacted?
2. Is there any indication of legislative intent to either create such a remedy or to deny one?
3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy?, and
4. Is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?[206]

Furthermore, the second question must be the focus of the court's "central inquiry."[207]

The court found that the plaintiff failed the first question, as the regulations were created for the protection of FTA and the federal government, not other bidders.[208] Next, the court found the plaintiff also failed the second and most determinative question, as the regulation specifically states that grantees are to use their own procurement procedures as proscribed by state and local law.[209] The court also found that there was nothing in the "underlying purposes of the legislative scheme" to suggest a private cause of action under the third question.[210] Indeed, the only time the regulation even referred to remedies for violations was in the context of describing what actions FTA may take against a grantee that violates regulations.[211] Finally, the court found the plaintiff failed the fourth question as well, as it could have brought a state law claim or filed a com-

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suits under APA could be brought in other instances against the FTA in conjunction with a grantee's actions (*see, e.g.,* Coalition for Safe Transit, Inc. v. Bi-State Dev. Agency, 778 F. Supp. 464, 467 (E.D. Mo. 1991)); however no such suits appear in the reporters.

[193] *See, e.g.*, GFI Genfare v. Regional Transp. Auth., 932 F. Supp. 1049 (N.D. Ill. 1996), failure to use competitive bidding in violation of FTA regulations does not give right of action to excluded bidder; *see also* Razorback Cab of Ft. Smith, Inc. v. Flowers, 122 F.3d 657 (8th Cir. 1997), failure to comply with notice and hearing regulations does not give right of action to impacted party; Rapid Transit Advocates, Inc. v. Southern California Rapid Transit Dist., 752 F.2d 373 (9th Cir. 1985), failure to comply with planning regulations does not give right of action to impacted party; A.B.C. Bus Lines, Inc. v. Urban Mass Transp. Admin., 831 F.2d 360 (1st Cir. 1987), failure to comply with regulations restricting competition with private transportation companies does not give right of action to a private transportation company so affected; Allandale Neighborhood Ass'n v. Austin Transp. Study Policy Advisory Comm., 840 F.2d 258 (5th Cir. 1988), failure to comply with planning regulations does not give right of action to impacted party; Evanston v. Regional Transp. Auth., 825 F.2d 1121 (7th Cir. 1986), failure to comply with regulations requiring public hearings does not give right of private action to the impacted parties; and Tulacz v. Federal Transit Admin., 1992 U.S. Dist. LEXIS 12511 (D. Or. 1992); failure to comply with regulations concerning public hearings and development planning does not give right of action to impacted party. However, see discussion *infra* of FTA-mandated protest procedures.

[194] 24 Hour Fuel Corp. v. Long Island R.R. Co., 903 F. Supp. 393 (E.D. N.Y. 1995).

[195] *Id*. at 394.

[196] *Id*. at 395.

[197] *Id*. at 395.

[198] *Id*. at 395.

[199] *Id*. at 395.

[200] *Id*. at 396.

[201] *Id*. at 397.

[202] *Id*. at 397.

[203] *Id*. at 397 (citing 49 C.F.R. § 18.36).

[204] *Id*. at 397.

[205] *Id*. at 397.

[206] *Id*. at 397 (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)).

[207] *Id*. at 397–98 (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979)).

[208] *Id*. at 398, noting that 49 C.F.R. § 18.1 (1995) specifically states that the purpose of the regulations is to establish uniform administrative rules for federal grants.

[209] *Id*. at 398 (quoting 49 C.F.R. § 18.36(b)(1) (1995)).

[210] *Id*. at 398.

[211] *Id*. at 398 (quoting 49 C.F.R. § 18.43(a)(5) (1995)).

plaint with FTA, which would have investigated LIRR's conduct.[212] In concluding the case, the court refused to take supplemental jurisdiction of any possible state claims on the grounds that it did not believe the plaintiff could prevail on them.[213] The court therefore granted summary judgment in favor of LIRR.[214]

With respect to the *24 Hour Fuel Corp.* court's comment about a disappointed party filing a complaint with FTA, the procedure for such complaints is found at 49 C.F.R. § 18.36(b)(12) (2001).[215] Grantees and subgrantees must have written protest procedures to handle and resolve disputes relating to their procurements and must notify FTA of any such protests.[216] A protestor is obligated to "exhaust all administrative remedies" with the grantee and subgrantee before filing a complaint with FTA.[217] FTA will review only complaints that allege violations of federal law or regulations and those that allege violations of the grantee's or subgrantee's own protest procedures for failure to review a protest.[218] Any other complaints will be referred to the grantee or subgrantee.[219] In the event that FTA concludes that a remediable violation has occurred, it may impose a wide variety of sanctions on the grantee or subgrantee.[220]

### 6. Indemnification and Suretyship

In contracting, particularly for construction or other high-value work, it is a common practice for the party letting the contract to require the party performing the work to provide some form of security against the possibility that the work will not be completed.[221] The security is typically given through the provision of an instrument that represents all or part of the agreed value of the work. This creates a trilateral relationship between the party that assumes liability for the performance (the surety), the party that owes the duty to perform (the principal), and the party to which the duty is owed (the obligee).[222] The instrument that creates this relationship and represents the surety's liability may be referred to generally as a "bond."[223]

A different yet allied concept is that of indemnification, which exists as a two-party agreement to cover losses or costs suffered from misperformance of the contract, rather than to complete the contract, as with a surety.[224] Thus while a surety is directly and immediately liable for nonperformance of the contract, an indemnitor becomes liable only after efforts to avoid or recoup losses have been unsuccessful.[225] The instrument of indemnification may also be known as a "bond"; however, in most instances of public contracting where a method of securing a contract is required, the use of a surety bond is mandated,[226] so the term "indemnity bond" will be used to distinguish it here.

FTA imposes bonding requirements on its grantees through regulations, the MA, and FTA Circular 4220.1E.[227] At first glance, FTA's bonding standards appear to be in a state of disrepair, with its regulations providing one standard, while the Circular prescribes another.[228] Current FTA regulations require that a payment bond be issued for 100 percent of the contract price for all construction or facility improvement contracts over the federal government's simplified acquisition threshold.[229] However, the Circular states that a

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[212] *Id* at 398.

[213] *Id*. at 399–400.

[214] *Id*. at 399–400.

[215] *See* FTA C. 4220.1E para. 7.l for a brief description of the protest procedure as described by the FTA to grantees.

[216] 49 C.F.R. § 18.36(b)(12) (2002). http://www.fta.dot.gov/library/admin/BPPM/ch11.html#fn1 (visited April 21, 2003).

[217] 49 C.F.R. § 18.36(b)(12) (2002).

[218] 49 C.F.R. §§ 18.36(b)(12)(i) and (ii) (2002).

[219] 49 C.F.R. § 18.36(b)(12)(ii) (2002).

[220] These include, but are not limited to: (1) temporarily withholding payments pending correction of the deficiency; (2) disallowing (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance; (3) wholly or partly suspending or terminating the current award for the program; or (4) withholding further awards from the program. 49 C.F.R. § 18.43(a)(1) through (4) (2000).

[221] Aside from the potential direct cost to government agencies of incomplete or misperformed contracts, the requirement of bonds also arose to address the equitable issues presented by the fact that subcontractors and suppliers could not impose liens on government property. Consequently, if a contractor whose assets were largely bound up in government contracts defaulted on its payments, there was a significant risk that its creditors would be unable to recover the monies owed. *See generally,* SELECTED STUDIES IN TRANSPORTATION LAW, Volume 1.

[222] 74 AM. JUR. 2D *Sureties* § 3 (2001).

[223] The instrument may also sometimes be referred to as a "surety bond," a "liability bond," or a "statutory bond." *See* BLACK'S LAW DICTIONARY 171, 1158 (7th ed. 1999). There are technical distinctions between these different categories of bonds, e.g., a "statutory bond" refers to a form of surety bond required to be issued by a statute; the terms, however, are often used imprecisely and interchangeably. The term "bond" will be used for all purposes here, except where a distinction between types is made by a statute, regulation, or case.

[224] SELECTED STUDIES. *See* Leatherby Ins. Co. v. City of Tustin, 76 Cal. App. 3d 678, 687, 143 Cal. Rptr. 153 (1977).

[225] SELECTED STUDIES. *Id*.

[226] SELECTED STUDIES. *See*, *e.g*., 40 U.S.C. § 3131 (2003).

[227] MANUAL § 8.2.1; FTA C. 4220.E.11. The MA does not have specific language on bonding amounts. It merely states,

> To the extent applicable, the Recipient agrees to comply with the following bonding requirements: (1) Construction Activities. The Recipient agrees to provide bid guarantee, contract performance, and payment bonding to the extent deemed adequate by FTA and applicable federal regulations, and comply with any other bonding requirements FTA may issue. (2) Other Activities. The Recipient agrees to comply with any other bonding requirements or restrictions FTA may impose.

FTA MA § 15.m.

[228] The Circular's standard mirrors the language of the Miller Act prior to its amendment in 1999. Act of August 17, 1999, Pub. L. No. 106-49, § 1, 113 Stat. 231 (1999). The Manual reiterates the Circular's standard. MANUAL § 8.2.1.

[229] 49 C.F.R. § 18.36(h)(3) (2001) and 49 C.F.R. § 19.48(c)(3) (2001), respectively for governmental units and for institutions

payment bond must at least be issued in the following amounts:

1. 50 percent of the contract price if the price is not more than $1 million;

2. 40 percent of the contract price if the price is more than $1 million but not more than $5 million; or

3. $2.5 million if the contract price is more than $5 million.[230]

Obviously this difference between the regulations and the Circular could produce very dissimilar results in the size of payment bonds that would be required. The solution to this conundrum is found in a close reading of the relevant regulations (49 C.F.R. § 18.36(h) and 49 C.F.R. § 19.48(c), for governmental units and nonprofit organizations, respectively). Both regulations require the use of their standards (including the 100 percent payment bond), except "the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected."[231] FTA's interpretation of this permissive language is that the bonding requirements of the Circular are adequate to protect its interests. Therefore the more stringent requirements of the regulation only apply where a grantee is not otherwise subject to the Circular.[232]

Aside from the aforementioned payment bond, under the federal regulations, the contractor must also execute a performance bond for 100 percent of the contract price.[233] The regulations also require the contractor provide a "bid guarantee."[234]

The Manual recognizes that bonding serves a useful purpose in government contracting.[235] However, it discourages unnecessary or excessive bonding, for that raises contracting costs and may deter some businesses from competing for the award.[236] The Manual suggests that grantees should consider whether they are "seriously concerned" about one or more of the following points before employing bonding in any situations where it is not mandatory:

1. The financial strength and liquidity of the offerors;

2. The inadequacy of legal remedies for contractor failure and the effect that failure could have on the grantee; and

3. The difficulty and cost of completing the contractor's work if it is interrupted.[237]

If the grantee decides to use bonding in a contract where it would not otherwise be required, it should consider using a lower level of bonding, as it is rare that a full 100 percent of the contract price will actually be required to deal with any failure on the contractor's part.[238] The only situation where the Manual suggests requiring a bond in excess of 100 percent is where a delay or failure on the part of the contractor could have a major impact on the grantee's entire transit system, rather than simply the particular project the contract concerns.[239] If bonding issues persistently complicate the grantee's bidding process, it may be advisable to adopt a more stringent prequalification process for bidders or use competitive negotiations instead.[240]

### 7. Collusive Bidding and RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO) may at first blush appear to be an unusual legislative provision to discuss in the context of transit procurement, given its strong association with the prosecution of organized crime.[241] However, RICO has significant implications for certain illicit practices in

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of higher education, hospitals, and other non-profit organizations. The payment bond is a form of indemnity bond to protect "all persons supplying labor and material" for the purpose of fulfilling the contract. 40 U.S.C. 3131(b)(2) (2003). The simplified acquisition threshold is currently $100,000. 41 U.S.C. § 403(11) (2001).

[230] FTA C. 4220.1E para. 11.c.

[231] 49 C.F.R. § 18.36(h) (2001). *See* 49 C.F.R. § 19.48(c) (2001) for substantially similar language as applied to non-profit organizations other than governmental units.

[232] The regulation and Circular:

> can be read consistently with each other. The C.F.R. provision says we can accept grantee bond policies if we determine our interests are adequately protected. It is only if we DON'T make that determination that the 100% rule kicks in.
>
> The [Circular] provision says we can (read "will") accept grantee bond policies if they hit the scaled minimums. You can't look to (h)(3) of the C.F.R. passage without reading the basic language in (h) itself that puts a condition on the 100% requirement. Make any sense at all?

E-mail from Susan Martin, Regional Counsel, FTA Region 8, and James LaRusch, Attorney-Advisor, Office of Chief Counsel for FTA, to author (Dec. 5, 2001) (on-file with author) (emphasis in the original).

[233] 49 C.F.R. § 18.36(h)(2) (2001) and 49 C.F.R. § 19.48(c)(2) (2001), respectively, for governmental units and for institutions of higher education, hospitals, and other non-profit organizations. The performance bond is a form of surety bond that guarantees the completion of the contract. *See* 40 U.S.C. § 3131 (2002).

[234] 49 C.F.R. § 18.36(h)(1) (2001) and 49 C.F.R. § 19.48(c)(1) (2001), respectively, for governmental units and for institutions of higher education, hospitals, and other non-profit organizations.

[235] MANUAL § 8.2.1.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] Indeed, RICO was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922 (1970).

the transit industry. RICO creates four general categories of violations when committed by a "person:"[242]

> 1. The use of income derived from a pattern of racketeering activity or collection of unlawful debts to invest in the acquisition of an interest, or the establishment or operation of, any enterprise that is engaged in or otherwise affects interstate or foreign commerce;
>
> 2. The use of a pattern of racketeering activity or collection of unlawful debts to acquire or maintain any interest in, or control of, any enterprise which is engaged in or otherwise affects interstate or foreign commerce;
>
> 3. Conducting or participating through a pattern of racketeering activity or collection of unlawful debt in the conduct of the affairs of any enterprise which is engaged in or otherwise affects interstate or foreign commerce;
>
> 4. Conspiring to violate any of the previous provisions.[243]

Underlying these categories are four elements that are required to find a RICO violation in any category: a "person," an "enterprise," a "pattern," and "racketeering activity." The element "person" is broadly construed, meaning any individual or entity capable of holding a legal or beneficial interest in property.[244] An "enterprise" is any individual, partnership, corporation, association, or other legal entity, as well as any group of individuals associated in fact, even if not a legal entity.[245] Government agencies and public entities have been found to be "enterprises" within the meaning of the statute, including the Illinois DOT, the Tennessee Governor's office, and a division of the Construction and Building Department of the Baltimore Department of Housing and Community Development.[246] "Pattern" is defined as at least two acts of "racketeering activity," which have occurred within 10 years of each other.[247] The U.S. Supreme Court has pared down this extremely broad scope by borrowing the definition of "pattern" from another statute. Thus a "pattern" exists if "it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[248] "Racketeering activity" includes a vast array of federal and state crimes, most of which are irrelevant to transit procurement,[249] but several may potentially be present. These would include state bribery and extortion charges that may be punished by imprisonment for more than 1 year,[250] and federal charges of bribery, extortion, mail and wire fraud, and numerous forms of interfering in federal or state investigations.[251] It is critical to note that proof of commission of these acts alone is sufficient to meet the requirements of RICO; the party need not have been convicted of the act.[252] Mail and wire fraud are the two offenses most likely to create a possible RICO violation in the transit procurement context, as the passage of bids, notices of acceptance, and checks through the mails (including the use of clearinghouses by banks), or the discussion of competitive proposals by telephone or videoconference, can form the basis for a single fraudulent bid to create multiple violations of federal statutes.[253] Indeed, 18 U.S.C. § 1346 implicitly puts collusive bidding practices and the corruption of public officials within the context of the mail and wire fraud statutes[254] by defining "fraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."[255]

In addition to its criminal implications,[256] RICO also creates a civil remedy, including a private right of action. The Act gives federal courts the power to prevent and restrain violations of RICO by issuing appropriate orders, including, but not limited to:

> 1. Ordering a person to divest any interest in any enterprise;
>
> 2. Imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise which is engaged in, or otherwise affects, interstate or foreign commerce; or
>
> 3. Ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.[257]

Furthermore, when a private party brings a successful RICO action it may collect treble damages and trial costs, including reasonable attorney's fees.[258]

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[242] 18 U.S.C. § 1962 (2000).

[243] 18 U.S.C. §§ 1962(a) through (d) (2000).

[244] 18 U.S.C. § 1961(3) (2000).

[245] 18 U.S.C. § 1961(4) (2000).

[246] *See* United States v. Hocking, 860 F.2d 769 (7th Cir. 1988); United States v. Thompson, 685 F.2d 993 (6th Cir. 1982); and Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245 (D. Md. 1980), respectively.

[247] 18 U.S.C. § 1961(5) (2000).

[248] Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479, 497 n.14 (1985) (quoting 18 U.S.C. § 3575(e) (1985)).

[249] Despite hyperbolic statements by some in the industry, it is unlikely that RICO provisions for crimes such as murder, "white slave traffic," and "peonage" (18 U.S.C. § 1961(1)(B) (2001)) will be raised in investigations of procurements even in the most hardened transit agencies.

[250] 18 U.S.C. § 1961(1)(A) (2000).

[251] 18 U.S.C. § 1961(1)(B) (2000).

[252] 18 U.S.C. § 1961(1) (2000).

[253] Note that mailings do not have to be fraudulent in and of themselves, they merely need to be "incident to an essential part of the scheme." Pereira v. United States, 347 U.S. 1, 8 (1954).

[254] 18 U.S.C. §§ 1341 and 1343 (2000), respectively.

[255] 18 U.S.C. § 1346 (2000).

[256] A criminal RICO conviction is punishable by up to 20 years imprisonment (or life if one of the racketeering activities is separately punishable by life imprisonment), and forfeiture of all assets relating to, or procured with proceeds from, the crime. 18 U.S.C. § 1963(a) (2000).

[257] 18 U.S.C. § 1964(a) (2000).

[258] 18 U.S.C. § 1964(c) (2000).

More than half of the states have enacted legislation modeled on the federal RICO statutes.[259] However, unlike some areas of legislation where states have taken federal statutes almost word for word, RICO has inspired far more creativity on the part of state governments, leading to many permutations on the general theme.[260] Different types of crimes may be considered "racketeering activity"; what constitutes a "pattern" may be broader or narrower; and the right to civil action (public or private) may be broadened, curtailed, or even eliminated.[261]

For example, California's version of RICO extends to "criminal profiteering activity," which is defined as any act committed, attempted, or threatened for financial gain or advantage, where that act may be charged as crime within the statute's scope,[262] including bribery, extortion, false or fraudulent schemes and activities, and conspiracy to commit any of the aforementioned crimes.[263] The criminal profiteering activity must have been committed in a "pattern," defined as committing two acts within the statute's scope that "have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics," were not isolated events, and were "committed as a criminal activity of organized crime."[264] This of course places a much higher hurdle before a prosecutor than the federal RICO statute, where it is merely necessary to prove as part of the racketeering prosecution that the earlier bad act was committed. Finally, while criminal property forfeiture is permitted under California's statute,[265] there is no provision for civil action, either by the state or a private party.[266]

Forms of collusive bidding may be divided into two general classes: those perpetrated by the bidders themselves and those perpetrated by the bidders acting in conjunction with an employee of the contracting agency.

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[259] KATHLEEN F. BRICKEY, CIVIL RICO (RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT) APPLICATIONS IN THE HIGHWAY CONSTRUCTION INDUSTRY (NCHRP Legal Research Digest No. 18 (1990)).

[260] *Id*.

[261] *Id*.

[262] CAL. PENAL CODE § 186.2(a) (2000).

[263] CAL. PENAL CODE § 186.2(a)(2), (6), (21), (25) (2000). Notably, obstruction of investigations and obstruction of justice have not been included. New York State's RICO statute (which terms racketeering "enterprise corruption") sets a higher bar for a successful criminal RICO prosecution than either California's act or the federal act, although it does include obstruction of justice as one possible predicate crime. N.Y. PENAL LAW § 460.10 (2000). The requisite pattern of predicate crimes to give rise to a charge of enterprise corruption is significantly more complex than either the federal or California RICO variants: (1) there must be at least three criminal acts; (2) the acts must have been committed within 10 years of the charge being brought; (3) the acts must have neither been isolated events, nor "so closely related and connected in point of time and circumstance of commission" so as to constitute a single criminal offense or transaction; (4) the acts must have been related to each other either through a common scheme or were committed by persons acting with the requisite mental culpability and associated with the criminal enterprise; (5) two of the criminal acts must be crimes other than conspiracy; (6) two of the criminal acts, one of which must be a felony, occurred within 5 years of the charge being brought; and (7) each of the criminal acts occurred within 3 years of another one of the criminal acts. N.Y. PENAL LAW §§ 460.10(4)(a) to (c) and 460.20(1) and (2)(a) to (c) (2000). Further complicating matters for prosecutors under the New York State version of the RICO Act is the requirement that a jury may diminish the amount of assets forfeited if that forfeiture would be "disproportionate to the conduct" the defendant committed. N.Y. PENAL LAW § 460.30(1)(a) through (c) (2000). For example, a defendant may own 100 million dollars of stock in a major automotive manufacturer. The defendant uses his influence over the company to induce it to bribe several state officials in exchange for a five million dollar bus procurement contract. The defendant is subsequently arrested and convicted of enterprise corruption. If obliged to forfeit his entire holding in the automotive manufacturer, he would be losing at least 20 times the value of his illicit gains, a clearly disproportionate loss. There is no provision for a right of action to bring a private civil suit for enterprise corruption; however, if it is determined in the criminal trial that the defendant caused personal injury or property damage to another party, the court may assess a fine up to three times the gross value the defendant gained or three times the gross value of the loss the defendant caused. N.Y. PENAL LAW § 460.30(5) (2000). The money collected from the fine will be used to pay restitution to victims of the defendant's crimes for medical expenses, lost earnings, or property damage, with any excess being paid to the state treasury. N.Y. PENAL LAW § 460.30(5) (2000). It is thus questionable whether a transit system in New York that suffered losses by virtue of a RICO conspiracy would be eligible to recover a portion of the fine/restitution. If the defendant is convicted of enterprise corruption, then the state may bring a civil action against the defendant to obtain such injunctions as are necessary to prevent future acts of enterprise corruption. N.Y. C.P.L.R. § 1353(1) (2000). The injunctive actions are mostly similar to the federal RICO Act (N.Y. C.P.L.R. §§ 1353(1)(a) through (c) (2000)); however, the court may also suspend licenses or permits issued by any state agency, and revoke the state certificate of incorporation of a business in which the defendant has a controlling interest (if the corporation is chartered in another state, the court may revoke its authorization to do business in New York). N.Y. C.P.L.R. §§ 1353(1)(d) and (e) (2000).

[264] CAL. PENAL CODE §§ 186.2(b)(1) to (3) (2000). The acts must have been committed within 10 years of each other, and any prior acts used to support a criminal profiteering charge must not have resulted in an acquittal. CAL. PENAL CODE § 186.2(b) (2000).

[265] CAL. PENAL CODE § 186.3(a) (2000).

[266] The LA Manual does not specifically address RICO concerns, but it does contain guidelines for the reporting of suspicious bidder behavior that may be within the scope of both the federal and California RICO statutes. Contracting officers must report to the Executive Officer of the OP&D all incidences of identical bids being proffered. LA MANUAL § 2.8. Contracting officers must also report any bids that appear to have been made in violation of antitrust laws, but which may also be within the scope of RICO, such as simultaneous price increases by bidders. *See* LA MANUAL § 2.8.B.

In the former class, cost-plus bidding,[267] rotation bidding,[268] and geographical bidding[269] are the most common forms of bid rigging. Rotation bidding and geographical bidding are relatively easy to detect over time, as a consistent pattern of winning contractors will appear.[270] Cost-plus bidding is more insidious, as the pattern of winners will likely remain as random as it was before the bid rigging began. However, if an agency takes the precaution of preparing an independent estimate of a project's cost prior to the receipt of bids and then comparing it to the submitted bids, the bid rigging can often be discovered. If many or most of the bids for each project exceed the estimated cost, there is a possibility a cost-plus bidding scheme may be in effect or the procurement cost estimate may have been inadequately prepared.

In the latter class of collusive bidding, the tailor bid[271] and the discretionary award[272] are the most frequently practiced. Here too, the agency must look for a pattern of awards, but it must pay particular attention to who the contracting personnel were in each instance, as well as who the winners were. The tailor bid presents particularly difficult problems for the transit agency as self-monitor. It is common for personnel to prefer a particular brand or product, often for understandable reasons of product satisfaction, ease of use, and ease of maintenance. The personnel submitting the technical specifications to the procurement office will in some instances attempt to write requirements that favor the preferred product or service. Over time, while the overall pattern of winners will appear random, it may be discovered that in every project where Company Y was awarded the contract, Mr. Z within the user department prepared the technical specifications. The discretionary award is more easily spotted than the tailor bid, but still presents a challenge.[273]

[267] Where the bidders agree to simply add a certain fixed percentage to their bids (e.g., all prices will be increased by 10 percent), but otherwise still engage in competitive bidding.

[268] Where the bidders agree to take turns winning contracts. *See* BRICKEY, *supra* note 259, at 13–14.

[269] Where the bidders agree to divide a geographic region into exclusive territories. *See id*.

[270] A particularly egregious instance of geographical bidding occurred in Connecticut, where a pair of road tar suppliers divided the state in two, with one company winning all contracts in the eastern half of the state, while the other won all contracts in the western half. Amazingly, it took 6 years for this pattern to be noticed. United States v. Koppers Company, 652 F.2d 290 (2d Cir. 1981).

[271] Where the specifications for a bid advertisement are drafted in a manner designed to guide the contract to a particular bidder. *See* BRICKEY, supra note 259, at 15.

[272] Where an employee of the agency has the power to "throw" an award to a particular bidder by making decisions about what constitutes a "responsible" bidder or other judgments independent of raw numbers. *See id*.

[273] *E.g.*, while the overall pattern of winners still appears random, it may be discovered that in every project where Company A was awarded the contract, Ms. B was the contracting officer.

## 8. Environmental Requirements

FTA itself does not directly impose environmental standards through regulation;[274] however, it does incorporate by reference the standards of NEPA,[275] and the FTA MA also places certain environmental obligations on grantees.[276] The MA requires that grantees include in all third party contracts and subgrants greater than $100,000 "adequate provisions" to ensure that the recipients of those funds report the use of facilities placed, or likely to be placed, on the EPA's "List of Violating Facilities,"[277] refrain from using such facilities, and report violations to FTA and EPA.[278] Furthermore, third party contractors and subgrantees must comply with Section 114 of the Clean Air Act,[279] Section 308 of the Federal Water Pollution Control Act,[280] and all other applicable parts of those acts.[281] Grantees are also obligated to comply with EPA's "Comprehensive Procurement Guidelines for Products Containing Recovered Materials"[282] where possible, and otherwise provide "a competitive preference" for goods and services that con-

[274] Some authorities have argued that 23 C.F.R. § 771.101 represents such an imposition. However, the regulations encapsulated by that C.F.R. part are for the implementation of "the National Environmental Policy Act of 1969 as amended (NEPA), and the regulation of the Council on Environmental Quality (CEQ), 40 C.F.R. parts 1500 through 1508." *See* 23 C.F.R. § 771.101 (2002). Thus it does not represent direct regulation by the FTA.

[275] 49 C.F.R. § 622.101 (2000).

[276] FTA MA §§ 15.f and g.

[277] The EPA no longer releases the "List of Violating Facilities" as an independent document. It is now incorporated into the General Services Administration's "Lists of Parties Excluded from Federal Procurement or Non-procurement Programs," which identifies all parties excluded from receiving federal government contracts. The electronic version of this list is called the Excluded Parties Listing System, and is available at http://epls.arnet.gov (visited April 21, 2003). Alternatively, a printed copy can be obtained from the U.S. Government Printing Office.

[278] FTA MA § 15.f.

[279] The statute mainly requires subject entities to maintain records and conduct testing on atmospheric emissions within the scope of the act and follow appropriate certification guidelines. 42 U.S.C. § 7414(a)(1) (2000).

[280] The statute principally requires subject entities to maintain records and conduct testing on effluent discharge within the scope of the act. 33 U.S.C. § 1318 (2000).

[281] 42 U.S.C. §§ 7401 *et seq.* (2000) and 33 U.S.C. §§ 1251 *et seq.* (2000), respectively.

[282] 40 C.F.R. §§ 247.1 *et seq.* (2000). The guidelines apply to all procurements made with federal funds with a fiscal year total of $10,000 or more where the item being procured has been designated by the EPA as being within the scope of the regulation. 40 C.F.R. § 247.2(a)(1) (2000). The $10,000 total is for an entire organization, not specific departments or groups within an organization. 40 C.F.R. § 247.2(a)(3) (2000). The list of items subject to the regulation can be found at 40 C.F.R. §§ 247.10 *et seq.* (2000).

serve natural resources, protect the environment, and are energy efficient.[283] Section 3—Environmental Law provides a more complete discussion of environmental issues pertaining to transit.

### 9. Architectural, Engineering, or Related Services

The procurement of architectural and engineering services[284] at the federal level is governed by Title IX of the Federal Property and Administrative Services Act of 1949, more commonly known as the Brooks Act.[285] While the Comptroller General has found the terms of the Brooks Act to not be legally compulsory for grantees,[286] FTA requires grantees to abide by the Act's requirements unless there is a comparable state act in place.[287] The Act effectively operates as an exemption to ordinary rules of competitive bidding, instead assessing the bidders on the basis of "demonstrated competence and qualification" at "fair and reasonable prices."[288]

In accordance with the requirements of the Brooks Act, the grantee must encourage licensed firms to annually submit a statement of qualifications and performance data.[289] Subsequently, for each project that is expected to require architectural or engineering services, the grantee will evaluate the statements on file, along with any new submissions delivered in response to an advertisement, and then conduct discussions with at least three firms regarding the anticipated needs of the project.[290] Based on these discussions, the grantee will then rank the firms on the basis of which are the most highly qualified to render the needed services.[291] The grantee must first attempt to negotiate a contract with the most qualified firm at the level of compensation the grantee determines to be reasonable and fair, based on the nature, scope, and complexity of the services required.[292] In the event the grantee is unable to reach a mutually satisfactory agreement with the most highly qualified firm, the grantee must formally terminate the negotiations with it and then approach the second-place firm about the work.[293] The grantee will proceed in this manner until it reaches a firm on its list that is willing to undertake the work at a fair and reasonable price.[294] If the grantee exhausts its initial list, it must reconsult all available statements of qualifications, compile a new list of qualified firms, and repeat the negotiation process until a firm is selected.[295]

### 10. Grants and Cooperative Agreement Cost Principles

DOT and its operating administrations (principally FTA and FHWA for these purposes) are bound by the guidelines of the Office of Management and Budget (OMB) for determining allowable costs under grants; cost reimbursement plans; and contracts with "governmental units,"[296] educational institutions,[297] and nonprofit organizations other than educational institutions.[298] The circulars are intended to provide a uniform approach for determining allowable costs and to promote effective program delivery and efficiency, but not to dictate the extent of federal participation in the administration or use of federal funds.[299]

The principles established by Circular A-87 apply to all federal agencies in determining costs incurred by governmental units under federal awards, except where those awards are to publicly owned or financed educational institutions and hospitals, in which case the conditions of the other circulars apply.[300] Subawards are subject to the cost principles applicable to the particular organization concerned, e.g., if a governmental unit makes a subaward to an educational institution, the conditions of the circular governing educational institutions will apply.[301] OMB will grant exemptions to the terms of Circular A-87 where a federal non-entitlement program includes a statutory authorization for consolidated planning and administrative funding, provided that most of the governmental unit's funding is nonfederal and there is a state law or regulation that gives guidance substantially similar to the Circular's.[302]

Generally, a cost item is allowable if it meets a number of broad criteria.[303] Costs must be divided into those

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[283] FTA MA § 15.g.

[284] Architectural and engineering services are those that are: (1) so defined by state law, or otherwise require equivalent licensure by the state where the work is to be performed; (2) professional services that are associated with planning, design, construction, alteration, or repair of real property; or (3) professional services that architects or engineers may logically or justifiably perform, including surveying, conceptual design, soils engineering, etc. 40 U.S.C. § 3308 (2002).

[285] 40 U.S.C. §§ 541 *et seq*. (2000).

[286] 59 Comp. Gen. 251 (1980).

[287] FTA MA § 15(i); FTA C. 4220.1E para. 9.e.

[288] 40 U.S.C. § 542 (2000).

[289] 40 U.S.C. § 543 (2000).

[290] *Id*.

[291] *Id*.

[292] 40 U.S.C. § 544(a) (2000).

[293] 40 U.S.C. § 544(b) (2000).

[294] *Id*.

[295] 40 U.S.C. § 544(c) (2000).

[296] O.M.B. Circ. No. A-87, Rev. (1997) [A-87]. "Governmental units" includes state, local, and federally recognized Indian tribal governments. A-87(1).

[297] O.M.B. Circ. No. A-21, Rev. (1998) [A-21].

[298] O.M.B. Circ. No. A-122, Rev. (1998) [A-122].

[299] A-87(5).

[300] A-87 Attachment A(A)(3)(a).

[301] A-87 Attachment A(A)(3)(b).

[302] A-87 Attachment A(A)(3)(e).

[303] These criteria include, but are not limited to: (1) necessary and reasonable for proper and efficient performance and administration of the award; (2) allocable under the terms of the Circular; (3) determined in accordance with Generally Accepted Accounting Principles (GAAP) unless otherwise provided for by the Circular; and (4) adequately documented. A-87 Attachment A(C)(1). A cost is reasonable if it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. A-87 Attachment A(C)(2). A cost is allocable if

that are direct[304] or indirect.[305] Indirect costs may be pooled to facilitate equitable distribution of those expenses among benefited cost objectives.[306] Particular rules govern 42 general categories of items, ranging from alcoholic beverages to motor pools to underrecovery of costs under federal award agreements.[307] The omission of a specific item from the list does not imply it is either allowable or not; instead, the item's status should be based on the treatment of similar or related items.[308] The Circular requires governmental units to establish a Central Service Cost Allocation Plan (CSCAP), which will serve to allocate costs to federal awards for services such as accounting, data entry facilities, and other shared expenses incurred by the organs of the governmental unit.[309] Finally, the Circular provides guidance in establishing a general indirect cost rate, which is a percentage multiplier applied to direct costs under a federal award to determine the amount of indirect costs that should also be charged to the award.[310]

### 11. Procurement Challenges

A bid award may be set aside if the challenger clearly demonstrates that: (1) the procurement official's decision did not have a rational basis; or (2) the procurement procedure constituted a clear and prejudicial violation of an applicable regulation or procedure.[311] With respect to the first ground, courts have recognized that contracting officers are "entitled to exercise discretion upon a broad range of issues confronting them."[312] The court examines whether "the contracting agency provided a coherent and reasonable explanation of its exercise of discretion."[313] The "disappointed bidder bears a 'heavy burden' of showing that the award decision 'had no rational basis.'"[314] When a case is brought on the second ground, the disappointed bidder must show "a clear and prejudicial violation of applicable statutes or regulations."[315]

The refusal of the courts to demand any more of an agency's procurement decision than substantial compliance with applicable law and baseline substantive rationality is premised on the grounds that "judges are 'ill-equipped to settle the delicate questions involved in procurement decisions.'"[316]

## C. BUY AMERICA REQUIREMENTS

### 1. Buy America Overview

Domestic purchasing requirements fall into two general categories—one that applies to direct federal procurements ("Buy American"), which has been in place since the Great Depression,[317] and another more recent one that applies to grants and other federal funds, such as those given to transit agencies ("Buy America").[318] Although the federal government began financing state and local transit agencies in 1964, it was not until the passage of the Surface Transportation Assistance Act of 1978 [1978 STAA] that there was serious effort to require such agencies to spend federal funds exclusively on domestically produced equipment and rolling stock.[319] While the Urban Mass Transit Administration (UMTA) had long pursued a strategy of encouraging foreign manufacturers to relocate to the United States, Congress found that effort unsatisfactory, as relocation

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the goods or services involved are chargeable or assignable to the relevant cost objective in accordance with relative benefits received. A-87 Attachment A(C)(3)(a).

[304] Direct costs are those that can be identified with a particular final cost objective. A-87 Attachment A(E)(1).

[305] Indirect costs are those that are incurred for a common or joint purpose benefiting more than one cost objective and not readily assignable to the objective benefited without a disproportionate effort to the results achieved. A-87 Attachment A(F)(1).

[306] A-87 Attachment A(F)(1).

[307] A-87 Attachment B Preamble.

[308] A-87 Attachment B Preamble.

[309] A-87 Attachment C(A)(1). Detailed guidelines for the setup and operation of CSCAPs are provided by the Department of Health and Human Services in a brochure entitled, "A Guide for State and Local Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government," available through the U.S. Government Printing Office. A-87 Attachment C(A)(2).

[310] A-87 Attachment E. There are separate methods of calculating single and multiple allocation bases. A-87 Attachment E(C)(2) and (3). Circulars A-21 and A-122 provide substantially similar guidance for educational institutions and other nonprofit organizations respectively, with the principal difference being in the general categories of items used to determine the allowability of costs. *See, e.g.*, A-21(J) and A-122 Attachment B.

[311] Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

[312] Latecoere Int'l, Inc. v. U.S. Dep't of Navy, 19 F.3d 1342, 1356 (11th Cir. 1994).

[313] *Id.*

[314] Saratoga Dev. Corp. v. United States, 21 F.3d 445, 456 (D.C. Cir. 1994) (quoting Kentron Hawaii Ltd. v. Warner, 480 F.2d 1166, 1169 (D.C. Cir. 1973)).

[315] Kentron Hawaii, Ltd. v. Warner, 480 F.2d 1166, 1169 (D.C. Cir. 1973); Latecoere, 19 F.3d at 1356. *See also* Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324 (Cir. 2001).

[316] Delta Data Sys. Corp v. Webster, 744 F.2d 197, 203 (D.C. Cir. 1984) (quoting Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260, 1271 (5th Cir. 1978)). *See generally* Elcon Enterprises, Inc. v. WMATA, 977 F.2d 1472 (D.C. Cir. 1992); AM General Corp. v. Dep't of Transp., 433 F. Supp. 1166 (D. D.C. 1977).

[317] Lawrence Hughes, *Buy North America: A Revision to FTA Buy America Requirements*, 23 TRANSP. L.J. 207, 208–09 (1995) [Hughes]. After the Civil War, an act had been passed to compel the War and Navy Departments to purchase arms domestically. Hughes at 208, n.2.

[318] However, publications and speakers often confuse the terms and simply refer to "Buy American" in regard to both types of restrictions.

[319] Hughes at 213–14.

had the potential to increase domestic competition, which was viewed as undesirable.[320] The 1978 STAA provided that federal dollars granted under the Federal Transit Act had to be spent on domestically-produced products if the project had a value of $500,000 or more; those below the cut-off were exempted from review.[321]

Four years later, Congress revisited the subject of "Buy America." Dissatisfied with the regulatory structure created by UMTA following the 1978 STAA, Congress enacted the Surface Transportation Assistance Act of 1982 [1982 STAA], which, while codifying some of UMTA's actions, also imposed stringent new burdens on recipients of federal transit funds.[322] The 1982 STAA eliminated the $500,000 cut-off, subjecting all projects to "Buy America" compliance.[323] Furthermore, the act added a requirement that all steel and manufactured products for such projects be produced domestically.[324]

Congress also took aim at the exceptions to "Buy America" that UMTA had allowed under its original regulatory structure. Congress deleted an exception for "unreasonable cost," and revised a standing waiver for foreign products with prices that were 10 percent or greater below equivalent domestic products.[325] Additionally, Congress permitted state and local governments to enact more stringent "Buy America" standards, but prohibited them from enacting corresponding "Buy State" or "Buy Local" laws.[326] The 1982 STAA did, however, allow UMTA to retain a general "public interest" exception and an exception for when no satisfactory domestic producers were available.[327] Finally, Congress codified UMTA's definition of domestically produced vehicles and equipment, which defined such items as being composed of 50 percent or more American content, by total cost, with final assembly in the United States.[328]

Taking a legal maxim of Voltaire's to heart,[329] 5 years later Congress passed the 1987 STURAA.[330] Having previously codified UMTA's 50 percent rule, Congress now decided that amount was insufficient to ensure that enough business was diverted to domestic producers.[331] After some debate, it was agreed that the content requirement would increase to 55 percent as of October 1, 1989, and increase again to 60 percent as of October 1, 1991.[332] The 1987 STURAA also further increased the price differential required to trigger the automatic waiver for rolling stock to 25 percent,[333] bringing it into line with the price differential for all other projects. Lastly, the content requirement was extended to include "sub-components" in addition to the "systems" and "components" already covered.[334]

Congress again returned to the "Buy America" provision in 1991 with ISTEA. This time iron was added to the list of items that had to be completely domestically produced, while statutory penalties for false claims of domestic manufacture were introduced as well.[335] Congress concluded this round of activity by renaming UMTA the Federal Transit Administration.[336] Finally, in 1998, Congress enacted TEA-21.[337] The change wrought by TEA-21 was relatively minor compared to those that preceded it. It gave the Secretary of Transportation [Secretary] the power to permit suppliers to correct mistaken or faulty "Buy America" certificates, provided the suppliers swear under penalty of perjury that the errors were inadvertent or clerical in nature.[338] (Although since TEA-21's enactment the "Buy America" provision has been unchanged, one possible revision that may eventually take place would be to address the

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[320] Hughes at 215.

[321] Hughes at 216.

[322] Hughes at 217–18.

[323] Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097.

[324] *Id*. Originally the Act proposed to include cement along with steel, but it was deleted before the act's passage.

[325] *Id*. The threshold price differential was increased to 25 percent for all projects other than the purchase of rolling stock, for which the 10 percent threshold was retained.

[326] Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097.

[327] Hughes at 217–18.

[328] Hughes at 218.

[329] "Let all the laws be clear, uniform and precise; to interpret laws is almost always to corrupt them," quoted in A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT & MODERN SOURCES (H.L. Mencken ed., 1942).

[330] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, tit. III, § 337, 101 Stat. 132, 241 (1987).

[331] Hughes at 219–20.

[332] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, tit. III, § 337, 101 Stat. 132, 241 (1987).

[333] *Id*.

[334] *Id*. This final piece of legislative legerdemain actually made it easier for foreign-made products to comply with the "Buy America" requirements, as it meant that domestically produced subcomponents shipped abroad and incorporated into other products (as is often done with computer chips) could be counted towards the American content requirement.

[335] Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, tit. I § 1048, 105 Stat. 1914, 1999–2000 (1991). FTA has interpreted the provisions on iron and steel as applying to "construction or building materials made either principally or entirely from steel or iron. All other manufactured products, even though they may contain some steel or iron elements, would not be covered." 61 Fed. Reg. 6300 (1996).

[336] Hughes at 221.

[337] Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998).

[338] Transportation Equity Act for the 21st Century, Pub. L. No. 105-178 § 3020(b), 112 Stat. 107 (1998). Readers interested in learning more about the history and development of "Buy America" are advised to consult Lawrence Hughes, *Buy North America: A Revision to FTA Buy America Requirements*, 23 TRANSP. L.J. 207 (1995) and the excellent Transit Cooperative Research Program's, *Guide to Federal Buy America Requirements*, Doc. LRD-17 (2001).

seeming conflict between "Buy America" and the North American Free Trade Agreement.)[339]

### 2. Applicability of Buy America

The statutory basis for "Buy America" in federally-assisted transit procurements is found in 49 U.S.C. § 5323(j). The Secretary may only release funds for a project to be financed under the Federal Transit Act if the steel, iron, and manufactured goods used in the project are domestically produced.[340] Labor costs involved in final assembly are not to be included in determining the total cost of components.[341] If a person or firm has been found to have affixed a fraudulent "Made in America" label to a product or otherwise misrepresented a foreign product as being domestically produced, that person or firm is barred from receiving any future contracts or subcontracts issued under the Federal Transit Act.[342] Finally, the Secretary may allow a supplier of steel, iron, or manufactured goods to correct mistaken or faulty "Buy America" certificates after bid opening.[343] The supplier must swear under penalty of perjury that such a mistake was inadvertent or the result of clerical error, with the burden of proof being on the supplier.[344] The grantee is not permitted to accept the supplier's sworn statement at face value, and may only honor such statements as to truly clerical or inadvertent errors. The errors must be minor, and this procedure cannot be used to correct submissions that were defective or noncompliant with the "Buy America" requirements at the time the bid or proposal was submitted.

Except where a waiver is provided, no funds may be granted by FTA unless all iron, steel, and manufactured products used in the project are produced domestically.[345] The steel and iron requirements apply to all construction materials that are made principally of steel or iron and are used as part of infrastructure projects (such as bridges or rail lines), but not to steel or iron used as part of other manufactured products or rolling stock.[346] A manufactured product is considered to be domestically produced if all of the necessary manufacturing processes take place in the United States and all components are of U.S. manufacture.[347] A component is of U.S. manufacture if it is assembled in the United States, regardless of the origin of its subcomponents.[348]

If the cost of components produced domestically is more than 60 percent of the cost of all components and final assembly takes place domestically, the above requirements do not apply to the procurement of rolling stock, train controls, communication, or traction power equipment.[349] For a component to be considered domes-

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[339] While NAFTA generally requires free trade in goods and services between the United States, Canada, and Mexico, government procurements, including those made through "cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services," are exempt. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993). But the "Buy America" statute implicitly permits exemptions for non-domestically produced items where a foreign nation "has an agreement with the United States government under which the Secretary has waived the requirement of" the statute. 49 U.S.C. § 5323(j)(4)(A) (2002).

[340] 49 U.S.C. § 5323(j)(1) (2000). Although 49 U.S.C. § 5323(j) only specifically applies to funds disbursed under the Federal Transit Act, FTA's implementing regulations broaden it to cover funds that are made available through "Interstate Transfer" or "Interstate Substitution" funds as well. 49 C.F.R. § 661.1 (2000). A little-known provision of the Interstate highway program permits unused highway funds to be used for mass transit projects, so funds received through it are technically not part of the Federal Transit Act (Title 49, Chapter 53).

[341] 49 U.S.C. § 5323(j)(3) (2000).

[342] 49 U.S.C. § 5323(j)(5) (2000). The Secretary may not prevent a state from enacting more stringent "Buy America" restrictions than those provided by 49 U.S.C. § 5323(j). 49 U.S.C. § 5323(j)(6) (2000). However, the FTA will not participate in contracts governed by state or local "Buy America" programs that are not explicitly defined by state law (e.g., administrative interpretations of nonspecific state legislation), nor will the FTA participate in contracts governed by "Buy State" or "Buy Local" programs. 49 C.F.R. § 661.21(b)(2-3) (2003).

[343] 49 U.S.C. § 5323(j)(7) (2000). This does not include instances where a bidder has completely failed to submit a "Buy America" certificate. In such cases the bid is nonresponsive.

[344] 49 U.S.C. § 5323(j)(7) (2000).

[345] 49 C.F.R. § 661.5(a) (2003). An exception is provided for the refinement of steel additives, which need not have been done in the U.S. 49 C.F.R. § 661.5(b) (2003).

[346] 49 C.F.R. § 661.5(c) (2003). FTA defines a manufacturing process as being "the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials." 49 C.F.R. § 661.3 (2003). FTA regulations define rolling stock as including "buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services." 49 C.F.R. § 661.3 (2003).

[347] 49 C.F.R. § 661.5(d)(1) and (2) (2003).

[348] 49 C.F.R. § 661.5(d)(2) (2003).

[349] 49 C.F.R. § 661.11(a) (2003). By way of explanation, a "component" is any article, material, or supply, whether manufactured or otherwise, that is directly incorporated into an end product at the final assembly location. 49 C.F.R. § 661.11(c) (2003). A "sub-component" is any article, material, or supply, whether manufactured or otherwise, that is "one step removed" from a component in the manufacturing process and that is directly incorporated into a component. 49 C.F.R. § 661.11(f) (2003). "Final assembly" is the creation of an end product from components brought together for that purpose as part of the manufacturing process. If a grantee is purchasing an entire system as one unit, installation of the system is considered "final assembly." 49 C.F.R. § 661.11(r) (2003). Final assembly of a new rail car would typically at least include the following operations: installation of propulsion control equipment, propulsion cooling equipment, brake equipment, energy sources for auxiliaries and controls, heating and air conditioning, communications equipment, motors, wheels and axles, suspensions and frames; the inspection and verification of all installation and interconnection work; and the in-plant testing of the stationary product to verify all functions. Final assembly of a new bus would typically at least include the following opera-

tically produced, more than 60 percent, by cost, of its subcomponents must be domestically produced and the manufacture of the component must take place in the United States.[350] A subcomponent is domestically produced simply if it is manufactured in the United States.[351]

To clarify, imagine a system with 10 components, nine of equal cost [EC] and a tenth of equal cost plus one cent [EC+1], with each component being made up of 10 subcomponents, again nine EC and one EC+1.[352] For the system to meet the requirements of "Buy America," four of the EC components may be manufactured abroad out of wholly foreign content. However, the five remaining EC components and the EC+1 component may each contain up to four foreign-made EC subcomponents. A piece of rolling stock could thus have as little as 36 percent (i.e., 60 percent of 60 percent) domestic content.[353] Furthermore, as there is no domestic content requirement for subcomponents,[354] they will be considered to be of U.S. origin as long as their sub-subcomponents are assembled domestically, regardless of the contents' origin. Theoretically then, it would be possible to completely build a rail car in a foreign nation, break it down to the sub-subcomponent level, ship those parts to the United States, reassemble the rail car, and have a vehicle which is deemed 100 percent American, although such a strategy would present substantial risks in the event of a miscalculation on content.[355]

If a subcomponent manufactured in the United States is exported for inclusion in a foreign-made component and it receives a tariff exemption, it will retain its "domestic identity" and will be counted toward the domestic content requirement.[356] However, if a domestically produced subcomponent fails to receive such an exemption, it loses its "domestic identity" and must be counted as foreign content.[357] Raw materials produced domestically, but exported for incorporation into a component which is then imported, are considered foreign content.[358] If a component is manufactured in the United States, but contains less than 60 percent domestic subcomponents, by cost, the cost of manufacturing the overall component may be added to the value of the domestic subcomponents in an effort to reach the 60 percent threshold.[359]

The cost of components and subcomponents is ordinarily considered to be the price a bidder is obligated to pay a supplier for such items.[360] The exception to this rule for domestically produced items is for those that are shipped abroad under a tariff exemption as detailed above. For such items, their cost is either the cost of purchase as noted on the invoice and entry papers when they leave the country or, if not purchased, the value of the item at the time it leaves the country as noted on the invoice and entry papers.[361] In the case of foreign-made components and subcomponents, transportation costs to the final assembly point must be included in the overall cost of the items.[362] The cost of foreign-made items is determined using the foreign exchange rate at the time the bidder executes the relevant "Buy America" certificate.[363] If a component or subcomponent is manufactured by a bidder itself, the overall cost is the sum of the cost of the labor, materials, and allocated

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tions: the installation of the engine, transmission, and axles, including the cooling and braking systems; the installation of the heating and air conditioning equipment; the installation of pneumatic and electrical systems, door systems, passenger seats, passenger grab rails, destination signs, and wheelchair lifts; and road testing, final inspection, repairs, and preparation of the vehicles for delivery. *See* Dear Colleague Letter from Gordon J. Linton, Administrator, FTA (Mar. 18, 1997) (*available at* http://www.fta.dot.gov/library/reference/buyamerica/byamrdc3.htm (visited April 21, 2003)). A partial list of train control equipment, communication equipment, and traction power equipment is presented at 49 C.F.R. § 661.11(t) through (w). The FTA considers all items listed in Appendices B and C to 49 C.F.R. § 661.11 (2003) to be "components" within the scope of the "Buy America" regulations. 66 Fed. Reg. 32412-13 (2003).

[350] 49 C.F.R. § 661.11(g) (2003).

[351] 49 C.F.R. § 661.11(h) (2003).

[352] The "equal cost plus one cent" component and subcomponent are necessary for the example because domestic content must be *greater* than 60 percent.

[353] A simplified version of this example was presented at 66 Fed. Reg. 32, 412–413 (2001).

[354] Based on the language of the enabling statute and the responses of commentators to the Notice of Proposed Rulemaking, the FTA concluded that "sub-subcomponents" were not within the scope of "Buy America." *See* 56 Fed. Reg. 926 (M) and (O) (1991).

[355] Something similar to this process has been done by Ontario Bus Industries, which shipped partially completed buses from its main plant in Mississauga, Ontario, to a smaller facility in upstate New York for final assembly so as to comply with "Buy America" requirements. Hughes at 234. An error by the firm led to an FTA investigation in 1994, which resulted in an $80,000 fine for mislabeling its products as "Made in New York." However, the FTA did not bar Ontario Bus Industries from competing for future federally-funded bus orders. *Ontario Runs Bus Builder*, PLANT, Apr. 4, 1994, at 2.

[356] 49 C.F.R. § 661.11(i) (2003). *See* 19 C.F.R. §§ 10.11 through 10.24 (2003) for an explanation of tariff exemptions.

[357] 49 C.F.R. § 661.11(j) (2003).

[358] 49 C.F.R. § 661.11(k) (2003). For example, if steel ingots are produced by the Monongahela Metal Foundry and are then shipped to a Canadian plant to be turned into I-beams, the I-beams would be considered completely foreign, even if they contained 100 percent American steel. One transit industry insider characterized this as, "A racial purity law for American steel."

[359] 49 C.F.R. § 661.11(l) (2003).

[360] 49 C.F.R. § 661.11(m)(1) (2003).

[361] 49 C.F.R. § 661.11(o) (2003).

[362] 49 C.F.R. § 661.11(m)(1) (2003). The regulation does not state whether it is permissible to add transportation costs to domestic products. In the absence of a specific prohibition, however, it appears that it could be done.

[363] 49 C.F.R. § 661.11(n) (2003).

overhead costs, along with "an allowance for profit."[364] However, it should be remembered that labor costs for final assembly cannot be included in determining overall costs.[365] The actual price of a component is to be considered in determining domestic content, not the bid price.[366]

Finally, once a bidder has determined whether the product it is offering is in compliance, it must submit the appropriate "Buy America" certificate.[367] FTA regulations require that grantees comply with "Buy America" requirements,[368] and failure by a bidder to submit a proper certificate will oblige the grantee to treat the bid as nonresponsive.[369] After a bidder has submitted its certificate of either compliance or noncompliance, it is bound by its certification upon opening of the bids.[370] If a bidder has certified that it is in compliance with the "Buy America" requirements, it may not subsequently request a waiver for any of those requirements.[371] Consequently, it is vital for a bidder to be aware of any necessary waivers and the procedures needed to obtain them.

If a successful bidder is found to be out of compliance with its certification, it must take the actions determined by FTA to be necessary to bring itself into compliance.[372] The bidder may not adjust its price to compensate for making the necessary changes.[373] If the bidder fails to take the required actions, it will not be eligible to receive the contract if the award is not yet complete.[374] However, if the contract has already been awarded and the bidder has failed to bring itself into compliance with its certification, then it has breached the contract.[375] This of course raises the question of how it may be discovered that a bidder is not in compliance. One way is through the pre-award and post-delivery review processes, the other way is through an FTA investigation; but most commonly as a result of a bid protest with the grantee by an unsuccessful bidder.[376]

### 3. FTA Buy America Investigations

There is a presumption that a bidder that has submitted a "Buy America" certificate is in compliance with the requirements.[377] However, in the event that another party (typically a losing or excluded bidder) suspects that a bidder is not in compliance with the requirements, that party (or "petitioner") may submit a petition for FTA to launch an investigation.[378] The petition must be in writing and include a statement of the grounds for the petitioner's suspicions and any supporting documentation.[379] If the evidence presented in the petition is sufficient to overcome the presumption of compliance, FTA will commence an investigation of the bidder.[380] Alternatively, FTA may, *sua sponte*, launch an investigation if the conditions are "appropriate."[381] Once the decision is made to proceed with an investigation, the burden is on the bidder to prove it is in compliance with the terms of the "Buy America" regulation.[382]

FTA will notify the grantee of all documentation that will be necessary for the bidder to provide to assist the investigation.[383] Once notice has been given, the grantee

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[364] 49 C.F.R. § 661.11(m)(2) (2003). The regulation states that these cost factors are to be determined in accordance with "normal accounting procedures." This would seem to be equivalent to Generally Accepted Accounting Procedures, as no other definition is offered.

[365] 49 C.F.R. § 661.11(p) (2003).

[366] 49 C.F.R. § 661.11(q) (2003). This is presumably to deter contractors from deliberately over-pricing domestically produced components in an effort to reach the 60 percent threshold.

[367] 49 C.F.R. §§ 661.6 and 661.12 provide samples of the certificate that should be completed for nonrolling stock and rolling stock procurements respectively.

[368] 49 C.F.R. § 661.13(a) (2003).

[369] 49 C.F.R. § 661.13(b) (2003).

[370] 49 C.F.R. § 661.13(c) (2003). This puts a noncompliant bidder in an unusual position. If the bidder locates domestic suppliers of needed components or subcomponents at or below the cost of the foreign-made items used to calculate its bid, it may not substitute those domestic items in an effort to make its bid more favorable. Although contradictory to traditional bidding practices, it would appear that, to go along with the logic of the "Buy America" statute, the FTA should revise this part of the regulation to permit noncomplying bidders to change their certification if it will result in an equal or lower final cost.

[371] 49 C.F.R. § 661.13(c) (2003).

[372] 49 C.F.R. § 661.17 (2003).

[373] *Id*.

[374] *Id*.

[375] *Id*.

[376] As a practical matter, most competitors keep track of the domestic content of competitors' products and will file a bid protest with the grantee if they have lost a contract due to a noncompliant product having been proffered by the winner.

[377] 49 C.F.R. § 661.15(a) (2003).

[378] 49 C.F.R. § 661.15(b) (2003). The petition to the FTA for an investigation is not a substitute for a bid protest, and the losing bidder may choose to file both a bid protest with the grantee and a petition for an investigation with the FTA to avoid the claim that it has failed to exhaust its administrative remedies.

[379] 49 C.F.R. § 661.15(b) (2003).

[380] *Id*. The FTA may provide the winning bidder an opportunity to refute the petitioner's claims prior to a formal investigation. *See*, *e.g.*, Letter from Gregory B. McBride, Acting Chief Counsel, FTA to Rolf Meissner, Vice President and General Manager, Siemens Transportation Systems, Inc., Vehicle Division (June 5, 2001) (*available at* http://www.fta.dot.gov/library/legal/buyamer/inltrs /stsi6501.html (visited April 21, 2003)) (discussing a formal response from a manufacturer accused of violating "Buy America" requirements.) However, there is no statutory or regulatory requirement that compels the FTA to give the winning bidder an opportunity to respond prior to an investigation.

[381] 49 C.F.R. § 661.15(c) (2003).

[382] 49 C.F.R. § 661.15(d) (2003).

[383] *Id*. An interesting question is raised by this process of using the grantee to conduct part of the investigation for FTA. In Printz v. United States, 521 U.S. 898 (1997), the U.S. Supreme Court held,

must respond to the request for documentation within 15 days.[384] Alternatively, the bidder being investigated may correspond directly with FTA rather than going through the grantee, provided that the bidder informs the grantee of its plans and the grantee agrees in writing.[385] The grantee must then in turn notify FTA, in writing, that the bidder will be corresponding directly with it.[386] Because of the risk to FTA funding, in most instances the grantee will not agree to the bidder bypassing the grantee unless the bidder agrees in writing to simultaneously provide copies of all documents to the grantee.[387] If the bidder desires, it may submit proprietary information only to FTA directly, while any remaining information will be funneled through the grantee.[388] FTA may conduct site investigations as needed, but will give "appropriate notification" to the party whose property is to be inspected.[389]

The grantee or bidder's reply will be sent to the petitioner by FTA after it has been received.[390] The petitioner then has 10 days to submit comments to FTA as to the content of the reply.[391] These comments will be forwarded to the grantee and bidder, which then have 5 days to respond to the petitioner's comments.[392] Failure by any party to respond within the required time frame may result in FTA disregarding their comments and proceeding to decide the issues on the basis of the other parties' responses.[393]

Upon request, FTA will make any information substantially related to the investigation available to interested parties, excluding only information that it is barred by law or regulation from releasing.[394] Therefore, a party that does not wish to have proprietary information disclosed must submit a statement to FTA identifying any proprietary information included in the documentation.[395] The regulation defines proprietary information as any information "whose disclosure could reasonably be expected to cause substantial competitive harm" to the party submitting it.[396]

If the petition for investigation is made before the contract has been awarded, the grantee is barred from making the award until the investigation is completed, unless one of three conditions is met:

1. The items to be procured are urgently required;
2. Delivery of performance will be unduly delayed by failure to make the award promptly; or
3. Failure to make prompt award will otherwise cause undue harm to the grantee or the federal government.[397]

If the grantee decides the contract must be awarded before the completion of the investigation, it must notify FTA of any such decision prior to making the actual award.[398] FTA may refuse to release funds for that contract while the investigation is pending.[399]

Once FTA concludes its investigation, it will issue a written initial decision.[400] Any party involved in the investigation may request that FTA reconsider its initial decision.[401] However, FTA will only accept such a request if the party submits new matters of fact or points of law that the party was unaware of, or otherwise did not have access to, while the investigation was in progress.[402] A request for reconsideration must be filed with FTA not later than 10 days after the initial

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The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. Printz, 521 U.S. at 935. FTA's position is that it is a "funding agency" rather than a "regulatory agency" and that the MA creates a contractual relationship, not a regulatory one; thus, by that logic, the Printz decision would not be applicable. However, it is far from clear whether the U.S. Supreme Court would agree with such an interpretation of FTA's authority. Printz has not been cited in regard to any cases involving "Buy America" investigations, but a grantee that finds such an investigation burdensome may wish to explore the case's applicability in this area.

[384] 49 C.F.R. § 661.15(e) (2003).

[385] *Id*.

[386] *Id*.

[387] This is in part because the grantee may be conducting its own investigation, and would need the successful bidder to provide it with documents and information essential to its investigation.

[388] 49 C.F.R. § 661.15(e) (2003). Any additional documents requested by the FTA must be provided within 5 days unless an exemption is specifically given. 49 C.F.R. § 661.15(f) (2003).

[389] 49 C.F.R. § 661.15(i) (2003).

[390] 49 C.F.R. § 661.15(g) (2003).

[391] 49 C.F.R. § 661.15(g) (2003).

[392] *Id*.

[393] 49 C.F.R. § 661.15(h) (2003).

[394] 49 C.F.R. § 661.15(j) (2003).

[395] 49 C.F.R. § 661.15(k) (2003). The alleged proprietary information must be identified wherever it appears and any further comments on the material must be submitted within 10 days of the time it is originally provided. 49 C.F.R. § 661.15(k) (2003).

[396] 49 C.F.R. § 661.15(l) (2003).

[397] 49 C.F.R. § 661.15(m)(1) through (3) (2003).

[398] 49 C.F.R. § 661.15(n) (2003).

[399] 49 C.F.R. § 661.15(n) (2003).

[400] 49 C.F.R. § 661.15(o) (2003). If the investigation determines the bidder has inadvertently compromised its "Buy America" certification, it must bring itself into compliance. If the violation of the "Buy America" requirement is determined by FTA, another federal agency, or a court to have been intentional, however, then the bidder will be ineligible to receive any contract or subcontract made with FTA funds. 49 C.F.R. § 661.18 (2003). Willful refusal by a bidder to comply with its certification will have the same result as an intentional violation of the "Buy America" requirements. 49 C.F.R. § 661.19 (2003). A bidder has intentionally violated the "Buy America" requirements if it has affixed a "Made in America" label to a product not manufactured in the United States or otherwise represents a foreign-made product as being domestically produced. 49 C.F.R. § 661.18(a) and (b) (2003).

[401] 49 C.F.R. § 661.15(o) (2003).

[402] *Id*.

decision is released.[403] If FTA decides the request has merit, it will conduct another investigation consistent with the procedures above and with the need to obtain a prompt resolution to the dispute.[404] The right to petition FTA for an investigation and the right to request a review of its decision are the only federal legal rights created for third parties, *i.e.,* parties other than the winning bidder, by the "Buy America" requirements.[405] However, a party other than the apparent successful bidder may also have a right to file a bid protest with the grantee, pursuant to the grantee's own procedures.

### 4. Buy America Waivers

The procedure for waivers under the transit procurement "Buy America" requirements combines both statutory and regulatory elements.[406] 49 U.S.C. § 5323(j) permits the Secretary to issue waivers in four circumstances. First, there is a general "public interest" waiver.[407] Second, a waiver may be issued if the steel, iron, or goods produced in the United States are not available in sufficient quantity or are of inferior quality to what is reasonably needed.[408] As previously explained, a waiver also exists for rolling stock and related equipment where the cost of components and subcomponents produced domestically is greater than 60 percent of the total cost and final assembly takes place domestically.[409] Finally, a waiver may be given if including domestic materials will increase the total cost of the project by more than 25 percent above the cost of using imported materials.[410]

FTA's regulations do much to add finesse to the bare bones of 49 U.S.C. § 5323(j)'s waiver structure. The Secretary delegated the office's authority under the statute to the Administrator of FTA [Administrator], so waivers are granted through the office of the Administrator.[411] To grant a public interest waiver, the Administrator must consider "all appropriate factors" in regards to each request unless a general waiver has been provided by the regulation itself.[412] The Administrator may grant a waiver if he or she determines the materials for which the waiver is requested are not produced in the United States in sufficient or reasonably available quantities and of a satisfactory quality.[413] If no responsive or responsible bid is received offering an item produced domestically, it will be presumed that conditions are suitable for issuing such a waiver.[414] In the event of a single source procurement from a foreign supplier, however, the burden is on the grantee to prove the item needed is available only from that source or that it is otherwise not available domestically in sufficient quantity or quality.[415] Finally, a waiver can be issued if the Administrator determines that the inclusion of domestic content will raise the cost of the contract by more than 25 percent.[416] The factors for each of the types of waiver must be evaluated separately.[417]

In the case of rolling stock procurements, the public interest and availability waivers may be applied to specific components or subcomponents.[418] If waivers are granted for such components or subcomponents, they will be counted toward the total domestic content of the vehicle.[419] A similar principle extends to manufactured goods as well, permitting the public interest and availability waivers to convert foreign-made components and subcomponents into these treated as domestically manufactured ones.[420]

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[403] *Id*.

[404] *Id*.

[405] 49 C.F.R. § 661.20 (2003). The regulation denies "any additional right, at law or equity, for any remedy including, but not limited to, injunctions, damages, or cancellation of the Federal grant or contracts of the grantee." 49 C.F.R. § 661.20 (2003). It is unclear whether a decision by the FTA in this context would be subject to judicial review under the APA (5 U.S.C. §§ 551 *et seq*.). While the APA grants a right of review to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" (5 U.S.C. § 702 (2001)), there have been no court challenges against an FTA "Buy America" investigative decision in at least 10 years, and the only previous claim to attempt to challenge a federal "Buy America" decision was disposed of on the grounds that the then UMTA's "Buy America" regulations did not give rise to a private cause of action. *See* Ar-Lite Panelcraft, Inc. v. Siegfried Constr. Co., No. CIV-86-525C, 1989 U.S. Dist. LEXIS 6394 (W.D. N.Y. Mar. 10, 1989).

[406] The statutory component is 49 U.S.C. §§ 5323(j)(2) and (4), while the regulatory component is 49 C.F.R. § 661.7 and its appendix together with § 661.11 and its appendix.

[407] 49 U.S.C. § 5323(j)(2)(A) (2000).

[408] 49 U.S.C. § 5323(j)(2)(B) (2000).

[409] 49 U.S.C. §§ 5323(j)(2)(C)(i) and (ii) (2000).

[410] 49 U.S.C. § 5323(j)(2)(D) (2000).

[411] This is inferable from the text of 49 C.F.R. § 661.7, which makes no reference to the Secretary, but which refers to the Administrator granting waivers.

[412] 49 C.F.R. § 661.7(b) (2003). As of January 8, 2001, the available general waivers are: (1) those laid out in 48 C.F.R. § 25.108; (2) 15-passenger vans and wagons produced by Chrysler Corp. are exempt from the requirement of being assembled in the U.S.; (3) micro-computer equipment, including software; (4) small purchases as defined in 49 C.F.R. § 18.36(d); and (5) for rolling stock and related procurements, foreign-made spare parts may be acquired where the cost of those parts is 10 percent or less of the total project cost and the parts are procured as part of the same overall contract. Appendix to 49 C.F.R. § 661.7 (2003); Appendix A to 49 C.F.R. § 661.11 (2003).

[413] 49 C.F.R. § 661.7(c) (2003).

[414] 49 C.F.R. § 661.7(c)(1) (2003).

[415] 49 C.F.R. § 661.7(c)(2) (2003).

[416] 49 C.F.R. § 661.7(d) (2003). This is determined by multiplying the lowest responsive and responsible bid that relies on foreign-made components by 1.25 and comparing it to the lowest responsive and responsible bid that relies on domestic components. If the former bid is still less than the latter, the waiver will be granted.

[417] 49 C.F.R. § 661.7(e) (2003).

[418] 49 C.F.R. § 661.7(f) (2003).

[419] 49 C.F.R. § 661.7(f) (2003).

[420] 49 C.F.R. § 661.7(g) (2003).

The regulation concludes by providing for two instances in which a waiver need not or may not be granted. The former is where the foreign nation in which the item is produced has entered into an agreement with the United States to suspend the "Buy America" requirement.[421] The latter is where although the foreign nation in question has entered into such an agreement, it has violated the terms of the agreement by discriminating against American-made goods that are within the scope of the agreement.[422]

To receive a waiver, a bidder must ordinarily request it in writing "in a timely manner" through the grantee that is making the procurement.[423] The grantee will then in turn submit the request in writing, with all relevant facts and supporting information, to the Administrator through the appropriate regional FTA office.[424] The exception to the general rule is where a bidder is requesting either a public interest waiver or an availability waiver. In such a case, the bidder itself may submit the waiver request to FTA, with a copy to the grantee, who may also submit a request.[425] Following review of the request, the Administrator will publicly release a written determination listing the reasons for granting or denying the requested waiver.[426] This procedure applies to all iron, steel, and manufactured goods not in compliance with the "Buy America" requirements, as well as rolling stock failing to meet the 60 percent domestic content requirement.[427]

### 5. Pre-Award Buy America Audit

As initially implemented, no uniform review mechanism existed to verify the domestic content of rolling stock procured through FTA grants. This changed, however, with the passage of STURAA.[428] STURAA directed FTA (at the time called UMTA) to develop standards for both pre-award and post-delivery audits to assess the domestic content of rolling stock, as well as verifying that the vehicles complied with federal motor vehicle safety requirements and the specification of the bid itself.[429] STURAA further mandated that FTA must make provisions for independent inspections as part of the prescribed auditing procedures.[430] To this end, FTA formulated 49 C.F.R. § 663,[431] which applies to all recipients of grants under the Federal Transit Act, and 23 U.S.C. § 103(e)(4), using those funds to purchase passenger-carrying rolling stock.[432]

49 C.F.R. § 663 defines "pre-award" as being that period before the grantee enters into a formal contract with the bidder.[433] An "audit" is a review resulting in a report containing certification of compliance with the "Buy America" requirements, bid specifications, and, if applicable, the Federal Motor Vehicle Safety Standards.[434] Indeed, an audit is specifically limited to verifying those points.[435] Funds provided through an FTA grant may be used by the grantee to cover the costs of any activities related to the audit process.[436] The grantee is obligated to certify it will carry out the auditing process in compliance with the terms of FTA regulations and maintain the requisite certifications on file.[437] Failure by the grantee to comply with the requirements of the regulation can result in the suspension or compulsory repayment of any funds provided by FTA.[438] The purpose of a pre-award audit is to verify that the rolling stock proposed by the bidder complies with applicable "Buy America" and federal motor vehicle safety requirements. It must be noted that the pre-award audit is independent of both the post-delivery audit and any FTA investigation of "Buy America" compliance that might be implemented in accord with the procedures discussed in § 5.02.03 above.[439]

A pre-award audit must include three parts: (1) a duly executed "Buy America" certificate; (2) a statement that the purchase meets the grantee's requirements; and (3) a Federal Motor Vehicle Safety certificate, if necessary.[440] The requirement for a "Buy America" cer-

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[421] 49 C.F.R. § 661.7(h)(1) (2003), by implication, permits such a suspension. The U.S.-Canada Free Trade Agreement, NAFTA, and similar agreements do not constitute suspensions of this provision however. Hughes at 221–22. As of the last revision to 49 C.F.R. § 661.7(h), no agreement existed that suspended the requirement. The FTA considers this portion of the regulation "inactive." 61 Fed. Reg. 6300, 6300-01 (1996).

[422] 49 C.F.R. § 661.7(h)(1) and (2) (2003). As no such agreements exist as of this writing, this provision is likewise inactive.

[423] 49 C.F.R. § 661.9(b) (2003). A grantee may also request a waiver on its own initiative.

[424] 49 C.F.R. § 661.9(c) (2003).

[425] 49 C.F.R. § 661.9(d) (2003).

[426] 49 C.F.R. § 661.9(e) (2003).

[427] 49 C.F.R. § 661.9(a) (2003); 49 C.F.R. § 661.11(x) (2003). If rolling stock has some foreign content but meets the 60 percent threshold, the bidder merely needs to complete the appropriate "Buy America" certificate. 49 C.F.R. § 661.12 (2003).

[428] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 159. 56 Fed. Reg. 48384 (1991).

[429] 56 Fed. Reg. 48384 (1991).

[430] *Id*.

[431] *Id*.

[432] 49 C.F.R. § 663.3 (2003). 49 C.F.R. § 663 also applies to funds disbursed under the National Capital Transportation Act; however, that act applies only to Washington, D.C., transit agencies. 49 C.F.R. § 663.3 (2003).

[433] 49 C.F.R. § 663.5(a) (2003).

[434] 49 C.F.R. § 663.5(f) (2003).

[435] 49 C.F.R. § 663.9 (a) and (b) (2003). It should be noted that an audit mandated by this section is separate from the audit process required by the Office of Management and Budget through its Audits of State and Local Governments Circular A-128 of 1985. 49 C.F.R. § 663.9(c) (2003).

[436] 49 C.F.R. § 663.11 (2003).

[437] 49 C.F.R. § 663.7 (2003).

[438] 49 C.F.R. § 663.15 (2003).

[439] 49 C.F.R. § 663.13 (2003).

[440] 49 C.F.R. § 663.23 (a) through (c) (2003). The Federal Motor Vehicle Safety standards are promulgated by the Na-

tificate may be met in two different ways. If a waiver has been granted for the purchase, then a letter to that effect from FTA will suffice.[441] Absent a waiver (which is rarely granted), the grantee must have certification, prepared by itself or by a party other than the manufacturer or its agents, which lists components and subcomponents of the rolling stock, identified by manufacturer, country of origin, and costs, along with the location of final assembly and a description of activities and costs associated with that assembly.[442] As a matter of practice, many grantees believe that a pre-award audit prepared by an independent third party offers advantages of increased accuracy and reduced prospects of a successful claim of organizational conflict of interest. A statement that the purchase meets the grantee's requirements must include certification that the desired rolling stock satisfies the specifications given in the bid advertisement and that the bidder is a responsible manufacturer capable of meeting the advertisement's specifications.[443] If the rolling stock acquired would be subject to the Federal Motor Vehicle Safety standards, the grantee must obtain, and keep on file, a copy of the manufacturer's certification information that confirms the rolling stock complies with those standards.[444] If the rolling stock acquired is not subject to the Federal Motor Vehicle Safety Standards, the grantee must keep on file its certification that it received a statement to that effect from the manufacturer.[445] The only exception to the requirement that some sort of record be kept on file concerning the rolling stock's compliance with Federal Motor Vehicle Safety Standards is where the rolling stock is not a motor vehicle.[446]

### 6. Post-Delivery Buy America Audit

The requirement of a post-delivery audit was created at the same time as the pre-award audit, and it is a substantially similar process.[447] "Post-delivery" is defined as that time period from when the rolling stock is delivered to the grantee until: (1) title to the rolling stock is transferred to the grantee, or (2) the rolling stock is put into revenue service, whichever comes first.[448] An "audit" is, once again, a review resulting in a report containing certification of compliance with the "Buy America" requirements, bid specifications, and, if applicable, Federal Motor Vehicle Safety Standards.[449] The scope and financing methods for a post-delivery audit are identical to those of the pre-award audit.[450] The purpose of a post-delivery audit is to verify that the rolling stock, as actually manufactured, meets the bidder's contractual and regulatory obligations.[451] A post-delivery audit must be completed before the rolling stock's title is transferred to the grantee.[452]

Like a pre-award audit, a post-delivery audit must include three parts: (1) a duly executed "Buy America" certificate; (2) a statement that the purchase meets the grantee's requirements; and (3) a Federal Motor Vehicle Safety Standard certificate, if necessary.[453] There are two possible means by which the requirement for a "Buy America" certificate may be satisfied. One is a letter from FTA granting a waiver for the purchase.[454] In the absence of a waiver, the grantee must have certification, prepared by itself or an independent third party, which lists components and subcomponents of the rolling stock, identified by manufacturer, country of origin, and costs, along with the location of final assembly and a description of activities and costs that were associated with such assembly.[455] As a matter of practice, many grantees prefer that the certification be prepared by an independent third party. A report from an experienced outside party may provide greater technical expertise than is available in-house, and eliminates the risk that the post-delivery audit was slanted toward ratifying the award decision made by procurement staff. A statement that the purchase meets the grantee's requirements must include a report from a resident inspector at the manufacturing site that provides accurate records of all vehicle construction activity and explains how the construction and operation of the rolling stock meets the specifications of the contract.[456] Following the inspector's certification, the completed rolling stock must also be visually inspected and road tested, after which the rolling stock may be considered by the grantee to have met the contract's specifications.[457]

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tional Highway Traffic Safety Administration and are codified at 49 C.F.R. § 571 (2002).

[441] 49 C.F.R. § 663.25(a) (2003).

[442] 49 C.F.R. § 663.25(b)(1) and (2) (2003).

[443] 49 C.F.R. § 663.27(a) and (b) (2003).

[444] 49 C.F.R. § 663.41 (2003).

[445] 49 C.F.R. § 663.43(a) (2003).

[446] 49 C.F.R. § 663.43(b) (2003).

[447] 56 Fed. Reg. 48384 (1991).

[448] 49 C.F.R. § 663.5(b) (2003).

[449] 49 C.F.R. § 663.5(f) (2003).

[450] 49 C.F.R. §§ 663.3, 663.7, 663.9, 663.11, 663.13, and 663.15 (2003).

[451] *See* Letter from Gregory B. McBride, Acting Chief Counsel, FTA, to Rolf Meissner, Vice President and General Manager, Siemens Transportation Systems, Inc., Vehicle Division (June 5, 2001) (*available at* http://www.fta.dot.gov/library/legal/buyamer/inltrs/stsi6501.html (visited April 21, 2003)).

[452] 49 C.F.R. § 663.31 (2003).

[453] 49 C.F.R. § 663.33(a) through (c) (2003).

[454] 49 C.F.R. § 663.35(a) (2003).

[455] 49 C.F.R. § 663.35(b)(1) and (2) (2003).

[456] 49 C.F.R. §§ 663.37(a)(1) and (2) (2003). A resident inspector must be someone who was at the manufacturing site throughout the time of manufacture of the rolling stock, other than an employee or agent of the manufacturer. 49 C.F.R. § 663.37(a) (2003). Some transit industry members claim that the resident inspector need not be present during the entire manufacturing process, but the regulation does not explicitly make such an allowance.

[457] 49 C.F.R. § 663.37(b) (2003).

An exception to the regular procedure for the post-delivery review of rolling stock is made for procurements of 10 or fewer buses or any quantity of ordinary production model vans.[458] In the event of such procurements, a resident inspector's report is not required; the grantee must simply visually inspect and test drive the rolling stock.[459] The other post-delivery audit requirements still apply, however.

As in the pre-award audit, if the rolling stock acquired would be subject to the Federal Motor Vehicle Safety Standards, the grantee must obtain, and keep on file, a copy of the manufacturer's certification information that confirms the rolling stock complies with those standards.[460] If the rolling stock acquired is not subject to the Federal Motor Vehicle Safety Standards, the grantee must keep on file its own certification that it received a statement to that effect from the manufacturer.[461] The only exception to the requirement that a record be kept on file concerning the rolling stock's compliance with Federal Motor Vehicle Safety Standards is where the rolling stock is not a motor vehicle.[462]

If the grantee is unable to complete a post-delivery audit because it cannot be certified that the rolling stock meets the "Buy America" requirements or that it meets the grantee's requirements, the grantee may reject the rolling stock.[463] The grantee may then exercise any legal rights it has under the contract or at law.[464] Alternatively, the grantee and manufacturer may agree to conditional acceptance of the rolling stock pending the manufacturer's correction of the deviations within a reasonable period of time.[465]

### 7. Other "America First" Regulations

There are two other "America First" regulations that are of tangential interest to the realm of transit procurement. These are typically called "Fly America"[466] and "Ship America."[467] "Fly America" simply requires that, with certain exceptions, anyone whose air travel is financed with federal government funds must use a U.S. flag air carrier service.[468] The term "U.S. flag air carrier service" is broadly construed. In addition to regular U.S. flag air carriers,[469] the term also includes foreign air carriers that have entered into code-sharing arrangements with U.S. flag air carriers, provided that the ticket or e-ticket documentation identifies the U.S. flag air carrier's designator code and flight number.[470]

A foreign air carrier may not be used merely because of cost, convenience, or personal preference.[471] However, a foreign air carrier may be used where:

1. Use of such an air carrier is a matter of necessity;[472]

2. The service is provided under a transportation agreement that the United States and the home government of the foreign carrier are parties to and that DOT has determined to meet the requirements of the Fly America Act;[473]

3. No U.S. flag air carrier provides service on a particular leg of the route, but in such a case the traveler may only use the foreign carrier to travel to the nearest point possible that will permit a transfer to a U.S. flag air carrier;[474]

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[458] 49 C.F.R. § 663.37(c) (2003).

[459] *Id*.

[460] 49 C.F.R. § 663.41 (2003).

[461] 49 C.F.R. § 663.43(a) (2003).

[462] 49 C.F.R. § 663.43(b) (2003).

[463] 49 C.F.R. § 663.39(a) (2003). Strangely, this part of the regulation omits any reference to the Federal Motor Vehicle Safety Standards as being grounds to reject delivery of rolling stock. This would seem to imply that the grantee must accept delivery of the rolling stock, but presumably would have a breach of contract action that would require the correction of the defects. The use of the permissive "may" by the regulation is also peculiar, and the regulation offers no guidance, nor does the Federal Register entry for the regulation (59 Fed. Reg. 43,778), nor does the definitive "Dear Colleague Letter" on the subject (Dear Colleague Letter from Gordon J. Linton, Administrator, FTA (Mar. 18, 1997) (*available at* http://www.fta.dot.gov/library/reference/buyamerica/byamrdc3.htm (visited April 23, 2003)), *amended by* Dear Colleague Letter from Gordon J. Linton, Administrator, FTA (Aug. 5, 1997) (*available at* http://www.fta.dot.gov/library/reference/buyamerica/dc_c-97-13.html (visited April 21, 2003)). Based on other FTA rulings, however, it appears likely that the FTA would withdraw its funding for the part of the procurement that involved noncompliant rolling stock. *See* Letter from Patrick W. Reilly, Chief Counsel, FTA, to Stanley L. Kaderbeck, Deputy Commissioner and Chief Engineer, City of Chicago Department of Transportation (Dec. 14, 1999) (*available at* http://www.fta.dot.gov/library/legal/buyamer/inltrs/bal121499.html (visited April 21, 2003)) (rejecting request for a waiver for two noncompliant steel beams but offering that if the beams were procured separately with nonfederal funds, the FTA would still fund the remainder of the original procurement).

[464] 49 C.F.R. § 663.39(a) (2003).

[465] 49 C.F.R. § 663.39(b) (2003).

[466] 41 C.F.R. §§ 301-10.131 through 301-10.140 (2002).

[467] 46 C.F.R. §§ 381.1 through 381.9 (2002). "Ship America" is also sometimes referred to as "Cargo Preference" by FTA.

[468] 41 C.F.R. § 301-10.132 (2002). Under the MA, this includes trips financed through FTA grant money. FTA MA § 14.c. A U.S. flag air carrier is a carrier that holds a certificate under 49 U.S.C. § 41102, with the exception of foreign air carriers operating under permits. 41 C.F.R. § 301-10.133 (2002).

[469] A U.S. flag air carrier is a carrier that holds a certificate under 49 U.S.C. § 41102, with the exception of foreign air carriers operating under permits. 41 C.F.R. § 301-10.133 (2002).

[470] 41 C.F.R. § 301-10.134 (2002).

[471] 41 C.F.R. §§ 301-10.139 and 301-10.140 (2002).

[472] 41 C.F.R. § 301-10.135(a) (2002). Necessity exists when service via a U.S. flag air carrier is available but: (1) it cannot provide the air transportation needed; (2) it will not accomplish the agency's mission; (3) a foreign carrier will provide more expeditious travel in the event of medical problems; (4) an unreasonable safety risk is posed by traveling on a U.S. flag air carrier; or (5) there are no available seats in the authorized class of service on a U.S. flag air carrier, but such seats are available on a foreign air carrier. 41 C.F.R. § 301-10.138(a) and (b) (2002).

[473] 41 C.F.R. § 301-10.135(b) (2002).

[474] 41 C.F.R. § 301-10.135(d) (2002).

4. A U.S. flag air carrier involuntarily reroutes traffic to a foreign air carrier;[475]

5. Travel time on a foreign carrier would be 3 hours or less, while use of a U.S. flag air carrier would at least double the travel time;[476]

6. The costs of such transportation will be reimbursed in full by a third party;[477]

7. Despite offering nonstop or direct service to the destination, use of a U.S. flag carrier would extend travel time by 24 hours or more;[478]

8. Use of a U.S. flag air carrier would increase the number of transfers that must be made outside of the United States by two or more;[479]

9. Where nonstop or direct service is not available and use of a U.S. flag air carrier would increase travel time by 6 hours or more;[480] or

10. Where nonstop or direct service is not available and use of a U.S. flag air carrier would result in a connection time of 4 hours or more at an overseas airport.[481]

The "Ship America" regulations define cargoes that must be transported on U.S. flag vessels and the procedures necessary to document those activities.[482] The U.S. DOT is explicitly subject to the conditions of the "Ship America" regulations.[483] Cargoes that are subject to the terms of the regulation include equipment, materials, or commodities procured for the account of the United States, as well as such cargoes procured with grants, loans, or guarantees made by the federal government.[484] A party subject to "Ship America" must supply the Office of National Cargo and Compliance with a report providing certain information about any shipments within 20 working days of the date of loading if the shipment originates from the United States, or 30 working days if it originates in another country.[485] The report must be in the format approved by the Maritime Administrator.[486] Alternatively, a properly notated copy of the ocean bill of lading, in English, may be substituted for the report.[487]

All cargoes shipped by a federal department or agency that fall under the "Ship America" regulations must first be loaded on available U.S. flag vessels.[488] Where it is not feasible to transport an entire shipment exclusively on board U.S. flag vessels, the cargo must be loaded in such a manner as to give U.S. flag vessels freight revenue per long ton that is at least equal to the revenue generated for the foreign flag vessels.[489] Federal departments and agencies are obligated to require all grantees or other fund recipients to make use of U.S. flag vessels in such a way that domestically owned vessels receive at least 50 percent of the revenue generated by the shipment.[490]

## D. PROPERTY ACQUISITION

### 1. Real Property Acquisition and the URARPAPA

The acquisition of real property by a state agency using federal funds requires the agency to comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URARPAPA).[491] URARPAPA was Congress's response to the large-scale displacement of people and businesses that had resulted from the vast expansion of federally-funded highway, mass transit, and urban redevelopment programs in the previous decade and a half.[492] URARPAPA was passed for the purpose of establishing "a uniform policy for the fair and equitable treatment of person displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance."[493] In particular, URARPAPA was passed to ensure that "displaced persons"[494] do not "suffer dispro-

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[475] 41 C.F.R. § 301-10.135(e) (2002).

[476] 41 C.F.R. § 301-10.135(f) (2002).

[477] 41 C.F.R. § 301-10.135(g) (2002).

[478] 41 C.F.R. § 301-10.136(a) (2002).

[479] 41 C.F.R. § 301-10.136(b)(1) (2002).

[480] 41 C.F.R. § 301-10.136(b)(2) (2002).

[481] 41 C.F.R. § 301-10.136(b)(3) (2002).

[482] 46 C.F.R. § 381.1 (2002). Certain provisions of the "Ship America" regulation are unlikely to be of ordinary concern to the transit industry, such as those dealing with the shipment of bulk agricultural goods (46 C.F.R. § 381.9), and are therefore excluded from this analysis. Please consult the C.F.R. for a more complete discussion of issues related to "Ship America."

[483] 46 C.F.R. § 381.2(c)(15) (2002).

[484] 46 C.F.R. § 381.2(b)(1) and (4) (2002). As provided for by the MA, this includes cargoes obtained with FTA grant money. FTA MA § 14.b.

[485] 46 C.F.R. § 381.3(a) (2000). The report must include: (1) the identity of the sponsoring U.S. government agency or department; (2) the name of the vessel; (3) the vessel flag of registry; (4) the date of loading; (5) the port of loading; (6) the port of final discharge; (7) the commodity description; (8) the gross weight in pounds; and (9) the total ocean freight revenue in U.S. dollars. 46 C.F.R. § 381.3(a)(1) through (9) (2002).

[486] 46 C.F.R. § 381.3(b) (2002).

[487] *Id*.

[488] 46 C.F.R. § 381.5 (2000). An exemption is permitted to this where the agency and the Maritime Administrator agree that there are no available U.S. flag vessels at "fair and reasonable rates" or where there is a "substantially valid reason" for loading foreign vessels first. 46 C.F.R. § 381.5(a) and (b) (2002).

[489] 46 C.F.R. § 381.4 (2002).

[490] 46 C.F.R. § 381.7 (2002).

[491] 42 U.S.C. § 4621 (2000). Interested readers should also consult FTA Circular 5010.1C, ch. II on this subject.

[492] Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646, 84 Stat. 1895 (1971) (codified as amended at 42 U.S.C. § 4601 *et seq.*).

[493] 42 U.S.C. § 4621(b) (2000).

[494] A "displaced person" is any person who moves from real property, moves their personal property from real property, or is a residential tenant, or conducts a business or farm operation that will be permanently displaced as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a federal agency or with federal financial assistance. 42 U.S.C. §§ 4601(6)(A)(i) and (ii) (2000). This does not

portionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons."[495]

Before FTA may approve any federally financed grant to, or contract or agreement with, a grantee that will result in the acquisition of real property or otherwise displace a person within the scope of URARPAPA, the grantee must provide "appropriate assurances" that it will comply with both URARPAPA and DOT's pertinent regulations.[496] A grantee may provide such assurances at one time to cover all subsequent federally assisted programs or projects if the federal agency believes that would serve the purposes of URARPAPA.[497] If a federal or state agency provides federal funds to a third party that will cause displacement, the agency providing the funds is responsible for ensuring compliance with DOT's regulations, even if the contract between the agency and the third party stipulates that the third party is responsible.[498] FTA may choose to waive any requirement under DOT's regulations provided that URARPAPA does not mandate the requirement and that the waiver would not reduce any assistance or protection promised by the regulations.[499] As an alternative to the URARPAPA regulatory regime, FTA may release funds to a grantee if the latter certifies that there exists a comparable state provision providing equal or greater protection than URARPAPA.[500] Where there are multiple compensatory programs available, a displaced person may not receive compensation under URARPAPA if another program (such as the aforementioned state provision) is in effect.[501]

FTA is required to monitor state compliance with URARPAPA and DOT's regulations.[502] To this end, FTA periodically must investigate a grantee's performance, with the grantee being obligated to provide any information requested for the purpose of the investigation.[503] If the investigation reveals that a grantee has failed to comply with federal (or FTA-approved equivalent state) laws and regulations governing the payment of relocation assistance, property transfer costs, or litigation expenses, FTA should withhold further funding from the project until the grantee brings itself into compliance.[504] If the grantee is in violation of any other laws and regulations pertinent to real property acquisition, FTA may withhold funding until the situation is rectified.[505] In either event, FTA must notify the "lead agency" (i.e., DOT acting through FHWA), of its intention to withhold funds at least 15 days prior to making a final determination about whether to do so.[506]

A grantee receiving federal funds for real property acquisition or other displacement of persons must maintain records of all such acquisitions and displacements in sufficient detail to show compliance with URARPAPA and DOT regulations.[507] Additionally, a grantee must submit a report of its real property acquisition and displacement activities if FTA so requests.[508]

## 2. The Appraisal Process

### *a. Content of Appraisals*

Before an attempt is made to acquire real property, whether by negotiation with a property owner or an action under eminent domain, the grantee interested in acquiring the property must obtain an appraisal of the property's value.[509] The format and level of documentation for an appraisal will depend on the complexity of the work required.[510] However, an agency must develop minimum standards for appraisals "consistent with established and commonly accepted appraisal practice" for properties that, due to their simplicity or low value, would not require the degree of analysis necessary for a

include persons who are determined to have been living unlawfully on the property, who moved into the property with the intent of obtaining assistance under URARPAPA, or had rented the property with the knowledge that their tenancy would be terminated by the property acquisition. 42 U.S.C. § 4601(6)(B)(i) and (ii) (2000).

[495] 42 U.S.C. § 4621(b) (2000). Working under this direction from Congress, DOT formulated 49 C.F.R. §§ 24.1 *et seq*. While these regulations are largely a recapitulation of URARPAPA, it does bring with it a somewhat more pragmatic outlook. For example, DOT's regulations begin with the statement that the purpose of them, among other things, is "to encourage and expedite acquisition by agreements with…owners, to minimize litigation and relieve congestion in the courts, and to promote public confidence in federal and federally-assisted land acquisition programs." 49 C.F.R. § 24.1(a) (2002).

[496] 49 C.F.R. § 24.4(a)(1) (2002).

[497] *Id*.

[498] 49 C.F.R. § 24.4(a)(2) (2000).

[499] 49 C.F.R. § 24.7 (2002). Any request for a waiver must be examined on a case-by-case basis. 49 C.F.R. § 24.7 (2002).

[500] 49 C.F.R. § 24.4(a)(3) (2002); 49 C.F.R. § 24.601 (2002).

[501] 49 C.F.R. § 24.3 (2002).

[502] 49 C.F.R. § 24.4(b) (2002).

[503] 49 C.F.R. § 24.603(a) (2002).

[504] 49 C.F.R. § 24.603(b) (2002). Interestingly, this regulation specifically uses the word "should," which implies the federal agency retains some measure of discretion about whether to withhold payments. The regulation does not offer guidance as to when it may be appropriate to continue payments despite a violation.

[505] 49 C.F.R. § 24.603(b) (2002).

[506] *Id*.

[507] 49 C.F.R. § 24.9(a) (2002). These records are to be kept for at least 3 years after each displaced person receives the final payment to which he or she is entitled under the appropriate federal laws and regulations. 49 C.F.R. § 24.9(a) (2002).

[508] 49 C.F.R. § 24.9(c) (2002). However, such a report may not be required more frequently than once every 3 years unless the FTA shows good cause. 49 C.F.R. § 24.9(c) (2002).

[509] 49 C.F.R. § 24.102(c)(1) (2002). An appraisal is not necessary if the owner has approached the agency about the possibility of donating the property or where the agency reasonably anticipates the fair market value of the property would be $2500 or less. 49 C.F.R. § 24.102(c)(2) (2002).

[510] 49 C.F.R. § 24.103(a) (2002).

detailed appraisal.[511] A detailed appraisal reflecting "nationally recognized appraisal standards, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisition" must be prepared for all other real property acquisitions.[512] Additionally, if the owner of a "real property improvement" plans to remove it prior to acquisition of the property (e.g., an above-ground swimming pool, prefabricated tool shed, etc.), the amount offered for the property must be discounted by the salvage value of the improvement.[513]

*b. Appraiser Qualifications*

Agencies (federal or state) are required to establish minimum qualifications for appraisers.[514] These qualifications must be consistent with the degree of complexity posed by the appraisal assignment.[515] If an agency wishes to employ an independent appraiser for a "detailed appraisal," the appraiser so retained must be certified in accordance with Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[516] (See Section 5.03.02.01 above for a description of what must be included in an appraisal.) An appraiser or reviewing appraiser may not have any interest, direct or indirect, in the property to be appraised that could in any way conflict with the preparation or review of the appraisal.[517] Compensation for appraisal work must not be predicated upon the value of the property.[518]

*c. Appraisal Reviews*

Any grantee that is making acquisitions of real property must have an appraisal review process.[519] At a minimum, the process must include a qualified reviewing appraiser who shall examine all appraisals to determine whether each meets applicable appraisal requirements, and return individual appraisal reports for corrections or revisions if necessary.[520] If the reviewing appraiser determines that an appraisal is unsatisfactory, and it is not practical to obtain an additional appraisal, then the reviewing appraiser may "develop appraisal documentation" to support an approved or recommended valuation.[521] The reviewing appraiser's certification of the recommended or approved value of the property must be set forth in a signed statement that identifies the appraisal reports used and explains the basis for the certification.[522] Damages or benefits to any remaining property must also be identified in the certification.[523] If a significant amount of time has passed since the initial appraisal, the grantee must obtain a new appraisal of the property.[524]

### 3. The Real Property Acquisition Process

A grantee that plans on acquiring real property is subject to a wide range of obligations under URARPAPA and DOT's regulations for the purpose of protecting property owners and tenants' interests and rights.[525] The obligations discussed below apply to almost any acquisition of real property for projects where there is federal financial assistance in any part.[526] The only circumstances where these obligations do not apply are those where:

1. The transaction is voluntary;[527]

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[511] *Id*.

[512] *Id*. A detailed appraisal must at least include: (1) the purpose and function of the appraisal, a definition of the property being appraised, and a statement of the assumptions and limiting conditions affecting the appraisal; (2) an adequate description of the physical characteristics of the property being appraised (and, in the case of a partial acquisition, an adequate description of the remaining property), a statement of the known and observed encumbrances, title information, location, zoning, present use, an analysis of highest and best use, and at least a 5-year sales history of the property; (3) all relevant and reliable approaches to value consistent with commonly accepted professional appraisal practices; (4) a description of comparable sales, including a description of all relevant physical, legal, and economic factors such as parties to the transaction, source and method of financing, and verification by a party involved in the transaction; (5) a statement of the value of the real property to be acquired and, for a partial acquisition, a statement of the value of the damages and benefits, if any, to the remaining real property; and (6) the effective date of valuation, date of appraisal, signature, and certification of the appraiser. 49 C.F.R. § 24.103(a)(1) through (6) (2002). To the extent permitted by state law, the appraiser should adjust his or her findings to avoid any reflection of the property's likely acquisition upon its value, other than that due to physical deterioration within reasonable control of the owner. 49 C.F.R. § 24.103(b) (2002).

[513] 49 C.F.R. § 24.103(c) (2002).

[514] 49 C.F.R. § 24.103(d)(1) (2002).

[515] *Id*. The regulation does not prescribe exact qualifications, but it does recommend examining "experience, education, [and] training." 49 C.F.R. § 24.103(d)(1) (2002).

[516] 49 C.F.R. § 24.103(d)(2) (2002). The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 is codified at 12 U.S.C. §§ 3331 *et seq*. (2000).

[517] 49 C.F.R. § 24.103(e) (2002).

[518] *Id*. An appraiser may not act as a negotiator for the acquisition of any property that he or she has done appraisal work on, except where the property is valued at $2500 or less and the grantee so approves. 49 C.F.R. § 24.103(e) (2002).

[519] 49 C.F.R. § 24.104 (2002).

[520] 49 C.F.R. § 24.104(a) (2002).

[521] 49 C.F.R. § 24.104(b) (2002).

[522] 49 C.F.R. § 24.104(c) (2002).

[523] *Id*.

[524] 49 C.F.R. § 24.102(g) (2002). The regulation does not define how great a delay is necessary to reach the level of "significant."

[525] 49 C.F.R. § 24.1 (2002).

[526] 49 C.F.R. § 24.101(a) (2002).

[527] For a transaction to be considered voluntary it must meet *all* of the following requirements: (1) no specific site or property needs to be acquired; (2) the property to be acquired is not part of an intended, planned, or designated project area where all or substantially all of the property within the area is to be acquired within specific time limits; (3) the agency will not acquire the property in the event negotiations fail to result in an

2. The grantee making the acquisition lacks eminent domain power;[528]

3. The property is to be acquired from a government entity and the grantee making the acquisition cannot condemn property of that sort;[529] or

4. The property is to be acquired by a cooperative from a party who, as a condition of membership in the cooperative, has agreed to provide needed real property without charge.[530]

Aside from the acquisition of fee simple interests in land, these obligations also apply where the grantee is seeking to acquire fee title subject to a life estate, acquire a lease of 50 years or more (including options), or acquire a permanent easement.[531]

A grantee must make every reasonable effort to acquire real property by negotiation.[532] But before those negotiations may commence, the grantee is obligated to undertake a number of preliminary tasks. As soon as is feasible, the grantee must notify the owner of its interest in acquiring the property, the grantee's need to secure an appraisal of the property, and the basic protections given the owner under URARPAPA and DOT's own regulations.[533] Following the appraisal process (discussed above), the grantee must establish an amount, not less than the appraisal value, that it believes is the just compensation for the property, and promptly deliver to the owner a written offer for the property on those price terms.[534] The grantee must make reasonable efforts to contact the owner or the owner's agent and discuss its offer for the property, along with its acquisition policies and procedures.[535] Following the grantee's overtures, the owner shall be given reasonable opportunity to consider the offer and to present information for the purpose of suggesting the modification of the grantee's offer.[536] If that information is compelling, a material change in the condition of the property has occurred, or a significant amount of time has passed since the initial appraisal, the grantee is obligated to have the original appraisal updated or a new one prepared.[537] If a meaningful change in the fair market value is found, the grantee must promptly reestablish the amount of just compensation and submit a modified offer to the owner in writing.[538]

The purchase price for the property may exceed the amount determined as being just compensation when reasonable efforts to negotiate an agreement at that amount have failed and an authorized official of the grantee certifies the greater settlement as being "reasonable, prudent, and in the public interest."[539] A written justification must be prepared that indicates the available information that supports such a settlement.[540] If the acquisition of part of the property would result in the owner holding "an uneconomic remnant," the grantee shall offer to acquire that remnant as well.[541] The grantee may agree to permit a former owner or tenant to remain on the property following its acquisition with the understanding that the grantee may terminate the leasehold on short notice and that rent will be charged at the fair market rate for such occupancy.[542]

Special provisions govern the acquisition of property that includes tenant-owned improvements. A grantee must offer to acquire at least an equal interest in all buildings, structures, or other improvements on any property to be acquired, and this shall include any improvement a tenant has made where it has the right or obligation to remove the improvement at the expiration of its lease term.[543] Just compensation for a tenant-owned improvement is calculated as the amount by which the improvement contributes to the fair market value of the whole property or its salvage value, whichever is greater.[544] However, no payment may be made to a tenant-owner for any improvement unless:

1. The tenant-owner transfers to the grantee its entire interest in the improvement;

2. The owner of the property where the improvement is located disclaims its interest; and

3. The payment would not result in the duplication of any compensation otherwise authorized by law.[545]

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amicable agreement and the owner is informed of such in writing; and (4) the agency informs the owner of what it believes to be the fair market value of the property. 49 C.F.R. § 24.101(a)(1)(i) through (iv) (2002).

[528] The agency must unambiguously notify the owner of its lack of eminent domain power before making an offer for the property and also inform the owner of what it believes to be the fair market value of the property. 49 C.F.R. § 24.101(a)(2)(i) and (ii) (2002).

[529] *See, e.g.,* TEX. LOCAL GOV'T CODE § 261.001 (2000), which gives counties eminent domain power over all public lands except those serving as cemeteries.

[530] 49 C.F.R. § 24.101(a)(1) through (4) (2002).

[531] 49 C.F.R. § 24.101(b) (2002).

[532] 49 C.F.R. § 24.102(a) (2002).

[533] 49 C.F.R. § 24.102(b) (2002).

[534] 49 C.F.R. § 24.102(d) (2002). Along with the offer, the agency must provide the owner a written statement giving the basis of the offer for just compensation, which must include: (1) a statement of the amount offered, and in the case of a partial acquisition, the compensation for damages, if any, to the remaining property; (2) a description and location identification of the real property and the interest in the real property to be acquired; and (3) an identification of the buildings, structures, and other improvements that are considered to be part of the real property for which the offer of just compensation is made. 49 C.F.R. §§ 24.102(e)(1) through (3) (2002).

[535] 49 C.F.R. § 24.102(f) (2002).

[536] *Id.*

[537] 49 C.F.R. § 24.102(g) (2002).

[538] *Id.*

[539] 49 C.F.R. § 24.102(i) (2002).

[540] *Id.*

[541] 49 C.F.R. § 24.102(k) (2002).

[542] 49 C.F.R. § 24.102(m) (2002).

[543] 49 C.F.R. § 24.105(a) (2002).

[544] 49 C.F.R. § 24.105(c) (2002).

[545] 49 C.F.R. § 24.105(d)(1) through (3) (2002).

Aside from just compensation for the property itself, an owner is entitled to other sorts of reimbursements under URARPAPA and DOT's guidelines as well. An owner must be reimbursed for all reasonable costs necessarily incurred for recording fees and other similar expenses incidental to conveying the property to the agency,[546] penalty costs for prepayment of preexisting recorded mortgages, and the *pro rata* share of any prepaid property taxes for the period after the grantee obtains title or takes effective possession of the property, whichever is earlier.[547] When feasible, the grantee shall pay these costs directly so as to spare the owner from having to pay them and then seek reimbursement from the grantee.[548] An owner is also entitled to reimbursement for any reasonable expenses (e.g. attorney's fees, appraisal fees, etc.) incurred as a result of a condemnation action, but only if:

1. The final judgment of the court is that the grantee cannot acquire the property via condemnation;
2. The condemnation proceeding is abandoned by the grantee other than under an agreed-upon settlement; or
3. The court renders a judgment in favor of the owner in an inverse condemnation proceeding or the grantee effects a settlement of such proceeding.[549]

A grantee is prohibited from advancing the date of condemnation, delaying negotiations, or otherwise undertaking any coercive actions calculated to induce an agreement on the terms for acquiring the property.[550] Furthermore, before requiring the owner to surrender possession of the property, the grantee must pay the owner the agreed purchase price or, in the event of a condemnation action, deposit with the court an amount not less than the grantee's determination of fair market value or the court's award of compensation.[551] Grantees are barred from intentionally creating circumstances that would give rise to an inverse condemnation proceeding.[552] If a grantee wishes to use eminent domain to acquire property, it must institute formal condemnation proceedings.[553]

### 4. The Relocation Process

Before a grantee acquires real property, it must assess whether that planned acquisition will result in the displacement of any persons (including both residential and business displacement).[554] A person is "displaced" when he or she moves from a piece of real property or removes his or her personal property from a piece of real property as a direct result of:

1. A written notice of intent to acquire, the initiations of negotiations for, or the acquisition of, the real property in whole or in part for a federally-funded project;
2. The rehabilitation or demolition of the real property for the purposes of a federally-funded project; or
3. A written notice of intent to acquire, or the acquisition, rehabilitation or demolition of, in whole or in part, other real property on which the person conducts a business or farm operation, for a federally-funded project.[555]

However, there are many exceptions to this general category of displaced persons, which may reduce or even eliminate the possible amount of compensation a person may receive.[556]

A "relocation assistance advisory program" must be established to deal with any anticipated displaced persons.[557] The advisory program must include such facilities and services as are appropriate or necessary to render many possible forms of assistance.[558] This assistance must include, but is not limited to:

1. A determination of the relocation needs and preferences of each person to be displaced, including a personal interview with each person;
2. Providing current and continuing information on the availability, purchase prices, and rental costs of comparable replacement dwellings; and
3. Providing current and continuing information of the availability, purchase prices, and rental costs of suitable commercial and farm properties and locations, along with assistance in establishing a business or farm in a suitable replacement location.[559]

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[546] This does not include costs solely required for perfecting the owner's title to the property prior to transfer. 49 C.F.R. § 24.106(a)(1) (2002).

[547] 49 C.F.R. § 24.106(a)(1) through (3) (2002).

[548] 49 C.F.R. § 24.106(b) (2002).

[549] 49 C.F.R. § 24.107(a) through (c) (2002).

[550] 49 C.F.R. § 24.102(h) (2002).

[551] 49 C.F.R. § 24.102(j) (2002).

[552] 49 C.F.R. § 24.102(l) (2002).

[553] *Id*.

[554] This planning procedure should be done in "such a manner that the problems associated with the displacement of individuals, families, businesses, farms, and non-profit organizations are recognized and solutions are developed to minimize the adverse impacts of displacement." 49 C.F.R. § 24.205(a) (2002). *See* 49 C.F.R. § 24.205(a) and (b) (2002) for more on the recommended contents of such a plan and financing for planning.

[555] 49 C.F.R. § 24.2 (2002). See definition of "displaced person."

[556] These exceptions include, but are not limited to: (1) a person who moves before the initiation of negotiations, unless the agency determines that the person was displaced as a direct result of the project; (2) a person who enters into occupancy of the property only after the date of its acquisition for the project; (3) a person who has occupied the property for the purpose of obtaining assistance under URARPAPA; (4) a person whom the agency determines has not been displaced as a direct result of a partial acquisition; (5) a person who is determined to be in unlawful occupancy prior to the initiation of negotiations or who has been evicted for cause; or (6) a person who is not lawfully present in the U.S. and who has been determined to be otherwise ineligible for relocation benefits. 49 C.F.R. § 24.2 (2002). See definition for "persons not displaced," which also includes a number of more exotic categories of non-displaced persons.

[557] 49 C.F.R. § 24.205(c)(1) (2002).

[558] 49 C.F.R. § 24.205(c)(2) (2002).

[559] 49 C.F.R. § 24.205(c)(2)(i) through (iii) (2002).

The relocation program shall be coordinated with project work and "other displacement-causing activities" to minimize duplication of functions and to ensure that displaced persons receive consistent treatment.[560]

As soon as feasible, the grantee must furnish a person scheduled to be displaced with a general written description of the grantee's relocation program.[561] Eligibility for relocation assistance begins on the same date as the initiation of negotiations for the property; the grantee must promptly notify occupants in writing of that change in status.[562] No lawful occupant may be required to move unless he or she has received at least 90 days advance written notice of the earliest date by which he or she may be required to move.[563] In the event that the 90-day notice is issued before a comparable replacement dwelling is available, the notice must state clearly that the occupant will not have to move earlier than 90 days after such a dwelling comes available.[564] However, an occupant may be required to move on less than 90 days written notice if the grantee determines that such a notice is impracticable.[565]

Ordinarily, a person to be displaced from a residential dwelling cannot be compelled to vacate the property unless at least one comparable replacement dwelling has been made available.[566] Where possible, three or more comparable replacement dwellings should be made available for the occupant's selection.[567] However, under certain limited circumstances FTA (or in the case of "flexed funds," FHWA) may grant a waiver to the requirement that a comparable dwelling be made available before a person is obligated to move from a property.[568] Where a waiver is granted, the grantee must "take whatever steps are necessary" to relocate the person to a "decent, safe and sanitary dwelling," including paying for reasonable moving expenses and increases in rent or utilities incurred as part of the relocation, and make available a comparable replacement dwelling as soon as it is feasible.[569]

Once a person has become eligible for relocation assistance, he or she must file a claim for assistance with such supporting documentation as may be reasonably required to demonstrate expenses occurred for the purposes of relocating.[570] A displaced person must also demonstrate that he or she is a U.S. citizen, an alien lawfully present in the United States, or, in the case of a corporation, authorized to conduct business within the United States.[571] The grantee is obligated to provide

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[560] 49 C.F.R. § 24.205(d) (2002).

[561] 49 C.F.R. § 24.203(a) (2002). The written description must, at minimum, do the following: (1) inform the person that he or she may be displaced for the project and explain the relocation payment for which the person may be eligible; (2) inform the person that he or she will be given reasonable relocation advisory services; (3) describe the conditions of eligibility and the procedures for obtaining the relocation payment; (4) inform the person that he or she will be given at least 90 days notice before being displaced and that the displacement will not occur unless at least one comparable replacement dwelling has been made available; (5) inform the person that anyone who is an alien not lawfully present in the U.S. is ineligible for relocation advisory services and payments unless such ineligibility would result in exceptional and extremely unusual hardship to a qualifying spouse, parent, or child; and (6) describe the person's right to appeal the agency's determination as to a person's application for assistance under URARPAPA and DOT's regulations. 49 C.F.R. § 24.203(a)(1) through (5) (2002). As the regulation states that the grantee "shall" provide a description of the relocation program to people scheduled to be displaced, the grantee must provide copies of the description even if those potentially displaced have not requested relocation assistance.

[562] 49 C.F.R. § 24.203(b) (2002).

[563] 49 C.F.R. § 24.203(c)(1) (2002). The notice must either give a specific date as the earliest date by which the occupant may be required to move, or indicate that the occupant will receive a further notice, giving at least 30 days advance warning, of the specific date by which the occupant must depart the property. 49 C.F.R. § 24.203(c)(3) (2002).

[564] 49 C.F.R. § 24.203(c)(3) (2002).

[565] 49 C.F.R. § 24.203(c)(4) (2002). The agency is required to keep a copy of its determinations in the applicable case file.

[566] 49 C.F.R. § 24.204(a) (2002). A "comparable replacement dwelling" is one that is: (1) decent, safe, and sanitary; (2) functionally equivalent to the original dwelling; (3) adequate in size to accommodate the occupants; (4) in an area not subject to unreasonably adverse environmental conditions; (5) in a location generally not less desirable than the location of the original dwelling with respect to public utilities or commercial and public facilities, and that is reasonably accessible to the person's place of employment; (6) on a site that is typical in size for residential development with normal site improvements, including customary landscaping but not necessarily special improvements (such as swimming pools or gazebos); (7) currently available to the displaced person on the private market (unless the person was receiving government housing assistance, in which case it may so reflect that assistance); and (8) within the financial means of the displaced person. 49 C.F.R. § 24.2 (2002). See definition for "comparable replacement dwelling."

[567] *Id*. A comparable replacement dwelling is considered to have been made available when: (1) the person to be displaced has been informed of its location; (2) the person has had sufficient time to negotiate and enter into a purchase agreement or lease for the property; and (3) the person is assured of receiving the relocation assistance and acquisition payment in sufficient time to complete the purchase or lease of the property. 49 C.F.R. § 24.204(a)(1) through (3) (2002).

[568] The available circumstances are: (1) a major disaster as defined in § 102(c) of the Disaster Relief Act of 1974; (2) a presidentially declared national emergency; or (3) any other emergency that requires immediate evacuation of the property, such as when continued occupancy would constitute a substantial danger to the health or safety of the occupants. 49 C.F.R. § 24.204(b)(1) through (3) (2002).

[569] 49 C.F.R. § 24.204(c)(1) through (3) (2002).

[570] 49 C.F.R. § 24.207(a) (2002). All claims must be filed with the agency within 18 months after the date of displacement, if tenants, or, if owners, the date of displacement or the date of the final acquisition payment, whichever is later. The agency may waive this deadline for good cause. 49 C.F.R. § 24.207(d)(1) and (2) (2002).

[571] 49 C.F.R. § 24.208(a)(1) through (4) (2002). *See* 49 C.F.R. § 24.208 (2002) for further details on how citizenship and legal

reasonable assistance to displaced persons in completing and filing a claim.[572] Payments may be made in advance of receiving all supporting documents if the displaced person can demonstrate the need for such a payment to avoid hardship; however, the grantee must impose safeguards to ensure that the payment is used for a proper purpose.[573] If there were multiple occupants in the original dwelling who relocated to different dwellings, the grantee must determine whether they had formed a single household in the original dwelling and allocate relocation assistance accordingly.[574] Where the grantee disapproves all or part of a claim for payment, or refuses to even consider one, it is required to promptly notify the claimant in writing, including the basis for its determination and the procedures for appealing that decision.[575]

A variety of different payment schemes for relocation are based on the nature of the displacement, either residential or "nonresidential" (i.e. businesses, farms, and nonprofit organizations). For residential moves, the displaced person has a choice of receiving a fixed payment[576] or a payment for any reasonable and necessary moving expenses as determined by the agency.[577] Residential displaced persons receive different payments for housing based on the length and nature of their residency on the original property.[578] A similar choice between fixed payments[579] and reasonable and necessary expenses[580] confronts nonresidential displaced persons, but such persons can further qualify to receive reasonable and necessary "reestablishment expenses."[581] Finally, special rules for compensation exist where the grantee is displacing a utility's facilities in such a manner as to create "extraordinary expenses" for the utility.[582]

### 5. Nondiscrimination in Housing

The implementation of any real property acquisition and relocation plan must be in accordance with a wide variety of civil rights legislation and executive orders.[583] Of particular significance, however, are 42 U.S.C. § 3608 and Executive Order 12892 of January 20, 1994, as these impose affirmative duties to combat discrimination on DOT, its agencies, and recipients of federal funds. The former mandates: "All executive departments and agencies shall administer their programs and activities relating to housing and urban development…in a manner affirmatively to further the purposes of [the Fair Housing Act] and shall cooperate with the Secretary [of Housing and Urban Development] to further such purposes."[584]

Executive Order 12892 builds significantly upon this base. It begins by explaining that the term "programs and activities" includes not only those operated directly by the federal government, but all grants, loans, and contracts made by the federal government, as well as all exercise of regulatory responsibility.[585] This includes FTA grants of federal financial assistance, including interstate substitution funds.[586] In addition to carrying

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residency may be certified and verified, and how to deal with relocation assistance for illegal aliens.

[572] 49 C.F.R. § 24.207(a) (2002). Claims shall be reviewed in an expeditious manner and payment shall be made as soon as is feasible following receipt of sufficient supporting documentation. 49 C.F.R. § 24.207(b) (2002).

[573] 49 C.F.R. § 24.207(c) (2002). Advance relocation payments are to be deducted from the total of the final relocation amount to be paid. 49 C.F.R. § 24.207(f) (2002).

[574] 49 C.F.R. § 24.207(e) (2002). If the occupants originally formed a single household, each person must receive a prorated share of the reasonable relocation payment that would have been made to a single household. If the occupants originally constituted multiple households, then each such groups are entitled to separate relocation payments. 49 C.F.R. § 24.207(e) (2002).

[575] 49 C.F.R. § 24.207(g) (2002).

[576] 49 C.F.R. § 24.302 (2002). The amount of the fixed payment is to be determined based on a schedule prepared by the Federal Highway Administration.

[577] 49 C.F.R. § 24.301 (2002). This includes, but is not limited to: (1) transportation for a distance of 50 miles or less; (2) storage of personal property for 12 months or less; and (3) insurance for the replacement value of personal property moved. 49 C.F.R. § 24.301(a), (d), and (e) (2002). See 49 C.F.R. § 24.301 (2002) for a further list of ordinarily permissible expenses and 49 C.F.R. § 24.305 (2002) for a list of expenses usually not covered by relocation payments.

[578] The categories are homeowners with 180 days or more of occupancy prior to initiation of negotiations (49 C.F.R. § 24.401 (2002)), tenants and homeowners with 90 days or more of occupancy prior to initiation of negotiations (49 C.F.R. § 24.402 (2002)), and tenants and homeowners with less than 90 days of occupancy prior to initiation of negotiations (no housing payments beyond the acquisition amount provided for under 49 C.F.R. §§ 24.101 and 24.102 (2002)). Mobile home owners and occupants receive special consideration. 49 C.F.R. §§ 24.501 *et seq*.

[579] 49 C.F.R. § 24.306 (2002).

[580] 49 C.F.R. § 24.303 (2002).

[581] 49 C.F.R. § 24.304 (2000). Reestablishment expenses include, but are not limited to: (1) repairs or improvements to the replacement real property as required by federal, state, or local law; (2) advertisement of replacement location; and (3) estimated increased costs of operation for the first 2 years of operation at the replacement site. 49 C.F.R. § 24.304(a)(1), (8), and (10) (2002). *See* 49 C.F.R. § 24.304(a) and (b) (2002) for a more complete list of permissible and impermissible reestablishment expenses.

[582] 49 C.F.R. § 24.307 (2002). "Extraordinary expenses" are those that, in the determination of the agency, are not routine or predictable expense relating to the utility's occupancy of rights-of-way and are not ordinarily budgeted as operating expenses. 49 C.F.R. § 24.307(b) (2002).

[583] 49 C.F.R. § 24.8 (2002). This includes § 1 of the Civil Rights Act of 1866, Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, the Age Discrimination Act of 1975, Executive Order 11063—Equal Opportunity and Housing, and Executive Order 12259—Leadership and Coordination of Fair Housing in Federal Programs.

[584] 42 U.S.C. § 3608(d) (2000).

[585] Exec. Order No. 12892 § 1-102, 59 Fed. Reg. 2939 (1994).

[586] FTA MA § 21.b.

out the actions specifically delineated in 42 U.S.C. § 3608, the head of each executive agency must take appropriate steps to require that all persons and entities "who are applicants for, or participants in, or who are supervised or regulated under" the prescribed forms of agency programs must comply with the terms of the order.[587] If the agency receives a complaint alleging a violation of the Fair Housing Act, or otherwise obtains information that suggests that a violation has occurred, it must forward that complaint or information to the Secretary of Housing and Urban Development for investigation.[588] Where the complaint or information "indicate a possible pattern or practice of discrimination in violation of the Act," the agency must also forward it to the U.S. Attorney General.[589]

The order requires the head of each executive agency to cooperate and provide requested information to any other agency that is investigating possible violations of the Fair Housing Act.[590] If an executive agency concludes that any person or entity, including state or local government agencies, within the scope of its authority has not complied with the terms of the order, or any other regulation or procedure adopted pursuant to the order, the executive agency must first attempt to resolve the violation by "informal means."[591] However, the agency is under no obligation to attempt an informal resolution if another executive agency has already attempted such a resolution with the same person or entity and been rebuffed.[592] If informal resolution fails or is discarded as an option, the executive agency must impose sanctions, but may choose which of those sanctions is appropriate,[593] including:

1. Cancellation or termination of agreements or contracts;

2. Refusal to extend any further aid under any program or activity within the scope of the order until it is satisfied that the person or entity will bring itself into compliance;

3. Refusal to grant supervisory or regulatory approval to such a person or entity under any program or activity within the scope of the order or revoke any such approval if already given; and

4. Any other action that "may be appropriate under law."[594]

The sanctions imposed by the executive agency in response to findings of violations of the order must be reported to the Secretary of Housing and Urban Development and, where appropriate, the Attorney General, in a timely manner.[595]

Finally, the order directs the heads of executive agencies to consider imposing sanctions against any person or entity against which another executive agency has imposed sanctions under the terms of the order.[596] The heads of executive agencies should also consider imposing sanctions against a person or entity that is subject to an ongoing investigation by either the Secretary of Housing and Urban Development or the Attorney General.[597]

### 6. Energy Assessments

In the wake of the energy crises of the 1970s, the U.S. federal government briefly became concerned with improving energy efficiency in public buildings.[598] In the realm of transportation, that led to the enactment of a regulation mandating the preparation of an "energy assessment" as a condition for FTA (at the time UMTA) assistance in the construction or modification of buildings.[599] An energy assessment consists of an analysis of the total energy requirements of a building, at a level of detail appropriate for the scale of the proposed construction activity.[600] The analysis must consider the overall design of the facility or modification, and alternative designs thereto, particularly noting the materials and techniques to be used and "special or innovative" conservation measures to be employed.[601] Furthermore, the analysis must also describe the fuel

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[587] Exec. Order No. 12892 § 2-203, 59 Fed. Reg. 2939 (1994).

[588] Exec. Order No. 12892 § 2-204, 59 Fed. Reg. 2939 (1994).

[589] *Id*.

[590] Exec. Order No. 12892 § 5-501, 59 Fed. Reg. 2939 (1994).

[591] Exec. Order No. 12892 § 5-502, 59 Fed. Reg. 2939 (1994). "Informal means" include "conference, conciliation, and persuasion."

[592] *Id*.

[593] *Id*.

[594] Exec. Order No. 12892 § 5-502(a) through (d), 59 Fed. Reg. 2939 (1994).

[595] Exec. Order No. 12892 § 5-505, 59 Fed. Reg. 2939 (1994).

[596] Exec. Order No. 12892 § 5-504, 59 Fed. Reg. 2939 (1994).

[597] *Id*.

[598] The structure of the regulation clearly suggests that at one time it was intended to serve as part of a larger regulatory regime for energy conservation that never came to pass. While 49 C.F.R. § 622.301 (2003) requires the preparation of an energy assessment, it makes no provisions for penalties in the event the applicant fails to prepare one. (FTA could possibly withhold funding because the application would be incomplete, but the regulation does not specifically authorize that.) Furthermore, there is no requirement that the applicant follow any of the recommendations contained in the analysis; it need merely note them and continue on. By comparison, 14 C.F.R. § 152.607, which is the only other part of the C.F.R. to require an energy assessment, orders that "the building design, construction, and operation shall incorporate, to the extent consistent with good engineering practice, the most cost-effective energy conservation features identified in the energy assessment." 14 C.F.R. § 152.607 (2000). The fact that the term "energy assessment" only appears in three C.F.R. parts, including 49 C.F.R. § 622.301 and 14 C.F.R. § 152.607 (discussed above), further indicates its status as an anomaly. Removal of the energy assessment requirement or a reconfiguration of it into something meaningful would doubtless serve to eliminate a time-consuming step of the procurement process that is currently of very limited value.

[599] 45 Fed. Reg. 58038 (1980) (codified at 14 C.F.R. 152.607 and 49 C.F.R. § 622.301).

[600] 49 C.F.R. § 622.301(a) (2003).

[601] 49 C.F.R. § 622.301(a)(1) through (3) (2003).

requirements for the structure's environmental systems and operations essential to its purpose, project those requirements over the life of the facility, and provide an estimated cost for the fuel.[602] With respect to fuel, the analysis must outline opportunities for using an energy source other than petroleum or natural gas, with particular emphasis on the potential for employing renewable energy sources.[603]

Compliance with the energy assessment requirement must be documented as part of the EA or EIS for projects that are obligated to produce them.[604] For all other projects, the energy assessment must be sent to FTA along with the application for assistance.[605] Under certain limited circumstances, FTA may provide financial assistance for the purpose of completing the assessment.[606]

### 7. Property Management

Because of concerns about the possibility of federal funds being spent on projects that will be abandoned prematurely, the Federal Transit Act imposes certain minimum requirements on grantees for the maintenance of equipment and facilities. Under "urbanized area formula grants,"[607] the Secretary may release a grant only if the applicant submits a program of projects that has gone through a public participation process.[608] The applicant must also provide certification for the grant's fiscal year that the applicant:

1. Has or will have the legal,[609] financial,[610] and technical capacity[611] to carry out the program;

2. Has or will have satisfactory continuing control[612] over the use of the equipment and facilities; and

3. Will maintain[613] the equipment and facilities.[614]

Substantially similar restrictions apply for ordinary capital investment grants and loans as well.[615] Except as

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[602] 49 C.F.R. § 622.301(a)(4) (2003).

[603] 49 C.F.R. § 622.301(a)(5)(i) and (ii) (2003).

[604] 49 C.F.R. § 622.301(b) (2003).

[605] *Id*.

[606] 49 C.F.R. § 622.301(c) (2003). *See* OMB Circular No. A-87, Rev. (1997) for how to determine eligibility for such assistance.

[607] These grants are for capital projects and financing "the planning and improvement costs of equipment, facilities, and associated capital maintenance items for use in mass transportation, including the renovation and improvement of historic transportation facilities." 49 U.S.C. § 5307(b)(1) (2000).

[608] *See* 49 U.S.C. § 5307(c) (2000) for a description of the public participation process.

[609] "Legal capacity" is a demonstration by the grant applicant that it is authorized and eligible under state or local law to receive and use FTA funds. Officials of the applicant must have been delegated the appropriate authority under state and local law by the governing body of the applicant. For the first capital program grant application, an "Opinion of Counsel" must be submitted by the applicant. This document identifies the legal authority of the applicant, citing relevant statutes and describing any pending legislation or litigation that may impact the applicant's legal authority or otherwise affect the applicant's ability to complete the project. Subsequent grant applications may be based on the authority expressed in the annual certification process. However, if a change occurs that may significantly affect the applicant's ability to carry out the project, a new Opinion of Counsel must be filed with FTA. Federal Transit Administration Circular 9300.1A ch. 6 § 4(b) (1998) [FTA C. 9300.1A].

[610] "Financial capacity" refers to the applicant's ability to match and manage FTA funds, cover cost overruns and operating deficits, and to maintain and operate federally-funded property and equipment. The sources of local and state contributions must be identified and assurances made that adequate funds are available from those sources. The statement of financial capacity must reflect two items: financial condition and financial capability. Financial condition includes historical trends and present experience in financial factors affecting the applicant's ability to operate and maintain its transit system at the current level of service. Financial capability concerns the sufficiency of the applicant's funding sources to meet any future operating deficits and capital costs, as well as the reliability of those sources. After an applicant's first grant procedure, financial capacity will be determined during its annual OMB Circular A-133 audit. FTA C. 9300.1A ch. 6 § 4(c) (1998). *See* Federal Transit Administration Circular 7008.1 (1987) for a detailed discussion of how to determine financial capacity.

[611] "Technical capacity" concerns the ability of the applicant to properly execute and manage federal grants. The FTA generally relies on its own past experience with the applicant; but where an applicant is seeking a capital grant for the first time, the applicant must demonstrate that it is able to complete the project in accordance with all relevant laws and regulation. All applicants must include a "proposed project milestone schedule" and certify that its procurement system is in compliance with all applicable federal laws, regulations, executive orders, and FTA Circular 4220.1D (now FTA Circular 4220.1E). FTA C. 9300.1A ch. 6 § 4(d) (1998).

[612] The FTA generally relies on its past experience with the grant applicant when making this determination. The grant applicant may include brief descriptions or references to documents supporting its capability to maintain adequate control of the property to be acquired. Evidence of such control may be shown through property inventory records, excess real property utilization plans, procurement manuals, financial reports, and related documents. If the applicant has previously received grants for capital projects, satisfactory continuing control may be demonstrated through biennial inventories of real property to ensure that the property continues to be needed for the purposes specified in the initial grants. FTA C. 9300.1A ch. 6 § 4(e) (1998).

[613] Grantees must maintain equipment and facilities obtained with federal funds in good operating order. Maintenance plans are required to be documented, and the grantee must have a system for recording and enforcing warranty claims. A first-time grant applicant should provide sufficient information to enable the FTA to determine whether the applicant will exercise satisfactory continuing control over equipment and facilities and that the applicant has an adequate maintenance plan. If a recent performance review of the applicant has been made under the Urbanized Area Formula Program, information from that review may be sufficient to make the necessary findings without further documentation. FTA C. 9300.1A ch. 6 § 4(f) (1998).

[614] 49 U.S.C. § 5307(d)(1)(A) to (C) (2001).

otherwise provided,[616] the Secretary may only release funds in those instances where it has been determined the applicant "has or will have the legal, financial, and technical capacity to carry out the project, satisfactory continuing control over the use of equipment or facilities, and the capability to maintain the equipment or facilities," along with the will to so maintain them.[617]

### 8. Flood Insurance

In 1968, Congress adopted the National Flood Insurance Program (NFIP) for the purpose of reducing the risk of catastrophic loss the public faced from flooding.[618] Executive branch agencies are ordinarily barred from providing funds for the acquisition of property, or construction on previously owned property, that has been determined to lie within a "special flood hazard" area.[619] Yet funds may be made available if the buildings, structures, and any personal property are covered by flood insurance at least equal to the development cost of the project or to the maximum limit of coverage permitted by the NFIP for the type of construction concerned, whichever is less, and for the life of the property regardless of changes in ownership.[620] Under the FTA MA, a grantee must participate in the NFIP where the project or acquisition in question has an insurable value of $10,000 or more.[621] It is therefore important that the grantee ascertain early in the planning process whether land under consideration for the project lies on a floodplain.

## E. ACQUISITION OF ROLLING STOCK

### 1. General Acquisition Rules

The acquisition of rolling stock largely proceeds in the same manner as any other procurement; however, there are some notable differences. There are the special "Buy America" requirements that apply to rolling stock. Furthermore, an unusual statutory exception to the basic rules of competitive bidding applies to the acquisition of rolling stock.[622]

49 U.S.C. § 5326 specifically provides that grantees may enter into contracts for rolling stock based on initial capital costs or "performance, standardization, life cycle costs, and other factors" in addition to contracts reached through bidding.[623] This effectively gives explicit legal permission for the use of competitive proposals in place of sealed bids. FTA strongly encourages grantees to avail themselves of this option if possible.[624] Grantees may wish to obtain a copy of the American Public Transportation Association's (APTA) *Standard Bus Procurement Guidelines*, which contains suggested contract terms, warranty conditions, and other informa-

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[615] Funds released under these programs may be used for: (1) capital projects for new fixed guideway systems, and extensions to such existing systems, including the acquisition of real property, the initial acquisition of rolling stock for the system, alternatives analysis related to the development of the system, and the acquisition of rights-of-way and relocation, for fixed guideway corridor development for projects in the advance stage of alternatives analysis or preliminary engineering; (2) capital projects, including property and improvements other than highways and fixed guideway facilities, needed for an efficient and coordinated mass transportation system; (3) the capital costs of coordinating mass transportation with other transportation; (4) the introduction of new technology, through innovative and improved products, into mass transportation; (5) capital projects to modernize existing fixed guideway systems; (6) capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities; (7) mass transportation projects planned, designed, and carried out to meet the special needs of elderly individuals and individuals with disabilities; and (8) the development of corridors to support fixed guideway systems, including protecting rights-of-way through acquisition, construction of dedicated bus and high occupancy vehicle lanes and park-and-ride lots, and other nonvehicular capital improvements that the Secretary may decide would result in increased mass transportation usage in the corridor. 49 U.S.C. § 5309(a)(1) (2000).

[616] The exceptions are twofold. First, the Secretary may release funds to state or local government authorities for the acquisition of interests in real property to be used for mass transportation systems as long as there is a reasonable expectation that the property is required for mass transportation and will be so used within a reasonable amount of time. 49 U.S.C. § 5309(b)(1) and (2) (2000). Second, the Secretary may release funds for a new fixed guideway system, or an extension thereto, if it is determined that the project is: (1) based on the results of an alternatives analysis and preliminary engineering; (2) justified based on a comprehensive review of its mobility improvements, environmental benefits, cost effectiveness, and operating efficiencies; and (3) supported by an acceptable degree of local financial commitment, including evidence of stable and dependable financing sources to construct, maintain, and operate the system or extension. 49 U.S.C. § 5309(e)(1)(A) through (C) (2000).

[617] 49 U.S.C. § 5309(d)(1) and (2) (2000).

[618] Charles T. Griffith, *The National Flood Insurance Program: Unattained Purposes, Liability in Contract, and Takings*, 35 WM. & MARY L. REV. 727 (1994).

[619] 42 U.S.C. § 4012a(a) (2000).

[620] 42 U.S.C. § 4012a(a) (2000). However, if the funds are provided through a loan or loan guarantee, the insurance policy must only equal the outstanding principal of the loan and need only continue until the loan has been repaid in full. 42 U.S.C. § 4012a(a) (2000). Loans that are for an original amount of $5000 or less and that are made for a period of 1 year or less need not have flood insurance. 42 U.S.C. § 4012a(c)(2)(A) and (B) (2000). State-owned property need not be federally insured if the Director of the NFIP determines it to be covered by a state flood insurance program that offers comparable protection to the NFIP. 42 U.S.C. § 4012a(c)(1) (2000).

[621] FTA MA § 20.b. It should be noted that the FTA has apparently failed to promulgate an actual regulation, as required under 42 U.S.C. § 4012a(b)(2) (2000), but the Master Agreement is nonetheless considered controlling.

[622] FTA defines rolling stock as including "buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services." 49 C.F.R. § 661.3 (2000).

[623] 49 U.S.C. § 5326(c)(1) and (2) (2000).

[624] MANUAL § 6.3.1.1.

tion designed to assist in formulating an effective RFP.[625]

### 2. Bus Testing

A further difference between the acquisition of rolling stock, in particular buses,[626] and general procurements is the requirement that buses be tested at a specific federal government facility. In 1987, as part of STURAA,[627] Congress mandated that federal funds could be used to acquire new bus models after September 30, 1989, only if those bus models had been tested at a specific federal facility.[628] Consequently, FTA now requires all new or altered bus models to be tested in accordance with the bus testing standards below before final acceptance of the first vehicle by the grantee.[629]

It is the responsibility of the grantee to determine whether a vehicle it wishes to acquire is a "new bus model."[630] While it is the grantee's responsibility to determine whether the vehicle falls within the regulation's scope, it is the responsibility of the vehicle's manufacturer to schedule the testing and transport the test vehicle to the testing facility.[631] FTA and the manufacturer must pay 80 percent and 20 percent of the testing costs, respectively.[632]

Once the vehicle is delivered to the testing facility, it will be subject to different forms of testing depending both on the novelty and the life expectancy of the model. If the model has not previously been tested at the facility, then it must undergo the full range of tests in all categories of inspection.[633]

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[625] MANUAL § 6.3.1.2. (The Manual incorrectly refers to the organization as the American Public Transit Association.) Grantees should be aware that not all of the recommendations contained in the *Standard Bus Procurement Guidelines* comply with FTA or DOT requirements, so the text should be considered strictly advisory. MANUAL § 6.3.1.2. However, proper use of the *Standard Bus Procurement Guidelines* should significantly reduce the likelihood of bid protests as the guidelines were developed jointly by APTA members and bus manufacturers, so they are reflective of most industry standards.

[626] A bus is a "rubber-tired automotive vehicle used for the provision of mass transportation." 49 C.F.R. § 665.5 (2003).

[627] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, tit. III, § 317(a), 101 Stat. 132, 233 (1987).

[628] 49 U.S.C. § 5323(c) (2000). Administered by Pennsylvania State University's Pennsylvania Transportation Institute in Altoona, the bus testing facility was formerly a training facility for railroad personnel. 57 Fed. Reg. 33394 (1992); 49 U.S.C. § 5318(a) (2000).

[629] 49 C.F.R. § 665.7(a) (2003).

[630] 49 C.F.R. § 665.7(b) (2003). The term "new bus model" is broader than simply a truly new design, in that it includes all bus models that first entered mass transit service in the U.S. on October 1, 1988, or later, and bus models that were in service prior to that date but that have subsequently undergone a "major change in configuration or components." 49 C.F.R. § 665.5 (2003). A "major change in configuration" is a change that may have a significant impact on the handling, stability, or structural integrity of the vehicle. 49 C.F.R. § 665.5 (2003). A "major change in components" means: (1) for a vehicle not manufactured on a mass produced chassis, a change in its engine, axle, transmission, suspension, or steering components; or (2) for a vehicle that is manufactured on a mass produced chassis, a change in the vehicle's chassis from one major design to another. 49 C.F.R. § 665.5 (2003).

[631] 49 C.F.R. §§ 665.21 and 665.25 (2003). Only a single test vehicle is required; it must already meet all applicable federal motor vehicle safety standards (*see* 49 C.F.R. §§ 571.1 *et seq.*), and be substantially fabricated and assembled by techniques and tooling that will be used in the production of subsequent vehicles of that model. 49 C.F.R. § 665.11(a)(1) through (3) (2003).

[632] 49 U.S.C. § 5318(d) (2000). As a practical matter, the manufacturer's share of the testing cost is passed on to the grantee. Thus, when a grantee makes a decision about technical specifications, it must assess whether it is willing to accept the delay and cost of having a vehicle tested at Altoona due to changes in configuration or components that the grantee may be interested in.

[633] 49 C.F.R. § 665.11(b) (2003). The categories of inspection are: (1) maintainability; (2) reliability; (3) safety; (4) performance; (5) structural integrity; (6) fuel economy; and (7) noise. "Maintainability" includes "bus servicing, preventive maintenance, inspection and repair." 49 C.F.R. pt. 665, App. A(1) (2003). "Reliability" is measured by recording all vehicle breakdowns that occur during testing, including repair time, and the actions necessary to restore the vehicle to operational status. 49 C.F.R. pt. 665, App. A(2) (2003). "Safety" is determined by the vehicle's handling and stability during obstacle and lane-change tests. 49 C.F.R. pt. 665, App. A(3) (2003). "Performance" is a function of the vehicle's acceleration and gradeability at seated load weight. 49 C.F.R. pt. 665, App. A(4) (2003). "Structural integrity" is determined by testing the vehicle's structural strength and durability, along with its resistance to physical distortion. 49 C.F.R. pt. 665, App. A(5) (2003). "Fuel economy" is determined by measuring miles attained per gallon of fuel expended at seated load weight. 49 C.F.R. pt. 665, App. A(6) (2003). "Noise" is measured from both the interior and exterior of the vehicle. 49 C.F.R. pt. 665, App. A(7) (2003). If the model itself has not been tested previously, but uses a mass-produced chassis that has been tested at the facility before for use in another model, then the new model need only undergo partial testing. 49 C.F.R. § 665.11(c) (2003). "Partial testing" is defined as performing only those tests that might yield significantly different data from previous tests on the chassis or model. 49 C.F.R. § 665.5 (2003). Equally, if the model itself has been tested previously, but the manufacturer now wishes to have the certified operational life of the model extended, partial testing is required. 49 C.F.R. § 665.11(d) and (f) (2003). If the model has been tested previously, it may be used in lower service life categories without further testing. 49 C.F.R. § 665.11(f) (2003). The life expectancy of the model is determined by its minimum service life as measured in years or miles. The categories are: (1) minimum service life of 12 years or 500,000 miles; (2) minimum service life of 10 years or 350,000 miles; (3) minimum service life of 7 years or 200,000 miles; (4) minimum service life of 5 years or 150,000 miles; and (5) minimum service life of 4 years or 100,000 miles. 49 C.F.R. § 665.11(e) (2003) A manufacturer may choose to terminate testing prematurely and will only be assessed the costs of any tests performed to the time testing was stopped. 49 C.F.R. § 665.27(b) (2003). The facility's operator will perform all maintenance and repairs on the test vehicle as per the manufacturer's specifications, unless the operator determines that the

Once testing is completed, the operator of the facility must provide a test report to the manufacturer that submitted the bus for inspection.[634] The manufacturer in turn must provide a copy of the test report to the grantee during the procurement process at the stage identified by the grantee.[635] If a bus model that has been tested has subsequently had alterations made to it that have not been tested, the manufacturer must notify the grantee of the alteration during the procurement process and describe it, explaining why the alteration was not considered a "major change" within the scope of the regulation.[636]

## F. RAIL LINE, TRACKAGE RIGHTS, AND RIGHTS-OF-WAY

Prior to the ICC Termination Act of 1995, rail common carriers operating in interstate and foreign commerce fell under the jurisdiction of the Interstate Commerce Commission (ICC), as they had since the creation of this, the nation's first independent agency, in 1887.[637] With ICC's sunset, such jurisdiction, and much of its staff, was transferred to the nascent U.S. Surface Transportation Board (STB), housed within DOT.

Agreements between carriers for the transfer of operating authority from one railroad to another, or for the joint use of facilities—whether by line sales, leases, or trackage use arrangements—require prior review and approval by the STB.[638] STB also has broad authority to impose such conditions as it deems appropriate as a condition of approval of a transfer of operating authority.[639] STB also monitors and adjudicates disputes that may arise under trackage rights or lease arrangements.[640]

Smaller intercarrier transactions are usually not controversial, particularly with respect to leases in which both parties will use the track and accept the public service obligation. The same is true for trackage rights agreements, which allow two carriers to operate over a single track. However, STB has no authority to compel a railroad to allow another service provider, such as a transit operator, to operate over the rail carrier's track, though there have been legislative proposals to confer such authority to STB from time to time.[641]

In 1985, ICC streamlined processing of these transactions by providing for expeditious review under a "class exemption"[642] for many of these transactions,[643] which may be invoked by filing a 7-day advance notice at STB. Any person may challenge a particular transaction by filing a petition to revoke the exemption, though such revocations are rare.[644] Trackage rights allow one railroad to perform local, overhead, or bridge operations over the tracks of another carrier that may or may not continue to provide service over the same line.[645] Leases and contracts to operate rail lines by a Class I railroad also require STB approval.[646]

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nature of the maintenance or repair would require the manufacturer's assistance. 49 C.F.R. § 665.27(c) (2003). In that event, the operator must be allowed to supervise the manufacturer's work. 49 C.F.R. § 665.27(c) (2003). The manufacturer may observe all tests, even if it is not permitted to assist. 49 C.F.R. § 665.27(d) (2003). Posting an observer at the facility is highly recommended if the design is new or represents a very substantial change over an earlier design, as the observer (if sufficiently trained) may be able to answer questions for the testing staff, thereby reducing the amount of time necessary to complete the process.

[634] 49 C.F.R. § 665.13(a) (2003).

[635] 49 C.F.R. § 665.13(b)(1) (2000). If the manufacturer uses a test report in support of its effort to obtain a contract, it must make the report publicly available and notify the facility operator of this action. 49 C.F.R. § 665.13(b)(2) and (d) (2000). However, the test report is the only information or documentation that will be made public in connection with models tested at the facility. 49 C.F.R. § 665.13(e) (2000).

[636] 49 C.F.R. § 665.13(c) (2003).

[637] Paul Dempsey, *The Interstate Commerce Commission: The First Century of Economic Regulation,* 16 TRANSP. L. J. 1 (1987).

[638] STB approval under the statutory "public interest" standard automatically confers antitrust immunity, as well as immunity from other federal and state laws that might otherwise be used to block such a transaction. 49 U.S.C. § 11321 (2000).

[639] 49 U.S.C. § 11324(c) (2000).

[640] The statutory requirements for line sales differ depending upon whether the annual revenue of the involved carriers places them in the categories of Class I ($250 million or more), Class II (less than $250 million but more than $20 million) or Class III ($20 million or less). *See* 49 C.F.R. § 1201 1-1 (2002).

[641] KEVIN SHEYS, STRATEGIES TO FACILITATE ACQUISITION AND USE OF RAILROAD RIGHT OF WAY BY TRANSIT PROVIDERS (TCRP Legal Research Digest, 1994).

[642] 49 C.F.R. § 1180.2(d)(7) (2002).

[643] 49 C.F.R. § 1180.2(d) (2002). The class exemption embraces the acquisition of nonconnecting lines approved for abandonment; the acquisition of nonconnecting lines, where the transaction is not part of a series that would lead the railroads to connect with each other and does not involve a Class I railroad; renewal of leases; joint projects involving the relocation of a line of railroad that does not disrupt service to shippers; and acquisitions of trackage rights.

[644] Paul Dempsey & William Mahoney, *The U.S. Short Line Railroad Phenomenon: The Other Side of the Tracks,* 21 TRANSP. L.J. 383, 389 (1993).

[645] Bridge trackage rights improve operating efficiency for a carrier by providing alternative, shorter, and/or faster routes. Local trackage rights may introduce a new competitor. STB approval of trackage rights arrangements is required under either 49 U.S.C. 11323 (if a Class I carrier), 10902 (if a Class II or III carrier), or 10901 (if a noncarrier) (2000). See 49 C.F.R. § 1180 (proposals under § 11323); 49 C.F.R. § 1150 (proposals under § 10901 or § 10902) (1999).

[646] Lines are sometimes leased by a non-operating carrier to another carrier willing to assume the common carrier obligation of providing service on demand. 49 U.S.C. § 11323 (2000). See 49 C.F.R. § 1180 (2002). (Leases by a noncarrier or by a Class II or III railroad are handled as a line acquisition under 49 U.S.C. § 10901 or § 10902, respectively.) A class exemption exists for the renewal of previously approved leases, 49 C.F.R. § 1180.2(d)(4) (1999). INTERSTATE COMMERCE COMMISSION,

### 1. Line Sales to Noncarriers

A noncarrier, such as a transit operator, must obtain authorization from STB in order to acquire or operate an existing rail line from a railroad common carrier subject to STB's jurisdiction.[647] STB may disapprove such an application only if it finds the proposal inconsistent with the "public convenience and necessity."[648]

Since 1980, railroads have sold increasing numbers of branch lines to smaller carriers and noncarriers. As a consequence, several hundred new shortline and regional railroads have been created.[649] Moreover, several transit providers have also purchased rail lines without becoming common carriers subject to jurisdiction of STB.[650] By avoiding railroad common carrier status, transit providers avoid subjecting themselves to a plethora of STB regulatory requirements.[651]

The acquisition of a rail line by a noncarrier enjoys a simplified and expedited process.[652] Advance notice of 7 days for each proposed transaction, however, must be published in the *Federal Register*.[653]

STB's general policy has been not to impose labor protection provisions on the line transfers to noncarrier new entrants.[654] However, where the *only* apparent purpose of a proposed sale was to abrogate a collective bargaining agreement, the regulatory agency has declined to treat a proposal as a line sale to a noncarrier.[655] STB has also disapproved efforts to purchase rail lines under class exemptions when it found that the purchaser intended to scrap the line.[656]

### 2. Financial Assistance Program

The Staggers Rail Act of 1980 established expedited procedures for rail line abandonments.[657] But recognizing that line abandonments might result in the loss of valuable access to communities and shippers, and the loss of rights-of-way of potential value now or in the future, Congress established procedures whereby a "financially responsible person" might acquire the line either to preserve the service, or bank the right-of-way for future rail use.[658] A significant number of offers of financial assistance to purchase or subsidize rail lines are filed each year.[659] Many transit organizations have been among the purchasers.[660]

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STUDY ON INTERSTATE COMMERCE COMMISSION REGULATORY RESPONSIBILITIES (1994).

[647] 49 U.S.C. § 10901(a)(3) and (4) (2000). 49 C.F.R. § 1150 (2002). The statute has been consistently construed in such a way that line acquisitions by existing carriers are governed by § 11343, *e.g.*, Railway Labor Exec. Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991), and noncarrier line acquisitions are covered by § 10901, *e.g.,* People of the State of Illinois v. United States, 604 F.2d 519, 524–25 (7th Cir. 1979). The STB adopted a class exemption in 1996 allowing Class III railroads to acquire and operate additional rail lines through a notification process. 49 C.F.R. § 1150.41 (2002).

[648] The STB may modify a proposal or condition its approval. 49 U.S.C. § 10901(c) (2000). The purpose of requiring regulatory approval for a noncarrier acquisition of an existing line is (1) to prevent a carrier from avoiding regulatory review by accomplishing indirectly (through a noncarrier affiliate) what it could not accomplish directly without regulatory scrutiny, and (2) to ensure that the public is not harmed by transfers of lines to entities that are not able to provide the needed rail service.

[649] See Dempsey & Mahoney, *supra* note 644, at 383.

[650] SHEYS, *supra* note 641, at 7–8.

[651] See 49 U.S.C. §§ 10101 *et seq.* (2000).

[652] *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C. 2d 810 (1985), aff'd* Illinois Commerce Comm'n v. ICC*,* 817 F.2d 145 (D.C. Cir. 1987); 49 C.F.R. §§ 1150.31 *et seq*. (2002). 49 C.F.R. § 1180.2(d)(2) (2002).

[653] 49 C.F.R. 1150.32 (2002). See Dempsey & Mahoney, *supra* note 644, at 383, 389.

[654] But for a comprehensive criticism of the ICC/STB activities in this arena, *see* William Mahoney, *The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroad's Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act,* 24 TRANSP. L.J. 241 (1997).

[655] *Sagamore National Corp.—Acquisition and Operating Exemption—Lines of Indiana Hi-Rail Corp.,* Finance Docket No. 32523 1994 Lexis 219 (1994).

[656] SURFACE TRANSPORTATION BOARD, 1996/1997 ANNUAL REPORT (1997).

[657] See Note, *Proposed Regulatory Reform in the Area of Railroad Abandonment*, 11 TRANSP. L.J. 301 (1979); Note, *The Staggers Rail Act of 1980: Authority to Compete With Ability to Compete*, 12 TRANSP. L.J. 213 (1982). The STB must determine whether "the public convenience and necessity require or permit a proposed abandonment or discontinuance. In applying this standard, the STB weighs the financial interests of the individual railroad, the service and development needs of local shippers and communities, and the public interest in maintaining a healthy, adequate interstate rail network. The STB must also evaluate whether the discontinuance or abandonment will have "a serious adverse impact on rural and community development." *See generally,* Paul Dempsey, *Entry Control Under the Interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation,* 13 WAKE FOREST L. REV. 729 (1977).

[658] When a rail line is approved for abandonment, any person may offer to purchase or subsidize that line to permit continued rail service. 49 U.S.C. § 10905 (2000). 49 C.F.R. § 1152.27 (2002). The STB's financial assistance program is available to all rail lines authorized for abandonment. *Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance*, 4 I.C.C. 2d 164, 169 (1987) (applying the financial assistance procedures to abandonments authorized by exemption under Section 10505 as well as those approved under Section 10903).

[659] From fiscal years 1988 through 1994, 90 offers of financial assistance were filed, covering a total of 1,575 miles of rail line.

[660] Examples include the Metropolitan Transit Authority of Harris County, Texas, *Union Pacific Railroad Abandonment*, 2001 STB Lexis 586 (2001); Madison County Metro-East Transit, *Norfolk Southern Railway Abandonment,* 2001 STB Lexis 336 (2001); Dallas Area Rapid Transit, *Dallas Area Rapid Transit Abandonment Exemption*, 2000 STB Lexis 664 (2000).

The Financial Assistance Program is designed to enable immediate and uninterrupted continuation of rail service on lines that otherwise would be abandoned and the right-of-way lost.[661] Statutory deadlines, however, limit the time that a railroad can be required to continue losing money from operating a line while a purchase or subsidy agreement is being negotiated.[662]

Whenever an application for abandonment is filed, a notice must be published in the *Federal Register* within 20 days.[663] Within 10 days of the decision or 120 days of the application, whichever comes sooner, any person may offer to purchase or subsidize that line to permit continued rail service.[664] If an offeror is found to be financially responsible[665] and the offer both reasonable (i.e., it is likely the assistance proposed would cover the difference between revenues attributable to the line and the avoidable cost of providing the service, plus a reasonable profit, or the acquisition cost of the line), and *bona fide*, STB must postpone the abandonment authority to allow the parties to negotiate.[666] If the parties fail to reach an agreement, STB can compel the carrier to sell the line to the offeror, or to provide subsidized service, with STB setting the amount of compensation.[667]

A local governmental institution such as a transit provider has several alternatives in pursuing a rail line: (1) the transit system could make its own offer of financial assistance for the line (though it might have a responsibility to continue freight service over the rail line); (2) the transit system could enter into an agreement with another offeror for shared use of the line after the acquisition; or (3) the transit system could oppose the line's acquisition by an offeror on grounds that it is not financially responsible, or has failed to make a *bona fide* offer.[668]

Without this program, persons who wish to preserve rail service could still purchase a line from the abandoning railroad or provide a subsidy through private, voluntary agreements with the abandoning carrier, though there would be no way to force the carrier to negotiate. Similarly, the program ensures against the loss of service while the arrangement is in negotiation. Most importantly, the Financial Assistance Program ensures that the right-of-way is not lost to reversionary interest holders, in which case the difficulty, cost, and time required to condemn the needed land likely would eliminate any prospect of restoring the line. State condemnation proceedings are not nearly as expeditious as the federal financial assistance program. Moreover, in some states condemnation actions are limited to public entities.[669] Under the law of other states, a transit agency intending to exercise its power of eminent domain may find that the eminent domain authority of the rail carrier is superior, barring condemnation by the transit authority.

### 3. Rails-To-Trails Program

A transit agency may not have the ability to purchase a right-of-way from a railroad seeking to abandon a line. Yet both the transit agency and the railroad may see value in preserving the right-of-way as a potential future line for transportation services as demand and financial ability grow. Section 8(d) of the National Trails System Act Amendments of 1983 provides for the preservation of rail rights-of-way that would otherwise be abandoned, and their use as recreational trails, if a voluntary agreement is concluded between the rail carrier and a potential rail sponsor. [670] The proposed trail sponsor must agree to two conditions:

1. To bear all managerial, financial, and legal responsibility for the right-of-way, including payment of property taxes and assumption of any liability in connection with the trail use; and

2. That the line shall remain subject to possible reactivation for rail service at any time.

Where these two conditions are met, the rail line will not be considered abandoned, and any reversionary interests in the underlying right-of-way will not be triggered during the interim period of trail use. STB may only deny a trail use application if the carrier refuses to participate, or the trail user fails to pay taxes and assume liability for the right-of-way.[671]

This "railbanking" provision is designed to preserve rail corridors as a national transportation resource while adding to the nationwide system of trails in the

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[661] *Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance*, 4 I.C.C. 2d 164, 169 (1987) (applying the financial assistance procedures to abandonments authorized by exemption under Section 10505 as well as those approved under Section 10903).

[662] INTERSTATE COMMERCE COMMISSION, STUDY ON INTERSTATE COMMERCE COMMISSION REGULATORY RESPONSIBILITIES 45 (1994).

[663] 49 C.F.R. § 1152.27 (2003).

[664] 49 U.S.C. § 10905 (2000). 49 C.F.R. § 1152.27(c) (2003).

[665] Financial responsibility relates both to whether the offeror has the resources necessary to cover the line's fair market value purchase price, 49 U.S.C. § 10905(f)(1) (2000), and to operate the line for a 2-year period, 49 U.S.C. § 10905(f)(4) (2000). 49 U.S.C. § 10905(d) and (e) (2000). If an offeror is found to be financially responsible and the offer reasonable and *bona fide*, the STB must postpone the abandonment authority to allow the parties to negotiate.

[666] 49 U.S.C. § 10905(d) and (e) (2000).

[667] The STB must determine the amount of subsidy "based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line." 49 U.S.C. § 10905(e) and (f) (2000). In the case of a sale, the STB may not set a price that is below the fair market value of the line.

[668] SHEYS, *supra* note 641, at 5.

[669] INTERSTATE COMMERCE COMMISSION, *supra* note 622, at 45–46.

[670] 16 U.S.C. §§ 1247(d), 1248(b) (2000). This statute amended the National Trails System Act of 1968.

[671] 49 C.F.R. § 1152.29 (2002).

interim.[672] Railroad lines were laid before the growth of many cities and offer the only straight-line transportation corridor free of obstruction in many urban areas. Some transit operators have shown interest in preserving these rights-of-way for future passenger rail corridors. Previous legislative efforts to preserve unused rail rights-of-way had been largely unsuccessful because most rail rights-of-way are not owned in fee simple absolute by the railroad, but are held under an easement. [673] Under the law of some states, a railroad easement automatically expires, and the land reverts to the original landowner, if it is no longer used for rail service. Such an expiration provision may supersede state property law.[674]

In every abandonment proceeding, the public is advised of the potential availability of the line—through direct notice to the National Park Service and to the head of each county through which the line runs, and publication in both local newspapers and the *Federal Register*—and given an opportunity to negotiate voluntary agreements to use the line as a recreational trail if it is approved for abandonment. The trail sponsor must file a trail use request in an STB abandonment proceeding, which includes:

1. A map clearly identifying the corridor proposed for trail use;

2. A statement of willingness to accept financial responsibility, manage the trail, pay the property taxes, and accept responsibility for any liability arising from the use of the right-of-way as a trail; and

3. An acknowledgement that the use of the right-of-way for a trail is subject to the sponsor's fidelity to its obligations, and that future reactivation of the trail as a right-of-way is accepted.[675]

If the parties reach an agreement, the railroad may salvage its track and discontinue service on the line, but the right-of-way remains intact for use as a trail. If no agreement is reached, the railroad may abandon the line entirely, provided the other relevant statutory and regulatory obligations are fulfilled.[676]

While the Rails-to-Trails program theoretically supersedes state laws that would otherwise compel the return of a discontinued railroad easement to the underlying property holder,[677] the question of when "discontinued" becomes "abandoned" remains partially within the realm of state law.[678] Consequently there have been a string of court decisions finding that while the Rails-to-Trails program may convert a right-of-way to non-rail uses, such an action constitutes a taking.[679]

A representative case, *Glosemeyer v. United States*, concerned an action by a group of Missouri landowners. The landowners held fee interests in property burdened by two separate railroad easements held by the Missouri Pacific Railroad (MoPac) and the Missouri-Kansas-Texas Railroad Company (MKT).[680] The MoPac ceased operating trains over its line in question in 1991; it received permission from ICC to abandon the line in 1992, and that same year negotiated an agreement with a trail service provider.[681] The following year, the MoPac removed all rails and ties from the right-of-way.[682] The MKT ceased operating trains over its line in 1987, received permission from ICC to abandon the line later that year, and immediately thereafter turned over the line to a trail service provider.[683] Some time later, the MKT removed all track from the right-of-way.[684] The landowners alleged that they would have enjoyed full use of the right-of-way except for the railroads' transfer of their easements to the trail service providers, and consequently the transfer amounted to a taking of a new easement.[685]

The court recognized that Congress deliberately preempted state property law with the National Trails System Act Amendments of 1983, but it noted that where such preemption extinguishes a property interest, a compensable taking has occurred.[686] Thus whether the Rails-to-Trails Program effected a taking in this instance depended "upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest."[687] In other words,

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[672] By 1999, some 930 trails had been developed over some 8,900 miles of abandoned rights-of-way outside the rail-banking program. U.S. GENERAL ACCOUNTING OFFICE, SURFACE TRANSPORTATION: ISSUES RELATED TO PRESERVING INACTIVE RAIL LINES AS TRAILS 4 (Oct. 1999).

[673] These include the alternative public use provisions of 49 U.S.C. § 10906 (2000); the provisions of 45 U.S.C. § 716(a)(4) (2000) for preserving track in fossil fuel natural resource areas; and the rail banking provisions of Section 809 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 10906.

[674] Preseault v. ICC, 494 U.S. 1, 8 (1990) [Preseault].

[675] U.S. GENERAL ACCOUNTING OFFICE, *supra* note 672, at 6.

[676] INTERSTATE COMMERCE COMMISSION, *supra* note 662, at 48.

[677] Preseault, 494 U.S. at 8.

[678] *See, e.g.*, Conrail v. Lewellen, 682 N.E.2d 779 (Ind. 1997), finding that for purposes of determining whether an easement returned to the underlying property owner, "abandonment" of a right-of-way was determined by state statute, not the ICC/STB; *see also* Chatham v. Blount County, 789 So. 2d 235 (Ala. 2001), while not specifically a Rails-to-Trails case, it recognized that state law defines when a rail line has been abandoned and a railroad may not transfer its easement once it has been extinguished.

[679] *See, e.g.,* Preseault; Fritsch v. Interstate Commerce Comm'n, 59 F.3d 248 (D.C. Cir. 1995); Glosemeyer v. Missouri K. T. R.R., 879 F.2d 316 (8th Cir. 1989); Chatham v. Blount County, 789 So. 2d 235 (Ala. 2001).

[680] Glosemeyer v. United States, 45 Fed. Cl. 771,774–75 (2000) [Glosemeyer]. While this case was heard in the U.S. Court of Federal Claims, the ruling was made using Missouri state law under the Erie doctrine.

[681] *Id*. at 774.

[682] *Id*. at 774.

[683] *Id*. at 775.

[684] *Id*. at 775.

[685] *Id*. at 775–76.

[686] *Id*. at 776.

[687] *Id*. at 776 (quoting Preseault at 24).

if the easements would have been terminated without the intervention of the Rails-to-Trails Program, then new easements for the recreational trails have been imposed.[688]

Under Missouri law, an abandonment of an easement occurs where there is evidence of an intention to abandon and acts consistent with that intent.[689] With particular regards to railroads, an easement for a right-of-way is extinguished when trains cease to operate over it with no prospect for resumption of service.[690] The court found the very fact that the railroads sought permission from ICC to abandon their lines demonstrated their intent to abandon their easements.[691] Meanwhile, the complete removal of tracks from the rights-of-way made it clear there was no prospect for resumption of rail service.[692] Finally, the fact that the railroads conveyed their entire legal easements to the trail service providers "for a contrary purpose" offered definitive proof of abandonment.[693]

The U.S. federal government attempted to argue that the use of the rights-of-way as trails that were part of the national "railbank" constituted use for a "railroad purpose" within the scope of state law.[694] However, the court strongly rejected this argument, pointing out that under Missouri law an easement "terminates as soon as such purpose ceases to exist, is abandoned, or is rendered impossible."[695] A "railroad purpose" has been defined in Missouri as one related to "the movement of trains over rails,"[696] and not to encompass other forms of transportation or recreational uses.[697] Consequently, while it was hypothetically possible for the rights-of-way to return to railroad use someday, the court found the fact that no "evidence was offered of a present intent to reinstate rail service in the future" established that the easements were indeed abandoned.[698] Having found that the plaintiffs were entitled to full use of their land, the court quickly concluded a taking had occurred and issued a summary judgment in their favor.[699]

## G. INTELLECTUAL PROPERTY

FTA's purpose in providing financial assistance to research and development projects is to increase transportation knowledge in general rather than to benefit the direct recipient of federal largesse.[700] With regard to patents, a grantee must immediately notify FTA and give a detailed report of any patentable "invention, improvement, or discovery" made by the grantee, or its third party contractors, which is conceived of or first reduced to practice in the course of a federally-funded project.[701] Unless FTA waives its rights, in writing, to the patentable item or process, the grantee must turn over those rights in accordance with the Department of Commerce's regulations concerning federal interests in intellectual property.[702]

The MA deals with copyright issues in somewhat more detail. FTA interests extend to all "subject data"[703] delivered or to be delivered by a grantee to FTA under a grant or cooperative agreement.[704] Grantees, other than institutions of higher learning, may not publish or reproduce subject data in whole or in part, other than for their own internal purposes, without the written consent of FTA until such time as FTA publicly releases, or approves the release of, the data.[705] Institutions of higher learning are free to publish subject data.[706] A

[688] *Id*. at 776.

[689] *Id*. at 776.

[690] *Id*. at 777.

[691] *Id*. at 777.

[692] *Id*. at 777.

[693] *Id*. at 778.

[694] *Id*. at 778.

[695] *Id*. at 778 (quoting Ball v. Gross, 565 S.W.2d 685, 689 (Mo. Ct. App. 1978)).

[696] *Id*. at 779.

[697] *Id*. at 779 (quoting Boyles v. Mo. Friends of the Wabash Nature Trail, Inc., 981 S.W.2d 644, 649–50 (Mo. Ct. App. 1998)).

[698] *Id.* at 780.

[699] *Id.* at 782.

[700] FTA MA § 18.d.

[701] FTA MA § 17.a.

[702] FTA MA § 17.b. Although the Department of Commerce's regulations only specifically apply to non-profit organizations and small businesses, the FTA MA applies the regulations to all grantees, subgrantees, and any third party contractor, regardless of their size or nature. FTA MA § 17.b. The Department of Commerce regulations are found at 37 C.F.R. §§ 401.1 *et seq*. (2000).

[703] Subject data is recorded information that is delivered or specified to be delivered under a grant or cooperative agreement, including, but not limited to, computer software, engineering drawings, manuals, technical reports, and related information. Financial reports, cost analyses, or other items used for project administration purposes are excluded. FTA MA § 18.a.

[704] FTA MA § 18.a. Funds delivered by grant or cooperative agreement in accordance with the MA ordinarily compose all FTA financial assistance; however, in the event that a party receives funding in some other manner, it is governed by the bald language of DOT's intellectual property regulations. Where the grantee is a *state or local government*, the federal agency providing funds reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for federal government purposes: (1) the copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and (2) any rights of copyright to which a grantee, subgrantee, or contractor purchases ownership with grant support. 49 C.F.R. § 18.34 (a) and (b) (2002). Where the grantee is an *institution of higher education, a hospital, or other non-profit organization*, it may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. However, the awarding agency reserves a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use the work for federal purposes and to authorize others to do so. 49 C.F.R. § 19.36(a) (2002).

[705] FTA MA § 18.b(1).

[706] FTA MA § 18.b(2).

grantee, regardless of its status, must agree to provide the federal government a royalty-free, non-exclusive, and irrevocable license to publish or otherwise use, and to authorize others to use, any subject data developed or purchased with federal funds by the grantee or third party contractors.[707] Data developed without federal funds does not become subject to FTA control, but FTA is free to disclose such data to other parties unless the grantee supplying it has clearly indicated that it is proprietary or confidential.[708]

Unless otherwise limited by state law, a grantee must agree to "indemnify, save, and hold harmless" the federal government[709] against any liability, including costs and expenses, resulting from the grantee's willful or intentional violation of another party's copyright arising out of the publication, use, or disposition of any data furnished under the project.[710] However, the grantee will not be required to indemnify the federal government for such liability arising from the wrongful acts of federal employees or agents.[711] The prudent transit attorney will ensure that this indemnification clause is passed through to contractors in all third party contracts in which a copyright clause is contained.

## H. THE METRIC SYSTEM

Although the United States had legalized use of the metric system in 1866 and was a signatory to the 1875 Treaty of the Meter, which established the General Conference of Weights and Measures and other intergovernmental bodies devoted to the refinement and promotion of the metric system, the United States lagged behind many other nations in adopting it for general use.[712] In an effort to accelerate American use of the metric system, Congress passed the Metric Conversion Act of 1975.[713] The Metric Conversion Act established that it is "the declared policy of the United States" to prefer the use of the metric system for the purpose of trade and commerce.[714] More significantly, the Act required each federal agency to use the metric system in its procurements, grants, and other business activities by the end of the fiscal year 1992, except where it would prove impractical or otherwise create inefficiencies.[715] Nonmetric weights and measures were to be permitted to remain in nonbusiness agency activities.[716]

With the end of the 17-year phase-in period rapidly approaching, President George H.W. Bush issued Executive Order 12770 on July 25, 1991, for the purpose of implementing Congress's earlier directives.[717] The order required the heads of all executive branch departments and agencies (including FTA) to adopt the metric system for use in all procurements, grants and other business-related activities by September 30, 1992.[718] Use of the metric system would not be required where impractical. However, the federal agencies were required to establish "effective process[es] for a policy-level and program-level review" of any proposed exceptions.[719] The agencies must list any such exceptions in their annual reports, with proposals for remedying the problems giving rise to the exceptions.[720] Furthermore, the departments and agencies must also use metric units in government publications as those publications are revised on a normal schedule, or where a new publication is issued.[721]

Neither DOT nor its operating administrations have adopted any regulations giving detailed directions to grantees on the use of the metric system.[722] FTA's MA, which all grantees are obligated to sign as part of receiving federal funding, simply requires grantees to "use the metric system of measurement in [their] Project activities," and "[t]o the extent practicable and fea-

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[707] FTA MA § 18.c(1) and (2). In the event a project is not completed, all data produced to date by that project will become subject data and must be delivered to the FTA. FTA MA § 18.d. Unless it has specifically declared it will not do so, the FTA may give any other grantees or third party contractors access to relevant subject data or license the use of copyrighted materials by those parties. FTA MA § 18.d.

[708] FTA MA § 18.g.

[709] Including its officers, employees, and agents as long as they are acting within the scope of their official duties. FTA MA § 18.e.

[710] *Id*.

[711] *Id*.

[712] 15 U.S.C. § 205a (2000).

[713] Pub. L. No. 94-168, § 2, 89 Stat. 1007 (1975). This was later amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. V, subtit. B, pt. I, subpt. F, § 5164(a), 102 Stat. 1451 (1988).

[714] 15 U.S.C. § 205b(1) (2000).

[715] 15 U.S.C. § 205b(2) (2000).

[716] 15 U.S.C. § 205b(4) (2000).

[717] Exec. Order No. 12770 Preamble, 56 Fed. Reg. 35,801 (July 29, 1991).

[718] Exec. Order No. 12770 § 2(a), 56 Fed. Reg. 35,801 (July 29, 1991).

[719] Exec. Order No. 12770 § 2(a)(1) and (2), 56 Fed. Reg. 35,801 (July 29, 1991).

[720] Exec. Order No. 12770 § 2(a)(2), 56 Fed. Reg. 35,801 (July 29, 1991).

[721] Exec. Order No. 12770 § 2(b), 56 Fed. Reg. 35,801 (July 29, 1991).

[722] DOT's regulation for its own internal processes states in its entirety,

> The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205), declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally funded activities. Federal awarding agencies shall follow the provisions of E.O. 12770, "Metric Usage in Federal Government Programs."

49 C.F.R. § 19.15 (2002).

sible…accept products and services with dimensions expressed in the metric system of measurement."[723]

The practical problem for grantees is that routine commercial products and spare parts are stated in standard/imperial measurements rather than metric. [724] Furthermore, the volume of business generated is unlikely to convince suppliers to make products available in metric measurements. Thus, in procurements for which metric measures are required, the grantee must be certain to clearly state in the advertisement and contracting documents whether the use of standard/imperial measures will make the bid nonresponsive or otherwise result in negative consequences for the bidder.[725]

## I. PROPERTY DISPOSITION

If a grantee under the Federal Transit Act decides that an asset obtained using federal funds (in whole or in part) no longer serves the purpose for which it was acquired, it must seek approval from the Secretary for any disposition of the asset.[726] The Secretary may authorize the transfer of the asset to a "local government authority" for a public purpose related to mass transportation without further obligation to the federal government.[727] If the transfer is for a public purpose other than mass transportation, the Secretary may only approve it if:

1. The asset will remain in public use for at least 5 years after the date the asset is transferred;

2. There is no purpose eligible for assistance under the Federal Transit Act for which the asset should be used;

3. The overall benefit of the transfer, considering fair market value and other factors, is greater than the FTA's interest in liquidating the asset and obtaining a pecuniary return; and

4. Following "an appropriate screening or survey process,"[728] there is no interest in acquiring the asset (if a facility or land) for federal government use.[729]

After making the above determinations, the Secretary must give final approval for the transfer in writing, including the reasons and findings that support the decision.[730]

In the event the grantee wishes to dispose of assets other than by transferring them to a local government, it must obtain permission from the Secretary, who may attach such conditions as are deemed appropriate or are required by statute.[731] These are typically referred to as "disposition instructions." If FTA permits the grantee to dispose of the asset, the grantee must follow applicable state and local statutes and regulations for the disposition of used or obsolete property. Many such statutes or ordinances require a legal notice or public posting of the assets and sale to the highest offeror. The net income of asset sales or leases must be used by the grantee to cover project costs or other capital costs that are being financed by FTA.[732]

More detailed provisions on the disposition of both real property and equipment are provided by FTA Circular 5010.1C, ch. II. The Circular requires that for real property, grantees must prepare, and keep updated, an excess property utilization plan for all property that is no longer needed for its originally intended purpose.[733] The plan should identify and explain the reason that the property is no longer required for its original purpose.[734] An inventory list should be part of the plan, including such information as the property's location, condition of the title, original acquisition cost, federal participation ratio, FTA grant number, appraisal information, description of improvements, current use of the property, and the anticipated disposition of the property.[735] The grantees must notify FTA when real

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[723] FTA MA § 30; 49 C.F.R. § 19.44(a)(3)(v) (2001).

[724] DOT itself routinely uses standard/imperial measurements in its own regulations and publications. *See, e.g.*, 49 C.F.R. § 665.11(e) (2000), which measures the service life of buses in terms of miles, and 49 C.F.R. § 665 App. A(6) (2000), which states that fuel efficiency will be measured in miles per gallon "or equivalent."

[725] Negative consequences could include compelling the successful bidder to pay the grantee's cost for converting standard/imperial measures to metric.

[726] 49 U.S.C. § 5334(g)(1) (2000). The statute does not prescribe a minimum dollar amount to trigger the Secretary's involvement and the FTA has not promulgated any regulations concerning this statute. FTA Circular 5010.1C, ch. II (3)(f), however, establishes value based rules for the disposition of equipment. See discussion *infra*.

[727] 49 U.S.C. § 5334(g)(1) (2000). Puzzlingly, the statute uses the specific term "local government authority." Ordinarily, statutes are careful to either say merely "government authority" (*see, e.g.*, 49 U.S.C. § 5565(a) (2000)) or say "State and local" (*see, e.g.*, 49 U.S.C. § 5565(a)(1) (2000)) when discussing governments other than the U.S. federal government. The term "local government authority" would seem to suggest that a grantee may only transfer the asset to a truly local government authority and could not transfer it to a state government authority. The statute does not articulate any logic for denying grantees the right to make transfers at the state level, so this may simply be the result of poor drafting, but grantees should be careful to not make plans that rely on transfers to state government authorities without receiving clarification from the Secretary as to the permissibility of doing so.

[728] Posting a notice of the proposed transfer in the Federal Register is a typical method of screening. *See, e.g.*, 63 Fed. Reg. 53122 (1998), which is a notice of the intent to dispose of a parking/recreation facility in Dorado, Puerto Rico.

[729] 49 U.S.C. § 5334(g)(1)(A) through (D) (2000).

[730] 49 U.S.C. § 5334(g)(2) (2000). The requirements imposed by 49 U.S.C. § 5334 are in addition to, and do not supersede, any other statutes governing the disposition of federally-owned or -financed property under an assistance agreement. 49 U.S.C. § 5334(g)(3) (2000). There do not appear to be any such statutes in effect as of March 12, 2001.

[731] 49 U.S.C. § 5334(g)(4)(A) (2000).

[732] 49 U.S.C. § 5334(g)(4)(B) (2000).

[733] *See* FTA C. 5010.1C, ch. II (2)(c)(0).

[734] *See id*.

[735] *See id*.

property is no longer being employed for the purpose that it was acquired for, whether idled or put to alternative uses.[736] Excess real property utilization plans and inventories must be retained by the grantee for FTA examination during the Triennial Review process, unless the FTA and grantee agree otherwise.[737]

If a grantee determines that it no longer requires real property acquired with federal funds, FTA may approve use of the property for other purposes.[738] This includes use in other federally-funded programs or in nonfederal programs if those programs' purposes are consistent with the purpose of programs within FTA's purview.[739] If a grantee will use the funds from the real property's disposal to acquire replacement real property under the same program, FTA may allow the net proceeds from the disposal of the original property to be used as offset against the cost of the replacement property.[740] FTA recognizes seven (arguably eight) alternative means of disposing of real property:

1. Sell and reimburse FTA;
2. Offset against replacement costs;
3. Sell and use proceeds for other capital projects;
4. Sell and keep proceeds in open project;
5. Transfer to public agency for nontransit use;
6. Transfer to other FTA-eligible project;
7. Retain title and buy out FTA share; and
8. Employ in joint development (although included with disposition methods in the Circular, FTA considers this a form of program income).[741]

Disposition of equipment, including rolling stock, is a less complex process than disposition of real property; however, the process still has its share of nuances. Rolling stock that has not been fully depreciated is singled out for special treatment, without regard to its value.[742] FTA must be reimbursed for its share of interest in the rolling stock's disposal price.[743] Any disposition of rolling stock prior to the end of its projected service life requires approval from FTA beforehand.[744] If revenue rolling stock is disposed of prior to the end of its service life, FTA must receive either its share of the unamortized value of the rolling stock's remaining service life[745] or the federal share of the sales price, whichever is greater.[746] With prior FTA approval, grantees may use 100 percent of the trade-in value or sales proceeds from the disposition of rolling stock, whether retaining any service life or not, to offset the cost of replacement rolling stock.[747] If the cost of the replacement rolling stock is greater than the proceeds from the sale of the original, the grantee must cover the difference.[748] If there are any proceeds from the sale remaining after the acquisition of the replacement rolling stock, those are to be returned to FTA, less the share of the grantee and other agencies.[749]

In the case of equipment other than rolling stock with some residual service life, when the equipment is no longer needed for the project or program it was acquired for, the grantee may employ the equipment in other projects or programs, but must receive FTA approval before doing so.[750] FTA retains its interest in the equipment under such circumstances.[751] If the grantee chooses to sell the equipment instead, it is subject to different FTA requirements depending on the equipment's value. Where the equipment is estimated to have a fair market value greater than $5,000, whether for a single unit or for an aggregation of items purchased collectively,[752] FTA must be reimbursed with a percentage of either the fair market value or the net proceeds, equal to FTA's participation in the original grant.[753] The grantee must notify the FTA of the method planned for disposal.[754] If upon reaching its projected service life the equipment is estimated to have a fair market value of $5,000 or less, whether for a single unit or for an aggregation of items purchased collectively, the grantee may dispose of the equipment without reimbursing FTA.[755] The grantee must, however, retain a record of this action.[756]

With prior FTA approval, grantees may also either transfer equipment to another public agency without reimbursing FTA[757] or sell the equipment and use the proceeds to reduce the gross project cost of other FTA-eligible capital transit projects.[758] In the latter instance,

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[736] *See id*.

[737] *See id*.

[738] *See* FTA C. 5010.1C, ch. II (2)(c)(1).

[739] *See id.*

[740] *See id.*

[741] *See* FTA C. 5010.1C, ch. II (2)(c)(1) for more detail on each of these disposal alternatives.

[742] *See* FTA C. 5010.1C, ch. II (3)(f)(1).

[743] *See id.*

[744] *Id*.

[745] This is calculated on straight line depreciation of the original purchase price. *Id*.

[746] *Id*.

[747] *See* FTA C. 5010.1C, ch. II (3)(f)(5).

[748] *Id*.

[749] *See id*. *E.g.*, a grantee purchases a rail car for $500,000, including $400,000 in FTA funds. Some time later, the grantee sells the rail car for $200,000 and purchases a bus for $100,000 with the proceeds. 80 percent (i.e., its share of the original procurement) of the remaining $100,000 would be returned to FTA, while the grantee would receive 20 percent.

[750] FTA C. 5010.1C, ch. II (3)(f)(2).

[751] *Id*.

[752] *E.g.*, 20,000 pieces of 6-foot steel rebar purchased for a construction project.

[753] FTA C. 5010.1C, ch. II (3)(f)(3). *E.g.*, A grantee purchases $50,000 of office furniture, including $25,000 in FTA-provided funds. Some years later, the grantee sells the office furniture for $20,000. FTA must then be reimbursed with $10,000.

[754] *Id*.

[755] FTA C. 5010.1C, ch. II (3)(f)(4).

[756] *Id*.

[757] FTA C. 5010.1C, ch. II (3)(f)(6). The Circular recommends that grantees interested in making such transfers consult with their regional FTA offices for procedures. *Id*.

[758] FTA C. 5010.1C, ch. II (3)(f)(7).

the grantee must record the receipt of the proceeds, showing that the funds are restricted to use in a subsequent capital project.[759] Subsequent capital grant applications should indicate that the gross project cost has been reduced by proceeds from the earlier equipment disposal.[760]

## J. OTHER PROCUREMENT REQUIREMENTS AND CONSIDERATIONS

Because so many factors in making a procurement are governed by regulations other than those directly pertaining to procurement itself, further Sections that should be consulted in conjunction with procurement decisions include Section 3—Environmental Law, [761] Section 4—Finance,[762] and Section 7—Safety.[763]

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[759] *Id*.

[760] *Id*.

[761] Including such topics as compliance with the Clean Air Act, the Federal Water Pollution Control Act, and NEPA.

[762] Including such topics as project management oversight, rail terminal conversion, and job access and reverse commute grants.

[763] Including such topics as seismic design and related issues.

SECTION 6

# ETHICS

## A. INTRODUCTION

The federal government provides financial assistance to state or local governments by engaging the recipient[1] in either a direct procurement contract[2] or a nonprocurement program.[3] While an agency such as the Department of Defense (DOD) typically engages in procurement contracts to acquire property or services for its direct benefit, the FTA generally participates in nonprocurement programs by providing financial assistance to state and local governmental institutions (such as local transit providers)[4] through a grant[5] or a cooperative agreement.[6] Thus, in order to ensure that the recipient, its board members, managers, employees, and any third party contractors who have been awarded a contract or purchase order by the recipient adhere to an acceptable ethical standard, a recipient must comply with legal requirements pertaining to ethics that are set forth in the FTA MA.[7]

The ethics section of the FTA MA provides that a recipient receiving FTA assistance agrees to (1) maintain a written code of ethics, (2) comply with lobbying restrictions, (3) abide by the provisions of the Hatch Act, (4) adhere to the Program Fraud Civil Remedies Act of 1986 and U.S. DOT regulations, "Program Fraud Civil Remedies," and (5) act in accordance with government-wide debarment and suspension regulations.[8] Further, in accordance with the FTA MA, the recipient also agrees to comply with FTA Circular 4220.1D, "Third Party Contracting Requirements,"[9] which in turn encourages the grantee to utilize the technical assistance and guidance set forth in the FTA Best Practices Procurement Manual.[10]

In addition to being contractually bound by the FTA ethics policy, a recipient has a primary responsibility to comply with federal statutes, federal regulations, and Executive Orders.[11] The prudent transit lawyer should understand the general "flow down" of FTA regulations and of the FTA MA framework: (i) a statute is enacted by Congress; (ii) regulations promulgated by DOT implement the statute; and (iii) a contractual provision appears in the FTA MA. FTA includes the provision in the FTA MA in some instances because Congress requires federal agencies such as FTA to include the provision in their grant agreements; in other instances, Congress further requires that the grantee include the provision in its third party contracts. Finally, FTA includes such provisions in its MA so that it could potentially enforce the provision contractually. In addition to the statute passed by Congress, the regulations promulgated by DOT or FTA and the provision in the FTA MA, FTA may issue Circulars, "Dear Colleague" letters, or other publications providing technical information relevant to FTA grant programs.

Sections within Title 49 of the Code of Federal Regulations (C.F.R.),[12] "Transportation," which is issued by DOT, summarize the ethical regulations a grantee must follow.[13] However, many of the DOT regulations found in Title 49 do not impose any further ethical burden on the recipient. More specifically, the regulations pertaining to (1) the maintenance of a written code of ethics,[14] (2) lobbying restrictions,[15] (3) the Program Fraud

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[1] The term "recipient" means the entity that receives federal assistance directly from FTA to accomplish the project, and includes each FTA "grantee" and each FTA recipient of a cooperative agreement. FTA Master Agreement (MA) § 1 (2003).

[2] A procurement contract refers to the existence of a legal relationship between the federal government and a state or local government or other recipient where the purpose is to acquire property or services for the federal government's direct benefit. AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, THE PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT iv (2d ed. 1996).

[3] The term "nonprocurement program" refers to any federal assistance program including grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. 48 C.F.R. § 9.403 (2003).

[4] Local government includes a public transit authority as well as a county, municipality, city, town, township, special district, or council of governments. FTA MA § 1 (2003).

[5] A grant agreement is an instrument by which FTA awards federal assistance to a recipient to support a project in which FTA does not take an active role or retain substantial control.

[6] A cooperative agreement is an instrument by which FTA awards federal assistance to a recipient to support a project in which the FTA takes an active role or retains substantial control.

[7] The specific requirements of the FTA MA are incorporated into the grant agreement or cooperative agreement executed by the recipient. As a condition of receiving funds, federal requirements must be met by the recipient as well as the subrecipients and contractors. FTA MA (2003).

[8] FTA MA § 3 (2003).

[9] The FTA Circular 4220.1D outlines the requirements a grantee must adhere to in the solicitation, award, and administration of its third party contracts.

[10] The FTA Best Practices Procurement Manual outlines grantee practices that have proven to be successful in order to assist grantees in conducting third party procurements. These procedures are not mandatory unless identified, and are meant to be informative and helpful to the grantee community.

[11] FTA MA § 2 (2003).

[12] 49 C.F.R. pt. 18 (2003). The C.F.R. codifies the permanent rules published in the federal register by the executive departments and agencies of the federal government. The code is divided into 50 titles representing broad areas of federal regulation. Each title is divided into volumes that are identified by the name of the issuing agency. Title 49 is composed of seven volumes. The first volume (parts 1-99) contains current regulations issued under the Office of the Secretary of Transportation.

[13] 49 C.F.R. (2003).

[14] 49 C.F.R. § 18.36(b)(3) (2003).

[15] 49 C.F.R. § 20 (2003). Section 3 of the FTA MA provides that the recipient must comply with DOT regulations, "New Restrictions on Lobbying," as set forth in 49 C.F.R. § 20.

and Civil Remedies Act of 1986,[16] and (4) government-wide debarment and suspension in nonprocurement activities are the same as those outlined in the MA.[17]

A recipient should also consult the ethics regulations set forth under Title 48 of the CFR, the "Federal Acquisition Regulations System" (FAR).[18] The language from Part 3 of the FAR, "Improper business practices and personal conflicts of interest," and Part 9 of the FAR, "Contractor qualifications," provides model contract language for DOT and other federal agencies.[19] Therefore, since the ethics regulations outlined by DOT in Title 49 generally parallel those set forth in the FTA MA and FTA Circular 4220.1D, and are based on the FAR, the sections in this chapter discuss the ethical regulations promulgated by DOT as well as variations arising under the FAR.[20]

However, when consulting FAR provisions, the prudent transit lawyer should keep in mind that the FAR governs direct federal procurements and acquisitions and, thus, differs from the DOT federal regulations under Title 49.[21] Accordingly, the FAR does not apply to recipient procurement programs; most grantees use their own third party procurement program or that of the local government with FTA requirements and certain FAR provisions blended in.[22] FAR ethical requirements and standards are reflected, but not incorporated by reference, into the FTA MA, and so therefore decisions by the Comptroller General and the courts construing FAR can provide important guidance to recipients as to issues arising under the ethical provisions of the FTA MA.

In addition, many states have adopted statutes and regulations that impose ethical obligations upon grantees, and many local governments have followed suit. It is not uncommon for a grantee to be subject to a state "Little Hatch Act," a local ordinance governing conflicts of interest, opinions of the state Attorney General as to improper business practices by public officials and employees, and state debarment and suspension of contractors. Most state procedures providing for reciprocal debarment are based on a debarment in another jurisdiction—state or federal.[23]

There are also a number of ethical requirements imposed upon lawyers, as lawyers, by their state and local bar associations and the courts before which they practice. Given that lawyers generally should be familiar with these requirements,[24] and most states require ethics credits as part of their Continuing Legal Education obligations, these nontransit specific requirements upon the profession are not addressed in this section.

## B. CODE OF ETHICS FOR THIRD-PARTY PROCUREMENTS

Where a third party contract[25] is involved, DOT regulations and the FTA MA require that the grantee[26] maintain a "written code of standards of conduct" governing the performance of its employees engaged in the award and administration of contracts.[27] Such a code must prohibit a grantee's employees, officers, agents, immediate family members, partners, and board members from participating in the selection, award, or administration of a third party contract or sub-agreement supported by FTA funds if a conflict of interest, real or apparent, would be involved.[28] The written code should guard against a personal conflict of interest by prohibiting the recipient's employees, officers, agents, immediate family members, partners, and board members,

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[16] The Program Fraud Civil Remedies Act of 1986 is implemented at 49 C.F.R. § 31 (2003). The provisions of this Act may also be found within Section 3 of the FTA MA.

[17] The FTA MA regulations parallel Title 49 of the Code of Federal Regulations.

[18] 48 C.F.R. (2003). The FAR contains the rules and procedures the federal government has established for the acquisition of supplies and services.

[19] 48 C.F.R. (2003). The federal acquisition regulations and other requirements are implemented by DOT in parts 1 to 69 of 48 C.F.R. (2003).

[20] The subtle variations that exist among the procurement (FAR) and nonprocurement (DOT) regulations will be identified when necessary.

[21] Although DOT regulations generally cover nonprocurement programs, Title 49 provides a section outlining procurement regulations that bind grantees and subgrantees using federal funds to procure property and services under a grant.

[22] In making procurements funded by a federal grant, grantees and subgrantees must use their own procurement procedures that reflect applicable state and local laws and regulations, provided that the procurements are consistent with applicable federal law. 49 C.F.R. § 18.36(b)(1) (2003).

[23] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 37. At the federal level, Executive Order 12689 requires agencies to establish regulations for reciprocal government-wide debarment and suspension. 62 Fed. Reg. 57770 (Oct. 29, 1997).

[24] *See, e.g.,* AMERICAN BAR ASS'N, MODEL RULES OF PROFESSIONAL CONDUCT, AND MODEL RULES OF PROFESSIONAL RESPONSIBILITY (1990).

[25] A "third party contract" refers to any purchase order or contract awarded by a grantee to a vendor or contractor using federal financial assistance awarded by the FTA. FTA Circular 4220.1D (1996).

[26] A "grantee" is the public or private entity to which a grant or cooperative agreement is awarded by FTA. The grantee is the entire legal entity even if only a particular component of the entity is designated in the assistance award document. FTA Circular 4220.1D § 6 (1996).

[27] 49 C.F.R. § 18.36(b)(3) (2003); FTA MA § 3(c) (2003); FTA Circular 4220.1D § 7(c) (1996). The requirements for establishing a written code of standards of conduct are based on the common grant rules, federal statutes, Executive orders and their implementing regulations, and FTA policy. The FTA Circular 4220.1D, which may be found within the FTA's Best Practices Procurement Manual, applies to all FTA grantees and subgrantees that contract with outside sources under FTA assistance programs. If a grantee accepts operating assistance, the requirements of Circular 4220.1D apply to all transit-related third party purchase orders and contracts.

[28] 49 C.F.R. § 18.36(b)(3) (2003); FTA MA § 3(c) (2003); FTA Circular 4220.1D § 7(c) (1996).

who have a financial or other interest in the entity selected for award, from participating in all phases of the third party contract.[29]

FTA issued the following examples of personal conflict of interest situations that typically occur, along with the corresponding suggested means for avoiding future conflict:[30]

1. A transit agency employee in the construction program office is assigned responsibility to administer a contract for A & E services that has been awarded to her husband's firm. This creates a personal conflict of interest for the employee. *Means for Avoiding Future Conflict*: Employees should be required to file an annual disclosure statement with their agency concerning their financial and employment status and that of immediate family members. Agency employees and their managers must be sensitive to avoid personal conflict of interest situations, and if they arise, employees must remove themselves from the assignment.

2. An agency employee involved with administering an agency contract is invited by an official of the contractor to attend a sporting event free of charge. If the agency employee accepts the free tickets, he or she creates a personal conflict of interest. *Means for Avoiding Future Conflict*: When a contractor offers gifts to an agency employee, the employee should notify his or her supervisor, and an agency manager should then notify the contractor that such gifts are not permitted by agency rules.

3. An agency's contractor was assigned to participate on an evaluation panel to evaluate competitive proposals. The contractor's employee assigned to the panel had a 401(k) retirement plan with one of the bidders. This represented a personal conflict of interest. *Means for Avoiding Future Conflict*: Agencies should not use consultants as voting members of evaluation panels for competitive contract awards. Consultants should only be used as advisors, and they should sign financial disclosure statements.

The code of standards of conduct must also provide measures for recognizing and avoiding organizational conflicts of interest.[31] An organizational conflict of interest exists where because of other activities, relationships or contracts, (1) a contractor is unable to provide impartial assistance or advice to the grantee, (2) a contractor's objectivity in performing the contract is impaired, or (3) a contractor has an unfair competitive advantage.[32] Examples of organizational conflict of interest situations and the suggested means for avoiding future conflict, as identified by FTA, are outlined below:[33]

1. A contractor was performing project management services for an agency, and these services included an oversight role of the agency's construction contractors. In the course of time this project management contractor decided to acquire a company that was performing a design-build contract for the same agency. In addition to performing project management services, the contractor was assigned to oversee the design-build contract for the agency. This acquisition created an organizational conflict of interest in that the project manager could no longer be objective in its oversight role with respect to the design-build contract. *Means for Avoiding Future Conflict*: This agency made a decision, with the contractor's cooperation, to remove the contractor from one of its roles.

2. A company is hired by an agency to make recommendations concerning alternative choices for a river crossing (the alternative choices are to build a bridge or to use ferries). However, this company has an organizational conflict of interest because it owns a subsidiary whose major line of business is designing and building bridges. *Means for Avoiding Future Conflict*: Agencies must be aware of potential conflict of interest situations when they contract with a consultant to advise them about competing alternatives. Agencies must take necessary steps to preclude contractors from doing studies when the contractor has a financial interest in the outcome of the study. Accordingly, the soliciting proposal should require offerors to identify any financial or organizational interests in the technology field to be studied.

3. A company doing preliminary engineering work as a subcontractor on an agency contract was asked to prepare a budget for the permanent project management services contract that would eventually be assigned. This subcontractor subsequently bid on the project management contract, and the individual who was assigned the job of developing the project budget on the subcontract was also the company's person who prepared the company's price proposal when the project was bid. This company won the contract award, and the determining factor between the competing proposals in winning the award was price, not relative technical strengths. Here, the company gained an unfair competitive advantage by virtue of its work that gave it access to important information that was not publicly available. *Means for Avoiding Future Conflict*: The agency eventually terminated the project management services contract. The agency could have taken steps early to "wall off" the subcontractor employee who had access to

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[29] 49 C.F.R. § 18.36(b)(3) (2003); FTA MA § 3(c) (2003); FTA Circular 4220.1D § 7(c) (1996).

[30] Fed. Transit Admin., *Conflicts of Interest: Personal and Organizational* (visited Aug. 15, 2003), http://www.fta.dot.gov/library/procurement/conflicts. A complete listing of the personal conflict of interest scenarios compiled by FTA may be found at this Web site.

[31] FTA MA § 3(a)(2) (2003).

[32] FTA MA § 3(a)(2) (2003). Federal transit law requires contracts to be awarded by free and open competition. Organizational conflicts of interest that cause an unfair competitive advantage are an impediment to free and open competition and are thus considered "restrictive of competition" by FTA Circular 4220.1D, par. 8a(5).

[33] Fed. Transit Admin., *supra* note 30 (proposed changes to Best Practices Manual issued on Dec. 29, 2000). A complete listing of the organizational conflict of interest scenarios compiled by FTA may be found at this Web site.

the budget data (i.e., prevented the employee from passing nonpublic information to his company). In this case this individual should have signed a nondisclosure statement so that he could not participate in his company's later proposal effort. Alternatively, this sensitive task could have been assigned to a contractor that was not likely to bid on the defined work.

FTA further requires that a grantee code of conduct provide that "the grantee's officers, employees, agents, or Board members will neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements."[34] The grantee may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal value.[35] As permitted by state or local law, such standards of conduct must include penalties, sanctions, or other disciplinary actions for violations of the standards of conduct by the grantee's and subgrantee's officers, employees, or agents, or by the contractors or their agents.[36]

The FTA Best Practices Procurement Manual recommends that every agency employee involved in the award or administration of contracts be given a copy of the agency's (or state's) written standards of conduct and be required to sign a statement that they understand and accept the standards.[37] Agency employees should be instructed on the types of activities that may be inconsistent with their agency responsibilities.[38] To facilitate this instruction, grantee procurement and technical personnel are encouraged to work closely with their legal counsel to review all situations that appear to have the potential for an organizational conflict of interest.[39] FTA also recommends that agencies conduct training sessions for employees who are directly involved in the procurement process.[40]

## C. DISCLOSURE OF CONFLICTS OF INTEREST

An offeror's contract proposal must include a statement describing past, present, or planned organizational, financial, contractual or other interest(s) with an organization regulated by DOT, or with an organization whose interests may be substantially affected by DOT activities.[41] The statement should describe the interest(s) of the offeror, its affiliates, proposed consultants, proposed contractors, and key personnel of any of the above.[42] Where a potential conflict arises, the offeror must describe why he or she believes the proposed contract can be performed objectively.[43] Conversely, where no potential conflict of interest exists, the offeror must certify in its proposal that no affiliation exists that would create a conflict of interest.[44] Ultimately, if a conflict of interest is found to exist, the contracting officer may (1) disqualify the offeror, or (2) award the contract while taking necessary steps to mitigate or avoid the conflict.[45]

## D. FALSE OR FRAUDULENT STATEMENTS OR CLAIMS

The FTA MA imposes two significant requirements concerning false or fraudulent statements or claims on grant recipients:

1. The Recipient acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986 and DOT regulations, "Program Fraud Civil Remedies,"[46] apply to its actions pertaining to this Project. Upon execution of the underlying grant or cooperative agreement the Recipient certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make in connection with the project covered by the grant agreement or cooperative agreement. In addition to other penalties that may be applicable, the Recipient further acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, or certification to the federal government, the federal government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, on the Recipient to the extent the federal government deems appropriate.[47]

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[34] 49 C.F.R. § 18.36(b)(3) (2003); FTA MA § 3(c) (2003); FTA Circular 4220.1D § 7(c) (1996).

[35] Fed. Transit Admin., *supra* note 30 (proposed changes to Best Practices Manual issued on Dec. 29, 2000). These are known as "de minimus" gifts. For FTA and other federal employees, the level is set at $20 per occasion with a maximum of $50 per calendar year from the same source (including affiliates). In many cases, however, the best response to a gift being offered is a simple "thank you but no thank you."

[36] 49 C.F.R. § 18.36(b)(3) (2003); FTA MA § 3(c) (2003); FTA Circular 4220.1D § 7(c) (1996).

[37] FED. TRANSIT ADMIN., BEST PRACTICES PROCUREMENT MANUAL (3d ed. 1998).

[38] FED. TRANSIT ADMIN., *supra* note 37.

[39] Fed. Transit Admin., *supra* note 30 (issued on Dec. 29, 2000). The prudent transit attorney should be available to prepare restrictive contracting clauses and inform grantees when involvement by FTA regional counsel would be appropriate.

[40] FED. TRANSIT ADMIN., *supra* note 37. Employees may then be forewarned that firms bidding on government contracts have, in the past, attempted to secure awards by offering to employ procurement personnel in return for contract awards.

[41] FED. TRANSIT ADMIN., *supra* note 37, at App. B. 10. The prudent transit attorney must keep in mind that the offeror may not know of this obligation unless the recipient includes notice of the obligation in the Request for Proposals or Invitation for Bids.

[42] *Id*.

[43] *Id*.

[44] *Id.*

[45] *Id*.

[46] The Program Fraud Civil Remedies Act of 1986 is amended at 31 U.S.C. §§ 3801 *et seq*. and implemented at 49 C.F.R. pt. 31 (2003).

[47] For each false claim, the recipient is subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000. 31 U.S.C. § 3802 (1994). *See*

2. If the Recipient makes a false, fictitious, or fraudulent claim, statement, submission, or certification to the federal government in connection with an urbanized area formula project financed with federal assistance originally awarded by FTA under the authority of 49 U.S.C. § 5307, the government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5307(n)(1)[48] on the Recipient, to the extent the Federal Government deems appropriate.[49]

As a result of the language contained within the MA, which repeatedly reads "the Recipient," the inclusion of this clause verbatim in a third party contract might lead third party contractors to believe that only recipients must adhere to this FTA requirement. In order to avoid such an erroneous assumption, the prudent transit attorney should pass the obligation through to the third party contractor, by including the phrase "the Contractor" in place of "the Recipient."

## E. LOBBYING RESTRICTIONS

Pursuant to DOT regulations, "New Restrictions on Lobbying,"[50] each contractor who bids for an award of a federal contract, grant, or cooperative agreement exceeding $100,000 or an award of a federal loan exceeding $150,000 must certify,[51] to the best of his or her knowledge and belief, that:

1. No federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement; and

2. If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with [any application to FTA for federal assistance, the applicant for FTA funds must] complete and submit Standard Form-LLL, "Disclosure form to Report Lobbying."[52]

3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts; subgrants; and contracts under grants, loans, and cooperative agreements), and that all subrecipients shall certify and disclose accordingly.[53]

Grantees are required to include the lobbying clause in agreements, contracts, and subcontracts exceeding $100,000.[54] Signed certifications must be obtained by a grantee from subgrantees and contractors; the contractors are to retain the subcontractors' certifications.[55]

## F. EMPLOYEE POLITICAL ACTIVITY

The FTA MA specifies that a recipient must agree to comply with the Hatch Act.[56] The Hatch Act limits the political activities of state and local agencies and their officers and employees whose principal employment activities are financed in whole or in part with federal funds,[57] including a federal loan, grant, or cooperative agreement.[58] Hatch Act violations are handled by the

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*also* 49 C.F.R. § 31.3 (2003). Contractor is subject to a civil penalty of not more than $5,500 for each false claim.

[48] Under Section 5307(n)(1) of title 49, the Secretary may end a grant and seek reimbursement when a false or fraudulent statement or related act within the meaning of 18 U.S.C. § 1001 is made in connection with a certification or submission. *See also* S.T. Grand, Inc. v. City of New York, 344 N.Y.S.2d 938, 942 (1973). The court of appeals made the following determinations: (1) the vendor who procured a public contract in violation of competitive bidding requirements was not entitled to any payment; (2) if the vendor was paid, the public entity is entitled to recover all sums paid on the contract; and (3) if the vendor has not been paid, he or she is not entitled to recover either on the contract or in quasi-contract. The decision stipulated that policy considerations mandate that harsh forfeiture is essential to deter violation of competitive bidding.

[49] FTA MA 3(f) (2003).

[50] 49 C.F.R. § 20.110 (2003); FTA MA § 3(d) (2003). The regulations are based on 31 U.S.C. § 1352 and 49 U.S.C. § 322 (2002).

[51] 49 C.F.R. pt. 20, App. A (2003). Language in the Lobbying Certification is mandated by 49 C.F.R. pt. 19, App. A, § 7, which provides that contractors file the certification required by 49 C.F.R. pt. 20, App. A. *See also* 49 C.F.R. § 20.110 (2003).

[52] Standard Form-LLL is set forth in App. B of 49 C.F.R. pt. 20, as amended by "Government-wide Guidance for New Restrictions on Lobbying," 61 Fed. Reg. 1413 (1/19/96), and is mandated by 49 C.F.R. pt. 20, App. A. Updates to Standard Form-LLL are required for each calendar quarter in which any event occurs that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by the entity. Those amounts may include a cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a "covered federal action"; a change in the person(s) attempting to influence such action; or a change in the officer(s), employee(s), or member(s) contacted to influence such action. Grants Management Workbook (2001).

[53] 49 C.F.R. pt. 19, App. A (2003).

[54] FTA Grants Management Workbook § 10 (2003).

[55] *Id*. § 10.

[56] FTA MA 3(e) (2003). The Hatch Act is codified at 5 U.S.C. §§ 1501–1508 and §§ 7324–7326 (1994), and implemented by 5 C.F.R. § 151 (2001).

[57] The question of whether federal funds have been received by a state agency is irrelevant to the determination of whether the agency is a part of the state government and, thus, bound by the Hatch Act. *See* 5 U.S.C. § 1501(2) (2003).

[58] FTA MA § 3(e) (2003). Federal funds awarded by a state highway department to be exclusively used for highway construction and maintenance projects were "loans" and "grants" within the Hatch Act. Engelhardt v. U.S. Civil Service Comm., 197 F. Supp. 806, 810 (M.D. Ala. 1961).

Office of Special Counsel, which has jurisdiction. A state or local officer or employee may not:

1. Use his or her official authority or influence to interfere with or affect the result of an election or a nomination for office;

2. Directly or indirectly coerce, attempt to coerce, command, or advise a state or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

3. Be a candidate for elective office.[59]

Determining whether employee suspension or removal is an appropriate penalty for an employee violating the Hatch Act is dependent upon the seriousness of the violation and an account of the following mitigating factors: (1) nature of the offense and the extent of the employee's participation; (2) employee's motive and intent; (3) whether the employee received advice of counsel regarding the activities at issue;[60] (4) whether the employee ceased the activities once the violation was discovered; (5) employee's past employment record; and (6) political coloring of the employee's activities.[61] However, the Hatch Act does not apply to nonsupervisory personnel of a transit system (or of any other agency or entity performing related functions), who are otherwise covered solely by virtue of the receipt of operating assistance.[62]

The purpose of the Hatch Act is to preserve the notion that employment and advancement in a government position is not dependent upon political preference, so that government employees are free from pressure to vote for a candidate or contribute to a political campaign of their choice without fear of retribution.[63] Therefore, it is important for the employee to understand what types of political activities constitute direct or indirect coercion of an employee. The Merit Systems Protection Board (MSPB) in *Special Counsel v. Gallagher* was presented with this issue.[64] In this case, the director of administration and finance for a federally-financed transportation authority who asked an employee to "get a table of 10 together" for a fashion show sponsored by the Democratic Party and subsequently provided the employee with 10 unsold tickets, was found to have coerced that employee in violation of the Hatch Act.[65] The Chief Administrative Law Judge (CALJ) upheld the long-established rule that a "person in authority violates the Hatch Act if he willfully permits his official influence to be a factor in inducing a subordinate to make a political contribution."[66]

Although an understanding of how the Hatch Act limits the political activities of employees of state and local agencies facilitates compliance with the FTA MA, a knowing and willful violation is not required to violate the Hatch Act. For example, in *Alexander v. Merit Systems Protection Board*, the employee's uncertainty whether he was an employee under the Hatch Act did not prevent his removal for violating the Act.[67] Although the employee made an effort to determine if his employment status was covered by the Act, his blatant disregard of the unequivocal warnings, and his willingness "to take a chance on an unclear situation," justified his removal.[68]

## G. SPECIAL GRANT OR SUBGRANT CONDITIONS FOR "HIGH-RISK" GRANTEES

In accordance with the federal government's policy to protect the public interest, DOT may only conduct business with responsible persons.[69] Thus, DOT has implemented special grant and subgrant conditions for "high-risk" grantees.[70] DOT regulations state that a grantee or subgrantee may be deemed high-risk if he or she: (1) has a history of unsatisfactory performance, (2) is not financially stable, (3) has an unsatisfactory management system, (4) has not conformed to terms and conditions of previous awards, or (5) is otherwise not responsible.[71]

DOT regulations also specify that grantees and subgrantees may only work with responsible third party contractors who possess the ability to perform successfully under the terms and conditions of a proposed procurement.[72] When assessing a contractor's responsibility status, a grantee or subgrantee must consider the contractor's integrity, compliance with public policy (which includes compliance with applicable government regu-

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[59] 5 U.S.C. § 1502 (2003). Candidacy exceptions do exist. A state or local officer or employee may be a candidate for (1) the Governor or Lieutenant Governor of a state; (2) the Mayor of a city; (3) a duly elected head of an executive department of a state; (4) an individual holding elective office; (5) an activity in connection with a nonpartisan election; or (6) an officer of a political party, delegate to a political party or convention, member of a National, State, or local committee of a political party, or any similar position.

[60] However, the prudent transit attorney should convey to his or her client that in most cases, the lawyer for the agency is not the lawyer for the agency's individual employees.

[61] 5 U.S.C. § 1505 (2003).

[62] 23 U.S.C. § 142(g) (2003).

[63] United States v. National Treasury Employees Union, 513 U.S. 454, 470 (1995).

[64] Special Counsel v. Gallagher, 44 M.S.P.R. 57 (1990).

[65] *Id*. at 66.

[66] *Id*. at 68. The director's contention that he "asked, rather than told" his subordinates to help was unpersuasive to the CALJ. The director violated the Hatch Act despite a lack of evidence that he made threats or promises in conversations with the employees.

[67] Alexander v. Merit Systems Protection Bd., 165 F.3d 474, 481 (6th Cir. 1999).

[68] *Id*. at 481. The MSPB's determination that the employee did not act reasonably in deciding to disregard the Office of Special Counsel official's warning that he was covered by the Act justified the removal of the employee.

[69] 49 C.F.R. § 29.115(a) (2003). A discussion of the meaning of the term "responsible" may be found in § 6.073.

[70] 49 C.F.R. § 18.12(a) (2003).

[71] *Id*.

[72] 49 C.F.R. § 18.36(b)(8) (2003).

latory requirements), record of past performance, and financial and technical resources.[73]

Upon a determination that a grantee is high-risk, the awarding agency may refuse to provide federal financial assistance.[74] However, in the event the awarding agency elects to provide federal assistance to a high-risk grantee, the grantee's actions with regard to the use of such assistance will be closely monitored by that agency and special conditions and/or restrictions may govern the award.[75] Potential special conditions or restrictions include: (1) payment on a reimbursement basis; (2) additional project monitoring; (3) requiring additional, more detailed financial reports; (4) requiring the grantee or subgrantee to obtain technical or management assistance; or (5) establishing additional prior approvals.[76] Such agency scrutiny obliges the high-risk grantee to proceed cautiously, thus causing grant approval and project implementation to each take longer.[77] Furthermore, discretionary funds are less likely to be awarded to high-risk grantees.

## H. GOVERNMENT-WIDE DEBARMENT AND SUSPENSION

### 1. Overview

Executive Order No. 12549 provides that, to the extent permitted by law, executive departments and agencies shall participate in a government-wide system for nonprocurement debarment and suspension.[78] Agencies may impose debarment[79] or suspension[80] for any of the causes set forth by DOT using any procedures established by DOT.[81] DOT regulations broadly apply to all persons who have participated, are currently participating, or may reasonably be expected to participate in covered transactions under federal nonprocurement programs.[82] A person[83] who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.[84] Debarment or suspension of a participant[85] in a program by one agency shall have government-wide effect; that is, no agency may enter into a covered transaction with the excluded person for the specified period of debarment or suspension, or the period of proposed debarment under 48 C.F.R. Part 9, Subpart 9.4, unless DOT grants an exception.[86] For example, a cor-

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[73] *Id*.

[74] 49 C.F.R. § 18.12(a)(5) (2003).

[75] *Id*.

[76] *Id*.

[77] The annual list of certifications and assurances required of FTA grantees is compiled in a single record published annually in conjunction with the publication of FTA's annual apportionment notice. A grant applicant must certify once each year to all certifications and assurances that can be expected to apply to any grant the applicant will request within the fiscal year. The notice includes a signature page that must be signed by the grant applicant's authorized official and its attorney, and submitted electronically via FTA's Transportation Electronic Award Management (TEAM) system or sent to the appropriate regional office. Accordingly, this process is slower for "high-risk" grantees. *See* FTA Grants Management Workbook, available at http://www.fta.dot.gov/3909_ENG_HTML.htm.

[78] 49 C.F.R. § 29.100(a) (2003). Debarment and suspension are actions that, taken in accordance with Executive Order 12,549 and DOT regulations, help protect the public interest by ensuring that the federal government conducts business with responsible persons. *See* § 29.115.

[79] 49 C.F.R. § 29.105 (2003). Debarment is defined as an action taken by the debarring official in accordance with DOT regulations to exclude a person from participating in covered transactions. A debarring official is either: (1) The agency head, or (2) An official designated by the agency head. For DOT, the designated official is the head of a Departmental operating administration, who may delegate any of his or her functions and authorize successive delegations. This subject is discussed above, in Section 6.082.

[80] 49 C.F.R. § 29.105 (2003). Suspension is defined as an action taken by a suspending official that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation, whereby legal, debarment, or Program Fraud Civil Remedies Act proceedings may ensue. Rules for designating a suspending official and a debarring official are identical. This subject is discussed above, in Section 6.081.

[81] 49 C.F.R. § 29.115(b) (2003). The causes for suspension and debarment and the accompanying procedures are set forth in later sections.

[82] 49 C.F.R. § 29.110(a)(1) (2003). A covered transaction is a primary covered transaction or a lower tier covered transaction. A "primary covered transaction" is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a federal agency and a person. A "lower tier covered transaction" is: (1) any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction; (2) any procurement contract for goods or services between a participant and a person at any tier, regardless of type, expected to equal or exceed the federal procurement small purchase threshold (currently $25,000) under a primary covered transaction; (3) any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have critical influence on or substantive control over that covered transaction.

[83] 49 C.F.R. § 29.105 (2003). A "person" is "any individual, corporation, partnership, association, unit of government or legal entity, however organized."

[84] 49 C.F.R. § 29.100(a) (2003). In light of the serious nature of these sanctions, debarment or suspension of a participant is a discretionary act that is to be "imposed only in the public interest for the government's protections and not for purposes of punishment." 49 C.F.R. § 29.115(b) (2003).

[85] 49 C.F.R. § 29.105 (2003). A participant is defined as any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction.

[86] 49 C.F.R. § 29.200(a) (2003). DOT may grant an exception allowing a debarred, suspended, or voluntarily excluded per-

poration debarred by FHWA is likewise unable to enter into a primary covered transaction or a lower tier transaction with an FTA recipient.

Pursuant to the FTA MA, the recipient of DOT financial assistance agrees to comply with Executive Orders 12549 and 12689, "Debarment and Suspension,"[87] and DOT regulations, "Governmentwide Debarment and Suspension (NONPROCUREMENT)," under 49 C.F.R. Part 29.[88] FTA grantees not only are required to certify that they are not excluded from federally assisted transactions, but also must ensure that none of the grantee's "principals,"[89] subrecipients, and third party contractors and subcontractors is debarred, suspended, ineligible, or voluntarily excluded from participation in federally assisted transactions.[90] Further, a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance programs and placed on a "listing of debarred and suspended participants, participants declared ineligible,[91] and participants who have voluntarily excluded[92] themselves from participation in covered transactions."[93]

Suspension and debarment functions in DOT are decentralized, so that each administration within DOT is responsible for its own suspension and debarment actions. While FHWA has delegated this power to a "debarment official," the debarring official in the remaining administrations (FTA, Federal Rail Administration, Research and Special Programs Administration, Federal Maritime Administration, FAA, National Transportation Safety Administration, United States Coast Guard) is the head of DOT operating administration.[94] In addition to DOT, more than 50 federal agencies maintain debarment and suspension officials.[95]

Existing debarment and suspension practices are also regulated by the FAR. However, while DOT debarment and suspension regulations govern recipients involved in nonprocurement programs, the FAR prescribes policies and procedures governing the debarment and suspension of contractors engaging in direct procurement contracts with government agencies.[96] Policy language within the FAR provides that government agencies, such as DOT, establish methods and procedures for coordinating their debarment or suspension actions so as to implement the policies and procedures under the FAR.[97] As a result, government debarment and suspension regulations implemented by DOT appear within Title 49.[98]

### 2. The Executive Orders

Prior to the 1980s, no government-wide regulation comparable to the FAR subpart 9.4 existed for nonprocurement suspension and debarment.[99] Although various agencies had debarment and suspension programs in effect for nonprocurement programs (particularly HUD), these programs only excluded participation in a particular agency and not throughout the government.[100] However, in 1986 President Reagan issued Executive Order No. 12549 directing executive agencies to participate in a system for debarment and suspension from procurement and nonprocurement programs and activities.[101] The Executive Order states that "debarment or suspension of a participant in a program by one agency shall have government-wide effect," whereby Executive departments and agencies must "follow government-wide criteria and government-wide minimum due process procedures when they act to debar or suspend participants."[102] Accordingly, after the Office of Management and Budget implemented the Executive Order in May 1987, 34 agencies published a final Common Rule[103] that established a "uniform system of nonprocurement debarment and suspension."[104]

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son, or a person proposed for debarment under the FAR, to take part in a particular covered transaction.

[87] The parameters and effect of the Executive Orders are discussed in the following section.

[88] FTA MA § (3)(b) (2003).

[89] 49 C.F.R. § 29.105 (2003). A principal is an officer, director, owner, partner, key employee, or a person who has critical influence on or substantive control over a covered transaction.

[90] FTA Grants Management Workbook § 9 (2003). DOT regulations also provide that grantees and subgrantees may not make any award or permit any award (subgrant or contract) at any tier to any party that is debarred or suspended or is otherwise excluded from or ineligible for participation in federal assistance programs under Executive Order 12,549, "Debarment and Suspension." 49 C.F.R. § 18.35 (2003).

[91] 49 C.F.R. § 29.205 (2003). For example, in March 2002, the General Services Administration suspended Enron Corporation and Arthur Andersen, LLP, from government contracting. Regional offices are notified of such suspensions with Dear Colleague letters. *See, e.g.,* Fed. Transit Admin., *Subject: Suspension of Enron Corporation and Arthur Andersen* (Apr. 2, 2003), http://www.fta.dot.gov/office/regional/region1/ad0206.html.

[92] 49 C.F.R. § 29.210 (2003).

[93] 49 C.F.R. § 29.100(3)(2003).

[94] 49 C.F.R. § 29.105 (2003).

[95] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at Tab E.

[96] 48 C.F.R. § 9.4 (2003).

[97] 48 C.F.R. § 9.402(b) (2003)

[98] 49 C.F.R. § 29 (2003).

[99] Exec. Order No. 12,689, 3 C.F.R. 235 (1989). "Nonprocurement" activities refer to all programs and activities involving federal financial and nonfinancial assistance and benefits, as covered by Executive Order No. 12,549.

[100] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 35.

[101] Exec. Order No. 12,549, 3 C.F.R. 189 (1986). This Executive Order was intended to "curb fraud, waste, and abuse in Federal Programs, increase agency accountability, and ensure consistency among agency regulations concerning debarment and suspension of participants in Federal programs."

[102] Exec. Order No. 12,549, 3 C.F.R. 189 (1986).

[103] 48 C.F.R. § 9.403 (2003). The nonprocurement common rule refers to the procedures used by federal agencies to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order No. 12,549. Examples include grants, cooperative agreements,

In 1989, Executive Order No. 12689[105] addressed the issue of unifying the procurement and nonprocurement debarment and suspension systems so that debarment or suspension of a participant under either the FAR or the Common Rule would have government-wide effect.[106] After an Interagency Committee on Debarment and Suspension and the Federal Acquisition Streamlining Act of 1994 addressed the concept of reciprocity, an amended Common Rule and FAR were published on June 26, 1995.[107] Both bodies of regulation established that procurement and nonprocurement debarments and suspensions initiated on or after August 25, 1995, and proposed debarments under the FAR initiated on or after that date had government-wide effect.[108]

### 3. Determination of Responsible Grantees

In accordance with its objective to protect the public interest, DOT stipulates that federal assistance will be given to *responsible* persons only.[109] However, even though FTA has had to apply a definition of the term "nonresponsible" in its grant program, the term is not adequately defined by either DOT or FTA. Thus, consulting Subpart 9.1 of the FAR, "Responsible Prospective Contractors," is useful.[110] To be determined responsible under the FAR, a prospective contractor must: (1) have adequate financial resources to perform the contract or the ability to obtain them;[111] (2) be able to comply with the proposed delivery or performance schedule; (3) have a satisfactory performance record; [112] (4) have a satisfactory record of integrity and business ethics;[113] (5) have the necessary organizational experience, accounting and operational controls, and technical skills, or the ability to obtain them; (6) have the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and (7) be qualified and eligible to receive an award under applicable laws and regulations.

The bidder, rather than the government, bears the burden of affirmatively establishing its responsibility, and when necessary, must establish the responsibility of its proposed subcontractors as well.[114] If the prospective contractor fails to provide information clearly indicating that he or she is responsible, the contracting officer must withhold the contract award.[115]

In *Glazer Construction Co. Inc. v. United States*,[116] a federal district court held that a contractor who exhibited an unsatisfactory performance record was presently irresponsible under the FAR. In this case, the government contractor violated the contract's Buy America Act clause by using a nondomestic Canadian-made wall base as a material for construction.[117] The irresponsibility determination resulted from the contractor's false and misleading statements following the federal agency's initial inquiry into the origin of the wall base.[118] Instead of examining the wall base, the contractor made false representations that were "ignorant at best" and "intended to mislead at worst."[119] Ultimately, the contractor's "disdain" for its contractual obligations and its failure to answer directly to the agency's notice of proposed debarment, which stated that the contractor had made "false statements," warranted an irresponsible determination.[120]

When making a determination of present responsibility that is based on a legal violation, the debarring official is compelled to assess the relationship between the prior conviction and the contractor's business integrity.[121] While a satisfactory legal record is indicative of

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scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements.

[104] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 36.

[105] Exec. Order No. 12,689, 3 C.F.R. 235 (1989). This Executive Order was issued by President Bush on August 16, 1989, and was intended to "protect the interest of the Federal Government, to deal only with responsible persons, and to insure proper management and integrity in Federal activities." The Executive Order stipulated that "no agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded…that party from participation in a procurement or nonprocurement activity."

[106] *Id*.

[107] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 36.

[108] *Id.* at 36.

[109] 49 C.F.R. § 29.115(a) (2003).

[110] 48 C.F.R. § 9.104 (2003). General standards for contractor responsibility are found in this section.

[111] A commitment or arrangement that is in existence when the contract is awarded to acquire the needed resources, equipment, or personnel satisfies this requirement. § 9.104-3.

[112] 48 C.F.R. § 9.104-3(b) (2001). A contractor that is or recently has been "seriously deficient in contract performance," has failed to "apply sufficient tenacity and perseverance," or has failed to "meet the quality requirements of the contract," does not meet the requirement of a "satisfactory performance record" under the FAR and, thus, is presumed to be nonresponsible.

[113] A prospective contractor's record of integrity and business ethics may be assessed by examining his or her compliance with the law. § 9.104-3(c).

[114] 48 C.F.R. § 9.103(d) (2001).

[115] 48 C.F.R. § 9.103(b) (2001).

[116] Glazer Construction Co., Inc., 50 F. Supp. 2d 85, 96 (D. Mass. 1999).

[117] *Id*. at 91.

[118] *Id*. at 96.

[119] *Id*. at 95.

[120] *Id*. at 96. Furthermore, the contractor failed his burden of demonstrating, to the satisfaction of the debarring official, his present responsibility.

[121] 48 C.F.R. § 9.104-3(b) (2003). The Burke court examined the "totality of the circumstances"—the contractor's criminal conviction for negligent violation of the Clean Water Act and the fact that the contractor was president and sole owner of the violating company, which pled guilty to a criminal conspiracy. The court held that the contractor's criminal conviction showed

an honest and trustworthy contractor, a single violation of the law will not normally give rise to a determination of nonresponsibility.[122] Accordingly, contracting officers should give the greatest weight to violations of law that have been adjudicated within the 3 years preceding the offer, and to violations that are repeated, pervasive, or significant.[123] Moreover, a contracting officer should give consideration in situations where the contractor has made an effort to correct for past violations.[124]

Although a "nonresponsible" determination may lead to debarment, debarment is an entirely separate administrative process. A potential contractor can be determined nonresponsible, for instance, because of the nonresponsible actions of a subcontractor that could not be cured, and yet not be subjected to debarment. In most cases where a participant has acted in a nonresponsible manner, he or she may contact the agency to discuss settlement possibilities.[125]

## I. AGENCY ACTIONS THAT RESULT IN EXCLUSION

Pursuant to DOT regulations, a participant shall not knowingly do business under a covered transaction with a person who is (1) debarred or suspended,[126] (2) proposed for debarment under 48 C.F.R. Part 9, subpart 9.4,[127] or (3) ineligible for or voluntarily excluded from the covered transaction.[128] Characteristics of these actions are discussed below.

### 1. Suspension

Suspension is an action taken by a suspending official to disqualify a person from participating in covered transactions for a temporary period, pending completion of an investigation and any legal debarment or Program Fraud Civil Remedies Act proceedings that may ensue.[129] Suspension is a serious action to be imposed only when there is "adequate evidence"[130] of a wrongful act and it has been determined that immediate action is necessary to protect the government's interest.[131] DOT regulations provide that information pertaining to the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred to the suspending official. The suspending official must give written notice of the suspension and indicate whether it is based on an indictment, conviction, or other "adequate evidence that the respondent has committed irregularities."[132] A notice must also inform the respondent that suspension shall be for a temporary period pending the completion of an investigation or Program Fraud Civil Remedies Act proceeding.[133] In addition to enforcing the notice requirement, DOT protects suspended participants by allowing them an opportunity to contest the suspension.[134]

#### *a. Causes for Suspension*

Although the causes for suspension are similar to those set forth for a debarment, several important differences exist.[135] Most notably, while a cause for debarment must be established by a "preponderance of the evidence" standard, a cause for suspension requires a lesser "adequate evidence" standard.[136] Therefore,

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"a serious lack of business responsibility" and that debarment was proper. Burke v. EPA, 127 F. Supp. 2d 235, 239 (D. D.C. 2001).

[122] 48 C.F.R. § 9.104-3(b) (2003).

[123] 48 C.F.R. § 9.104-3(c) (2003).

[124] 48 C.F.R. § 9.104-3(c) (2003).

[125] Settlement agreements are discussed in Section 6.I.2C.

[126] Agencies may debar or suspend a contractor "only in the public interest for the Government's protection and not for purposes of punishment," and then only for the causes and under the procedures established under 48 C.F.R. pt. 9. 48 C.F.R. § 9.402 (2003).

[127] In the procurement area, proposal for debarment disqualifies the respondent from contracting pending a decision regarding debarment. In contrast, there is no exclusion upon proposal to debar in the nonprocurement area; DOT provides for exclusion only upon suspension, debarment, or voluntary exclusion. AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2.

[128] 49 C.F.R. § 29.225(a) (2003). A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals have not been excluded under DOT regulations, unless it knows the certification is erroneous. The agency bears the burden of proof in showing that a participant knowingly conducted business with a person that filed an erroneous certification.

[129] 49 C.F.R. § 29.105 (2003). If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or a United States Attorney requests its extension in writing, in which case it may be extended for an additional 6 months.

[130] The term "adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred. Under DOT regulations, an indictment is adequate evidence to support a suspension. 49 C.F.R. § 29.105 (2003).

[131] 49 C.F.R. § 29.400 (2003). The suspending agency may suspend a person for any of the causes outlined in the "Causes for Suspension" section outlined below.

[132] 49 C.F.R. § 29.411(b) (2003). The terms of the notice must be descriptive enough to place the contractor on notice without disclosing the government's evidence.

[133] 49 C.F.R. § 29.411(e) (2003). If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless the Assistant Attorney General requests an extension. Suspension may not extend beyond 18 months, unless such proceedings have been initiated within that period. 49 C.F.R. § 29.415(b) (2003).

[134] 49 C.F.R. § 29.412 (2003). A discussion of suspension and debarment proceedings follows in Section 6.09.

[135] Cause for Debarment is discussed in Section 6.082 below.

[136] 49 C.F.R. § 29.405(a) (2003). In assessing the adequacy of the evidence, the agency should consider how much information is available and how credible it is given the circumstances. The agency should also assess basic documents such as grants, cooperative agreements, loan authorizations, and contracts. § 29.405(c).

suspension may be imposed where adequate evidence[137] allows the suspending officer to "suspect" any of the following: (a) the commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction; (b) violating federal or state antitrust statutes; (c) commission of embezzlement, theft, forgery, bribery, falsifying or destroying records, making false statements, tax evasion, or receiving stolen property; and (d) commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.[138]

For example, in *Commercial Drapery Contractors, Inc., v. United States*, the D.C. Circuit court held that a grand jury indictment alleging Commercial's involvement in a scheme to defraud the government gave the government the authority to suspend the plaintiff-contractor.[139] The opinion noted that suspensions are *temporary* measures available to the government so that it may protect itself from suspected contractors.[140] Although regulations do not require defendants to suspend indicted contractors, they also do not require agencies to give suspended contractors a second chance.[141]

If the proposed suspension is not based on a civil judgment or conviction, DOT regulations stipulate that a participant *may* be suspended if any of the following causes "may" exist: (a) a serious violation of the terms of a public agreement or transaction; (b) a history of unsatisfactory performance on one or more public agreements or transactions; (c) a willful failure to perform in accordance with the terms of one or more public agreements or transactions; (d) a violation of the Drug-Free Workplace Act of 1988,[142] or (e) any other cause of so serious a nature that it affects the present responsibility of a person.[143] A participant may also be suspended for any of the following causes: (1) a nonprocurement suspension by any federal agency before October 1, 1988 (the effective date of Title 49 regulations), or a procurement suspension by any federal agency taken pursuant to the FAR subpart 9.4; or (2) knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person in connection with a covered transaction.[144]

[137] Indictment shall constitute adequate evidence for purposes of suspension actions. In contrast, a conviction or civil judgment, rather than a mere indictment, is necessary to establish a sufficient evidentiary basis for a debarment.

[138] 49 C.F.R. § 29.405(a) (2003).

[139] Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 4 (D.C. Cir. 1997).

[140] *Id*. at 5.

[141] *Id*. at 5.

[142] Pub. L. 100-690.

[143] 49 C.F.R. § 29.405(a)(2) (2003).

[144] 49 C.F.R. § 29.305(c) (2003).

### 2. Debarment

Debarment is an action taken by a debarring official[145] to exclude a person from participating in covered transactions.[146] Debarment may have devastating consequences for FTA grantees dependent on receiving financial assistance from DOT; the practical consequence of debarment is that the participant is excluded from receiving federal financial and nonfinancial assistance and benefits under federal programs and activities.[147] A debarred FHWA subcontractor, for example, cannot contract with an FTA grantee, and likewise cannot contract with the National Aeronautics and Space Administration (NASA), the Department of Agriculture, or any other federal agency.

When considering debarment, a debarring official must determine whether debarment is warranted and, if so, the appropriate period of debarment.[148] Pursuant to DOT regulations, information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred to the debarring official for consideration.[149] However, if a debarring official determines debarment is necessary, he or she may *not* immediately debar a participant and instead must issue a "notice of proposed debarment."[150] Such notice must specify the reasons for the proposed debarment and the cause(s) relied upon, so that the participant understands the conduct or transaction(s) upon which the proposed debarment is based.[151] Upon proposal for debarment, the participant's name is added to the "List of Parties Excluded from Federal Procurement and Nonprocurement Programs" as a participant proposed for debarment.[152]

[145] For DOT, the designated official is the head of the Departmental operating administration.

[146] 49 C.F.R. § 29.105 (2003).

[147] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 1. In some instances, the threat of suspension or debarment causes greater concern than either a criminal prosecution or civil action, because a participant might be disqualified *immediately* from interacting with DOT and would not have the ability to continue working while the criminal or civil matter is being resolved.

[148] 49 C.F.R. § 29.320 (2003). Debarment shall be for a period proportionate with the seriousness of the cause(s). If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period. Where the debarment is for violation of Subpart F relating to providing a drug-free workplace, the period of debarment must not exceed 5 years. However, in all cases, the debarring official may extend the debarment period for an additional period, if that official determines that an extension is necessary to protect the public interest. As a general rule, debarment should not exceed 3 years.

[149] 49 C.F.R. § 29.311 (2003).

[150] 49 C.F.R. § 29.312 (2003).

[151] 49 C.F.R. § 29.312(b) (2003). As with suspension proceedings, the respondent may within 30 days contest the proposed debarment.

[152] 49 C.F.R. § 29.100 (2003). The GSA compiles and maintains a current list of all parties debarred, suspended, proposed

The prudent transit lawyer should keep in mind that DOT subjects all participants of covered transactions to these proceedings.[153] More specifically, any DOT agency grantee receiving a grant or cooperative agreement, or who is involved in any other nonprocurement transaction, is eligible for debarment.[154] Likewise, any of the grantee's principals, subrecipients, and third party contractors involved in a procurement contract for goods and services must also be aware of debarment regulations.[155]

*a. Causes for Debarment*

The debarring official may debar a participant for a conviction of or civil judgment for: (a) the commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction; (b) violation of federal or state antitrust statutes; (c) commission of embezzlement, theft, forgery, bribery, falsifying or destroying records, making false statements, receiving stolen property, making false claims,[156] or obstruction of justice; or (d) commission of any other offense indicating a lack of business integrity or honesty that seriously and directly affects the present responsibility of the person.[157] However, while commission of a crime may lead to debarment, the mere existence of such a cause does not require debarment.[158]

If the proposed debarment is not based on a civil judgment or conviction, a participant may be debarred for: (a) serious violation of the terms of a public agreement or transaction; (b) a history of unsatisfactory performance on one or more public agreements or transactions; (c) a willful failure to perform in accordance with the terms of one or more public agreements or transactions;[159] (d) violating the Drug-Free Workplace Act of 1988;[160] or (e) any other cause of so serious a nature that it affects the present responsibility of a person.[161] A participant may also be debarred for any of the following causes: (1) a nonprocurement debarment by any federal agency before October 1, 1988 (the effective date of Title 49 regulations), or a procurement debarment by any federal agency taken pursuant to the FAR subpart 9.4; or (2) knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person in connection with a covered transaction.[162]

*b. Consideration of Mitigating Factors*

A government agency is not required to debar a contractor merely because a cause for debarment or suspension exists. DOT regulations state, "The seriousness of a person's acts or omissions and any mitigating factors shall be considered in making any debarment decision."[163] For example, in *Silverman v. United States*, the consideration of mitigating evidence was paramount to the federal district court's decision to terminate the government's debarment of the contractor.[164] In this case, the court held that the agency should have considered the contractor's motivation for pleading guilty to a misdemeanor charge of conversion of government property prior to making a debarment decision.[165]

While DOT indicates that the debarring official should consider mitigating factors when making any debarment decision, DOT regulations do not include a specific listing of mitigating factors.[166] The FAR, however, specifically instructs a debarring official to consider whether the contractor:

1. Had effective standards of conduct and internal control systems in place at the time the activity that constitutes a cause for debarment took place or had adopted such procedures prior to any government investigation of the cited activity;

2. Brought the activity cited as a cause for debarment to the attention of the appropriate government agency in a timely manner;

3. Investigated the circumstances surrounding the cause for debarment;

4. Cooperated with government agencies during the investigation and any court or administrative action;

5. Has paid or has agreed to pay to the government all criminal, civil, and administrative damages and investigative costs;

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for debarment, or declared ineligible by agencies or by the General Accounting Office.

[153] 49 C.F.R. § 29.110(a) (2003).

[154] 49 C.F.R. § 29.110(a)(1)(i) (2003).

[155] 49 C.F.R. § 29.110(a)(1)(ii)(B) (2003).

[156] A participant is particularly vulnerable to debarment for making false claims. Under the False Claims Act (FCA), the government may bring a civil suit to recover funds lost through fraudulent transactions. Additionally, private individuals with personal knowledge of fraud against the government may bring *qui tam* civil actions on behalf of the government against persons who have defrauded the government (§ 6.12).

[157] 49 C.F.R. § 29.305(a)(4) (2003).

[158] 49 C.F.R. § 29.300 (2003). The seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

[159] 49 C.F.R. § 29.305(b) (2003). *See also* Marshall v. Cuomo, 192 F.3d 473, 478 (4th Cir. 1999). The contractor's failure to maintain the HUD property in a "decent, safe, and sanitary" condition constituted a willful failure to perform in accordance with the terms of the contract. *See also* Glazer Construction Co., Inc. v. United States, 50 F. Supp. 2d 85, 87 (D. Mass. 1999). A preponderance of the evidence established that Glazer's violation of the contract's Buy America Act clause constituted a willful violation of the contract. Pub. L. No. 100-690.

[160] Pub. L. 100-690.

[161] 48 C.F.R. § 9.406-2 (2001); 49 C.F.R. § 29.305 (2003). In cases where debarment is not based on a civil judgment or conviction, the cause for debarment must be established by a preponderance of the evidence standard, which is defined as "proof by information that, compared with that opposing it, leads to a conclusion that the fact at issue is more probably true than not." 48 C.F.R. § 9.403 (2001).

[162] 49 C.F.R. § 29.305(c) (2003).

[163] 49 C.F.R. § 29.300 (2003).

[164] Silverman, 817 F. Supp. 846, 848 (S.D. Cal. 1993).

[165] *Id*. at 848.

[166] 49 C.F.R. § 29.300 (2003).

6. Has taken appropriate disciplinary action against the individuals responsible for the activity;

7. Has implemented or agreed to implement remedial measures, including those identified by the government;

8. Has instituted or agreed to institute new or revised review and control procedures and ethics training programs;

9. Has had adequate time to eliminate the circumstances within his or her organization that led to the cause for debarment; and

10. Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment.[167]

However, the existence or nonexistence of any of these mitigating factors or remedial measures does not necessarily determine a contractor's present responsibility.[168] Therefore, if a cause for debarment exists, the contractor has the burden of demonstrating, to the debarring official's satisfaction, his or her present responsibility and that the debarment is not needed.[169]

*c. Settlement and Voluntary Exclusion*

When in the best interest of the government, DOT may, at any time, settle a debarment or suspension action.[170] In accordance with such a settlement, a participant typically agrees to implement an ethics code, a compliance program, or an internal control system designed to prevent a repeat of the imprudent behavior, and agrees to continuing monitoring by the agency.[171] In addition, a participant may agree to a status of nonparticipation or limited participation in covered transactions under what is termed, "voluntary exclusion."[172] However, if the participant and the agency agree to a voluntary exclusion, the action is entered in the nonprocurement section of the GSA Lists, under the "voluntary exclusion" label.[173]

### 3. Scope of Suspension and Debarment

Although a cause for suspension[174] or debarment often results from actions committed by individual participants, actions of individuals may reflect adversely upon the organization and its officials.[175] Accordingly, the suspension or debarment of a person typically embodies the suspension or debarment of all its divisions or organizational components of all covered transactions, unless the debarment decision is limited by its terms to particular individuals or divisions, or to specific types of transactions.[176]

An employee's actions may lead to the suspension or debarment of his or her company from further government contracting. Fraudulent, criminal, or improper conduct of an officer, director, shareholder, partner, employee, or other individual associated with a participant "may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant."[177] The purpose of this provision is to minimize the availability of a participant being able to avoid debarment by turning a blind eye to the actions of its officials and personnel. Accordingly, the conduct will be imputed to the participant regardless of whether the participant knew or approved of the conduct. Furthermore, conduct that did not occur in connection with an individual's performance of duties may also be imputed to him or her if it took place with the "participant's knowledge, approval, or acquiescence."[178] The participant's "acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence."[179] Similarly, improper conduct of one participant in a joint venture (or similar arrangement) may be imputed to other participants if the conduct occurred: (1) for or on behalf of the joint venture, or (2) with the knowledge, approval, or acquiescence of the contractors.[180]

Conversely, improper conduct by a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who shared in, knew of, or had reason to know of the participant's conduct.[181] Therefore, an employee who lacks actual knowledge of improper conduct, but had reason to know of such conduct, may be debarred. However, the courts have not interpreted the phrase "reason to know" as it pertains to an employee, to mean "should have known."[182] In *Novicki v. Cook*, for

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[167] 48 C.F.R. § 9.406-1(a)(i) (2003).

[168] 48 C.F.R. § 9.406-1(a) (2003).

[169] *Id*.

[170] 49 C.F.R. § 29.315(a) (2003).

[171] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 67.

[172] 49 C.F.R. § 29.105 (2003).

[173] 49 C.F.R. § 29.105 (2003). In practice, this voluntary exclusion process is rarely used. AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 67.

[174] The scope of suspension is the same as the scope of a debarment, except that the procedures set forth in 49 C.F.R. §§ 29.410 through 29.413 shall be used in imposing suspension. 49 C.F.R. § 29.420 (2003).

[175] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 67.

[176] 49 C.F.R. § 29.325(a) (2003). For the DOT, the debarring or suspending official is the head of the Departmental operating administration, who may delegate any of his or her functions.

[177] 49 C.F.R. § 29.325(b)(1) (2003).

[178] *Id*.

[179] *Id*.

[180] 49 C.F.R. § 29.325(b)(3) (2003). Again, acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

[181] 49 C.F.R. § 29.325(b)(2) (2003).

[182] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 70. In Caiola v. Carroll, 851 F.2d 395 (D.C. Cir. 1988), the court reversed the district court's holding that the criminal conduct of the corporation should be extended to its president and secretary on grounds that these two officers had reason to know of the contractor's criminal conduct. While the United States Court of Appeals recognized that company officers with reason to know of criminal conduct

example, the U.S. Court of Appeals for the District of Columbia Circuit applied the Restatement[183] definition of "reason to know," which imposes no duty of inquiry and merely requires that an individual draw reasonable inferences from information already known to him or her.[184] Here, since the government contractor's president and chief executive officer did not have "reason to know" of the contractor's misconduct, debarment by the Defense Logistics Agency was unjustified.[185]

The debarring official may extend the suspension and debarment decision to include any affiliates of the participant.[186] Business concerns, organizations, or individuals are affiliates of each other if, (1) either one controls or has the power to control the other, or (2) a third party controls or has the power to control both.[187] The control requirement may be satisfied where there is interlocking management or ownership, identity of interests among family members, shared facilities and equipment, or common use of employees.[188] The issue of control becomes particularly important when an individual or company attempts to continue business in the form of a business entity that has been organized after a participant was debarred, proposed for debarment, or suspended. In such an instance, a participant that has the same or similar management, ownership, or principal employees as the participant that was debarred or suspended would be considered an affiliate.[189]

## J. SUSPENSION AND DEBARMENT PROCEEDINGS

DOT shall establish procedures governing the suspension and debarment decision-making process that are informal, practicable, and "consistent with principles of fundamental fairness."[190] DOT's process begins with the issuance of either a written notice of debarment or suspension to the respondent.[191] In the case of debarment, the written notice must advise the respondent (1) that debarment is being considered, (2) of the reasons for the proposed debarment, (3) of the cause(s) relied upon for proposing debarment, and (4) of the potential effect of a debarment.[192] Notice must also be given when a respondent is suspended so that he or she understands (1) that suspension has been imposed, (2) that the suspension is based on indictment, conviction, or other adequate evidence that the respondent has committed irregularities,[193] (3) the causes relied upon by DOT for imposing suspension, or (4) that the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings.[194]

### 1. Opportunity to Contest Proposed Debarment or Suspension

Within 30 days after receipt of the notice of proposed debarment or suspension, the respondent may "submit, in person, in writing, or through a representative, information and argument in opposition" to the proposed suspension or debarment.[195] This initial proceeding is available to all participants. In actions not based on a conviction or civil judgment, if the suspending or debarring official[196] finds that the respondent's submission in opposition raises a "genuine dispute over facts material to the *proposed* debarment [or suspension]," respondents may appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.[197] However, in actions based on a conviction[198] or civil judgment,[199] or in which

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could be debarred, such a cause for debarment must be established by a preponderance of the evidence. *See* 48 C.F.R. § 9.406-3(d)(3) (2003).

[183] *Restatement (Second) of Agency* § 9 cmt. d (1958); *see also Restatement (Second) of Torts* § 12(1) (1965).

[184] Novicki, 946 F.2d 938, 942 (D.C. Cir. 1991).

[185] *Id*. at 942. Although the president (Mr. Novicki) stated he became "generally aware" of some customer complaints after 4 years of alleged misconduct, there is no evidence that he was informed of "the number" of complaints, their "similarity," or their "continuing nature." Further, Novicki claimed he was told that the complaints concerned problems the contractor had no obligation to report to the government.

[186] 49 C.F.R. § 29.325(a)(2) (2003). Affiliates of the contractor may be debarred if they are (1) specifically named and (2) given written notice of the proposed debarment and an opportunity to respond.

[187] 49 C.F.R. § 29.105 (2003).

[188] *Id*.

[189] *Id*.

[190] 49 C.F.R. § 29.310 (2003); 49 C.F.R. § 29.410(b) (2003). Information relating to the existence of a cause for suspension or debarment from any source shall be promptly recorded, investigated, and referred to the debarring official for consideration.

[191] 49 C.F.R. § 29.312(b) (2003).

[192] 49 C.F.R. § 29.312(e) (2002).

[193] Notice is only required to describe any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence. § 29.510(c) (2003).

[194] 49 C.F.R. § 29.411(e) (2003).

[195] 49 C.F.R. § 29.313(a) (2003).

[196] The suspending or debarring official is the agency head, or an official designated by the agency head.

[197] 49 C.F.R. § 29.313(a) (2003); 49 C.F.R. § 29.412(a) (2003). Presentations with a suspending and debarring official are common and often lead to the settlement of all or part of the matter. Further, a business or individual who learns of a pending indictment or other wrongful action that may lead to suspension or debarment is advised to contact the agency staff as early as possible. AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 81.

[198] 49 C.F.R. § 29.105. A "conviction" is a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of *nolo contendere*.

[199] 49 C.F.R. § 29.105. A "civil judgment" is the disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained

there is no genuine dispute over material facts, the suspending or debarring official shall consider all of the information available and make a decision within 45 days.[200]

### 2. Settlement: Administrative Agreement

In many instances, an administrative agreement between the agency and the respondent leads to a resolution of the matter without suspension or debarment, or with limited suspension or debarment.[201] In general, the ability to settle an ethical violation by means of an administrative agreement depends on the following:[202]

*a. Removal of Wrongdoer*. If the ethical violation resulted from the conduct of one individual and did not permeate the organization, a settlement can usually take place if the organization is willing to remove the wrongdoer(s). As a practical matter, settlement is more feasible with larger companies; if a wrongdoer is a key player in a small company, removal from the company has the same affect as suspension or debarment.

*b. Implementation of an Ethics Code of Compliance Program*. An agency will likely insist on implementation of such a program as a prerequisite for signing an administrative agreement.[203]

*c. Additional Internal Controls and Remedial Measures*. As part of a settlement, an agency will generally insist that the grantee establish internal controls and remedial measures that are meant to prevent a repeat of the wrongdoing that gave rise to the suspension or debarment action.

*d. Reports and Monitoring*. An agreement generally obliges the grantee to submit reports to the agency and agree to continuous agency monitoring.

Most importantly, respondents are advised to immediately contact the agency to discuss settlement possibilities.[204]

### 3. Debarring Official's Decision

Upon receiving written materials in opposition to the suspension or proposed debarment, the agency official must then determine whether the respondent has raised a genuine dispute of material fact. In actions not based on a conviction or civil judgment, if the debarring or suspending official decides that a genuine dispute of material fact exists, he or she is required to allow the respondent(s) the opportunity to appear at a more formal proceeding.[205] In such a proceeding, the respondent may appear with counsel, submit documentary evidence, present witnesses, cross-examine agency witnesses, and obtain a transcribed record of the proceedings.[206] However, if the agency official concludes that there is no genuine dispute of material facts, he or she may make a decision to debar or suspend a participant based on all of the information in the administrative record, including any submission made by the participant.[207] Courts have held that when these procedures are properly applied, a contractor facing a possible debarment is not denied due process.[208]

When a debarring or suspending official concludes that there is no genuine dispute of material fact and denies a participant the opportunity to appear at a second hearing, the official's decision is a final agency decision for purposes of the Administrative Procedure Act (APA).[209] A court reviewing an agency decision may "set aside agency actions, findings, and conclusions that it finds to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[210] An agency decision is arbitrary and capricious, and reversible by court under the APA, where: (1) there was subjective bad faith on the part of the procuring officials; (2) it is clear the agency's determinations lacked a rational basis; and (3) the agency failed to consider the relevant factors or establish a reasonable connection between the facts and the decision.[211]

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of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988.

[200] 49 C.F.R. § 29.314(a); § 29.413(a).

[201] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 81.

[202] *Id*. at 81.

[203] The FTA MA provides that grantees maintain a "written code of standards of conduct." See § 6.01.

[204] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 81.

[205] 49 C.F.R. § 29.313(b)(1) (2003); 49 C.F.R. § 29.412(b)(1) (2003).

[206] 49 C.F.R. § 29.313(b)(1) (2003); 49 C.F.R. § 29.412(b)(1) (2003). This more formal proceeding is rare as the material facts are generally not in dispute. In a suspension action that is based on indictment, or in a proposed debarment action that is founded upon a conviction or civil judgment, no formal proceeding will be granted because another fact finder (a judge or a jury) has already found one of the bases for debarment beyond a reasonable doubt or by a preponderance of the evidence. AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 82.

[207] 49 C.F.R. § 29.314(a) (2003); 49 C.F.R. § 29.412(b)(1) (2003).

[208] Imco, Inc. v. United States, 97 F.3d 1422, 1427 (Fed. Cir. 1996).

[209] 49 C.F.R. § 29.314 (2001). If the agency official decides to impose debarment or suspension, the respondent shall be given prompt notice advising that the debarment or suspension is effective for covered transactions throughout the executive branch of the Federal Government unless the agency head makes an exception. See 49 C.F.R. § 29.314(d) (2003).

[210] 5 U.S.C. § 706(2)(A) (2003). Participants who have been suspended or proposed for debarment and who have also been denied a second hearing often allege that the agency official's decision was "arbitrary and capricious." However, participants rarely meet their heavy burden to demonstrate there was no rational basis for the agency's determinations.

[211] CRC Marine Services, Inc. v. United States, 41 Fed. Cl. 66, 83 (1998). *See also* Waterhouse v. United States, 874 F. Supp. 5 (D. D.C. 1994). When called upon to review a debarment decision, the Waterhouse court held that no disputed issues of material facts remained with respect to the contractor's claim that he did not have the intent necessary to accept an illegal gratuity from the supplier. The contractor's actions clearly showed that he intended to accept gratuities

Local debarment actions may also be subject to state judicial review on similar grounds. For example, in *Stacy & Witbeck v. City and County of San Francisco,*[212] the court upheld the city public utility commission's debarment under its municipal code of a contractor of a light rail station on grounds of filing a false claim. The court found the city had ample authority to suspend a contractor's right to bid, that the opportunity to bid is not a property right, and the agency's quasi-judicial procedures were consonant with requirements of due process and administered in a fair and proper manner.[213]

### 4. Arbitrary and Capricious Determination

The arbitrary and capricious standard is highly deferential, and an agency action is presumed to be valid.[214] Therefore, a court cannot substitute its judgment for that of the agency in situations where reasonable minds could have concluded differently.[215] For instance, the *Marshall v. Cuomo* court held that its function was not "to re-weigh conflicting evidence [or] to make credibility determinations."[216] Accordingly, the debarring official's decision to favor the Department of Housing and Urban Development's evidence as to the condition of the property over conflicting evidence presented by the government contractor was honored by the court and was not found to be arbitrary and capricious.[217]

Nevertheless, in cases where the debarment decision is not supported by the preponderance of the evidence, a court will reverse an agency's decision to debar a contractor.[218] In *Elaine's Cleaning Service, Inc. v. United States*, the U.S. district court held that the contractor's failure to pay benefits to its employees as required by the contract was a product of innocent negligence rather than culpable conduct.[219] In light of the "unusual circumstances" surrounding the missed payments, the government's interpretation of Elaine's conduct was unreasonable and unintelligible and, thus, the agency arbitrarily misapplied its own standards.[220]

## K. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY, AND VOLUNTARY EXCLUSION

To further ensure that government agencies conduct business with responsible participants, DOT requires potential participants in primary covered transactions to submit checkbox certifications regarding their debarment and criminal history.[221] Accordingly, at the time a proposal is submitted in connection with a primary covered transaction, prospective primary participants, or their principals, must certify that they:

A. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any federal department or agency;

B. Have not, within the preceding 3-year period, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or contract under a public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

C. Are not presently indicted for, or otherwise criminally or civilly charged by a government entity (federal, state, or local) with commission of any of the abovementioned offenses enumerated in (B); and

D. Have not, within the preceding 3-year period, had one or more public transactions (federal, state, or local) terminated for default.

Where the prospective primary participant is unable to certify to any of the statements in this certification, he or she shall attach an explanation to this proposal.[222] In addition, each participant may, but is not required to, check the Nonprocurement List for its principals.[223]

The regulations emphasize that the submission of an accurate certification is paramount. If the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous, he or she must give immediate notice to the department or agency.[224] Thus, the prudent grantee includes in its third party contracts a provision requiring the partici-

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from the supplier and, thus, the agency's determination was not arbitrary and capricious.

[212] 36 Cal. App. 4th 1074 (1995).

[213] The purpose of the ordinance was "to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public." *Id*. at 1094–96.

[214] *See* Kisser v. Cisneros, 14 F.3d 615, 618 (D.C. Cir. 1994).

[215] *See* Burke v. EPA, 127 F. Supp. 2d 235, 237 (D. D.C. 2001).

[216] Marshall, 192 F.3d 473, 478 (4th Cir. 1999).

[217] *Id*. at 478.

[218] *See* Elaine's Cleaning Service, Inc. v. United States, 106 F.3d 726, 728 (6th Cir. 1997).

[219] *Id*. at 728.

[220] *Id*. at 728. *See also* Silverman v. United States, 817 F. Supp. 846, 848 (S.D. Cal. 1993). The government's refusal to consider mitigating evidence rendered the decision arbitrary, capricious, and an abuse of discretion. As a result, debarment was terminated.

[221] 49 C.F.R § 29.510(a) (2003). Certifications regarding debarment and suspension are required of principals of the grantee and all third-party contracts and subcontracts exceeding $100,000. The grantee's certification is part of the Annual List of Certifications and Assurances. FTA Grants Management Workbook § 9 (2001).

[222] 49 C.F.R. pt. 29, App. A (2003). "Principals" for the purposes of this certification means officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions).

[223] 49 C.F.R. § 29.510(a) (2003).

[224] 49 C.F.R. pt. 29, App. A (2003).

pant to simultaneously give notice to the grantee.[225] Furthermore, a certification in which the participant answers in the affirmative to any of the above listed provisions, or the inability of a person to provide a certification, will not necessarily result in the withholding of an award.[226] The prospective participant must submit an explanation of why he or she cannot provide the required certification.[227] The certification or explanation will be considered by the department or agency when deciding to enter into the transaction.[228] However, a participant's failure to provide a certification or an explanation disqualifies such person from participation in the transaction.[229]

Each participant must require participants in lower tier covered transactions to include a similar certification.[230] By submitting the certification, the prospective lower tier participant certifies that "neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency."[231] Further, such participant also agrees that should the proposed covered transaction be entered into, the participant shall not knowingly enter into any lower tier covered transaction with a person proposed for debarment under the FAR, debarred or suspended, declared ineligible, or voluntarily excluded from participation.[232] Lastly, each participant must require participants in lower tier covered transactions to include the same certification.[233]

## L. *QUI TAM* ACTIONS UNDER THE FALSE CLAIMS ACT

The False Claims Act (FCA) was enacted to "encourage private individuals who are aware of fraud being perpetrated against the government to bring such information forward."[234] Under the FCA, the government may bring a civil suit to recover funds lost through such fraudulent transactions.[235] Additionally, private individuals termed "relators," with personal knowledge of fraud against the government, may bring *qui tam*[236] civil actions on behalf of the government against persons who have defrauded the government.[237] As an incentive, private individuals who prosecute *qui tam* actions are entitled to a percentage of the proceeds of a judgment or settlement award, in addition to reasonable expenses, attorney's fees, and costs.[238] After Congress found that fraud permeated welfare, defense contracting, and Medicaid, the Act was amended in 1986 to provide enhanced penalties and a private right of action. The obvious intent of Congress was to apply criminal sanctions against grantees and those who commit fraud through grantee projects funded with federal financial assistance.

Pursuant to the FCA, a person may be liable for not less than $5,000 and not more than $10,000, plus three times the amount of damages sustained by the government because of the act of that person,[239] and attorney's fees and costs of a civil action brought to recover any such penalty and damages, if he or she makes any of the following false claims:[240]

1. Knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

2. Knowingly makes, uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the government;

3. Conspires to defraud the government by getting a false or fraudulent claim allowed or paid;

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[225] Certification instructions for lower tier covered transactions are found at 49 C.F.R. pt. 29, App. B. A participant may rely upon the certification of a participant in a lower tier covered transaction. Disclosure to FTA is required, if at any time a grantee or other covered entity learns that certification was erroneous when submitted or if circumstances have changed (new personnel, indictments, convictions, etc.).

[226] 49 C.F.R. § 29.510(a) (2003). The submission of a false, fictitious, or fraudulent certification may subject the bidder to criminal prosecution. 48 C.F.R. § 52.209-5(a)(2) (2002).

[227] 49 C.F.R. pt. 29, App. A (2003). The prudent grantee requires that the explanation be in writing and maintained in both the contract file and the grant file.

[228] 49 C.F.R. § 29.510(a) (2003).

[229] 49 C.F.R. pt. 29, App. A (2003).

[230] 49 C.F.R. § 29.510(b) (2003).

[231] 49 C.F.R. pt. 29, App. B (2003).

[232] *Id*.

[233] 49 C.F.R. § 29.510(b) (2003).

[234] United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992).

[235] 31 U.S.C. § 3730(a) (2003). The Attorney General is obligated to investigate a violation under Section 3729. If the Attorney General finds that a person has violated or is violating Section 3729, he or she may bring a civil action against the person.

[236] An action by a private party against a person violating the False Claims Act is a "qui tam" proceeding.

[237] 31 U.S.C. § 3730(b)(i) (2003). A person may bring a civil action for a violation of Section 3729 for the person and for the United States Government, whereby the action shall be brought in the name of the government.

[238] United States v. Schimmels, 127 F.3d 875, 877 (9th Cir. 1997).

[239] However, if the person committing an FCA violation is found to have (1) furnished government officials responsible for investigating the false claims violations with all information known to such person about the violation within 30 days of obtaining the information, (2) cooperated with the investigation of the violation, and (3) at the time such person furnished the government with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation, the court may assess not less than 2 times the amount of damages sustained by the government.

[240] 31 U.S.C. § 3729 (2003). The term "claim" includes any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient.

4. Has possession, custody, or control of property or money used, or to be used, by the government and, intending to defraud the government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

5. Authorizes to make or deliver a document certifying receipt of property used, or to be used, by the government and, intending to defraud the government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

6. Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

7. Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government.[241]

When a relator brings a *qui tam* action, the government may choose to intervene, in which event the relator is entitled to a percentage share of any recovery.[242] However, if the government does not intervene and instead elects to "pursue its claim through any alternative remedy," the relator remains entitled to the same share of the recovery to which he or she would have been entitled had the government pursued its claim by intervening in the relator's *qui tam* action.[243] The statute of limitations under the FCA is 3 years from the date that the agency knew or should have known of the false claim, but in no event may 10 years pass after the date of the false claim.

The availability of FCA *qui tam* actions allows DOT to protect itself from grantees and third party contractors using federal assistance in a fraudulent manner.[244] For example, in *Lamers v. City of Green Bay*, the owner of a private bus company who had lost his contract to transport school children was allowed to bring a *qui tam* action against the city.[245] In this case, the relator alleged that the City of Green Bay, which owns and operates Green Bay Transit (GBT), made false statements and representations to FTA so that GBT could obtain annual FTA grant funds and so that it could avoid repayment of improperly received funds in violation of 31 U.S.C. § 3729(a)(2) and (7).[246] The United States District Court held that the relator could bring the *qui tam* action against GBT because he satisfied the "original source" requirement of the FCA.[247] Although the court found no evidence to support the inference that the City of Green Bay defrauded the federal government, and the relator's claims under § 3729(a)(7) were not actionable, the *qui tam* remedy remains a potentially viable check against government fraud.

The civil monetary penalty of $10,000 per claim gives *qui tam* actions particular bite; each line item in an itemized invoice can be the basis for a separate civil penalty. For example, the *United States v. Schimmels* court found 149 separate violations of the FCA following a *qui tam* action brought by employee-relators.[248] In this case, the Schimmels were held to have violated the FCA by knowingly and falsely certifying to the government that their employees had been paid in accordance with the Davis-Bacon Act.[249] Upon receiving federal funds for public works projects, the Schimmels completed a Davis-Bacon Act program form listing two employees as participants in an apprenticeship program.[250] However, evidence demonstrated that apprenticeship training was never actually provided for these employees and the apprenticeship program payment that was financed with federal funds was ultimately claimed by the Schimmels as "wages paid" to their employees.[251] Although the underlying amount was relatively small—10 cents per hour per employee—the U.S. District Court

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[241] 31 U.S.C. § 3729 (2003). Under the FCA, the terms "knowing" and "knowingly" mean that a person, with respect to information: (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, whereby no proof of specific intent to defraud is required.

[242] 31 U.S.C. § 3730(b)(2) (2003). The government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information. If the government does not intervene, successful false claims' plaintiffs can recover up to 30 percent of the damages award. However, if the government proceeds with an action brought by a person, such person may receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person contributes to the prosecution of the action.

[243] 31 U.S.C. § 3730(c)(5) (2003).

[244] *See* 456 PLI/Lit 7, 15 (1993). Bid-rigging throughout state and federal government contracts will increasingly be a subject of *qui tam* suits. However, the *qui tam* system has been attacked as being unconstitutional since the amendments to the FCA were passed in 1986 and 1988. But in fact, *qui tam* has long been upheld by state courts as constitutional. *See, e.g.,* Sutton v. Phillips, 116 N.C. 502 (1895), and Drew v. Hilliker, 56 Vt. 641 (1884).

[245] U.S. ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1016 (7th Cir. 1998).

[246] *Id*. According to the relator, GBT and City officials falsely represented the scope of the school bus transportation it provided in transporting students and school personnel.

[247] *Id*. at 981. Section 3730 stipulates that the relator must be an "original source" within the meaning of the FCA. The following two criteria must be met: (1) the relator must be an individual who has direct and independent knowledge (knowledge that does not derive from prior public disclosure) of the information on which the allegations are based, and (2) the relator must have voluntarily provided the information to the government before filing an action based on this information. 31 U.S.C. § 3730(e)(4)(B) (2003).

[248] United States v. Schimmels, 127 F.3d 875, 882 (9th Cir. 1997).

[249] *Id*. at 877.

[250] *Id*. at 877.

[251] *Id*. at 876.

imposed $15,000 in actual damages and civil penalties of $1,400,000.[252]

In summary, FCA liability extends to all participants involved in FTA grant projects; subcontractors, contractors, grantees, and the state may all be drawn into a *qui tam* action.[253] Such claims can be brought against a contractor or subcontractor without naming the grantee as a defendant. *Qui tam* actions can be filed directly against subcontractors and may be based on false or inflated invoices submitted by a contractor to a grantee for reimbursement. Even if the grantee has no direct contact with the subcontractor or if no damage is proven, a *qui tam* action lies if any federal funds are used to reimburse a submitted invoice. The only required nexus is that the subcontractor received federal financial assistance.

Arguably then, the grantee's greatest exposure under the FCA may be created when a grantee ignores or intentionally disregards false claims submitted by a contractor and forwards them to the government for reimbursement. Since the FCA is meant to expose grantees who fail to detect fraudulent contractors, the prudent grantee will develop a False Claims Integrity Program so that all personnel can learn to identify and report false claims. Such a program should also provide for training of third party contractors, and may be used by the grantee as a basis to disqualify a potential corrupt bidder or to reject a bid. In order to facilitate the implementation of such a program, a policy statement adopted by the grantee's board, or similar authority, should be adopted and distributed throughout the agency.

## M. OFFICE OF INSPECTOR GENERAL

In addition to being ethically bound by FTA policy and Title 49 of the C.F.R., grantees must recognize that their use of DOT funds is subject to review and investigation by DOT's Office of Inspector General (OIG).[254] Serving as DOT's criminal investigative element, the OIG has made investigating contract and grant fraud a top priority.[255] Accordingly, OIG has designated a national contract and grant fraud coordinator, as well as regional "specialists" responsible for organizing fraud prevention, detection, and investigation efforts with DOT components such as the FHWA, FTA, and FAA.[256] The OIG stipulates that these specialists will manage efforts to combat contract and grant fraud with the state DOTs and grantees that manage transportation related funds.[257]

With the foregoing framework in hand, the Inspector General's office conducts audits to detect potential fraud within DOT programs.[258] While some audits are required by law, others are requested by the Secretary of Transportation, officials of the agencies that make up DOT, or by members of Congress.[259] In addition to conducting audits, the OIG may investigate grantees or contractors who have been referred by an agency within DOT or who have exhibited a pattern of criminal behavior.[260] Ultimately, results from Inspector General audits are submitted directly to the affected agency within DOT and to the appropriate congressional committees upon completion.[261] OIG then publishes semiannual reports summarizing the results of recent audits and investigations.[262]

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[252] *Id*. at 882.

[253] Additionally, individuals who prepare and submit a false claim for payment may also be joint and severally liable.

[254] Http://www.oig.dot.gov. The newly launched DOT Inspector General Web site contains audit reports, congressional testimonies, and semi-annual reports to Congress dating back to 1997.

[255] Http://www.oig.dot.gov/docs_by_area.php?area=12.

[256] *Id*.

[257] *Id*.

[258] Office of Inspector Gen., U.S. Dep't of Transp., *supra* note 254. Most audits are public documents. Many of OIG's recent reports are available on its Web site.

[259] Office of Inspector Gen., U.S. Dep't of Transp., *Frequently Asked Questions* (visited Aug. 15, 2003), http://www.oig.dot.gov/faq.php. Since 1997, the OIG has conducted nearly 400 audits.

[260] Office of Inspector Gen., U.S. Dep't of Transp., *supra* note 259. An OIG hotline allows citizens and government workers to "blow the whistle" on waste, fraud, or abuse.

[261] Office of Inspector Gen., U.S. Dep't of Transp., *supra* note 259. Summaries of completed investigative activities are posted to the Web site under investigative priority areas.

[262] Office of Inspector Gen., U.S. Dep't of Transp., *supra* note 259.

SECTION 7

# SAFETY

## A. RAIL SAFETY

The purpose of railroad safety regulation is to protect the general public, passengers, and employees. The earliest federal regulations were imposed to protect the populace from steam locomotive boiler explosions. Later regulations were promulgated to govern the inspection and maintenance of railroad motive power, rolling stock, and physical plants. Employees also became the focus of federal oversight. More recently, the crashworthiness of rolling stock has become the subject of regulation.[1] Growing demand and increased governmental financial support is generating significant expansion of light and heavy rail transit systems.[2]

### 1. Federal Legislation

Congress first addressed railroad safety in the Safety Appliance Acts of 1893,[3] 1903,[4] and 1910,[5] which required certain equipment on trains, primarily for the safety of the crew, though passenger safety was enhanced as well. They included requirements that the locomotive and a sufficient number of cars in the train be equipped with power brakes, and that they have coupling devices and drawbars, handholds, ladders, running boards, and grab bars.[6] These requirements were supplemented with the Boiler Inspection Act of 1911[7] and the Signal Inspection Act of 1920.[8] The Hours of Service Act of 1907[9] was passed "to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long on an exacting task."[10] These pre-1970 safety statutes are referred to as the "older safety statutes."[11]

The most comprehensive legislation passed by Congress was the Federal Railroad Safety Act of 1970,[12] the purpose of which was "to promote safety in all areas of railroad operations and to reduce railroad related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents…."[13] The Rail Safety Improvement Act of 1988[14] gave DOT direct jurisdiction over employee qualifications, raised maximum civil penalties, and made individuals liable for willful violations.[15] The Rail Safety Enforcement and Review Act of 1992[16] required the Federal Railroad Administration (FRA) to revise its power brake regulations and its track safety standards, and to evaluate the safety of maintenance of way employees. The Federal Railroad Safety Authorization Act of 1994, known as the "Swift Rail Development Act of 1994,"[17] required the FRA to issue passenger safety standards.[18] Thus, the FRA (and its predecessor, the ICC, now the STB), have long regulated the nation's railroads for safety purposes.[19]

### 2. FRA/FTA Jurisdiction

The FRA's jurisdiction over railroads is broader than that of the STB under the Interstate Commerce Act, and is not confined to "common carriers by railroad" as defined under that Act.[20] FRA's railroad safety jurisdiction extends to "commuter or other short-haul railroad passenger service in a metropolitan or suburban area," and commuter service formerly operated by Conrail, as well as high-speed intercity rail, but it does not extend to "rapid transit operations in an urban area that are not connected to the general railroad system of trans-

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[1] TRANSIT COOPERATIVE RESEARCH PROGRAM, JOINT OPERATION OF LIGHT RAIL TRANSIT OR DIESEL MULTIPLE UNIT VEHICLES WITH RAILROADS 6-7 (TCRP Report No. 52, 1999).

[2] Federico Cura, *Rail Transit Industry Spurs Heavy Activity,* APTA PASSENGER TRANSPORTATION, Feb. 19, 2001, at 8.

[3] 27 Stat. 531, 532.

[4] 32 Stat. 943.

[5] 45 U.S.C. §§ 22–34 (2000).

[6] WILLIAM KENWORTHY, 1 TRANSPORTATION SAFETY LAW PRACTICE MANUAL § 5.1 (Butterworth 1989).

[7] R.J. Corman R.R. Co. v. Palmore, 999 F.2d 149 (6th Cir. 1993).

[8] 49 U.S.C. § 26 (2000). KENWORTHY, *supra* note 6 §§ 5.2-5.3.

[9] 45 U.S.C. §§ 61–54b (2000).

[10] *Id*. Baltimore & Ohio R.R. Co. v. Interstate Commerce Comm., 221 U.S. 612, 31 S. Ct. 621, 55 L. Ed. 878 (1911); Atchison, Topeka & Santa Fe Ry. Co. v. United States, 244 U.S. 336 37 S. Ct. 635, 61 L. Ed. 1175 (1917); Chicago & Alton R.R. Co. v. United States, 247 U.S. 197, 38 S. Ct. 442, 62 L. Ed 1066 (1918).

[11] 49 C.F.R. pt. 209, App. A (1999). The "older safety statutes" also include the Locomotive Inspection Act, 45 U.S.C. § 22-34 (2000), and the Accident Reports Act, 45 U.S.C. § 38-43 (2000). The regulations implementing these statutes are found at 49 C.F.R. pts. 213–236 (1999).

[12] Pub. L. 91-458. 84 Stat. 971.

[13] Chicago Transit Auth. v. Flohr, 570 F.2d 1305, 1308 (7th Cir. 1977). KENWORTHY, *supra* note 6 § 5.5.

[14] Pub. L. 100-342, 102 Stat. 624 (June 22, 1988).

[15] KENWORTHY, *supra* note 6 § 5.6.

[16] Pub. L. 102-365, 106 Stat. 972 (Sept. 3, 1992), codified by Pub. L. 103-272, 108 Stat. 745 (July 5, 1992).

[17] Pub. L. 103-440, 108 Stat. 4615 (Nov. 2, 1994). 49 U.S.C. §§ 20101 (purpose); 20113 (state enforcement); 20133 (crashworthiness, maintenance, inspection, emergency response procedures, safety operating rules and conditions of passenger cars); 20145 (bridge displacement detection systems); 20146 (institute for railroad safety); 20151 (railroad trespassing and vandalism) (2000). The 1994 Act also recodified the Federal Safety Appliance Act, 49 U.S.C. §§ 20301–20306 (2000). Phillips v. CXS Transp. Inc., 190 F.3d 285 (4th Cir. 1999) (*cert. den*. 2000 U.S. Lexis 1757).

[18] 49 C.F.R. pts. 209 (railroad safety and enforcement, fitness for duty, and follow-up on FRA recommendations), *id*. at 218 (operating practices, including minimum requirements for protection of railroad employees engaged in inspection, maintenance, and operation of rolling stock), and *id*. at 240 (qualifications and certification of locomotive engineers, including eligibility, testing, training, certification, and monitoring).

[19] The FRA also exercised jurisdiction under the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 *et seq*. (2000).

[20] 49 C.F.R. pt. 209, App. A (1999).

portation."[21] Unfortunately, the statute fails to define either term.[22]

So, what is the difference between commuter railroad passenger service and rapid transit operations?[23] The question is an important one, for as discussed in Section 9—Labor Law, transit lawyers may wish to avoid exposure to the Federal Employers Liability Act,[24] the Railroad Retirement Act,[25] the Railway Labor Act,[26] and jurisdiction of the FRA, the Surface Transportation Board, and the National Mediation Board.

As noted above, the Federal Railroad Safety Act of 1970 gave FRA authority to regulate all areas of railroad safety,[27] which presumably included rail transit.[28] But acting upon a petition from APTA in 1975, the FRA promulgated a rule excluding rail rapid transit systems from its jurisdiction because of the "many differences between urban rail rapid transit operations and railroad operations."[29]

In *Chicago Transit Authority v. Flohr*,[30] the Chicago Transit Authority (CTA) argued that it did not fall within the definition of a "railroad" under the Railroad Safety Act of 1970, and that the FRA's safety regulations therefore were inapplicable to it. CTA pointed out that its electrically self-powered units were substantially lighter and smaller than railroad cars;[31] that they did not use the rails of any railroad, nor did rail carriers use CTA's lines; that UMTA[32] provided 80 percent of its capital funding and safety regulatory oversight; and that the term "railroad" as it is commonly used does not embrace a rapid transit system. The 7th Circuit U.S. Court of Appeals agreed. It held that the legislative history of the Urban Mass Transportation Act[33] conclusively demonstrated that there was no intent to bring rapid transit systems within the jurisdiction of the FRA. Therefore the CTA was not a "railroad" within the meaning of the Act, and the FRA's regulatory authority with respect to railroad safety does not extend to rail rapid transit.[34]

Yet in *Port Authority Trans-Hudson Corporation v. Federal Railroad Administration*,[35] the D.C. Circuit refused to remove a rail transit operation from FRA jurisdiction although it had eliminated the operator's connections to the "general railroad system of transportation." Thus, in New Jersey, PATH is regulated as a railroad, yet a similar transportation authority, the Port Authority Transportation Company (PATCO), is deemed an "interurban electric railway" not subject to FRA jurisdiction.[36]

Since these cases have been decided, the FRA has issued a rather detailed Policy Statement identifying (what it perceives to be)[37] its jurisdictional perimeters over passenger railroad operations.[38] According to FRA, the nature of the operations rather then the type of the equipment used determines whether the FRA has jurisdiction.[39] According to FRA,

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[21] 49 U.S.C. § 20102 (2000). Prior to 2000, FTA defined a "commuter" service as systems that have as their primary purpose the transportation of commuters to and from work within a metropolitan area, but do not devote a substantial portion of their service to moving passengers between stations within an urban area. "Rapid transit operations" referred to rail systems that are devoted in substantial part to moving people from point to point within an urban area. As explained below, FRA has amended its definitions to remove the issue of whether a substantial portion of its operations is devoted to moving people from station to station, and focused instead on whether such service is a primary or incidental function of its service. 65 Fed. Reg. 42532 (July 10, 2000).

[22] The statute defines "railroad" to include "any form of nonhighway ground transportation that runs on rails or electromagnetic guideways." 49 U.S.C. 20102 (2000). In this definition, FRA believes that "Congress clearly intended to include 'commuter service.'" 65 Fed. Reg. 42529 at 42531-32 (July 10, 2000).

[23] One source summarized the difference as follows:

> Railroads are part of a common standard, regulated, interconnected national systems of tracks, interchangeable rolling stock, and operational rules. Rail transit systems are separate metropolitan or state-based entities, whose standards and rules (and even track gauges) can vary. Rail transit vehicles (commuter rail excepted) are considered non-compliant with Federal railroad standards. Railroad tracks, therefore, may connect the metro areas, but not with rail transit systems within the metro areas. Railroads are regulated by [the FRA and STB]. Rail transit regulation is being reorganized by those states with or planning rail transit by Statewide Safety System Program Plans [SSPP]. The SSPP is directed at all modes of rail *transit* organized by the carriers largely through the American Public Transit Association (APTA) with the sanction [of FTA]. Rail transit regulation, as it will exist, may be largely performed regionally, applying Federal guidelines. Temporary waivers (for demonstrations of non-compliant equipment and special circumstances) and exceptions are granted by FTA.

TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1.

[24] 45 U.S.C. § 51 (2000). *See, e.g.,* Felton v. Southeastern Pa. Transp. Auth., 757 F. Supp. 623 (E.D. Pa. 1991).

[25] 45 U.S.C. § 231 *et seq*. (2000).

[26] 45 U.S.C. § 151 (2000).

[27] 49 U.S.C. § 20103(a) (2004)

[28] This interpretation was upheld in United States v. Mass. Bay Transp. Auth., 360 F. Supp. 698 (D. Mass. 1973).

[29] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 13.

[30] 570 F.2d 1305 (7th Cir. 1977).

[31] *See* PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 73 (Quorum 1986).

[32] UMTA is the Urban Mass Transportation Administration, which in 1991 was renamed the Federal Transit Administration. Act of Dec. 18, 1991, Pub. L. 102-240, 105 Stat. 2088.

[33] The name of the original Urban Mass Transportation Act was changed to the Federal Transit Act.

[34] Chicago Transit Auth. v. Flohr, 570 F.2d 1305, 1311 (7th Cir. 1977).

[35] 1997 U.S. App. Lexis 37565 (D.C. Cir. 1997), *cert. denied*, 525 U.S. 818 (1998).

[36] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 10.

[37] Of course, the courts, or perhaps Congress, will ultimately have the last word on the subject.

[38] 65 Fed. Reg. 42529 (July 10, 2000).

[39] 65 Fed. Reg. 42529 at p. 42531 (July 10, 2000).

> with the exception of self-contained urban rapid transit systems, FRA's statutory jurisdiction extends to all entities that can be construed as railroads by virtue of their providing non-highway ground transportation over rails or electromagnetic guideways, and will extend to future railroads using other technologies not yet in use.[40]

The FRA believes that "Congress flatly wanted FRA to have and exercise jurisdiction over all commuter operations and to not have or exercise jurisdiction over urban railroad transit operations that stand apart from the general rail system."[41]

The FRA begins its analysis with two presumptions. First, if there is a statutory determination that Congress considers a particular service to be commuter rail for any purpose, FRA deems it to be commuter rail subject to FRA safety jurisdiction.[42] Though it was not a safety statute, all of the commuter legislative and regulatory authorities listed by Congress in the Northeast Rail Service Act of 1981[43] are deemed by FRA to fall under its safety jurisdiction.[44] Second, if the operations consist of a subway or elevated operation with its own tracks on which no other railroad operates, and which has no highway-rail grade crossings, operates within an urban area, and moves passengers within it, it shall be presumed by FRA to be an urban rapid transit system not subject to FRA safety jurisdiction.[45] When neither of these two factors exist, the following criteria (focusing on the system's geographical reach and the frequency of service) are considered on a case-by-case basis:

***Indicators of a commuter railroad:***

- The system serves an urban area, its suburbs, and more distant outlying communities in the greater metropolitan area.
- The system's primary function is moving passengers back and forth between their places of employment in the city and their homes within the greater metropolitan area, and moving passengers from station to station within the immediate urban area is, at most, an incidental function.
- The vast bulk of the system's trains are operated in the morning and evening peak periods, with few trains at other hours.

***Indicators of urban rapid transit:***

- Serves an urban area and may also serve its suburbs.
- The moving of passengers from station to station within the urban boundaries is a major function of the system, and there are multiple station stops within the city for that purpose.
- The system provides frequent train service even outside the morning and evening peak periods.[46]

FRA has jurisdiction over the "general railroad system of transportation"—the network of standard gauge track[47] over which goods may be transported nationwide and passengers may travel between cities and within metropolitan and suburban areas.[48] FRA exercises jurisdiction over all intercity rail passenger operations.[49] If the operations are those of a "commuter railroad," FRA deems them to be within its jurisdiction even if there is no connection to any other railroad—FRA considers the operation to be a part of the general railroad system.[50] Examples of commuter railroads include Metra and the Northern Indiana Commuter Transportation District (Chicago area), Virginia Railway Express and the Maryland Railroad Commuter Authority (MARC) (Washington, D.C., area), and the Port Authority Trans Hudson (New York area).[51] FRA also has jurisdiction over "commuter or other short-haul railroad passenger service in a metropolitan or suburban area."[52] As an example, the FRA identifies "a passenger system designed to move intercity travelers from a downtown area to an airport, or from an airport to a resort area" as within its jurisdictional reach.[53] Thus, a short-haul service subject to FRA jurisdiction extends from an interstate hub (such as an airport) to a downtown location (such as from the Charlotte airport to Charlotte).

Though the FRA has jurisdiction over passenger and freight railroads, it does not have jurisdiction over rail rapid transit systems or light rail transit (LRT)[54] not

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[40] 49 C.F.R. pt. 209, App. A (1999).

[41] 65 Fed. Reg. 42529 at p. 42531 (July 10, 2000).

[42] *Id*. at 42532.

[43] Pub. L. No. 97-35, 95 Stat. 357. Under this statute, the term "commuter authority" includes the Metropolitan Transportation Authority, the Connecticut Department of Transportation, the Maryland Department of Transportation, the Southeastern Pennsylvania Transportation Authority, the New Jersey Transit Authority, and the Port Authority Trans-Hudson Corporation. 45 U.S.C. § 1104(3) (2000).

[44] 49 C.F.R. pt. 209, App. A (2000).

[45] 65 Fed. Reg. at 42532 (July 10, 2000); 49 C.F.R. pt. 209, App. A (2000).

[46] 65 Fed. Reg. 42529 at p. 42532 (July 10, 2000); 49 C.F.R. pt. 209, App. A (2000).

[47] Standard gauge track is 4 feet, 81/2 inches from rail to rail. Pub. L. 94-210, 90 Stat. 66. Transit rail trackage can be narrower or wider than standard gauge track. For example, San Francisco's MUNI cable car has 3 feet, 6 inch gauge, while BART has 5 feet, 6 inch gauge. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 2–5.

[48] 49 C.F.R. pt. 209, App. A (2000).

[49] *Id*.

[50] 65 Fed. Reg. 42530 n. 2 (July 10, 2000). "A commuter system's connection to other railroads is not relevant under the rail safety statutes. In fact, FRA considers commuter railroads to be part of the general railroad system regardless of such connections." 65 Fed. Reg. 42544, 49 C.F.R. pt. 209, App. A (1999).

[51] 49 C.F.R. pt. 209, App. A (1999).

[52] 49 U.S.C. § 20102(i)(A)(i) (2000).

[53] 49 C.F.R. pt. 209, App. A (2000).

[54] LRT consists of a "broad spectrum of rail transit capable of operating in mixed (street traffic, pedestrian, subway, elevated) environments. Typically LRT is overhead electrically powered and functions flexibly in urban/suburban locations." TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 5.

connected to the general railway network.[55] Thus, urban rapid transit operations generally are not part of the general railroad system. Examples include CTA in Chicago, Metro in Washington, D.C., and the subway systems in New York, Boston, and Philadelphia. Though the type of equipment used is not determinative of urban rapid transit status, the types of vehicles ordinarily associated with rapid transit are street railways, trolleys, subways, and elevated railways.[56]

Though not ordinarily a part of the general railroad system, an urban rapid transit operation may have sufficient connections to that system to warrant the exercise of FRA safety jurisdiction over the transit line to the extent it is connected.[57] The FRA has listed several examples, including:

- An urban rapid transit system sharing track with a railroad. It would be under FRA safety jurisdiction when it operated on the general system, but not when the vehicle moved to the street railway not used by a conventional railroad.
- A railroad crossing at grade[58] where the urban rapid transit line crossed a railroad's tracks.
- An urban rapid transit system using a shared right-of-way with a railroad involving joint control of trains.
- An urban rapid transit system sharing highway grade crossings with a railroad.[59]

But FRA has also made it clear that an urban rapid transit system may seek a waiver from the FRA's safety regulation if it "is in the public interest and consistent with railroad safety."[60] Waiver petitions are considered by the FRA's Railroad Safety Board.[61] The waiver process is fairly complex; it depends upon subject matter, and may be best suited for demonstrating experimental prototype or foreign noncompliance equipment for a limited duration.[62]

However, the FRA has stated it might confer a waiver from its passenger safety regulations[63] for the operation of urban rapid transit light rail cars and heavy conventional rail cars on the general railroad system when there is complete temporal separation between the incompatible equipment,[64] or where safety is assured through other highly competent methods of collision avoidance.[65] In 1999, the FRA granted petitions for shared use of rail lines filed by New Jersey Transit[66] and the Utah Transit Authority.[67] It has since granted waivers to the Santa Clara Valley Transit Authority (in San Jose, California), the San Diego trolley, and Baltimore light rail. This is consistent with the FRA/FTA Joint Policy Statement that strongly encourages the shared use of conventional railroad lines consistent with railroad safety to provide increased transportation opportunities for passengers in metropolitan areas.[68]

Similarly, both the San Diego Trolley, Inc., and the Baltimore Central Light Rail Line have joint operations with freight railroads, but neither are deemed subject to FRA jurisdiction since they are both considered rail rapid transit.[69] In both instances, light rail runs during

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[55] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 9.

[56] 49 C.F.R. pt. 209, App. A (2000).

[57] *Id*.

[58] A grade crossing is one at the same elevation as the railroad track. Grade crossings are an area of significant safety concern, for many automobiles and trucks have been hit by trains at these locations.

[59] 49 C.F.R. pt. 209, App. A (2000). "FRA has no intention of overseeing rail transit operations conducted separate and apart from general system tracks, *i.e.,* the street portion of that service…. FRA does not currently intend to exercise its jurisdiction over operations outside the shared-track area." 65 Fed. Reg. 42527 (June 10, 2000).

[60] 49 U.S.C. § 20103(d) (2000).

[61] 49 C.F.R. § 211.9 (2000).

[62] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 10. As an example, FRA waiver #H-96-2 allowed Amtrak to perform demonstration runs on Siemens' RegioSprinter DMU, a nonconforming vehicle. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at B-1.

[63] 49 C.F.R. pt. 238.7 (2000).

[64] 65 Fed. Reg. 42533 (July 10, 2000).

[65] 65 Fed. Reg. 42535 (July 10, 2000). However, the FRA made it clear that the waiver proponent would bear a high burden of proving that safety would be assured through means other than temporal separation. *Id*. Examples of practical means to enhance light rail safety are discussed in *Transit Cooperative Research Program, Integration of Light Rail Transit into City Streets* (TRB 1996), and *Transit Cooperative Research Program, Light Rail Service: Vehicular and Pedestrian Safety, Research Results Digest* (July 1999).

[66] 64 Fed. Reg. 45 996 (Aug. 23, 1999). In southern New Jersey, New Jersey Transit proposed a joint-use project involving diesel transit over Amtrak and Conrail track. The Hudson-Bergen LRT also shares tracks (former Conrail trackage) with a freight railroad for short distance. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 23.

[67] 64 Fed. Reg. 53435 (Oct. 1, 1999). See 65 Fed. Reg. 42540 (July 10, 2000). The Utah Transportation Authority proposed to build an LRT system on the Salt Lake Southern railroad while having freight service provided by RailTex from midnight to 5:00 a.m. The project received FTA funding. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 23.

[68] 65 Fed. Reg. 42526, at p. 42528 (July 10, 2000). For an argument that the STB has authority to authorize transit rail operations over freight rail rights of way, *see* Charles Spitulnik & Jamie Rennert, *Use of Freight Rail Lines for Commuter Operations: Public Interest, Private Property,* 26 TRANSP. L.J. 319 (1999).

[69] In 1979, the LRT system's parent, the Metropolitan Transit Development Board (MTDB), acquired a railroad with a line that now serves as joint use track for San Diego's LRT and freight. Also that year, MTDB contracted with a freight railroad (the San Diego and Arizona Eastern Railway Company) to provide local freight service operations approved by the ICC. The following year, MTDB created the San Diego Trolley, Inc., as a wholly-owned subsidiary to operate and maintain LRT service over the line. In 1981, LRT operations began over a portion of the South Line. In 1984, the ICC approved change of the freight operator (to RailTex) over the line. By 1999, freight rail service operated over 35 miles of the LRT line, generally from 2:00 a.m. to 4:15 a.m. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 20.

the day and freight trains run on the same track throughout the night; passenger and freight vehicles do not co-mingle or operate concurrently on the same track.[70] Typically, where LRT has been established on freight railroad rights-of-way, the railroad abandons the line and transfers it to the LRT operator, or sufficient space exists on the line to permit adequate spacing between the freight railroad's and LRT track centers. Hence, the line is no longer considered connected to the general railway system, and transit operations on the line are not considered to fall under FRA jurisdiction.[71]

Since 1995, the FTA's rules on fixed guideway systems[72] have applied to any rapid transit system, or any portion thereof, not subject to the FRA's safety jurisdiction.[73] To avoid overlap, the rules are mutually exclusive. If FRA's rules apply, FTA's rules do not; only where FRA does not regulate do FTA's rules kick in.[74]

### 3. Regulatory Authority

Today, the Secretary of Transportation holds comprehensive regulatory authority " for every area of railroad safety."[75] To protect safety, the Secretary may take whatever actions deemed necessary, including issuing regulations or orders; conducting investigations; making reports; issuing subpoenas; requiring the production of documents; prescribing record keeping and reporting requirements; and inspecting railroad equipment, facilities, rolling stock, operations, and records.[76] The Secretary may also issue orders compelling compliance with rail safety regulations, impose civil penalties for their violation,[77] request injunctions, or recommend the Attorney General bring a civil action for an issuance of an injunction, enforcement of a subpoena, or collection of a civil penalty.[78] Where an unsafe condition or practice causes an emergency situation creating a hazard of death or personal injury, the Secretary may immediately issue an Emergency Order imposing restrictions and prohibitions that may be necessary to abate the condition.[79] Examples of instances in which Emergency Orders have been issued are discussed below.

### 4. Track and Equipment Safety Standards

In the Federal Railroad Safety Authorization Act of 1994, Congress mandated that DOT promulgate regulations addressing the minimum standards for the safety of rail passenger cars, including crashworthiness; interior features (including luggage restraints, seat belts, and exposed surfaces) that might affect passenger safety; maintenance and inspection; emergency response procedures and equipment; and any other rules and conditions that affect safety directly.[80] DOT rules address railroad passenger equipment design, performance, inspection, testing and maintenance, fire safety, emergency systems, and other safety requirements.[81] Specific regulations address passenger equipment repair, safety glazing, locomotive safety,[82] safety appliances and power brakes,[83] and emergency preparedness.[84] These regulations are imposed by FRA; FTA has no regulatory authority to impose such requirements.

Congress has required DOT to maintain a coordinated effort to address the railroad grade crossing problem and take "measures to protect pedestrians in

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In Baltimore, MTA (the Baltimore Central Light Rail) owns the tracks over which its LRT operates as well as Conrail's freight service on the north end of the system (between midnight and the period before morning MTA services begin). Though no FRA waiver explicitly approves these joint operations, MTA officials take the position that the FRA does not have jurisdiction over the operations because they are predominately light rail. However, MTA takes advantage of FRA track maintenance and signal systems, as does San Diego. FRA inspectors and MTA officials cooperate, with FRA inspectors serving an advisory role. FRA has not attempted to exert formal jurisdiction because freight trains do not constitute a significant portion of the total operations vis-à-vis light rail operations. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 22.

[70] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 2, 9–10.

[71] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 9–10.

[72] 49 C.F.R. pt. 659 (2000).

[73] 65 Fed. Reg. 42546 (July 10, 2000).

[74] 65 Fed. Reg. 42526 (July 10, 2000).

[75] 49 U.S.C. § 20103(a) (2000). KENWORTHY, *supra* note 6 § 5.5. The FRA exercises jurisdiction over rail safety under delegation from the Secretary of Transportation. 49 C.F.R. § 1.49 (1999).

[76] 49 U.S.C. § 20107 (2000). KENWORTHY, *supra* note 6 § 9.1.

[77] *See* 49 U.S.C. §§ 21301–21304 (2000). KENWORTHY, *supra* note 6 §§ 5.503, 9.204 (Butterworth 1989). *See, e.g.,* 49 C.F.R. pt. 238.11—Schedule of Civil Penalties (1999).

[78] 49 U.S.C. §§ 20111, 20112 (2000). Under certain circumstances, states may also bring a civil action to enforce rail safety regulations. 49 U.S.C. § 20113 (2000).

[79] 49 U.S.C. § 20104 (2000). KENWORTHY, *supra* note 6 § 9.201.

[80] 49 U.S.C. § 20133 (2000).

[81] 64 Fed. Reg. 25541 (May 12, 1999); 65 Fed. Reg. 41284 (July 3, 2000).

[82] In the Rail Safety Enforcement and Review Act of 1992, Congress required FRA to address locomotive crashworthiness and working conditions. FEDERAL RAILROAD ADMINISTRATION, OVERVIEW OF THE RAILROAD SAFETY REGULATORY PROGRAM AND STANDARDS-RELATED PARTNERSHIP EVENTS 9 (Jan. 28, 2000), RSAC Update pp. 2–3 (Apr. 12, 2001).

[83] The Rail Safety Enforcement and Review Act of 1992 required FRA to revise its power brake regulations. 49 C.F.R. pts. 215, 216, 220, 223, 229, 231, 232, and 238 (1999). 64 Fed. Reg. 25540 (May 12, 1999). At more than 120 pages, this is among the most verbose Federal Register rulemakings this author has ever encountered. An additional Federal Register rulemaking on the subject addressed the inspection, testing, maintenance, and movement of defective passenger equipment. 65 Fed. Reg. 41248 (July 3, 2000).

[84] 63 Fed. Reg. 24630 (May 4, 1998); 63 Fed. Reg. 36376 (July 6, 1998)

densely populated areas along railroad rights of way."[85] Inspections must be made of automatic train stop, train control, and signal apparatus.[86] Trains must be equipped with an "event recorder" (which records the train's speed, hot box, throttle position, brake application, and any other function necessary to monitor safety of the train's operation),[87] and power brakes.[88] Trains must also be equipped with various safety appliances (including automatic couplers, steps, hand brakes, ladders and running boards, grab irons or handholds, and power brakes),[89] though these requirements specifically do not apply to a "car, locomotive, or train used on a street railway."[90] Locomotives and their repairs must be inspected.[91] DOT also must promulgate track safety standards[92] and requirements for signal systems.[93] With respect to tracks, structures, and signals, FRA regulations address track safety,[94] signal and train control,[95] grade crossing signals,[96] and bridge safety.[97] With respect to motive power and equipment, FRA regulations address noise emissions,[98] rear end marking devices,[99] safety glazing,[100] locomotives,[101] and safety appliances.[102]

### 5. Employee and Operating Safety Standards

Locomotive operators must be licensed in a program requiring minimum training, a comprehensive knowledge of railroad operating practices and rules, and consideration of the individual's motor vehicle driving record.[103] To avoid fatigue (itself a major cause of accidents), dispatchers (operators, train dispatchers, or other train employees who by the use of electrical or mechanical devices dispatch, report, transmit, receive, or deliver orders related to or affecting train move-

[85] 49 U.S.C. § 20134 (2000). *See, e.g.,* 63 Fed. Reg. 40691 (July 10, 1998); 49 C.F.R. pt. 392.10 *et seq*. (1999).

[86] 49 U.S.C. § 20136 (2000).

[87] 49 U.S.C. § 20137 (2000). The NTSB noted that data has been lost from event recorders due to fire, water, and mechanical damage. In response, in 1995, the FRA promulgated more refined technical standards. FEDERAL RAILROAD ADMINISTRATION, *supra* note 82, at 8. The event recorder should not be confused with the black box in commercial aircraft. The Norfolk Southern Railroad is beginning use of video and audio cameras in the engineer's compartment. One of the threshold issues for pilot use of the video and audio equipment was acceptability by the railroad labor unions.

[88] 49 U.S.C. § 20141 (2000).

[89] 49 U.S.C. § 20302 (2000).

[90] 49 U.S.C. § 20301(b)(4) (2000).

[91] 49 U.S.C. § 20702 (2000).

[92] 49 U.S.C. § 20142 (2000).

[93] 49 U.S.C. §§ 20501–20505 (2000).

[94] 49 C.F.R. pt. 213 (1999). 63 Fed. Reg. 34029 (June 22, 1998).

[95] 49 C.F.R. pts. 233 (1999) (FRA reporting requirements for methods of train operation; block signal systems; interlockings; traffic control and cab signal systems; and similar appliances, methods, and systems). 49 C.F.R. pt. 235 (1999) (discontinuance or modification of block signal systems; interlockings; traffic control systems; automatic train stop; train control; or cab signal systems; or other similar appliances, devices, or systems). 49 C.F.R. pt. 236 (1999) (installation, maintenance, inspection, and repair of signal and train control systems; devices and appliances, including roadway signals; cab signals; track circuits; automatic block signal systems; interlockings; automatic train stop; and train control systems).

[96] 49 C.F.R. pt. 234 (1999). The regulations address minimum standards for maintenance, inspection, and testing of highway-rail grade crossing warning systems. 59 Fed. Reg. 50085 (Sept. 30, 1994); 61 Fed. Reg. 31802 (June 20, 1996)

[97] 49 C.F.R. pt. 213, App. C (1999).

[98] 49 C.F.R. pt. 210.3 (1999). These regulations are applicable to the noise emitted by moving rail cars and locomotives. They are inapplicable to (1) street, suburban, or interurban electric railways not connected to the general railroad system of transportation; (2) sounds emitted by warning devices such as horns, whistles, or bells when operated for safety purposes; (3) special-purpose equipment located on or operated from rail cars; (4) steam or engines; or (5) gas turbine powered locomotives, or inert retarders.

[99] 49 C.F.R. pt. 221 (1999) (minimum requirements for rear end marking devices for passenger, commuter, and freight trains). Lit visible markers are required on the rear of each passenger and commuter train. 49 U.S.C. § 20132 (2000). Separate requirements exist for locomotive visibility, 49 U.S.C. § 20143 (2000), and railroad car visibility, 49 U.S.C. § 20148 (2000).

[100] 49 C.F.R. pt. 223 (1999) (minimum requirements for glazing materials to protect rail employees and passengers from injury as a result of objects striking windows of locomotives, passenger cars, and cabooses).

[101] 49 C.F.R. pt. 229 (1999) (minimum standards for locomotives, including inspection and testing procedures and safety requirements for brake, draft, buff strength/crashworthiness, suspension, electrical systems, cab equipment, and MU "locomotives," though steam-powered locomotives are exempt). The Association of American Railroads (AAR) has published S-580, a standard for crashworthiness. Though not law, AAR S-580 is considered a recommended practice, from which deviations are carefully scrutinized by FRA. In fact, FRA looks to the engineering specifications and technical standards developed by a number of private associations, including the American Railway Engineering Association, the American Public Transit Association, the Institute of Electrical and Electronic Engineers, the American Society of Civil Engineers, the Construction Specification Institute, the American Society of Mechanical Engineers, and the American National Standards Institute. TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 11.

[102] 49 C.F.R. pt. 231 (1999) (requirements for various appliances in a railroad car, such as handholds, hand-brakes, and sill steps). As a follow up to Emergency Order No. 15, which addressed the local whistle bans on the Florida East Coast Railroad between Jacksonville and Miami, the Swift Rail Development Act of 1994 required FRA to issue regulations requiring use of train horns at highway-rail crossings. FEDERAL RAILROAD ADMINISTRATION, *supra* note 82, at 21.

[103] 49 U.S.C. § 20135 (2000). Bridge safety equipment must be provided to protect maintenance-of-way employees. 49 U.S.C. § 20139 (2000).

ments); signal employees (individuals employed by a railroad carrier engaged in installing, repairing, or maintaining signal systems); and train employees (individuals engaged in or connected with the movement of a train, including hostlers)[104] are subject to certain maximum work hour and minimum off duty rules. Train employees must not be allowed to remain or go on duty unless they have had at least 8 hours off duty during the preceding 24 hours, or if they had been on duty 12 consecutive hours, they have had at least 10 consecutive hours off duty.[105] Certain "whistleblower" legislation[106] has been enacted to protect rail employees who complain to DOT of a rail safety violation or who refuse to work because of hazardous conditions against employer retaliation.[107] Some states also have created an exception to the "employment at will" doctrine for employees who refuse to perform unlawful acts[108] or engage in whistleblowing for safety violations.[109]

Amtrak, which operates a number of commuter rail operations, must maintain a rail safety system program for employees.[110] Amtrak, SEPTA, New Jersey Transit, and several freight railroads (including Conrail) have formed the Northeast Operating Rules Advisory Committee (NORAC) to create a unified Book of Rules governing operations in the Northeast Corridor.[111] Clarity and uniformity of rules, elimination of contradictions, and enhanced communications help employees who must navigate trains on common rails, and thereby improve safety and operational efficiency.[112]

With respect to operating practices, the FRA has promulgated regulations addressing bridge and roadway workers,[113] operating rules and practices,[114] alcohol and drugs,[115] radio communications,[116] hours of service,[117] engineer certification,[118] and passenger train emergency preparedness.[119]

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[104] 49 U.S.C. § 21101 (2000).

[105] 49 U.S.C. § 21103 (2000). Separate requirements exist for signal employees, 49 U.S.C. § 21104 (2000), and dispatching service employees, 49 U.S.C. § 21105 (2000).

[106] 45 U.S.C. § 441 (2000). Maxfield v. Coe Rail, Inc., 1994 U.S. Dist. Lexis 8616 (E.D. Mich. 1994). The Federal Railroad Safety Authorization Act's protection of "whistleblowers" is limited to situations involving enforcement of the federal railroad safety laws. Mahler v. N.J. Transit Rail Operations, Inc., 570 A.2d 1289 (N.J. App. 1990).

[107] 49 U.S.C. § 20109 (2000). KENWORTHY, *supra* note 6 § 5.504.

[108] *See, e.g.,* Adams v. George W. Cochran & Co., 597 A.2d 28, 32 (D.C. 1991).

[109] Gray v. Citizens Bank of Washington, 602 A.2d 1096 (D.C. App. 1992); Taylor v. WMATA, 109 F. Supp. 2d 11 (D.C. 2000).

[110] 49 U.S.C. § 24313 (2000) provides:

> In consultation with rail labor organizations, Amtrak shall maintain a rail safety system program for employees working on property owned by Amtrak. The program shall be a model for other rail carriers to use in developing safety programs. The program shall include —
> (1) periodic analyses of accident information, including primary and secondary causes;
> (2) periodic evaluations of the activities of the program, particularly specific steps taken in response to an accident;
> (3) periodic reports on amounts spent for occupational health and safety activities of the program;
> (4) periodic reports on reduced costs and personal injuries because of accident prevention activities of the program;
> (5) periodic reports on direct accident costs, including claims related to accidents; and
> (6) reports and evaluations of other information Amtrak considers appropriate.

The railroad safety laws of 49 U.S.C. § 10101 (2000) are applicable to Amtrak. 49 U.S.C. § 24301(d) (2000). However, at this writing, Amtrak is scheduled to become financially self-sustainable or be sunset by 2002. 49 U.S.C. § 24101 (2000).

[111] The unified rules allow commingling of a number of different passenger and freight operations including:

- High-speed passenger trains (Amtrak Metroliners).
- Intercity passenger trains (Amtrak Northeast Direct and long distance intercity services).
- Diesel locomotive-hauled (or push-pull) commuter trains (MARC, NJT, CONDOT, MBTA).
- Electric locomotive hauled push-pull commuter trains (NJT, SEPTA, MARC).
- Electric multiple-unit commuter trains (NJT, SEPTA).
- Self-propelled diesel multiple unit trains (e.g., RDC: SPV-2000; MARC; SEPTA, LIRR, MN, NJT).
- Passenger terminal, switching, and yard operations (Amtrak/LIRR and formerly Washington Union Terminal).
- Numerous freight operations.

TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 2–13. In selecting and scheduling projects in the Northeast Corridor, Amtrak must give safety-related items highest priority. 49 U.S.C. § 24902(b)(1) (2000). It must pay 20 percent of the cost of eliminating highway grade crossings in the Northeast Corridor. 49 U.S.C. § 24906(b) (2000).

[112] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 9–10.

[113] 49 C.F.R. pt. 214 (1999).

[114] 49 C.F.R. pt. 217 (1999) (railroads must file their operating rules and practices with FRA, and must instruct their employees in operating practices). 49 C.F.R. pt. 218 (1999) (minimum requirements for railroad operating practices, including minimum requirements for protecting employees engaged in inspection, maintenance, and operation of rolling stock).

[115] 49 C.F.R. pt. 219 (1999) (minimum standards for control of drug use and alcohol misuse, such as drug prohibition and drug and alcohol testing). 61 Fed. Reg. 65959 (Dec. 16, 1996).

[116] 49 C.F.R. pt. 220 (1999) (minimum standards for operation of radio communications in railroad operations, including basic railroad operating rules, radio communications, record-keeping, and transmission of train orders). 63 Fed. Reg. 47182 (Sept. 4, 1998).

[117] 49 C.F.R. pt. 228 (1999) (reporting and record-keeping requirements of hours of service for certain railroad employees; standards and procedures for construction or reconstruction of employee sleeping quarters).

[118] 49 C.F.R. pt. 240 (1999) (minimum requirements for eligibility, training, testing, certification, and monitoring of locomotive engineers; requirement for an FRA-approved certification program, certification process, and implementation and administration thereof). 63 Fed. Reg. 50626 (Sept. 22, 1998). Rules addressing agency practice and procedure relative to

### 6. Accident Investigations and Emergency Orders

Rail accidents involving death or injury to an individual or damage to equipment or roadbed resulting from the carrier's operations[120] must be reported to DOT[121] and, if they cause serious personal injury or death, must be investigated by DOT (otherwise investigation is discretionary).[122] Major transportation accidents are also investigated by the National Transportation Safety Board (NTSB), and rail transit systems must report to it.[123]

Following an accident investigation, the DOT may issue an Emergency Order. As an example, after 14 railroad accidents killing 19 people and injuring 226 in early 1996, DOT Secretary Peña issued Emergency Order No. 20,[124] requiring improvements in train signals, communications, and emergency exits.[125] It required that intercity and passenger commuter railroads adopt operating rules providing for reduced speeds where delays exist between distant signals and signals at interlocking or controlled points; emergency exit marking and emergency window testing was also required.[126] One of the accidents involved a collision between MARC and Amtrak trains in Silver Spring, Maryland. The FRA's Emergency Order required that several interim measures be taken pending the NTSB report.[127] Two

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engineer certification appeals were promulgated in 1995. As of this writing, issues surrounding procedures on the properties, offenses warranting decertification, periods of decertification, operation of specialized equipment, and related issues are pending. FEDERAL RAILROAD ADMINISTRATION, *supra* note 82, at 8.

[119] 49 C.F.R. pt. 239 (1999).

[120] The regulation defines accidents and incidents that must be reported as:

(1) Any impact between railroad on-track equipment and an automobile, bus, truck, motorcycle, bicycle, farm vehicle, or pedestrian at a rail-highway grade crossing;
(2) Any collision, derailment, fire, explosion, act of God, or other event involving operation of railroad on-track equipment (standing or moving) that results in reportable damages greater than the current reporting threshold to railroad on-track equipment, signals, track, track structures, and roadbed;
(3) Any event arising from the operation of a railroad that results in:
(i) Death of one or more persons;
(ii) Injury to one or more persons that requires medical treatment;
(iii) Injury to one or more employees that requires medical treatment or results in restriction of work or motion for one or more days, one or more lost work days, transfer to another job, termination of employment, or loss of consciousness; or
(iv) Occupational illness of a railroad employee as diagnosed by a physician.
49 C.F.R. § 225.5 (1999).

[121] The regulations call for reporting via telephone:

(a) Each railroad must report immediately by toll free telephone, Area Code 800-424-0201, whenever it learns of the occurrence of an accident/incident arising from the operation of the railroad that results in the:
(1) Death of rail passenger or employee; or
(2) Death or injury of five or more persons.
(b) Each report must state the:
(1) Name of the railroad;
(2) Name, title, and telephone number of the individual making the report;
(3) Time, date, and location of accident/incident;
(4) Circumstances of the accident/incident; and
(5) Number of persons killed or injured.
49 C.F.R. § 225.9 (1999). Monthly written reports are also required. 49 C.F.R. § 225.11 (1999). Reports are divided into three categories: (1) highway/rail grade crossings; (2) rail equipment; and (3) death, injury and occupational injury. 49 C.F.R. § 225.19 (1999). Special reporting requirements are imposed where human factors were a cause of the accident. 49 C.F.R. § 225.12 (1999). If drug use or alcohol abuse may have been a causal factor, additional reporting is required. 49 C.F.R. § 225.17 (1999). Additional requirements exist for late reports. 49 C.F.R. § 225.13 (1999). Forms are listed in 49 C.F.R. § 225.21 (1999). Accident reports are available for public inspection. 49 C.F.R. § 225.7 (1999). However, the following events need not be reported:

(a) Casualties that occur at highway-rail grade crossings that do not involve the presence or operation of on-track equipment, or the presence of railroad employees then engaged in the operation of a railroad;
(b) Casualties in or about living quarters not arising from the operation of a railroad;
(c) Suicides as determined by a coroner or other public authority; or
(d) Attempted suicides.
49 C.F.R. § 225.15 (1999).

[122] 49 U.S.C. §§ 20703, 20901 (2000). 49 C.F.R. pt. 225 (1999). *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489, 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); U.S. v. Mass. Bay Transp. Auth., 360 F. Supp. 698 (D. Mass. 1973).

[123] Though the NTSB has no direct regulatory authority, it may investigate accidents, report findings, and make recommendations. NTSB findings may support termination of an employee responsible for an accident. *See, e.g.,* Doll v. Port Auth. Trans-Hudson Corp., 92 F. Supp. 2d 416 (D. N.J. 2000).

[124] 61 Fed. Reg. 6876 (Feb. 22, 1996); 61 Fed. Reg. 8703 (Mar. 5, 1996); 49 C.F.R. pt. 238 (2004).

[125] *Pena Asks for More Train Control,* ADVANCED TRANSPORTATION TECHNOLOGY NEWS (Mar. 1996).

[126] FEDERAL RAILROAD ADMNISTRATION, *supra* note 82.

[127] The NTSB found the probable cause of the January 6, 1996, collision of the WMATA train with a standing train at the Shady Grove station at Gaithersburg, Maryland, as the failure of WMATA

> management and board of directors (1) to fully understand and address the design features and incompatibilities of the automatic train control system before establishing automatic train operation as the standard operating mode at all times and in all weather conditions, (2) to permit operating department employees…to use their own experience, knowledge and judgment to make decisions involving the safety of Metrorail operations, and (3) to effectively promulgate and enforce a prohibition against placing standby trains at terminal stations on the same track as incoming trains.

The NTSB found the probable cause of the February 9, 1996, collision and derailment of two New Jersey Transit commuter trains near Secaucus, N.J., as "failure of the train 1254 engineer to perceive correctly a red signal aspect because of his diabetic eye disease and resulting color vision deficiency, which he failed to report to New Jersey Transit during annual medi-

involved train operations and were implemented within 24 hours. A third involved the inspection of emergency exits.[128] Within 5 days of the accident, MARC announced $5.6 million in window and door safety enhancements.[129] The Emergency Orders sometimes are given national scope. For example, after the Silver Spring accident and the DOT Emergency Order, Tri-Rail ordered its trains to slow down on stretches between Haileah and West Palm Beach, Florida.[130]

### 7. Inspections and Civil Penalties

The FRA employs more than 400 inspectors operating in nearly 50 offices throughout the nation; the states employ another 100 inspectors who participate in enforcing federal rail safety laws and regulations. They inspect rail equipment and track and signal systems and operations, and investigate hundreds of complaints each year that allege violations of federal law.[131] Again, however, FRA has no jurisdiction over transit except for commuter rail, and FTA has no provisions for imposing penalties for such violations.

Congress has authorized the Secretary of Transportation (and by delegation, the FRA) to issue civil penalties for violation of DOT safety laws and regulations.[132] In determining whether a violation warrants a civil penalty recommendation, the field inspector considers: (1) the inherent seriousness of the situation; (2) the kind and degree of safety hazard the situation poses; (3) any harm already caused; (4) the railroad's or individual's general level of compliance disposition; (5) their history of compliance, particularly at the specific division or location of the involved railroad; (6) whether a remedy other than a civil penalty is more appropriate; and (7) such other factors as the immediate circumstances make relevant. Discretion at the field and regional level is important to ensure "that the exacting and time-consuming civil penalty process is used to address those situations most in need of the deterrent effect of penalties."[133] At the commuter rail transit agency, the penalty settlement process is handled by local counsel, or if the amounts are small, by non-lawyers. Settlement is the rule, unless the violations are willful.

A civil penalty recommendation at the field level is reviewed at the regional level by a specialist in the subject matter involved who determines whether the recommendation is consistent with safety enforcement policy in similar circumstances. In close cases, guidance is sought from the FRA's Office of Safety. In practice, field staff who come across novel issues run them through FRA headquarters in Washington, D.C. Technically and legally sufficient violation reports deemed by the regional office consistent with FRA's national enforcement policy are forwarded to the FRA's Office of Chief Counsel, where they are reviewed by the Safety Division.[134]

If the violation was committed by a railroad, a penalty demand letter is issued that summarizes the claims, encloses the violation report and all relevant evidence, and explains that the railroad may pay in full or submit (orally or in writing) information in defense or mitigation. Settlement conferences may be held in which the FRA may adjust or compromise penalties. Of course, not all carriers to whom violation reports are issued accept the inspector's findings, plead guilty, or settle. In reality, there are many contested inspection reports.

If the violation was committed by an individual (a "manager, supervisor, official, or other employee or agent of a railroad") who has committed a willful[135] violation of FRA safety statutes or regulations, the FRA field inspector initially determines the best method of ensuring compliance. This method may be "an informal warning, a more formal warning letter issued by the Safety Division of the Office of Chief Counsel, recommendation of a civil penalty assessment, recommendation of disqualification or suspension from safety-sensitive service, or, under the most extreme circumstances, recommendation of emergency action."[136] Where

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cal examinations." TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at la-2, 3.

[128] FRA Emergency Order No. 20, 61 Fed. Reg. 6876 (Feb. 22, 1996).

[129] Prepared Statement of Maryland Transportation Secretary David Winstead Before the U.S. House Subcomm. on Railroads, Comm. on Transp. and Infrastructure, at 89 (Mar. 5, 1996). *See also* Prepared Testimony of NTSB Chairman James Hall Before the Senate Comm. on Commerce, Science, and Technology (Feb. 27, 1996).

[130] *Tri-Rail Trains Obey U.S. Slow-Speed Order,* Miami Herald, Feb. 23, 1996, at p. 2 BR.

[131] 49 C.F.R. pt., 209 App. A (1999).

[132] *See, e.g.,* 49 C.F.R. pt. 238, App. A, Schedule of Civil Penalties (1999).

[133] 49 C.F.R. pt. 209, App. A (1999).

[134] *Id*.

[135] The FRA has jurisdiction only over "willful" violations. Neither negligence nor strict liability concepts are relevant to the determination. The FRA describes a willful violation as

> an intentional, voluntary act committed either with knowledge of the relevant law or reckless disregard for whether the act violated the requirements of the law. Accordingly, neither a showing of evil purpose…nor actual knowledge of the law is necessary to prove a willful violation, but a level of culpability higher than negligence must be demonstrated.

49 C.F.R. pt. 209, App. A (1999), citing Trans World Airlines v. Thurston, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985), Brock v. Morelly Bros. Constr., Inc., 809 F.2d 161 (1st Cir. 1987), and Donovan v. Williams Enters., Inc., 744 F.2d 170 (D.C. Cir. 1984). Further, "A willful violation entails knowledge of the facts constituting the violation, but actual, subjective knowledge need not be demonstrated. It will suffice to show objectively what the alleged violator must have known of the facts based on reasonable inferences drawn from the circumstances." 49 C.F.R. pt. 209, App. A (1999). However, a subordinate is not deemed to have committed a safety violation under protest where his or her superior directly orders the action; in such circumstances, the supervisor may have committed the willful violation. *Id*.

[136] 49 C.F.R. pt. 209, App. A (1999).

the field inspector determines a civil penalty recommendation to the Office of Chief Counsel is warranted, he or she so informs the individual in writing. If the Office of Chief Counsel determines the case is meritorious, he or she will issue a civil demand letter informing the individual that discussion of any defenses or mitigating factors is encouraged, and that the individual may wish to obtain representation through an attorney and/or a labor representative. If a settlement cannot be reached, the FRA may issue a letter informing the individual it intends to ask the Attorney General to sue for the initially proposed amount, though in practice it rarely invokes the assistance of the Justice Department.[137] The FRA believes that indemnification of a civil penalty by a railroad or labor union would be inconsistent with the intent of Congress that the penalty have a deterrent effect on violations.[138]

The FRA takes the position that the statute does not require a formal, trial type administrative adjudication under Sections 556 and 557 of the APA. However, should a railroad or individual refuse to settle, they are entitled to a trial de novo in federal district court should the Attorney General sue to collect the civil penalty.[139]

### 8. Drug and Alcohol Testing

Drug and alcohol testing regulations[140] were promulgated by the FRA and FTA after evidence revealed that between 1975 and 1984, of 791 fatalities caused by rail employees, 37 (or 4.1 percent) resulted from accidents involving alcohol or drug abuse. The FRA concluded that this figure likely was low given underreporting by the railroad industry.[141]

Congress required that railroads conduct pre-employment, reasonable suspicion, random, and post-accident testing of all employees in safety-sensitive functions for the use of a controlled substance[142] and alcohol.[143] Under the DOT regulations, the employer must ensure that the following drugs are tested for: marijuana, cocaine, opiates, amphetamines, and phencyclidine.[144] Consumption of these drugs is strictly prohibited.[145] Congress also authorized promulgation of regulations permitting periodic recurring testing of rail employees conducting safety-sensitive functions. Employees must be disqualified or dismissed under DOT regulations if found to have used or been impaired by alcohol while on duty, or to have used a controlled substance except as allowed for medical purposes by law.[146] However, individual privacy is to be protected.[147] Privacy is discussed at length in the preamble to the drug and alcohol testing regulations. Rehabilitation programs must also be established.[148] DOT shall also promulgate guidelines establishing comprehensive standards for testing and laboratory procedures to be applied to controlled substances, as well as laboratory certification and de-certification standards.[149]

To the extent that an FTA recipient operates a railroad subject to the jurisdiction of the FRA, it must follow FRA drug and alcohol regulations[150] rather than the applicable FTA regulations[151] for its railroad operations.[152] Similarly, for those few FTA recipients operating marine vessels, the FTA and U.S. Coast Guard regulations[153] apply to such maritime operations. However, since the requirements for railroad employees[154] are substantially similar to those for transit employees, discussed in detail below, they are only succinctly summarized here.

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[137] *Id*. In practice, the Justice Department is unlikely to take on an FRA case unless the issue is provocative, such as an employer lying and threatening employees in a case involving falsification of hours of service, or discharging and punishing an employee for being honest on an accident report form. Most violations do not have this element of employer culpability. Hence, FRA tends to negotiate settlements without resort to litigation.

[138] *Id*. The FRA enjoys nonreviewable prosecutorial discretion whether to impose penalties for safety violations. *See* Railway Labor Executives Ass'n v. Dole, 760 F.2d 1021, 1024 (9th Cir. 1985).

[139] 49 C.F.R. pt. 209, App. A (1999).

[140] 49 C.F.R. pt. 219 (1999). Certain foreign railroads and small railroads are exempt from these regulations. *Id*. at pt. 219.3(c)

[141] Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 579 (9th Cir. 1988).

[142] A "controlled substance" is anything so designated under Section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 802 (2000), by the Secretary of Transportation.

[143] 49 U.S.C. § 20140(b)(1)(A) (2000).

[144] 49 C.F.R. § 655.21(b) (2001).

[145] 49 C.F.R. § 655.21(c) (2001).

[146] 49 U.S.C. § 20140(b)(1)(B) (2000). Sometimes employees claim they are using prescribed medication. *See, e.g.,* Bell v. Metropolitan Transit Auth. of Harris County, 1999 Tex. App. Lexis 4063 (Tex. App. 1999), Burka v. N.Y. City Transit Auth., 739 F. Supp. 814 (S.D. N.Y. 1990).

[147] 49 U.S.C. § 20140(c)(1) (2000). Results of tests and medical information must be kept confidential. 49 U.S.C. § 20140(c)(4) (2000).

[148] 49 U.S.C. § 20140(d) (2000).

[149] 49 U.S.C. § 20140(c)(2) (2000). All testing must be done under a "scientifically recognized method of testing capable of providing quantitative information about alcohol or a controlled substance." 49 U.S.C. § 20149(c)(4) (2000).

[150] 49 C.F.R. pts. 219 and 382 (1999), and 49 C.F.R. § 655.83 (1999).

[151] 49 C.F.R. pt. 655 (1999).

[152] 49 C.F.R. § 655.3(b) (1999).

[153] 33 C.F.R. §§ 95.040, 177.07 (1999), and 46 C.F.R. §§ 1.01-10, 4.05-10, 16.101, 16.107, 16.201, 16.203, 16.220, 122.206 (1999).

[154] *See* 49 U.S.C. § 20140 (2000). *See also* Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 802 (2000).

### 9. State Safety Oversight of Rail Fixed Guideway Public Systems

Prior to 1991, there were no federal laws or regulations governing the safety of local rail transit systems not subject to FRA safety jurisdiction. Congress addressed the issue in ISTEA. ISTEA required FTA to issue regulations requiring that states having rail fixed guideway mass transportation systems "not subject to regulation by the Federal Railroad Administration" establish a state safety oversight program.[155] FTA regulations went into effect in January 1997.[156] Within a little more than 3 years, 22 State Oversight Agencies were designated to implement these rules for 35 rail transit systems operating in 21 states and the District of Columbia. Since FTA requires all states with "New Starts" programs to be compliant, it is anticipated that most states will establish oversight programs.[157]

Under the DOT State Rail Safety Oversight regulations, states must play a major role in rail safety enforcement and investigation.[158] The regulations require states that had no rail oversight program to develop a program and submit it to FTA for approval. Prior to the promulgation of these regulations, there were several states in which rail systems operated with no rail safety oversight program; because the particular systems were not subject to FRA jurisdiction, no governmental entity was regulating the safety of these systems. FTA stepped in to require states to establish rail safety oversight programs that contained certain minimum components.

Where a state agency has been certified by DOT as authorized to enforce rail safety practices for equipment, facilities, and rolling stock within that state, it may enforce these requirements.[159] However, the statute provides that rail safety laws and regulations should be nationally uniform to the extent practicable. A state may adopt a more stringent rail safety law or regulation, but only if "(1) it is necessary to eliminate or reduce a local safety or security hazard, (2) it is not incompatible with a federal law, regulation or order, and (3) it does not unreasonably burden interstate commerce."[160]

The regulations define a "rail fixed guideway system" as any "light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley or automated guideway" that receives federal funding under the FTA's formula program for urbanized areas and is not regulated by the FRA.[161] States that have fixed rail mass transportation systems not regulated by the FRA are required to establish and implement a safety program plan that establishes safety requirements, lines of authority, levels of responsibility and accountability, and methods of documentation.[162] Those regulations[163]

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[155] 49 U.S.C. § 5330 (2000). The regulations appear at 49 C.F.R. pt. 659 (1999). 60 Fed. Reg. 248 (Dec. 27, 1995).

[156] 49 C.F.R. pt. 659 (1999).

[157] States with "New Starts" programs must have a functional Oversight Program in place in full compliance with 49 C.F.R. pt. 659 (1999). FEDERAL TRANSIT ADMIN., COMPLIANCE GUIDELINES FOR STATES WITH NEW STARTS PROJECTS 1, 4 (June 2000). The State Oversight Agency must require the transit agency to include safety in all planning, design, and construction of a New Starts system, in the form of a statement of safety standards that must be satisfied, including a clear and comprehensive list of criteria that must be incorporated into the design process. The transit agency should also be required to perform an appropriate hazard analysis in the planning, design, and construction phases. Based on implementation of these two requirements, the transit agency should be required to identify those elements critical to the safety of the new operation—processes whose recognition, control, performance, or tolerance is essential to the safe operation of the system. The transit agency must also develop a "safety certification plan" to ensure that elements critical to safety are properly designed and constructed. Finally, the State Oversight Agency should provide formal documentation certifying the safety of the New Starts system. *Id*. at 23–24.

[158] KENWORTHY, *supra* note 6 § 5.501.

[159] 49 U.S.C. § 20105 (2000).

[160] 49 U.S.C. § 20106 (2000).

[161] 49 C.F.R. § 659.5 (1999).

[162] 49 U.S.C. § 5330(c)(1) (2000). FTA regulations, "Rail Fixed Guideway Systems; State Safety Oversight," 49 C.F.R. pt. 659 (1999). The FTA's State Safety Oversight Program identifies eight distinct functions that must be performed:

1. Oversight Agency Designation and Authority. 49 C.F.R. § 659.21 (1999).

2. Oversight Agency Program Management. 49 C.F.R. §§ 659.23, 659.47, 659.31, and 659.45 (1999).

3. System Safety/Security Program Standard Preparation and Adoption and Rail Fixed Guideway System Safety/Security Program Plan Review and Approval Process. 49 C.F.R. §§ 659.31, 659.33 (1999).

4. Accident/Unacceptable Hazardous Conditions Investigations and Corrective Actions. 49 C.F.R. §§ 659.39, 659.41, and 659.43 (1999).

5. Three-Year Safety Reviews. 49 C.F.R. § 659.37 (1999).

6. Requiring and Reviewing RFGS Internal Safety Audit Process Reporting. 49 C.F.R. § 659.35 (1999).

7. Oversight Agency Certification and Reporting to FTA. 49 C.F.R. §§ 659.45, 659.49 (1999).

8. Hazard Management Process, 49 C.F.R. § 659.25.

FEDERAL TRANSIT ADMIN., *supra* note 157, at 5. The State Oversight Agency (SOA) must: (1) develop a System Safety Program Standard (SSPS); (2) require, review and approve, and monitor the implementation of the SSPS that complies with the Oversight Agency's Program Standard at each rail transit system; (3) require each rail transit system to report accidents and unacceptable hazardous conditions within a specified period of time to the SSA; (4) require the rail transit system to implement a corrective action plan; (5) conduct onsite visits at each rail transit system not less than every 3 years to perform a formal safety review; (6) require the rail transit system to conduct safety audits according to the Internal Safety Audit Process detailed in the APTA Manual (Checklist Number 9); and (7) report to FTA. *Id*. at 5–7.

In turn, the rail transit system must, at minimum: (1) develop an SSPP that complies with the SOA's Program Standard; (2) classify hazardous conditions according to the APTA Manual Hazard Resolution Matrix; (3) report any accident or unacceptable hazardous condition within the time frame es-

provide that they apply where FRA does not regulate.[164] In other words, the regulations cover rail operations that are not subject to FRA jurisdiction, but do not apply to portions of rail systems that are subject to FRA jurisdiction, so as to avoid duplicate coverage while ensuring that no rail fixed guideway systems slip through the cracks.

A state agency must be designated to review, approve, and monitor implementation of the plan; investigate hazardous conditions and accidents;[165] and require corrective action to eliminate those conditions.[166] The state rail safety oversight plan must be written, and on occasion, the local transit agency has penned the plan on behalf of the state so as to avoid risking FTA funds. Periodic audits and safety reviews, as well as reporting and investigations, are required.[167]

DOT may investigate a condition in FTA-financed rail equipment, facilities, or operations that it believes may cause a serious hazard of death or injury. At least every 3 years it must conduct an on-site safety review of the transit agency's implementation of its system safety program plan.[168] If it determines that such a hazard is present, the DOT requires the local transit provider to submit a plan to correct it. The DOT also may withhold further financial assistance until such plan is approved and implemented.[169]

If such a rail transit system operates in more than a single state, the affected states may designate an agency (other than the mass transportation authority) to provide uniform safety standards and enforcement.[170] For example, Maryland, Virginia, and the District of Columbia have established a joint state oversight agency to regulate their interstate rail fixed guideway systems.[171] The oversight agency must certify annually to FTA that it has complied with FTA's regulations.[172] Failure to comply with these requirements authorizes the DOT to withhold up to 5 percent of the state's fiscal year urbanized funds until compliance is achieved.[173]

Some states have delegated jurisdiction to regulate carrier safety and other devices or appliances, including grade crossings and signaling, to the state Public Utilities Commission (PUC) (known in a few states as the Railroad Commission).[174] Some states vest jurisdiction over employee safety in a state labor agency.[175]

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tablished by the SOA; (4) obtain the SOA's approval of a Corrective Action Plan and implement the Plan so as to minimize, control, correct, or eliminate the unacceptable hazardous condition; (5) conduct safety audits that comply with the Internal Safety Audit Process specified in Checklist Number 9 of the APTA Manual; (6) draft and submit to the SOA a report summarizing the results of the safety audit process. *Id*. at 7.

[163] 49 C.F.R. pt. 659.3 (1999).

[164] FTA Rail Safety Oversight Statute—49 U.S.C. § 5331; FTA regulations, "Rail Fixed Guideway Systems; State Safety Oversight," 49 C.F.R. pt. 659; 67 Fed. Reg. 44091 (July 1, 2002).

[165] According to FTA, "The oversight agency is not only responsible for developing its own investigatory procedures, it is responsible for determining how it will investigate. An oversight agency may contract for this service…." 60 Fed. Reg. 67034 (Dec. 27, 1995).

[166] 49 U.S.C. § 5330(c)(2) (2000); 49 C.F.R. § 659.21 (1999). A state must oversee the safety of rail fixed guideway systems through a designated oversight agency. 49 U.S.C. § 5330( )( ) (2000); 49 C.F.R. § 659.1 (1999); 60 Fed. Reg. 67046 (Dec. 27, 1995). The oversight agency must develop a system safety program standard that complies with the American Public Transit Association's *Manual for the Development of Rail Transit System Safety Program Plans* and requires the transit agency to address the personal security of its passengers and employees. 49 C.F.R. § 659.31 (1999). As an example of such state rail fixed guideway safety oversight programs, see the Colorado statutory scheme at C.R.S. § 40-18-101 *et seq*. (2000), or Florida's at FLA. STAT. § 341.061 *et seq*. (2000), or Oregon's at ORE. REV. STAT. §§ 479.950, 824.045 (1999), or Ohio's at OHIO REV. CODE ANN. § 5501.55 (Anderson 2001). The state of Washington requires that each regional transit authority that owns or operates a rail fixed guideway system to submit a system safety and security program plan to the state DOT, to implement and comply with it, and to notify the state DOT of an accident, unacceptable hazardous condition, or security breach within 24 hours and investigate them. WASH. REV. CODE § 81.112.180 (2001). In Texas, the state DOT oversees safety and security of rail fixed guideway mass transportation systems, and requires it to establish, implement, and oversee a safety program that includes transit agency oversight, accident investigation, data collection, and reporting. The transit agency must

> (1) develop a system safety plan that complies with the department's safety program plan standards; (2) conduct an annual internal safety audit and submit the audit report to the department; (3) report accidents and unacceptable hazardous conditions to the department in writing or by electronic means acceptable to the department; (4) minimize, control, correct or eliminate any investigated unacceptable hazardous condition as required by the department; and (5) provide all necessary assistance to allow the department to conduct appropriate on-site investigations of accidents and unacceptable hazardous conditions.
>
> TEX. TRANSP. CODE § 455.005 (2000).

[167] The transit agency must submit an annual safety audit. 49 C.F.R. § 659.35 (1999). It must also report accidents and unacceptable hazardous conditions to the oversight agency. 49 C.F.R. § 659.39 (1999). The oversight agency must investigate accidents and unacceptable hazardous conditions unless the National Transportation Safety Board has done so, 49 C.F.R. § 659.41(b) (1999), and require that the transit agency "minimize, control, correct or eliminate" the hazardous condition. 49 C.F.R. § 659.43 (1999). The transit agency must prepare an annual transit safety audit report, which is submitted to the state oversight agency. 49 C.F.R. § 659.35 (1999). The oversight agency must perform a safety review of the transit agency at least every 3 years. 49 C.F.R. § 659.37 (1999).

[168] 49 C.F.R. § 659.37 (1999).

[169] 49 U.S.C. § 5329(a) (2000).

[170] 49 U.S.C. § 5330(d) (2000).

[171] D.C. Code § 1-2445.1 *et seq*. (2000).

[172] 49 C.F.R. § 659.49 (1999).

[173] 49 U.S.C. § 5330(b) (2000); 49 C.F.R. § 659.7 (1999).

[174] *See, e.g.,* CAL. PUB. UTIL. CODE § 768 (2001):

> The commission may prescribe, among other things, the installation, use, maintenance, and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or

## B. FTA SAFETY INITIATIVE

The top priority of DOT and FTA is to "promote the public health and safety by working toward the elimination of transportation-related deaths, injuries, and property damage."[176] In May of 2000, the FTA published its first Safety Action Plan.[177] The plan included a number of initiatives, including: (1) enhancing its data collection and analysis processes;[178] (2) developing safety program activities relating to human factors;[179] (3) formulating transit system design standards;[180] (4) revising the State Safety Oversight rule;[181] (5) working with the industry to improve bus safety;[182] and (6) promoting innovative solutions to safe transportation to reduce deaths, injuries, and property damage.[183] Though not promulgated in the form of binding rules, they do provide important guidance to transit providers.

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other systems of signaling. The commission may establish uniform or other standards of construction and equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand.

*See also* CAL. PUB. UTIL. CODE § 778 (2001): "The commission shall adopt rules and regulations…relating to safety appliances and procedures for rail transit services operated at grade and in vehicular traffic."

[175] For example, Maryland vests "exclusive jurisdiction involving all areas of railroad [labor] safety and health" in its Labor Commissioner. MD. CODE ANN. LABOR & EMPLOYMENT § 5.5-104 (2001). California vests jurisdiction over the "occupational safety and health of employees of rail rapid transit systems, electric interurban railroads, or street railroads" in the California Division of Industrial Safety. CAL. LAB. CODE § 6800 (2001). *See* San Francisco Bay Area Rapid Transit District v. Division of Occupational Safety & Health, 111 Cal. App. 3d 362, 168 Cal. Rptr. 489 (1980)

[176] FEDERAL TRANSIT ADMIN., HIGHLIGHTS AND NEW DIRECTIONS: FTA'S ROLE IN SAFETY (2000).

[177] See http://www.fta.dot.gov.

[178] This included recommending changes to the National Transit Database facilitating collection of accident and incident causal data, and improving the Safety Management Information Statistics and Drug and Alcohol Management Information System databases.

[179] FTA delivered a series of Fatigue Awareness Seminars at transit agencies, sponsored a Fatigue Awareness Symposium and four Substance Abuse Seminars, and issued a best practices manual on implementation of the drug and alcohol testing programs. See http://www.fta.dot.gov.

[180] FTA published *Compliance Guidelines for States with New Starts Projects* (June 2000), and *Hazard Analysis Guidelines for Transit Projects* (Jan. 2000). FTA also coordinated the development of standardized light rail transit grade crossing signage with FHWA, and developed a Joint Policy on Shared Use Track with FRA.

[181] 69 C.F.R. (2001).

[182] FTA offered alternatives fuels bus safety training courses, and facilitated the development of bus safety courses.

[183] FTA has disseminated State Safety Oversight Program best practices, sponsored courses related to transit safety and security, and partnered with the industry to sponsor education and research. FEDERAL TRANSIT ADMIN., *supra* note 176.

## C. DRUG AND ALCOHOL ABUSE AND MISUSE

### 1. Introduction

FTA recipients must establish an anti-drug program and test employees performing safety-sensitive functions for misuse of alcohol or controlled substances. Employees who test positively must be removed from their safety-sensitive positions.

In *Amalgamated Transit Union v. Skinner*,[184] the D.C. Circuit held that DOT lacked statutory authority to mandate uniform national safety standards on local transit authorities by regulation.[185] The court read the statute and its legislative history to command case-by-case development of local solutions to safety hazards, even if the problems were experienced in a number of transit systems. The court said, "It was not designed to proceed via national, impersonal rulemaking procedures which produced a federally-mandated solution that might or might not be responsive to concerns at the local level."[186] The Court concluded:

> Congress has chosen not to give [FTA] direct regulatory authority over urban mass transit safety to the extent that would justify imposing a mandatory drug testing program on the employees of state, local, and private operating authorities. We hold accordingly that [FTA] exceeded its statutory authority over safety matters by imposing through rulemaking uniform, national requirements on local transit authorities….[187]

As a result of that decision, Congress passed the Omnibus Transportation Employee Testing Act of 1991 [Testing Act].[188] The Testing Act mandated that FTA grant[189] recipients establish a multifaceted anti-drug and alcohol misuse testing, education, and awareness program. The act requires that FTA recipients test employees in safety-sensitive positions for misuse of alcohol or controlled substances (defined by DOT to be marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP)), as a condition of receiving FTA funds.[190] The primary objective of federal drug and alcohol testing statutes and regulations is to prevent, through detection and deterrence, alcohol and controlled substance users from performing safety-sensitive functions so as to avoid personal injury and property damage[191]—for safety is a paramount public interest in transportation. The DOT initially promul-

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[184] 894 F.2d 1362 (D.C. Cir. 1990).

[185] Amalgamated Transit Union v. Skinner, 894 F.2d 1362 (D.C. Cir. 1990).

[186] 894 F.2d at 1369.

[187] 894 F.2d at 1372.

[188] Pub. L. No. 102-143, tit. V, 105 Stat. 952 (1991).

[189] These requirements apply to recipients of funds under 49 U.S.C. §§ 5307, 5309, and 5311 (2000).

[190] *See generally* Jill Dorancy-Williams, *The Difference Between Mine and Thine: The Constitutionality of Public Employee Drug Testing,* 28 N.M. L. REV. 451 (1998).

[191] 61 Fed. Reg. 9969, 9970 (Mar. 12, 1996).

gated separate regulations for drug abuse[192] and alcohol misuse, [193] and in 2001, consolidated rules for both in a single set of regulations.[194] Recognizing that the regulatory matrix here is complex, FTA has mercifully taken to publishing its letter-opinions in this area on its Web site,[195] and several are summarized here. Many have also been incorporated into its regulations.

### 2. Drug Abuse and Alcohol Misuse Statutes and Regulations

The Testing Act[196] required the Secretary of Transportation to promulgate regulations for the testing of employees for drugs and alcohol in four sectors of the transportation industry. The four affected DOT administrations are the Federal Motor Carrier Safety Administration (FMCSA) (with jurisdiction over the trucking industry), the FAA (airlines), the FRA (railroads),[197] and the FTA (transit).[198] Another DOT administration, the Research and Special Programs Administration (RSPA), also issued regulations regarding drug and alcohol testing of employees in the pipeline industry, even though the Act did not so require.[199] As noted above, in *Skinner,*[200] UMTA was sued as to its initial drug and alcohol testing regulations, and the D.C. Circuit ruled that UMTA had no legislative authority to promulgate the regulations. The Testing Act was the result, approximately 2 years later.

The Testing Act required the Secretary of Transportation to develop a program that directs recipients of FTA funds[201] to conduct random drug and alcohol testing of "mass transportation employees responsible for safety-sensitive functions."[202] Under FTA's regulations, a "covered employee" is one who performs or will perform a safety-sensitive function.[203] The regulations define a "safety-sensitive function" as: (1) operating a revenue service vehicle (whether or not it is in revenue service); (2) operating a nonrevenue service vehicle when required to be operated by a driver holding a Commercial Driver's License; (3) controlling the dispatch or movement of a revenue service vehicle; (4) maintaining a revenue service vehicle or equipment used in maintenance thereof (including repairs, rebuilding, and overhaul of such vehicles);[204] or (5) carrying a firearm for purposes of security.[205] The employer must decide if the employee is performing a safety-sensitive function, keeping in mind that the decision should be made based on the type of work performed, rather than the job title.[206]

Recipients of federal aid for mass transit projects must abide by the requirements of the Testing Act and the regulations promulgated by FTA. Failure to do so jeopardizes a recipient's eligibility for federal financial assistance.[207] The regulations provide, "A recipient will be ineligible for further FTA financial assistance if the recipient fails to establish and implement an anti-drug and alcohol misuse program in accordance with this part."[208] If a recipient has a *program*, it is eligible for federal financial assistance; if it does not have a *program*, it is ineligible. On the other hand, violation of the individual regulations (e.g., failure to report, failure to have proper testing procedures, failure to conduct a sufficient number of random drug tests, failure to test certain employees performing safety-sensitive functions) does not make a recipient ineligible for all federal financial assistance; rather, FTA's practice is to inform the recipient that its program is deficient and to instruct the recipient to correct the deficiencies. Failure to do so or to correct all of the deficiencies could result in the loss of a portion of federal financial assistance. As a practical matter, (i) FTA and recipients alike go to extraordinary lengths to avoid the loss of FTA financial

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[192] 49 C.F.R. pt. 653 (1999).

[193] 49 C.F.R. pt. 654 (1999).

[194] 49 C.F.R. pt. 655 (2000).

[195] www.fta.dot.gov/library/legal/dral. FTA should be encouraged to publish its letter-opinions in all the areas in which it has authority.

[196] Pub. L. No. 102-143, tit. V, 105 Stat. 952 (1991)

[197] See discussion above.

[198] U.S. DOT regulations, "Drug-Free Workplace Requirements (Grants)," 49 C.F.R. pt. 29, subpt. F (1999), as modified by 41 U.S.C. §§ 702 *et seq.* (2000).

[199] American Trucking Assocs. v. Federal Highway Admin., 51 F.3d 405 n.l (4th Cir. 1995).

[200] 894 F.2d 1362 (D.C. Cir. 1990).

[201] These requirements apply to recipients of funds under 49 U.S.C. §§ 5307, 5309, and 5311 (2000); see 49 U.S.C. 5331(b)(A). Recipients may include transit operators, states, metropolitan planning organizations (MPOs), and third-party contractors that provide safety-sensitive functions. States and MPOs that manage transit providers, but do not themselves perform transit operations, must ensure that the transit provider provides a certificate of compliance. Taxi companies and maintenance contractors performing safety-sensitive functions that contract with FTA recipients are also subject to the drug and alcohol regulations. Volunteers fall under the regulations only if they hold a commercial driver's license to operate a vehicle, or when they receive remuneration in excess of the actual personal expenses they incur in performing volunteer service. 66 Fed. Reg. 41996 (Aug. 9, 2001). FEDERAL TRANSIT ADMIN., FTA DRUG AND ALCOHOL REGULATION UPDATES, Issue 19 1-6 (Summer 2001).

[202] 49 U.S.C. § 5331(b)(1)(A) (2000) [the Testing Act].

[203] 49 C.F.R. § 655.4 (2001). *See generally* DRUG & ALCOHOL TESTING—A SURVEY OF LABOR-MANAGEMENT RELATIONS (TCRP Legal Research Digest No. 16, 2001).

[204] This fourth category explicitly is inapplicable to employers funded under 49 U.S.C. §§ 5307 or 5309, are in an area of less than 200,000 in population, and contract out such services, or receive funding under 49 U.S.C. § 5311 and contract out such services. 49 C.F.R. § 655.4 (2001). Thus, maintenance contractors of FTA recipients serving areas of 200,000 or less in population are exempt from these regulations. FEDERAL TRANSIT ADMIN., *supra* note 201, at 4.

[205] 49 C.F.R. § 655.4 (2001).

[206] FEDERAL TRANSIT ADMIN., *supra* note 201, at 3.

[207] *See* 49 U.S.C. § 5331(g) (2000).

[208] 49 C.F.R. § 655.83(c) (2001).

assistance, (ii) FTA invokes the loss of federal financial assistance only after repeated warnings and as a last resort, and (iii) recipients are very careful to never let the situation get to the point where federal financial assistance will be lost (especially when the competition for federal discretionary funds is so intense).

### 3. Applicability of the Drug and Alcohol Regulations

FTA's drug and alcohol regulations apply to any entity that receives FTA funding under Sections 5307, 5309, or 5311 of Title 49 of the United States Code (urbanized area formula, capital funding, and nonurbanized area programs, respectively). This may include transit agencies, subrecipients, operators and contractors of transit agencies (such as taxi companies), states, and MPOs.[209] The issue is whether the entity receives such funding, not whether FTA operating or capital funds were used to acquire or operate a particular vehicle or facility. If the entity receives such funding, then all its safety-sensitive employees are subject to these regulations, whether or not federal funds were spent on the particular vehicles or facilities in which they work.[210] In making a grant, the federal government acquires an interest in the entire project, and not just those portions directly funded by the grant.[211] With respect to vehicles for which FTA funds were used in the acquisition or purchase, the rules apply to recipients throughout the useful life of such equipment.[212] If the original recipient transfers the vehicle to another recipient with FTA approval, the drug and alcohol testing requirements pass to the second recipient and the first recipient is relieved of the obligation (to the extent that the obligation arises from the transferred vehicle).

The regulations apply to any employee performing a safety-sensitive function within the coverage of the regulations, regardless of the source of funding.[213] However, the regulations apply only to employees performing safety-sensitive functions. A "safety-sensitive function" includes any of the following (as noted above, the first five are specified in the FTA's regulations; the remaining are from FTA opinion letters interpreting the regulations):

- Operating a revenue service vehicle, even when not in revenue service;
- Operating a nonrevenue service vehicle, when required to be operated by an individual holding a Commercial Driver's License;
- Controlling the dispatch or movement of a revenue service vehicle;
- Workers involved in ongoing daily, or on a routine basis, maintenance (including repairing, overhauling, or rebuilding) of revenue service vehicles or equipment (including engine and parts rebuilding and overhaul);[214]
- Employees who carry a firearm for security purposes;[215]
- Maintenance contractors that rebuild and return components to a grantee;[216]
- Contractors or direct employees engaged in the maintenance, overhauling, and rebuilding of revenue service engines, parts, vehicles, and equipment (e.g., engine blocks, crankshafts, hydraulic cylinders, pumps, and hydraulic lines);[217]
- Contractors that performs overhaul/rebuilding work on a regular, although infrequent, basis, irrespective of whether there is a long-term contract between the contractor and the grantee;[218]
- Employees of a contractor who replaced employees of a grantee who performed "safety-sensitive" functions;[219]

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[209] As a "recipient" defined in 49 C.F.R. § 655.4 (2001); 66 Fed. Reg. 41996 (Aug. 9, 2001).

[210] Letter from FTA Chief Counsel Patrick Reilly to Puerto Rico Department of Transportation and Public Works Assistant Secretary Freya Feria (Nov. 9, 1999). Http://www.fta.dot.gov/library/legal/dral/99toc.htm.

[211] Letter from FTA Chief Counsel Patrick Reilly to San Francisco Bay Area Rapid Transit District Attorney Marco Gomez (Aug. 20, 1999). Http://www.fta.dot.gov/library/legal/dral/99toc.htm.

[212] Letter from FTA Chief Counsel Patrick Reilly to San Francisco Deputy City Attorney Robin Reitzes (Feb. 5, 1999). Http://www.fta.dot.gov/library/legal/dral/99toc.htm.

[213] Letter from FTA Chief Counsel Patrick Reilly to San Francisco Bay Area Rapid Transit District Attorney Marco Gomez (Aug. 20, 1999). Http://www.fta.dot.gov/library/legal/dral/99toc.htm.

[214] 64 Fed. Reg. 425 (Jan. 5, 1999). 49 C.F.R. § 655.4 (2001). An exception exists if the recipient receives funding under 49 U.S.C. §§ 5307 or 5309 (2000), is in an area of less than 200,000 in population, and contracts out such services, or receives funding under 49 U.S.C. § 5311 (2000), and contracts out such service. 49 C.F.R. § 655.4 (2001). Under such circumstances, one is deemed not to be maintaining revenue service vehicle or equipment. *Id.*

[215] 49 C.F.R. § 655.4 (2001).

[216] Letter from FTA Chief Counsel Patrick Reilly to Oregon Tri-County Metropolitan Transportation Manager Harry Saporta (Aug. 23, 1999). Http://www.fta.dot.gov/library/legal/dral/sapa99.htm.

[217] Letter from FTA Chief Counsel Patrick Reilly to Oregon Tri-County Metropolitan Transportation Manager Harry Saporta (Aug. 23, 1999); Letter from FTA Chief Counsel Patrick Reilly to San Francisco Bay Area Rapid Transit District Associate General Counsel Andrea Ravas (Apr. 14, 2000); Letter from FTA Chief Counsel Patrick Reilly to Tom Campbell (Apr. 14, 2000). Http://www.fta.dot.gov/library/legal/dral/99toc.htm.

[218] Letter from FTA Chief Counsel Patrick Reilly to St. Joseph Transit Manager John Nardimi (Feb. 8, 1999). "If the grantee always goes to the same contractor for overhaul/rebuilding work, and the contractor, based on its past relationship with the grantee, reasonably expects to perform the grantee's overhaul/rebuilding work, the rule applies, even absent a written contract." *Id*. www.fta.dot.gov/library/legal/dral/nardmi99.htm.

[219] Letter from FTA Chief Counsel Patrick Reilly to Transport Workers Union Local 100 Director Thomas Cassano (Mar. 25, 1999). Http://www.fta.dot.gov/library/legal/dral/cass99.htm.

• A private operator (e.g., paratransit broker) and its subcontractors who provide service under an agreement with an FTA recipient;[220] and

• Security guards, tow truck operators, and maintenance contractors who perform safety-sensitive functions, regardless of whether they are paid with federal funds.[221]

The following are *not* considered employees performing safety-sensitive functions:

• Maintenance contractors performing nonsafety critical component repairs (e.g., farebox maintenance, video electronics repair, destination sign repair);[222]

• Maintenance subcontractors;[223]

• An employee who does not otherwise perform a safety-sensitive function (e.g., car servicer or rail janitor) who incidentally controls the movement of a revenue service vehicle, or for whom a vehicle operator stops to let them pass, or who has potential exposure to a high-voltage third rail;[224]

• Local maintenance personnel who work for taxicab companies whose primary purpose is not public transit service, but who incidentally provide public transit service;[225] and

• Contractors that provide overhaul or rebuilding work on an ad hoc or one-time basis, without a long-term contract with the grantee.[226]

### 4. Anti-Drug and Anti-Alcohol Certifications

The Drug-Free Workplace Act of 1988 (DFWA),[227] and its implementing regulations require that an applicant for FTA funding agree that it will provide a drug-free workplace.[228] In accordance with the DFWA, DOT requires that a grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace by:

1. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;[229]

2. Establishing an ongoing drug-free awareness program to inform employees about (a) the dangers of drug abuse in the workplace, (b) any available drug counseling, rehabilitation, and employee assistance programs, (c) the penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

3. Requiring each employee to be engaged in the performance of the grant to be given a copy of a statement published in No. 1 above; and

4. Notifying employees that as a condition of employment under the grant, the employee will (a) abide by terms of the statement, and (b) notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than 5 days after such conviction.[230]

Upon receipt of notice of the criminal drug statute violation, the grantee is further required to "take appropriate personal action" against the employee, which may include (1) terminating the employee or (2) requiring the employee to participate in a drug abuse assistance or rehabilitation program.[231] The applicant's

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[220] Letter from FTA Chief Counsel Patrick Reilly to San Francisco Deputy City Attorney Robin Reitzes (Feb. 5, 1999). See http://www.fta.dot.gov/library/legal/dral/reitzes99htm.

[221] *Id*.

[222] Letter from FTA Chief Counsel Patrick Reilly to Oregon Tri-County Metropolitan Transportation Manager Harry Saporta (Aug. 23, 1999). www.fta.dot.gov/library/legal/dral/sapa99.htm.

[223] Letter from FTA Chief Counsel Patrick Reilly to Oregon Tri-County Metropolitan Transportation Manager Harry Saporta (Aug. 23, 1999). www.fta.dot.gov/library/legal/dral/sapa99.htm. However, grantees may not subcontract out maintenance work merely to avoid complying with the rules. *Id*. Letter from FTA Chief Counsel Patrick Reilly to Tom Campbell (Apr. 14, 2000).

[224] Letter from FTA Chief Counsel Patrick Reilly to Chicago Transit Authority Manager Cary Morgen (Aug. 9, 1999). Http://www.fta.dot.gov/library/dral/mor99.htm.

[225] Letter from FTA Chief Counsel Patrick Reilly to Oregon Tri-County Metropolitan Transportation Manager Harry Saporta (June 17, 1999). www.fta.dot.gov/library/legal/dral/sapa99.htm.

[226] Letter from FTA Chief Counsel Patrick Reilly to St. Joseph Transit Manager John Nardimi (Feb. 8, 1999). Transit attorneys would be well advised to build a notebook on various topics with opinion letters. *See, e.g.,* www.fta.dot.gov/library/legal/dral/nardmi99.htm.

[227] Drug-Free Workplace Act of 1968, as amended, 41 U.S.C. § 702 *et seq.* (2000).

[228] "Drug-Free Workplace Requirements (Grants)," 49 C.F.R. pt. 29, subpt. F (1999), as modified by 41 U.S.C. § 702 *et seq.* (2000).; Drug-Free Workplace Act of 1968, as amended, 41 U.S.C. § 702 *et seq.* (2000) and OMB's subpart to its government-wide debarment and suspension rule. 49 C.F.R. § 29.600(a)(1) (2001). Requirements for the drug-free workplace certification for grantees other than individuals are found at 49 C.F.R. pt. 29, App. C. FTA notes that the provisions of the DFWA are separate from and in addition to the FTA Drug and Alcohol Testing Program. FTA Grants Management Workbook § 20 (2001).

[229] Minutes or resolutions of policy boards can show the adoption of a drug-free workplace policy. A copy of the written policy, memoranda, notifications on bulletin boards, employee handbooks, and letters sent to employees are all potential sources of information showing a grantee has notified employees. Some employers have employees sign statements that they have received such notification. FTA Grants Management Workbook § 20 (2001).

[230] 49 C.F.R. pt. 29, App. C (2001).

[231] *Id*.

When a grantee receives notice of an employee's criminal conviction for a drug statute violation that occurred in the workplace, it has ten calendar days within which to report the conviction to the appropriate FTA regional office. Grantee must provide the individual's position title and the grants in which the individual was involved. Further, the grantee must take one of the following actions within 30 days of receiving notice of such a conviction: (1) take appropriate personnel action up to and including termination, consistent with the Rehabilitation Act of 1973, as amended; or (2) require the employee to participate satisfacto-

"agreement" is further required by the annual FTA MA, and for recurring grantees, as part of the Annual Certifications and Assurances submitted by the grantee when it files its first grant application within a fiscal year.

Grantees must certify that, as a condition of the grant, they "will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant."[232] If such a grantee is convicted of a criminal drug offense, he or she must report the conviction in writing within 10 days of the conviction to every grant officer.[233] DOT regulations provide that if it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the DFWA, the agency may take action authorized by the Act or utilize any other remedy available to the federal government.[234] Note that the DFWA requirement applies to all employees of the grantee, but does not apply to contractors or the grantee, while the FTA Drug and Alcohol Testing Policy applies only to "safety sensitive" employees and contractors.[235]

An applicant for FTA funds must certify that it has established and implemented an anti-drug program and has conducted employee training.[236] If the applicant for FTA funding has employees regulated by the FRA, it must also certify that it has an anti-drug program and alcohol misuse program complying with FRA regulations.[237] An applicant for FTA funds also must certify that it has established and implemented an alcohol misuse prevention program.[238] States must also certify compliance on behalf of their transit fund subrecipients, as must MPOs.[239] Failure to establish a program of alcohol and controlled substances testing renders an applicant ineligible to receive further FTA grants.[240]

Drug and alcohol policies drafted by a local transit provider may be submitted to the FTA for a determination of adequacy. If a DOT regulation requires interpretation in a specific context, the FTA Administrator or Chief Counsel may provide a binding agency decision.[241]

### 5. Alcohol and Controlled Substances Testing

The Testing Act required that the DOT promulgate regulations requiring FTA-funded mass transportation providers "to conduct preemployment, reasonable suspicion, random, and post-accident testing of mass transportation employees responsible for safety-sensitive functions" for the use of a controlled substance or alcohol in violation of law.[242] The Act and its implementing regulations require that each covered employer[243] establish an anti-drug program, which includes: (1) a statement describing the employer's policy on prohibited drug use and alcohol misuse in the workplace, including the consequences associated with prohibited drug use or alcohol misuse; (2) an education and training program; (3) a testing program; and (4) procedures for referring an employee who has a positive drug test to a Substance Abuse Professional (SAP).[244] The employer's anti-drug and alcohol misuse policy statement available to safety-sensitive employees must contain: (1) the identity of the person available to answer questions about it; (2) the categories of employees subject to it; (3) the circumstances under which an employee will be tested; (4) the procedures used for drug and alcohol testing;[245] (5) the requirement that employees submit to testing; (6) a description of employee behavior that constitutes a refusal to test; (7) the consequences of a verified positive drug or alcohol test (of 0.04 or greater) or a refusal to submit to a test; (8) the consequences for an alcohol test of between 0.02 and 0.04; and (9) any additional requirements imposed by the employer not inconsistent with the FTA rules.[246] Its employees must be required to: (a) abide by the terms of the statement, and (b) notify the employer of any conviction for a violation of a criminal drug statute.[247] An employer may choose to

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rily in a drug abuse assistance or rehabilitation program approved for such purposes.

FTA Grants Management Workbook § 20 (2001).

[232] 49 C.F.R. pt. 29, App. C, Alternate II Certif. § (a) (2001).

[233] *Id*. at Alternate Certif. II § (b).

[234] *Id*. at § 2.

[235] FTA Grants Management Workbook § 20 (2001). See http:/www.fta.dot.gov/grant_programs.

[236] 49 C.F.R. § 655.14(b) (2001).

[237] "Control of Alcohol and Drug Use," 49 C.F.R. § 655.82. 49 C.F.R. § 655.3 (2001).

[238] "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations," 49 C.F.R. pt. 655 (2001).

[239] 49 C.F.R. § 655.73 (2001); 66 Fed. Reg. 41996 (Aug. 9, 2001).

[240] 49 U.S.C. § 5331(g) (2000). 49 C.F.R. § 655.82(c) (1999).

[241] Letter from FTA Chief Counsel Patrick Reilly to Arkansas State Highway and Transportation Department Administrator Jim Gilbert (Nov. 24, 1999). Http://www.fta.dot.gov/library/legal/dral/99toc.htm.

[242] 49 U.S.C. § 5331(b)(1)(A) (2000).

[243] Employers that receive FTA assistance, and their contractors, are subject to these regulations. 66 Fed. Reg. 41996 (Aug. 9, 2001).

[244] 49 C.F.R. § 655.12 (2001). See 49 U.S.C. § 5331 (2000); 59 Fed. Reg 7589 (Feb. 15, 1994); 66 Fed. Reg. 41996 (Aug. 9, 2001).

[245] Prior to 2001, employees had to be provided with written notice of the employer's anti-drug policies and procedures. With the new rules, employers need only specify that their procedures will comply with 49 C.F.R. pt. 40, instead of providing a detailed elaboration of the testing procedures to be used. FEDERAL TRANSIT ADMIN., FTA DRUG AND ALCOHOL REGULATION UPDATES (Issue No. 19, Summer 2001).

[246] 49 C.F.R. § 655.15(j), "May not impose requirements that are inconsistent with, contrary to, or frustrate the[se] provisions." (2001).

[247] Drug-Free Workplace Requirements (Grants), 49 C.F.R. pt. 29, subpt. F (1999), as modified by 41 U.S.C. § 702 (2000). This requirement extends to all employees working on any activity under the grant, and not merely those whose positions have been wholly or partially federally funded. An employee who pleads *nolo contendere* must also report such conviction to

impose additional requirements not mandated by the FTA, such as recurring training or employee rights provisions, though it should indicate that these are the employer's and not the FTA's requirements.[248] Neither the Testing Act nor the regulations require that the employer's assessment program pay for the cost of an employee's treatment or rehabilitation.[249]

The FTA published its initial rules on prohibited drug[250] and alcohol[251] abuse in 1994.[252] In August 2001, FTA promulgated a unified rule for drug and alcohol testing.[253] DOT's procedural rules closely track the *Mandatory Guidelines for Federal Workplace Drug Testing Programs* issued by the U.S. Department of Health and Human Services.[254] Though local transit providers enjoy substantial discretion in the administration of these rules, all alcohol and drug testing must comport with those procedures.[255]

The anti-drug and the alcohol misuse programs must make available the services of an SAP.[256] An SAP must be knowledgeable and remain up-to-date on contemporary DOT Substance Abuse Professional Guidelines.[257] The rules require that any employee who has tested positively for drugs or alcohol, or who has refused to submit to such a test, be evaluated by an SAP, regardless of whether the employer elects to terminate the employee. The SAP is responsible for evaluation, referral, and treatment of employees identified through breath and urinalysis testing as positive for alcohol and/or a controlled substance, or who refuse to be so tested. The fundamental responsibility of the SAP is to provide a face-to-face assessment and clinical evaluation of an employee who tests positive for alcohol or drugs to determine whether he or she needs assistance resolving problems with alcohol and/or drug abuse.[258] If the SAP determines that the employee who has refused to submit to, or tested positive in, a drug or alcohol test is in need of assistance in resolving drug abuse problems, the SAP shall recommend a course of action to the employee that the employee must follow before returning to the safety-sensitive position.[259] The SAP shall determine whether the employee has properly followed the SAP's recommendations, and determine the frequency and duration of unannounced follow-up testing.[260] The employer has no obligation under the Act or the regulations to pay for treatment or rehabilitation of a current abuser of drugs or alcohol.[261]

Five types of employee tests are required: (1) pre-employment (including transfer of an employee to a safety-sensitive position); (2) reasonable suspicion; (3) post-accident; (4) random; and (5) return to duty/follow-up (periodic).[262] Drug testing is required in all five situations, while alcohol testing is required in all five except pre-employment.[263]

• **Pre-Employment Testing.** Before 2001, an employer was required to administer a drug test and receive a negative result before hiring a potential employee.[264] Today, an employer may hire an employee before administering such a test, but may not allow the employee to perform a safety-sensitive function unless the applicant takes a drug test with a verified negative result.[265] Prior to the first time an employee performs a safety-sensitive function, the employer must ensure that the employee is tested and has a negative result for marijuana, cocaine, opiates, amphetamines, or PCP, and alcohol.[266] For alcohol, pre-employment testing is discretionary.[267] If the employer chooses to administer an alcohol test, the individual must have an alcohol

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the employer. Letter from FTA Chief Counsel Patrick Reilly to San Francisco Bay Area Rapid Transit District attorney Marco Gomez (Aug. 20, 1999).
Http://www.fta.dot.gov/library/legal/dral/99toc.htm.

[248] The employer may also incorporate by reference 49 C.F.R. pt. 40 in its policy statements, or make it available for review by employees upon request. 66 Fed. Reg. 41996 (Aug. 9, 2001).

[249] 66 Fed. Reg. 41996 (Aug. 9, 2001).

[250] 49 C.F.R. pt. 653 (1999).

[251] 49 C.F.R. pt. 654 (1999).

[252] 49 C.F.R. pt. 655 (2001). Shortly thereafter, it published the *Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit,* which provides a comprehensive overview of the rules and a useful desk reference for any transit lawyer who deals with drug and alcohol testing program issues. See http://www.fta.dot.gov.

[253] 49 C.F.R. pt. 655 (2001).

[254] 49 C.F.R. pt. 40 (1999); 61 Fed. Reg. 18713 (Apr. 29, 1996); 65 Fed. Reg. 79462 (Dec. 19, 2000).

[255] 49 C.F.R. pt. 655 (2001). 65 Fed. Reg. 79462 (Dec. 19, 2000); 66 Fed. Reg. 41996 (Aug. 9, 2001).

[256] Originally, DOT defined a substance abuse professional (SAP) as a licensed or certified psychologist, social worker, or employee assistance professional, or an alcohol and drug abuse counselor certified by the National Association of Alcohol and Drug Abuse Counselors. It has since expanded the list of qualified SAPs. *See* 61 Fed. Reg. 9969 (Mar. 12, 1996); 49 C.F.R. pt. 382. §§ 199.101, 199.109, 199.243, 382.401, 655.52 (2004).

[257] 49 C.F.R. § 40.281(b) (2001).

[258] 61 Fed. Reg. 9969, 9970 (Mar. 12, 1996).

[259] Such assistance may include full or partial in-patient treatment, out-patient treatment, educational programs, and aftercare. 61 Fed. Reg. 9969, 9970 (Mar. 12, 1996).

[260] 49 C.F.R. pt. 40 (2004).

[261] 66 Fed. Reg. 41996, 41998 (Aug. 9, 2001).

[262] 66 Fed. Reg. 41996, 42000-42001 (Aug. 9, 2001).

[263] The rule requires that the DOT procedures in 49 C.F.R. pt. 40 (1999) be applied to safety-sensitive transit employees. 49 C.F.R. § 655.46 (2001). 66 Fed. Reg. 41996 (Aug. 9, 2001).

[264] 66 Fed. Reg. 41996 (Aug. 9, 2001).

[265] 49 C.F.R. § 655.41 (1999).

[266] 49 C.F.R. § 382.301, 382.305, 382.307, 655.42, 655.43 (2004). An individual who will perform a safety-sensitive function for two separate companies need submit to only one pre-employment test, provided that the results are sent to both companies. Letter from FTA Chief Counsel Patrick Reilly to Ohio Health Consortium representative Dwight Newell (May 5, 1999). Http://www.fta.dot.gov/library/legal/dral/99toc.htm.

[267] If an employer chooses to conduct a pre-employment alcohol test, it must follow the testing procedures in 49 C.F.R. pt. 40 (2001).

concentration level below 0.02 before he or she is allowed to perform a safety-sensitive function.[268] Where an employee has been away from work for more than 90 consecutive calendar days,[269] he or she must successfully pass a drug test before returning to a safety-sensitive function.[270]

• **Reasonable Suspicion Testing.** An employer shall conduct testing when it has a reasonable suspicion that the employee has used a prohibited drug, or is under the influence of alcohol. Reasonable suspicion shall be based on "specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors" of the employee, and made by a company official who has been trained in detecting the symptoms of drug abuse and alcohol misuse.[271] Follow-up testing is required where the employee has tested positive for drug use.

• **Post-Accident Testing.** The Testing Act provides that post-accident testing must occur whenever a human life is lost in a mass transportation accident,[272] and that post-accident testing also may be required by DOT whenever bodily injury, significant property damage, or other serious accident occurs involving mass transportation.[273] Under DOT regulations, as soon as practicable following an accident involving the loss of human life, the employer must test each surviving employee operating the mass transit vehicle at the time of the accident, and any other covered employee who could have contributed to the accident.[274] As soon as practicable following an accident not involving the loss of human life, the employer must test each employee operating the mass transit vehicle at the time of the accident, unless the employer determines that the covered employee's performance can be completely discounted as a contributing factor.[275] The regulations require that employers document the decision to test or not to test.[276] Where the employer is unable to perform a post-accident test within the required timeframe, it may use the testing results of post-accident law enforcement agencies when the personnel have independent authority for the tests and the employer is able to obtain the results consonant with local law.[277] Moreover, in the case of a fatality, the transit operator need not perform a post-accident test where one has been performed under the testing regulations of the FMCSA.[278]

• **Random Testing.** The principal purpose of testing employees randomly is deterrence.[279] The Testing Act provides that DOT "may prescribe regulations for conducting periodic recurring testing of mass transportation employees responsible for safety-sensitive functions" for the misuse of alcohol or a controlled substance in violation of law or government regulation.[280] The regulations require that the selection of such employees for random drug and alcohol testing shall be made by a scientifically valid method so as to ensure each employee has an equal chance of being tested each time tests are conducted.[281] Employees must be selected for tests in a nondiscriminatory and impartial method, so that no employee is harassed by being treated differently from another in similar circumstances.[282] The dates for conducting the random testing should be spread reasonably throughout the year,[283] though they should be performed at least quarterly.[284] Random testing for alcohol misuse is restricted to safety-sensitive performance, while random drug testing may be per-

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[268] 49 C.F.R. § 655.42(e) (2001). An employee may not be allowed to perform safety-sensitive functions if his alcohol level is 0.04 or greater. 49 C.F.R. § 655.31(b) (2001). If the employee tests between 0.02 and 0.04, he or she may not perform a safety-sensitive function until the employee's alcohol concentration drops below 0.02, and 8 hours have elapsed since administration of the test. 49 C.F.R. § 655.35 (2001). An employee's direct supervisor shall not serve as the breath alcohol technician for the performance of an alcohol test. 49 C.F.R. § 655.53 (2001). Neither shall the direct supervisor serve as the collection site person for the employee's drug test. *Id*. No alcohol may be consumed within 4 hours of performing a safety-sensitive function. 49 C.F.R. § 655.33 (2001).

[269] A test may not be administered for a leave of less than 90 days. FEDERAL TRANSIT ADMIN., *supra* note 201, at 3.

[270] 49 C.F.R. § 655.41(d) (2001); 66 Fed. Reg. 41996 (Aug. 9, 2001).

[271] 49 C.F.R. § 655.43(a)(b) (2001). Company officials other than supervisors may make a reasonable suspicion determination provided they have been trained in detecting the signs and symptoms of drug abuse and alcohol misuse. FEDERAL TRANSIT ADMIN., *supra* note 201, at 4. For alcohol, the employer may direct reasonable suspicion testing only while the employee is performing safety-sensitive functions, or just prior to or after such performance. 49 C.F.R. § 655.43(c) (2001).

[272] 49 U.S.C. § 5331(b)(2)(A) (2000).

[273] 49 U.S.C. § 5331(b)(2)(B) (2000).

[274] 49 C.F.R. § 655.42(a)(ii) (2001).

[275] 49 C.F.R. § 655(a)(2) (2001). Such tests have been upheld as Constitutional. Tanks v. Greater Cleveland Regional Transit Auth., 930 F.2d 475 (6th Cir. 1991); Bennett v. Mass. Bay Transp. Auth., 1998 Mass. Super Lexis 164 (Mass. Superior Ct. 1998). The Constitutional dimensions of drug testing are discussed in greater detail below.

[276] 49 C.F.R. § 655.44(d) (2001). FEDERAL TRANSIT ADMIN., *supra* note 201, at 5.

[277] 49 C.F.R. § 655.44(f) (2001); 63 Fed. Reg. 67612 (Dec. 8, 1998); 66 Fed. Reg. 41996, 42001 (Aug. 9, 2001).

[278] FEDERAL TRANSIT ADMIN., *supra* note 201, at 5. The post-accident testing regulations of the Federal Motor Carrier Safety Administration may be found at 49 C.F.R. § 382.303 (1999).

[279] 66 Fed. Reg. 41996 (Aug. 9, 2001).

[280] 49 U.S.C. § 5331(b)(1)(B) (2000); 49 C.F.R. § 655.45(e) (2001).

[281] Examples proffered in the regulations include "a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made." 49 C.F.R. § 655.45(e) (2001).

[282] 49 U.S.C. § 5331(d)(8) (2000).

[283] 49 C.F.R. § 655.45(g) (2001).

[284] 66 Fed. Reg. 41996, 42001 (Aug. 9, 2001).

formed at any time throughout the workday.[285] The minimum annual percentage rate for random drug testing is 50 percent of covered employees, and 10 percent for alcohol testing.[286] When these regulations were first promulgated, the requirements were 50 percent and 25 percent for drug and alcohol testing, respectively.[287] In the event the national positive test rate again exceeds the permitted level, the minimum random testing rate returns to the original higher level required by the regulations.[288]

• **Return-to-Duty Testing.** Once an employee has failed or refused to take a drug or alcohol test, an SAP must evaluate the employee, prescribe a treatment regimen, and determine whether the employee has fulfilled the SAP's recommendations. Before such an employee is allowed to return to a safety-sensitive job, he or she must have passed the return to duty drug test, and if the SAP so determines, an alcohol test.[289]

• **Follow-up Testing.** Whenever the SAP determines it appropriate,[290] the employee may be subjected to unannounced follow-up drug and/or alcohol testing.[291] Follow-up testing for drug abuse or alcohol misuse shall consist of at least six tests within the first 12 months of the employee's return to duty.[292] The SAP, and not the employer, determines whether the employee requires up to 60 months of follow-up testing.[293] The SAP determines both the length of follow-up testing and the number of follow-up tests.

As noted above, the Testing Act required that DOT establish the minimum list of the controlled substances for which transit employees may be tested,[294] and DOT requires that employers test employees performing safety-sensitive functions for marijuana, cocaine, opiates, amphetamines, and PCP.[295] If an employee tests positively for one of these controlled substances or alcohol,[296] or otherwise violates the rule, he or she must be removed from his or her safety-sensitive position. The regulations require that the employer treat a refusal by a covered employee to submit to a test as a negative test result, and such employees may not perform safety-sensitive functions.[297] If the employee tests positively or refuses the test, the employee must also be informed about available education or rehabilitation programs.[298]

The employer may dismiss the employee, though it has an obligation to provide him with a list of the resources available in evaluating and resolving problems associated with the misuse of alcohol.[299] The employer may also adopt a second chance policy, whereby an employee who has violated the drug and alcohol regulations may be allowed to return to a safety-sensitive position after completing rehabilitation.[300] An employee who tests positive for drug use or refuses to submit to a test shall be advised of the resources available to him or her, including a list of SAPs and counseling and treatment programs.[301] The employer is not obligated to either create or pay for treatment programs for employees. The employer's obligation is limited to informing the employee of counseling and treatment programs available to the employee.

As is discussed in greater detail in Section 10—Civil Rights, one who is "currently engaging in the illegal use of drugs" is not a qualified individual with a disability within the meaning of the Americans with Disabilities Act.[302] For example, in *Redding v. Chicago Transit Authority*,[303] a transit bus driver alleged she was unlawfully dismissed because she tested positively for cocaine pursuant to a mandatory drug test. After the employee first tested positive, the Chicago Transit Authority twice provided the employee with comprehensive drug treatment. The employee then refused to provide a mandatory urine specimen. When she eventually did, it tested positive for narcotics, and the employee was dismissed. Noting that operating a bus is a safety-sensitive duty, and that the regulations require that one who

[285] 66 Fed. Reg. 41996, 41998 (Aug. 9, 2001).

[286] 49 C.F.R. § 653.47 (2000). These numbers are adjusted annually depending upon the number of "positives" for use of prohibited drugs or misuse of alcohol during the preceding year. See 46 Fed. Reg. 13997 (Mar. 8, 2001).

[287] 49 C.F.R. § 655.45(c)(d) (2001).

[288] In 1999, the FTA lowered the random alcohol testing rate to 10 percent. Because the random alcohol violation rate was lower than .5 percent for 2 consecutive years (0.19 percent for 1997 and 0.22 percent for 1998), the random alcohol testing rate remained at 10 percent for 2000. 64 Fed. Reg. 66230 (Nov. 24, 1999).

[289] 49 C.F.R. §§ 199.105, 199.225, 199.243, 382.121, 655.46, 655.61 (2004); 49 C.F.R. pt. 40, subpt. O (2001). Marine employees are subject to U.S. Coast Guard testing procedures performed by a Medical Review Officer.

[290] The SAP shall determine the frequency and duration of follow-up testing. 49 C.F.R. pt. 40, subpt. O (2001).

[291] 49 C.F.R. § 382.309, 49 C.F.R. pt. 40, subpt. O (2001).

[292] 49 C.F.R. pt. 40, subpt. O (2001).

[293] A union agreement that attempts to circumscribe such SAP discretion is inconsistent with these rules. Letter from FTA Chief Counsel Patrick Reilly to Chicago Transit Authority Manager Cary Morgen (Mar. 1, 1999).

[294] 49 U.S.C. § 5331(d)(2)(B) (2000).

[295] 49 C.F.R. pt. 40 § 655.41 (1999).

[296] 49 C.F.R. § 199.133 (2004). An employee may not be removed from a safety-sensitive function before final verification of the negative test result. FEDERAL TRANSIT ADMIN., *supra* note 201, at 11.

[297] 49 C.F.R. §§ 655.49(a), 655.61(a)(3) (2001); 49 C.F.R. § 40.191 (2001) (describes what constitutes a refusal to take a drug test); 49 C.F.R. § 40.261 (describes what constitutes a refusal to take an alcohol test).

[298] 49 C.F.R. § 199.133 (2004). The employer has the discretion to administer a second test immediately; however, the employer must treat all applicants the same. 49 C.F.R. § 40.197 (2001).

[299] Letter from FTA Chief Counsel Patrick Reilly to Kari Blackburn (July 12, 1999).
Http://www.fta.dot.gov/library/legal/dral/99toc.htm.

[300] 66 Fed. Reg. 41996 (Aug. 9, 2001).

[301] 49 C.F.R. §§ 655.12, 655.62 (2001).

[302] 42 U.S.C. § 12114(a) (2000).

[303] 2000 U.S. Lexis 14557 (S.D. Ill. 2000).

tests positive for an illegal drug must cease performing a safety-sensitive function, the court held that the driver "was not qualified under the ADA to perform her duties as a bus driver after she tested positive for cocaine."[304]

The Testing Act required DOT to establish standards for laboratories,[305] testing procedures for controlled substances testing, and laboratory procedures, including use of the best available technology, to ensure reliability and accuracy of controlled substances testing.[306] Such testing must "be confirmed by a scientifically recognized method of testing capable of providing quantitative information about alcohol or a controlled substance."[307] Specimens must be "retained in a secure manner to prevent the possibility of tampering…."[308] DOT must establish procedures and standards for periodic review and criteria for certification of laboratories performing controlled substances testing.[309] DOT adopted such regulations at 49 C.F.R. Part 40.

Congress also required DOT to develop requirements that promote individual privacy in the collection of specimens.[310] Test results and medical information collected shall remain confidential, except that they may be used for imposing appropriate sanctions upon employees who have violated legal requirements.[311] The DOT may require temporary disqualification or permanent dismissal of any employee found to have used or been impaired by alcohol when on duty, or to have used a controlled substance not medically and lawfully prescribed, whether or not on duty.[312] Congress also required DOT to establish requirements for rehabilitation programs and treatment for employees found to have violated these provisions.[313]

Though the regulations impose extensive record-keeping requirements,[314] restrictions have been placed on outside access to facilities and records.[315] DOT regulations provide that an employer may disclose drug and alcohol testing information to the state oversight agency or grantee required to certify compliance of these procedures.[316] The employer may not release information to a law enforcement agency solely upon the request of such agency.[317] Upon written request of the employee, a covered employee is entitled to obtain copies of records concerning his or her use of drugs and alcohol, or have such records made available to a subsequent employer, or to any other person. USDOT and state agencies overseeing rail fixed guideway systems may have access to facilities and records. As part of an accident investigation, the NTSB may have access. In a workers' compensation, unemployment compensation, or other proceeding relating to a benefit sought by the covered employee, the decision maker may have access.[318] Moreover, in a criminal or civil action resulting from an employee's performance of a safety-sensitive function, where a court believes that information is relevant to the case and issues a court order requiring the employer to produce the information, the employer may release the information to the court.[319]

### 6. FTA Drug and Alcohol Audits

In 1997, the FTA also announced a drug and alcohol audit program both to determine compliance with federal law and to provide assistance in evaluating drug and alcohol testing procedures and offering corrective recommendations. Systems that are selected for audit are ordinarily notified by letter 6 weeks prior to the arrival of the audit team so as to give ample opportunity for assembling requested information and making logistical arrangements.[320] The audit consists of two parts: a desk audit and an on-site review.

### 7. Constitutionality of Drug and Alcohol Testing

The Fourth Amendment of the U.S. Constitution protects the people against "unreasonable search and seizure." Except in a relatively small class,[321] searches without consent or a valid search warrant are unreasonable. Warrantless drug testing of employees without probable cause or reasonable suspicion of drug use constitutes a search potentially violating the Fourth Amendment. As one court noted, "it is by now well settled that government drug testing of employees constitutes a search or seizure for purposes of the Fourth

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[304] *Id*. at 8.

[305] FTA testing may only be performed by Department of Health and Human Services-certified laboratories. A list of such laboratories is published during the first week of every month in the Federal Register under the Substance Abuse and Mental Health Services Administration heading. FEDERAL TRANSIT ADMIN., *supra* note 201, at 9.

[306] 49 U.S.C. § 5331(d)(2)(A) (2000).

[307] 49 U.S.C. § 5331(d)(4) (2000).

[308] 49 U.S.C. § 5331(d)(5) (2000).

[309] 49 U.S.C. § 5331(d)(2)(C) (2000).

[310] 49 U.S.C. § 5331(d)(1) (2000).

[311] 49 U.S.C. § 5331(d)(7) (2000). 49 C.F.R. §§ 219.211, 552.13, 655.44 (2004)

[312] 49 U.S.C. § 5331(c) (2000).

[313] 49 U.S.C. § 5331(e) (2000).

[314] 49 C.F.R. §§ 655.71, 655.72 (2001).

[315] 49 C.F.R. § 655.73 (2001).

[316] 49 C.F.R. § 655.73(i) (2001); 66 Fed. Reg. 41996 (Aug. 9, 2001).

[317] 66 Fed. Reg. 41996, 41998 (Aug. 9, 2001).

[318] 49 C.F.R. § 655.73(g) (2001).

[319] 49 C.F.R. § 40.323(a)(2) (2001). FEDERAL TRANSIT ADMIN., *supra* note 201, at 3.

[320] Letter from Gordon Linton re FTA Drug and Alcohol Audit Program (July 2, 1997). Http://www.fta.dot.gov/legal/guidance/dear-colleague/1977.

[321] Among the exceptions to the Fourth Amendment warrant requirement is the "administrative search exception," which upholds drug testing without individualized suspicion in highly regulated industries. Policeman's Benevolent Ass'n v. Township of Washington, 850 F.2d 133, 135 (3d Cir. 1988).

Amendment."[322] Collection and testing of urine[323] or blood pursuant to a government directive intrudes upon "an excretory function traditionally shielded by great privacy."[324] It involves the highly private function of urination, considered by some to be offensive to personal dignity.[325] The testing of urine for drugs by an arm of the state and municipal governments constitutes a search and, therefore, "must meet the reasonableness requirement of the Fourth Amendment."[326] In evaluating Fourth Amendment claims, courts balance the intrusiveness of the test against the government's interest satisfied by testing.[327]

In *Skinner v. Railway Labor Executives' Ass'n*,[328] the U.S. Supreme Court examined the constitutionality of FRA regulations requiring blood and urine tests of railroad employees involved in certain train accidents, and of employees who violate certain safety rules. In upholding the tests as constitutional, the Court noted that railroad employees' reasonable expectations of privacy were diminished by their participation in an industry pervasively regulated for safety, and the persons tested "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."[329] The Supreme Court weighed the government-as-employer interest in stopping misuse of drugs by employees in safety-sensitive positions against the intrusion upon personal privacy affected by the requirement of administering a urinalysis test.[330] It found the governmental interest in safety compelling, noting that "employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others."[331] *Skinner* is cited in the preamble to the DOT regulations as legal authority for the drug and alcohol testing program. Other cases have extended these principles to employees performing safety-sensitive functions in other transportation modes.[332] The government interest in protecting the safety of large groups of people traveling by mass transit has been held sufficient to override the personal interest of transit employees against warrantless searches.[333]

In the absence of individualized suspicion, the reasonableness of such a search depends on balancing the "special need" of the government against the extent of the intrusiveness of the testing procedure.[334] Reasonableness is judged by balancing the search's intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. The factors to be considered are: the nature of the privacy interest upon which the search intrudes, the character of the intrusion, the immediacy of the government concern, and the efficacy of the search for meeting it.[335]

For example, in *Beharry v. New York City Transit Authority*,[336] a case in which a signal maintainer's helper refused to provide a urine sample for drug screening, a federal district court held, "the Authority's request that Beharry provide a small urine sample within a two-hour period caused a minimal interference with Beharry's privacy rights, which must be outweighed by the Authority's concerns with protecting the safety of its employees and customers."[337] Similarly, in *Holloman v. Greater Cleveland Regional Transit Authority*,[338] a case in which a bus driver tested positive for marijuana on the day he was involved in a rear-end collision, the Sixth Circuit held that the transit authority had a compelling governmental interest in "protecting the safety of its passengers and the general public by ensuring that its drivers do not operate buses while under the influence of alcohol or drugs," and that this interest outweighed the employee's diminished expectations of privacy.[339] In another transit case, the Seventh Circuit has held, "the public interest in the safety of mass transit riders outweighs any individual interest in

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[322] Transport Workers' Union of Phila. v. Southeastern Pa. Transp. Auth., 863 F.2d 1110, 1115 (3d Cir. 1998).

[323] Urine specimen guidelines are published at www.dot.gov /ost/dapc.

[324] Vernonia School Dist. v. Acton, 515 U.S. 646, 658, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).

[325] Transport Workers' Union of Phila. v. Southeastern Pa. Transp. Auth., 863 F.2d 1110, 1119 (3d Cir. 1998).

[326] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989); see Burka v. N.Y. City Transit Auth., 739 F. Supp. 814, 819 (S.D. N.Y. 1990). *See* Dorancy-Williams, *supra* note 190.

[327] Gonzalez v. Metropolitan Transp. Auth., 174 F.3d 1016, 1020 (9th Cir. 1999).

[328] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617, 109 S. Ct. 1402 , 103 L. Ed. 2d 639 (1989). *See* Dorancy-Williams, *supra* note 190.

[329] Skinner, 489 U.S. 602, at 628.

[330] Skinner, 489 U.S. at 614. *See also* Drake v. Delta Airlines, Inc., 923 F. Supp. 387, 396–97 (E.D. N.Y. 1996), *aff'd in relevant part*, Drake v. Delta Airlines, Inc., 147 F.3d 169, 170–71 (2d Cir. 1998). Beharry v. MTA, 1999 U.S. Dist. Lexis 3157 (E.D. N.Y. 1999).

[331] Skinner, 489 U.S. at 628.

[332] International Bhd. of Teamsters v. Department of Transp., 932 F.2d 1292 (9th Cir. 1991), upholds the constitutionality of drug testing for bus and commercial truck drivers. What was critical in Teamsters was that the persons tested could be impaired "behind the wheel." Teamsters, 932 F.2d at 1304. Railway Labor Executives' Assoc. v. Skinner, 934 F.2d 1096 (9th Cir. 1991), upheld the random testing of railroad workers, even without a crash or safety violation.

[333] Transport Workers' Union of Phila. v. Southeastern Pa. Transp. Auth., 863 F.2d 1110, 1121 (3d Cir. 1988).

[334] Chandler v. Miller, 520 U.S. 305, 318, 137 L. Ed. 2d 513, 117 S. Ct. 1295 (1997). *See* Dorancy-Williams, *supra* note 190.

[335] Vernonia School Dist. v. Acton, 515 U.S. 646, 653, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).

[336] 1999 U.S. Dist. Lexis 3157 (E.D. N.Y. 1999).

[337] *Id*. at 30.

[338] 1991 U.S. App. Lexis 6904 (6th Cir. 1991).

[339] *Id*. at 4.

refusing to disclose physical evidence of intoxicating or drug abuse."[340]

Regarding the nature and immediacy of the government concern, in a case involving bus drivers, the transit authority "presented extensive evidence of a severe drug abuse problem among its operating employees."[341] In *Transport Workers' Union of Philadelphia v. Southeastern Pennsylvania Transportation Authority*,[342] the Third Circuit upheld random testing of safety-sensitive transit employees where the transit authority adduced evidence of a significant drug problem. In a 2-year period, operators of vehicles at fault who tested positive for drugs or alcohol were involved in six major accidents involving 89 injuries; the operator at fault in another accident refused to submit to a test. Twelve percent of "new hires" tested positive. The court concluded, "In light of the evidence connecting impairment with drug use, it was appropriate for SEPTA to design its program in an effort to detect drug users. It was not required to limit its detection efforts to those employees whose then-current impairment could be detected…."[343] The court reiterated the Supreme Court's admonition that even when a search is designed with important public safety considerations in mind, there must still be sufficient safeguards to ensure against abuse of official discretion in deciding when and how the search is implemented.[344] The Third Circuit found SEPTA's random drug testing program reasonable, finding that "the plan contains sufficient safeguards, in the form of confidentiality, chain of custody, verification, and random selection procedures, to protect against abuse of discretion by implementing officials."[345]

However, in *Gonzalez v. Metropolitan Transit Authority*,[346] it was unclear whether the employees would pose a substantial immediate threat to public safety if impaired by drugs or alcohol, whether the procedure for testing them would be reasonably effective for finding out if they are impaired, or whether the tests as performed were an undue invasion of their privacy. The court therefore held the testing unconstitutional. Similarly, in *Bolden v. Southeastern Pennsylvania Transportation Authority*,[347] the Third Circuit upheld a $285,000 jury award in a Section 1983 action against SEPTA, concluding that compulsory, suspicionless back-to-work testing of a maintenance custodian who tested positive for marijuana use constituted a violation of the employee's Constitutional rights. The court noted that the employee was not a safety-sensitive employee likely to create any great risk of causing harm to others, and did not have diminished privacy expectations due to the pervasive government regulation. Hence, a transit agency's "test everyone" drug testing program can get the agency in trouble, because the agency loses the safe harbor of the regulations as to employees who perform safety-sensitive functions.

Nonetheless, in a Section 1983/Fourth Amendment claim brought by 18 bus or rail employees involved in on-the-job incidents who had failed their blood and urine tests, the D.C. Circuit held that the WMATA was immune from suit because the local jurisdictions had in the charter establishing the multi-state authority both conferred on it sovereign immunity and delegated it 11th Amendment insulation from suit in federal courts.[348]

Beyond the Fourth Amendment issues raised here, in at least one instance a First Amendment issue was raised. The Metro-Dade Transit Agency was confronted with an employee who, during an observed drug test, refused to remove a cap bearing a religious inscription due to a sincerely-held religious belief. FTA regulations require that prior to a drug or alcohol test being administered, the employee must remove unnecessary outer garments so that he or she would not be able to conceal items used to obstruct the test.[349] To accommodate the employee's religious belief, the transit agency determined the employee would be allowed to keep his hat on provided he agreed to allow an observed specimen collection. The FTA concluded this was an appropriate balance between accommodating the employee's First Amendment rights and the transit agency's responsibilities with complying with federal regulations.[350]

### 8. Preemption

The Supremacy Clause of the U.S. Constitution "invalidates any state law that contradicts or interferes with an Act of Congress."[351] The most obvious case for federal preemption exists when Congress has expressly declared its intent.[352] The Testing Act provides that "a State or local government may not prescribe, issue, or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this section."[353] State and local governments may not issue any law, regulation, or other requirement inconsistent with DOT alcohol and substance abuse regula-

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[340] Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976).

[341] Transport Workers' Union v. Southeastern Pa. Transp. Auth., 884 F.2d 709, 711 (3d Cir. 1988).

[342] 863 F.2d 1110 (3d Cir. 1988).

[343] 863 F.2d at 1120 (3d Cir. 1998).

[344] *See* Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

[345] 863 F.2d at 1121 (3d Cir. 1988).

[346] 174 F.3d 1016, 1020 (9th Cir. 1999).

[347] 953 F.2d 807, 823-4 (3d Cir. 1991).

[348] Sanders v. Washington Metro. Area Transit Auth., 819 F.2d 1151 (D.C. Cir. 1987).

[349] 49 C.F.R. § 40.25(f)(4) (1999).

[350] Letter from Patrick Reilly to Metro-Dade Transit Agency Chief Ronald Jones (Dec. 7, 1999). Http://www.fta.dot.gov/library/legal/dral/htm.

[351] Hayfield N. R. Co. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 627, 104 S. Ct. 2610, 81 L. Ed. 2d 527 (1984).

[352] *See, e.g.*, Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 31, 134 L. Ed. 2d 237, 116 S. Ct. 1103 (1996); Greenwood Trust Co. v. Commonwealth of Mass., 971 F.2d 818, 822 (1st Cir. 1992).

[353] 49 U.S.C. § 5331(f)(1) (2000).

tions. However, a state criminal law imposing sanctions "for reckless conduct leading to loss of life, injury, or damage to property" is not preempted.[354] The regulations provide that they preempt state law to the extent that (a) compliance with both the state or local requirement and the DOT drug and alcohol regulations is not possible, or (b) compliance with the state or local requirement is an obstacle to the accomplishment and execution of the DOT drug and alcohol regulations.[355] The regulations also provide that they are not to be construed to preempt any state criminal law "that imposes sanctions for reckless conduct leading to actual loss of life, injury, or damage to property…."[356]

Federal courts have held that where Congress has mandated random drug and alcohol screens for employees who perform safety-sensitive functions, contrary state law cannot stand as an obstacle to the testing protocol.[357] Noting that federal drug and alcohol testing regulations were imposed by Congress under the taxing and spending clause of the U.S. Constitution, the First Circuit Court of Appeals in *O'Brien v. Massachusetts Bay Transportation Authority*,[358] held that when the federal government conditions the receipt of federal money on complying with certain requirements, and the state accepts the money, the Supremacy Clause requires the local law (in this case, the Massachusetts Declaration of Rights, which prohibited unreasonable searches and seizures) to yield. The court concluded:

> Massachusetts authorities have elected to draw on federal coffers to finance a bevy of mass transit projects. Having accepted those funds, they must abide by the conditions that Congress attached to them, one of which mandates random drug and alcohol screens for employees who…perform safety-sensitive functions. Because applicable law includes an express preemption provision, contrary state law cannot stand as an obstacle to the testing protocol….[359]

[354] *Id*. "Preemption," an example of a state law not in conflict with the federal requirements is Florida Statutes, Section 440.101. This Florida Drug & Alcohol Statute grants employers who adopt the law both a discount for Workers' Compensation premiums and bars employee recovery in accidents where the employee tests positive post-accident. (The case law seems to imply a causation requirement.) The law also gives authority for testing additional substances identified in the state law, but not the federal requirements. The blending of the two by allowing federal law to preempt and state law to supplement, however, is no easy task. One must be equally as concerned, when adopting the state law, not to violate the collective bargaining agreement(s), which apply.

[355] 49 C.F.R. §§ 653.9(a), 654.9(a) (1999).

[356] 49 C.F.R. §§ 653.9(b), 654.9(b) (1999).

[357] O'Brien v. Mass. Bay Transp. Auth., 162 F.3d 40 (1st Cir. 1998).

[358] *Id.*

[359] 162 F.3d at 45.

## D. MOTOR VEHICLE DRIVER QUALIFICATIONS

### 1. Federal Statutes

In order to promote the safe operation of commercial motor vehicles (CMVs), to minimize dangers to the health of CMV operators and other employees, and to ensure increased compliance with traffic laws and CMV safety and health regulations,[360] DOT has been given wide-ranging jurisdiction to address highway safety.[361] CMVs and their driver qualifications and certifications are regulated by the DOT's FMCSA.[362]

The Motor Carrier Safety Act of 1984[363] defined a CMV as "any self-propelled vehicle in interstate commerce to transport passengers or property" if the vehicle transports more than 16 passengers (including the driver),[364] has a gross weight of 10,001 or more pounds, or transports hazardous materials requiring the vehicle to be placarded.[365] The Motor Vehicle Safety Act of 1986[366] required state implementation of a single,[367] classified commercial driver's license (CDL) program.[368] The ICC Termination Act of 1994[369] defined a CMV as a vehicle that is

> designed or used to transport passengers for compensation, but excluded vehicles providing taxicab service and having a capacity of not more than 6 passengers and not operated on a regular route or between specified places, [or] is designed or used to transport more than 15 pas-

[360] 49 U.S.C. § 31131(a) (2000).

[361] DOT has jurisdiction to conduct and make contracts for inspections and investigations; compile statistics; make reports; issue subpoenas; require production of documents and property; take depositions; hold hearings; prescribe record keeping and reporting; conduct and make contracts for studies, development, testing evaluation, and training; and perform such other acts it deems appropriate. 49 U.S.C. § 31133(a) (2000).

[362] Pub. L. 99-570, 100 Stat 3209 (1986). General driver qualifications are set forth in 49 C.F.R. § 391.11 (1999). *See* Fed. Reg. 33254 (June 18, 1998). *See also* FEDERAL AND STATE LICENSING AND OTHER SAFETY REQUIREMENTS FOR COMMERCIAL MOTOR VEHICLE OPERATORS AND EQUIPMENT (TCRP LEGAL RESEARCH DIGEST NO. 18, 2001).

[363] Pub. L. 98-554, 98 Stat. 2832 (1984).

[364] CMVs that transport between 9 and 15 passengers (including the driver) for compensation must file a motor carrier identification report, mark their vehicles with a DOT identification number, and maintain an accident register. 49 C.F.R. pt. 390 (1999). 66 Fed. Reg. 2756 (Jan. 11, 2001).

[365] 49 C.F.R. § 390.5 (1999).

[366] Pub. L. 99-570, 100 Stat. 3207 (1986).

[367] No longer may a driver hold a license from more than one state. 49 U.S.C. § 31302 (2003).

[368] It required that DOT establish and maintain a "National Driver Register to assist chief driver licensing officials of participating States in exchanging information about the motor vehicle driver records of individuals." 49 U.S.C. § 30302 (2000). Before this legislation was passed, persons licensed to drive automobiles could drive tractor-trailers.

[369] Pub. L. 104-88, 109 Stat. 803 (1995).

sengers, including the driver, and is not used to transport passengers for compensation.

TEA-21[370] further amended the CMV definition to make it clear that the 10,001 pounds requirement referred to either "gross vehicle weight" (GVW) or the "gross vehicle weight rating" (GVWR).

### 2. Commercial Motor Vehicles

At this writing, a CMV is defined as a self-propelled or towed vehicle used in interstate commerce to transport passengers or property if the vehicle: (a) has a GVW or GVWR of 10,001 pounds or more,[371] whichever is greater; (b) is designed or used to transport more than eight passengers (including the driver) for compensation: (c) is designed or used to transport more than 15 passengers (including the driver) and is not used to transport passengers for compensation; or (d) is used to transport hazardous material in such quantity as to require placarding.[372] Moreover, the Motor Carrier Safety Improvement Act of 1999[373] added commercial vans known as "camionetas" and commercial vans operating in interstate commerce outside of commercial zones that have been determined to pose serious safety risks.

### 3. National Driver Register Program

DOT must maintain an informational system that serves as a clearinghouse and depository of information about the licensing, identification, and disqualification of CMV operators.[374] Under the DOT's National Driver Register program, states are to notify DOT of any individual who is denied a motor vehicle operator's license; or had it revoked, suspended, or canceled for cause; or who is convicted under state motor vehicle laws for operating a motor vehicle under the influence of alcohol or a controlled substance, for being involved in a fatal traffic accident, reckless driving or racing on the highways, for failing to give aid or information when involved in an accident resulting in death or personal injury, or for engaging in perjury or knowingly making a false affidavit or statement to officials regarding activities governed by law involving the operation of a motor vehicle.[375]

### 4. Driver Requirements, Suspension, and Disqualification

No individual may operate a CMV without a valid CDL.[376] An individual may hold only one CDL. The "single CDL" requirement was adopted in response to several serious accidents in which it was discovered that commercial drivers held licenses from multiple states, and continued to operate a commercial vehicle using a second or third license after the driver's initial license had been suspended, revoked, terminated, or canceled. Commercial driver's licenses are issued by states[377] under minimum uniform standard regulations promulgated by DOT requiring written and driver tests ensuring, among other things, that the operator has a working knowledge of applicable DOT safety regulations,[378] and has adequate physical qualifications for the position.[379] A driver of passengers must secure a P (passenger) endorsement on his or her CDL, which requires passing a specific knowledge and skills test. The general knowledge test is comprised of at least 30 questions, and the applicant must answer 80 percent of them correctly.[380] The applicant must also pass a skills test in a vehicle of the type he or she is expected to operate.[381]

CMV drivers are also required to notify their employer of violations of state or local motor vehicle laws; driver's license suspension, revocation, or cancellation; and any previous employment as a CMV operator.[382] The employer may not knowingly allow its employee to operate a CMV while he or she has a driver's license suspended, revoked, or cancelled; has lost the right to operate a CMV in a state, or has been disqualified from operating a CMV; or has more than one driver's license.[383]

Individuals must be disqualified for 1 year from operating a CMV for using a CMV in the commission of a felony, or a first offense of driving a CMV under the influence of alcohol or a controlled substance or leaving the scene of an accident.[384] They may be disqualified for life if they have more than one violation of driving a CMV under the influence of alcohol or controlled substances or leaving the scene of an accident, or using a

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[370] Pub. L. 105-178, 112 Stat. 107 (June 9, 1998).

[371] There are three classes of CMVs: Class A (any combination of vehicles with gross weight of 26,001 or more pounds, provided the vehicle(s) towed exceed 10,000 pounds); Class B (vehicles with gross weight of 26,001 or more pounds, provided the vehicle towed is less than 10,000 pounds in weight); and Class C (any vehicle other than a Class A or B vehicle that is either designed to transport 16 or more passengers, including the driver, or is placarded for hazardous materials. It is the Class C vehicle that is relevant for transit operators.

[372] 49 U.S.C. § 31132 (2000).

[373] Pub. L. 106-159, 113 Stat. 1748 (1999).

[374] 49 U.S.C. §§ 31106, 31309(a) (2000).

[375] 49 U.S.C. § 30304(a) (2000). At this writing, no reported transit cases have been discovered addressing this issue.

[376] 49 U.S.C. § 31302 (2000).

[377] 49 U.S.C. § 31301(3) (2000).

[378] 49 U.S.C. §§ 31305(a), 31308 (2000). 49 C.F.R. § 383.71 (1999).

[379] 49 C.F.R. pts. 383, 391 (1999).

[380] 53 Fed. Reg. 27654 (July 21, 1988), 49 C.F.R. § 383.111, App. to subpt. G (2004).

[381] 49 C.F.R. § 383.113 (2004).

[382] 49 U.S.C. § 31303 (2000).

[383] 49 U.S.C. § 31304 (2000).

[384] 49 U.S.C. § 31310(b) (2000). One is deemed driving under the influence of alcohol when one has a blood alcohol concentration level at or above .04 percent. 49 U.S.C. 31310(a) (2000). DOT must also suspend a CMV operator for at least 60 days for committing two serious traffic violations involving a CMV within a 3-year period. 49 U.S.C. § 31310(e) (2000).

CMV in the commission of more than a single felony.[385] CMV drivers convicted under federal, state, or local law of violating railroad-highway grade crossing standards may be disqualified by the FMCSA from operating a CMV.[386] DOT regulations also limit hours of service.[387] Certain "whistleblower" protections have been extended to employees who file a complaint regarding violations of CMV safety regulations or refuse to operate a vehicle because of such violations or a reasonable apprehension of personal injury.[388] DOT must also conduct timely investigations of nonfrivolous written complaints alleging substantial safety violations.[389] Violations of the CDL regulations by drivers may subject them to civil fines of up to $2,500 and criminal penalties of up to $5,000 and/or up to 90 days in prison; employers who knowingly allow a driver to operate a CMV without a valid CDL may be subject to a fine of up to $10,000.[390]

DOT regulations prohibit an insulin-dependent diabetic from driving a CMV weighing 10,001 pounds or more or designed to carry 15 or more passengers.[391] They also require that drivers undergo periodic physical examinations. In *Myers v. Hose,*[392] the Fourth Circuit U.S. Court of Appeals addressed the collision of these physical requirements and the Americans with Disabilities Act (ADA). Joseph Myers had a distinguished record as a bus driver (of a vehicle carrying more than 16 passengers) for the County of Frederick, Maryland, but upon his DOT-mandated physical, was diagnosed with heart failure, hypertension, and uncontrollable diabetes. Myers requested time to bring his diabetes under control. But the County asked him to resign or retire. He chose the latter option, then brought suit under the ADA.[393] The court in *Myers* observed that in determining whether the ADA has been violated, it must be demonstrated that the plaintiff is able to perform the essential duties of the job in question, and if not, whether he could do it with reasonable accommodation.[394] The court noted that, "The basic function of a bus driver is to operate his motor vehicle in a timely, responsible fashion. It is essential that a driver perform these duties in a way that does not threaten the safety of his passengers or other motorists."[395] Because of his diabetes, heart condition, and hypertension, the court concluded that his driving "would profoundly compromise the safety of his passengers, pedestrians, and other motorists" and therefore he was unable to perform the essential duties of the job.[396] The Fourth Circuit also held that "reasonable accommodation does not require the County to wait indefinitely for Myers' medical condition to be corrected, especially in light of the uncertainty of cure."[397]

Similarly, a driver who has a "heart condition" and thereby is ineligible for DOT certification is not a "qualified individual" within the meaning of the ADA during the period when he did not possess DOT certification. The employer is legally required to refuse the driver's request to return to driving a CMV until he presented the proper certification.[398] Nor is it incumbent upon the employer to provide a disabled employee with another job when he or she is unable to meet the demands of the present position.[399] Several other cases have held that dismissal of a bus driver who is prohibited by DOT regulations from physically performing such activities is not a violation of the ADA.[400]

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[385] 49 U.S.C. § 31310(c)(d) (2000). DOT must also suspend a CMV operator for at least 60 days for committing two serious traffic violations involving a CMV within a 3-year period. 49 U.S.C. § 31310(e) (2000). Drivers must notify the state and their employer of any state or local motor vehicle traffic control law violation. 49 C.F.R. §§ 383.31, 391.27 (1999). States in which a traffic violation occurs must notify the CMV-issuing state thereof. 49 C.F.R. § 384.209 (1999). Traffic convictions when driving noncommercial vehicles are also relevant to CMV certification. 49 C.F.R. § 383.77 (1999).

[386] 49 U.S.C. § 31310(j) (2000). 49 C.F.R. pts. 383, 384 (1999). 64 Fed. Reg. 48104 (Sept. 2, 1999). Other disqualification criteria are set forth in 49 C.F.R. 391.15 (1999).

[387] 49 U.S.C. § 31502(b) (2000). 49 C.F.R. pts. 350, 390, 394, 395, and 398 (1999).

[388] 49 U.S.C. § 31105 (2000).

[389] 49 U.S.C. § 31143 (2000).

[390] Fritz Damm, United States Commercial Motor Vehicle Selected Driver Regulations (Canadian Transport Lawyers Ass'n Annual Meeting, Quebec, PQ, Canada, Nov. 30, 2001).

[391] 49 C.F.R. §§ 391.41(b)(3), 391.43, 391.64 (2004).

[392] 50 F.3d 278 (4th Cir. 1995).

[393] Since the ADA is discussed at length in Section 10—Civil Rights, its requirements will not be repeated here.

[394] 50 F.3d at 281.

[395] 50 F.3d at 282 (citing Strathie v. Dep't of Transp., 716 F.2d 227, 231–32 (3d Cir. 1983).

[396] 50 F.3d at 282.

[397] 50 F.3d at 283. *See also* Davidson v. Atlantic City Police Dep't, 1999 U.S. Dist. Lexis 13553 (D. N.J. 1999).

[398] Bay v. Cassens Transp. Co., 212 F.3d 969, 974 (7th Cir. 2000).

[399] Bates v. Long Island R.R. Co., 997 F.2d 1028, 1035–36 (2d Cir. 1993), *cert. denied,* 510 U.S. 992, 114 S. Ct. 550 (1993). The EEOC has taken the position that an employer may have an obligation to provide an employee with an available light duty job as a reasonable accommodation to a disability. *EEOC, Enforcement Guidelines on Workers' Compensation at the ADA*, Questions 27-29 (Sept. 3, 1996), available at http://www.eeoc.gov/policy/docs/workshop.html. However, the employer need not create a light-duty job to accommodate a disabled employee. Hoskins v. Oakland County Sheriff's Dep't, 227 F.3d 719, 729 (6th Cir. 2000); Gile v. United Airlines, 95 F.3d 492, 499 (7th Cir. 1996); White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995). Nor is there an obligation to reassign a disabled employee to a job where there is a more qualified nondisabled candidate for the position. EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000). Robert Mignin, *Accommodating the Disabled Worker: Recent Developments Under the Americans With Disabilities Act* (Transp. Lawyers Ass'n Annual Meeting, Tucson, Ariz., May 8-12, 2001).

[400] *See, e.g.,* Dougherty v. El Paso, 56 F.3d 695, 698 (5th Cir. 1995); Chandler v. City of Dallas, 2 F.3d 1385, 1394 (5th Cir. 1993); Christopher v. Laidlaw Transit, 899 F. Supp. 1224, 1227 (S.D. N.Y. 1995).

### 5. State CMV Regulation

As noted above, the definition of a CMV is a vehicle operating in interstate commerce. Most transit operators provide intrastate service. Nonetheless, the federal program requires the coordination and cooperation of the states. As noted above, the states issue CDLs.[401] States are also relied upon to inform DOT of the infractions of CMV operators so that its clearinghouse function can operate effectively.[402]

States are encouraged to develop and implement programs to improve CMV safety and enforce CMV regulations.[403] For fiscal years 1998–2003 inclusive, some $579 million was authorized from the Highway Trust Fund to subsidize up to 80 percent of a state's activities in this area.[404] The DOT may delegate the responsibility of investigating and enforcing DOT CMV regulations to a state.[405] But Congress has imposed its highway safety mandate on the states not just by offering a carrot, but by also threatening the stick. The statute makes clear that states are obliged to adopt and implement a program for testing and ensuring the fitness of CMV operators consistent with the DOT's minimum standards, may issue a CDL only to individuals who pass a written and driving test for the operation of a CMV that satisfy those minimum standards, and have in effect and enforce blood alcohol concentration prohibitions at least as stringent as those adopted by DOT.[406] DOT has promulgated regulations addressing state-administered CDL procedures,[407] and driver physical qualifications requirements.[408] Failure to meet these requirements requires DOT to withhold 5 percent of state transportation funding under 23 U.S.C. § 104(b)(1), (3), and (4) during the first fiscal year of noncompliance, and 10 percent thereafter.[409]

A state that enacts a law or regulation affecting CMV safety must submit a copy to DOT immediately after its enactment or issuance.[410] If the DOT Secretary determines it is not as stringent as that prescribed by DOT, the state regulation may not be enforced.[411] Some states have enacted laws explicitly adopting Federal Motor Carrier Safety Regulations.[412]

## E. BUS EQUIPMENT AND TESTING REQUIREMENTS

Congress has mandated that DOT promulgate regulations ensuring that CMVs are maintained, equipped, loaded, and operated safely.[413] Regulations have been promulgated addressing the safety features of buses, including such areas as antilock brake systems,[414] glazing and window construction,[415] seat belt assemblies and anchorages,[416] occupant crash protection,[417] school bus operations,[418] and bus testing.[419] CMVs must pass a state or federal inspection of all safety equipment mandated by regulation.[420] States may enforce a program for inspection of CMVs as or more stringent than that adopted by DOT.[421]

In each application for the purchase or lease of buses, a recipient of FTA funds must certify that any new bus model, or any bus model with a major change in configuration or components, to be acquired or leased with FTA funds will be tested at the approved bus testing facility at Altoona, Pennsylvania.[422] Trolley buses are exempted since Altoona has no facilities to test them. The buses must meet all applicable Federal Motor Ve-

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[401] 49 U.S.C. § 31301(3) (2000).

[402] 49 U.S.C. § 30304(a) (2000).

[403] 49 U.S.C. § 31103(a) (2000).

[404] 49 U.S.C. § 31104(a) (2000).

[405] 49 U.S.C. § 31133(c) (2000).

[406] 49 U.S.C. § 31311 (2000).

[407] 49 C.F.R. pt. 383 (1999).

[408] 49 C.F.R. pt. 391 (1999).

[409] 49 U.S.C. § 31314 (2000).

[410] 49 U.S.C. § 31141(b) (2000).

[411] 49 U.S.C. § 31141(c)(3) (2000). Moreover, a state may not enforce a CMV law or safety regulation that the DOT Secretary decides may not be enforced. 49 U.S.C. § 31141(a) (2000). The state may, however, petition for a waiver, which the Secretary may grant if it is "consistent with the public interest and the safe operation of commercial motor vehicles." 49 U.S.C. § 31141(d) (2000).

[412] For example, Illinois has explicitly adopted 49 C.F.R. pts. 385, 390, 391, 392, 393, 395, and 396, and ordered its Department of Transportation to adopt regulations "identical in substance to the Federal Motor Carrier Safety Regulations…." 625 ILCS 5/18b-105(e) (2001). *See also* N.J. STAT. ANN. § 48:4-2.1e *et seq*. (2001).

[413] 49 U.S.C. § 31136(a)(1) (2000). *See* ROLLAND KING, SYNTHESIS OF TRANSIT PRACTICE: BUS OCCUPANT SAFETY (TCRP 1996), for a survey of the practical means by which passenger safety may be enhanced.

[414] 49 C.F.R. § 393.55 (1999).

[415] 49 C.F.R. §§ 393.61, 393.63 (1999).

[416] 49 C.F.R. § 393.93 (1999). Congress has mandated that such regulations "ensure that brakes and brake systems of commercial motor vehicles are maintained properly and inspected by appropriate employees. At minimum the regulations shall establish minimum training requirements and qualifications for employees responsible for maintaining and inspecting the brakes and brake systems." 49 U.S.C. § 31137(b) (2000).

[417] 49 C.F.R. § 571.208 (1999).

[418] 49 C.F.R. § 605.3 (1999).

[419] 49 C.F.R. § 665.11 (1999).

[420] 49 U.S.C. § 31142(a) (2000).

[421] 49 U.S.C. § 31142(c)(1)(A) (2000). A state may be prohibited from enforcing its inspection program if, after notice and hearing, DOT determines the state is not enforcing its program in a way that achieves the objectives of federal law. 49 U.S.C. § 31142(c)(2) (2000).

[422] Federal Transit Act of 1964, 49 U.S.C. § 1601 *et seq*., 1608(h); § 317, Surface Transportation and Uniform Relocation Assistance Act of 1987; 49 C.F.R. §§ 665.1, 665.5, 665.7 (1999); 57 Fed. Reg. (July 28, 1992). A manufacturer schedules a bus for testing by contacting Penn State's Transportation Institute at Pennsylvania State University.

hicle Safety Standards.[423] Buses are tested for maintainability; reliability; safety; performance; structural integrity, including structural strength and distortion; structural durability; and fuel economy.[424] The safety test consists of a handling and stability test, assessing the vehicle's ability to avoid obstacles and change double lanes at increasing speeds up to 45 miles per hour or until the vehicle can no longer be operated over the course, whichever is lower.[425] Both the pre-award and post-delivery audit must include a manufacturer's Federal Motor Vehicle Safety certification.[426] Pre-award audit and post-delivery audit are Buy America requirements that apply to any bus order, not just a new bus or bus model that is subject to new bus testing. Bus testing, pre-award and post-delivery audits, and Buy America requirements are discussed in Section 5—Procurement.

## F. FINANCIAL RESPONSIBILITY AND FITNESS REQUIREMENTS

Congress has mandated minimum financial responsibility and liability and property damage insurance requirements for interstate passenger carriers. Those using motor vehicles with a seating capacity of at least 16 passengers shall have insurance, a guarantee or a surety bond in the amount of not less than $5 million, while the requirement is $1.5 million for those having a seating capacity of not more than 15 passengers.[427] These requirements do not apply to motor vehicles: (1) transporting only school children and teachers to and from school; (2) operating a taxicab service having a seating capacity of not more than six passengers and not operated on a regular route between specified points; (3) carrying not more than 15 individuals in a single, daily round trip to and from work; or *importantly,* (4) providing transit service funded in whole or part under a grant under 49 U.S.C. §§ 5307, 5310, or 5311 (urbanized area formula, elderly person and disability, or nonurbanized area formula programs, respectively), including transportation of elderly or disabled passengers—except that where the transit service area extends beyond the boundaries of a single state, the minimum financial responsibility shall be the highest level required of any state.[428]

The DOT must determine whether a CMV operator is fit to safely operate such vehicles, and periodically update that determination.[429] Fitness is a long-standing regulatory requirement of common carriers that survived deregulation.[430] This criterion assesses whether the carrier is fit, willing, and able to provide the proposed service and satisfy the applicable rules and regulations. Typically, it involves an assessment of the carrier's compliance disposition, financial fitness, managerial ability, and ability to perform the services safely.[431] If a passenger operator is deemed not fit, it must cease operations 46 days after such determination until it is subsequently deemed fit.[432] However, these requirements do not apply to transit systems operating entirely within a single state.

## G. CONSTRUCTION SAFETY REGULATION

Safety at the worksite is regulated by the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor.[433] New federally-funded buildings and additions to existing buildings built with federal assistance must be designed and constructed in accordance with the seismic design and construction requirements and certified through the Annual Certification and Assurance process.[434] Before accepting deliv-

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[423] 49 C.F.R. pt. 571 (1999); 49 C.F.R. § 665.11(a)(2) (1999). *See also* 49 C.F.R. § 396.11 (1999).

[424] Under the "Bus Testing," regulations at 49 C.F.R. § 665.7 (1999), the model of the bus financed by FTA must have been tested at a bus testing facility approved by FTA.

[425] 49 C.F.R. pt. 665, App. A (1999).

[426] A pre-award audit includes a Buy America certification, a purchaser's requirements certification, and where appropriate, a manufacturer's Federal Motor Vehicle Safety certification. 49 C.F.R. § 663.23 (1999); 56 Fed. Reg. 48395 (Sept. 24, 1991). A post-delivery audit includes a post-delivery Buy America certification, a post-delivery purchaser's requirements certification, and a manufacturer's Federal Motor Vehicle Safety Standard self-certification. 49 C.F.R. § 663.33 (1999). See Section 5—Procurement, above, for a discussion of these audit requirements.

[427] 49 U.S.C. § 31138(b), (c) (2000). Knowing violations of this provision are subject to a civil penalty of not more than $10,000 for each violation. 49 U.S.C. § 31138(d)(1) (2000).

[428] 49 U.S.C. § 31138(e) (2000).

[429] 49 U.S.C. § 31144(a) (2000).

[430] *See* PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 111–17 (Quorum 1986).

[431] For an examination of the fitness requirements in another modal context, *see* PAUL DEMPSEY & LAURENCE GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 256–60 (Coast Aire 1997).

[432] 49 U.S.C. § 31144(c)(2) (2000). A passenger operator may have a review of an adverse fitness determination within 30 days of a finding of a lack of fitness. 49 U.S.C. § 31144(d) (2000).

[433] U.S. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 657, 667 (2000). U.S. Occupational Safety and Health Administration, DOL, regulations on safety standards, 29 C.F.R. pts. 1900–1910 (1999). Section 107 of the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 327–333 (2000). U.S. Occupational Safety and Health Administration/DOL regulations, "Safety and Health Regulations for Construction," 29 C.F.R. pt. 1926 (1999). U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction," 29 C.F.R. pt. 5 (1999); and U.S. DOL regulations, "Safety and Health Regulations for Construction," 29 C.F.R. pt. 1926 (1999). For activities not involving construction, *see* Section 102 of the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 327–332 (2000), and U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction," 29 C.F.R. pt. 5 (1999).

[434] 49 C.F.R. pt. 41 (1999), Executive Order No. 12699, "Seismic Safety of Federal and Federally-Assisted or Regulated New Building Construction," 42 U.S.C. § 7704 note (2000),

ery of any building financed with FTA assistance, an FTA-funding recipient must obtain a certificate of compliance with the seismic design and construction requirements of 49 C.F.R. Part 41.[435] Federal law also bans the use of lead-based paint in construction or rehabilitation of residence structures.[436]

Responding to findings showing that a considerable part of the American population lived in areas with moderate to major earthquake risks and that existing safeguards were inadequate,[437] Congress in 1977 implemented legislation calculated to improve safety in federal buildings and buildings constructed using federal funds.[438] Following the devastating Loma Prieta earthquake of October 1989, President Bush issued Executive Order 12699 to reinforce the federal government's commitment to improved seismic safety.[439] These two enactments led to the formulation of the DOT's seismic safety regulations.[440]

Calculated to be "mission-appropriate and cost-effective,"[441] the regulations apply to any new DOT-owned or -leased buildings, and all new construction (including additions and renovations) made with DOT funds or otherwise within the scope of the DOT's regulatory powers.[442] The FTA (and other DOT operating agencies, such as the FHWA) is to be responsible for the design and construction of its own buildings in accordance with seismic design and construction standards adopted by DOT.[443] A certificate verifying compliance with the standards must be presented to the FTA prior to acceptance of the completed building.[444] Where the FTA enters into a new lease for a building,[445] it must obtain a certificate from the building's owner reflecting the same information as would be required in the construction of a new building.[446] A leased building with plans and specifications erected after January 5, 1990, must comply with the same seismic standards as a new structure.[447]

Where the FTA assists in the financing of construction of new buildings or additions to existing buildings, whether through grants, direct loans, mortgage insurance, or loan guarantees, it must ensure that the construction work complies with the seismic standards adopted by DOT.[448] The grantee must provide the operating administration with certification containing the same information as is required for the FTA's own structures.[449] This same principle applies to any buildings or additions that are "DOT regulated."[450] Neither the seismic regulations themselves nor the Federal Register entry for them give any guidance as to what specifically constitutes a "DOT regulated" building as distinct from a building constructed using federal funds provided by DOT and/or FTA. Erring on the side of caution, recipients of federal funds should probably consider all buildings constructed for them to be "DOT regulated."

## H. SECURITY

Security differs from safety in that safety is freedom from accidental danger, whereas security is freedom from intentional danger. The transit environment poses particular security problems. As one source notes:

> It is open to anyone who pays for entrance and often to those who choose not to pay. It contains a variety of settings and targets configured in predictable patterns. Many of the targets are stationary and unguarded. Potential victims are often crowded together in intimidating conditions or in conditions that make it hard for them to guard their property and for others to see what is happening. On the street, offenders may not know what people will do next, but on public transport the choices for behavior are more limited and, therefore, more predictable.[451]

> Offenders preying on the system, and on staff and passengers, will continue to take advantage of the many criminal opportunities presented by the transit environ-

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pursuant to the Earthquake Hazards Reduction Act of 1977, as amended, 42 U.S.C. §§ 7701 *et seq*. (2000), 49 C.F.R. § 41.117 (1999).

[435] "Seismic Safety," 49 C.F.R. § 41.117(d) (1999).

[436] Section 401(b) of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4801, 4831(b) (2000).

[437] 42 U.S.C. § 7701(1) and (2) (2000).

[438] Earthquake Hazards Reduction Act of 1977, Pub. L. No. 95-124, § 2, 91 Stat. 1098 (1977) (codified as amended at 42 U.S.C. §§ 7701 *et seq.*).

[439] Exec. Order No. 12699 § 1, 55 Fed. Reg. 835 (1990).

[440] 58 Fed. Reg. 48599 (June 14, 1993). 49 C.F.R. § 41.100(a) (2000).

[441] 58 Fed. Reg. 32867 (June 14, 1993). 49 C.F.R. § 41.100(a) (2000).

[442] 49 C.F.R. § 41.117(d) (2000).

[443] 49 C.F.R. § 41.110(a) (2000). The DOT recommends the use of model codes based on the National Earthquake Hazards Reduction Program (NEHRP) Recommended Provisions, particularly the 1991 International Conference of Building Officials Uniform Building Code, the 1992 Supplement to the Building Officials and Code Administrators International (BOCA, International) National Building Code, and the 1992 Amendments to the Southern Building Code Congress (SBCC) Standard Building Code. 49 C.F.R. § 41.120.

[444] 49 C.F.R. § 41.110(c) (2000). The certificate may include the engineer and architect's authenticated verifications of seismic design codes, standards, and practices used in the design and construction of the building, construction observation reports, local or state building department plan review documents, or any other documents deemed appropriate by the administration-owner. *Id*.

[445] According to the Federal Register entry for this regulation, a building should be considered to be "federally leased" when the DOT and/or its operating administrations occupy at least 15 percent of the building's total square area. 58 Fed. Reg. 32870 (1993).

[446] 49 C.F.R. § 41.115(c) (2000).

[447] 49 C.F.R. § 41.115(b) (2000).

[448] 49 C.F.R. § 41.117(a) (2000).

[449] 49 C.F.R. § 41.117(d) (2000).

[450] 49 C.F.R. § 41.119(a) and (d) (2000).

[451] Martha Smith & Ronald Clarke, *Crime and Public Transport,* 27 CRIME & JUST. 169, 171 (2000).

> ment. By its very nature this is difficult to secure. It is open to all members of the public, criminal or not. At off-peak times, trains, stations and bus stops tend to lack supervision from staff and tend to be lonely and intimidating. During rush hours, they may be so crowded that passengers have difficulty in protecting their persons or their property. These conditions are often exacerbated by lack of funding, poor administration, bad design, and inadequate policing.[452]

As is described in Section 11—Carrier Liability, transit providers have been held liable where one foreseeably assaults,[453] hits,[454] shoot,[455] rapes,[456] or pickpockets a passenger.[457] Though passengers injured on buses may not prevail where the driver is unaware of the assault,[458] typically, these cases hold that a common carrier is bound to exercise extraordinary care to protect its passengers where it knows or should know that a third person threatens injury, or might be anticipated to injure, the passenger.[459]

Therefore, security must be an integral part of transit system planning, design, construction, and operation. Vigorous maintenance and policing, as well as situational measures tailored to specific crime problems, also offer potential relief. The classic example of designing out crime is the WMATA Metro, whose subway system was designed with spacious platforms, open escalators and passageways, use of manned closed circuit television, and the absence of vendors and rest rooms.[460] Walls of the D.C. Metro subway stations are set back from the passenger waiting platforms, out of reach of potential graffiti artists. WMATA buses are also equipped with silent alarms to notify the dispatcher of a problem (who in turn notifies transit and local police), and flashing alarm lights to signal police officers in the vicinity of a problem, and drivers are instructed when to use them.[461] The New York subway system has also seen a decrease in crime, perhaps corresponding with its policy of more vigorous police enforcement of minor offenses (including fare evasion).[462]

The FTA encourages transit systems to develop and implement a Transit System Security Plan.[463] Security is also an element of the state safety oversight rule, discussed above.[464] The overall goal is to maximize the level of security and reliability to all passengers, employees, and any other individuals coming into contact with the transit system, including its vehicles, equipment, and facilities, while minimizing threats to human safety and vandalism.[465]

Unless it has determined that it is not necessary, a recipient of FTA funds must expend at least 1 percent of the amount of the federal assistance it receives for each fiscal year[466] for transit security projects, including increased lighting in or adjacent to a transit system, increased camera surveillance of an area in or adjacent to that system, emergency telephone line or lines to contact law enforcement or security personnel in an area in or adjacent to that system, and any other project intended to increase the security and safety of an existing or planned transit system.[467] Capital grant funds are also available for crime prevention and security.[468] Many transit systems are using the 1 percent security funds to install video cameras on transit vehicles.

The tragic events of September 11th, 2001 (in which the New York World Trade Center and the Pentagon were attacked by aircraft flown by suicide hijackers), led Congress to pass the Air Transportation Safety and System Stabilization Act.[469] The legislation established a new Transportation Security Administration (TSA) originally within the DOT, but since folded into the nascent Department of Homeland Security. Though the initial focus of the legislation was aviation, and certainly this has been the immediate concern of the TSA, one may anticipate that the new agency may eventually promulgate regulations addressing transit as well.

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[452] *Id*. at 219.

[453] McCoy v. Chicago Transit Auth., 69 Ill. 2d 280, 371 N.E.2d 625 (Ill. 1977); Kenny v. SEPTA, 581 F.2d 352 (3d Cir. 1978).

[454] Carswell v. SEPTA, 259 Super. 167 393 A.2d 770 (Pa. Super. 1978).

[455] Martin v. Chicago Transit Auth., 128 Ill. App. 3d 834, 471 N.E.2d 544 (Ill. App. 1984).

[456] Weiner v. Metropolitan Transp. Auth., 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (N.Y. 1982).

[457] Eagan v. Chicago Transit Auth., 240 Ill. App. 3d 784, 608 N.E.2d 292 (Ill. App. 1992).

[458] Milone v. Wash. Metro. Area Transit Auth., 91 F.3d 229 (D.C. Cir. 1996) (bus rider who had been punched in the back of the head by an unruly passenger; jury verdict for WMATA affirmed; evidence insufficient to establish knowledge by bus driver of dangerous condition on bus as would create duty to protect rider). *But see* Wash. Metro. Area Transit Auth. v. O'Neill, 633 A.2d 834 (D.C. App. 1993) (transit authority held negligent where its driver refused to assist passengers from assault and battery).

[459] McPherson v. Tamiami Trail Tours, 383 F.2d 527, 531 (5th Cir. 1967) [unprovoked attack by a Caucasian passenger on an African-American passenger].

[460] Smith & Clarke, *supra* note 451, at 169, 208.

[461] Under WMATA rules, the silent alarm is to be used where a passenger is exposed to assault, threat of bodily harm, or robbery, or is suffering acute illness or serious injury. Milone v. Wash. Metro. Area Transit Auth., 91 F.3d 229, 231 (D.C. Cir. 1996). Wash. Metro. Area Transit Auth. v. O'Neill, 633 A.2d 834 (D.C. App. 1993).

[462] Smith & Clarke, *supra* note 451, at 169, 210.

[463] *See FTA Transit System Security Planning Guide* (Jan. 1994).

[464] This issue is also discussed elsewhere in this Section.

[465] *See generally* PAUL DEMPSEY, AIRPORT PLANNING & DEVELOPMENT: A GLOBAL SURVEY 343–49 (McGraw Hill 1999).

[466] Such sums must be apportioned in accordance with 49 U.S.C. § 5336 (2000).

[467] 49 U.S.C. § 5307(d)(1)(J) (2000).

[468] 49 U.S.C. § 5321 (2000).

[469] 107 Pub. L. 42, 115 Stat. 230 (Sept. 22, 2001).

## I. STATE AND LOCAL SAFETY REGULATION

As noted above, FTA has mandated that states establish State Rail Safety Oversight Programs to govern "New Starts" and other rail systems. States have also taken over administration of portions of CMV control. Some states have given their state DOTs broad authority to promulgate rules addressing equipment and operational safety standards.[470] County and city governments issue ordinances specifying speed limits or HOV lanes for use by buses. Some states have passed laws requiring that other drivers yield the right-of-way to a transit bus entering traffic.[471] Other states address equipment on an item-by-item basis, promulgating laws regulating, for example, lighting,[472] brakes,[473] safety glass,[474] and emission inspections.[475]

To ensure safety, many have passed laws governing passenger conduct on public passenger vehicles. [476] For example, the District of Columbia prohibits smoking; consumption of food or drink; spitting; carrying flammable or combustible liquids, live animals, explosives, acids, or any other inherently dangerous item aboard street railway or bus lines; or "knowingly to cause the doors of any rail transit car to open by activating a safety device designed to allow emergency evacuation of passengers." [477] The City of Memphis forbids playing radios or other devices on the transit vehicle, on grounds that noise could keep the operator from hearing horns, or distract the operator or passengers from warnings.[478]

A few states have established transportation safety boards. For example, Virginia established a 12-member Board of Transportation Safety to advise the Commissioner of Motor Vehicles, state DOT, and Governor on "the elements of a comprehensive safety program for all transportation modes operating in Virginia."[479] Other states (such as California, Florida, Massachusetts, New York, and Pennsylvania) authorize various aspects of transit operation to be regulated by their PUCs.[480] For example, the Pennsylvania DOT inaugurated the PennDOT Rail Transit Safety Review Program to provide comprehensive safety analysis and regulation of fixed guideway systems (i.e., rapid transit, light rail, busway, and inclined planes), including those of SEPTA, the Port Authority of Allegheny County in Pittsburgh, and the Cambria County Transit Authority in Johnstown; it does not include commuter rail services regulated by the FRA. The California PUC promulgates safety rules and regulations over LRT (but not heavy rail transit) equipment and operations and monitors compliance with those provisions.[481]

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[470] *See, e.g.,* FLA. STAT. § 341.061(2) (2000): "The department shall adopt by rule minimum equipment and operational safety standards for all…bus transit systems…." It also requires that each bus transit system develop a transit safety program plan, and certify to the department that its plan is consistent with the safety standards, and that all transit buses be inspected not less than annually. *Id*.

[471] *See, e.g.,* ORS § 811.167 (1999) (Oregon).

[472] *See, e.g.,* N.C. GEN. STAT. § 20-129 (2000).

[473] *See, e.g.,* 625 ILCS 5/12-301 (2001) (Illinois).

[474] *See, e.g.,* MASS. ANN. LAWS ch. 90, § 9A (2001).

[475] *See, e.g.,* N.J. STAT. § 39:8-60 (2001).

[476] For example, the District of Columbia requires that passengers shall not stand "in front of the white line marked on the forward end of the floor of any bus or otherwise conduct himself in such a manner as to obstruct the vision of the operator." D.C. CODE § 44-223(7) (2000).

[477] D.C. CODE § 44-223 (2000).

[478] Memphis City Code § 2-336 (2001).

[479] VA. CODE ANN. § 46.2-224 (2000).

[480] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at 13.

[481] TRANSIT COOPERATIVE RESEARCH PROGRAM, *supra* note 1, at C-1–3. California rail safety regulation was upheld as not preempted by federal law in Union Pacific R.R. v. Cal. PUC, 109 F. Supp. 2 1186 (N.D. Cal. 2000).

SECTION 8

# OPERATIONAL LIMITATIONS

## INTRODUCTION

Congress has enacted legislation designed to protect private enterprise from federally subsidized competition. Congress was concerned that federal funding not be used without consideration of the interests of private carriers that compete with federally funded transit providers for patronage. This concern resulted in the creation of certain protections for private carriers, including restricting certain operations by recipients and subrecipients of federal funds.[1] Such legislation seeks to protect two categories of competitors from federally-funded transit operations—private charter bus operators[2] and private school bus operators.[3]

## I. STATUTORY AND REGULATORY BACKGROUND

In the early 1970s, Congress became increasingly concerned that federally-funded mass transportation facilities and equipment not be used in unfair competition against private carriers. This concern resulted in restrictions on the use of FTA-assisted equipment and facilities for charter service that first appeared in Section 164(a) of the Federal Aid Highway Act of 1973.[4] Section 164(a), which prohibited all charter service outside an FTA recipient's urban area, read as follows:

> No Federal financial assistance shall be provided under (1) subsection (a) or (c) of section 142, title 23, United States Code, (2) paragraph (4) of subsection (e) of section 103, title 23, United States Code, or (3) the Urban Mass Transportation Act of 1964, for the purchase of buses to any applicant for such assistance unless such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in charter bus operations in competition with private bus operators outside of the area within which such applicant provides regularly scheduled mass transportation service. A violation of such agreement shall bar such applicant from receiving any other Federal financial assistance under those provisions of law referred to in clauses (1), (20), and (30) of this subsection.

Section 164(a) was amended by Section 813(b) of the Housing and Community Development Act of 1974[5], and reflected in Section 3(f) of the Urban Mass Transportation Act of 1964, as amended, as follows:

> No Federal financial assistance under this Act may be provided for the purchase or operation of buses unless the applicant or any public body receiving such assistance for the purchase or operation of buses or any publicly owned operator receiving assistance, shall as a condition of such assistance enter into an agreement with the Secretary that such public body, or any operator of mass transportation for such public body, will not engage in charter bus operations outside the urban area within which it provides regularly scheduled mass transportation service, except as provided in the agreement authorized by this subsection. Such agreement shall provide for *fair and equitable arrangements*, appropriate in the judgment of the Secretary, to assure that the financial assistance granted under this Act will not enable public bodies and publicly owned operators to foreclose private operators from the intercity charter bus industry where such private operators are willing and able to provide such service…(emphasis added).

Since the 1974 amendments, Congress has made no substantive changes to the charter bus restrictions set forth above.[6]

The Urban Mass Transportation Administration (hereafter FTA) published its first rule regulating charter bus activities by FTA recipients on April 1, 1976.[7] The rule prohibited public transit operators from providing charter bus service outside their urban operating areas unless "fair and equitable arrangements" had been made to protect "willing and able" private intercity charter bus operators. The rule was quite broad, and allowed FTA recipients to compete, within their existing operating areas, against private carriers. FTA recipients were required to certify that their charter service was "incidental," and that revenues generated by such service were equal to or greater than the cost of providing the service. Finally, the regulation required that charter certifications be made available for review and comment by private carriers.

Early charter bus decisions revolved around the definitions of "urban area" and "incidental service," cost certification, and cost allocation plans. Many FTA grantees complained that the rule created undue administrative burdens on them, while private operators voiced concern that publicly funded operators were forcing them out of business with federally-funded equipment. Even the FTA found the rule cumbersome, and on January 19, 1981, issued an advance notice of proposed rulemaking (ANPRM) to revise the rule.[8]

After an especially long period of comment and review, FTA issued a complete revision of its charter regulations on April 13, 1987. The revised regulations established a general prohibition on the use of FTA-funded equipment and facilities for charter service.[9] Incidental use was allowed only where there were no willing and able private operators, or where private operators lacked equipment accessible to the elderly or disabled. Two other exemptions, for hardship situations in non-urbanized areas and for special events, could be obtained with FTA approval. On November 3, 1987,

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[1] *See, e.g.*, 49 U.S.C. §§ 5323(1), 5323(d), and 5323(f) (2000).

[2] 49 C.F.R. pt. 604.

[3] However, on demand taxicab service is not within the protected category. PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 327 (Quorum 1986). Westport Taxi Service, Inc. v. Adams, 571 F.2d 697 (2d Cir. 1978).

[4] Pub. L. 93-87, 87 Stat. 280 (Aug. 13, 1973).

[5] Pub. L. 93-383, 88 Stat. 633 (Aug. 22, 1974).

[6] 49 U.S.C. §§ 5323(d), 5323(f) (2000).

[7] 41 Fed. Reg. 14123 (Apr. 1, 1976).

[8] 46 Fed. Reg. 5394 (Jan. 19, 1981).

[9] 52 Fed. Reg. 11916 (Apr. 13, 1987).

FTA issued charter service questions and answers to its April 13, 1987, rulemaking.[10]

FTA amended its charter rule on December 30, 1988, to add three additional exceptions to the general prohibitions described above.[11] The amendment allowed the incidental use of FTA-funded equipment and facilities under certain conditions for: 1) direct charter service with nonprofit social services agencies,[12] 2) provision of service to the elderly by social services agencies in nonurbanized areas, [13] and 3) service agreed upon between FTA recipients and local private operators pursuant to a willing and able determination allowing such service.[14] FTA has not made changes to its charter regulations since the December 1988 amendments.

## A. Charter Service

Charter service is defined as:

> Transportation using buses or vans, or facilities funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge (in accordance with the carrier's tariff) for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin. This definition includes the incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment.[15]

Every applicant for FTA assistance must submit with its grant application an agreement that the recipient will not operate prohibited charter service.[16] This agreement should not be confused with the so-called charter agreement executed between the recipient and all willing and able charter providers in the recipient's service area; the charter agreement specifies which types of charter service the recipient may operate directly. The foregoing rules apply to both recipients and subrecipients.[17] The rules also apply to FTA-funded vans and buses, but not to FTA-funded facilities and equipment such as rail vehicles and ferry boat vehicles.[18]

Incidental charter service is defined as charter service that does not "interfere with or detract from" the provision of mass transportation service, or does not "shorten the mass transportation life of the equipment or facilities" being used.[19] The purpose of the rules is to ensure that FTA-funded equipment and facilities are available for mass transportation. Though the issue of what is "incidental" is determined by FTA on a case-by-case basis, among charter services the FTA explicitly does *not* consider "incidental" are the following:

- Service performed during peak hours;[20]
- Service that does not meet its fully allocated cost;
- Service used to count toward meeting the useful life of any facilities or equipment; and
- Service provided in equipment that is excess of an FTA-approved spare ratio.[21]

Generally speaking, recipients of FTA funds are prohibited from providing charter services where private companies are available and willing to provide such services (known as "willing and able" providers).[22] A "willing and able" provider is one who has the desire, the physical capability,[23] and the legal authority to provide charter service in the area in which it is proposed.[24] The purpose of the prohibition is to ensure that federal-funded equipment and facilities do not compete unfairly with private charter carriers.[25] All operators—public or private—receiving FTA assistance through the recipi-

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[10] 52 Fed. Reg. 42248 (Nov. 3, 1987).

[11] 53 Fed. Reg. 53348 (Dec. 30, 1988).

[12] 49 C.F.R. § 604.9(b)(5) (2003).

[13] 49 C.F.R. § 604.9(b)(6) (2003).

[14] 49 C.F.R. § 604.9(b)(7) (2003).

[15] 49 C.F.R. 604.5(e) (2003).

[16] For state administered programs, the state must submit the charter agreement and obtain and retain written certification of compliance by its subrecipients. 49 C.F.R. 604.7(a) (2003).

[17] As the FTA noted,

> a private operator that receives [FTA] assistance through a recipient, whether under contract to provide specific service or by means of an allocation plan as in New Jersey, was subject to the regulation to the extent that the assisted equipment or facilities were used to provide charter service…. Consequently, all operators for a recipient, whether public or private, under contract or receiving assistance through a recipient, are subject to the charter rule but only to the extent that the operator uses [FTA] funded equipment or facilities to provide charter service…. Therefore, in shorthand, the rule treats all operators for a recipient as a recipient to the extent that they stand in a recipient's shoes.

52 Fed. Reg. 11918-9 (Apr. 13, 1987).

[18] According to FTA, "Since there are so few private rail or ferry boat operators, we believe that not including charter rail and charter ferry boat service within this rule will have little if any adverse effect on operators." 52 Fed. Reg. 11916 (Apr. 13, 1987). However, charter service provided with FTA-funded rail or ferry boat equipment must be incidental to the provision of mass transportation. 52 Fed. Reg. 11920 (Apr. 13, 1987).

[19] 49 C.F.R. 604.5(i) (2003).

[20] FTA has defined peak hours as generally running from 6:00-9:00 a.m., and from 4:00-7:00 p.m. 52 Fed. Reg. 11926 (Apr. 13, 1987).

[21] 52 Fed. Reg. *Id*. at 11926 (Apr. 13, 1987).

[22] 49 C.F.R. 604.9(b)(1) (2003).

[23] A charter operator need not demonstrate that it has any particular capacity level. It may be deemed willing and able even if it has only one bus, and that bus may be an intercity bus, a transit bus, a school bus, or a trolley bus. However, an operator must have at least one bus or van to be considered "willing and able." Transportation brokers are ineligible for such designation. 52 Fed. Reg. 11922 (April 13, 1987). FTA recognized that "it is possible where there is only one willing and able private operator that has precluded the recipient from providing any charter service that the private operator could refuse to provide requested charter service and leave the customer without transportation." However, the agency considered such circumstances unlikely, and concluded "that the market will take care of the situation." 52 Fed. Reg. 11922 (Apr. 13, 1987).

[24] 49 C.F.R. § 604.5(p) (2003).

[25] 52 Fed. Reg. 11916-17 (Apr. 13, 1987).

ent stand in the shoes of the recipient for purposes of the charter prohibition.

## B. Exceptions

### *1. The No "Willing and Able" Private Carriers Exception*

An applicant seeking FTA financial assistance to acquire or operate transportation equipment or facilities must submit to FTA a formal written agreement that it will provide charter service only to the extent that there are no private charter service operators willing and able to provide the charter service.[26]

In order to determine whether such private operators exist, a transit operator must publish a notice in a local newspaper and send a copy to all local private charter operators and any operator that requests it, as well as to the American Bus Association and the United Bus Owners of America.[27] The notice must describe the charter service sought to be directly provided by the recipient,[28] and give the private operators not less than 30 days to submit written evidence that they are "willing and able" to provide the service.[29] The FTA prohibits a recipient requiring detailed proof of the private charter operator's ability to provide charter service.[30] The transit operator may, but need not, hold an oral hearing.[31] If there are no private operators willing and able to provide the proposed charter service, the FTA recipient may directly provide incidental charter service.[32] However, if there is at least one private charter operator willing and able to provide the charter service the FTA recipient seeks to provide directly to the public, the recipient is prohibited from providing such charter service using FTA-funded equipment or facilities.[33]

For example, if the public transit provider announces its desire to provide charter bus and van service, and there are private bus companies that state that they are "willing and able" but do not have at least one van, the public operator may directly provide incidental charter service in FTA-funded vans, but not buses.[34] The rationale is that the private bus companies, while "willing," are not "able" to operate van service because of the absence of at least a single van.

### *2. The Contract Exception*

As noted above, to the extent that there is at least one such private "willing and able" private charter operator, an FTA recipient may not directly provide charter service. It may, however, provide charter service or vehicles under contract or lease to a private charter operator.[35] Typically, this would be under circumstances where the private operator does not have sufficient equipment to satisfy the capacity demands of the charterer,[36] or when the private operator is unable to provide "equipment accessible to elderly and disabled persons."[37] In both circumstances, the FTA recipient is under contract with the private operator and not with the passengers.[38] During the contract or lease term, the private charter operator must be responsible for the direction and control of the public transit provider's equipment.[39] However, the regulations do not require the recipient to lease its FTA-funded vehicles to the private charter operator. Moreover, the private charter

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[26] 49 U.S.C. § 5323(d) (2000), C.F.R. 604.7 (2003).

[27] Notice should be published not less than 60 days prior to the date that the recipient proposes to commence directly providing the charter service. The notice must be published in a general circulation newspaper in the geographic region in which the recipient seeks to provide charter service. If the region is large enough, it may have to be published in more than one newspaper to cover the entire area. A state is free to publish one newspaper notice to cover all its subrecipients, or publish a notice for each subrecipient tailoring the publication to cover only the region in which the subrecipient operates, or it can publish regional notices to cover several subrecipients. 52 Fed. Reg. 11926-27 (Apr. 13, 1987).

[28] The notice must describe the days, times of day, geographic region, and vehicles. 49 C.F.R. § 604.11(c)(2) (1999). FTA encourages, but does not require, that the notice indicate the purpose of the charter, or the groups to be transported. 52 Fed. Reg. 42248 (Nov. 3, 1987). The notice should describe the proposed charter service and request that private charter operators respond with evidence to prove they are willing and able to provide it. 52 Fed. Reg. 11926-27 (Apr. 13, 1987).

[29] If the FTA recipient believes that a private charter operator has falsified its "willing and able" filing, it may file a complaint with the FTA Chief Counsel, who shall direct the parties to informally resolve the dispute; failing that, he or she shall rule on the complaint within approximately 90 days. 52 Fed. Reg. 42250 (Nov. 3, 1987). The FTA recipient may look behind the evidence where it has reasonable cause to believe that some or all of the evidence submitted has been falsified. According to FTA, "we have no intention of permitting an unscrupulous private operator from affecting the services that a recipient may provide to the ultimate detriment of the customer." Once the recipient determines that an eligible willing and able private operator exists, it may cease reviewing the evidence submitted. According to FTA, "if a private operator satisfies the definitional requirements of desire, ability to obtain the vehicles, and legal authority, the private charter operator is automatically willing and able." Within 60 days of the deadline for filing a "willing and able" statement, the recipient must inform all the private operators that submitted evidence of its decision. 52 Fed. Reg. 11916 (Apr. 13, 1987).

[30] "The notice must not require anything beyond: (1) A statement that the private operator has the desire to provide the service described and the physical capability to do so, and (2) submission of documents showing that it possesses the requisite legal authority." 52 Fed. Reg. 42248 (Nov. 3, 1987).

[31] If it holds an oral hearing, it is advised to make a copy of the transcript available to any party who requests one. 52 Fed. Reg. 42250 (Nov. 3, 1987).

[32] 49 C.F.R. 604.9(b)(2003).

[33] The rule applies to recipients and subrecipients. 49 C.F.R. 604.9(a) (2003).

[34] 52 Fed. Reg. 11920 (Apr. 13, 1987).

[35] 49 C.F.R. § 604.9(b)(2) (2003).

[36] 52 Fed. Reg. 11921 (Apr. 13, 1987).

[37] 49 C.F.R. § 604.9(b)(2)(ii).

[38] 52 Fed. Reg. 11916 (Apr. 13, 1987).

[39] 52 Fed. Reg. 42248 (Nov. 3, 1987).

operator's drivers may operate the recipient's vehicles. Nor do the regulations require that the recipient forego its safety rules, operating procedures, and accident reporting requirements. In effect, the private charter operator becomes a broker for the charter operations of the federally-funded FTA recipient.

*3. The Hardship Exception*

FTA recipients in non-urbanized areas may petition the agency for a "hardship exception" that allows the recipient to provide charter service directly to the customer if willing and able private operators impose minimum trip durations that exceed the proposed charter trip, or willing and able private operators are located so far from the origin of the charter service that the costs of the service would be onerous.[40] In either situation, the process for seeking a hardship exception is the same.

First, after determining that there is one or more willing and able private charter operators, the recipient must provide those operators with 1) a written explanation why FTA should grant a hardship exception in that particular case, and 2) a 30-day comment period within which the private operators may respond. Second, after the comment period closes, the recipient must send the FTA's Chief Counsel[41] a copy of the notice it sent to the willing and able operators, and copies of all comments received. The Chief Counsel reviews the materials submitted and grants or denies the request in whole or in part. Because hardship exceptions are effective for only 12 months, such exceptions, where warranted, must be resubmitted on a yearly basis.[42]

*4. The Special Events Exception*

Upon petition,[43] a waiver may also be granted to an FTA-funded public transit operator, allowing it to provide charter service for special events to the extent that private charter operators are incapable of providing the service.[44] The rules do not define "special events," but FTA has expressed its intention that they "include only events of an extraordinary, special and singular nature such as the Pan American Games and the visits of foreign dignitaries."[45] Though no public notice is required, FTA expects recipients applying for such an exemption to have contacted private carriers in the area to determine whether they are unable to provide such service.[46] In other words, the recipient has the option of providing broad public notice or notifying the local private carriers individually. FTA has made it clear that special events waivers will be sparingly granted and that the recipient applying for such a waiver will have a heavy burden to prove that the requested charter service cannot be provided by private charter operators. Generally, such exceptions are limited to events of national or international importance where private operators would be unable to provide the necessary level of service.[47]

*5. The Nonprofit and Government Agencies Exception*

The legislative history of the Department of Transportation and Related Agencies Appropriations Act of 1988[48] indicates that in response to complaints of transit agencies that the charter bus regulations restricted charter service too greatly, Congress asked that a rulemaking be undertaken to amend the charter regulations to "permit non-profit social service agencies with clear needs for affordable and/or handicapped-accessible equipment to seek bids for charter services from publicly funded operators."[49] The Congress expressed its concerns that the charter regulations may have been adversely affecting the "transportation disadvantaged"—those people of limited physical or financial means who depend on transit to meet their mobility needs.[50] It suggested that "these non-profit agencies…be limited to government entities and those entities subject to section 501(c) 1, 3, [4] and 19 of the Internal Revenue Code."[51]

In response, FTA promulgated regulations allowing recipients to contract directly for charter services with social service agencies that serve elderly and disabled patrons or receive funding from U.S. Department of

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[40] 49 C.F.R. § 604.9(3) (2003).

[41] As a practical matter, hardship requests are processed through FTA's regional counsel in the particular region where the request arises.

[42] 52 Fed. Reg. 11925 (Apr. 13, 1987).

[43] Petitions must be filed at least 90 days prior to the proposed service. They must describe the event, and explain how it is special, and why private charter operators are incapable of providing it. *Id*.

[44] 49 C.F.R. § 604.9(b)(4) (2003). The incapability of private operators to meet the needs of the special event is the central issue in determining whether the exception will be granted. FTA has indicated that "private charter operators would not be capable of providing charter service if, for example, their fleets, even when pooled together, would not equal or even approximate the level of service required by the event." 52 Fed. Reg. 11925 (Apr. 13, 1987).

[45] 52 Fed. Reg. 11916 (Apr. 13, 1987).

[46] 52 Fed. Reg. 42248 (Nov. 3, 1987).

[47] 52 Fed. Reg. 11925 (Apr. 13, 1987).

[48] Pub. L. 100-202, 101 Stat. 1329 (Dec. 22, 1987).

[49] H.R. REP. NO. 100-498, CONG. REC. H12787 (Dec. 21, 1987). FTA interpreted this as limited to two types of circumstances: (1) where the government entities and tax-exempt organizations need charter service that may be difficult for them, or their constituents, to afford; and (2) where the government entities and tax-exempt organizations need transportation equipment accessible to elderly or disabled patrons. 53 Fed. Reg. 18964 (May 25, 1988).

[50] H.R. REP. NO. 100-498, CONG. REC. H12787 (Dec. 21, 1987).

[51] 53 Fed. Reg. 53348 (Dec. 30, 1988). Congress also recommended that an exemption be provided to "those public transit authorities which purchased charter rights entirely with non-federal funds prior to the enactment of the Urban Mass Transportation Act of 1966." The agency declined to adopt the latter recommendation, believing that it would be contrary to the governing statutory requirements. *Id*.

Health and Human Services (HHS) programs,[52] provided that the social service agency with which the FTA recipient contracts is either a governmental institution, or an organization exempt from taxation under Sections 501(c) 1, 3, 4, or 19 of the Internal Revenue Code.[53]

Though a major catalyst for these regulations was the mobility needs of the disabled, one must recognize that FTA takes the position that exclusive service for elderly disabled riders is considered to be "mass transportation" service under the Federal Transit Act, and not charter service, even if provided only on an incidental basis, so long as it is open to all elderly and disabled persons in a geographic service area, and not restricted to a particular group.[54]

*6. The Non-Urbanized Area Exception*

Similar to the nonprofit and government agencies exception, the non-urbanized area exception[55] allows FTA recipients to contract directly with eligible entities for charter services where more than 50 percent of the passengers on a trip will be elderly. As its name implies, this exception applies only in non-urbanized areas of less than 50,000.

*7. The Agreement with Private Operators Exception*

An FTA-funded transit provider may directly provide charter service where it has reached a written agreement allowing it to do so with all "willing and able" private carriers.[56] To qualify, the recipient must provide for such an agreement in its annual charter notice, and complete the review process on all the replies it receives in response to the notice.[57] The agreement may define the exempted charter service in any terms to which the parties agree. FTA's approval or concurrence is not required, but notice of the agreement must be published.[58]

*8. Charter Service with Locally Funded Equipment and Facilities*

The charter prohibition applies only to FTA-funded equipment and facilities. FTA takes the position that where a recipient establishes a separate company using equipment and facilities purchased, maintained, and operated exclusively with local funds, any charter operations by that company are exempt from the FTA's charter bus prohibitions. Alternatively, a recipient can establish a separate charter division that receives no federal funds, does not use federally-funded equipment, and does not use federally-funded facilities.[59] Note, however, that the operator must do more than simply identify certain equipment in its fleet as locally funded.

However, in a case involving the Manchester, New Hampshire, transit authority, FTA took the position that, if there is a "willing and able" charter provider, a transit authority may not allow its separate charter operator to use an FTA-funded garage in connection with charter operations even on an incidental basis. FTA-funded facilities also include offices and other administrative locales. However, a transit provider could lease space in an FTA-funded garage to a private carrier on an incidental basis. FTA also recommends that, where a transit operator establishes a charter subsidiary, affiliate, or division, that the maintenance work be contracted out rather than performed in-house in an FTA-funded garage.[60] This reflects FTA's view that charter service should be provided by private charter operators to the maximum extent practicable. FTA, in furtherance of its policy, strictly construes the charter regulations and will find that any nexus to FTA funds (e.g., an FTA-funded garage) will prohibit the recipient's proposed charter operation.

A person who believes that an FTA recipient is in violation of the regulations may submit a written complaint to the FTA Regional Administrator (in the case of charter operations), who shall first attempt to conciliate the dispute. The Regional Administrator shall send a copy of the complaint to the respondent, and allow it 30 days to file written evidence that no violation has occurred. The complainant has 30 days to rebut the response in writing. The Regional Administrator has the discretion to engage in further investigation and/or grant a party's request for oral hearing. The Regional Administrator shall attempt to issue a written decision within 30 days of receiving all the evidence.[61] Should the Regional Administrator determine, on complaint or *sua sponte,* that a violation has occurred, he or she may order such remedies as are appropriate.[62] If the Regional Administrator determines that there has been a continuing pattern of violation, he or she may bar the respondent from the receipt of further financial assistance for mass transportation facilities and equip-

[52] It should be emphasized that the exemption is limited to the very narrow category of HHS-funded agencies. Recipients may not provide charter service to the Girl Scouts, to a University, or to the Junior League. Transit systems fought hard for this right in the rulemaking process; FTA rejected these arguments and limited the exemption to HHS-funded organizations. Thus, being a Section 501(c)(1) or a 501(c)(3) organization is not enough.

[53] 53 Fed. Reg. 18964 (May 25, 1988).

[54] 52 Fed. Reg. 42248 (Nov. 3, 1987).

[55] 49 C.F.R. § 604.9(b)(6) (2003).

[56] A recipient of FTA funds may provide charter service directly to the customer where a formal agreement has been executed between the recipient and all willing and able private charter operators. 49 C.F.R. § 604.9(b)(7) (1999).

[57] 52 Fed. Reg. 42248 (Nov. 3, 1987).

[58] 49 C.F.R. § 604.9(b)(4) (2003).

[59] If a recipient sets up a separate company that has only locally funded equipment and facilities and operates with only local funds, or the recipient is able to maintain separate accounts for its charter operators to show that the charter service is truly a separate division that receives no benefits from the mass transportation division, then the charter rule would not apply.

52 Fed. Reg. 42248 (Nov. 3, 1987).

[60] 52 Fed. Reg. 42252 (Nov. 3, 1987).

[61] 49 C.F.R. § 604.15 (2003).

[62] 49 C.F.R. § 604.17(a) (2003).

ment.[63] The losing party may appeal the Regional Administrator's decision to the FTA Administrator within 10 days of receipt.[64] FTA's final decision on a charter bus appeal is subject to judicial review.[65]

## II. SCHOOL BUS OPERATIONS

### A. The General Prohibition

Similar to the charter bus prohibitions, federal law limits federal funding to those recipients that agree not to provide school bus transportation in competition with private school bus operators.[66] This section protects private school bus operators from competition by federally-funded mass transportation providers.[67] Neither an FTA recipient nor any transit operator performing work in connection with such a recipient may engage in school transportation operations in competition with private school transportation operators, except as permitted under the Federal Transit Act.[68]

Section 3(g) of the Urban Mass Transportation Act of 1964 prohibited federal financial assistance for transit operations unless the recipient entered into an agreement with DOT that it would not engage in school bus operations "exclusively for the transportation of students and school personnel, in competition with private school bus operators."[69] Several subsequent pieces of legislation affirmed this prohibition, and expanded it from applicability to the purchase of buses to all grants for the construction or operation of transit facilities and equipment.[70] The purpose of the legislation was to prevent competition with private school bus operators, competition that Congress perceived to be unfair.[71] But only exclusive school bus operations were prohibited, for Congress did not intend to prohibit use of public transit for school-related purposes, or prohibit school-bound riders from boarding transit vehicles.[72]

An applicant seeking FTA financial assistance to acquire or operate transportation facilities and equipment must certify that it will: (1) engage in school transportation operations in competition with private school transportation operators only to the extent permitted by the Federal Transit Act; and (2) comply with the requirements of the applicable regulations before providing any school transportation.[73] The Federal Transit Act permits federal financial assistance for the use of mass transit equipment to provide school bus service so long as "the applicant agrees not to provide school bus transportation that exclusively transports students and school personnel in competition with a private school bus operator."[74] The FTA MA contractually obligates the recipient to comply with these provisions.[75]

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[63] 49 C.F.R. § 604.17(b) (2003).

[64] 49 C.F.R. § 604.19(a) (2003).

[65] 5 U.S.C. §§ 701–706 (2000). 49 C.F.R. 604.21 (2003).

[66] 49 U.S.C. § 5323(f) (2000).

[67] Area Transportation v. Ettinger, 1999 U.S. Dist. LEXIS 18503 (1999).

[68] 49 U.S.C. § 5323(f) (2000); FTA regulations, "School Bus Operations," 49 C.F.R. pt. 605 (2003).

[69] 49 U.S.C. § 1602(g) (1964).

[70] A similar provision was included in Section 164(b) of the Federal-Aid Highway Act of 1973, though the "grandfather" provisions authorizing continuation of preexisting school bus operations differ. The Urban Mass Transportation Act set a November 26, 1974, cut-off date, while the Federal-Aid Highway Act of 1973 set an August 13, 1973, date. Section 109(a) of the National Mass Transportation Assistance Act of 1974 (Pub. L. 93-503; Nov. 26, 1974; 88 Stat. 1565) added a new Section 3(g) to the Urban Mass Transportation Act of 1964 (49 U.S.C. § 1602(g)) and applies to all grants for the construction or operation of mass transportation facilities and equipment under the Federal Transit Laws, as amended. No federal financial assistance may be provided for the construction or operation of facilities and equipment for use in providing public mass transportation service unless the applicant and the Administrator enter into an agreement that the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel, in competition with private school operators. 49 C.F.R. § 605.1 (2003); 41 Fed. Reg. 14128 (Apr. 1, 1976); Federal Mass Transit Act of 1964, as amended (49 U.S.C. § 1601 *et seq.*); 23 U.S.C. § 103(e)(4) (2000); 23 U.S.C. § 142(a) and (c) (2000); and 49 C.F.R. 1.51 (2003).

[71] Chicago Transit Auth. v. Adams, 607 F.2d 1284, 1291 (7th Cir. 1979).

[72] Lamers v. City of Green Bay, 998 F. Supp. 971, 989 (E.D. Wis. 1998), quoting the legislative history as saying,

> [T]he intent and legal effect of this section will not prevent those cities which have their own mass transit buses to allow them to be used by riders of school age to travel at reduced fares, nor to prohibit the routing of a public transit bus adjacent to school facilities, as a part of the regularly scheduled bus system service for any passenger. 119 Cong. Rec. 28102 (1973) (statement of Rep. Kluczynski, Chairman of the Transportation Subsommittee).

[73] 49 U.S.C. § 5323(f) (2000), and FTA regulations, "School Bus Operations," at 49 C.F.R. § 605.14 (2003). As required by 49 U.S.C. § 5323(f) (2000) and FTA regulations, "School Bus Operations," at 49 C.F.R. § 605.14 (2003), the applicant for FTA funding must agree that it and all its recipients will: (1) engage in school transportation operations in competition with private school transportation operators only to the extent permitted by 49 U.S.C. § 5323(f), and implementing regulations; and (2) comply with the requirements of 49 C.F.R. pt. 605 before providing any school transportation using equipment or facilities acquired with federal assistance awarded by FTA and authorized by 49 U.S.C. ch. 53 or tit. 23 U.S.C. for transportation projects.

[74] 49 U.S.C. § 5323(f) (2000). 49 C.F.R. pt. 605 (2003). The transit provider must enter into a written agreement with the FTA providing that "the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel in competition with private school bus operators." 49 C.F.R. § 605.14 (2003). The contents of the agreement are set forth in 49 C.F.R. § 605.15 (2003).

[75] Master Agreement § 29, available for review at http://navigation.helper.realnames.com/framer/1/113/default.asp?realname=Federal+Transit+Administration&url=http%eA%2F%2Fwww%Efta%2Edot%2Egov%2F&frameid=1&providerid=113&uid=30021314 (visited Mar. 23, 2002).

### B. Exceptions

A federally-funded transit provider seeking to engage in school bus operations must hold public hearings assessing the economic, social, and environmental consequences of such service, and notify private school bus operators of its intentions.[76] It must also demonstrate to FTA that: (1) it operates an urban school system and a separate and exclusive bus program for that school system; (2) the private school bus operators are unable to provide service safely, and at a reasonable rate; or (3) that it or its predecessor was engaged in providing school bus operations in the year preceding August 13, 1973, (in the case of a grant involving the purchase of buses), or November 26, 1974, (in the case of an FTA grant involving facilities and equipment).[77]

### C. Tripper Service

In 1982, FTA amended its regulations to authorize tripper service as an extension of the statutory prohibition of only "exclusive" school bus operations.[78] Tripper service is defined as "regularly scheduled mass transportation service which is open to the public, and which is designed or modified to accommodate the needs of school students and personnel, using various fare collections or subsidy systems."[79] Buses used in such service must be clearly marked as open to the public and not carry the designation "school bus" or "school special." They may stop only at a regular transit stop. The routes must be in regular route service in its published route schedule.[80] However, the routes need not be extensions of preexisting routes, and the transit provider may design separate routes to accommodate students. Trippers are routes that start and stop based on the school year calendar and do not operate over the summer. Some transit operators have a number of student pass programs that give students significant discounts. In some instances, transit providers have agreements with school districts that fund pass programs for their students, which allow the district to reduce its own yellow bus service significantly, though this works only for schools in more urban areas. According to one court, "From the perspective of private school bus operators, this is a loophole you can drive a bus through."[81] One might also argue that transit bus service provides enhanced safety and service, and better trained operators.

### D. Distinguishing School Bus from Charter Operations

In *Chicago Transit Authority v. Adams,*[82] the Seventh Circuit addressed the differences between school bus and charter operations. At issue was whether the Chicago Transit Authority could provide daily bus service in vehicles purchased with federal funds from a common departure point at a neighborhood school each morning and back to the school at the end of the school day. The service was used to transfer students to less crowded schools and to schools offering special facilities or programs, and to facilitate racial desegregation. FTA took the position that such service was not forbidden school bus operations, but instead constituted permissible incidental charter service.[83] The U.S. Court of Appeals for the Seventh Circuit disagreed:

> Since the transportation here is daily service to and from school at the beginning and end of the school day, it is indistinguishable from undisputed school bus operations except for the common point of pick-up and delivery….[w]e believe that the language of the charter regulation describes a single trip or series of trips for school students rather than daily transportation at the beginning and end of each school day when it speaks of groups traveling under a "single contract" and "under an itinerary, either agreed on in advance or modified after having left the place of origin. The school bus operations regulation, on the other hand, speaks of transportation "to and from school," language which we have concluded describes the daily transportation of students to and from their schools of regular attendance at the beginning and end of the school day.[84]

The court also noted that the regulations limited charter bus operations for school students to "incidental use."[85] The court agreed with FTA that the legislation restricted the use of federally-funded buses in school bus or charter operations to nonpeak hours when those vehicles are least likely to be needed for regularly scheduled mass transportation service to the public. Though federal funds may not be used to finance the purchase of buses used primarily in charter service, a transit provider is not prohibited from using such buses for charter service during idle or off-peak periods when

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[76] 49 C.F.R. § 605.4 (2003). The notice requirements to the public and to private school bus operators are set forth in 49 C.F.R. § 605.16 (2003). The private school bus operators may file written comments at the time of the public hearing, and the transit provider shall submit the comments and a transcript of the public hearing to the FTA. 49 C.F.R. § 605.18 (2003). The filing requirements are elaborated in 49 C.F.R. § 605.19 (2003). If there are no private school bus operators in the area, the transit provider may so certify to FTA, in lieu of meeting the notice requirements of § 605.16. 49 C.F.R. § 605.17 (2003).

[77] 49 C.F.R. § 605.11 (2003).

[78] 47 Fed. Reg. 44795, 44803 (2003).

[79] 49 C.F.R. § 605.3 (2003).

[80] *Id*.

[81] Lamers v. City of Green Bay, 998 F. Supp. 971, 991.u.10 (E.D. Wis. 1998).

[82] Chicago Transit Auth. v. Adams, 607 F.2d 1284 (7th Cir. 1979).

[83] *Id*. The charter regulations authorized "the incidental use of buses for the exclusive transportation of school children." 607 F.2d at 1291. (The provision now reads, "the incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment." 49 C.F.R. § 604.5(e) (2003)).

[84] *Id*. at 1292 [citation omitted].

[85] *Id*. at 1294.

the buses are not needed for scheduled runs.[86] Only buses not purchased with federal funds can be used for more than incidental charter operations for school service.[87] Under FTA's regulations, incidental charter service is defined as charter service that does not "(1) interfere with or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Acts; or (2) does not shorten the mass transportation life of the equipment or facilities."[88] However, this prohibition on the use of federally-funded equipment does not apply to tripper service, described above.[89]

### E. Complaints, Remedies, and Appeals

In the case of alleged school bus violations, the complaint procedures are similar to those for alleged charter bus violations, but involve the filing of a written complaint directly to the FTA Administrator.[90] The Administrator allows the respondent 30 days to show cause, in writing, why a hearing should not be held, and may hold one or more evidentiary hearings.[91] The Administrator makes a written determination of whether a violation has occurred, and if it has, he or she may impose such remedial measures as he or she may deem appropriate, including barring a grantee from receipt of further FTA financial assistance.[92] Parties have the right to judicial review under the APA[93] once these administrative procedures have been exhausted.[94]

Several courts have noted that where a statute clearly reflects an intent to protect a competitive interest, the protected party has standing to bring suit to require compliance.[95] But standing can be a problem for a private carrier alleging that a public transit provider is engaging in unlawful operations. For example, in *Area Transportation, Inc. v. Ettinger,*[96] a school bus operator in Flint, Michigan, filed a complaint with FTA alleging that a competitor was providing prohibited, exclusive school bus service in violation of federal law. FTA agreed, and ordered the public transit provider to "cease and desist any such further service," but imposed no requirement that prior federal grants be returned, or that future federal funds be withheld. The private carrier sought a declaratory order that: (1) FTA lacks discretion to determine the appropriate sanction for a statutory violation; (2) FTA must declare the public transit provider ineligible for future federal transit assistance grants; and (3) FTA must require the recipient to repay the grants it received for each year it was in violation.

In *Ettinger,* the court noted that to establish standing under the APA, a plaintiff must prove (1) an "injury in fact," as required by the case or controversy requirement under Article III of the Constitution, and (2) that he or she falls within the "zone of interests" contemplated by the relevant statute. The court found the latter requirement met, and proceeded to evaluate whether the plaintiff had suffered an "injury in fact" for Article III purposes. The court noted that Article III standing requires a plaintiff to prove: (1) he or she suffered an "injury in fact"—an invasion of a concrete and particularized legally recognized interest; (2) there was a causal connection between defendant's action and plaintiff's injury, such that the injury is fairly traceable to defendant's action and not caused by some third party not before the court; and (3) a favorable decision will likely redress the injury. The court found that the private carrier alleged an injury in fact (that the public transit provider enjoyed a competitive advantage because of the federal grant), but that it failed to prove its injury was fairly traceable to the FTA's decision (the injury instead was caused by illegal school bus service performed by a third party not before the court). The court also held the remedy sought (the repayment of federal grants to FTA) would not redress its injury, but would instead injure the public transit provider. Therefore, plaintiff lacked Article III standing. The FTA had not cut off the private carrier's future funding, nor required repayment of earlier sums collected unlawfully; it merely ordered the private carrier to cease and desist from the unlawful activity.[97] The court also observed that the Federal Transit Act does not explicitly require payment of federal funds where recipients are found to have engaged in unlawful activities; in effect, leaving wide discretion to the FTA as to remedies.[98]

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[86] 49 C.F.R. pt. 605, App. A (2003).

[87] *Id*. at 1293–94. 49 C.F.R. § 605.12 (2003).

[88] 49 C.F.R. § 604.5(i) (2003).

[89] 49 C.F.R. § 605.13 (2003).

[90] 49 C.F.R. § 605.30 (2003).

[91] 49 C.F.R. § 605.32 (2003).

[92] 49 C.F.R. §§ 605.33, 605.34 (2003).

[93] 5 U.S.C. §§ 701–706 (2000); 49 C.F.R. § 605.35 (2003).

[94] Suburban Trails, Inc. v. N.J. Transit Corp., 800 F.2d 361 (3d Cir. 1986); Bradford School Bus Transit, Inc. v. Chicago Transit Auth., 537 F.2d 943 (7th Cir. 1976); TPI Construction Servs. v. City of Chicago, 1980 U.S. Dist. Lexis 17135 (N.D. Ill. 1980).

[95] City of Evanston v. Regional Transp. Auth., 825 F.2d 1121, 1123 (7th Cir. 1987); South Suburban Safeway Lines, Inc. v. City of Chicago, 416 F.2d 535, 539 (7th Cir. 1969); Bradford School Bus Transit, Inc. v. Chicago Transit Auth., 537 F.2d 943 (7th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977). However, some courts have found that the Federal Transit Act was intended to benefit the public at large and not create special benefits for particular classes of persons. *See, e.g.,* A.B.C. Bus Lines, Inc. v. Urban Mass Transp. Admin., 831 F.2d 360 (1st Cir. 1987), and Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982).

[96] 75 F. Supp. 3d 862 (N.D. Ill. 1999), 1999 U.S. Dist. Lexis 18503 (N.D. Ill. 1999); *aff'd*, Area Transp., Inc. v. Ettinger, 219 F.2d 671 (7th Cir. 2000).

[97] *Id*. at 864.

[98] 1999 U.S. Dist. Lexis 18503 (1999).

SECTION 9

# LABOR LAW

## A. INTRODUCTION

Although most transit systems do not operate heavy rail systems, we begin our discussion with the Railway Labor Act of 1926 (RLA).[1] The RLA was the first comprehensive body of labor law promulgated by Congress. The RLA encompasses many of the foundational concepts of collective bargaining and dispute resolution in the labor/management context.[2] Concepts such as unfair labor practices and the union's duty of fair representation, for example, are treated similarly by courts whether they arise under the RLA or subsequent labor legislation.

If the transit system has an interstate rail component, the RLA is likely to govern. But one must be cognizant of the fact that if the transit system is a state or local governmental agency, its employees are likely to be governed by state labor law or civil service requirements. If the transit workers are private sector employees, the National Labor Relations Act (NLRA)[3] will usually apply.

Many other laws are relevant in the labor and employment context, including civil rights laws, civil service regulations, and regulation by state human resources agencies. Further, all FTA recipients must adhere to the labor protective requirements established by Section 13(c) of the Federal Transit Act.[4]

## B. THE RAILWAY LABOR ACT

### 1. Introduction

Title III of the Transportation Act of 1920[5] created a new agency, the U.S. Railroad Labor Board (RLB), which attempted to avoid interruptions to commerce by negotiating disputes. Title III was designed to deal with the sometimes violent confrontations between labor and management in the railroad industry.[6] Prior legislation, including the anemic Arbitration Act of 1888, the Erdman Act of 1898, and the short-lived Newlands Act of 1913, had failed to eliminate the conditions that gave rise to strikes. A national strike in 1922 revealed that the 1920 Act still was not the solution, leading Congress in 1926 to promulgate the RLA,[7] the first legislation to force management to recognize and bargain with employee representatives.[8]

The RLA is administered by the three-member National Mediation Board (NMB), each member of which is appointed for a 3-year term by the President with the advice and consent of the Senate. During their terms, board members may be removed only for "inefficiency, neglect of duty, malfeasance in office, or ineligibility." No more than two of the three members may be affiliated with the same political party.[9]

### 2. Applicability of the RLA

Railroad and airline labor relations are governed by the RLA.[10] Certain transit authorities that provide rail service are classified as "common carriers" subject to the jurisdiction of the STB, and are thereby also subject to the Railway Labor Act and other railway labor legislation.[11] The Railway Labor Act defines "carrier" to include "any railroad subject to the jurisdiction of the Surface Transportation Board, any express company…and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad…."

But the RLA provides that the term "carrier" does not include "any street, interurban, or suburban electric railway unless such railway is operated as a part of a general steam [or other motive power]-railroad system of transportation…."[12] Courts have generally deferred to the administrative determination (originally by the ICC and since 1995 by its successor agency, the STB) as to the scope of the electric railway exception.[13] Among the criteria that have been deemed relevant in determining whether the exemption applies are whether the commuter line is connected to the general rail system, whether it is used to connect traffic over that system,

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[1] Pub. L. No. 69-257, 44 Stat. 577 (1926).

[2] For example, the labor protective provisions (LPPs) developed under the RLA served as the model for LPPs developed for the transit industry imposed under Section 13(c), described below.

[3] 29 U.S.C. § 152(2) (2000).

[4] 49 U.S.C. § 5333(b) (2000).

[5] Pub. L. No. 66-152, 41 Stat. 456 (1920).

[6] *See generally* WILLIAM WITHUHN, RAILS ACROSS AMERICA: A HISTORY OF RAILROADS IN NORTH AMERICA 49 (SMITHMARK 1993); JOHN CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 201-02 (Random House 1998); William Mahoney, *The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroads Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act*, 24 TRANSP. L.J. 241, 245 (1997); RUSSELL BOURNE, AMERICANS ON THE MOVE: A HISTORY OF WATERWAYS, RAILWAYS AND HIGHWAYS 100, 109 (Fulcrum 1995).

[7] Pub. L. No. 69-257, 44 Stat. 577 (1926).

[8] For a review of this history, *see* Mahoney, *supra* note 6, at 241, 245–51 (1997).

[9] 45 U.S.C. § 154 (2000).

[10] *See generally* WILLIAM THOMS & FRANK DOOLEY, AIRLINE LABOR LAW (1990).

[11] A number of states and their subdivisions operate commuter rail services. *See, e.g.,* CAL. GOV'T CODE § 14304 (2001); CONN. GEN. STAT. § 52-557b (2001); MD. TRANSP. CODE ANN. § 3-217 (2001); MINN. STAT. § 174.80 (2001).

[12] 45 U.S.C. § 151 First (2000). The STB may, and upon request of the NMB or complaint of any party shall, hold a hearing to determine whether any line operated by electric power falls within the RLA. *Id*. A similar exemption exists under the Railroad Unemployment Insurance Act. 45 U.S.C. § 351 (1999). The Railroad Unemployment Insurance Act is the railroad counterpart to state unemployment compensation laws.

[13] *See, e.g.*, Railway Labor Executives' Ass'n v. ICC, 859 F.2d 996, 998 (D.C. Cir. 1988).

whether the commuter line handles freight, and the contractual understandings between the commuter and freight railroads.[14] The RLA is also applicable to certain commuter rail operations, including those operated by Amtrak.[15] But most transit systems do not want to be subject to RLA jurisdiction and go to great lengths to avoid it. Other than railroads and airlines, in most industries labor/management relations are governed by the NLRA. But many transit systems are state or local agencies, and their employees are not subject to NLRA. They are subject to state law, with possibly a civil service component. The law of many states or localities prohibits strikes by governmental employees.[16]

Two federal courts have held that the RLA is applicable only to those employees who perform work related to the carrier's rail or air operations.[17] This would suggest, for example, that a transit operator's bus drivers would not fall under the RLA, though its rail workers might. However, the NMB has taken the position that the RLA is not limited to those employees directly engaged in rail or air operations, but "extends to virtually all employees engaged in performing a service for the carrier so that the carrier may transport passengers or freight."[18] Thus, a transit operator providing commuter rail operations could potentially find its entire workforce under the RLA.

### 3. Purposes

The purposes of the RLA are:

1. To avoid any interruption to commerce or to the operation of any carrier engaged therein;
2. To forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;
3. To provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of the Act;
4. To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; and
5. To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.[19]

The principal purpose of the RLA is to avoid industrial strife between employers and employees so as to avoid disruptions to commerce.[20]

### 4. Union Certification

The NMB supervises the election of, and certifies the exclusive bargaining representative for, the employees; it also oversees the collective bargaining process.[21] Unlike the NLRA, bargaining under the RLA is done on a "craft" basis, by an occupational group of railroad or airline employees (e.g., engineers, firemen, machinists, dispatchers, pilots, or flight attendants),[22] even when the employees are geographically segregated.[23] The RLA provides, "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class…."[24] A union may be certified by the NMB only on a system-wide

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[14] DOUGLAS LESLIE, THE RAILWAY LABOR ACT 71 (BNA 1995).

[15] Congress has declared that, "Amtrak shall provide intercity and commuter rail passenger transportation that completely develops the potential of modern rail transportation to meet the intercity and commuter passenger transportation needs of the United States." 49 U.S.C. § 24101(b) (2000). Amtrak is given authority to "acquire, operate, maintain, and make contracts for the operation and maintenance of equipment and facilities necessary for intercity and commuter rail passenger transportation…." 49 U.S.C. § 24305(a) (2000). Under the Northeast Rail Service Act of 1981, Pub L. 97-35, 95 Stat. 643, as amended (1981) and Pub. L. 98-377 (Dec. 21, 1982), certain northeast corridor Conrail commuter operations were transferred to Amtrak Commuter and specified regional commuter authorities. For a list see 45 U.S.C. § 1104(3) (2000). Congress has declared that, "Modern and efficient commuter rail passenger transportation is important to the viability and well-being of major urban areas and to the energy conservation and self-sufficiency goals of the United States." 49 U.S.C. § 24101 (2000). Commuter service is defined as "short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets, and by morning and evening peak period operations." 45 U.S.C. § 1104(4) (2000).

[16] Extensive legal battles were fought in the 13(c) arena to establish the principle that 13(c) does not create a federal body of labor law applicable to transit workers; state law controls and disputes are to be resolved in state court—not federal court—applying state law. If transit workers do not have the right to binding interest arbitration, a meaningful dispute resolution mechanism, such as fact finding or the right to strike, suffices for 13(c) purposes.

[17] Northwest Airlines v. Jackson, 185 F.2d 74 (8th Cir. 1950); Pan American World Airways, Inc. v. United Bhd. of Carpenters & Joiners of America, 324 F.2d 217 (9th Cir. 1963). LESLIE, *supra* note 14, at 63.

[18] *Federal Express Corp*., 23 NMB 32 (1995).

[19] 45 U.S.C. § 151a (2000).

[20] PAUL DEMPSEY ET AL., 2 AVIATION LAW & REGULATION § 15.12 (1992).

[21] The largest airline unions are the Air Line Pilots Association, the International Association of Machinists, and the Association of Flight Attendants, all members of the AFL-CIO.

[22] Among the railroad unions are the Brotherhood of Locomotive Engineers, Brotherhood of Maintenance of Way Employees, Brotherhood of Railroad Signalmen, the Transportation Communications Union, and Transport Workers Union of America. For a full list of AFL-CIO transportation trades unions, *see* http://www.ttd.org/aboutTTD/ttd_affiliate_unions.htm (Oct. 15, 2001).

[23] AMERICAN BAR ASS'N, THE RAILWAY LABOR ACT 29 (BNA Supp. 2001). For a list of the well-recognized railway crafts, see LESLIE, *supra* note 14, at 98–99.

[24] 45 U.S.C. § 152 Fourth (2000).

basis—one which includes all members of that craft or class, regardless of their work location.[25]

Where a craft or class is unrepresented, the NMB usually requires that a union desiring to gain recognition as the bargaining representative submit an application to investigate a dispute (Form NMB-3), accompanied by authorization cards signed by at least 35 percent of the craft or class employees.[26] If the craft or class is already represented, authorization cards submitted by a majority must be submitted.[27] Once the Board receives the NMB-3 application, it appoints a mediator to investigate the dispute. The mediator determines whether there is a sufficient showing of interest to hold an election, and assesses the validity of the cards submitted.[28] If the mediator concludes there are an insufficient number of eligible cards, the case is dismissed. But if a sufficient number of cards has been filed to warrant an election, another union may petition to put itself on the ballot by filing cards from 35 percent of eligible employees.[29]

Many cases concern the lawfulness of carrier activities directed at employees attempting to organize a union.[30] The carrier may not deny, question, influence, coerce, or interfere in any way with the right of its employees to join or organize a union of their choice.[31] Management's conferring or withholding of a benefit during the organizing effort may be deemed improper carrier interference.[32] Management threats or predictions that unionization will eliminate jobs or cause the carrier to liquidate the company are considered by the NMB to be an unlawful interference with election conditions.[33] Nor may an employer regularly question employees about whether they have received their ballots, or about what they have done or intend to do with them.[34] Carriers are also prohibited from requiring prospective employees to sign any agreement to join or not to join a labor organization.[35]

In 1999, the NMB issued a revised standard ballot for conducting representative elections. Usually the NMB conducts a representation election by mail ballot, though it may conduct a ballot box election.[36] The NMB has discretion to extend the voting period. If the employer taints the laboratory conditions the NMB seeks to create for an election, the NMB has broad discretion to impose a remedy "to eliminate the taint of interference on the election,"[37] including gauging employee sentiment via means other than a secret ballot election, or conducting rerun elections.[38] Remedies "are fashioned in accordance with the extent of carrier interference found."[39] Moreover, one who is wrongfully discharged for pursuing union activities may bring an action seeking reinstatement, back pay, restored benefits, and/or restored seniority against the employer.[40] There are instances, albeit rare, in which union actions invalidated elections; unions, while having far fewer restrictions than carriers, also do not operate on an unrestricted basis.

However, the courts have held that a carrier has a First Amendment right to communicate its general views about unionism and its specific views about a particular union, so long as it does not threaten a reprisal or promise a benefit. The carrier also has the right to make objective predictions as to the impact it believes unionization will have upon the company.[41]

A majority of all eligible employee must cast valid ballots approving union representation.[42] The union with the majority of votes cast is certified as the collective bargaining representative.[43] If a union requests an election and less than a majority vote for representation, or if a union renounces representation, the craft or class will become unrepresented.[44] A carrier may voluntarily recognize a union prior to its certification, but it is under no obligation to recognize one that has not been certified by the NMB.[45]

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[25] LESLIE, *supra* note 14, at 91.

[26] The NMB maintains confidentiality as both to the identity and number of card signers in support of a representative election. AMERICAN BAR ASS'N, *supra* note 23, at 42.

[27] LESLIE, *supra* note 14, at 109.

[28] In order to determine their validity, the carrier is asked to provide an alphabetical list of all employees eligible to vote—those on the carrier payroll on the last payroll period prior to the receipt of the NMB-3 application. LESLIE, *supra* note 14, at 111.

[29] LESLIE, *supra* note 14, at 115. Eligibility to vote is limited to "employees and subordinate officials." Under the RLA, an employee includes "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work as defined as that of an employee or subordinate official…," as defined by the Surface Transportation Board. 45 U.S.C. § 151 Fifth (2000).

[30] LESLIE, *supra* note 14, at 157. For a representative list of activities that the NMB has concluded to constitute carrier election interference, s*ee* LESLIE, *supra* note 14, at 165, 169–71.

[31] 45 U.S.C. § 152 Fourth.

[32] LESLIE, *supra* note 14, at 167.

[33] AMERICAN BAR ASS'N, *supra* note 23, at 114.

[34] AMERICAN BAR ASS'N, *supra* note 23, at 115.

[35] 45 U.S.C. § 152 Fifth (2000).

[36] LESLIE, *supra* note 14, at 124.

[37] *Federal Express Corp*., 20 NMB 7, 44 (1992).

[38] AMERICAN BAR ASS'N, *supra* note 23, at 129–30.

[39] *Federal Express Corp.,* 20 NMB 7, 44 (1992).

[40] LESLIE, *supra* note 14, at 159–60. Federal courts are split as to the right to a jury trial, or whether an employee can recover punitive damages in a wrongful discharge case. AMERICAN BAR ASS'N, *supra* note 23, at 107. However, a carrier may permit an employee to confer with management during working hours without loss of time, or provide free transportation to employees while engaged in the business of a labor organization. *Id*.

[41] AMERICAN BAR ASS'N, *supra* note 23, at 72.

[42] LESLIE, *supra* note 14, at 125.

[43] LESLIE, *supra* note 14, at 126; AMERICAN BAR ASS'N, supra note 23, at 64.

[44] LESLIE, *supra* note 14, at 135.

[45] LESLIE, *supra* note 14, at 197.

When a prior election has been held, absent "unusual or extraordinary circumstances," the NMB may impose a qualified bar on a new election of the same craft or class of employees of the same carrier from 1 year on the date on which: (1) less than a majority of eligible voters participated in the prior election; (2) the Board dismissed the application on grounds that no dispute existed; or (3) the Board dismissed the application after the applicant withdrew it.[46] The NMB may also impose a 2-year certification bar from the date of certification of a representative covering the same craft or class of employees.[47] In some instances, the existence of a collective bargaining agreement (CBA) bars a representation election during the duration of the agreement.[48]

### 5. Duty of Fair Representation

The union has a "duty of fair representation" toward its employees. This duty is a judicially created doctrine designed to protect individual employees against discriminatory treatment by their union.[49] The requirement is a counterbalance to the union's position as the employee's sole bargaining representative.[50] Thus, an employee's union must pursue meritorious grievances in good faith, and pursue the interest of all employees fairly in negotiating a new contract.[51] It must not favor one group of employees over another in bargaining with management.[52] It must bargain fairly on behalf of minority union members by not negotiating a contract that excludes them from certain positions.[53] But, because a union has to satisfy the collective needs of a diverse group of employees, it enjoys a certain amount of discretion in pursuing their interests, and breaches the "duty of fair representation" only when its conduct toward an employee is arbitrary, discriminatory, or in bad faith.[54] A union breaches its duty of fair representation when it fails to act with complete good faith and honesty.[55]

### 6. Duty to Bargain in Good Faith

Under the RLA, both the union and management have a duty to engage in collective bargaining in good faith—they are obliged to meet, confer with, and make reasonable efforts to achieve written agreements resolving labor-management disputes. The RLA explicitly commands that it is the duty of labor and management

> to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes [whether arising inside or outside of those agreements] in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and [its] employees….[56]

The U.S. Supreme Court has held that the terms "rates or pay, rules and working conditions" are to be interpreted broadly.[57] Absent the carrier's bad faith in negotiating the initial CBA, the union may not engage in self-help[58] prior to exhaustion of the RLA's mandatory collective bargaining procedures.[59] Management may not go around the designated employee representatives and attempt to bargain directly with its members.[60]

### 7. Dispute Resolution

#### *a. Types of Disputes*

Disputes under the RLA fall into one of three major categories: representation disputes, major disputes, and minor disputes.[61] Each is handled under a different

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[46] 29 C.F.R. § 1206.4 (1999).

[47] 29 C.F.R. § 1206.4 (1999).

[48] LESLIE, *supra* note 14, at 116–17.

[49] Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202, 65 S. Ct. 226 (1944); Maher v. N.J. Transit Operations, 593 A.2d 750, 761 (N.J. 1991).

[50] Hines v. Anchor Motor Freight, 424 U.S. 554, 564, 96 S. Ct. 1048 (1976).

[51] The union must act without hostility or discrimination, and in complete good faith and honesty to avoid arbitrary conduct. Parker v. Metropolitan Transp. Auth., 97 F. Supp. 2d 437 (S.D. N.Y. 2000).

[52] For a transit case in which the court found the union had engaged in unlawful racial discrimination, *see* Allen v. Amalgated Transit Union, Local 788, 554 F.2d 876 (8th Cir. 1977).

[53] Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

[54] Ford Motor Co. v. Hoffman, 345 U.S. 330, 338, 73 S. Ct. 681 (1953); Vaca v. Sipes, 368 U.S. 171, 190 (1967). For a transit case in which the employee failed to prove the union's actions were arbitrary, discriminatory, or in bad faith, *see* Masy v. N.J. Transit Rail Operations, Inc., 790 F.2d 322 (3d Cir. 1986), and Butler v. WMATA, 1990 U.S. Dist. Lexis 10631 (D. D.C. 1990). For a contrary case, *see* Allen v. Amalgated Transit Union Local 788, 554 F.2d 876 (8th Cir. 1977). The failure of a union to seek arbitration on behalf of an employee does not constitute a breach of the duty of fair representation, absent proof that the union's conduct toward its member was arbitrary, discriminatory, or in bad faith. Burning v. Niagara Frontier Transit Metro Sys., 710 N.Y.S.2d 276 (App. Div. 2000).

[55] Graham v. Trans World Airlines, 688 F. Supp. 1387 (W.D. Mo. 1988).

[56] 45 U.S.C. § 152 First (2000).

[57] Order of Railroad Telegraphers v. Chicago & N.W. R.R., 362 U.S. 330, 338, 80 S. Ct. 761 (1960).

[58] Work slow-downs, sick-outs, or strikes are unlawful activities prior to exhaustion of the RLA's procedural requirements.

[59] AMERICAN BAR ASS'N, *supra* note 23, at 159–60 (BNA Supp. 2001). But the exceptions to the exhaustion requirement are set forth in Sisco v. Consol. Rail Corp., 732 F.2d 1188 (3d Cir. 1984), and elsewhere in this Section.

[60] LESLIE, *supra* note 14, at 186.

[61] One treatise also refers to resolution of statutory disputes. LESLIE, *supra* note 14, at 7. *Statutory disputes* are disputes for which the RLA creates an enforceable right or obligation, but does not commit its enforcement exclusively to one of the administrative processes. The principal category of statutory disputes involves employee rights arising under Section 2 of the RLA. However, this is not a term that has caught on in the courts. Independent Ass'n of Continental Pilots v. Continental Airlines, 155 F.3d 685, 690 (3d Cir. 1998).

statutory dispute resolution procedure and has differing obligations regarding maintenance of the *status quo*; hence the categorization of the dispute may affect its ultimate outcome.[62] The U.S. Supreme Court has observed that the "RLA subjects all railway disputes to virtually endless 'negotiation, mediation, voluntary arbitration, and conciliation.'"[63] Usually the courts are called in to decide whether a dispute is major or minor.[64]

### *b. Representation Disputes*

*Representation disputes* involve the selection of the employee's representatives for purposes of collective bargaining. Exclusive jurisdiction over this issue is vested in the NMB,[65] which may define the scope of the carrier, define the appropriate "craft or class" for bargaining, specify the rules for conducting elections, and designate bargaining representatives.[66]

Within 30 days after request of either party to a dispute as to which union shall represent a craft or a group of employees, the NMB shall investigate and certify the individuals that have been designated and authorized to represent the particular employees. The NMB may take a secret ballot or utilize any other appropriate method of designating the employee representatives, in whatever manner shall ensure that the certified representatives have been chosen without the interference, influence, or coercion of the carrier.[67]

### *c. Major Disputes*

*Major disputes* involve formation or modification of collective bargaining agreements (e.g., wages, work rules, working conditions).[68] They are disputes with respect to "the formation of collective agreements or efforts to secure them."[69] A major dispute focuses on the terms an agreement should contain.[70] These disputes are designed to be resolved through collective bargaining between the labor unions and management. The statutory process requires a meet and confer process, with good faith negotiations, mediation, nonmandatory arbitration, and if all else fails, intervention by a Presidential Emergency Board. Until these procedures are exhausted, neither party may upset the *status quo* by engaging in self-help.[71] A central purpose of the RLA is to avoid "any interruption to commerce or to the operation of any carrier engaged therein." Describing the *status quo* maintenance requirement as "an almost interminable process," the U.S. Supreme Court has observed:

> The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout.[72]

As a union contract approaches expiration, labor and management typically begin negotiations for a new contact by exchanging proposals. If they cannot negotiate a settlement, the party seeking to change the existing contract may post a "*Section 6 notice*" 30 days prior to any intended change, which triggers the collective bargaining process of the RLA. Within 10 days of receipt of such notice, representatives of labor and management must agree on a time and place for such negotiations.[73] The conference must begin within the 30 days, and the carrier may not change existing rules, working conditions, or pay during this period.[74] No time limits dictate the length of negotiations. Management and labor may negotiate for as long as they wish, and the *status quo* remains undisturbed during the entire period (i.e., the existing contract governs, and neither party may engage in "self-help" economic warfare).[75] But if bargaining is terminated, a 10-day *status quo* period begins. If, during this period, neither side requests NMB mediation, nor does the NMB *sua sponte* offer mediation, then at the end of this period, either side may engage in self-help.[76]

If either party perceives an impasse, it may so inform the NMB, which ordinarily attempts to mediate the dispute or recommends tripartite arbitration. If, at its discretion, the NMB declares that the parties have reached an impasse, the parties enter a 30-day "cooling off" period, after which either side may engage in self-help—the union may strike, and/or management may unilaterally impose lower wage/work rules and permanently lock out[77] and replace any strikers.[78] But since

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[62] LESLIE, *supra* note 14, at 1.

[63] Detroit and Toledo Shore Line v. United Transp. Union, 396 U.S. 142, 148–49, 90 S. Ct. 294 (1969); Burlington N. Ry. Co. v. Brotherhood of Maintenance Way Employees, 481 U.S. 429, 444 107 S. Ct. 1841 (1987).

[64] LESLIE, *supra* note 14, at 7.

[65] LESLIE, *supra* note 14, at 89.

[66] LESLIE, *supra* note 14, at 1–2.

[67] 45 U.S.C. § 152 Ninth.

[68] United Transp. Union v. Southeastern Pa. Transp. Auth., 23 F. Supp. 2d 557 (E.D. Pa. 1998).

[69] Elgin, Joliet & Eastern R.R. Co. v. Burley, 325 U.S. 711, 65 S. Ct. 1282 (1945); Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 302 109 S. Ct. 2477 (1989).

[70] United Transp. Union v. Southeastern Pa. Transp. Auth., 23 F. Supp. 2d 557 (E.D. Pa. 1998).

[71] LESLIE, *supra* note 14, at 8. Such self-help on the part of the union might include a sick-out, or strike; self-help on the part of management might for example include a unilateral reduction in wages, or a lock-out.

[72] Detroit & Toledo Short Line R.R. v. United Transp. Union, 396 U.S. 142, 150 (1969).

[73] 45 U.S.C. § 156 (2004).

[74] *Id*.

[75] LESLIE, *supra* note 14, at 213.

[76] 45 U.S.C. § 156 (2000).

[77] A lock out is the temporary withholding of work from employees by shutting down the operation in order to bring pressure on the employees or their bargaining representative to

the RLA's dispute resolution procedures are "almost interminable," this reality often brings the parties to compromise and settlement without strikes or lockouts.[79]

In emergency situations (where a threatened strike or lockout would "deprive any section of the country of essential transportation service"), the NMB must notify the President, who may call an Emergency Board to investigate the facts.[80] The Emergency Board shall submit its report to the President within 30 days after its creation. Neither party may engage in self-help until 30 days after the President receives the Board's report[81]—in effect giving the parties an additional 60-day cooling-off period beyond the aforementioned requirements. While common in major railroad strikes, the creation of Emergency Boards has been an uncommon response to airline strikes.

If a strike occurs, management may not fire a striking worker who subsequently decides to return to work if a position is available for him or her (after conclusion of the strike, management is not obliged to lay off newly hired workers who crossed the picket line). While returning workers are given their vested seniority rights, thereby putting them ahead of the newly hired "scabs," they return at the unilaterally dictated lower wages and working conditions, unless management and labor expressly negotiate a different arrangement. Because common carriers constitute both a service industry and have high fixed costs, carriers cannot take either a prolonged strike or labor acrimony without suffering deleterious service, cost, and revenue consequences. Thus, even in the post-deregulation era, unions have significant leverage in protecting existing wages and work rules.

One issue that sometimes arises is the permissible degree of influence a governmental institution can exert in labor-management collective bargaining negotiations of its contractors. One case involved a situation in which the state of New Jersey subsidized a private bus line under a statute authorizing it to contract with bus lines "in imminent danger of terminating all bus services or all rail transit services provided…to insure the continuance of that portion of the bus and rail transit services which is essential." During the midst of negotiations between the private bus company and its unions on successor agreements, New Jersey officials announced that the state would no longer assist any transit company that entered into a collective bargaining agreement that included a cost of living clause. The union filed suit, seeking declaratory and injunctive relief on the theory that the state policies were a type of regulation destroying free negotiations, which were preempted by federal statutes creating the right of collective bargaining. The court dismissed the suit, finding that the state had merely established conditions as to how it would spend its own money. [82] Thus, efforts by state officials to influence their contractors' collective bargaining agreements in order to save the state's money are permissible.[83]

*d. Commuter Rail Major Dispute Procedures*

In response to the June-July 1980 PATH strike by the Transportation Communications Union-Railway-Carmen in the New York metropolitan area, as well as the debate over whether the RLA applied to former Conrail commuter services, Congress established significantly more rigorous procedural requirements for publicly funded and operated rail commuter carriers (including Amtrak commuter services).[84] If the labor-management dispute is not adjusted, and the President does not create an Emergency Board in the manner described above, then the Governor of any state through which the commuter services operate, or any party to the dispute, may request that the President create an Emergency Board. Upon such request, the President is obligated to do so. Absent an agreement, the *status quo* must be maintained by the parties for 120 days after the Emergency Board is created.[85] Within 60 days after its creation, the NMB must conduct a public hearing at which each party shall appear and explain why it has not accepted the recommendations of the Emergency Board for settlement.[86]

If no settlement has been reached after 120 days from creation of the Emergency Board, either party or the Governor may request the President to establish another Emergency Board, and he shall be obligated to do so.[87] Within 30 days of its creation, the parties shall submit their final offers for settlement of the dispute to the Board.[88] Within 30 days of the submission of these final offers, the Board shall submit a report to the President identifying the offer it considers the most reasonable.[89] Neither party may engage in self-help during the 60 days following the issuance of this report.[90] After this period, if the Board designated the carrier's final offer as the most reasonable, striking employees shall be denied benefits under the Railroad Un-

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accept the employer's terms of settlement of a labor dispute. MICH. COMP. LAWS SERV. § 423.201 (2001).

[78] *See generally* DEMPSEY ET AL., *supra* note 20 § 15.

[79] Detroit & Toledo Short Line R.R. v. United Transp. Union, 396 U.S. 142, 149 (1969). LESLIE, *supra* note 14, at 215.

[80] *See, e.g.,* Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429, 1207 S. Ct. 1841 (1987).

[81] 45 U.S.C. § 160 (2000).

[82] Amalgamated Transit Union v. Byrne, 429 F.2d 1025 (3d Cir. 1977).

[83] Alan Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 WIS. L. REV. 1 (1982).

[84] LESLIE, *supra* note 14, at 61. 45 U.S.C. § 159a(a) (2000).

[85] 45 U.S.C. § 159a(c)(1) (2000).

[86] 45 U.S.C. § 159a(d) (2000).

[87] 45 U.S.C. § 159a(e) (2000).

[88] 45 U.S.C. § 159a(f) (2000).

[89] 45 U.S.C. § 159a(g) (2000).

[90] 45 U.S.C. § 159a(h) (2000).

employment Insurance Act.[91] If the Board has designated labor's final offer as the most reasonable, then the carrier shall be denied the benefit of any work stoppage agreement among carriers.[92]

As an example, President Clinton called two Emergency Boards to deal with a dispute between several unions and Metro-North Commuter Railroad, the nation's second largest commuter railroad, over the unions' demands of pay parity with the Long Island Railroad, one of several transportation companies operated by New York MTA. On September 29, 1995, the panel recommended that all of the labor unions' final offers be accepted, except for those of the Teamsters (representing the maintenance-of-way employees), and the Electrical Workers (representing electrical supervisors), and in these areas accepted Metro-North's final offers. The Board recommended a 3-year agreement, with 3 percent wage increases in both July 1995 and January 1996 and 4 percent in January 1997, and life insurance benefits of $28,000 effective in 1996. It also made a number of other recommendations addressing issues such as skill differentials, sick leave, personal days, holidays, and work rule changes dealing with work force scheduling, part-time employees, swing time, meal time, extra lists, break periods, and road pay.[93] President George W. Bush also exerted his authority to call an Emergency Board to avoid a threatened strike at United Airlines.

*e. Minor Disputes*

While major disputes seek to create contractual rights, *minor disputes* seek to enforce them.[94] Minor disputes are over grievances arising from interpretation and application of existing contract provisions.[95] They are disputes with respect to an existing (or implied) agreement that relate "either to the meaning or proper application of a particular provision with respect to a specific situation or to an omitted case."[96] A dispute is minor if the contested action is "arguably justified" by the CBA or not "obviously insubstantial."[97] A minor dispute's distinguishing feature is that it may be conclusively resolved via application and interpretation of the agreement.[98] The burden of proving a dispute is minor is a light one.[99]

Minor disputes are "adjusted," submitted to compulsory arbitration through the railroad's internal grievance machinery, if necessary, all the way through the carrier's System Board of Adjustment[100] (e.g., the National Railway Adjustment Board (NRAB) for railroads),[101] which is final and binding on the parties in most cases.[102] Congress intended to keep minor disputes out of the courts.[103] These procedures are exclusive, subject to a few exceptions: (1) where the employer repudiates the private grievance machinery; (2) where resort to administrative remedies would be futile; or (3) where the employer is joined in a "duty of fair representation" claim against the employee's union.[104] Minor disputes are not strikeable; after a lengthy mediation process, major disputes can be subject to strikes and lockouts.

## 8. Labor Protective Provisions

"Labor protection" is a term of art referring to the mitigation of the effect of carrier mergers and consolidations on employees. Labor Protective Provisions (LPPs) are usually imposed in the context of a carrier merger or acquisition. LPPs usually provide for integration of seniority lists; wages and benefits; for displacement, dismissal, and relocation allowances; and for arbitration of disputes.

To understand LPPs, one must be acquainted with their historical evolution. This is not merely an idle intellectual stroll through history, however. As noted, certain rail commuter providers have found themselves under the jurisdiction of the RLA. For rail employees, Congress has mandated that LPPs be no less generous than those conferred prior to 1976, and explicitly referred back to LPP legislation it passed in 1940. For transit employees, Section 13(c) also builds on that 1940 legislation and regulatory interpretations thereof; 13(c) was the model embraced by Congress for Amtrak as well and its governing statute also references that 1940 legislation. Hence, LPP benefits conferred today can be no less generous than those established by Congress in

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[91] 45 U.S.C. § 159a(i) (2000).

[92] 45 U.S.C. § 159a(j) (2000).

[93] *Labor Management Bargaining in 1995,* 119 MONTHLY LAB. REV. 26 (Jan. 1996).

[94] Parker v. Metropolitan Transp. Auth., 97 F. Supp. 2d 437, 446 (S.D. N.Y. 2000).

[95] 45 U.S.C. § 153 First (i) (2000).

[96] Elgin, Joliet & Eastern R.R. v. Burley, 325 U.S. 711 (1945).

[97] Consolidated Rail Corp. v. Railway Labor Executives' Assoc., 491 U.S. 299, 306 (1989); Maher v. N.J. Transit Operations, 593 A.2d 750, 758 (N.J. 1991). "A minor dispute concerns the meaning and application of the provisions of the negotiated agreement that has been hammered out at the bargaining table. Minor disputes include disputes about the existence or extent of provisions established or implied into the agreement by usage, practice or custom." United Transp. Union v. Southeastern Pa. Transp. Auth., 23 F. Supp. 2d 557, 559 (E.D. Pa. 1998).

[98] United Transp. Union v. Southeastern Pa. Transp. Auth., 23 F. Supp. 2d 557 (E.D. Pa. 1998).

[99] McQuestion v. N.J. Transit Rail Operations, Inc., 30 F.3d 388 (3d Cir. 1994).

[100] In the rail industry, System Boards of Adjustment usually consist of three members—a railroad member, a labor member, and a neutral chair. LESLIE, *supra* note 14, at 283.

[101] *See* LESLIE, *supra* note 14, at 278.

[102] Adams v. N.J. Transit Rail Operations, 2000 U.S. Dist. Lexis 2154 (S.D. N.Y. 2000).

[103] Masy v. N.J. Transit Rail Operations, 643 F. Supp. 1145 (Sp. Ct. R.R.R.A. 1986).

[104] Cisco v. Consol. Rail Corp., 732 F.2d 1188 (3d Cir. 1984); Masy v. N.J. Transit Rail Operations, 790 F.2d 322, 326 (3d Cir. 1986).

1940.[105] Thus, the historical regime has tremendous relevance in the contemporary law.

Since the 1930s, employees in railroads subject to mergers and consolidations have enjoyed a level of job protection unrivaled by any other industry. The Emergency Railroad Transportation Act of 1933 (ERTA) was the first statute to protect railway employees affected by railroad consolidations.[106] Before ERTA expired, labor and management negotiated what became the prevailing basis of railroad labor protection—the Washington Job Protection Agreement of May 1936 [the *Washington Agreement*]. Eighty-five percent of the nation's carriers signed the *Washington Agreement*. Its major benefits included:

- For an employee deprived of employment ("displaced"), 60 percent of the employee's average monthly salary (less earnings from other railroad employment) for up to 5 years, depending on length of service, or a lump sum payment of up to 12 months' pay, depending on length of service.
- For an employee whose position was worsened (employee forced to hold a lower-paying job), a "displacement allowance" guaranteed the same pay earned prior to the merger for up to 5 years, depending on length of service.
- For any employee required to move, reimbursement of moving expenses, including any loss suffered in the sale of a residence for less than its fair market value.
- For all employees, retention of fringe benefits enjoyed in previous employment.[107]

In 1940, Congress added Section 5(2)(f) to the Interstate Commerce Act to require the ICC to impose LPPs in rail mergers, consolidations, acquisitions, line abandonments, and related transactions. The Act provided that in the case of a railroad merger, the employees would be placed in no worse position in relation to their employment after the merger had been consummated. Such protection was to extend not less than 4 years from the ICC decision approving the merger.[108]

The ICC first prescribed LPPs under this provision in the *New Orleans Union Passenger Terminal Case*.[109] The *New Orleans Conditions*, as they came to be known, provided employee protection from the effects of a rail merger or acquisition for at least 4 years from the effective date of the ICC's order approving the transaction. During that period, an employee deprived of employment as a result of the merger or acquisition received monthly compensation equivalent to that formerly received by him or her. An employee retained in service, but downgraded to a lower paying job as a result of the transaction, received a monthly displacement allowance equivalent to the difference between his or her old and new salaries. The employee was also eligible for reimbursement for moving expenses and losses incurred in the sale of a home. After the 4-year period, the adversely affected employee could continue to receive the benefits available under the *Washington Agreement.*[110]

In Section 13(c) of the Urban Mass Transportation Act of 1964 [Section 13(c)] (discussed in detail below in Section 9.300), Congress gave transit employees protections no less beneficial than those conferred under Section 5(2)(f), but added five additional protections, only one of which was specifically set forth in the Interstate Commerce Act:

1. Preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
2. Continuation of collective bargaining rights;
3. Protection of employees against a worsening of their positions with respect to their employment;
4. Assurance of employment to employees of acquired mass transportation systems and priority of reemployment for employees terminated or laid off; and
5. Paid training or retraining programs.[111]

With the enactment of the Rail Passenger Service Act of 1970 (RPSA), Congress created Amtrak. In it, Congress adopted language substantially similar to the LPP language of Section 13(c). It provided that a "railroad shall provide fair and equitable arrangements to protect the interests of employees affected by discontinuance of intercity rail passenger service…," and that such "protective arrangements shall include, without being limited to, such provisions as may be necessary" to accomplish the five specified objectives, listed above, set forth in Section 13(c). Like Section 13(c), RPSA Section 405 provided, "Such arrangements shall include provisions protecting individual employees against a worsening of

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[105] However, as explained below, legislation promulgated in 1995 that sunset the I.C.C., exempts mergers of two Class III railroads (those having annual operating revenue of less than $25 million), and imposes less generous LPP requirements on mergers between Class II (those with operating revenue of less than $258 million but more than $25 million) and Class III railroads.

[106] ERTA required that no carrier could reduce the number of its employees below that prevailing in May 1933, and that the carrier must pay all moving expenses and property losses incurred by employees forced to move as a result of the consolidation.

[107] PAUL DEMPSEY & WILLIAM THOMS, LAW AND ECONOMIC REGULATION IN TRANSPORTATION 302 (Quorum 1986). Until the U.S. Supreme Court's decision in United States v. Lowden, 308 U.S. 225 (1939), it was unclear whether the Interstate Commerce Commission held jurisdiction to require labor protective provisions as a condition of approving a rail merger. Lowden concluded that the ICC did indeed have such authority. Thereafter, the ICC imposed LPPs modeled on the Washington Agreement.

[108] 49 U.S.C. § 11347 (1994).

[109] 282 I.C.C. 271 (1952).

[110] DEMPSEY & THOMS, *supra* note 107, at 302–03. A number of mergers consummated in the 1960s included LPPs voluntarily agreed to by labor and management. Several carriers agreed to reduce jobs only by attrition—in effect giving employees lifetime jobs. William Thoms & Sonja Clapp, *Labor Protection in the Transportation Industry,* 64 N.D. L. REV. 379 (1988).

[111] 49 U.S.C. § 5333(b) (2004).

their positions with respect to their employment which shall in no event provide benefits less than those established to Section 5(2)(f) of the Interstate Commerce Act."

In 1971, the Secretary of Labor certified an LPP under Section 405 of the Amtrak Act that became known as "*Appendix C-1*." It essentially included the *New Orleans Conditions*, with the upgrading of monthly compensation guarantees by general wage increases during the protective period, and increasing of the protective period to 6 years (for employees with 6 years of service) from the date the employee was adversely affected. Thereafter, ICC-imposed LPPs under the *Oregon Short Line* and *New York Dock*[112] provisions did not materially differ from the *Appendix C-1* provisions.[113]

In February 1976, Congress promulgated the Railroad Revitalization and Regulatory Reform Act [4R Act].[114] It amended former Section 5(2)(f) of the Interstate Commerce Act by adding the following language: "Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)."[115] Rail labor law expert Bill Mahoney has observed:

> [The amendments] for the first time expressly incorporated into the Interstate Commerce Act the five specific requirements for the protection of bargaining agreements, representation, retraining and employment rights as established by the Secretary of Labor under the Amtrak statute.... As minimum protection for employees, the amendments required the Commission to combine the more beneficial employee protections contained in the *New Orleans* conditions with those provided in Appendix C-1.[116]

At this writing, the Act requires that before a rail consolidation, merger, or acquisition of control may be approved, the railroad must

> provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under section 5(2)(f) of the Interstate Commerce Act before February 5, 1976.... [The arrangement] must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the [Surface Transportation Board, successor to the ICC].[117]

So, LPPs must be at least as generous as those imposed prior to the 4R Act. As explained above, the 4R Act referred to the RPSA, which embraced Section 13(c), and was summarized in *New York Dock*.

Prior to 1980, virtually all cases involving sales of rail lines were between two existing railroad carriers and arose under section 11343 of the Interstate Commerce Act, which required the involved carriers to agree, as a condition of ICC approval, to an arrangement that would protect the economic interests and collective bargaining agreement rights of employees affected by the sale.[118] But in 1982, the ICC declined to impose labor-protective provisions in the sale of lines by major railroads to noncarriers.[119] This abstention was expanded in 1985 when the ICC promulgated regulations formally exempting short line[120] sales from virtually all regulation.[121] The class exemption effectively relieved the selling railroad of any obligation to compensate the employees for the loss of their jobs as a result of the sale, and relieved the short line or regional railroad successor of an obligation to employ the displaced workers.[122] The ICC concluded that if it could eliminate the requirement of employee protection *(i.e.,* if it could essentially "deregulate" employee protection), the sales of short lines would soar. Thus, the ICC decided to employ another provision in the Act—Section 10901—dealing with the acquisition of a railroad line by "a person other than a rail carrier."[123] By using this provision, the ICC declined to protect employee interests in approving applications for acquisition.[124]

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[112] New York Dock R.R. v. United States, 609 F.2d 83 (2d Cir. 1979).

[113] DEMPSEY & THOMS, *supra* note 107, at 303.

[114] Pub. L. No. 94-210, 90 Stat. 31 (1976).

[115] 4R Act § 402(a).

[116] William Mahoney, *The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroad's Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act*, 24 TRANSP. L.J. 241, 259 (1997).

[117] 49 U.S.C. § 11326(a) (2000).

[118] 49 U.S.C. §§ 11343, 11347 (2000).

[119] *Knox & Kane R.R. Co., Petition for Exemption*, 366 I.C.C. 439 (1982).

[120] Short line railroads are of varying sizes. Some operate over several thousand miles of track. In the aggregate, approximately 500 short line railroads operate over about 50,000 of rail trackage in the United States.

[121] *See Ex Parte 392*, 1 I.C.C.2d 810, 811 (1985); *see also* Frank Wilner, *Labor Protection Moves Seen Stunting Growth of Short Lines,* TRAFFIC WORLD, Dec. 29, 1986, at 61; William Thoms, *Railroad Spin-Offs, Labor Standoffs, and the P&LE,* 18 TRANSP. L.J. 57, 75 (1989). The decision of the U.S. Supreme Court in Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n, 491 U.S. 490 (1989), is distinguishable from most short line sales because the sale there was not a true short line spin-off, but the sale of an entire railroad. The seller was not maintaining any contractual or other relationship with the new company and the unions had not requested the ICC to issue labor protective provisions. Thoms, *supra*, at 83.

[122] Further, the class exemption effectively emasculated all potential opposition by shippers concerned about a potential loss of service.

[123] 49 U.S.C. § 10901 (2000).

[124] At first, the ICC held that it would not impose employee protective conditions in such cases unless adverse effects upon employees were significant. But when such proof was presented in a case involving the sale of virtually all of what had been the Gulf, Mobile, and Ohio Railroad before its merger with the Illinois Central (involving over 700 miles of line), the ICC refused to impose employee protective conditions, holding it would do so only in "unusual circumstances." For a discus-

As a matter of practice and procedure, the ICC virtually withdrew from the regulatory arena where short lines are concerned. With its creation of a "class exemption" in 1985, the ICC significantly reduced the requirements for acquiring small railroads or rail lines.[125] Today, unless the annual revenue of the carrier to be created by the transaction exceeds $5 million, an applicant need merely file a 7-day notice of intent to purchase a line,[126] "thereby ensuring the narrowest window for potential opponents to object."[127] At the end of the 7-day period, approval of the sale is automatic, absent a stay. If the annual revenue exceeds $5 million, the applicant must post a notice of intent 60 days before the effective date of the exemption.[128] The notice is void *ab initio* if it contains false or misleading information.[129] The filing of a notice permits the noncarrier to proceed without any further action on the part of the STB.[130] Under the class exemption, the noncarrier has no obligation to make offers of employment to the employees of the selling carrier, nor does the selling carrier have any obligation to provide compensation for those of its employees who lose employment as a result of the sale. In order to seek any compensatory protections, the displaced employees must file an after-the-fact "petition to revoke" the exemption for purposes of providing benefits for employees.[131] In order for a trunk line carrier to transfer a line to another entity, the two parties need only agree on a sale or lease arrangement and the transferee or lessee then need only file written notice to that effect.

Since beginning its permissive approach on these issues, the ICC has imposed labor protective provisions in only one case. In *Fox Valley & Western, Ltd.–Exemption, Acquisition & Operation,*[132] the ICC ruled that the sale was subject to Section 11343 (requiring labor protection), because the sale was of an entire railroad rather than a short line. In 1992, the ICC unanimously imposed labor protection on former workers of the Fox River Valley and Green Bay & Western Railroads, whose companies were acquired by the Wisconsin Central Limited (WCL), a 2,500-mile rail system.[133] In *Fox Valley & Western Limited v. Interstate Commerce Commission,*[134] Judge Posner upheld the decision, concluding:

> In a section 11343 transaction, the Commission is required, as a condition of its approval, to make the carrier protect the workers affected by the transaction. The required protections are those the Commission prescribed in *New York Dock Railway,* and include paying workers made surplus by the transaction and unable to find another railroad job up to six years' wages. In contrast, in a section 10901 transaction, the Commission "may" require labor protection, but need not. It is a matter of discretion, and the Commission has ruled that only in exceptional circumstances will it exercise its discretion in favor of requiring labor protection in 10901 cases.[135]

The Interstate Commerce Act was "sunset" on December 31, 1995, and its responsibilities were transferred to the new STB, a nascent "independent" agency within DOT.[136] With the promulgation of the ICC Termination Act of 1995,[137] Congress amended the statutory LPP provisions for employees of a merged Class II and one or more Class III[138] to 1 year of severance pay, reduced by rail earnings during the 12-month period.[139] Under the amendments, a merger of Class III railroads does not trigger mandatory LPPs.[140]

## C. RAILROAD EMPLOYMENT LAWS

### 1. Retirement and Unemployment Compensation

The Railroad Retirement Act[141] established a system of annuity, pension, and death benefits for STB-regulated railroad employees.[142] Former Conrail commuter services and interstate commuter rail services fall under the Railroad Retirement Act and Federal Employers Liability Act (FELA), though noncommuter

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sion of employee protective conditions, *see Oregon Short Line R.R. Abandonment*, 354 I.C.C. 76 (1987).

[125] 49 C.F.R. §§ 1150.31 to .35 (2003).

[126] *Id*. § 1150.32.

[127] Kevin Dowd, *The Little Railroad That Could,* 25 TRANSP. L.J. 67, 71 (1992).

[128] 49 C.F.R. §§ 1150.32(e), 1150.42(e) (2003).

[129] 49 C.F.R. §§ 1150.32(c), 1150.42(c) (2003).

[130] 49 C.F.R. § 1150.31 to .35 (2003).

[131] 49 C.F.R. § 1150.32(c) (2003).

[132] 9 I.C.C. 2d 209 (1992).

[133] *See Wisconsin Cent. Transp. Corp. Continuance in Control*, Fin. Docket No. 32036, 1992 ICC LEXIS 279, at 31-32 (Dec. 4, 1992); *see also WC Wins a Decision,* TRAINS, Feb. 1993, at 15. Portions of this section were adapted from Paul Dempsey & William Mahoney, *The U.S. Short Line Railroad Phenomenon: The Other Side of the Tracks,* 21 TRANSP. L.J. 383 (1993).

[134] 15 F.3d 641 (7th Cir. 1994).

[135] 15 F.3d at 644 [citations omitted]. Posner continued, "By interpreting section 10901 broadly and exempting transactions under it from the duty of labor protection, the Commission has fostered the creations of new, unregulated short-line railroads to take over lines formerly operated by regulated railroads." Paul Stephen Dempsey & William G. Mahoney, *The U.S. Short Line Railroad Phenomenon*, 24 U. TOL. L. REV. 425 (1993). *Id*. *See also* Brotherhood of R.R. Signalmen v. Interstate Commerce Comm'n, 63 F.3d 638 (7th Cir. 1995), in which Judge Posner reaffirmed his earlier holding.

[136] The STB has authority to overturn an arbitration decision under the RLA under certain circumstances. *See* United Transp. Union v. Surface Transp. Bd., 114 F.3rd 1242 (D.C. Cir. 1997).

[137] Pub. L. No. 104-88, 109 Stat. 803 (1995).

[138] A Class I railroad has annual operating revenue in excess of $258 million; a Class II railroad has operating revenue less than $258 million but more than $25 million. Class III railroads fall below that threshold.

[139] 49 U.S.C. § 11326(b) (2000).

[140] 49 U.S.C. § 11326(c) (2000).

[141] 50 Stat. 307 (1937).

[142] *See, e.g.,* Santa-Maria v. Metro North Commuter R.R., 81 F.3d 265 (2d Cir. 1996).

services of a transit agency do not.[143] Under it, the Railroad Retirement Board (RRB) adjudicates claims of eligible employees for various types of benefits created under the Act, including unemployment insurance benefits.[144] The Railroad Retirement Act of 1974[145] is the railroad industry's counterpart to Social Security, and the Railroad Unemployment Insurance Act[146] provides unemployment compensation to railroad employees.

A transit agency that acquires a freight rail line may find itself subject to these laws. However, transit employers have a strong incentive to avoid being classified as a rail carrier subject to the Railroad Retirement Act, for it imposes significantly higher retirement and disability taxes than does Social Security. The Railroad Retirement Act requires employers to pay taxes and withhold taxes under two tiers. Tier I is the railroad equivalent of Social Security, and is set at the Social Security rate. Tier II requires an additional 4.9 percent tax on employees and 16.10 percent tax on employers over and above what they would pay were they under the Social Security system.[147]

The Railroad Retirement Act applies to any carrier subject to the jurisdiction of the STB.[148] The statutory provisions regarding applicability of the Railroad Retirement Act are nearly identical to those described in this Section above regarding the applicability of the RLA. A transit system acquiring a rail line may inadvertently find itself a rail carrier subject to the jurisdiction of the STB, and therefore under the Railroad Retirement Act. In order to avoid doing so, the transit provider should structure the transaction to ensure that it does not obtain the right to provide or control freight operations over the line, and seek a jurisdictional determination that it is not a rail carrier[149] from the STB prior to closing.[150] The transaction can be structured so that the right to provide freight service or control freight operations is retained by the seller or conveyed to a third party (such as by excepting an easement for freight operations from the purchase of the rail line or specifying it has no control over the freight railroad's abandonment of freight operations over the line or its frequency of service).[151]

Even if a transit system finds itself subject to STB jurisdiction, it still may avoid applicability of the Railroad Retirement Act, for the RRB has created a classification for a "non-operating carrier" to which the Railroad Retirement Act does not apply. It has held that a rail carrier subject to STB jurisdiction will be presumed to be subject to the Railroad Retirement Act unless:

- the railroad line owner does not have for-profit railroad activities as a primary business purpose;
- the railroad line owner does not operate (or retain the capacity to operate) the railroad line; and
- the operator of the line is (or will be) covered by the Railroad Retirement tax and unemployment insurance laws.[152]

Thus, in order to be classified a non-operating carrier, the transit provider should: (1) avoid engaging in for-profit railroad activities; (2) avoid operating (or retaining the capacity to operate) the rail line; and (3) ensure the freight operator on the line is subject to the Railroad Retirement Act. [153] In any event, before acquiring a rail line, the transit lawyer must acquaint himself or herself with the implications of being deemed a rail carrier subject to the Railway Labor Act, the Railway Retirement Act, and other railroad specific legislation, and if he or she does not want to subject the transit agency to such laws, so structure the transaction to avoid them.

### 2. Railroad Hours and Overtime Laws

Congress passed the Hours of Service Act of 1907[154] to promote safety by limiting the number of consecutive hours various types of railroad employees could work.[155] The Adamson Act of 1916[156] mandated that 8 hours is the standard workday of railroad employees. State law regarding the hours and overtime of railroad employees is preempted by federal law.[157]

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[143] Felton v. South Eastern Pa. Transp. Auth., 952 F.2d 59 (3d Cir. 1991).

[144] Railroad Retirement Board et. al. v. Duquesne Warehouse Co., 326 U.S. 446, 66 S. Ct. 238 (1946).

[145] Pub. L. 93-445, 88 Stat. 1304 (Oct. 16, 1974).

[146] 45 U.S.C. § 351 (2000).

[147] Tracie Spear & Kevin Sheys, Staying "On" Social Security (unpublished paper, 2001).

[148] 45 U.S.C. § 231(a)(1)(3) (2000).

[149] 49 U.S.C. § 10102 (2000).

[150] Spear & Sheys, *supra* note 147. *See State of Maine Dep't of Transportation—Acquisition & Operation Exemption—Maine Central Railroad,* 8 I.C.C.2d 835 (1991).

[151] Spear & Sheys, *supra* note 147.

[152] *Railroad Ventures, Inc.,* B.C.D. 98-48.

[153] The RRB assumes an entity that owns a rail line solely to preserve passenger or freight services satisfies the first prong of the test. It also assumes that an entity that leases a line is not operating it if it does not have control over day-to-day operations of the line. The transit provider also improves its chances of avoiding application of the Railroad Retirement Act if it limits its service to passenger operations. Spear & Sheys, *supra* note 147.

[154] 45 U.S.C. § 61-64b. In 1994, these sections were recodified as 49 U.S.C. §§ 20102, 21101, and 21103 (2000).

[155] The term "railroad" in 49 U.S.C. § 20102(1) (2000):

> (A) means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including—
> (i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and
> (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but
> (B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

[156] 45 U.S.C. §§ 65-66 (2000).

[157] Erie R.R. v. N.Y., 233 U.S. 671 (1914); R.J. Corman R.R. Co. NY/Memphis Line v. Palmok, 999 F.2d 149 (6th Cir. 1993).

## D. THE FEDERAL TRANSIT ACT

### 1. Introduction

Congressional concern with the deterioration of urban mass transportation led to the promulgation of the Urban Mass Transportation Act of 1964 [the UMTA Act]. In the decade prior to its enactment, 243 private transit companies were sold and 194 were abandoned. The number of revenue passengers carried by intracity buses and rail had declined by 22 percent between 1956 and 1960. With rising costs and declining patronage, transit companies (most of which were private companies) were forced to raise fares, cut service, and defer maintenance, leading to a downward spiral in which service deterioration forced by economic considerations—and the growing prevalence of the automobile—in turn led to declining passenger demand for transit. As the private sector transit companies disappeared or downsized, transit employees suffered a corresponding decline in wages, working conditions, and employment.[158]

The UMTA Act was passed at a time when many private transit companies had disappeared and others were in precarious financial condition. The statute was designed to allow local governments to step in and purchase such companies so that communities would not lose transit services. Congress was faced with the reality that the disappearance of private sector transit companies would leave many localities with little or no transit service, and that local government was the transit provider of last resort. Congress also recognized that many state laws prohibited collective bargaining by public employers, and "was aware that public ownership might threaten existing collective-bargaining rights of unionized transit workers." Therefore, Congress included Section 13(c) in the UMTA Act "to prevent federal funds from being used to destroy the collective-bargaining rights of organized workers."[159]

The 1964 legislation was designed to arrest the downward financial spiral by providing federal funding through grants and loans to finance the capital facilities and equipment necessary to preserve and expand the nation's public transit systems. To address concerns raised by organized labor during the debate of the UMTA Act, Congress included a requirement that specific labor protective provisions be in place[160] as a condition of receiving federal financial assistance.[161]

Labor protective provisions for transit employees were originally included in Section 13(c) of the UMTA Act.[162] Even though the statute has been recodified as Sections 5333(b) of the Federal Transit Act, many attorneys and much of the literature still refer to it as Section 13(c). The purpose of the labor protections was to protect employees who might be adversely affected by industry changes arising as a result of public authorities taking over private transit operations, or through technological advances. Section 13(c) includes several major requirements:

- Before the FTA may release federal funds to a grant recipient, the U.S. Department of Labor (DOL) must certify that labor protective arrangements (a/k/a "Section 13(c) arrangements") exist to protect the interest of employees affected by the assistance. Under Section 13(c), "fair and equitable arrangements" must be in place to protect "the interest of employees affected by such [federal] assistance."[163] Hence, a transit agency's failure to provide protection to the satisfaction of DOL results in a loss of federal funds.[164]
- Protective arrangements must be included in five areas:

1. Preservation of rights, privileges, and benefits under existing collective bargaining agreements;
2. Continuation of collective bargaining rights;
3. Protection of employees against worsening of their positions;
4. Assurance of employment;
5. Paid training or retraining.[165]

- Such arrangements must "include provisions protecting individual employees against a worsening of their positions, with respect to their employment which shall in no event provide benefits less than those established pursuant to Section 5(2)(f) of this title" (described above).[166]

The contract granting federal funds must "specify the terms and conditions of the protective arrangements." In summary, the Federal Transit Act can be viewed as both a transit funding and a labor protection act.[167] To-

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[158] G. KENT WOODMAN ET AL., TRANSIT LABOR PROTECTION—A GUIDE TO SECTION 13(C) OF THE FEDERAL TRANSIT ACT (TCRP Legal Research Digest No. 4, 1995).

[159] Jackson Transit Auth. v. Local Division 1285, Amalgamated Transit Union, 457 U.S. 15, 102 S. Ct. 2202, 72 L.2d 639 (1982).

[160] Section 13(c) does not impose the conditions, nor does it require that labor and management agree. Section 13(c) provides that the specified protective arrangements must be found by the Secretary of Labor to be sufficient, and they must be in place, before federal funds can be released.

[161] WOODMAN ET AL., *supra* note 158.

[162] 49 U.S.C. § 1609(c) (1964). This provision was amended by TEA-21 to be a part of the Federal Transit Act. 49 U.S.C. § 5333(b) (2000).

[163] *Id*. DOL has interpreted this requirement to cover all employees of established systems whose interests may be adversely affected by programs pursued under the Act.

[164] Charles Chieppo, *The T Contract Truth—Federal Transit Act Derails Competition,* BOSTON HERALD, Dec. 24, 2000, at 17.

[165] Section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. App. § 1609(c) (now 49 U.S.C. § 5333(b) (2000)).

[166] Section 5(2)(f) of the Interstate Commerce Act is now 49 U.S.C. § 11326 (2000) (formerly § 11323). It provides a variety of monetary benefits to employees of railroads whose companies are merged or consolidated, including compensation to offset the loss of jobs or earnings, unusual expenses, and other equalizing compensation up to 5 years from the date of change. DEMPSEY & THOMS, *supra* note 107, at 307.

[167] WOODMAN ET AL., *supra* note 158. *See also* 49 U.S.C. § 5311 (2000). Special Warranty for the Nonurbanized Area Pro-

day, the three largest transit unions are the Amalgamated Transit Union, Transport Workers Union, and United Transportation Union.[168]

### 2. Section 13(c) Certification Procedures

Section 13(c) of the Act requires that, before federal funds may be awarded by the FTA, the Secretary of Labor must certify that the transit authority has made "fair and equitable" labor protective arrangements that include, among other things, provisions ensuring employees of "the continuation of collective bargaining rights."[169] The Secretary of Labor must find that all of the provisions of Section 13(c) have been fulfilled before he or she can issue a certification.[170] If the parties disagree as to the protective arrangements, the Secretary of Labor can impose them.

The DOL's certification procedure begins with its receipt of an FTA grant application filed by the FTA grant recipient. The application is forwarded to DOL's Office of Labor-Management Standards, Division of Statutory Programs, which examines the application for its completeness. If the application is incomplete, DOL notifies FTA, requesting the missing information, and suspends processing of the application. When the application is complete, DOL recommends the employee protection terms and conditions that will apply to the grant,[171] and usually sends them both to the relevant labor unions and the grant applicant for review.[172] This point in time signals the beginning of DOL's 60-day target for completion of processing the application.[173] It is important to keep in mind FTA's quarterly grant processing cycle, under which FTA commits to process a grant received on the first day of the calendar quarter by the end of the calendar quarter, as well as the processing of 13(c) certification by DOL. As a practical matter, two agencies are involved, with the FTA having little substantive influence on DOL. The FTA Section13(c) Guidelines are not binding on DOL.

The applicant or the unions may file an objection to the DOL recommended employee protection terms and conditions, and DOL will rule on such objections. Between 1996 and 2000, union or applicant objections accounted for 12–16 percent of all referrals.[174] If DOL determines the objections are invalid, it will issue a certification based upon its recommended terms and conditions. If DOL determines the objections are valid, the parties are accorded additional time to resolve the differences.

Union referral may not be required if (1) there is no union in the service area of the proposed project, (2) the project is a routine replacement of equipment and/or facilities of like kind and character with no potential material effect on employees, or (3) the project is an amendment or revision to a previously approved project and there is no change in scope of the project.[175] But these circumstances are quite rare; as a practical matter, almost every federal grant application goes through the Section 13(c) process. DOL tends to err on the side of caution, taking the position of "if in doubt, send it out" to the parties.

If no union referral is required, the DOL certification process allows for "fast tracking" of the application. DOL instead imposes the "nonunion warranty," a two-page document incorporating the more detailed rights and benefits set forth in the Appendix C-1 or Amtrak protections, requiring the grantee to agree to provide specific labor protection for employees in the "mass transportation industry" in the service area of the project.[176]

### 3. Protected Employees

An individual is entitled to Section 13(c) protection when: (1) the employee is engaged in mass transportation services; and (2) the employee is the type of employee entitled to Section 13(c) protection.

The FTA defines mass transportation as: (1) service that is open to access by and for the benefit of the general public, and under the control of the provider; (2) service that typically interconnects with and has transfer points to other mass transportation services; and (3) service that operates on a regular schedule (as opposed to on an as needed, irregular basis), engages in advertising, and has a printed schedule. On the other hand, DOL has defined mass transportation by what it is not: (1) it is not exclusive ride taxi service; and (2) it is not service to individuals or groups that excludes use by the general public.[177]

In answering the second question (whether the individual is the type of employee entitled to Section 13(c)

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gram agreed to by the Secretaries of Transportation and Labor, dated May 31, 1979, U.S. DOL implementing procedures.

[168] Http://www.kclabor.org/transit.htm (visited Mar. 23, 2002).

[169] 49 U.S.C. § 5333(b) (2004).

[170] Amalgamated Transit Union Int'l v. Donovan, 767 F.2d 939 (D.C. Cir. 1985).

[171] Standard Transit Employee Protective Arrangements are set forth in U.S. DOL guidelines, "Section 5333(b), Federal Transit Law," 29 C.F.R. pt. 215 (2003). 49 U.S.C. § 5333(b) (2000).

[172] U.S. DOL Guidelines, "Section 5333(b), Federal Transit Law," 29 C.F.R. pt. 215 (2003).

[173] DOL established this target in January 1996. As of April 2000, DOL had met the 60-day target for processing applications 98 percent of the time. However, the DOL's 60-day period does not begin to run until it has reviewed the application for completeness and recommended terms and conditions to the grant applicant and the union. It does not include the period between receipt of the application and a determination that the application is complete. Suspended applications are not subject to the 60-day target. *U.S. General Accounting Office, Transit Grants: Department of Labor's Certification Process* (Apr. 25, 2000).

[174] *U.S. General Accounting Office, Transit Grants: Department of Labor's Certification Process* (Apr. 25, 2000).

[175] *U.S. General Accounting Office, Transit Grants: Department of Labor's Certification Process* (Apr. 25, 2000).

[176] WOODMAN ET AL., *supra* note 158.

[177] WOODMAN ET AL., *supra* note 158.

protection), DOL has proceeded on a case-by-case basis, examining the position, duties, and responsibilities of the individual to ascertain his "relative position in the hierarchy of management." In so doing, DOL has focused primarily on the extent to which the claimant affects management policy, and whether he or she exercises independent judgment and discretion in a way commonly associated with top-level management. DOL has construed the word "employee" broadly to encompass all but top-level individuals in policymaking positions.[178] Transit systems have successfully argued in certain cases that employees were not entitled to 13(c) protections because they were not adversely affected by federal financial assistance.[179] This is important; an adverse effect by federal financial assistance is a prerequisite to triggering 13(c) protections.

### 4. Standard 13(c) Agreements

Agreements concluded by labor and management under Section 13(c) typically include similar provisions. Some are mandated by the Federal Transit Act, and others have been adopted as part of the Section 13(c) "custom and usage," while still others owe their origin to the national Model Section 13(c) Agreement.[180] Among typical such provisions are the following:

*Definitions*—The term "project" is usually not limited to the particular activity receiving federal funds, but includes any operational, organizational, or other change occurring as a result of federal assistance. There is substantial disagreement as to the "duration of the project." This is an important point because Section 13(c) protections continue throughout the "duration of the project." Transit unions contend that 13(c) protections last so long as the capital asset purchased with federal grant funds remains in use or service (e.g., the entire useful life of the building or transit vehicle). Transit systems historically have contended that Section 13(c) protections last only until the federal funds are expended, or, at the outside, at the expiration of the planned useful life of the capital asset.[181]

*Preservation of Rights, Privileges, and Benefits under Existing Collective Bargaining Agreements*—This is a statutory requirement. Existing rights and benefits must be preserved and continued, though they may be modified through the process of collective bargaining.

*Continuation of Collective Bargaining Rights*—This is a statutory requirement, discussed in greater detail below. It guarantees that employees will continue to have the right to bargain collectively with their employer concerning the terms and conditions of their employment.

*Notice of Proposed Changes*—The grantee must ordinarily give the union 60-days advance notice of any change that may adversely affect employees. After such notice, the parties must meet to negotiate an implementing agreement. However, a work rule change does not necessarily require 60-days notice prior to implementation, nor does Section 13(c) require that management negotiate an implementing agreement over matters that are inherent management rights.

*Section 13(c) Benefits*—Employees must be protected against a worsening of their position, including a displacement allowance, dismissal allowance, lump sum separation allowance, moving expense, and home sale protection. However, Section 13(c) does not guarantee perpetual employment or preservation of an existing job position. It merely protects covered transit workers from a worsening of their condition by the use of federal funds. If causes other than the use of federal funds worsen an employee's position, or if an employee is displaced without the use of federal funds (e.g., a downsizing due to a budget crisis), no Section 13(c) implications arise.[182]

*Resolution of Section 13(c) Disputes*—There are two types of arbitration—interest arbitration and grievance arbitration. Interest arbitration involves the terms and conditions of a collective bargaining agreement. Each Section 13(c) certification must contain an impasse resolution procedure. The impasse resolution procedure may be fact finding, the right to strike, the permissive right to strike under a state statute, binding interest arbitration, or some other mechanism. Section 13(c) does not by its terms require binding interest arbitration; for almost 20 years DOL's position and practice has been that DOL will not impose binding interest arbitration upon an unwilling recipient (or, stated differently, DOL will include binding interest arbitration in a 13(c) certification only if the transit system agrees). Only rarely is the impasse resolution mechanism binding interest arbitration.[183] Grievance arbitration is used as the final step to resolve 13(c) grievances.

*Claims Procedure*—This clause specifies time limits for bringing a Section 13(c) claim, and establishes a process for its presentation and resolution. The 13(c) certification is not a substitute for the collective bargaining agreement. Claims under 13(c) are resolved under the 13(c) grievance procedure; claims under the collective bargaining agreement are resolved through whatever grievance or dispute resolution mechanism is contained in the CBA.

*Resolution of Interest Disputes*—This provision provides a process for resolving "interest disputes" (the making or maintenance of a collective bargaining

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[178] WOODMAN ET AL., *supra* note 158.

[179] "[T]he contention that a public transit authority must grant collective bargaining rights whenever it receives federal assistance was considered and rejected by Congress…." United Transp. Union v. Brock, 815 F.2d 1562,1565 (D.C. Cir. 1987). *See also* Local Division No. 714, Amalgamated Transit Union v. Greater Portland Transit District of Portland Maine, 589 F.2d 1 (1st Cir. 1978); Division 587, Amalgamated Transit Union v. Municipality or Metro. Seattle, 663 F.2d 875 (9th Cir. 1981).

[180] WOODMAN ET AL., *supra* note 158.

[181] For additional details *see* WOODMAN ET AL., *supra* note 158.

[182] *See* WOODMAN ET AL., *supra* note 158.

[183] The ATU Constitution requires locals to offer binding interest arbitration prior to going out on strike.

agreement or terms to be included in it). The process may include a right to strike, binding interest arbitration, or factfinding. The process must be "meaningful," and requires certain elements (e.g., publicity of the fact finder's conclusions in a manner designed to bring pressure upon the recalcitrant party.)[184]

*Priority of Reemployment*—The statute requires that dismissed employees be entitled to priority in reemployment to fill any vacant position reasonably comparable to the employee's previous position. If retraining is necessary, it must be done at the employer's expense.

*First Opportunity for Work Clause*—Some agreements provide employees with the right to the first opportunity for any new jobs created as a result of the project.

*Duplication of Benefits*—Most agreements prohibit the duplication of pyramiding of employee protection benefits.

*Successor Clause*—Most agreements provide that successors or assigns of the parties are obligated to honor all its terms and conditions.[185]

### 5. Continuation of Collective Bargaining Rights

As noted above, Section 13(c) requires that the Secretary of Labor certify that "fair and equitable arrangements are made…to protect the interests of employees affected by such assistance," and that protective arrangements must include "provisions as may be necessary for…the continuation of collective bargaining rights." Some courts have ruled that "the Secretary is not free to certify an agreement that does not provide for the continuation of collective bargaining rights."[186] Several courts have held that the Secretary's decision of whether or not to certify a 13(c) agreement as "fair and equitable" is "committed to agency discretion" under the APA,[187] and therefore not reviewable by the courts.[188]

Other courts have concluded certification is reviewable as to the issue of the Secretary's abuse of discretion. *Amalgamated Transit Union International v. Donovan*[189] addressed the issue of whether a public transit authority seeking federal assistance may abrogate existing collective bargaining rights upon acquisition of a private firm. In *Donovan,* mass transportation in Atlanta, Georgia, was provided by the Atlanta Transit System (ATS) prior to 1971. The Amalgamated Transit Union (ATU) represented ATS's employees, and concluded a series of collective bargaining agreements with ATS governing wages, hours, and other conditions and terms of employment under the NLRA. In 1965, the Georgia legislature created MARTA as a public corporation authorized to purchase and operate the ATS mass transit system. In 1971, ATU and MARTA concluded a 13(c) agreement that was certified as fair and equitable by the Secretary of Labor. Following the receipt of federal funds, in 1972, MARTA purchased the assets, property, and facilities of ATS.[190]

During the ensuing decade, MARTA applied for and received additional federal transit funds. In each case, the Secretary of Labor certified the 13(c) agreement between the parties as fair and equitable. When a collective bargaining agreement expired in 1981, before a new collective bargaining agreement could be concluded, and during interest arbitration, MARTA ceased paying cost of living adjustments required under the expired collective bargaining agreement. Shortly thereafter, the Georgia legislature passed a statute limiting MARTA's authority to bargain with United Transportation Union (UTU) over the assignment of employees, discharge and termination of employees, subcontracting of work, fringe benefits for part-time employees, and overtime, and changed the procedures for interest arbitration. Among other things, the statute required that the arbitrator be a resident of Georgia, familiar with government finance, and state in his or her award the extent of any increase in fares or decrease in service resulting from his or her award. Not wanting to jeopardize federal funding, the parties agreed to support the Secretary of Labor's certification of the 1977 Section 13(c) agreement to authorize release of pending federal transit funds, with each side free to litigate the legality of the state law limitation on interest arbitration. In 1982, the Secretary of Labor certified the agreement as fair and equitable.

In *Donovan,* the D.C. Circuit Court of Appeals concluded that several provisions of the state statute were "completely antithetical to the concept of collective bargaining under section 13(c)" and that therefore the Secretary's certification of the agreement was improper.[191] The Secretary of Labor is not free to approve an agreement that fails to guarantee the continuation of collective bargaining rights.[192] Section 13(c)'s requirement that labor protective agreements provide for "the continuation of collective bargaining rights" means that where employees enjoyed collective bargaining rights before public acquisition of the transit system, they are entitled to continue to be represented in meaningful, "good faith" negotiations with their employer over wages, hours, and other terms and conditions of employment. Meaningful collective bargaining does not exist if an employer possesses unilateral power to establish wages, hours, and other conditions of employ-

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[184] For a more detailed explanation of these provisions, *see* WOODMAN ET AL., *supra* note 158.

[185] For a more thorough explanation of these provisions, *see* WOODMAN ET AL., *supra* note 158.

[186] Greenfield & Montague Transp. Area v. Donovan, 758 F.2d 22 (1st Cir. 1985).

[187] Pub. L. No. 404, 60 Stat. 237 (June 11, 1946).

[188] *See, e.g.,* Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth., 667 F.2d 1327, 1343 (11th Cir. 1982); Kendler v. Wirtz, 388 F.2d 381, 383–4 (3d Cir. 1968); City of Macon v. Marshall, 439 F. Supp. 1209 (1977).

[189] Amalgamated Transit Union Int'l v. Donovan, 767 F.2d 939 (D.C. Cir. 1985).

[190] 767 F.2d at 941–2.

[191] 767 F.2d at 951–3.

[192] 767 F.2d at 955.

ment without the consent of the union or without at least bargaining in good faith to impasse over disputed issues.[193]

But what if the collective bargaining agreement has lapsed before the public entity acquires the transit facility? Such a situation arose in *United Transportation Union v. Brock.*[194] Prior to its public acquisition, transit service in Greenville, South Carolina, was provided by a private firm, Greenville City Coach Lines, Inc. In 1975, the firm notified the city of Greenville that it was forced to discontinue its service on grounds of unprofitability. The city formed the Greenville Transit Authority to fill the void. Though the Authority hired several of the Coach Lines' employees, it did not acquire any of its assets, and provided service without federal assistance until 7 years after beginning service. When the Authority applied for federal assistance, the UTU informed the Authority that UTU had a sufficient number of signed employee authorization cards designating UTU as their bargaining representative. The Authority refused to recognize UTU as the bargaining representative on grounds that the Authority was a public entity outside the jurisdiction of the NLRA, and because it was prohibited by state law from bargaining with the union.[195]

In *Brock,* Judge Bork, writing for the U.S. Court of Appeals for the District of Columbia Circuit, interpreted the Section 13(c) requirement of the "continuation of collective bargaining rights" as being required "only when the transit employees had collective bargaining rights that could be affected by the federal assistance."[196] On these facts, Judge Bork found that the transit employees had no collective bargaining rights that could be affected by transit assistance; those rights were lost 7 years before the Authority applied for federal transit assistance.[197]

### 6. Arbitration

In promulgating Section 13(c), Congress neither protected the right to strike nor required interest arbitration as a condition of federal transit aid.[198] Congress made it clear that the right to strike is not to be preserved pursuant to federal law and that binding interest arbitration will not be required. Yet, Congress did mandate the continuation of collective bargaining. Prior to the U.S. Supreme Court's unanimous decision in *Jackson Transit,* several federal appellate courts issued injunctions ordering a local transit provider to submit to interest arbitration of a new CBA pursuant to the terms of a Section 13(c) agreement.[199] *Jackson Transit* held that the UMTA Act did not create a federal body of labor law applicable to transit workers; rather, state law controls, and labor disputes are to be decided under state law in state courts, not federal courts. The end result is that Section 13(c) requires protection of the *process* of collective bargaining. So long as the right of collective bargaining is protected, no 13(c) violation occurs if a particular outcome results from collective bargaining.[200]

## E. FEDERAL VS. STATE JURISDICTION

Congress has never exercised its power to occupy the entire field of labor law.[201] The U.S. Supreme Court decision in *Jackson Transit*[202] is the seminal case identifying the role of federal courts and federal law *vis-à-vis* state courts and state law in reviewing collective bargaining impasses asserted under Section 13(c) of UMTA, and civil rights claims under Section 1983. In 1966, the city of Jackson, Tennessee, applied for federal aid to convert a failing private sector bus company into a public entity, the Jackson Transit Authority. In order to secure federal funding, the Authority entered into a Section 13(c) agreement with the ATU guaranteeing, *inter alia,* the preservation of transit workers' collective bargaining rights. The Secretary of Labor certified the agreement as "fair and equitable," and the Authority received several hundred thousand dollars in federal transit aid.

A series of CBAs between the Authority and ATU were concluded thereafter. But 6 months after signing a 3-year CBA in 1975, the Authority announced it believed it was no longer bound by the contract. ATU filed suit in federal court seeking damages and injunctive relief. Concluding that, "Congress intended that labor relations between transit workers and local governments would be controlled by state law,"[203] the U.S. Supreme Court held that Section 13(c) does not provide a federal cause of action for alleged breaches of Section

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[193] 767 F.2d at 950. *See also* Railway Labor Executives' Ass'n v. United States, 987 F.2d 806, 814 (D.C. Cir. 1993).

[194] 815 F.2d 1562 (D.C. Cir. 1987).

[195] 815 F.2d at 1564.

[196] 815 F.2d at 1565.

[197] *Id*.

[198] *See* Local Division 1285, Amalgamated Transit Union AFL-CIO v. Jackson Transit Auth., 650 F.2d 1379, 1392 (6th Cir. 1981) ("Section 13(c) does not require protection of interest arbitration…"), *rev'd on other grounds*, Jackson Transit Auth. v. Local Division 1285, Amalgamated Transit Union, AFL-CIO, 457 U.S. 15, 102 S. Ct. 2202, 72 L. Ed. 2d 639 (1982); Local Division No. 714, Amalgamated Transit Union v. Greater Portland Transit Dist., 589 F.2d 1, 6-7 (1st Cir. 1978) (statute does not command that interest arbitration be provided), overruled in part on other grounds, Local Division 589, Amalgamated Transit Union v. Commonwealth of Mass., 666 F.2d 618 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117, 102 S. Ct. 2928, 73 L. Ed. 2d 1329 (1982).

[199] *See* Division 587, Amalgamated Transit Union v. Municipality of Metro. Seattle, 663 F.2d 875 (9th Cir. 1981), and cases cited therein.

[200] *See* WOODMAN ET AL., *supra* note 158.

[201] Maher v. N.J. Transit Rail Operations, 593 A.2d 750, 755 (N.J. 1991).

[202] Jackson Transit Auth. v. Local Division 1285, Amalgamated Transit Union, 457 U.S. 15, 102 S. Ct. 2202, 72 L. Ed 2d 639 (1982).

[203] *Id*. at 23.

13(c) agreements; instead, these disputes must be settled in state court according to state law:[204]

> Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local government entities and transit workers. Section 13(c) would not supersede state law, would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations.[205]

Hence, Section 13(c) CBAs are governed by state law applied in state courts.[206] In *Jackson,* the Supreme Court went on to hold that no Section 1983[207] federal cause of action may be pursued by an aggrieved union. Hence, state law controls the relationship between transit systems and transit workers; Section 1983 cannot be used to bootstrap a claim that properly falls within state court into federal court. In so holding, the court emphasized the congressional intent that state law should apply.[208]

Duties imposed under the RLA on carriers and their employees are binding and their breach is redressable in federal court.[209] If the complaint alleges a violation of the RLA, then original federal jurisdiction is conferred.[210] Typically, federal courts determine at the outset whether the dispute is major or minor.[211] However, a state cause of action is preempted by the RLA where an RLA employee's claim requires an interpretation of the CBA;[212] but if the claim involves rights and obligations that exist independent of the CBA, the state action is not preempted.[213] For example, courts have found that state whistleblower laws are not preempted by the RLA.[214]

Moreover, under Section 301 of the Taft-Hartley Act,[215] suits to enforce CBAs are within the original jurisdiction of federal courts, and therefore removable if filed in state court.[216] If the transit workers are governed by the NLRA, jurisdiction lies with the NLRB (with judicial review.) As one court noted, "when a state law claim is substantially dependent on analysis of a collective bargaining agreement, a plaintive may not evade the preemptive force [of a federal labor law] by casting the suit as a state law claim."[217] In most such instances, however, the employer is a private sector firm and not public sector transit agency. Moreover, labor relations between governmental transportation providers and their employees enjoy a specific legislative exemption from the application of the NLRA.[218] Government employees explicitly are excluded from the application of the NLRA.

## F. THE NATIONAL LABOR RELATIONS ACT

### 1. Introduction

As noted above, Congress explicitly exempted public transit providers from the application of the NLRA.[219] Nonetheless, private transportation firms (other than rail and air common carriers subject to the RLA) fall under the jurisdiction of NLRA.

Congress enacted the NLRA in 1935 to ensure collective bargaining between employers and employees.[220] The NLRB consists of five Board members appointed by the President, with the advice and consent of the Senate, for 5-year, staggered terms, removable from office only for cause. In promulgating the NLRA, Congress "sought to find a broad solution, one that would bring industrial peace by substituting…the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are

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[204] *See also* Greenfield and Montague Transp. Area v. Donovan, 758 F.2d 22, 25 (1st Cir. 1985), and Nieto-Santos v. Fletcher Farms, 743 F.2d 638 (9th Cir. 1984). *But see* City of Independence Mo. v. Bond, 756 F.2d 615 (8th Cir. 1985), holding that because the matter at issue called for the construction of a federal statute, federal question jurisdiction does exist.

[205] 457 U.S. 20, 21 [footnotes omitted].

[206] *See also* Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth., 667 F.2d 1327 (11th Cir. 1982).

[207] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2000).

[208] 457 U.S. at 29.

[209] *See, e.g.*, Virginian Ry. Co. v. System Fed'n, 300 U. S. 515, 545, 51 S. Ct. 593 (1937); Steele v. Louisville & N.R. Co., 323 U.S. 193, 65 S. Ct. 226 (1944).

[210] 28 U.S.C. § 1337 (2000).

[211] LESLIE, *supra* note 14, at 7.

[212] Four exceptions have been identified when a employee may sue in federal court, obviating the need to resolve the minor dispute before an adjustment board: (1) when the employer jettisons the private grievance machinery; (2) when resort to administrative remedies would be futile; (3) when the employer is joined in a duty-of-fair representation claim against the union, or (4) when because of the union's breach of its duty of fair representation, the employee has lost the right to press his grievance before the Board. Childs v. Pa. Fed'n Bhd. of Maintenance Way Employees*,* 831 F.2d 429, 437 (3d Cir. 1987).

[213] Hawaiian Airlines v. Norris*,* 512 U.S. 246, 114 S. Ct. 2239 (1994); Parker v. Metropolitan Transp. Auth., 97 F. Supp. 2d 437 (S.D. N.Y. 2000).

[214] Maher v. N.J. Transit Rail Operations*,* 593 A.2d 750 (N.J. 1991).

[215] 29 U.S.C. § 185 (2000).

[216] 28 U.S.C. § 1441 (2000). *See* Graf v. Elgin, Joliet & Eastern Ry. Co., 697 F.2d 771,774 (7th Cir. 1983).

[217] Barousse v. Paper, Allied-Industrial*,* 2000 U.S. Dist. Lexis 16370 (E.D. La. 2000). International Bhd. of Elec. Workers v. Heckler, 481 U.S. 791 (1987).

[218] 29 U.S.C. § 152(2) (2000).

[219] *Id*.

[220] Phoenix Eng'g, Inc., v. MK-Ferguson of Oak Ridge Co., 966 F.2d 1513, 1519 (6th Cir. 1992).

not effectively established."[221] The NLRA gives employees the right to organize; to form, join, or assist any union; to bargain collectively through representatives of their own choosing; to act together for mutual aid or protection; or to choose not to engage in any of these protected activities.[222]

### 2. Representation

A petition for a representation election can be filed by employers, employees, or unions. The petition must be supported by 30 percent of the employees in the bargaining unit designated by the petition, usually in the form of signed and dated "authorization cards." The NLRB staff will investigate and authenticate the cards. The regional director will seek to achieve agreement between the union(s) and the employer for a consent election; failing that, he will order an employee of the regional office to conduct a representation election by secret ballot of the employees.

There are many things an employer may not lawfully do. For example, it may not unilaterally recognize a union that has not attained majority status as the exclusive bargaining representative of its workers, for such action conflicts with the right of self-organization.[223] Nor may an employer dismiss or punish employees for encouraging others to join a union.[224] Threats of discharge, plant closings, loss of benefits or other reprisals; threats against strikes; surveillance of union leaders; promises of inducements; employee interrogation and polling; and other coercive activities may be unlawful.[225] Where the NLRB determines that the employer has engaged in unfair labor practices, it may issue a "*Gissel bargaining order*"[226] requiring the employer to recognize and bargain with the union even though the union has not won a majority in a representation election.[227] Moreover, some of the empirical literature suggests that "dirty" elections (involving unlawful campaigning) have no more effect on election outcomes than "clean" elections,[228] so there is little practical reason to engage in coercive activities.

### 3. Collective Bargaining

An NLRB-designated union has the exclusive right to represent its employees in collective bargaining negotiations with management. The employer may not ignore a designated union and attempt to bargain directly with employees.[229]

Free collective bargaining is the cornerstone of the structure of labor-management relations ordained by NLRA.[230] No state or its governmental institutions may, for example, coerce a local transportation provider into settling a labor management dispute by threatening to deny renewal of an operating franchise. State interference with a company's labor relations is enforceable under Section 1983[231] in an action for compensatory damages.[232]

The scope of collective bargaining principally concerns wages, hours, and other terms and conditions of employment. There are many cases as to what constitutes a mandatory subject of collective bargaining (e.g., assignment of overtime, contracting work to employees outside the established bargaining unit)[233] and a permissive subject of bargaining (e.g., inclusion of a binding interest arbitration clause in the next CBA, or subcontracting).[234]

### 4. Arbitration

In 1960, the U.S. Supreme Court handed down its decisions in what has become known as the *Steelworkers Trilogy*,[235] which culminated the process of federalization of the law of CBAs in grievance arbitration that began with promulgation of the Labor Management Act of 1947 (Taft-Hartley Act). Noting that the grievance

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[221] National Labor Relations Bd. v. Hearst Publications, 322 U.S. 111 (1944).

[222] Duke Univ. and Amalgamated Transit Union, 315 NLRB 1291 (1995).

[223] Sandra Nunn, *Are American Businesses Operating Within the Law? The Legality of Employer Action Committees and Other Worker Participation Plan*, 63 U. CIN. L. REV. 1379 (1995).

[224] Terry Bethel & Catherine Melfi, *The Failure of Gissel Bargaining Orders,* 14 HOFSTRA LAB. L.J. 423 (1997).

[225] Joel Rogers, *Divide and Conquer: Further Reflections On the Distinctive Character of American Labor Laws,* 1990 WIS. L. REV. 1, 127–28 (1990).

[226] National Labor Relations Bd. v. Gissel Packing Co., 395 U.S. 575, 89 S. Ct. 1918 (1969).

[227] Victoria Johnson, *Did Old MacDonald Have a Farm?*, 69 U. COLO. L. REV. 295 (1998).

[228] *J. Getman, S. Goldberg & J. Herman, Union Representation Elections: Law And Reality* 160 (1976); Charles Jackson & Jeffrey Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. PA. L. REV. 1 (1982).

[229] Medo Photo Supply Corp. v. National Labor Relations Bd., 321 U.S. 678, 64 S. Ct. 830 (1944).

[230] Golden State Transit v. City of L.A., 440 U.S. 519, 551, 106 S. Ct. 1395 (1986); N.Y. Tele. Co. v. N.Y. Dep't of Labor, 99 S. Ct. 1328 (1979).

[231] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2000).

[232] Golden State Transit Corp. v. City of L.A., 493 U.S. 103, 110 S. Ct. 444 (1989).

[233] National Labor Relations Bd. v. Centra, Inc., 954 F.2d 366 (6th Cir. 1992); Fibreboard Paper Products Corp. vs. National Labor, 85 S. Ct. 398 America (1964).

[234] Furniture Rentors of America v. National Labor Relations Bd., 36 F.3d 1240 (3d Cir. 1994).

[235] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S. Ct. 1343 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 80 S. Ct. 1347 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

machinery is at the very heart of industrial self-governance, the court held that grievances are presumed to be arbitrable, and parties to a CBA are deemed compelled to arbitrate unless it can be concluded that the agreement withdrew the matter from arbitration; a court should also enforce an arbitration award so long as it draws its essence from a CBA.[236] The obligation to arbitrate derives from either the agreement of the parties—usually a collective bargaining agreement or a statute. Absent agreement or a statute, a party cannot be forced into arbitration.

### 5. Unfair Labor Practices

A party alleging an employer or union has engaged in an unfair labor practice must file a "charge" with the NLRB within 6 months of the alleged violation.[237] After investigation, the regional director decides whether to issue a "complaint," which triggers prosecution of the employer in a hearing before an NLRB administrative law judge (ALJ), unless the regional director is able to negotiate a settlement. If a hearing is held, the ALJ will issue a recommended decision and order, which, if exceptions are filed, is appealed to the full NLRB, which may issue a written decision and order, usually on the basis of the written briefs and the record developed by the ALJ. In addition, the matter can be referred to General Counsel for advice before the regional director issues his/her decision.

The NLRA declares it an unfair labor practice for an employer "by discrimination in regard to…tenure of employment…to…discourage membership in any labor organization."[238] Prohibited activities include refusing to hire employees because of their union affiliation,[239] interrogating employees about their union activities, threatening employees with plant closing and other reprisals if they unionize, suspending employees because of their union activities, and soliciting grievances or promising to relieve grievances to influence employee union activities.[240] The U.S. Supreme Court has interpreted the NLRA to forbid "a discharge…in any way motivated by a desire to frustrate union activity."[241] The Court held that to prove an unfair labor practice, the NLRB General Counsel need only demonstrate a *prima facie* case of bad motive. For example, the NLRB might prove that the employer knew of the employee's union activities, and that circumstances surrounding the discharge suggest the existence of a "bad" motive. The NLRB may then shift the burden of proof to the employer to prove that it would have fired the employee anyway, even in the absence of the union activity.[242]

It is also an unfair labor practice to refuse to bargain collectively on rates of pay, wages, hours, and other terms and conditions of employment with the duly elected and certified bargaining representative of the employees.[243] The duty of collective bargaining embraces the obligation of an employer and union to meet at reasonable times and confer in good faith on matters of wages, hours, and other terms and conditions of employment.[244]

A union, too, may be held to have engaged in an unfair labor practice. For example, a union may not, over the objection of a dues-paying nonmember, spend dues on activities not related to collective bargaining, contract administration, or grievance adjustment.[245] The NLRB has also held that a union's breach of its duty of fair representation is an unfair labor practice.[246]

### 6. Judicial Review

A party seeking to challenge an NLRB decision in the courts must first exhaust its administrative remedies.

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[236] Martin Malin, *Symposium on Labor Arbitration Thirty Years After the Steelworkers Trilogy*, 66 CHI.-KENT L. REV. 551 (1990). *See also* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 168 (1983).

[237] Amalgamated Transit Union, Local Union No. 1433 (Phoenix Transit System), 2001 NLRB Lexis 765 (2001). However, the equitable doctrine of fraudulent concealment may toll the statute of limitations. Benfield Electric Co., 331 NLRB No. 590 (2000). The statute of limitations does not begin to run until the employee knows or has reasons to know that an unfair labor practice has been committed. Land and Air Delivery, Inc. v. NLRB, 862 F.2d 354 (D.C. Cir. 1988). Lacking a specific statute on the subject, the U.S. Supreme Court has extended this 6-month limitation to suits against both employers and unions. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983). Trial v. Atchison, Topeka & Santa Fe Rwy., Co. 896 F.2d 120 (5th Cir. 1990).

[238] Proof is usually required of antiunion animus. National Labor Relations Bd. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). But some conduct is so inherently destructive of employee interests that it will be deemed to be unlawful even without proof of antiunion purpose. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); NLRB v. Centra, Inc., 954 F.2d 366 (6th Cir. 1992).

[239] Shortway Subburban Lines, Inc., 286 NLRB 323 (1987). *See also* NLRB v. Burns Int'l Security Service, 406 U.S. 272, 92 S. Ct. 1571 (1972), where the U.S. Supreme Court held that an employer who hires a sufficient number of the predecessor's employees so that they constitute a majority of the work force, and conducts essentially the same business as the predecessor, has a duty to bargain with their collective bargaining representative. The employer may not decline to hire the predecessor's employees solely because they are members of a union.

[240] Tuskeegee Area Transp. System, 308 NLRB 251 (1992); Capitol Transit, Inc., 289 NLRB 777 (1988).

[241] National Labor Relations Bd. v. Transportation Management Corp., 462 U.S. 393 (1983).

[242] S*ee also* NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979).

[243] School Bus Services, Inc., and Amalgamated Transit Union, 312 NLRB 1 (1993). It is also an unfair labor practice to withdraw recognition from a union without having reasonable grounds for doubting its majority status. Furniture Rentors of America v. NLRB, 36 F.3d 1240 (3d Cir. 1994).

[244] NLRB v. Centra, Inc., 954 F.2d 366 (6th Cir. 1992).

[245] Communications Workers of America v. Beck, 487 U.S. 735 (1988); Transport Workers of America, 1999 NLRB Lexis 722 (1999).

[246] Miranda Fuel Co., 140 NLRB 181 (1962); DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 103 S. Ct. 2281 (1983).

Only final orders are reviewable, and only by the U.S. Court of Appeals.[247] The NLRB itself may also defer consideration of the dispute, first requiring exhaustion of the CBA grievance procedures before it will entertain an appeal.[248] Courts too, may require an aggrieved employee to exhaust his or her internal union procedures before entertaining a suit against the union for unfair labor practices.[249]

The period prior to the promulgation of the NLRA was marked by judicial hostility to the economic weapons utilized by labor in its efforts to unionize. Courts would often enjoin unionizing efforts if they deemed them having "unlawful objectives" or using "unlawful means." Critics alleged the courts were striking unionization actions down not because they were unlawful, but because the courts disapproved of them. The Wagner Act of 1935 created the NLRB partially in response to this widely acknowledged judicial hostility toward unions. Faced with a congressional policy of promoting unionization and collective bargaining, courts began to accord such efforts greater deference.[250] Such deference included upholding the NLRB's decision whenever the record contained any substantial evidence to support it, without regard to the weight of the countervailing evidence.

In *Universal Camera Corp. v. National Labor Relations Board*,[251] the U.S. Supreme Court reined in such discretion. Contrary to the findings of its ALJ, who found insubordination as the cause of an employee's removal, the NLRB concluded that the employee was removed in retaliation for his testimony in a Board hearing to determine the representated class. The Supreme Court found that in reviewing NLRB decisions, the courts were obliged—in considering the substantiality of evidence—to take into account whatever in the record fairly detracts from its weight. Justice Frankfurter, writing for the court, held:

> [T]he Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past.…Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds.…The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment of matters within its special competence or both.[252]

The Court went on to hold that the evidence may be less substantial when the ALJ, who has heard the witnesses and "lived the case," has drawn conclusions different from the Board, particularly in cases where witness credibility is in issue.[253] This is consistent with the well-established tenet that on matters involving the credibility of witnesses, a reviewing court should not substitute its judgment for that of the tribunal who heard and observed the manner and demeanor of the witnesses first hand.

And what of the NLRB's interpretation of its statute? Is the NLRB's interpretation of the NLRA entitled to deference by a reviewing court, and if so, what level of deference? At issue in *NLRB v. Hearst Publications*[254] was whether the NLRB's conclusion that newsboys (who sell papers on the street) were "employees" of newspapers within the meaning of the NLRA, for whom collective bargaining is required. The U.S. Supreme Court was extremely deferential to the NLRB's expertise in interpreting the NLRA:

> Everyday experience in the administration of the [NLRA] gives the [NLRB] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question of who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, "belongs to the usual administrative routine" of the Board.…
>
> Undoubtedly, questions of statutory interpretation…are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute.…But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.…[T]he Board's determination that specified

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[247] 29 U.S.C. § 160(e), (f) (2000). Narrow exceptions exist to the exhaustion requirement, where there is an agency violation of a plain and unambiguous statutory command or prohibition, or where there is a plain violation of a constitutional right. Zipp v. Geske & Sons, Inc., 103 F.3d 1379 (7th Cir. 1997). Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324, 89 S. Ct. 548 (1969).

[248] *See, e.g.,* Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991). The NLRB has ruled deferment is appropriate where (1) there is a long-standing bargaining relationship between the parties; (2) there is no enmity by the employer toward the employee's exercise of his rights; (3) the employee exhibits a willingness to arbitrate; (4) the CBA's arbitration clause covers the matter at issue; and (5) the contract and its meaning are central to the dispute. Collyer Insulated Wire, 192 NLRB 837 (1971). Moreover, courts have held that employees must exhaust their dispute resolution procedures under their CBAs before bringing a suit alleging their violation under the Labor Management Relations Act. *See, e.g.,* Schwarz v. United Automobile Workers Union, 837 F. Supp. 530 (W.D. N.Y. 1993); Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

[249] Garner v. UAW, 800 F. Supp. 706, 714 (S.D. Ind. 1991).

[250] STEPHEN BREYER ET AL., ADMINISTRATIVE LAW & REGULATORY POLICY 218 (4th ed. 1999).

[251] 340 U.S. 474 (1951).

[252] *Id.*

[253] *See* NLRB v. Universal Camera Corp. (II), 190 F.2d 429 (2d Cir. 1951), where Judge Learned Hand wrote, "we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded."

[254] 322 U.S. 111 (1944).

> persons are "employees" under [the NLRA] is to be accepted if it has "warrant in the record" and a reasonable basis in law.[255]

Though Congress subsequently amended the definition of "employee" in the NLRA to exclude "an individual having the status of an independent contractor,"[256] judicial deference to NLRB statutory interpretations has been relatively widespread.[257]

### 7. Federal Preemption

Not all efforts of state governments to take over transit operations have been successful. At issue in Division 1287 of the *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Missouri,*[258] was a decision of the Governor of Missouri, acting under a Missouri statute, to seize and operate a striking transit company, Kansas City Transit, Inc.. The U.S. Supreme Court held that the state statute authorizing seizure of the transit company was invalid under the Supremacy Clause of the U.S. Constitution as making unlawful a peaceful strike in conflict with Section 7 of the NLRA,[259] which guarantees the right to bargain collectively and the right to strike. The Court pointed out:

> …[T]he State's involvement fell far short of creating a state-owned and operated utility whose labor relations are by definition excluded from the coverage of the National Labor Relations Act. The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual management of the company, and there was no change of any kind in the conduct of the company's business.[260]

The Supreme Court's opinion underscores the conclusion that Section 13(c) protects the *process* of collective bargaining, regardless of whether the transit workers are employed by a governmental entity or a private sector entity. State antitrust law has also been held preempted where the allegedly anticompetitive agreement concerning wages and working conditions fell within the terms of a CBA negotiated under the NLRA.[261] Finally, state and local efforts to supplement the penalties for violation of the NLRA have been deemed preempted by federal law. Thus, the efforts by the BART to debar a steel provider from doing further business with it because of alleged violations of the NLRA was held beyond the power of state and local governments.[262] The preemption extends to activities "that the NLRA protects, prohibits, or arguably protects or prohibits."[263]

## G. MINIMUM WAGE LAWS

### 1. The Davis-Bacon Act

Employees of contractors and subcontractors involved in a construction contract in excess of $2,000 funded by a federal loan or grant for a public building or public works project[264] must be paid wages not less than those

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[255] *Id*.

[256] 29 U.S.C. § 152(3).

[257] If the NLRB's "construction of the statute is reasonably defensible, it should not be rejected merely because the courts prefer another view of the statute." Ford Motor Co. v. National Labor Relations Bd., 441 U.S. 488, 497 (1979). However, the courts will not defer to the NLRB's statutory interpretation when its construction is inconsistent with the statutory language. National Labor Relations Bd. v. Insurance Agents, 361 U.S. 477, 499 (1960); National Labor Relations Bd. v. Highland Park Mfg. Co., 341 U.S. 322 (1951). Sometimes, the court substitutes its judgment for the NLRB's when the question involves statutory interpretation. *See, e.g.*, Office Employees Int'l Union v. NLRB, 353 U.S. 3133 (1957). These standards of judicial review of agency interpretation of its statutes were refined in Chevron, Inc., v. Natural Resources Defense Council, 467 U.S. 837 (1984), where the Supreme Court held:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter…. If, however, the court determines Congress has not directly addressed the precise questions at issue, the court does not simply impose its own construction on the statute…. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute….
>
> If Congress has explicitly left a gap for the agency to fill…[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

*Id*. at 842–44 [citations and footnotes omitted]. But in Immigration and Naturalization Service v. Cardoza Fonseca, 480 U.S. 421 (1987), the Supreme Court may have circumscribed the reach of Chevron, reserving the right to use traditional tools to decide pure questions of statutory construction in determining whether two statutory provisions are equivalent. In NLRB v. United Food Workers Union, 484 U.S. 112 (1987), the Court held that under both Chevron and Cardoza Fonseca, "on a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect…. However, 'where the statute is silent or ambiguous with respect to the specific issue,'" then Chevron-type deference is appropriate. *Id*. at 123, citations omitted. Noting its traditional deference to NLRB decisions, in United Food Workers, the Court upheld a regulation permitting its General Counsel to approve settlements, not subject to Board approval, and therefore not subject to judicial review.

[258] 374 U.S. 74, 83 S. Ct. 1657 (1963).

[259] 29 U.S.C. § 157 (2000).

[260] 374 U.S. at 81 [footnotes omitted].

[261] Local 24 of the International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Oliver, 358 U.S. 283 (1959), 79 S. Ct. 297 (1954).

[262] CF&I Steel v. Bay Area Rapid Transit District, 2000 U.S. Dist. Lexis 13810 (N.D. Calif. 2000).

[263] Wisconsin Dep't of Industry Labor and Human Relations v. Gould, 475 U.S. 282 (1986), *citing* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773 (1959).

[264] A "public works" project has been interpreted to include fixed works contracted for public use such as railroads and roads. 38 Op. Att'y Gen. 418 (1936).

prevailing on similar construction in the locality, as determined by the Secretary of Labor.[265] The Davis-Bacon Act, enacted in 1931 while the nation was mired in the Great Depression, established the $2000 threshold. The threshold has to date not been amended or adjusted for inflation. Thus, virtually every construction contract funded by or supported by a federal grant (such as an FTA grant) is subject to the Davis-Bacon Act.[266]

Davis-Bacon is essentially a minimum wage statute.[267] The purpose of the Act is to protect employees from substandard earnings by fixing a floor under wages on government projects.[268] This is accomplished by a determination of the "prevailing wage" in the locality for each trade and craft, including apprentices. It protects local wages by preventing contractors from basing their bids for federally-funded construction projects on wages lower than those prevailing in the area.[269] The Act applies to FTA-funded construction projects, which are not federal construction projects; they are local construction projects supported with federal financial assistance in the form of an FTA grant or loan. Davis-Bacon compliance is assured by the FTA through contracting "flow-down" provisions under the FTA MA and its procurement regulations. FTA requires grantees to insert Davis-Bacon requirements in its third-party contracts with contractors.[270]

The DOL determines minimum wage rates and fringe benefits prevailing in the community at or about the time of execution of the construction contract.[271] This establishes the minimum wages to be paid to workers under a federally-funded project. In addition to payment of a base hourly wage to workers, Davis-Bacon also ensures payment of an hourly fringe benefit component directly with the wages or in the form of a contribution to an employee benefit plan, such as a pension plan.[272] The Secretary of Transportation may approve a federal grant or loan under DOT's jurisdiction only after being assured that the required labor standards will be observed on the construction work.[273] Where federal funding is anticipated, Davis-Bacon applies, irrespective of whether such funding had not been formally applied for or approved.[274] The recipient is responsible for making certain that the Davis-Bacon determinations are obtained prior to work commencing on the project. This is important because it is an administrative step that must be completed. The construction contractor will base its bid upon certain wage rates, and if the Davis-Bacon determinations as to "prevailing wages" come in higher on one or more crafts or trades, the construction contractor may seek a Construction Change Order from the recipient to cover the increased cost.

The Davis-Bacon Act was intended to be a "general prohibition or command to a federal agency."[275] It was not intended to create a private cause of action for employees,[276] and it does not authorize a suit for back wages.[277] An employee of a federal contractor does not have a private right of action under Davis-Bacon for back wages.[278] Disputes as to whether workers are properly classified,[279] for example, must be referred to the

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[265] *See* 49 U.S.C. § 5333(a) (2000), the Davis-Bacon Act, 40 U.S.C. §§ 276a–276a(7) (2000), and U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction." 29 C.F.R. pt. 5 (2003). In fiscal year 1995, the Department of Labor completed approximately 100 prevailing wage surveys, gathering wage and fringe benefit data from more than 37,000 employers. At the dawn of the 21st Century, the average wage determinations in predominantly nonunion counties were about 7 years old, on average.

[266] Davis-Bacon applies to "construction, alteration and/or repair…of public buildings or public works" and extends to "all mechanics and laborers employed directly upon the site of the work." 40 U.S.C. § 276a (2000). The work site has been defined by DOL to include "material or supply sources, tool yards, job headquarters, etc., in the site of the work only where they are dedicated to the covered construction project and are adjacent or virtually adjacent to the location where the building or work is being constructed." Not covered is the off-site transportation of materials, supplies, and tools, "unless such transportation occurs between the construction work site and a dedicated facility located 'adjacent or virtually adjacent' to the construction site." 29 C.F.R. pt. 5 (2003).

[267] Associated Builders & Contractors of Texas Gulf Coast v. United States Dep't of Energy, 451 F. Supp. 281 (S.D. Tex. 1978).

[268] United States v. Binghamton Constr. Co., 347 U.S. 171, 74 S. Ct. 438 (1954).

[269] L.P. Cavett Co. v. United States Dep't of Labor, 101 F.3d 1111 (6th Cir. 1996).

[270] FTA Master Agreement § 24, http://navigation.helper.realnames.com/framer/1/113/default.asp?realname=Federal+Transit+Administration&url=http%3A%2F%2Fwww%2Efta%2Edot%2Egov%2F&frameid=1&providerid=113&uid=30021314 (visited Mar. 26, 2002). The flow-down language is also mandated by DOL regulations, 29 C.F.R. § 5 (2003).

[271] Bushman Constr. Co. v. United States, 164 F. Supp. 239 (Ct. Cl. 1958).

[272] Kennedy v. Roland Parson Contraction Corp., 790 F. Supp. 12 (D. D.C. 1992).

[273] 49 U.S.C. § 5333(c) (2000).

[274] North Ga. Bldg. and Constr. Trades Council v. Goldschmidt, 621 F.2d 697 (5th Cir. 1980).

[275] University Research Ass'n, Inc. v. Coutu, 450 U.S. 754, 101 S. Ct. 1451 (1981).

[276] Operating Eng'rs Health and Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 671 (9th Cir. 1998). Private litigation would introduce significant uncertainty into government contracting, undercutting the administrative scheme created to bring consistency into the administration and enforcement of the Act. University Research Ass'n v. Coutu, 540 U.S. 754 (1981).

[277] United States v. Binghamton Constr. Co., 347 U.S. 171, 74 S. Ct. 438 (1954); Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit District, 752 F.2d 373, 376 (9th Cir. 1985); Operating Eng'rs and Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 671, 675 (9th Cir. 1997).

[278] University Research Ass'n v. Coutu, 450 U.S. 754 (1981).

[279] *See* Tennessee Roadbuilders Assoc. v. Marshall, 446 F. Supp. 399 (Md. 1977).

Secretary of Labor for determination.[280] DOL has sole responsibility for resolving employee classification disputes under the Act.[281] For example, an appellate court has held that the Secretary of Labor's determination that separate wage schedules were appropriate for highway and transit projects was held within his discretion under Davis-Bacon.[282] The correctness of DOL's conclusion as to the prevailing wages in a particular area under Davis-Bacon is not subject to judicial attack.[283] But the legality of the procedures used by DOL is subject to judicial review,[284] as is the issue of whether a finding by the DOL Wage Appeals Board that Davis-Bacon is applicable to a particular contract.[285]

However, the Secretary of Labor has the right to pursue an action on behalf of underpaid employees.[286] The government may withhold payment to an FTA recipient where a contractor underpays its employees under Davis-Bacon.[287] Moreover, even if a project does not fall under Davis-Bacon application, the contractor can still bind itself to pay Davis-Bacon wages by contract.[288]

Various courts have held that federal statutes do not preempt state prevailing wage laws.[289] The Davis-Bacon Act provides that it will "not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates,"[290] but is silent with regard to state statutes. Some courts have denied contractor's efforts to strike down such state laws on grounds of preemption by Davis-Bacon.[291] However, at least one court has held that Davis-Bacon preempts state prevailing wage laws.[292]

### 2. The Service Contract Act

The McNamara-O'Hara Service Contract Act of 1965[293] requires that federally assisted projects pay the minimum prevailing wage. This is important to a transit agency that purchases a great deal of integrated services.

Specifically, the Service Contract Act provides that every contract in excess of $2,500, the principal purpose of which is to provide services to the federal government through the use of service employees, shall contain specific provisions addressing minimum wages, fringe benefits, and working conditions, as approved by the Secretary of Labor.[294] Wages may not be lower than those specified in the Fair Labor Standards Act (FLSA),[295] described below. Fringe benefits shall include medical care, retirement pensions, death benefits, compensation for injuries or illness, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, and apprenticeship costs.[296] Working conditions shall not expose service employees to unsanitary, hazardous, or dangerous conditions.[297]

DOL has promulgated regulations creating a number of exemptions from the Service Contract Act. Examples include prime contracts or subcontracts for the maintenance, calibration, or repair of automated data processing and word processing equipment, scientific equipment, and office and business machines.[298] Also exempt are certain vehicle maintenance services, financial services, hotel and motel lodging, common carrier transportation, real estate services, and relocation services.[299]

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[280] United States v. Dyncorp, Inc., 895 F. Supp. 844, 852 (E.D. Va. 1995).

[281] *Id*.

[282] Commonwealth of Va. ex rel. Commissioner, Va. Dep't of Highways & Transp. v. Marshall, 599 F.2d 588 (4th Cir. 1979).

[283] United States v. Binghamton Constr. Co., 347 U.S. 171, 74 S. Ct. 438 (1954).

[284] Commonwealth of Va. ex rel. Commissioner, Va. Dep't of Highways & Transp. v. Marshall, 599 F.2d 588 (4th Cir. 1979); Tenn. Roadbuilders Assoc. v. Marshall, 446 F. Supp. 399 (M.D. Tenn. 1977).

[285] North Ga. Bldg. & Constr. Trades Council v. Goldschmidt, 621 F.2d 697 (5th Cir. 1980). If it questions the applicability of the Davis-Bacon Act, the contractor must contact the Wage and Hour Administrator.

[286] Irwin Co. v. 3525 Sage St. Assoc., 37 F.3d 212 (5th Cir. 1994).

[287] Unity Bank & Trust Co. v. United States, 5 Cl. Ct. 380 (1984), *aff'd*, 756 F.2d 870 (1985). The government pays the contractor on a federal project such as a federal courthouse, but the government does not pay the contractor on a FTA-funded construction project. The government will withhold grant funds from the recipient of an FTA-funded project if the contractor violates the Davis-Bacon requirements.

[288] Vulcan Arbor Hill Corp. v. Reich, 81 F.3d 1110 (D.C. Cir. 1996).

[289] *See, e.g.,* Burgio & Campofelice, Inc. v. N.Y. State DOL, 107 F.3d 1000 (2d Cir. 1997) (ERISA does not preempt prevailing state wage law); General Electric Co. v. N.Y. State Dep't of Labor, 698 F. Supp. 1093 (S.D. N.Y. 1988) (state wage laws not preempted by federal retirement acts or federal labor relations laws).

[290] 40 U.S.C. § 276a-3 (2000).

[291] Siuslaw Concrete Constr. Co. v. State of Wash., Dep't of Transp., 784 F.2d 952 (9th Cir. 1986).

[292] Southern Cal. Labor Management Operating Eng'rs Contract Compliance Comm. v. Lloyd W. Aubry, Jr., 54 Cal. App. 4th 873; 1997 Cal. App. LEXIS 347; 63 Cal. Rptr. 2d 106 (Calif. 1993).

California courts have also held that ERISA preempts state wage laws. Division of Indus. Relations v. Nielsen Constr. Co., 51 Cal. App. 4th 1016; 1996 Cal. App. LEXIS 1185; 59 Cal. Rptr. 2d 785 (Calif. 1996).

[293] Pub. L. 89-286, 79 Stat. 1034 (Oct. 22, 1965).

[294] 41 U.S.C. § 351 (2002).

[295] 29 U.S.C. § 201 *et seq.* (2000).

[296] 41 U.S.C.S. 351(a)(2) (2004).

[297] 41 U.S.C.S. 351(a)(3) (2004).

[298] 29 C.F.R. § 4.123(e)(1) (2003). The exemptions apply if conditions specified in the regulations are met.

[299] 29 C.F.R. § 4.123(e)(2) (2003).

### 3. The Fair Labor Standards Act

The FLSA of 1938[300] requires that employers pay the minimum hourly wage, as established periodically by Congress, and that they shall not require more than 40 hours of work per week unless the employees are paid one and one half times their normal hourly wage.[301] These requirements are also imposed in federally financed or assisted projects or government contracting under the Contract Work Hours and Safety Standards Act.[302]

Congress created an FLSA Administrator, who has the power to seek injunctions attempting to restrain FLSA violations. The Administrator also issues interpretive bulletins and informal rulings. The U.S. Supreme Court has given such interpretations of the application of the FLSA significant weight.[303]

FLSA has been the subject of an interesting conflict between the Commerce Clause and the Tenth Amendment of the U.S. Constitution. Originally, FLSA's wage and overtime provisions did not apply to employees of state and local governments. In 1961, the Act's minimum-wage coverage was extended to employees of any private mass transit carrier with annual gross revenue of more than $1 million.[304] In 1966, Congress extended FLSA coverage to state and local government employees by withdrawing the exemptions from, *inter alia,* transit carriers whose rates and services were subject to state regulation; Congress also eliminated the overtime exemption for public transit employees other than drivers, operators, and conductors.[305] In 1974, Congress repealed the remaining overtime exemption for transit employees and extended FLSA to virtually all state and local governmental employees.[306] *Garcia v. San Antonio Metropolitan Transit Authority*[307] was the landmark U.S. Supreme Court decision holding that governmental employees were subject to overtime.[308]

In 1976, in *National League of Cities v. Usery*,[309] the U.S. Supreme Court held that the Commerce Clause of the U.S. Constitution[310] does not empower Congress to enforce minimum wage and overtime pay provisions of the FLSA against the states in areas of traditional governmental functions, and that instead, such powers are reserved to the states under the Tenth Amendment.[311] The Court [held that the 1974 Amendments were invalid "insofar as they operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[312]

Four months later, the San Antonio Metropolitan Transit Authority (SAMTA) notified its employees it would no longer honor the FLSA overtime obligations. SAMTA was a public mass transit authority organized on a county-wide basis, a successor to a private mass transit firm that ceased operations in 1959.

But in 1979, the Wage and Hour Administration of the DOL ruled that SAMTA's operations "are not constitutionally immune" from FLSA under *Usery.* SAMTA filed suit seeking a declaratory judgment that *Usery* precluded the application of FLSA's overtime and record keeping requirements. The federal district court held that the municipal ownership and operation of a transit system was a traditional governmental function under *Usery,* and therefore immune from federal wage and overtime requirements. On appeal, the U.S. Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*[313] overruled *Usery,* concluding that there was nothing in the FLSA, as applied to SAMTA, that was destructive of state sovereignty or violative of any constitutional provision. SAMTA was subject to nothing more than the same minimum wage and overtime requirements that hundreds and thousands of other public and private employers must satisfy.[314] *Garcia* made clear that transit employees were covered under FLSA, and that they could enforce their claims in suits brought in federal or state court.[315]

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[300] Fair Labor Standards Act, as amended, 29 U.S.C. §§ 206 and 207 (2000).

[301] 29 U.S.C. § 207(a)(1) (2000).

[302] Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 327 through 334 (2000). Nonconstruction Labor/Wage and Hour—Section 102 of the Contract Work Hour and Safety Standards Act, 40 U.S.C. §§ 327 through 332 (2000). See also U.S. DOL regulations on Prevailing Wage and Overtime Requirements—"Labor Standards Provisions Applicable to Contracts Governing 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. pt. 5 (2003).

[303] As the Supreme Court noted in Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161 (1944)

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its…pronouncements, and all those factors which give it power to persuade, if lacking power to control.

[304] Fair Labor Standards Amendments of 1961, Pub L. 87-30, 75 Stat. 65 (May 5, 1961).

[305] Fair Labor Standards Amendments of 1966, Pub. L. 89-601, 80 Stat. 830-844 (Sept. 23, 1966).

[306] Fair Labor Standards Amendments of 1974, Pub. L. 93-259, 88 Stat. 55-74 (Apr. 8, 1974).

[307] 469 U.S. 528, 105 S. Ct. 1005 (1985).

[308] Following Garcia, there were several lawsuits in which transit workers requested overtime. The defense was that Garcia should be applied prospectively, not retroactively. *See* Bester v. Chicago Transit Auth., 887 F.2d 118 (7th Cir. 1989).

[309] 426 U.S. 833 (1976), 96 S. Ct. 2465 (1976).

[310] U.S. CONST. ART. 1, § 8.

[311] 426 U.S. at 852.

[312] *Id*.

[313] 469 U.S. 528, 105 S. Ct. 1005 (1985).

[314] 469 U.S. at 554.

[315] Welch v. State Dep't of Highways and Public Transp., 780 F.2d 1268 (5th Cir. 1986); Mineo v. Port Auth. of N.Y. and N.J., 779 F.2d 939 (3d Cir. 1985).

To ameliorate the difficulties caused by these conflicting Supreme Court decisions, Congress then amended FLSA to eliminate retroactive liability for functions categorized as "traditional." However, non-traditional functions, such as transit systems, were deemed unaffected by the 1985 FLSA amendments.[316]

Another congressional response to Supreme Court interpretations of FLSA was the Portal-to-Portal Act,[317] passed to limit a decision of the Supreme Court construing FLSA as requiring compensation for activities such as walking from the factory gate to the workbench, and changing into work clothes.[318] Thus, for example, a federal court has held that a transit authority is not required to compensate a transit police canine handler for the time spent commuting to and from work accompanied by the dog entrusted to him.[319]

However, where the USDOT has authority under the Federal Motor Carrier Safety Act to establish the maximum number of hours an employee can work, DOT jurisdiction supersedes DOL's authority under the FLSA.[320]

## H. STATE LABOR LAW

Intrastate public transit employees not subject to the RLA or NLRA are instead subject to state law. Both the RLA and NLRA exclude from their coverage employees of political subdivisions of the state,[321] which many transit authorities are. While in many states the labor statutes are similar in scope and application to the federal laws,[322] in others there are significant differences between the state and federal schemes.[323] Hence, federal decisions are not binding on state courts where federal laws are inapplicable.[324]

States have their own statutory procedures governing public employers and employees in such areas as union certification, collective bargaining, [325] dispute resolution,[326] and unfair labor practices,[327] and differing common law treatment on labor issues such as employment-at-will.[328] A few require transit agencies to engage in limited privatization by contracting out the provision of a portion of bus service to private firms.[329]

But perhaps the most significant difference is that in many states, public employees can be denied the right to strike.[330] For example, in Utah,

> Employees of any public transit system…shall have the right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing, provided, however, that such employees and labor organizations shall not have the right to join in any strike against such public transit system.[331]

In New York, "No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage or condone a strike."[332] In Colorado, within 20 days of filing a notice of intent to strike by a labor union, the Director of the State Department of Labor shall assess whether such a strike "would interfere with the preservation of the public peace, health and safety," and if so, issue an order denying the strike and setting the dispute for mediation and mandatory arbitration.[333] In Missouri, the Governor was given authority to take possession of any public utility whose "lockout, strike or work stoppage" in his opinion "threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare."[334]

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[316] *See* Bester v. Chicago Transit Auth., 887 F.2d 118, 122 (7th Cir. 1989), and cases cited therein.

[317] 29 U.S.C. § 251 (2000).

[318] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), 66 S. Ct. 1187 (1946).

[319] Reich v. N.Y. City Transit Auth., 45 F.3d 646 (2d Cir. 1995).

[320] United Transp. Union v. Ozark Newark Elizabeth Bus, Inc., 111 F. Supp. 2d 514 (D. N.J. 2000).

[321] 29 U.S.C. § 152 (2000).

[322] *See, e.g.,* CAL. PUB. UTIL. CODE § 25051 (2001), which established a collective bargaining and arbitration scheme similar to the federal system.

[323] *See, e.g.,* Communications Workers of America v. Western Elec. Co., 551 P.2d 1065 (Colo. 1976).

[324] Hoff v. Amalgamated Transit Union, 758 P.2d 674 (Colo. 1987).

[325] *See, e.g.,* CAL. PUB. UTIL. CODE § 25051 (2001); MICH. COMP. LAWS SERV. §§ 423.201, 423.215 (2001); N.Y. CONSOL. LAWS SERV. CIV. 2 § 200 (2001).

[326] *See, e.g.,* N.Y. City Transit Auth. v. Amalgamated Transit Union, 726 N.Y.S.2d 694 (N.Y. 2001). Arbitration appears to be favored in many states, with state court deference to the arbitrator's decision a common feature. *See, e.g.,* Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union, 742 N.E.2d 630 (Ohio 2001). However, a court may not enforce an arbitration whose decision is contrary to public policy, such as the duty of common carriers to ensure the safety of their passengers. Greater Cleveland Regional Transit Auth. v. Amalgamated Transit Union, 749 N.E.2d 817 (Ohio 2001).

[327] *See, e.g.,* MICH. COMP. LAWS §§ 423.201–423.216 (2001).

[328] For example, in Georgia, a public employee has no vested right to employment absent a property interest vested by local ordinance or by implied contract. Dixon v. MARTA, 529 S.E.2d 398 (Ga. App. 2000).

[329] For example, the State of Colorado required Denver's RTD to contract out 35 percent of bus service to private operators, as measured by vehicle hours driven. COLO. REV. STAT. § 32-9-119.5 (2)(a) (2002).

[330] *See, e.g.,* MICH. COMP. LAWS SERV. § 423.201 (2001). Persons operating a street railway system have been deemed public employees within the meaning of the act. The absolute right to strike is guaranteed neither by the common law nor the 14th Amendment. City of Detroit v. Amalgamated Ass'n of Street, Elec. R.R. & Motor Locals Employees of America Employees, 51 N.W.2d 228 (Mich. 1952). However, it may be conferred by statute or a CBA.

[331] UTAH CODE ANN. § 17A-2-1031 (2001).

[332] N.Y. CLS Civ. S § 210(1) (2004).

[333] COLO. REV. STAT. 8-3-113 (3) (2002). Regional Transp. District v. Colo. Dep't of Labor, 830 P.2d 942 (Colo. 1992) (upholding the constitutionality of the statute).

[334] MO. REV. STAT. § 295.180 (2000). However, as noted above, this provision was deemed unconstitutional in Amalga-

As public employees, many transit workers enjoy state or municipal civil service status, with its myriad of job protection requirements.[335] State civil service laws govern issues as diverse as employment qualifications, examinations, promotion, job classification, salary grades, retirement, collective bargaining, grievances, suspension, removal and other disciplinary action, dispute resolution, hearings, appeals, and judicial review.[336] For example, in Ohio, employees of a county transit provider are deemed employees of the county itself who can avail themselves of seniority provisions, vacation, holiday and sick leave privileges, and the retirement system.[337] Some establish a civil service commission or personnel board.[338] Transit lawyers would be well advised to check the labor laws of their local jurisdiction to determine the respective rights and duties of employers and employees.

## I. MISCELLANEOUS FEDERAL STATUTES

Other federal laws impact labor and employment. Some address ethics, including the Copeland Act[339] (which prohibits kickbacks). Others focus on employee safety, including the Occupational Safety and Health Act,[340] and the Contract Work Hour and Safety Standards Act.[341] Still others address civil rights, such as Title VII of the Civil Rights Act of 1964 (which prohibits employment discrimination based on race, sex, national origin or religion);[342] the Age Discrimination in Employment Act[343] (which protects employees against age discrimination); the Rehabilitation Act of 1973[344] (which prohibits federal agencies and recipients from discriminating against disabled persons); and the ADA of 1990[345] (which prohibits private entities from discriminating against the disabled). These statutes will be addressed elsewhere in this book, specifically in Section 6—Ethics, Section 7—Safety, and Section 10—Civil Rights, respectively.

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mated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Mo., 374 U.S. 74 (1963).

[335] *See, e.g.,* N.Y. CIV. SERV. LAW § 1 (Consol. 2001).

[336] *See, e.g.,* D.C. CODE § 1-629.4 (2001); OHIO REV. CODE ANN. §§ 4177.09, 4117.10 (Anderson 2001); WASH. REV. CODE § 41.56.100 (2001); N.Y. CIV. SERV. LAW §§ 20, 50, 52, 56, 61, 75, 76, 80, 121, 131, 209 (Consol. 2001). N.Y. RETIRE & SS LAW § 2 (Consol. 2001).

[337] OHIO REV. CODE ANN. § 306.04 (Anderson 2001).

[338] *See, e.g.,* WASH. REV. CODE § 41.56.100 (2001).

[339] Prohibition against Kickbacks—Copeland "Anti-Kickback" Act —18 U.S.C. § 874 and 40 U.S.C. § 276c (2000); 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. pt. 3 (1999).

[340] Safety at Worksite—U.S. Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590, Dec. 29, 1970. See also, U.S. Occupational Safety and Health Administration, DOL, regulations on safety standards, 29 C.F.R. pts. 1900—1910.1000 (2003). U.S. Occupational Safety and Health Administration/DOL regulations, "Safety and Health Regulations for Construction," 29 C.F.R. pt. 1926 (2003).

[341] Safety Standards at Worksite—Section 107 of the Contract Work Hour and Safety Standards Act, 40 U.S.C. § 333, and U.S. DOL regulations, "Safety and Health Regulations for Construction," 29 C.F.R. pt. 1926 (2003).

[342] 42 U.S.C. §§ 2000e-17 (2000). *See also* U.S. DOL regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. pts. 60 *et seq*. (2003).

[343] The Age Discrimination in Employment Act, 29 U.S.C. § 621-34 (2000), protects employees who are at least 40 years old from discrimination on the basis of their age. The purpose of the statute is to protect older employees on the basis of their abilities, rather than their age. To establish a *prima facie* case, a plaintiff must prove: (1) he or she belongs to a protected class (age 40 or older); (2) he or she was qualified for his or her position; (3) he or she was terminated from employment; and (4) he or she was replaced by a younger person. If the plaintiff proves these elements, the burden of proof shifts to the employer to prove the plaintiff's discharge was the result of "some legitimate, nondiscriminatory reason." If the defendant proves this, the burden shifts again to the plaintiff to prove that the reasons proffered by the defendant for discharge were merely a pretext for discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973); Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987).

[344] Section 504 of the Rehabilitation Act of 1973 prohibits the federal government and recipients of federal funds from discriminating against people with disabilities in employment. It provides that, "No otherwise qualified individual…shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (2000).

[345] The Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (2000), extends to private employers the prohibition against employment discrimination against people with disabilities. An employer of 15 or more individuals may not discriminate against any "otherwise qualified" individual on the basis of mental or physical disability. A qualified individual is one "with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position…and who, with or without reasonable accommodation, can perform the essential functions." 29 C.F.R. § 1630.2(m) (2003).

SECTION 10

# CIVIL RIGHTS

## A. INTRODUCTION

This section begins with an overview of federal civil rights legislation. It then examines the requirements imposed upon federal transit fund recipients, particularly in terms of affirmative action and disadvantaged business enterprise contracting. This is followed by a review of the means by which a citizen may pursue a state or local transit provider for violation of his or her civil rights. The section then examines issues of employment discrimination, a subject that could have been included in the preceding section on "Labor Law." This is followed by a review of discrimination in transportation issues, including racial and disabilities discrimination, and requirements to improve access for disabled passengers.

## B. FEDERAL CIVIL RIGHTS LEGISLATION—AN OVERVIEW

Several federal laws have been enacted and programs[1] created to prohibit various forms of discrimination. These include:

- Title VI of the Civil Rights Act of 1964[2] prohibits discrimination on the basis of race, color, or national origin;[3] Title VII prohibits such discrimination in the context of employment;[4] Title VIII requires nondiscrimination in the sale, rental, or financing of housing;
- The Federal Transit Act[5] also prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity;[6]
- Title IX of the Education Amendments of 1972[7] prohibits discrimination on the basis of sex;[8]
- The Age Discrimination Act of 1975[9] prohibits age discrimination.[10]
- Section 504 of the Rehabilitation Act of 1973[11] and the ADA of 1990[12] prohibit discrimination on the basis of handicaps;[13]
- Title IX of the Education Amendments of 1972[14] and the Drug Abuse Office and Treatment Act of 1972[15] prohibit discrimination on the basis of drug abuse;
- The Comprehensive Alcohol Abuse and Alcoholism Prevention Act of 1970[16] prohibits discrimination on the basis of alcohol abuse or alcoholism;[17]
- The Public Health Service Act[18] requires confidentiality of alcohol and drug abuse patient records;[19]
- Section 1101(b) of TEA-21[20] provides for participation of disadvantaged business enterprises in FTA programs.[21] DOT's implementing regulations (49 C.F.R. Part 26) are among the most problematic issues for grantees;

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[1] The major federal programs include Title VI of the Civil Rights Act of 1964 (Service Delivery/Benefits); Equal Employment Opportunity (EEO); Disadvantaged Business Enterprise (DBE) Program; and the Americans with Disabilities Act (ADA) Program.

[2] 42 U.S.C. § 2000d (2000). This requirement is implemented by U.S. DOT Regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act," 49 C.F.R. pt. 21 (2002).

[3] Requirements prohibiting discrimination on the basis of race, color, or national origin are set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000), and U.S. DOT regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act," 49 C.F.R. pt. 21 (2002). *See* Sections 10.E.6 through 10.E.8, below.

[4] 42 U.S.C. § 2000e (2000). *See* Section 10.E, below.

[5] 49 U.S.C. § 5332 (2000).

[6] *See* U.S. DOT Regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 C.F.R. pt. 26 (2002) (All references to C.F.R. are to 002 edition unless otherwise noted). *See* Section 10.E, below.

[7] 20 U.S.C. §§ 1681, 1683, and 1685 through 1687 (2000).

[8] *See* Section 10.E.10, below.

[9] 42 U.S.C. §§ 6101 *et seq.* (2000).

[10] *See* Section 10.E.12, below.

[11] 29 U.S.C. § 794 (2000). U.S. DOT Regulations, "Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance," 49 C.F.R. pt. 27, implementing 29 U.S.C. § 794 and 49 U.S.C. § 5310(a) & (f).

[12] 42 U.S.C. §§ 12101 *et seq.* (2000); U.S. DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. pt. 37 (2002). U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. pt. 1630 (1999); Joint U.S. Architectural and Transportation Barriers Compliance Board/U.S. DOT regulations, "Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 36 C.F.R. pt. 1192 and 49 C.F.R. pt. 38 (2002); U.S. DOJ regulations, "Nondiscrimination on the Basis of Disability in State and Local Government Services," 28 C.F.R. pt. 35; U.S. DOJ regulations, "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 28 C.F.R. pt. 36 (1999); U.S. GSA regulations, "Accommodations for the Physically Handicapped," 41 C.F.R. subpt. 101–19 (1999); U.S. DOT Regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. pt. 37, subpt. H, "Over-the-Road Buses," and joint U.S. Architectural and Transportation Barriers Compliance Board/U.S. DOT Regulations, "Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 36 C.F.R. pt. 1192 and 49 C.F.R. pt. 38; FTA Regulations, "Transportation for Elderly and Handicapped Persons," 49 C.F.R. pt. 609, implementing 29 U.S.C. § 794 and 49 U.S.C. §§ 5307(d) & 5308(b).

[13] *See* Sections 10.E.14 and 10.F.2, below.

[14] 20 U.S.C. §§ 1681, 1683, 1685–87 (2000).

[15] Pub. L. 92-255, Mar. 21, 1972, 86 Stat. 65 (as amended).

[16] Pub. L. 91-616, Dec. 31, 1970, 84 Stat. 1848 (as amended).

[17] *See* Section 10.E.13, below.

[18] *See* 42 U.S.C. 290 dd-2.

[19] *See* Section 10.E.13, below.

[20] 23 U.S.C. § 101 note (2000) (Pub. L. 105-178, tit. I § 1101(b)).

[21] *See* Section 10.C.3, below.

• The Equal Pay Act of 1963[22] protects individuals who perform substantially equal work in the same company from sex-based wage discrimination;[23] and

• The Civil Rights Act of 1991[24] provides compensatory and punitive damages and attorneys' fees in cases of intentional employment discrimination.[25]

These statutes have generated a robust volume of litigation against transit providers. Among the types of discriminatory practices prohibited under these statutes are the following:

• "Harassment," "discrimination," or "disparate treatment" on the basis of race, color, religion, sex, national origin, disability, or age;

• Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;[26]

• Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; and

• Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, or national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.[27]

## C. CONTRACTING REQUIREMENTS OF FEDERAL GRANTEES

### 1. Equal Employment Opportunity Program

Grantees with 50 or more employees that have received in the previous fiscal year federal capital and/or operating funds of more than $1 million, or technical studies grants totaling over $250,000, must develop an Equal Employment Opportunity (EEO) program.[28] The program must be submitted to the FTA for approval. Each FTA Regional Office has a civil rights officer who serves as the point of contact for civil rights issues. Each year, the grantee must submit an Equal Employment Opportunity (EEO) report to FTA. Among the report's contents should be a listing of every person employed by the grantee identified by gender, and a similar listing of hiring and promotions since the most recent report; confirmation of the ongoing validity of the grantee's EEO policy statement; a statement that the grantee has an EEO Officer who is autonomous and reports to the General Manager, Board Chair, or other top official; and complaints received since the most recent report and status/disposition thereof. The Grantee Attorney certificate on each application for FTA financial assistance and the Grantee Attorney certificate on the Annual Certifications and Assurances each require the Grantee Attorney to certify that the grantee is in compliance with its legal obligations regarding its EEO Program.

Recipients of federal funds may not discriminate against any employee or applicant for employment because of race, color, creed, sex, disability, age, or national origin.[29] The grantee may require any documentation it may deem necessary to ensure that subrecipients do not discriminate. FTA reviews subrecipient compliance when performing a state management or other state review.[30] FTA also reviews the grantee's performance of its EEO program against FTA's requirements.

### 2. Certification of Nondiscrimination

Federal statutes applicable to FTA grant programs provide that no person may be excluded from participation in, be denied the benefits of, or be subject to discrimination under any project, program, or activity funded in whole or in part through federal financial assistance on the basis of race, color, creed, national

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[22] Equal Pay Act of 1963, Pub. L. No. 88-38, 29 U.S.C. § 206(d) (2000).

[23] *See* Section 10.E.11, below.

[24] Pub. L. 102-166 (Nov. 21, 1991); 105 Stat 1071; 42 U.S.C. § 1981 (2000).

[25] *See* Section 10.E, below.

[26] *See* Section 10.E.4, below.

[27] U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers* (last modified June 27, 2001), http://www.eeoc.gov/facts/qanda.html.

[28] FTA Circular 4704.1, "Equal Employment Opportunity Program Guidelines for [FTA] Recipients."

[29] 49 U.S.C. § 5332 (2000) (which prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity), Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d (2000), and U.S. DOT regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act," 49 C.F.R. pt. 21 (2002). An applicant for FTA funding must assure that it will comply with all requirements of 49 C.F.R. pt. 21, FTA Circular 4702.1, "Title VI Program Guidelines for Federal Transit Administration Recipients." Discrimination on the basis of race, color, creed, national origin, sex, or age in employment or business opportunity is prohibited. 49 U.S.C. § 5332 (2000). Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 2000 (2000), and 49 U.S.C. § 5332 (2000). 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. pts. 60 *et seq*. (2002) (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and E.O. 12086 (43 Fed. Reg. 46501)); 42 U.S.C. § 2000(e) note (2000). The FTA's Master Agreement also bars discrimination in federal transit programs. *See* U.S. Department of Transportation, Federal Transit Administration, *Master Agreement* (last modified Oct. 1, 1999), http://www.fta.dot.gov/library/legal/agreements/2000/ma.html.

[30] FTA Circular 9040.1E, ch. 9.

origin, sex, or age.[31] Specifically, Title VI of the Civil Rights Act of 1964 provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI bars both intentional discrimination as well as discrimination that results in a disparate impact (i.e., a neutral policy that has a disparate impact on protected groups).[32] For example, if a grantee receives FTA funds to purchase new buses, Title VI requires that the vehicles be used by the grantee in all portions of its service area, and not primarily in affluent (and often nonminority) neighborhoods. As explained below, Title VI has recently formed the basis of litigation to challenge fare increases and decisions as to the placement of light rail systems (e.g., that a transit system invested large sums in a light rail system serving affluent nonminority neighborhoods, and smaller sums on new buses to provide service in minority neighborhoods).[33]

President Clinton's Environmental Justice Executive Orders amplified Title VI, requiring that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." The stated objective is to encourage federal agencies to incorporate environmental justice into their mission by addressing adverse health and societal impacts on minority and low-income populations.[34] In addition to the discussion below, environmental justice is also discussed in Section 3—Environmental Law.

The grantee must annually certify to FTA the grantee's compliance with its civil rights requirements through the Annual Certifications and Assurances for FTA Grants.[35] In addition, applicants for FTA funding must certify that each project will be conducted, property acquisitions undertaken, and project facilities operated in accordance with all applicable requirements of 49 U.S.C. § 5332 of the Federal Transit Act (which prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity); Title VI of the Civil Rights Act of 1964;[36] USDOT regulations;[37] and all other statutes relating to discrimination.[38] An applicant for FTA funding must also certify that no otherwise qualified person with a disability shall be, solely by reason of that disability, excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in, any program or activity receiving or benefiting from federal assistance.[39]

Compliance with these regulations is a condition of receiving federal financial assistance from DOT.[40] The FTA MA contains these requirements, and the grantee attorney is required to sign a certification that incorporates these and other FTA requirements.[41] The rules also make clear that any private entity that contracts with public entities for the provision of public transit, "stands in the shoes of the public entity for purposes of determining the application of ADA requirements."[42] FTA may withhold funds to the state or instruct the

[31] 49 U.S.C. § 5332 (formerly § 19 of the FT Act). Title VI of the Civil Rights Act of 1964.

[32] 65 Fed. Reg. 31803 (May 19, 2000).

[33] Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth., 263 F.3d 1041, 1043 (9th Cir. 2001).

[34] Exec. Order No. 12,898 (Feb. 11, 1994). Michael Knorr, *Environmental Injustice: Inequities Between Empirical Data and Federal, State Legislative and Judicial Responses*, 6 U. BALT. J. ENVTL. L. 71 (1997).

[35] Each recipient of FTA financial assistance must have its Title VI submission approved by FTA and annually certify compliance regarding the level and quality of transit service. FTA Circular 4702.1, "Title VI Program Guidelines for Urban Mass Transportation Recipient."

[36] 42 U.S.C. § 2000d (2000).

[37] "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act," 49 C.F.R. pt. 21 at 21.7 (2002).

[38] Applicants for FTA funding must certify that they will comply with all statutes relating to nondiscrimination, including:

- Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, prohibits discrimination on the basis of race, color, or national origin;
- Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, 1683, and 1685 through 1687, prohibits discrimination on the basis of sex;
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 prohibits discrimination on the basis of handicaps;
- The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101 through 6107, prohibits discrimination on the basis of age;
- The Drug Abuse Office and Treatment Act of 1972, Pub. L. 92-255, Mar. 21, 1972, 86 Stat. 65, as amended, provides for nondiscrimination on the basis of drug abuse;
- The Comprehensive Alcohol Abuse and Alcoholism Prevention Treatment and Rehabilitation Act of 1970, Pub. L. 91-616, Dec. 31, 1970, 84 Stat. 1848, as amended, 42 U.S.C. 4541 *et seq*., provides for nondiscrimination on the basis of alcohol abuse or alcoholism;
- The Public Health Service Act of 1912, 42 U.S.C. §§ 290dd-3 and 290ee-3, provides for confidentiality of alcohol and drug abuse patient records;
- Title VIII of the Civil Rights Act (Fair Housing Act), 42 U.S.C. § 3601 *et seq*., provides for nondiscrimination in the sale, rental, or financing of housing; and
- Section 1101(b) of the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101 note, provides for participation of disadvantaged business enterprises in FTA programs.

[39] Rehabilitation Act of 1973, 29 U.S.C. 794 (2000), Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq*. (2000); 49 C.F.R. pts. 27, 37, and 38 (2002).

[40] 49 C.F.R. § 27.19 (2002).

[41] U.S. Dep't of Transp., Federal Transit Admin., *Master Agreement* (last modified Oct. 1, 1999), http://www.fta.dot.gov/library/legal/agreements/2000/ma.html.

[42] 55 Fed. Reg. 40766 (Oct. 4, 1990).

state to defer provision of Federal Section 5311 funds to any noncompliant subrecipient. FTA may also refer the issue of noncompliance to the Attorney General for civil action.[43]

DOT has issued a policy statement requiring transit operators, MPOs, and state DOTs to develop a transportation planning public involvement process to engage minority and low-income populations in the decision-making function.[44] Each of these recipients of federal funds must self-certify its compliance with Title VI. In implementing the Environmental Justice Executive Order in their state planning and research and UPWPs, the policy statement provides that FHWA and FTA should, at minimum, review how Title VI is addressed in their public involvement and plan development process.[45]

During certification reviews, MPOs must self-certify compliance with Title VI, and FTA/FHWA must certify such compliance in making the statutory finding that the state TIP is consistent with the planning requirements. FTA/FHWA should identify strategies and efforts the planning process has developed for compliance with Title VI. The planning process should also develop a demographic profile that identifies the locations and needs of socioeconomic groups, including low-income and minority populations covered by the Environmental Justice and Title VI requirements.[46]

### 3. Disadvantaged Business Enterprises

#### *a. Federal Legislation*

Congressional authorization for the current disadvantaged business enterprise (DBE) requirements is located in numerous legislative sources.[47] Congress enacted the Small Business Act of 1958 (SBA),[48] STAA,[49] and STURAA[50] to achieve minority business participation goals.[51] The SBA states that "[it] is the policy of the United States that small business concerns, ...owned and controlled by socially and economically disadvantaged individuals, …shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency."[52] Economically disadvantaged individuals are defined by the Act as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[53]

Replacing regulations that had resulted in significant judicial setbacks,[54] in 1999 DOT promulgated new

[43] FTA Circular 9040.1E, ch. 9.

[44] The FHWA and FTA perform federal review and certification of MPOs. The Secretary of Transportation must certify the metropolitan planning process not less than every 3 years. The certification consisted of a desk audit by FHA/FHWA field staff of documentation pertaining to the planning process, a site visit, a public meeting, and preparation of a report on the certification review. *See* Section 2—Transportation Planning, for a more detailed description of the MPO certification and review process.

[45] 65 Fed. Reg. 31,803 (May 19, 2000).

[46] 65 Fed. Reg. 31,803 (May 19, 2000); 49 C.F.R. pts. 619 & 622 (2002).

[47] 23 U.S.C. § 324 (2000); 42 U.S.C. § 2000d, *et seq*. (2000); 49 U.S.C. §§ 1615, 47107, 47113, 17123 (2000); § 1101(b), Pub. L. 105-178, 112 Stat. 107, 113.

[48] Pub. L. No. 85-536 (July 18, 1958), 72 Stat. 384.

[49] Pub. L. No. 97-424 (Jan. 6, 1983), 96 Stat. 2097.

[50] Pub. L. No. 100-17 (Apr. 2, 1987), 101 Stat. 132.

[51] Harrison & Burrowes Bridge Constructors v. Cuomo, 981 F.2d 50, 53 (2d Cir. 1992).

[52] 15 U.S.C. § 637(d)(1) (2000).

[53] 15 U.S.C. § 637(a)(6)(A) (2000).

[54] Prior to promulgation of 49 C.F.R. pt. 26 (2000), the federal program defined minority-group membership as an individual who claims membership as a minority and who is "so regarded by that particular minority community." 49 C.F.R. § 23.53 (1997). The federal program used "minority," "socially and economically disadvantaged individuals," "small business concern," and "disadvantaged" interchangeably. It required awarding contracts to people defined by sex, race, and ethnicity and that the grant recipient maintain a disadvantaged program with "practical" numerical goals as a condition for federal grants. 49 C.F.R. § 23.41-53 (1997). The principal objective of the regulations was to eliminate discrimination and require affirmative action, "to ensure nondiscriminatory results and practices in the future, and to involve minority business enterprises fully in contracts and programs funded by the Department." 49 C.F.R. § 23.5 (1997). The overall goal for federal fund recipients was for disadvantaged business enterprise participation to be "practical and related to the availability of [DBEs] in desired areas of expertise." 49 C.F.R. § 23.45(g) (1997). DBEs were defined as small businesses (those employing fewer than 500 employees) owned and controlled by socially and economically disadvantaged individuals; or in the case of any publicly-owned business, at least 51 percent of the stock must be owned by one or more socially and economically disadvantaged individual. DOT did not conduct certifications, but relied on certification from the Small Business Administration and state Departments of Transportation. The federal regulations required that the certifying entity presume that African Americans, Hispanics, Asian Pacific Americans, Subcontinent Asians, Native Americans, or members of other groups who from time to time were so designated by the Small Business Administration were socially disadvantaged. Women were also presumed to be socially disadvantaged. Business owners who certified that they were members of those named groups were considered socially and economically disadvantaged. 49 C.F.R. § 23.62 (1997). Other individuals could qualify as socially and economically disadvantaged if they could demonstrate it. 13 C.F.R. 124.1-1 (2000). These included those who could show they were socially or economically disadvantaged, and women-owned businesses. Since STURRA, women have been presumed to be socially and economically disadvantaged for purposes of the DBE program, and therefore no demonstration of eligibility has since been required of them.

A transit grantee that issued a federally assisted contract was required to implement a DBE affirmative action program, and submit its overall goals to the appropriate Federal Transportation Administrator for approval. SANDRA VAN DE WALLE, THE IMPACT OF CIVIL RIGHTS LITIGATION UNDER TITLE VI AND RELATED LAWS ON TRANSIT DECISION MAKING (TCRP Legal

regulations at 49 C.F.R. Part 26 [Part 26].[55] The DBE regulations were issued after a series of major affirmative action lawsuits, intense debate in the halls of Congress, and a rulemaking process that took more than 3 years to complete.[56] After the U.S. Supreme Court decision in *Adarand* (discussed below), President Clinton directed DOT and the other Executive Branch agencies to gather particularized evidence of discrimination to determine whether their affirmative action programs were narrowly tailored to serve a compelling government interest, and to reform or eliminate those programs that were not.[57] In order to survive strict scrutiny analysis, DOT revised its DBE rules in February of 1999.[58] DOT knew that the regulations were at the vanguard of the anti-affirmative action agenda, and drafted Part 26 with the greatest possible care to survive judicial challenge. The new rules are designed to establish a narrowly tailored program that provides a "level playing field" for small economically and socially disadvantaged businesses.[59]

*b. DBE Certification*

Eligibility to participate in the DBE program as a DBE is based on economic and social factors.[60] Applicants have the burden of proof to show that they meet the size, ownership and control standards, and group membership for DBE participation.[61] Pursuant to Part 26, a DBE is defined as a for-profit small business:

1. That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

2. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.[62]

Social and economic disadvantage is rebuttably presumed for "women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA,…."[63] Individuals not presumed socially and economically disadvantaged may also be eligible for DBE certification if their personal net worth is below $750,000 and their businesses do not exceed small business standards.[64] The new rules impose a personal net worth eligibility cap of $750,000 irrespective of race, gender, or size of the business.[65]

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Research Digest, 1997). Thus, the recipient developed and administered the DBE program, and set its goals and objectives on a contract-by-contract basis, subject of course to compliance with DOT regulations and approval by FTA. *Id*. at 5–6. 49 C.F.R. § 23.45(g) (1997). Bidders failing to meet the individual DBE goal could, however, nevertheless be awarded projects provided that the bidder could demonstrate good faith efforts to obtain DBE participation. 49 C.F.R. § 23.45(h)(2) (1997); Tenn. Asphalt Co. v. Farris, 942 F.2d 969, 970 (6th Cir. 1991).

Annually, each state recipient of federal funds was required to submit its goal to the DOT Secretary. Prior to 1999, if the goal submitted was less than 10 percent, a state was required to show its efforts to locate disadvantaged businesses, to make such businesses aware of contracting opportunities, and to encourage disadvantaged businesses, and must provide information concerning legal or other barriers impeding participation of disadvantaged businesses, the availability of such businesses to work on the recipient's contracts, the size and other characteristics of the minority population in the recipient's jurisdiction, and the relevance of such statistics to the potential availability of such businesses. 49 C.F.R. §§ 23.64 and 23.65 (1997). If a recipient requested approval of a goal of less than 10 percent, it had to submit additional justification therefore, which the Administrator could approve or deny. 49 C.F.R. §§ 23.64(e), 23.65, and 49 C.F.R. pt. 23, subpt. D, App. (1997). *See* Ellis v. Skinner, 961 F.2d 912, 915 (10th Cir.), *cert. denied sub nom*. Ellis v. Card, 506 U.S. 939 (1992). 49 C.F.R. §§ 23.64(e), 23.65 (1997). The Administrator held authority to approve a goal less than 10 percent if a finding was made that the recipient was making all appropriate efforts to increase disadvantaged business participation to 10 percent, and that despite such efforts, the lower goal was a reasonable expectation given the availability of disadvantaged businesses. 49 C.F.R. § 23.66 (1997).

[55] Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs, 49 C.F.R. pt. 26 (1999).

[56] Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 57 Fed. Reg. 58288 (Dec. 9, 1992) (codified at 49 C.F.R. pt. 23 ); 62 Fed. Reg. 29548 (May 30, 1997) (codified at 49 C.F.R. pts. 23 and 26); 64 Fed. Reg. 5096 (Feb. 2, 1999) (codified at 49 C.F.R. pts. 23 and 26).

[57] VAN DE WALLE, *supra* note 54, at 7.

[58] 64 Fed. Reg. 5096 (Feb. 2, 1999).

[59] 66 Fed. Reg. 23208 (May 8, 2001).

[60] 49 C.F.R. §§ 26.61, 26.63, 26.65, 26.67, 26.69, 26.71. U.S. Dep't of Transp., Office of Small and Disadvantaged Business Utilization, *The New DOT DBE Rule is Narrowly Tailored* (visited Oct. 28, 2001), http://www.osdbuweb.dot.gov/business/dbe/ntcht.htm.

[61] U.S. Dep't of Transp., Office of Small and Disadvantaged Business Utilization, *What's New in the New DOT DBE Rule?* (visited Oct. 28, 2001), http://www.osdbuweb.dot.gov/business/dbe/summary.htm.

[62] 49 C.F.R. § 26.5 (2002). DBEs also must be (1) U.S. citizens or legal permanent residents, (2) not have an average gross income of more than $17,420,000 over 3 years, (3) be at least 51 percent owned and controlled by economically disadvantaged individuals, (4) meet the SBA small size in the primary industry group under 13 C.F.R. pt. 121 (1999), (5) if owned by ANCs, Indian Tribes, and Native Hawaiian Organizations, meet the small business size requirements and be controlled by socially and economically disadvantaged individuals, (6) meet the requirements of pt. 26 concerning licenses and credentials, and (7) be for-profit. 66 Fed. Reg. 23219 (May 8, 2001).

[63] 49 C.F.R. § 26.67 (2002).

[64] *Id*., 49 C.F.R. § 26.69 (2002). United States Dep't of Transp., *President Clinton Announces Significant New Rule on Disadvantaged Business to Help Ensure Fair Competition for DOT Contracts* (Jan. 29, 1999) (News Release), *available in* 1999 WL 38999. 13 C.F.R. pt. 121 (2001) (defining small business standards under the SBA).

[65] 49 C.F.R. § 26.67 (2002).

The presumption of social advantage for individuals with certain specified racial and national origin (e.g., Pakistanis are deemed socially disadvantaged, while Polish immigrants are not) classifications has been criticized as over inclusive.[66] DOT noted that the list was produced by Congress, and indicated that the list created a rebuttable presumption challengeable by anyone seeking to overcome the presumption.[67] A white male can also make an individual showing of social and economic disadvantage to seek to achieve eligibility under the program.[68]

*c. Quotas, or Aspirational Goals?*

DOT's DBE program was criticized as a *de facto* quota program in which recipients insisted that contractors meet numerical goals irrespective of other considerations and did not take the good faith efforts of contractors seriously, and the DBE program imposed a set-aside regardless of the availability of race-neutral solutions. In response, DOT emphasized that the "DBE program is not a quota or set-aside program, and is not intended to operate as one."[69] The 10 percent national statutory goal is "aspirational" only. Unlike the regulations they replaced (49 C.F.R. Part 23), the new rules do not require recipients to provide a special justification to DOT if their overall goal is less than 10 percent.[70] Recipients set their own goals based on local market conditions.[71] Goals are to be established based on the number of "ready, willing and able DBEs" in the local market.[72] Recipients must meet the maximum feasible portion of their overall goals via race-neutral means, such as outreach and technical assistance.[73] The new regulations explicitly prohibit the use of quotas under any circumstances, and prohibit set-asides except when no other approach is likely to redress egregious discrimination.[74] Bidders now can satisfy the "good faith efforts" requirement either by having enough DBE participation to meet the goal, or if not, by documenting good faith efforts of their attempt to meet the goal.[75]

Congress also enacted the SBA[76] to assist businesses owned and controlled by the socially and economically disadvantaged. Both ISTEA[77] and TEA-21[78] set an aspirational goal of 10 percent of transportation contracting funds to projects employing DBEs.[79] This 10 percent target is considered by DOT to be a flexible goal.[80]

Prior to the seminal U.S. Supreme Court decision in *Adarand,* discussed below, the judicial inquiry into compelling interest was different when a local entity, rather than Congress, utilized a racial classification. While Congress has the authority to address problems of nationwide discrimination with legislation that is nationwide in application,[81] a state or local government has only "the authority to eradicate the effects of discrimination within its own legislative jurisdiction."[82] Thus, in analyzing the purely local component of a DBE program, the question is whether the agency crafted a narrowly tailored program to serve the compelling interest presented in its locality.[83] A minority business enterprise provision could pass constitutional muster if the following two conditions are met: (1) the provision was supported by a finding of a competent judicial, legislative, or administrative body that unlawful discrimination had in the past been perpetrated against minority business enterprises; and (2) the minority business enterprise requirement was narrowly drawn to remedy the prejudicial effects flowing from the specific prior discrimination.[84]

*d. Recipient Eligibility*

FTA recipients who receive more than $250,000 in FTA assistance during a fiscal year must establish a DBE program.[85] FTA must approve a transit agency's DBE program as a condition of receipt of FTA financial assistance.[86] The DBE program is both a requirement for eligibility as a recipient and a condition of the continued receipt of FTA funds.[87] A transit grantee that receives FTA funds must develop a DBE program, submit it to the appropriate operating administration (OA) for approval, and implement the approved DBE program.[88]

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[66] 64 Fed. Reg. at 5099.

[67] *Id*.

[68] *Id*., 49 C.F.R. § 26.67 (2002).

[69] 64 Fed. Reg. at 5097.

[70] 49 C.F.R. § 26.41 (2002).

[71] 49 C.F.R. § 26.45 (2002). The overall goals must be based on evidence of the relative availability of ready, willing, and able DBEs in the area. *Id*.

[72] U.S. GENERAL ACCOUNTING OFFICE, DISADVANTAGED BUSINESS ENTERPRISES (June 2001).

[73] 49 C.F.R. § 26.51 (2002).

[74] 49 C.F.R. § 26.43 (2002).

[75] 49 C.F.R. § 26.53 (2002).

[76] Pub. L. 87-305 (Sept. 26, 1961), 75 Stat. 667. 15 U.S.C. § 637(d)(1) (2000).

[77] Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240 (Dec. 18, 1991), 105 Stat. 1919.

[78] Pub. L. 105-178 (June 9, 1998), 112 Stat. 113.

[79] FTA Circular 4716.1A, *"Disadvantaged Business Enterprise Requirements for Recipients and Transit Vehicle Manufacturers."*

[80] VAN DE WALLE, *supra* note 54, at 12.

[81] *See* City of Richmond v. Croson, 488 U.S. 469, 504 (1989).

[82] *Id*. at 491–92.

[83] Houston Contractors Ass'n. v. Metropolitan Transit Auth. of Harris County, 1999 U.S. App. Lexis 15100 (June 28, 1999) (189 F.3d 467).

[84] *See* University of Cal. Regents v. Bakke, 438 U.S. 265 (1978); *see also* Fullilove v. Klutznick, 448 U.S. 448 (1980).

[85] 49 C.F.R. § 26.21.

[86] *Id*.

[87] *Id*.

[88] 49 C.F.R. § 26.21 (2002). 49 C.F.R. § 26.5 (defining operating administration as the following parts of the DOT: FAA; FHWA; and FTA).

Once certified to participate in the DBE program, recipients must set annual overall goals.[89] Goals must be based on evidence of DBE availability, readiness, and willingness to participate.[90] Recipients should determine realistic goals by researching DBE directories, bidders lists, and census information and imputing these figures into a formula to determine the rate of DBE participation.[91] Goals are only to be met using "race-neutral" means, without the use of quotas and only the very limited use of minority set-asides.[92] Recipients must also establish a monitoring and enforcement mechanism to ensure work committed to DBEs is actually performed by them.[93]

Though DOT could withhold funding to a recipient that failed to meet its goals, DOT insisted it had never imposed such sanctions.[94] A new provision was added to explicitly state that a recipient cannot be penalized or treated as being in noncompliance on grounds that its DBE participation falls short of its overall goal.[95] DOT will only penalize recipients if the noncompliance and inappropriate administration was in bad faith.[96] However, the rules also provide that failure to comply with them may result in the imposition of sanctions, including "the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied."[97]

Statutory low-bid requirements exist for prime contractors. DOT emphasized that the new regulations do not require a grant recipient to accept a higher bid for a prime contract from a DBE when a non-DBE has submitted a lower bid. Prime contractors, however, must make good faith efforts to achieve DBE-contract goals.[98] Prime contractors are also free to accept whatever subcontractor bid they wish.[99]

Coordinating its program with the SBA,[100] DOT has developed a standard certification form for DBE eligibility,[101] and a uniform reporting form for all its agencies, including FTA.[102] DOT has also established a model DBE program that recipients may adopt to help them comply with Part 26.[103] Both were in proposed form as of July 2003.

### *e. Adarand*

The most significant case assessing the Constitutionality of DOT race-based preferences was *Adarand Con-*

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[89] 49 C.F.R. § 26.45 (2002). Goals must be set on August 1 of each year.

[90] *Id*. According to FTA, goal-setting involves a two-step process. In the first

> you are trying to determine what percentage DBEs (or firms that could be certified as DBEs) represent of all firms that are ready, willing, and able to compete for DOT-assisted contracting. This percentage is calculated by dividing the number of DBEs ready, willing, and able to bid for the types of work you will fund this year, by the number of all firms (DBEs and non-DBEs) ready, willing, and able to bid for the types of work you will fund this year. That is, the number of DBEs will be in the numerator, and the number of all firms (DBEs and non-DBEs) will be in the denominator. This is true regardless of the type of data you are employing to measure the relative availability (e.g., bidders list, census data and DBE directory, disparity study, alternate method, etc.)

In the second, the step one base figure is adjusted so as to make it as precise as possible. These are described in detail at http://osdbuweb.dot.gov/business/dbe/tips.html (visited Dec. 27, 2001).

[91] 49 C.F.R. § 26.45 (2002). Tips for setting goals may be found at http://osdbuweb.dot.gov/business/dbe/tips.html (visited Dec. 27, 2001). According to FTA

> it is extremely important to include all of your calculations and assumptions in your submission. In other words, you must "show your work." When you submit your overall goals (and the race/gender-neutral and race/gender-conscious portions of your goals), it is important that we can follow your thinking process. Set out explicitly what your data sources were, what assumptions you made, how you calculated each step of the process, etc.

[92] 49 C.F.R. §§ 26.51 and 26.43 (2002).

[93] 49 C.F.R. § 26.37 (2002).

[94] 64 Fed. Reg. at 5098.

[95] 49 C.F.R. § 26.47 (2002).

[96] *Id*.

[97] 49 C.F.R. § 26.101(a) (2002).

[98] 49 C.F.R. § 26.53 (2002).

[99] 64 Fed. Reg. at 5099–5100.

[100] SBA will accept firms certified as DBEs by DOT recipients, subject to the following additional requirements: (1) disadvantaged owners must be U.S. citizens (13 C.F.R. § 124.1002(d) (2002)); (2) the disadvantaged owner must have a personal net worth less than $750,000.00 (13 C.F.R. § 124.1002 (c) (1999)); (3) owners of firms who are women and are not members of one of the designated groups presumed to be socially disadvantaged under 13 C.F.R. § 124.103(b), must provide personal statements relating to their individual social disadvantaged status, § 24.1008(e)(2) (2002); and (4) with respect to DBE airport concessionaires, firms must meet the SBA size standard corresponding to their primary SIC code. *See* http://osdbuweb.dot.gov/business/legislation/memofunder.html (visited Dec. 27, 2001).

[101] *See* Notice of purposed Rulemaking, 66 F.R. 23208 (May 8, 2001). All DOT recipients in a state must have tendered to DOT a signed agreement creating a Uniform Certification Program for the state by March 4, 2002. Notice of purposed rulemaking.

[102] 66 Fed. Reg. 23208 (May 8, 2001), Notice of Proposed Rulemaking.

[103] *See* http://osdbu.dot.gov/programs/dbe.htm; and http://navigation.helper.realnames.com/framer/1000/default.asp?realame=DOT&cc=US&lc=en%2DUS&frameid=1565&providerid=262&url=http%3A%2F%2Fwww%2Edot%2Egov (visited Dec. 27, 2001). DOT notes that, "We have put a sample program document on our web site. This provides a model you can (but are not required to) use for the document, which may save you time in creating your own program. The key to a good program is including information about what you are doing in your state or locality to carry out the basic requirements outlined in the sample." Http://osdbuweb.dot.gov/business/dbe/hottips.html (visited Dec. 27, 2001).

*structors v. Pena.*[104] The case involved the Central Federal Lands Highway Division (CFLHD) of DOT and its award of a highway contract that included a Subcontractor Compensation Clause (SCC) (which the SBA requires all federal agencies to include in their prime contracts). The SCC rewards the prime contractor with a financial bonus of up to 10 percent of the value of the subcontract for subcontracting with DBEs.[105] Adarand, a Caucasian, was the low bidder for a subcontract, but to satisfy the SCC requirements, the prime contractor instead awarded the subcontract to a bidder previously certified by the state DOT as a DBE. Adarand brought suit alleging violation of the Equal Protection Clause of the U.S. Constitution.[106]

Overruling prior decisions, which had used intermediate scrutiny to assess federal "benign" race preferences,[107] the Supreme Court subjected DOT's use of race-based measures in its regulations to strict scrutiny analysis.[108] Stated differently, *Adarand* extended strict scrutiny analysis to federal affirmative action programs that use racial or ethnic criteria as a basis for decisionmaking, a standard that had previously only been applied to state or local programs.[109] The Court held, "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests."[110] Thus, affirmative action programs—whether federal, state, or local—are now subjected to "strict scrutiny."[111] They will pass Constitutional muster only if they are narrowly tailored to serve a compelling government interest.[112] What is encompassed by the "narrowly tailored" criterion? The Supreme Court in *Adarand* specified the first two factors listed below. The remaining factors were set forth by Justice Brennan in *United States v. Paradise,*[113] and later adopted by the Justice Department in its survey of the case law.

1. Did the government entity give any consideration to the use of race-neutral means to increase minority participation in governmental contracting?
2. Is the program limited in time so that it will not last longer than the discriminatory effects it is designed to eliminate?
3. What is the scope of the program, and is it flexible?
4. Is race relied on as the sole factor in determining eligibility, or is it only one of several factors?
5. Is the numerical target reasonably related to the number of qualified minorities in the applicable pool?
6. What is the extent of the burden placed on nonbeneficiaries of the program?[114]

With respect to what encompasses a "compelling government interest," the Supreme Court in *Adarand* observed that the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[115] Section 5 of the 14th Amendment confers upon Congress the power "to enforce, by appropriate legislation, the provisions of this article" guaranteeing due process and equal protection. This Constitutional grant may give the federal government more discretion in finding a compelling government interest to arrest discrimination than accorded the states.[116]

In the transit context, the "narrowly tailored" criterion is satisfied by having transit grantees develop contract goals according to the criteria of Part 26.[117] On the

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[104] 515 U.S. 200 (1995), *remanded* Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997), *vacated sub nom.* Adarand Constuctors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999), *rev'd* Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000), *remanded* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), *amended sub nom.* Adarand Constructors, Inc. v. Mineta, 121 S. Ct. 1401 (2001), *cert. granted*, Adarand Constructors, Inc. v. Mineta, 121 S. Ct. 1598 (2001).

[105] 15 U.S.C. § 637(d) (2000).

[106] U.S. CONST. amend. V.

[107] Metro Broadcasting v. FCC, 497 U.S. 547 (1990).

[108] 515 U.S. at 237–39.

[109] VAN DE WALLE, *supra* note 44, at 3.

[110] 616 U.S. 227, 115 S. Ct. at 2113.

[111] Under strict scrutiny, affirmative action programs pass constitutional muster if they are narrowly tailored to serve a compelling governmental interest. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[112] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). VAN DE WALLE, *supra* note 44.

[113] 480 U.S. 149 (1987).

[114] VAN DE WALLE, *supra* note 44. *See* United States v. Paradise, 480 U.S. 149, 171 (1987).

[115] 515 U.S. at 237.

[116] *See* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) (discussing both "compelling governmental interest" and Congress's authority to enforce remedies to address the lingering effects of discrimination).

[117] The regulations provide:

To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection…estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

(2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your

issue of whether there is a "compelling government interest," a commentator has noted that it is unlikely that

> achieving diverse racial and ethnic sources from which to procure construction and supplies would be found to constitute a compelling government interest. It appears more likely that…the courts will hold that racial classifications in procurement may only be justified by a compelling government interest to remedy the effects of past discrimination.[118]

As a subsequent transit case noted, when a government makes it more difficult for one group to participate in a governmental program, that group may have been denied its Constitutional right to equal protection.[119]

As noted above, after the first U.S. Supreme Court decision in *Adarand,* President Clinton directed DOT and the other Executive Branch agencies to gather particularized evidence of discrimination to determine whether their affirmative action programs were narrowly tailored to serve a compelling government interest, and to reform or eliminate those programs that were not.[120] In order to survive strict scrutiny analysis, DOT revised its DBE rules in February of 1999.[121] The old Part 23 rules required maximum reasonable participation by minorities in federally-funded transportation projects. The new Part 26 regulations attempt to create a level playing field through race neutral means. These "narrowly tailored"[122] rules have been described above.

### *f. Adarand Reprise*

*Adarand* continued on in the federal courts on remand for several years. After the first U.S. Supreme Court decision remanding the case for strict scrutiny analysis, the federal district court held the SCC program unconstitutional. The court found the SCC program both over- and under-inclusive—by including minority individuals who were not actually disadvantaged, and failing to include nonminority individuals who were disadvantaged. The court noted that Congress had failed to inquire whether entities seeking a racial preference had in fact suffered from the effects of past discrimination. The court concluded it was "difficult to envisage a race-based classification" that could ever be found to be narrowly tailored.[123]

On appeal, the 10th Circuit found Adarand lacked standing because he had been granted DBE status by the Colorado Department of Transportation. The Supreme Court sternly rebuked the 10th Circuit's construction of the law, and reversed and remanded the decision, finding both that Adarand did indeed have standing, and that the case was not moot. The Supreme Court reasoned that, "it is impossible to conclude that respondents have borne their burden of establishing that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur' if petitioner's cause of action remains alive."[124]

Once again on remand, the 10th Circuit reviewed the SCC program under the strict scrutiny standard and concluded that although the SCC as it existed in 1996 (when it adversely affected Mr. Adarand) was unconstitutional as insufficiently narrowly tailored, its defects had been remedied by Part 26, and that the current SCC program did pass strict scrutiny analysis.[125] Among the reasons identified by the court was the fact that the 1996 program had been based on FHWA's allegedly mandatory 12–15 percent minority goal, as opposed to a 5–10 percent "aspirational" goal mandated by Congress.[126] The 1996 SCC program also presumed economic disadvantage based on membership in certain racial groups, and was therefore insufficiently narrowly tailored.[127] As to a compelling government interest, the 10th Circuit found, "Congress repeatedly has considered the issue of discrimination in government construction procurement contracts—especially construction contracts—necessitating a race-conscious remedy."[128]

In 2001, the Colorado Department of Transportation announced a more aggressive affirmative action minority contracting program, which would set an overall DBE goal of 10.93 percent of design and construction

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> overall goals unless and until you do not meet your overall goal for a year.
>
> (4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

49 C.F.R. § 26.51(f) (2002).

[118] VAN DE WALLE, *supra* note 44, at 11.

[119] Houston Contractors Ass'n v. Metropolitan Transp. Auth., 993 F. Supp. 545 (S.D. Tex. 1997).

[120] VAN DE WALLE, *supra* note 44, at 13.

[121] 64 Fed. Reg. 5096 (Feb. 2, 1999).

[122] DOT insists its new rules are "narrowly tailored." *See* http://osdbuweb.dot.gov/business/DBE/NTcht.html. (visited Dec. 27, 2001). However, at this writing, this is still an issue being litigated in the courts.

[123] Adarand Constructors v. Pena, 965 F. Supp. 1556, 1580 (D. Colo. 1997).

[124] Adarand Constructors v. Slater, 528 U.S. 216, 224 (2000).

[125] Adarand Constructors v. Slater, 228 F.3d 1147 (10th Cir. 2000).

[126] 228 F.3d at 1182.

[127] 228 F.3d at 1184. The court found that more narrowly-tailored race-neutral measures were not considered as an alternative to race-conscious measures, the measures adopted were insufficiently temporally limited, and failed to take an individualized inquiry in determining economic disadvantage, and there was a complete absence in the record of why FHWA adopted a 12–15 percent goal. The 10th Circuit Court of Appeals suggests that the 1996 SCC program did not pass strict scrutiny analysis because it "is not narrowly tailored insofar as it obviates an individualized inquiry into economic disadvantage." The 10th Circuit required state certification standards "to incorporate an individualized inquiry into economic disadvantage."

[128] 228 F.3d at 1167.

contracts.[129] Adarand's petition for *certiorari* of the 10th Circuit decision was initially granted,[130] then subsequently vacated, by the U.S. Supreme Court.[131]

## D. CONSTITUTIONAL CLAIMS AGAINST STATES AND THEIR SUBDIVISIONS

### 1. Section 1983 Claims

Typically, a plaintiff who alleges discrimination against a public transit operator may allege a violation of a federal statute and a Constitutional right (such as the 14th Amendment's protection of due process and equal protection). 42 U.S.C. § 1981 prohibits discrimination with respect to making and enforcing contracts. The Civil Rights Act of 1991 amended § 1981 to include within its scope both contract performance as well as contract formation.[132]

The Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983, grants a civil remedy (damage awards and equitable redress) to persons deprived of constitutional rights by persons acting under the color of state law, in federal court without regard to the amount in controversy.[133] It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress.[134]

To establish a *prima facie* case under § 1983, the plaintiff must prove that (1) he or she was deprived of a right or interest secured by the Constitution and the laws of the United States, and (2) the deprivation occurred under color of state law.[135] Section 1983 does not create substantive rights; to prevail under it, the plaintiff must prove violation of an independent Constitutional or federal statutory right.[136] The Civil Rights Attorney's Fees Award Act of 1976[137] allows recovery of reasonable attorney's fees in a successful § 1983 action.[138]

Local governments may be held liable under § 1983. However, they may not be held liable under a *respondeat superior* theory.[139] Instead, the Constitutional deprivation must be the result of an official governmental policy or custom.[140] Thus, when presented with a 1983 claim, the transit attorney will examine closely the conduct of the employee. If the employee failed to act in accordance with the agency's policy or custom, the transit attorney may choose to send a reservation of rights letter to the employee or a notice that the agency reserves the right to decline responsibility in the event the proof shows that the employee acted outside the scope of the agency's policy or custom. The agency may file a motion to dismiss based on the actions of the employee being outside the scope of the agency's policy or custom (e.g., an assault by the employee). If successful, the dismissal of the agency means that the agency has no responsibility to reimburse a judgment obtained against the employee. For this reason, the initial notice to the employee must clearly state the extent to which the agency is willing to provide counsel, and also set forth the employee's right to retain counsel of his/her choice.

A governmental entity can be sued under § 1983 for (1) an express policy that, when enforced, causes a Constitutional deprivation, (2) a widespread practice that, though not authorized by law or express municipal policy, is so permanent and well-settled as to constitute a "custom or usage" with the force of law, or (3) a Constitutional injury that was caused by a person with final policymaking authority.[141] However, absent a Constitutional deprivation, ordinary tort actions, though cast as civil rights claims, are not cognizable under § 1983.[142]

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[129] Kevin Flynn, *Getting Diversity Back On the Road*, ROCKY MOUNTAIN NEWS, Apr. 19, 2001, at 5A.

[130] Adarand Constructors, Inc. v. Mineta, 121 S. Ct. 1598 (2001).

[131] Adarand Contractors, Inc. v. Mineta, 534 U.S. 103 (2001). The Supreme Court dismissed the writ on grounds that Adarand challenged issues not decided by the 10th Circuit, and nowhere challenged its finding that Adarand lacked standing.

[132] 42 U.S.C. § 1981 (2000). Allen v. Chicago Transit Auth., 2000 U.S. Dist. Lexis 11499 (N.D. Ill. 2000).

[133] 28 U.S.C. § 1343(3) (2000).

[134] 42 U.S.C. § 1983 (2000). *See, e.g.,* Monell v. Dep't of Social Services of the City of N.Y., 436 U.S. 658, 691 (1978).

[135] Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402, 1406 (5th Cir. 1995). The U.S. Supreme Court has rejected the defense that the "under color of" language applies only to conduct authorized and not forbidden by state law. Monroe v. Pape, 365 U.S. 167 (1961).

[136] Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617–18 (1979). In this case, a federal statutory right was invoked, namely the right to emergency assistance protected by 406(e)(1) of the Social Security Act (42 U.S.C. § 606(e)(1) (2000).

[137] 42 U.S.C. § 1988 (2000).

[138] *See* Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Resources, 532 U.S. 598 (2001) (holding that the fee-shifting provisions of the ADA and Fair Housing Amendments Act require a party to receive a court ordered decree or judgment on the merits, rather than act as a "catalyst," to be a "prevailing party," and receive attorney's fees.) Attorneys fees are recoverable even if the attorney did the work on a *pro bono* basis. Blum v. Stenson, 465 U.S. 886 (1984).

[139] Monell v. Dep't of Social Services of the City of N.Y., 436 U.S. 658, 691 (1978).

[140] *Id*. at 691.

[141] Allen v. Chicago Transit Auth., 2000 U.S. Dist. Lexis 11499 (E.D. Ill. 2000).

[142] "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law." Daniels v. Williams, 474 U.S. 327 at 332

Thus, for example, a *pro se* plaintiff unsuccessfully pursued a 1983 action against the State of New Jersey alleging it had injected him in the left eye with a radium electric beam, and that as a result, someone talks to him inside his brain.[143] Section 1983 actions have been brought against transit agencies for a number of alleged Constitutional violations, including restrictions against advertising,[144] the imposing of drug testing on employees,[145] racially-motivated employee dismissal,[146] and assault and battery or other abuse of patrons by transit police.[147] However, relatively few plaintiffs have prevailed in such litigation.

But note that private transit operators stand on a different footing, for the 14th Amendment applies to the states and their subdivisions (such as public transit operators). Even though a private transit company may be subject to economic and other regulation, where the regulatory agency exerts no jurisdiction over the practice in question, a Constitutional claim against the private company will fail.[148]

However, a relevant federal statute promulgated under the Commerce Clause may be invoked against a private transit operator. Thus, private firms that employ 15 or more individuals are subject to both Title VII of the Civil Rights Act and the ADA, and those with 20 or more employees fall under the Age Discrimination in Employment Act.

Though the federal government is not explicitly subject to § 1983, in *Bivens v. Six Unknown Federal Narcotics Agents*, the U.S. Supreme Court held that federal officials may be sued for damages flowing from their denial of a person's Constitutional rights, implying a cause of action from the Constitution itself.[149] In *Bivens,* the plaintiff alleged that police officers entered and searched his apartment and arrested him on narcotics charges without a warrant and without probable cause. In another case, the Court held a plaintiff must show (1) a constitutionally or statutorily protected right, (2) an invasion of that right, and (3) that the requested relief is appropriate.[150] A private cause of action against deprivation of a constitutionally protected right may be pursued against the federal government unless (a) special factors counsel hesitation, or (b) Congress has explicitly decreed an alternative remedy to be a substitute for recovery directly under the Constitution and that remedy is viewed as equally effective.[151] Thus, *Bivens* and progeny serve as an effective means of pursuing federal officials for Constitutional violations in the same way § 1983 provides a cause of action against state and local officials.[152]

The courts have created two types of immunity from 1983 and *Bivens* actions—absolute immunity and qualified immunity. Courts have conferred absolute immunity from § 1983 and *Bivens* actions to certain types of government officials, including judges,[153] prosecutors,[154]

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(1986) (fall by a prisoner occasioned by a pillow negligently left there by prison officials may constitute negligence, but is not a Constitutional deprivation, for due process protects against deliberate, not negligent, deprivations of life, liberty, or property). However, damages in a § 1983 action are "ordinarily determined according to principles derived from the common law of torts." Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 at 306 (1986).

[143] Searight v. State of N.J., 412 F. Supp. 413 (D. N.J. 1973). Numerous cases have been litigated where a party successfully states a claim under § 1983. For one such example, *see* Monell v. Dep't of Social Services, 436 U.S. 658 (1978) (local governing bodies are "persons" within § 1983 and can be sued directly. However, the 11th Amendment provides state immunity under § 1983. JAMES HENDERSON, JR., RICHARD PEARSON & JOHN SILICIANO, THE TORTS PROCESS 803 (5th ed. 1999).

[144] Examples of such cases include Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985) (claim brought under 1983 for denial of advertising); Lebron v. WMATA, 585 F. Supp. 1461 (D. D.C. 1984) (1983 claim brought for restrictions on advertising).

[145] Tanks v. Greater Cleveland Regional Transit Auth., 930 F.2d 475 (6th Cir. 1991) (1983 action brought against drug testing); Moxley v. Regional Transit Services, 722 F. Supp. 977 (W.D. N.Y. 1977) (1983 claim brought against drug testing); Dykes v. SEPTA, 68 F.3d 1564 (3d Cir. 1995) (1983 action brought challenging drug test).

[146] Morris v. WMATA, 781 F.2d 218 (D.C. Cir. 1986).

[147] Ricciuti v. N.Y. City Transit Auth., 941 F.2d 119 (2d Cir. 1991) (1983 action brought against assault and battery by transit police); Fischer v. WMATA, 690 F.2d 1113 (D.C. Cir. 1982) (1983 action brought for arrest, search and seizure, and stripping of patron).

[148] *See, e.g.,* Brown v. D.C. Transit System, 523 F.2d 725 (D.C. Cir. 1975).

[149] Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). The Court briefly summarized the facts:

> This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

403 U.S. at 389.

[150] Davis v. Passman, 442 U.S. 228 (1979).

[151] *Id*.

[152] *See* Saucier v. Katz, 533 U.S. 194 (9th Cir. 2001) (plaintiff prevailed in Fourth Amendment claim against a federal military officer for use of excessive force during a protest); Booth v. Churner, 532 U.S. 731 (2001) (plaintiff's claim against a federal corrections officer for mistreatment otherwise states a claim except that plaintiff failed to exhaust an administrative review process before filing suit); Hanlon v. Berger, 526 U.S. 808 (1999) (plaintiff's claim is denied because of qualified immunity of federal game officials because of legal uncertainties regarding media accompaniment of law enforcement officials at time of search).

[153] Stump v. Sparkman, 435 U.S. 349 (1978).

[154] Imbler v. Pachtman, 424 U.S. 409 (1976) (immunity when acting "within scope of duties.").

legislators,[155] and the President.[156] However, most other government officials enjoy only qualified immunity. Such qualified immunity protects them from liability in circumstances when they have acted in a good faith belief that their actions are lawful, and have not violated the constitutional rights of others. However, the official is not immune when he or she knew or reasonably should have known that the action taken would violate the Constitutional rights of others, or taken with the malicious intent of causing a deprivation of a Constitutional right or causing other injury.[157]

Federal employees are protected from personal liability for common law torts committed within their scope of employment; the suit is instead brought against the U.S. Government.[158] The Supreme Court has held that a suit brought against individual officials for violation of federal law[159] is not prohibited by the 11th Amendment prohibition against suits brought against states.[160]

### 2. Due Process

The 5th and 14th Amendments to the U.S. Constitution protect individuals against deprivation of life, liberty, and property without due process of law. In due process analysis, the initial question is whether life, liberty, or property is implicated by the government action at issue. Though early on, the jurisprudence focused on whether the individual had a "right" or a "privilege" in the liberty or property (the former conferring the right to due process, and the latter not), today, the courts look not to the weight, but to the nature of the interest at stake.[161] To have a property interest in a benefit, the individual must have more than an abstract need or desire for it, and more than a unilateral expectation of it; he or she must have a "legitimate claim of entitlement."[162] The concept of property denotes a broad range of interests secured by existing rules or understandings.[163] Property rights are not created by the Constitution, but stem from an independent source, such as state law.[164]

For example, in *Ward v. Housatonic Area Regional Transit District,*[165]a federal district court held that a passenger denied the opportunity to ride transit buses had failed "to point to the existence of any state law which would allow him to assert [a property] interest in fixed route bus service."[166] In *Medellin v. Chicago Transit Authority,*[167] a federal district court held that the relevant state statutes created neither a property interest in, nor a legitimate claim of entitlement for, employment. Some courts have taken the position that, absent a statute that confers a right to employment, employment is "at will," and not a property interest to which due process applies.[168] Hence, as part of the analysis of whether a property right exists, the transit attorney must check applicable state or local law. Is it a right-to-work state? Is the employee subject to civil service laws?

Other courts have held that one is not deprived of a liberty when he or she "is not rehired in one job, but is free as before to seek another."[169] In the seminal case of *Cleveland Board of Education v. Loudermill*,[170] the U.S. Supreme Court observed, "While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once committed, without appropriate procedural safeguards." Moreover, due process requires "some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment."[171] This is sometimes referred to as a "name-clearing hearing."

Once a liberty or property interest is identified, the second question is what process is due for its deprivation? Notice and an opportunity for comment are the essential components of due process. Must the opportunity for comment be conducted pre- or post-deprivation, and may it be in writing, or must it use oral procedures (including a trial-type hearing)? In assessing a due process claim, the courts employ a flexible approach, evaluating: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through the

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[155] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (immunization for planning agency officials, created by Nevada and California, when officals are acting in a capacity comparable to that of members of a state legislature).

[156] Nixon v. Fitzgerald, 457 U.S. 731 (1982) (absolute immunity when acts upon which liability is predicated are official acts).

[157] Harlow v. Fitzgerald, 457 U.S. 800 (1982); Scheuer v. Rhodes, 416 U.S. 232 (1974).

[158] The Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988). A plaintiff may, however, pursue damages against the federal government under the Federal Tort Claims Act. 38 U.S.C. § 2680 (2000). The immunity in the Westfall Act is qualified in the sense that it rests on those injuries caused by an employee acting within the scope of his/her employment as determined by the Attorney General.

[159] 28 U.S.C. §§ 1331, 1343 (2000).

[160] *See* Ex parte Young, 209 U.S. 123 (1908); *see also* Seminole Tribe v. Fla., 517 U.S. 44, 116 S. Ct. 1114 (1996).

[161] Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

[162] *Id*. at 577.

[163] Perry v. Sinderman, 408 U.S. 593 (1972).

[164] Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

[165] 154 F. Supp. 2d 339 (D. Conn. 2001).

[166] 154 F. Supp. 2d at 347.

[167] 1994 U.S. Dist. Lexis 10370 (N.D. Ill. 1994).

[168] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

[169] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 575 (1972).

[170] 470 U.S. 532 at 541 (1985).

[171] *Id.*

existing procedures and the value of additional safeguards; and (3) the government's interest.[172]

Public employees subject to dismissal who have a property interest in their job created by common law or by statute (sometimes referred to as a "legitimate claim of entitlement") may not be discharged[173] or suspended[174] without due process. Thus, before taking an adverse employment action against an employee, a public entity must give such an employee notice of the charges against him or her, and an opportunity to be heard.

In *Loudermill,* the Supreme Court addressed the summary dismissal of a security guard on grounds he lied on his job application. The Court held that there must be a pre-termination hearing, though it need not be elaborate. It should serve as

> an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.... The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.[175]

However, temporary job suspension stands on a different footing. There, the Supreme Court has required only a prompt post-suspension hearing.[176]

Beyond employment claims, another example of a due-process violation is denial of eligibility to a disabled person for paratransit services, for disability rights have also been deemed civil rights. DOT has opined, "Once an entity has certified someone as eligible, the individual's eligibility takes on the coloration of a property right.... Consequently, before eligibility may be removed 'for cause'...the entity must provide administrative due process to the individual."[177]

Even where a property interest is not implicated, the government may not deny a person a benefit on a basis that infringes on his or her Constitutional rights, for such a decision would be patently arbitrary and discriminatory, and therefore a denial of due process.[178] Such un-Constitutional means, for example, might include deprivation of a privilege on grounds of racial discrimination,[179] or retaliation for exercise of free speech.[180] Vagueness in the standards governing public officials has led to claims of arbitrary and discriminatory conduct on behalf of transit officials in denying proposed bus advertising.[181]

### 3. Equal Protection

Another method of protection against discrimination is via the Equal Protection Clause of the 14th Amendment, which guarantees "a right to be free from invidious discrimination in statutory classifications and other governmental activity."[182] It requires that all similarly situated people be treated alike.[183] The Equal Protection Clause not only protects fundamental rights, and protects citizens against suspect classifications such as race, it also protects them from arbitrary and irrational state action.[184] Such a claim is analyzed under the

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[172] Mathews v. Eldridge, 424 U.S. 319 (1976). *See* Dimino v. N.Y. City Transit Auth., 64 F. Supp. 2d 136, 158–59 (E.D. N.Y. 1999) (holding that a transit employee who was involuntarily placed on medical leave for pregnancy suffered only a temporary loss of job and salary that was "relatively minor and correctable at a later point. Furthermore, the procedural safeguards that were in place, and the government's overwhelming interest more than satisfy the limited due process protections implicated."). *Id.* at 159.

[173] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 578 (1972).

[174] Gilbert v. Homar, 520 U.S. 924 (1997).

[175] 470 U.S. 532 at 546 (1985).

[176] Gilbert v. Homar, 520 U.S. 924 (1997). This case involved the suspension of a university police officer who was arrested and charged with drug offenses. Where the justification for suspension is not so clear cut, the courts may reach a different conclusion. *See, e.g.*, Winegar v. Des Moines Indep. Community Sch. Dist., 20 F.3d 895 (8th Cir. 1994).

[177] *Transportation for Individuals with Disabilities,* 56 Fed. Reg. 45584-01 (Sept. 6, 1991) (codified at 49 C.F.R. pts. 27, 37, and 38); 49 C.F.R. pt. 37, App. D. *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970).

[178] Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

[179] This was alleged in the Title VII employment context in Pate v. Alameda-Contra Costa Transit Dist., 697 F.2d 870 (9th Cir. 1983). Plaintiffs failed to prove a grooming code violated Title VII as sexual discrimination in Hearth v. Metropolitan Transit Comm'n, 436 F. Supp. 685 (D. Minn. 1977). Fare increases were not deemed to be arbitrary or discriminatory in D.C. Transit System, Inc. v. WMATA, 466 F.2d 384 (D.C. Cir. 1972).

[180] *See* Perry v. Sinderman, 408 U.S. 583 (1972). Examples in the general area of transportation include: International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (requiring that regulation limiting distribution of literature and solicitation to exterior of airport terminals be reasonable); Jacobsen v. Howard, 109 F.3d 1268 (8th Cir. 1997) (state regulation that bans newspaper machines from rest stops unreasonable infringement of newspaper's First Amendment rights); Jews for Jesus, Inc. v. Board of Airport Comm'rs, 785 F.2d 791 (9th Cir. 1986) (city ordinance that prohibits all U.S. Const. amend. I activity is unconstitutional).

[181] United Food and Commercial Workers Union v. Southwest Ohio Regional Transit Auth., 163 F.3d 341 (6th Cir. 1998).

[182] Harris v. McRae, 448 U.S. 297, 322 (1980).

[183] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

[184] Hamlyn v. Rock Island County Metro. Mass Transit District, 986 F. Supp. 1126 (C.D. Ill. 1997) (transit authority's reduced fare program violates the Equal Protection Clause because it discriminates against passengers with AIDS). In Hamlyn, because of his AIDS affliction, plaintiff had difficulty walking more than one block. However, the reduced fare program established by the transit agency excluded persons whose sole disability was AIDS from eligibility. The court found that AIDS was a qualifying disability under the ADA and Rehabilitation Act, and that discrimination against persons who have AIDS violates the 14th Amendment.

*McDonnell Douglas* burden-shifting framework for Title VII claims, described below.[185]

In a facial challenge, as opposed to an "as applied" challenge, of a governmental classification, a two-step analysis is pursued: (1) the plaintiff must first demonstrate that the state action, on its face, results in members of a certain group being treated differently from other individuals based on membership in the group;[186] (2) if it is proven a cognizable class is treated differently, the court assesses the appropriate level of scrutiny to determine whether the distinction between the groups is legitimate.[187] If the classification is one enumerated in the 14th Amendment (such as race-based), it is a "suspect classification," entitled to heightened scrutiny. However, if the classification is not suspect, courts review state action under the highly deferential "rational basis" test.[188] If the challenge to the state action is on an "as applied" rather than a "facial" basis, plaintiff must prove the presence of an unlawful intent to discriminate against him or her for an invalid reason.[189]

### 4. Free Speech

First Amendment free speech issues typically arise in five principal contexts for a transit operator: (1) when the employer attempts to restrict the speech of its employees; (2) when the transit provider seeks to restrict the speech of its patrons; (3) when the transit provider seeks to restrict advertising on its vehicles and facilities; (4) when the transit provider seeks to restrict the speech of members of the public who are not patrons, such as panhandlers and street musicians; and (5) when an employer retaliates against an employee for asserting his or her right to complain against employment conditions, or for otherwise speaking out on a matter of public concern.[190] The first four types are addressed in this section. The fifth type of First Amendment issue is discussed in Section 10.E.4.

When a public employer imposes restrictions on its employee's speech, the courts employ the balancing test set forth by the U.S. Supreme Court in *Pickering v. Board of Education*.[191] It requires the courts to balance the interests of the employee, as a citizen, in commenting on matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the service it provides. Even where the governmental purpose is legitimate, it cannot be pursued by overbroad means when more narrowly tailored alternatives exist.[192] Thus, a transit operator that imposed a rule prohibiting uniformed employees from wearing buttons, badges, or other insignia except by its permission was held to have imposed too broad a restriction. The employer attempted to justify the rule on grounds as being necessary for the transit system to operate in a "safe, efficient and harmonious fashion." The court observed that, "a properly drafted rule, narrowly tailored to apply only to uniformed employees in circumstances that place them into contact with the public, with proper justification in the record, would pass constitutional muster."[193]

A content neutral limitation may lawfully restrict speech if it is narrowly tailored to serve a substantial governmental interest; reasonably regulates the time, manner and place of speech; and leaves open alternative channels for expression.[194] The time, manner, and place restrictions are evaluated to determine whether the banned expression is basically incompatible with the normal activity of a location at a particular time.[195] The extent to which the government may regulate speech depends on the nature of the location in issue.[196] With respect to fora that are traditionally public (e.g., sidewalks, streets, and parks), or intentionally designated for expression, the government may only impose a content specific restriction if necessary to serve a compelling governmental interest, and if it is narrowly tailored to serve that purpose.[197] The Supreme Court has observed that airport terminals, like shopping malls, are not public fora.[198]

In *Jews for Jesus v. Massachusetts Bay Transportation Authority*,[199] the MBTA banned noncommercial expressive activity from the paid areas of all its subway stations, and from the free areas of 12 of its stations. MBTA claimed that its ban on leafleting was necessary to protect the public safety, insisting that "leafleting threatens public safety by disrupting passenger flow and by creating litter."[200] MBTA also claimed that leafleting encouraged pickpocketing, and that litter more adversely affects handicapped passengers and causes accidents and fires and other disruptions in service. However, the U.S. Supreme Court has invalidated bans on leafleting, dismissing the danger to traffic conges-

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[185] Schlesinger v. N.Y. City Transit Auth., 2001 U.S. Dist. Lexis 632 (S.D. N.Y. 2001).

[186] Jones v. Helms, 452 U.S. 412, 423–24 (1981).

[187] Plyler v. Doe, 457 U.S. 202, 217–18 (1982).

[188] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985).

[189] Snowden v. Hughes, 321 U.S. 1, 8 (1944).

[190] *See generally* NORMAN HERRING & LAURA D'AURI, RESTRICTIONS ON SPEEDY AND EXPRESSIVE ACTIVITIES IN TRANSIT TERMINALS AND FACILITIES (TCRP Legal Research Digest No. 10, 1998).

[191] 391 U.S. 563, 568 (1968).

[192] NAACP v. Ala., 377 U.S. 288, 307–08 (1964).

[193] Scott v. Myers, 191 F.3d 82, 86, 87 (2d Cir. 1999).

[194] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[195] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[196] Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985).

[197] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[198] International Soc'y of Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

[199] 984 F.2d 1319 (1st Cir. 1993).

[200] *Id*. at 1324.

tion, and recognizing it as a particularly unobtrusive form of expression.[201]

In *Jews for Jesus*, the First Circuit noted that MBTA "deliberately has invited into the subway system a range of expressive activities that can produce problems similar to those it attributes to leafleting,"[202] including business flyers, wandering newspaper hawkers, and the sale of food and beverages in disposable containers. The Supreme Court also has placed a heavier burden of justification for bans against the solicitation of signatures in public places.[203] However, the First Circuit noted that the transit authority may legitimately ban expressive activity during crowded peak hours when the dangers to the public are enhanced.[204]

In upholding a restriction on leafleting in order for SEPTA to provide "comfortable, efficient and safe commercial transit service," a federal district court concluded, "Because the platforms and paid areas are nonpublic fora, SEPTA may regulate and even entirely ban expression in them so long as the regulations are viewpoint-neutral and reasonable."[205]

In *Wright v. Chief of Transit Police*,[206] the First Circuit evaluated the decision of the New York City Transit Authority (NYCTA) to ban the effort of members of the Socialist Workers Party to sell its newspapers in the subway by hand and try to engage interested persons in conversations to persuade them to buy the newspapers. The court expressed sympathy for NYCTA's concern over its passengers' safety and convenience, space limitation, and possible inundation of its facilities by others who would seek the same rights. Nonetheless, the court insisted that the transit authority devise a means more narrowly tailored to protect those legitimate objectives other than a complete ban.[207]

In *Young v. New York City Transit Authority,*[208] the Second Circuit upheld a prohibition against begging and panhandling in the New York City subway system. Concluding that begging was more conduct than speech, the court expressed "grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection."[209] The court noted that, "The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment."[210] Even if there were some protected speech in panhandling, the court observed that the purpose of the prohibition served legitimate public interests unrelated to the suppression of free speech and was content neutral; moreover, the court noted that the subway system was not a public forum.

Finally, the U.S. Supreme Court has broadly upheld a transit operator's or transit regulator's decision to impose content neutral restrictions or prohibitions on advertising. In *Lehman v. City of Shaker Heights*,[211] the Court upheld an advertising ban in transit vehicles. The court observed,

> In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles…. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.[212]

Transit systems tend to begin the defense of advertising and other restrictions by reliance on *Lehman* in general, and *Lehman's* "captive audience" language in particular. However, there has been much academic criticism of *Lehman*, a 5-4 decision.[213]

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[201] International Soc'y of Krishna Consciousness v. Lee, 505 U.S. 672 (1992). The Supreme Court has also noted that littering is the fault of the litterbug, not the fault of the leafleter. Schneider v. State, 308 U.S. 147, 162 (1939).

[202] 984 F.2d 1319, 1325 (1st Cir. 1993).

[203] Meyer v. Grant, 486 U.S. 414, 421 (1988).

[204] 984 F.2d 1319, 1326 (1st Cir. 1993).

[205] Stori v. Southeastern Transp. Auth., 1999 U.S. Dist. Lexis 14515 (E.D. Pa. 1999).

[206] 558 F.2d 67 (2d Cir. 1977).

[207] 558 F.2d 67, 68 (2d Cir. 1977).

[208] 903 F.2d 146 (2d Cir. 1990).

[209] 903 F.2d at 153.

[210] 903 F.2d at 154.

[211] 418 U.S. 298 (1974).

[212] 418 U.S. at 303, 304.

[213] For example, Professor William Lee wrote:

> The ban appeared to be facially neutral because it was directed at all candidates rather than those of one party. Yet the transit system advertisements were not of equal value to all candidates. Testimony in Lehman revealed that most of the transit system's riders were residents of the state assembly district Lehman sought to represent…. Thus, the ban's effects on Lehman were different than the effect on a candidate who needed to reach residents of a large area or who had greater financial resources. The plurality, however, failed to consider the possibility of the ban's disparate effects.

William Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression,* 54 GEO. WASH. L. REV. 757, 775 (1986) [citations omitted]. *See also* Sidney Buchanan, *The Case of the Vanishing Public Forum,* 1991 U. ILL. L. REV. 949 (1991), and Matthew McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine,* 52 STAN. L. REV. 929 (2000).

> The candidate argued that the transit cars were public forums and that the city policy impermissibly discriminated on the basis of message content. A plurality of the Court, however, upheld the policy despite its subject matter categorization. Instead of applying either the stringent scrutiny applicable to content-based restrictions in public forums, or the intermediate scrutiny applicable to content-neutral, public forum time, place, and manner restrictions, the plurality simply determined that the transit cars were not public forums and then asked whether the challenged policy was "arbitrary, capricious, or invidious."

Barbara Gaal, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property,* 35 STAN. L. REV. 121, 128–29 (1982) [citations omitted]. For an argument that these restrictions are Constitutionally impermissible, *see* Michael

In *Children of the Rosary v. City of Phoenix*,[214] a case closely following the *Lehman* analysis, the U.S. Court of Appeals for the Ninth Circuit upheld a city's ban on bus noncommercial advertising. A religious group was denied the opportunity to advertise the sale of its anti-abortion bumper stickers. The court held that advertising panels on a bus are nonpublic fora, for which the city was proprietor, and as such, could regulate the types of advertising sold if advertising standards were reasonable and nondiscriminatory. The regulations were deemed a reasonable effort to advance the city's interest in protecting revenue and maintaining neutrality on political and religious issues.

## E. EMPLOYMENT DISCRIMINATION

### 1. Types of Unlawful Employment Practices

As enumerated in Section 10.B above, several federal statutes declare it unlawful to discriminate in any area of employment, including:

- Hiring and firing;
- Compensation, assignment, or classification of employees;
- Transfer, promotion, layoff, or recall;
- Job advertisements;
- Recruitment;
- Testing;
- Use of company facilities;
- Training and apprenticeship programs;
- Fringe benefits;
- Pay, retirement plans, and disability leave; or
- Other terms and conditions of employment.[215]

In order to enforce these federal statutes, an aggrieved person must follow the procedures discussed below.

### 2. Exhaustion of Administrative Remedies

To preserve the right to bring a lawsuit for discrimination on the basis of race, color, sex, religion, national origin, age, or disability under Title VII, a plaintiff must first file an administrative complaint with the Equal Employment Opportunity Commission (EEOC) within 180 days, or the corresponding state agency (also known as "Fair Employment Practices Agencies") within 300 days, of the alleged discriminatory action,[216] and obtain a right-to-sue letter.[217] If there is a corresponding state agency in the jurisdiction, transit counsel should obtain and review a copy of the work-sharing agreement between the EEOC and the state agency.[218]

A complaining party must file a written charge of discrimination. Once a charge of discrimination has been filed it may be assigned for priority investigation if the facts suggest a violation of law. If the evidence is not so compelling, it may be assigned for a follow up investigation to determine whether a violation has occurred. If the EEOC deems the claim meritorious, it sends a copy

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Garvey, *Next Stop Censorship: A Facial Challenge to the Metropolitan Transportation Authority's Newly Adopted Advertising Standards,* 72 ST. JOHN'S L. REV. 485 (1998).

[214] 154 F.3d 972 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

[215] U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers* (last modified June 27, 2001), http://www.eeoc.gov/facts/qanda.html.

Applicants for FTA funding must certify that they will comply with all statutes relating to nondiscrimination, including:

- Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, prohibits discrimination on the basis of race, color, or national origin;
- Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, 1683, and 1685 through 1687, prohibits discrimination on the basis of sex;
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination on the basis of handicaps;
- The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101 through 6107, prohibits discrimination on the basis of age;
- The Drug Abuse Office and Treatment Act of 1972, Pub. L. 92-255, Mar. 21, 1972, provides for nondiscrimination on the basis of drug abuse;
- The Comprehensive Alcohol Abuse and Alcoholism Prevention Treatment & Rehabilitation Act of 1970, Pub. L. 91-616, Dec. 31, 1970, provides for nondiscrimination on the basis of alcohol abuse or alcoholism;
- The Public Health Service Act of 1912, 42 U.S.C. §§ 290dd-3 and 290ee-3, provides for confidentiality of alcohol and drug abuse patient records;
- Title VIII of the Civil Rights Act, 42 U.S.C. § 3601 *et seq*., provides for nondiscrimination in the sale, rental, or financing of housing; and
- Section 1101(b) of the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101 note, provides for participation of disadvantaged business enterprises in FTA programs.

[216] Miles v. N.Y. City Transit Auth., 1999 U.S. App. Lexis 13970 (2d Cir. 1999).

[217] 42 U.S.C. § 2000e-5(e) (2000). The same deadlines apply to complaints filed under the Americans with Disabilities Act and the Age Discrimination in Employment Act.

[218] The EEOC enforces the following laws: (1) Title VII of the Civil Rights Act, 42 U.S.C. § 2000 (1964). Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination; (2) the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963). The Equal Pay Act of 1963 prohibits discrimination on the basis of gender in compensation for substantially similar work under similar conditions; (3) the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (1967). The Age Discrimination in Employment Act of 1967 prohibits employment discrimination against individuals 40 years of age and older; (4) the Rehabilitation Act of 1973, §§ 501 & 505, 29 U.S.C. § 701 (1973). Section 501 of the Rehabilitation Act of 1973 prohibits employment discrimination against federal employees with disabilities; (5) the Americans with Disabilities Act of 1990, tits. I and V, 42 U.S.C.S. § 12101 (1990). Title I of the Americans with Disabilities Act of 1990 prohibits employment discrimination on the basis of disability in both the public and private sector, excluding the federal government; and (6) the Civil Rights Act of 1991, 42 U.S.C. 2000e-2(m) (1991). The Civil Rights Act of 1991 includes provisions for monetary damages in cases of intentional discrimination and clarifies provisions regarding disparate impact actions.

of the Charge to the respondent. At this point, the transit agency should prepare a detailed position statement, with the assistance of experienced civil rights/labor defense counsel. The EEOC will submit a request for information to which the transit agency and its attorney should prepare a detailed response. Upon completion of the investigation, EEOC will discuss the evidence with the charging party or the employer. If both the charging party and the employer agree, the dispute may be set for confidential mediation. EEOC can also seek to settle a charge at any time during the investigation. If the EEOC concludes there is no violation of law, the charge may be dismissed. Upon dismissal, the charging party is given notice, and 90 days to file suit.

If the EEOC determines that unlawful discrimination has occurred, and is unable to successfully conciliate or mediate the case, it decides whether to bring suit in federal court. If it declines to file suit, it will issue a notice closing the case, giving the charging party 90 days to file suit in his or her own behalf.[219] The charging party may also request the EEOC to issue a right-to-sue letter at any time. Due to the heavy backlog of charges to investigate, the EEOC in most instances issues the right-to-sue letter and administratively closes its file. However, the issuance of a right-to-sue letter to a requesting charging party does not preclude the EEOC from initiating litigation in its own name (if timely initiated) or participating in litigation initiated by the charging party.

The exhaustion of administrative remedies and adequate notice to the employer are essential elements of Title VII's remedial scheme. Failure to file a charge of discrimination with the EEOC deprives the courts of subject matter jurisdiction over the claim.[220] The purpose of the notice provision is to encourage voluntary settlement of discrimination claims through conciliation and compliance.[221] Likewise, the charge must be timely filed. The purpose of this requirement is to prevent the filing of stale claims and to afford the employer and the Commission the opportunity to investigate charges while witnesses' recollections are fresh and documentary evidence is available.

A plaintiff is barred from raising claims in a lawsuit that were not included in, or reasonably related to,[222] its charge before the administrative agency.[223] Hence, the scope of judicial review is limited to the scope of the EEOC investigation that can reasonably be expected to grow out of the discrimination allegation.[224] Thus, where a transit employee has brought only a sex discrimination claim before the EEOC, she may not subsequently pursue race discrimination and retaliation claims before a federal court.[225]

### 3. Three-Part Discrimination Analysis

The purpose of Title VII is to eliminate discrimination on the basis of race, color, religion, sex, or national origin.[226] Employment discrimination cases brought under Title VII fall in one of two categories—"mixed-motive" cases (or direct method), or "pretext" cases (or indirect method).

In mixed-motive cases, the plaintiff must prove by direct or strong circumstantial evidence of discriminatory intent the existence of a prohibited discriminatory factor that played a "motivating part" in an adverse employment action. As an example, plaintiff might prove that a decision-maker uttered discriminatory remarks evidencing hostility to a protected group,[227] or that such remarks were issued by one who tainted the decision-maker's judgment, if related to the decisional process on the adverse employment action.[228] But if the discriminatory remarks are unrelated to the employment decision and amount to no more than "stray remarks," discriminatory intent may not be proven.[229] If plaintiff proves discriminatory intent, the burden shifts to the defendant to prove that it would have made the same decision anyway.[230] Usually, discriminatory motivation is

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[219] U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers* (last modified June 27, 2001), http://www.eeoc.gov/facts/qanda.html.

[220] Sotolongo v. N.Y. City Transit Auth., 63 F. Supp. 2d 353, 360 (S.D. N.Y. 1999).

[221] Adams v. N.J. Transit Rail Operations, 2000 U.S. Dist. Lexis 2154 (S.D. N.Y. 2000).

[222] A claim is deemed reasonably related to the original charge where "the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Butts v. City of N.Y. Dep't of Housing Preservation and Dev., 900 F.2d 1397, 1401 (2d Cir. 1993); Sotolongo v. N.Y. City Transit Auth., 63 F. Supp. 2d 353, 360 (S.D. N.Y. 1999).

[223] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Allen v. Chicago Transit Auth., 2000 U.S. Dist. Lexis 937 (N.D. Ill. 2000).

[224] Sanchez v. Standard Brands, 431 F.2d 455 (5th Cir. 1970).

[225] Fowler v. N.Y. Transit Auth., 2001 U.S. Dist. Lexis 762 (S.D. N.Y. 2001).

[226] Trans World Airlines v. Hardison, 432 U.S. 63 (1977); King v. Wilmington Transit Co., 976 F. Supp. 356 (E.D. N.C. 1997).

[227] Castleman v. Acme Boot Co., 959 F.2d 1417, 1420 (7th Cir. 1992) (but such remarks are "rarely found.").

[228] Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989).

[229] Robinson v. Chicago Transit Auth., 1999 U.S. Dist. Lexis 8994 (N.D. Ill.1999). In Robinson, the alleged 'stray remarks' deemed unrelated to the employment decision included: (1) a statement by the foreman that "You black people are all the same. You take all day to do something."; (2) a statement by the line leader that he did not "care for blacks."; (3) a statement by the manager, "I don't care for black people in particular.… I appreciate your black ass staying out of my office."; (4) a statement by the manager, "I don't like you as a black person."; and (5) a statement by the general manager that blacks were "hard headed" and "harder to teach." The court held, "Collectively, these remarks do not paint a convincing mosaic of intentional discrimination." *Id*. at 12.

[230] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

proven by adducing policy documents, statements, or actions that exhibit a discriminatory attitude.[231]

More common are pretext cases. In pretext cases, courts use the burden-shifting framework for employment discrimination first articulated by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green.*[232] The framework for judicial assessment of a Title VII claim of discrimination under *McDonnell Douglas* involves a three-step process. First, the plaintiff must establish a *prima facie* case of discrimination. If he succeeds, the burden shifts to the defendant to show a legitimate, nondiscriminatory justification for the employment action. If the defendant does so, the burden shifts again to the plaintiff to prove that the reasons advanced by the defendant were specious, and that its true motivation was discrimination. The ultimate burden of proof, however, resides with the plaintiff. This allocation of the burden of production is explained in greater detail as follows:

### *a. Plaintiff's Prima Facie Case*

First, the plaintiff has the burden of proving, by a preponderance of the evidence, a *prima facie* case of discrimination. To prove a *prima facie* case of employment discrimination, a plaintiff must prove that (1) he or she is a member of a protected class, (2) who was qualified for the position, or was performing satisfactorily in it, (3) who suffered an adverse employment action (e.g., was not hired for, or was fired from the position), (4) under circumstances to give rise to an inference of discrimination based on his or her membership in the protected class.[233] A plaintiff may satisfy this either by offering direct proof of discriminatory intent, or proving disparate treatment.[234] Direct proof of discriminatory intent can be difficult for plaintiffs to establish. Employers rarely include a notation in the employee's personnel file that their actions are motivated by illegal factors.[235] Because the employer rarely leaves a "smoking gun" of illegitimate intent, a plaintiff is rarely able to prove discrimination by direct evidence and must instead rely on circumstantial evidence.[236]

In the seminal case of *Griggs v. Duke Power Co.,*[237] the U.S. Supreme Court created the disparate impact theory of discrimination, recognizing that Title VII was designed not only to prescribe overt discrimination, but also to prohibit "practices that are fair in form, but discriminatory in operation."[238] According to the Court, what is required by Title VII is "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial and other impermissible classification."[239] In order to establish a *prima facie* case of disparate impact, plaintiff must establish that application of a facially neutral standard has resulted in a significantly discriminatory hiring pattern,[240] or that a facially neutral employment practice falls more harshly on a protected group.[241] Such circumstantial evidence may consist, for example, in proof that the employer continued to seek applications from persons of plaintiff's qualifications after it dismissed him, invidious comments about others in the employee's protected group, more favorable treatment of employees not in the protected group, the sequence of events before plaintiff's discharge, or the timing of the discharge.[242]

A plaintiff pursuing a Title VII claim may rely either on disparate impact or disparate treatment.[243] Under the disparate treatment theory, a plaintiff must establish that the employer intentionally discriminated against a member of the protected class.[244]

### *b. Defendant's Burden*

Under the second stage of the *McDonnell Douglas* analysis, if plaintiff has established a *prima facie* case

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[231] Ralkin v. N.Y. City Transit Auth., 62 F. Supp. 2d 989, 998 (E.D. N.Y. 1999)

> (While a plaintiff's burden of establishing a prima facie case of discrimination is de minimus, she cannot meet this burden through conclusory or unsupported assertions. In this case, plaintiff has submitted no evidence, not even her own sworn affidavit, in support of her conclusory assertion that she performed her work satisfactorily. Rather, the record in this case shows that plaintiff received numerous unsatisfactory evaluations of her work performance from at least four different NYCTA employees and supervisors)

[citations omitted].

[232] 411 U.S. 792 (1973).

[233] Shumway v. United Parcel Service, 118 F.3d 60, 63 (2d Cir. 1997); Chambers v. TRM Copy Centers, 43 F.3d 29, 37 (2d Cir. 1994).

[234] Stockett v. Muncie Ind. Transit System, 221 F.3d 997 (7th Cir. 2000) (plaintiff failed to offer satisfactory proof that he was treated differently than non-black employee when drug tested).

[235] Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994).

[236] *Id.* at 37.

[237] 401 U.S. 424 (1971).

[238] 401 U.S. at 431.

[239] *Id.*

[240] Dothard v. Rawlinson, 433 U.S. 321 (1977).

[241] Proof of disparity can be demonstrated through a statistical analysis that compares the impact of an employment practice on a protected class vis-à-vis the labor pool. Duncan v. N.Y. City Transit Auth., 127 F. Supp. 2d 354, 2001 U.S. Dist. Lexis 711 (E.D. N.Y. 2001). The EEOC employs a four-fifths rule, whereby a selection rate for any protected class that is less than four-fifths (80 percent) of the rate for the group with the highest rate is generally regarded as evidence of adverse impact, whereas a greater than four-fifths rate is not generally considered evidence of adverse impact. 29 C.F.R. § 1607.4D (1999).

[242] *See* Ralkin v. N.Y. City Transit Auth., 62 F. Supp. 2d 989, 995 (E.D. N.Y. 1999), discussed above, and cases cited therein.

[243] Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986–87 (1988), Citing Griggs v. Duke Power Co., *supra*.

[244] Dist. Council 37, American Fed. of State, County & Mun. Employees, AFL-CIO v. N.Y. City Dep't of Parks and Recreation, 113 F.3d 347, 351 (2d Cir. 1997).

of discrimination, the burden shifts to the defendant to "articulate some legitimate, non-discriminatory reason" for the employment action.[245] The employer must show that the employment practice is "job related for the position in question and consistent with business necessity…."[246] The second prong of the three-step process—whether the employer has a legitimate nondiscriminatory business justification for its action—was elucidated in *Lanning v. Southeastern Pennsylvania Transportation Authority*,[247] a case that evaluated whether a physical fitness test (which included a requirement that applicants complete a 1.5 mile run within 12 minutes) measures the minimum aerobic capacity necessary to perform the job of a SEPTA transit officer, and therefore constituted a "business necessity."[248] According to the Third Circuit U.S. Court of Appeals, to survive a disparate impact challenge, a discriminatory cutoff score must be proven to measure the minimum qualifications necessary for successful performance of the job in question.[249] Other cases have found pursuing a reduction-in-force and reorganization of staff arising from budgetary constraints to be a legitimate business reason.[250] But even during such legitimate workforce reductions, an employer may not dismiss employees for illegitimate discriminatory reasons.[251] Other courts have found that "poor work performance, abuse of company time, and other rule violations" constitute a legitimate reason for dismissal.[252]

[245] The defendant need not "persuade the court that it was actually motivated by the proffered reasons." Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248, at 245 (1981). Instead, the "employer's burden here is one of production of evidence rather than one of persuasion." *Id*. Once a defendant offers a nondiscriminatory reason for its actions, the presumption established by plaintiff's *prima facie* case "drops out of the picture." St. Mary's Honor Center v. Hicks, 509 U.S. 502 at 511 (1993).

[246] 42 U.S.C. § 2000e-k (2000).

[247] 181 F.3d 478 (3d Cir. 1999).

[248] This standard was evaluated in detail in Lanning v. Southeastern Pa. Transp. Auth., 181 F.3d 478 (3d Cir. 1999). The trial court's decision that testing a transit police candidate's aerobic ability was job related and consistent with business necessity, and did not constitute a violation of the Civil Rights Act of 1991, was reversed by the Court of Appeals. Pass rates were significantly lower for women than men; thus, a facially neutral standard had resulted in a discriminatory hiring pattern. The Court of Appeals held that the test failed the business necessity doctrine.

[249] 181 F.3d at 494.

[250] Duncan v. N.Y. City Transit Auth., 2001 U.S. Dist. Lexis 711 (E.D. N.Y. 2001) (Plaintiff's performance was sub-par, the RIF was performed objectively, and the job termination was not age based, as alleged).

[251] Maresco v. Evans Chemetics, 964 F.2d 106, 111 (2d Cir. 1992).

[252] Robinson v. Chicago Transit Auth., 1999 U.S. Dist. Lexis 8994 (N.D. Ill. 1999) (Plaintiff exhibited

> a pattern of poor work performance, abuse of company time, insubordination, and other rule violations. He was formally disciplined about nine different times, received numerous verbal and written warnings and suspensions, and attended several corrective interviews. Plaintiff's work performance issues included excessive use of the telephone, leaving his assigned work location early, arriving at work late, sleeping at his work location, failing to properly clean engine parts, beginning his lunch break early and returning from lunch late, taking too long to perform tasks within proscribed time periods, failing to perform observable work for a significant period of time, leaving the building without permission, leaving his assigned work location, and refusing directions to return to work.),

*Id*. at 4.

*c. Plaintiff's Rebuttal*

Under the third and final step of *McDonnell Douglas* analysis, if the defendant provides a nondiscriminatory reason for the employment action, the presumption of discrimination "simply drops out of the picture,"[253] and the governing standard is whether the evidence, taken as a whole, reasonably supports an inference of intentional discrimination.[254] The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated remains at all times with the plaintiff.[255]

Specifically, the plaintiff must prove that the legitimate reasons offered by the defendant were not its true reasons, but were instead a pretext[256] for discrimination.[257] To prove pretext, plaintiff may show that the proffered reason either (1) has no basis in fact, (2) did not actually motivate the adverse employment action taken, or (3) was insufficient to motivate the adverse action taken.[258] Plaintiff must prove through either di-

[253] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 at 511 (1993).

[254] Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000).

[255] Stockett v. Muncie Ind. Transit System, 221 F.3d 997, 1000 (7th Cir. 2000).

[256] "Pretext means more than a mistake on the part of the employer; pretext 'means a lie, specifically a phony reason for some action.'" Wolf v. Buss (America) Inc., 77 F.3d 914, 919 (7th Cir. 1996) (quoting Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995)).

[257] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In other words, plaintiff must prove (1) that there is a material issue of fact as to the truthfulness of the employer's alleged reason for the adverse employment, and (2) by a preponderance of the evidence, that discriminatory animus was the real reason. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993). The plaintiff fails where he or she introduces "no evidence that the true motivation for the defendant's actions was illegal discrimination." Clark v. N.Y. City Transit Auth., 1999 U.S. App. Lexis 32729 (2d Cir. 1999). An individual who is transferred in an effort to induce resignation or to harass may sustain an action under Title VII. In the instant case, when the prima facie case was spelled out and the burden shifted to the employer, the plaintiff failed to rebut defendant evidence of nondiscriminatory reasons for transfer.

[258] O'Connor v. DePaul Univ., 123 F.3d 665 (7th Cir. 1997); Schrean v. Chicago Transit Auth., 1999 U.S. Dist. Lexis 16614 (E.D. Ill. 1999) (indirect evidence of sexual discrimination failed to prove that 1-day suspension for tardiness established a discriminatory pretext); Jones v. Wash. Metro. Area Transit

rect, statistical, or circumstantial evidence that the employer's reason is false, and that it is more likely than not that a discriminatory reason motivated the adverse employment action.[259] The plaintiff may also prevail if he or she can prove that an alternative employment practice with a less disparate impact would also serve the employer's legitimate business interest.[260]

### 4. Retaliation Claims

Retaliation claims may arise under (1) the First Amendment to the United States Constitution; (2) similar provisions of the state constitution; (3) the retaliation provisions of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the ADA, and similar statutes; and (4) similar state civil rights statutes.

The First Amendment of the U.S. Constitution prohibits the discharge of a public employee for the exercise of Constitutionally protected speech.[261] An employer may not lawfully retaliate against an employee for the exercise of his or her free speech rights.[262] Such a claim against a public transit operator can be brought under Section 1983, as discussed above.

Claims brought under either the First Amendment's Right to Petition Clause or the Free Speech Clause are governed by the interest balancing test, balancing the interests of the employee, as a citizen (in commenting on matters of public concern), against the interests of the government, as an employer (in promoting the efficiency of the workplace and its services). Under either clause, plaintiff must prove (1) he or she spoke out on a matter of public concern, and (2) he or she was retaliated against because of such speech.[263] The fundamental question is whether the speech in question may be "fairly characterized as constituting speech on a matter of public concern."[264] Whether particular speech addresses a matter of public concern must be determined by the content, form, and context of the statement.[265] The court focuses on the motive of the speaker to determine whether the speech was calculated to redress personal grievances (such as his or her personal dissatisfaction with the conditions of employment) or whether the speech has a broader public purpose.[266]

Title VII also prohibits retaliation against employees who have opposed allegedly illegitimate employment practices: "It shall be an unlawful employment practice for an employer to discriminate against an employee…because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this subchapter."[267] To establish a *prima facie* case of retaliation, a plaintiff must prove: (1) participation in a protected activity under Title VII (such as filing an EEOC complaint);[268] (2) such participation is known to the retaliator;[269] (3) an

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Auth., 205 F.3d 428 (D.C. Cir. 2000) (retaliation by termination as a result of the filing of a sexual harassment complaint will sustain plaintiff's claim of discriminatory pretext:

> Of the three reasons Miller offered in his October 30, 1987 letter for not promoting Jones, the district court reasonably rejected as pretextual two: Jones's "marginal" test score, because it was higher than the score of another employee who *was* promoted, and the instance when she gave a cash refund to a customer, because the court found her action consistent both with the Metrorail Handbook and with a Department directive. In contrast, the court accepted Miller's third reason, that Jones had "transmitted [her] personal views to [her] subordinates," as "more plausible—but violative of Title VII" because it reflected retaliation for protected activity, namely, the 1985 letter to Bassily complaining of Department discrimination. Because the court's findings of pretext and of retaliation as to the promotion claim are supported by the evidence, they are not clearly erroneous.)

[citations omitted]. *Id*. at 433.

[259] Gallo v. Prudential Residential Services, 22 F.3d 1219, 1255 (2d Cir. 1994). St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).

[260] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

[261] Rankin v. McPherson, 483 U.S. 378, 383 (1987); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 282–84 (1977).

[262] Connick v. Myers, 461 U.S. 138, 140 (1983) ("A public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.").

[263] White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1058 (2d Cir. 1993).

[264] Connick v. Myers, 461 U.S. 138, 146 (1983).

[265] *Id*. at 147–8 (1983).

[266] Schlesinger v. N.Y. City Transit Auth., 2001 U.S. Dist. Lexis 632 (S.D. N.Y. 2001) at 17, 18 (The speech in question contained plaintiff's complaints about, among other things, inadequate job description, salary, and improper classification as an employee. The court found that the statements were general in nature and related to his own personal situation, and thus did not give rise to a claim under U.S. Const. Amend. I.:

> Plaintiff's claim of retaliation is based on the following events: (1) plaintiff's October 25, 1999 memorandum to Gorman complaining of his inadequate job description and inadequate salary; (2) plaintiff's January 5, 2000 meeting with the IG, during which he complained of "fraud"; and (3) plaintiff's February 4, 2000 letter to Gorman complaining of his and his co-workers' workload and of his erroneous classification and Hay Point rating…. None of these statements addressed a matter of public concern. All of plaintiff's comments "were personal in nature and generally related to [his] own situation." Plaintiff was not speaking as a citizen, but rather as an employee complaining of his own labor dispute. Even though plaintiff's complaints of his heavy workload also addressed the workload of his co-workers, such speech does not constitute a matter of public concern because it related primarily "to plaintiff's personal circumstance and was motivated purely by self-interest.)

[citations omitted].

[267] 42 U.S.C. § 20003-3(a).

[268] Plaintiff need only prove a good faith belief that the activity was of a kind protected under Title VII. Fowler v. N.Y. Transit Auth., 2001 U.S. Dist. Lexis 762 (S.D. N.Y. 2001). Filing of an EEOC complaint is a protected activity. Dimino v. N.Y. City Transit Auth., 64 F. Supp. 2d 136, 155 (E.D. N.Y. 1999).

[269] Plaintiff need not show that individual decision-makers within the transit agency knew that he or she had made a complaint; there need only be general corporate knowledge that the plaintiff engaged in the protected activity. Fowler v. N.Y. Transit Auth., 2001 U.S. Dist. Lexis 762 (S.D. N.Y. 2001).

adverse employment action based on the employee's activity;[270] and (4) a causal connection between the protected activity and the employment action.[271] If plaintiff proves a *prima facie* case of retaliation, the burden shifts in the *McDonnell Douglas* manner described above to the defendant to demonstrate a legitimate, nondiscriminatory reason for the adverse employment action.[272] If the defendant does so, the plaintiff must prove that the defendant's proffered reason was merely a pretext for retaliation.[273]

For example, in *Adams v. New Jersey Transit Rail Operations,*[274] a federal district court concluded that a rail transit car cleaning employee made out a *prima facie* case of retaliation by proving her employer was aware she had filed a sex discrimination grievance with her union, and that the employer denied her the higher rate of pay associated with the tasks she was performing in close temporal proximity to the filing of her complaint.[275]

### 5. Hostile Work Environment

Title VII guarantees employees within Title VII's coverage the right to a workplace free from discriminatory intimidation, ridicule, and insult.[276] In order to establish a *prima facie* case of a hostile work environment, a plaintiff must prove that the workplace is permeated with discriminatory intimidation, ridicule, and insult.[277] To violate Title VII, the harassing conduct must be so offensive or pervasive that a reasonable person would conclude that it is hostile or abusive.[278] To determine whether the environment is hostile, the conduct must be examined in the totality of the circumstances.[279] In assessing whether a hostile environment exists, one must consider the "quantity, frequency, and severity of the racial, ethnic, or sexist slurs,"[280] and whether it interferes unreasonably with an employee's work performance.[281]

Isolated or sporadic incidents of discrimination do not usually create an unlawful sexually or racially hostile environment in violation of Title VII.[282] For example, isolated verbal abuse, intimidation, and racial epithets without more may not give rise to a Title VII claim.[283]

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[270] An "adverse employment action" is a material adverse change in the terms and conditions of employment. It must be more than a mere inconvenience or alteration in job conditions and responsibilities. It might be indicated, for example, by an employment termination, demotion, a less distinguished title, material loss of benefits, or significantly diminished responsibilities. Galabya v. N.Y. City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). A Lilliputian accumulation of numerous small employment actions may in the aggregate constitute an adverse employment action. As noted in one transit case:

> The actions could be viewed as a series of incidents which diminished the responsibilities the plaintiff had been exercising, humiliated the plaintiff, and substantially changed the conditions under which the plaintiff had been performing her job. The evidence at trial also indicated that the first of the series of actions that the plaintiff complained of as being retaliatory…occurred the day after she complained of discrimination and that other incidents occurred in sufficiently close proximity to protected activity to raise a strong inference of retaliation.

Fowler v. N.Y. Transit Auth., 2001 U.S. Dist. Lexis 762 (S.D. N.Y. 2001) at 22.

[271] DeCintio v. Westchester County Medical Center, 821 F.2d 111, 115 (2d Cir.), *cert. denied*, 434 U.S. 965 (1987). The causal connection may be proven indirectly by showing that the protected activity was proximate in time to the adverse employment action. Fowler v. N.Y. Transit Auth., 2001 U.S. Dist. Lexis 762 (S.D. N.Y. 2001). It may also be proven by showing that similarly situated individuals were treated differently. Malarkey v. Texaco, Inc., 983 F.2d 1204, 1213 (2d Cir. 1993).

[272] The plaintiff needs merely to establish facts sufficient to permit an inference of retaliatory motive to shift the burden to the defendant to adduce nondiscriminatory reasons for the adverse employment action. Ostrowski v. Atlantic Mut. Ins. Co., 968 F.2d 171, 182 (2d Cir. 1992).

[273] Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998); Sotolongo v. N.Y. City Transit Auth., 63 F. Supp. 2d 353, 360 (S.D. N.Y. 1999) (NYCTA prevailed on motion to dismiss by submitting evidence of defendant's well-documented psychological problems, threats of violence, and history of insubordination. Such evidence was enough to disprove a discriminatory pretext for retaliation.) Sotolongo v. N.Y. City Transit Auth., 2000 U.S. App. Lexis 14161 (2d Cir. 2000)

> (Assuming for the purposes of this appeal that Sotolongo has articulated a prima facie case of discrimination, it is clear that the TA has articulated a legitimate, non-discriminatory reason for his four-month suspension without pay. Although Sotolongo contests the district court's finding that he had a "history of insubordination," it is common cause that he had repeatedly been diagnosed with psychological problems and that psychologists had questioned his ability to work. Moreover, he does not contest that during the incident on February 14, 1995 he refused work instructions and issued threats of violence. Under these circumstances, the TA's concerns over Sotolongo's psychological stability and the safety of those around him suffice to articulate a reason for suspension that is independent of age or national origin. Moreover, Sotolongo has produced no evidence that these reasons were pretextual. There is no evidence that Sotolongo's superiors were even aware of his national origin. The alleged comment by his arresting officer is irrelevant to his employment. And Sotolongo has produced no evidence that his supervisors took his age into account when they suspended him after the February 14, 1995 incident.)

*Id*. at 7, 8.

[274] 2000 U.S. Dist. Lexis 2154 (S.D. N.Y. 2000).

[275] *Id*. at 47.

[276] Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986).

[277] Harris v. Forklift System, Inc., 510 U.S. 17 (1993).

[278] Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[279] Kotcher v. Rosa and Sullivan Appliance Ctr., 957 F.2d 59, 63 (2d Cir. 1992).

[280] Vore v. Ind. Bell Tel. Co., 32 F.3d 1161, 1164 (7th Cir. 1994).

[281] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

[282] Baskerville v. Culligan Intern. Co., 50 F.3d 428, 430–31 (7th Cir. 1995).

[283] Adams v. N.J. Transit Rail Operations, 2000 U.S. Dist. Lexis 2154 (S.D. N.Y. 2000) (Female African-American and Hispanic

> Plaintiffs broadly allege they were subject to verbal intimidation and threats (e.g., "It was not uncommon on any given day to have a General Foreman, Assistant Manager or a foreman yelling and screaming at me") and Richardson asserts that at some unspecified time someone stated to her "Oh so you want to be a

The U.S. Supreme Court has held that "'a mere utterance of an epithet which engenders offensive feelings in an employee,' does not sufficiently affect the conditions to implicate Title VII."[284] The harassment must be "extreme."[285] But where a plaintiff has established evidence of sexually or racially vicious epithets, physically intimidating or humiliating action, or a pattern of such behavior over an extended period of time, a claim for a hostile work environment has prevailed.[286]

In addition to demonstrating a hostile environment, plaintiffs must impute such harassment to the employer. An employer is liable for a supervisor's harassment if his or her acts fell within the scope of his authority or were foreseeable, and the employer failed to take remedial action.[287] An employer is only liable for the acts of its employees in creating a hostile work environment where it knew or should have known of the employees' actions and failed to take appropriate remedial action.[288] Appropriate action must be prompt, and likely to prevent future harassment.[289] As the U.S. Supreme Court held in *Faragher v. City of Boca Raton*,[290]

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence….

"The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[291] The failure of the employee to report a racial epithet to the employer may thwart the imputation of liability.[292]

Where an employer takes action to prevent and promptly correct any harassing behavior, and the employee fails to take advantage of such corrective or preventive procedures, the employee may not prevail on a Title VII claim.[293] An employer can raise a successful affirmative defense if the "defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[294]

### 6. Racial Discrimination

In order to prove a *prima facie* case of racial discrimination, a plaintiff must prove that: (1) he or she was treated differently, (2) from a person of another race or color, (3) where the defendant intended to discriminate, and (4) where the defendant's intent to discriminate caused the difference in the plaintiff's treatment.[295] The following cases illustrate how these issues have been dealt with in the context of alleged racial discrimination by transit providers.

*Brinson v. New York City Transit Authority*[296] involved a claim of racial discrimination by an African-

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man." Broad allegations of verbal abuse and intimidation, coupled with an isolated, gender-based epithet, without more, cannot create a hostile work environment. Because no reasonable jury could find that plaintiffs' assertions rise to the level required to sustain a Title VII claim for a hostile work environment, those claims must be dismissed.)

[citations omitted]; (transit operator succeeding in proving legitimate nondiscriminatory reason in hostile work environment/disparate working conditions claim by showing that work assignments were conducted in concert with plaintiffs' job descriptions); Schrean v. Chicago Transit Auth., 1999 U.S. Dist. Lexis 16614 (E.D. Ill. 1999) (employer responded to initial complaint with sufficient disciplinary action—no other formal complaint was filed with employer—initial complaint, therefore, was insufficient to establish a hostile work environment; suspension for tardiness not pretextual: "Merely because Schrean's co-workers and supervisor failed to treat her with sensitivity or tact, and used coarse language on one occasion and Schrean found this environment to be unpleasant, it is not discriminatory or hostile under the statute.").

[284] Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

[285] Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[286] Castro v. Local 1199, 964 F. Supp. 719 (S.D. N.Y. 1997).

[287] Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995). Burlington Indus. v. Ellerth, 524 U.S. 742 (1998). Guess v. Bethlehem Steel Corp., 913 F.2d 463 (7th Cir. 1990).

[288] Burlington Indus., Inc., v. Ellerth, 524 U.S. 742 (1998).

[289] Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990).

[290] 524 U.S. 775 (1998).

[291] 524 U.S. at 807.

[292] Robinson v. Chicago Transit Auth., 1999 U.S. Dist. Lexis 8994 (1999) (plaintiff failed to apprise CTA of harassment in order to give CTA an opportunity to take corrective action). Schrean v. Chicago Transit Auth., 1999 U.S. Dist. Lexis 16614 (E.D. Ill. 1999). (Transit employer had official sexual harassment policy whereby all complaints were to be filed in writing with transit affirmative action office. Plaintiff only filed initial claim to affirmative action office, which was substantiated by an investigation and resulted in disciplinary action against harasser. Harassment then continued, but plaintiff never filed another complaint with the affirmative action office.)

[293] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 749 (1998).

[294] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (holding the city vicariously liable for harassment and discrimination by the plaintiff's supervisors and any affirmative defense would fail because the city failed to clarify or discuss its policy on harassment with its employees).

[295] Alston v. N.Y. City Transit Auth., No. 97 CIV. 1080 (RWS), 1998 WL 437154 (S.D. N.Y. 1998) (bus driver dismissed on grounds of insubordination and assault failed to establish *prima facie* case of discrimination). The use of disparate impact data to prove racial discrimination was upheld in Carey v. Greyhound Lines, 380 F. Supp. 467 (E.D. La. 1973). Statistical evidence may be accorded great weight in proving a practice or pattern of discrimination. Ochoa v. Monsanto Co., 473 F.2d 318 (5th Cir. 1973).

[296] 60 F. Supp. 2d 23 (E.D. N.Y. 1999).

American bus driver who claimed racial discrimination in her dismissal after 11 years of employment during which she "received six warnings, four reprimands, and fifteen suspensions ranging from one to thirty days each….[accumulating] twenty-six citations in total for occurrences ranging from arriving at bus stops ahead of or behind schedule, failure to wear a tie, by-passing passengers waiting on the street, being 'AWOL,' and being 'reckless' and 'insubordinate.'" Ultimately she was dismissed after she was "insubordinate, obscene, and extremely threatening" toward a supervisor.[297] In granting the transit authority's motion for summary judgment, the court concluded, "plaintiff makes no showing that she was treated differently from other, white employees who accumulated the kind of disciplinary record she accumulated….[P]laintiff's extensive and progressive disciplinary record serves as a legitimate, non-discriminatory basis for her termination…."[298]

In *de Silva v. New York City Transit Agency*,[299] an Asian American and African American alleged discrimination against a transit authority on grounds they were not promoted to a desirable position, and were subject to undesirable transfers. To prove racial motivation, plaintiffs adduced a 7-year old survey of transit employees showing that 75 percent of African American and 45 percent of Asian American employees believed that system-wide racial discrimination is a problem at the transit authority. Because the survey was distributed to such a small and unidentified sample of employees, the court ruled it inadmissible.[300] The court concluded that there was no evidence that defendants acted with discriminatory intent or that they were in any way influenced by plaintiffs' race in making their promotional decisions.[301]

In a case alleging racial discrimination against a transit company for imposing a requirement that bus drivers be clean shaven (except for a neat and trimmed moustache), a court held "The wearing of a uniform, the type of uniform, the requirement of hirsute conformity applicable to whites and blacks alike, are simply non-discriminatory conditions of employment falling within the ambit of managerial decision to promote the best interests of its business."[302]

In *Stockett v. Muncie Indiana Transit System*,[303] an African-American bus driver complained of racial discrimination for being fired after testing positive in a drug test. The Seventh Circuit found that the plaintiff failed to show that being submitted to a drug test was the type of harassing act that constitutes an adverse employment action. The transit system conducted the test only after receiving a report that the employee had been smoking crack cocaine, and after a trained observer determined that he exhibited the signs of one under the influence of a controlled substance, establishing probable cause that he was under the influence of drugs. The court found that the drug policy was not the type of adverse employment action that Title VII was designed to prevent. Nor did the employee prove that non-black employees were treated more favorably.[304]

Sometimes transportation unions find themselves sued for discrimination.[305] A union's breach of its duty of fair representation can subject it to liability under Title VII if the breach can be proven to be motivated by plaintiff's race. A union's duty of fair representation includes the responsibility to act "without hostility or discrimination…in complete good faith and honesty… to avoid arbitrary conduct."[306] To establish a race-based Title VII claim against a union, the plaintiff must prove: (1) the employer violated the collective bargaining agreement with respect to the plaintiff; (2) the union allowed the breach to go unrepaired, breaching the duty of fair representation it owed to the employee; and (3) there was some indication that the union's failure was motivated by racial animus.[307] The second prong is satisfied whenever the union's conduct toward a member of its collective bargaining unit is arbitrary, discriminatory or in bad faith.[308]

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[297] 60 F. Supp. 2d at 25.

[298] 60 F. Supp. 2d at 30. A similar case was Sweet v. Topeka Metro. Transit Auth., 1990 U.S. Dist. Lexis 13809 (D. Kan. 1990), which upheld a dismissal of a bus driver against a claim of racial motivation. In *Sweet*, after a passenger boarded a bus that was running behind schedule, the driver made two personal stops—one to buy orange juice, and another to cash a personal check—the passenger complained to the driver about the delays, to which the driver responded, in contravention of the company's policies, "If you don't like how I drive this bus I'll bash your #%@!* face in and kick your ass off the bus." The court held plaintiff failed to produce evidence proving defendant's reasons for dismissal were pretextual, *Id*. at 7.

[299] 1999 U.S. Dist. Lexis 19998 (E.D. N.Y. 1999).

[300] *Id*. at 32. The U.S. Supreme Court has held that a small statistical sample or an incomplete data set can undercut a plaintiff's ability to prove disparate impact of a facially neutral employment action. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 996–97 (1988). Dimino v. N.Y. City Transit Auth., 64 F. Supp. 2d 136, 157 (E.D. N.Y. 1999).

[301] 1999 U.S. Dist. Lexis 19998, at 50 (E.D. N.Y. 1999).

[302] Brown v. D.C. Transit System, 523 F.2d 725, 728 (D.C. Cir. 1975).

[303] Stockett v. Muncie Ind. Transit Sys., 221 F.3d 997 (7th Cir. 2000).

[304] *Id*. at 997, 1002.

[305] *See, e.g.,* Brodie v. N.Y. City Transit Auth., 2000 U.S. Dist. Lexis 6144 at 7 (S.D. N.Y. 2000) (dismissing a claim that an employee's union "refused to help him in protecting his job because of his ethnicity and religion, even though they protected the jobs of other individuals of different ethnic backgrounds under similar circumstances" as too broad and conclusory to state a claim upon which relief can be granted).

[306] Vaca v. Sipes, 386 U.S. 171, 177 (1967); Parker v. Metropolitan Transp. Auth., 97 F. Supp. 2d 437 (S.D. N.Y. 2000).

[307] Gorham v. Transit Workers Union of America, 1999 U.S. Dist. Lexis 3573 (S.D. N.Y. 1999).

[308] Air Line Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65, 76 (1991).

### 7. Reverse Discrimination

In the employment context, to establish a *prima facie* case of reverse discrimination the plaintiff must prove that: (a) he or she belongs to a class; (b) he or she was qualified for and applied for a job or a promotion; (c) he or she was rejected despite his/her qualifications; and (d) other employees with equal or lesser qualifications who were members of a protected minority were hired or promoted.[309] Typical is the case where a Caucasian employee alleges evidence that African American employees were treated more favorably than Caucasians on the basis of race.[310]

One transit case on point is *Malabed v. North Slope Borough*,[311] a case in which North Slope Transit embraced a hiring preference for Native Americans. Malabed was of Filipino descent and had been hired as a security guard by North Slope, but thereafter dismissed so that the position could be re-noticed with the Native American preference; Malabed, an Asian-American, no longer qualified for the job. Though the EEOC had approved the preference under a federal statutory exemption to racial discrimination that allowed businesses or enterprises located on or near an Indian reservation to give a preference to Indians,[312] the federal district court held that employment preferences affecting fundamental rights or suspect classifications (such as race) could not withstand Constitutional scrutiny without particularized findings logically related to the perceived evil sought to be remedied.[313] In so doing, the court cited *City of Richmond v. J.A. Croson Co.,*[314] in which the U.S. Supreme Court struck down the City of Richmond's ordinance that 30 percent of all construction contracts be given to minority-owned businesses. In *City of Richmond,* the Supreme Court condemned the practice of relying on "a generalized assertion of past discrimination" to correct sweeping efforts to rectify past societal discrimination where no actual discrimination was identified.[315] However, one must recognize that reverse discrimination cases are difficult for plaintiffs to prove.

### 8. National Origin Discrimination

Title VII also prohibits employment discrimination on the basis of the employee's national origin.[316] It is unlawful to discriminate against a person because of their birthplace, ancestry, culture, or linguistic characteristics common to an ethnic group. The EEOC takes the position that requiring that employees speak only the English language on the job may violate Title VII unless the employer can prove that such a requirement is necessary, and the employees are informed of the rule and the consequences for its violation.[317] Reliance on English as the state's "official language" may not insulate the employer from a violation of Title VII national origin discrimination. However, EEOC guidelines on National Origin Harassment were struck down by the U.S. Supreme Court,[318] and have been repealed.[319]

In *Sotolongo v. New York City Transit Authority*,[320] a Cuban-American complained that his suspension, *inter alia,* was based on his national origin. The employer insisted that his suspension was based on his psychological problems, threats of violence (he said he would "cut" someone), and history of insubordination. The court in ruling in favor of the employer noted there was "no evidence even that plaintiff's supervisors were even aware of plaintiff's national origin."[321]

### 9. Religious Discrimination

Relatively few reported cases have been brought against transit providers in the employment context for alleged religious discrimination. Employers are required to reasonably accommodate the religious beliefs of existing or prospective employees unless such accommodation would impose an undue hardship.[322]

In *Mateen v. Connecticut Transit*,[323] a transit bus driver alleged he was discriminated against on racial and religious grounds (he was an African-American and Black Muslim). Shamsiddin Mateen was fired after causing an accident that damaged his bus, and after numerous negative reports from both white and black supervisors as to his abrasive and belligerent manner and outbursts of temper. Proof of a religious motive for

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[309] *See* Roberts v. Gadsden Mem'l Hosp., 835 F.2d 793, 795 (11th Cir. 1988); Wilson v. Bailey, 934 F.2d 301, 304 (11th Cir. 1991); Young v. City of Houston, Tex., 906 F.2d 177, 180 (5th Cir. 1990).

[310] *See, e.g.,* Schlesinger v. N.Y. City Transit Auth., 2001 U.S. Dist. Lexis 632 (S.D. N.Y. 2001).

[311] 42 F. Supp. 2d 927 (D. Alaska 1999).

[312] 42 U.S.C. § 2000e-2(i) (2000).

[313] 41 F. Supp. 2d at 941. The court in *Malabed* also relied on the nonconstitutional theory that the preference, adopted by North Slope Transit as an ordinance, violated a charter provision of North Slope Borough that barred discrimination based on national origin.

[314] 488 U.S. 469 (1989).

[315] 488 U.S. at 498–501.

[316] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. (2000); 29 C.F.R. pt. 1606 (2002).

[317] U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers* (last modified June 27, 2001), http://www.eeoc.gov/facts/qanda.html; 29 C.F.R. § 1606.7 (2002).

[318] Burlington Indus. Inc. v. Ellerth, 534 U.S. 742 (1998), Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[319] 64 Fed. Reg. 58,333 (Oct. 29, 1999).

[320] Sotolongo v. N.Y. City Transit Auth., 63 F. Supp. 2d 353 (S.D. N.Y. 1999); U.S. Equal Employment Opportunity Commission, *supra* note 317.

[321] Sotolongo v. N.Y. City Transit Auth., 63 F. Supp. 2d 353, 360 (S.D. N.Y. 1999).

[322] U.S. Equal Employment Opportunity Commission, *supra* note 317; 29 C.F.R. pt. 1605 (2002).

[323] 550 F. Supp. at 52 (D. Conn. 1982).

his dismissal was slim. According to the court, "A keen mind and manual dexterity are not the only criteria that management may utilize in determining a person's qualifications for employment. An ability to work well with others, patience, pleasantness, and self-control are permissible factors to be placed on the scale. In view of a bus operator's daily and extensive contact with the public, these personal characteristics are components for the successful performance of the job."[324]

In a state case, the New York City Transit Authority dismissed a bus driver for failing to show up for work on Fridays and Saturdays. As a Seventh Day Adventist, she claimed she was prohibited from working on the Sabbath—from sundown on Friday to sundown on Saturday. The union objected to any accommodation of her on grounds it would violate the seniority provisions in its CBA with the Transit Authority. In the interest of maintaining harmony in the workplace, the Authority declined to contest the issue with the union. The court held that an employer need not make such accommodations when it would be prohibited by the nondiscriminatory provisions of its CBA.[325]

There have been a number of recent claims of discrimination based on religion arising out of an employee's desire to wear attire required by his or her religion. In *Goldman v. Weinberger,* the U.S. Supreme Court addressed the issue of whether the U.S. Air Force could prohibit an Orthodox Jew from wearing a yarmulke, and concluded that the government's interest in uniformity and discipline legitimately justified a dress code, and that such code did not infringe on his First Amendment free exercise rights.[326] One transit case on point is *Kalsi v. New York City Transit Authority*.[327] New York subway inspectors were required to wear hard hats to avoid the risk of head injury while working under the cars. Charan Singh Kalsi was a Sikh, whose religious beliefs required him to wear a turban at all times. Kalsi refused to wear the hard hat over his turban, and was dismissed. The court found that the hard hat requirement was not pretextual, was grounded on legitimate safety concerns, and that Mr. Kalsi's dismissal was not religiously motivated.

### 10. Sexual Discrimination

Title VII of the Civil Rights Act of 1964[328] prohibits discrimination on the basis of sex.[329] To establish a *prima facie* case of gender discrimination in failing to be hired or promoted to a position, the plaintiff must show: (a) she is a member of a protected group; (b) she applied for a position; (c) she was qualified for that position when she applied; (d) she was not selected for that position; and (e) after the defendant declined to hire her the position either remained open, or a male was selected to fill it.[330] Employers also may not discriminate against employees on the basis of pregnancy, childbirth, and related medical conditions.[331] Neither may employers discriminate on the basis of sex in the payment of wages or benefits, under circumstances where men and women perform work of similar effort, skill, and responsibility.[332]

Evidence of a supervisor's sporadic or occasional derogatory utterances about an employee's sex generally is insufficient, without more, to establish a case of sexual discrimination.[333] However, such comments, if made contemporaneously with the employment decision in question, may constitute sexual discrimination.[334] But without evidence of pretext or discriminatory impact, the decision of an employer to suspend an employee because of excessive tardiness is not a violation of Title VII.[335]

The Pregnancy Discrimination Act (PDA) declares that discrimination against a woman because of her pregnancy is sex discrimination.[336] It prohibits policies that discriminate against fertile women, but not fertile

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[324] 550 F. Supp. at 55 (D. Conn. 1982).

[325] In the Matter of N.Y. City Transit Auth. v. State of N.Y. Executive Dep't, 627 N.Y.S.2d 360 (N.Y.S. Ct. 1995).

[326] Goldman v. Weinberger, 475 U.S. 503 (1986).

[327] 62 F. Supp. 2d 745 (E.D. N.Y. 1998).

[328] 42 U.S.C. 2000 *et seq*.

[329] *See generally* Maxine Eichner, *Getting Women's Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397 (1988).

[330] Davis v. Chevron USA., Inc., 14 F.3d 1082, 1087 (5th Cir. 1994).

[331] *See* the Family and Medical Leave Act, 29 U.S.C. § 2611 (2000). S*ee also* Rowe v. Laidlaw Transit, Inc., 244 F.3d 1115, 2001 U.S. App. Lexis 5533 (9th Cir. 2001). *See generally* the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000), discussed below.

[332] *See* the Equal Pay Act of 1963, Pub. L. No. 88-38, 29 U.S.C. § 206(d) (2000). Garcia v. Chicago Transit Auth., 244 F.3d 1115 1987 U.S. Dist. Lexis 554 (N.D. Ill. 1987)

> (In order to make out a case under the Equal Pay Act, the plaintiff must show that an employer pays different wages to employees of opposite sexes for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions. Although the complaint alleges that other CTA employees had a higher salary than the plaintiff, the complaint does not allege that the jobs those other CTA employees performed required equal skill, effort and responsibility and were done under similar working conditions as the plaintiff's job. Consequently, the court dismisses the equal pay claim.)

[citations omitted]. *See* Corning Glass Works v. Brennan, 417 U.S. 188 (1974) for a good example of a wage act case. Men were collecting greater salaries for equal work on a nightshift.

[333] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

[334] Schrean v. Chicago Transit Auth., 1999 U.S. Dist. Lexis 16614, at 19 (E.D. Ill. 1999) (suspension for tardiness not pretextual. "Merely because Schrean's co-workers and supervisor failed to treat her with sensitivity or tact, and used coarse language on one occasion and Schrean found this environment to be unpleasant, it is not discriminatory or hostile under the statute."), at 17.

[335] Schrean v. Chicago Transit Auth., 1999 U.S. Dist. Lexis 16614 (E.D. Ill. 1999).

[336] 42 U.S.C. § 2000e(k) (2000). *See, e.g.,* Legrand v. N.Y. Transit Auth., 2000 U.S. App. Lexis 894 (2d Cir. 2000).

men.[337] Unless pregnant women differ from other employees in their ability or inability to work, they must be treated the same as all other employees.[338] The PDA neither requires the creation of special programs for pregnant women, nor mandates special treatment for them.[339] Health and welfare plans must treat pregnancy as any other health condition.

With respect to an employer's fear of tort liability arising from injury to mothers or would-be mothers, the U.S. Supreme Court has held that it is the mother who must make the decision as to potential risks to the fetus, rather than the employer. Hence, fear of potential tort liability does not justify a fetal protection policy.[340]

### 11. Sexual Harassment

Title VII of the Civil Rights Act prohibits sexual harassment, which includes such practices as a supervisor seeking sexual favors from a subordinate employee, or creating a hostile workplace environment for persons of either gender.[341] An employer can be subjected to vicarious liability to a victimized employee for creation of a hostile environment by a supervisor with authority over an employee. When no tangible employment action has been taken, the employer may raise an affirmative defense to liability by proving that: (1) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of available preventive or correcting opportunities made available by the employer, or otherwise failed to avoid harm.[342]

The existence of an anti-harassment policy with complaint procedures is an important, though not essential, consideration in determining whether the employer has met the first prong of its defense.[343] To provide a defense, the anti-harassment policy (i) must be written, (ii) must be widely disseminated, (iii) must be uniformly enforced regardless of the position of the complainant and the respondent within the organization, and (iv) must provide a meaningful complaint procedure that includes alternative mechanisms in the event the respondent is the top person in the organization or the complainant's immediate supervisor. In *Caridad v. Metro-North Commuter Railroad,*[344] the Second Circuit considered a sexual harassment complaint by a transit employee who allegedly suffered several episodes of unwelcome sexual touching by her supervisor. The court held that failure of an employee to use the established complaint procedures provided by the employer will normally satisfy the second prong of the defense.[345]

### 12. Age Discrimination

The Age Discrimination in Employment Act of 1967 (ADEA),[346] and the Age Discrimination Act of 1975[347] prohibit discrimination on the basis of age. Such discrimination might include:

- Specifications in job notices of age preference. An age limitation may only be specified if age has been proved to be a *bona fide* occupational qualification (BFOQ);
- Discrimination on the basis of age by apprenticeship program; and
- Denial of benefits to older employees.[348]

The ADEA[349] protects employees who are at least 40 years old from discrimination on the basis of their age. The ADEA provides that it is unlawful "to discharge or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[350]

The purpose of the statute is to promote older employees on the basis of their abilities, rather than their age. To establish a *prima facie* case, a plaintiff must prove: (1) he or she is a member of a protected class (between 40 and 70 years of age); (2) he or she was qualified for the position in question or performed at or near the employer's legitimate expectations; (3) he or she was not hired for, not promoted to, or was dismissed from, the position; and (4) the position was filled by a

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[337] Dimino v. N.Y. City Transit Auth., 64 F. Supp. 2d 136 (E.D. N.Y. 1999).

[338] International Union UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991). For example, to force a woman to take unpaid medical leave during the full term of her pregnancy would violate Title VII. Dimino v. N.Y. City Transit Auth., 64 F. Supp. 2d 136 (E.D. N.Y. 1999).

[339] Urbano v. Continental Airlines, 138 F.3d 204, 206 (5th Cir. 1998). In passing the Pregnancy Discrimination Act, § 701(k) of Title VII, Congress made it clear that an employer must treat pregnant employees the same as non-pregnant employees. The passage of the PDA was meant to overrule the Supreme Court decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (General Electric's disability plan, which excluded pregnancy, does not violate Title VII). *See also* Lang v. Star Herald, 107 F.3d 1308, 1313 (8th Cir. 1997); Dimino v. N.Y. City Transit Auth., 64 F. Supp. 2d 136 (E.D. N.Y. 1999); LeGrand v. N.Y. City Transit Auth., 1999 U.S. Dist. Lexis 8020 (E.D. N.Y. 1999).

[340] Dimino v. N.Y. City Transit Auth., 64 F. Supp. 2d 136, 147 (E.D. N.Y. 1999). International Union UAW v. Johnson Controls, 499 U.S. 187 (1991) (policy that forbade women from lead exposure, but not men, violated Title VII. Transit Police Officer requested reassignment. Fear of liability did not in itself prevent a finding of a violation of Title VII by placing the officer on medical leave after she modified and refused an order reassigning her.)

[341] U.S. Equal Employment Opportunity Commission, *supra* note 219.

[342] Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998).

[343] Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[344] 191 F.3d 283 (2d Cir. 1999).

[345] 191 F.3d at 295.

[346] 29 U.S.C. § 621 *et seq*.

[347] 42 U.S.C. §§ 6101 *et seq*. (2000).

[348] U.S. Equal Employment Opportunity Commission, *supra* note 219.

[349] 29 U.S.C. § 621–34 (2000).

[350] 29 U.S.C. § 623(a) (2000).

younger person, or the position remains open.[351] If the plaintiff proves these elements, the burden of proof shifts to the employer to prove the plaintiff's discharge was the result of "some legitimate, nondiscriminatory reason." If the defendant proves this, the burden shifts again to the plaintiff to prove that the reasons proffered by the defendant for discharge were merely a pretext for discrimination.[352]

For example, in *Ralkin v. New York City Transit Authority*,[353] plaintiff alleged that the New York City Transit Authority maintained a "glass ceiling" for Caucasian, Jewish employees in their 40s and 50s. But the employer continued to employ a significant number of individuals roughly the same age and racial and religious affiliation after termination of the plaintiff; the court found this fact undercut any inference that the employer's actions were discriminatory. Moreover, the same person who hired the plaintiff was the same person who terminated her for unsatisfactory performance during her probationary period, and that supervisory employee was a woman in her 60s.[354] These circumstances led the court to dismiss the complaint on grounds that "no reasonable jury could find that defendant's decision to terminate plaintiff was motivated by racial, religious, or age bias…."[355] In another case, a transit worker was held not to have stated a claim upon which relief could be granted based on his dismissal where he was replaced by an individual 61 years of age.[356]

But the plaintiff fared better in *Epter v. New York City Transit Authority*,[357] where he was denied a promotion after refusal to take an electrocardiogram (EKG) test administered only to candidates over the age of 40. The court noted that where the employer relied on a facially discriminatory policy imposing adverse treatment on a protected class, the court need not proceed through the *McDonnell Douglas* burden-shifting formula, described above. The court also observed that an employer can maintain an age-specific policy only if it can prove that age is being employed as a "bona fide occupational qualification" (BFOQ).[358] Because the employer imposed a facially discriminatory age classification to administer EKGs only on employees over the age of 40, and because it could not prove the testing was a BFOQ, the employer was held to have violated the ADEA.[359]

However, the U.S. Supreme Court held that although the ADEA reflects a clear intent to abrogate a state's sovereign immunity, the abrogation exceeded Congress's authority under the 11th Amendment of the U.S. Constitution.[360] In *Kimel v. Florida Board of Regents*,[361] the U.S. Supreme Court held that though the ADEA reflects a clear Congressional intent to abrogate state sovereign immunity, the abrogation exceeded its authority under the 11th Amendment to the U.S. Constitution, which shields unconsenting states from suit in federal court.[362] Neither the 14th Amendment nor the Commerce Clause conferred on Congress the authority to arrest age discrimination. Thus, a public transit operator that enjoys sovereign immunity may be shielded from suit under the ADEA.[363] Decisions concerning the hiring, firing, and disciplining of employees are discretionary (as opposed to ministerial) in nature, and therefore enjoy immunity from judicial review.[364] However,

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[351] Julian v. N.Y. City Transit Auth., 857 F. Supp. 242 (E.D. N.Y. 1994). *See also* Dove v. Wash. Metro. Area Transit Auth., 1999 U.S. Dist. Lexis 12443 (D. D.C. 1999) (plaintiff was dismissed, not on the basis of age discrimination, but because of "20 instances of complaints of rude and unprofessional conduct during his tenure as a station manager, as well as four prior suspensions.") *Id*. at 4.

[352] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987).

[353] Ralkin v. N.Y. City Transit Auth., 62 F. Supp. 2d 989 (E.D. N.Y. 1999)

[354] *See* Sotolongo v. N.Y. City Transit Auth., 63 F. Supp. 2d 353 (S.D. N.Y. 1999), where the court noted that both supervisory employees who terminated plaintiff were over the age of 50. *Id*. at 360.

[355] Ralkin v. N.Y. City Transit Auth., 62 F. Supp. 2d 989, 1002 (E.D. N.Y. 1999).

[356] Heuser v. Metropolitan Transit Auth., 1999 U.S. App. Lexis 7655 (2d Cir. 1999).

[357] 2001 U.S. Dist. Lexis 753 (E.D. N.Y. 2001).

[358] An age classification is permissible only "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1) (2000).

[359] 2001 U.S. Dist. Lexis 753, at 22 (E.D. N.Y. 2001).

[360] Kimmel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

[361] 528 U.S. 62 (2000).

[362] *See also* Federal Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 122 S. Ct. 1864 (2002), which held that, absent its consent, a state could not be subject to a private cause of action brought in a quasi-judicial proceeding before a federal administrative agency.

[363] Jones v. WMATA, 205 F.3d 428 (D.C. Cir. 2000); Taylor v. Wash. Metro. Area Transit Auth., 109 F. Supp. 2d 11 (D. D.C. 2000).

[364] Burkhart v. WMATA, 112 F.3d 1207 (D.C. Cir. 1997) (hiring and supervision of a bus driver is discretionary in nature; court denies claim of negligent hiring, training, and supervision in a case of a physical altercation between a deaf passenger and a bus driver and thus fails to hold WMATA liable on the claim of negligent hiring, training, and supervision). The hiring, training, and supervising of employees is a discretionary function subject to immunity. Beebe v. WMATA, 129 F.3d 1283 (D.C. Cir. 1997). Taylor v. WMATA, 109 F. Supp. 2d 11 (D. D.C. 2000),

> (An activity that amounts to a "quintessential" governmental function, such as law enforcement, is clearly "governmental" and falls within the scope of sovereign immunity. For activities that are not quintessential governmental functions, the Court must consider whether the activity is "discretionary" or "ministerial." *Id*. Only if the activity is "discretionary" will it be considered "governmental" and therefore protected by sovereign immunity. An activity that is found to be "ministerial" is not protected by sovereign immunity.)

[citations omitted]. Beebe v. WMATA, 129 F.3d 1283 (D.C. Cir. 1997)

> (To determine whether an activity is discretionary, and thus shielded by sovereign immunity, we ask whether any statute,

where the public transit operator is not considered an arm of the state for 11th Amendment purposes, it enjoys no such immunity.[365]

### 13. Alcohol and Drug Use Discrimination

Discrimination on the basis of drug or alcohol abuse is prohibited by the Drug Abuse Office and Treatment Act of 1972[366] and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970.[367] Where a drug test is not performed in a routine fashion under the regular or legitimate practices of the employer, but is instead conducted in a manner that harasses or humiliates employees, requiring that an employee submit to a drug test may be an adverse employment action in violation of Title VII.[368] Although discriminatory drug testing is prohibited by federal statute, nondiscriminatory drug testing is required of certain "safety sensitive" transportation employees.[369] These requirements are discussed in detail above in Section 7—Safety.

In 1991, Congress passed the Omnibus Transportation Employee Testing Act.[370] In response DOT issued regulations for the "safety-sensitive"[371] workers of FHWA, FTA, FAA, FRA, FMCSA, and the RSPA.[372] These regulations specify when employees need to be tested for drugs and alcohol and the proper procedures that agencies must follow. The tests and procedures are designed to protect the workers' privacy, assure accuracy, and prevent discriminatory testing.[373]

### 14. Disabilities Discrimination

Congress has passed two major statutes addressing disabilities—the Rehabilitation Act of 1973, addressing discrimination by the federal government, and the ADA of 1990, applicable to virtually all other employers and transportation providers.

#### *a. The Rehabilitation Act of 1973*

Section 504 of the Rehabilitation Act of 1973 prohibits the federal government and recipients of federal funds from discriminating against people with disabilities in employment. It provides that, "No otherwise qualified individual…shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[374] A handicapped individual is one who "has [has a record of, or is regarded as having] a physical or mental impairment which substantially limits one or more of such person's major life activities." A 1978 amendment made it clear that a handicapped person under the Rehabilitation Act

> does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.[375]

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regulation, or policy specifically prescribes a course of action for an employee to follow. If no course of action is prescribed, we then determine whether the exercise of discretion is grounded in social, economic, or political goals. If so grounded, the activity is "governmental," thus falling within section 80's retention of sovereign immunity.).

S*ee also* Taylor v. Washington Metro. Area Transit Auth., 109 F. Supp. 2d 11 (D. D.C. 2000).

[365] Williams v. Dallas Area Rapid Transit, 242 F.3d 215, 2001 U.S. App. Lexis 2558 (5th Cir. 2001). The Fifth Circuit uses a six factor test to determine whether an agency is an arm of the state: (1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. Clark v. Tarrant County, 798 F.2d 736 (5th Cir. 1986).

[366] Pub. L. 92-255 (Mar. 21, 1972). 42 U.S.C. § 290ee-3 (2000). It was recodified with modifications in the Alcohol, Drug Abuse and Mental Health Administration Reorganization Act of 1992, Pub. L. No. 102-321.

[367] Pub. L. 91-616, Dec. 31, 1970; Public Health Service Act of 1912, 42 U.S.C. §§ 290dd-3 and 290ee-3 (2000), also recodified.

[368] Landon v. Northwest Airlines, 72 F.3d 620, 624–25 (8th Cir. 1995).

[369] Joe Maassen, *Drug Testing for Professional Drivers: It's the Law*, 13 No. 1 COMPLEAT L., S1 (1996).

[370] 49 U.S.C. App. § 2717.

[371] The definition of "safety-sensitive" varies among the regulations for the different transportation agencies. *See* Department of Transportation, *Factsheet: Department of Transportation (DOT) Drug and Alcohol Testing Regulations* `(visited Nov. 24, 2001), http://afscme.org/wrkplace/dfaq-dot.htm. For example, the FHWA defines "safety-sensitive" employees as operators of commercial vehicles. *Id*. The FTA, however, defines "safety-sensitive" employees as those employees:

- Operating a revenue service vehicle;
- Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;
- Controlling dispatch or movement of a revenue service vehicle; Maintaining a revenue service vehicle or equipment used in revenue service; or Carrying a firearm for security purposes.

Finally, the RSPA defines "safety sensitive" employees as those "who perform an operation, maintenance, or emergency-response function on a pipeline or at a liquefied natural gas facility." *Id*.

[372] *Id. See* 49 C.F.R. pt. 40 for a description of the DOT's regulatory procedures for drug and alcohol testing in the transportation industry. *See* 14 C.F.R. pts. 61 *et seq*. for the FAA's drug and alcohol testing rules, *See* 49 C.F.R. pt. 382 for the Federal Motor Carrier Safety Administration's (FMCSA) drug and alcohol testing rules. *See* 49 C.F.R. pt. 219 for the FRA's drug and alcohol testing rules. *See* 49 C.F.R. pt. 655 for FTA's drug and alcohol testing rules. *See* 49 C.F.R. pt. 199 for the RSPA's rules for drug and alcohol testing.

[373] *Testing and Documentation Procedures*, EMPLOY. DISCRIM. COORDINATOR, ¶ 26,520 (2001).

[374] 29 U.S.C. § 794(a) (2000).

[375] 29 U.S.C. § 706(7)(B) (2000).

Even before promulgation of this amendment, the U.S. Supreme Court was notably deferential to decisions of transit providers to dismiss or refuse to hire individuals on drugs, concluding that such discrimination violated neither the Civil Rights Act of 1964 nor the Equal Protection Clause of the 14th Amendment.[376]

In *Teahan v. Metro-North Commuter Railroad*,[377] the U.S. Court of Appeals for the Second Circuit applied the Rehabilitation Act to the dismissal of an employee whose alcohol and drug abuse led to his being unexcusedly absent from work 19 times in 1984, 14 times in 1985, 58 times in 1986, and 53 times in 1987. He entered a 30-day rehabilitation program in 1986, then relapsed into further drug and alcohol abuse. His employer sent him a letter in December 1987 informing him that his absenteeism was excessive. The employee entered another rehabilitation program, which this time was successful. The employer dismissed him in April 1988. The court noted that substance abuse was a handicap within the meaning of the Rehabilitation Act, and that an otherwise qualified handicapped individual may not be dismissed from federally-funded employment "solely by reason of his handicap."[378] Metro-North insisted that the reason for the dismissal was excessive absenteeism, not alcoholism, and that the delay between the decision to dismiss and actual dismissal was required in order to comply with the dismissal procedures set forth in its collective bargaining agreement. The court noted that the 1978 amendments, quoted above, eliminated from the definition of handicapped one "whose current use of alcohol or drugs" prevents the employee from performing the duties of the job.[379] The court held:

> [I]nsofar as the Rehabilitation Act evinces a general recognition of substance abuse as a disease, discrimination on the basis of such a handicap is antithetical to one of the goals of the Act—to ensure than handicapped persons are not victimized in the employment context by archaic or stereotypical assumptions concerning their handicap. But nothing in the language, history or precedents interpreting Section 504 suggest that this provision is designed to insulate handicapped individuals from the actual impact of their disabilities…. Consequently, we must be wary lest Section 504 be applied as a haven to protect substance abusers who have not in the past sought—nor do they seek in the present—help…. It would defeat the goal of Section 504 to allow an employer to justify discharging an employee based on past substance abuse problems that an employee has presently overcome…. The statute plainly is designed to protect rehabilitated or rehabilitating substance abusers from retroactive punishment by employers.[380]

Regulations promulgated under the Rehabilitation Act require that employers determine the competence of applicants or individuals with disabilities to perform the essential functions of jobs, with or without reasonable accommodations (i.e., any mechanical, electrical, or human device that compensates for an individual's disability).[381] Employers must make accommodations unless they would impose undue hardship upon employers. Physical job qualifications, which may screen out qualified handicapped individuals, must be "related to the specific jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job."[382]

The 1978 amendments to the Rehabilitation Act also made it clear that the "remedies, procedures, and rights" of an aggrieved individual are set forth in Title VI of the Civil Rights Act of 1964.[383] Once it is established that the plaintiff is handicapped within the meaning of the Rehabilitation Act, he or she may file a complaint of employment discrimination on the basis of denied employment. To prevail, the plaintiff must prove that (1) he or she is not "otherwise qualified" to do the particular job, (2) he or she cannot readily do other jobs for this or other employers because of the handicap, (3) he or she is being excluded from the job solely because of the handicap, (4) he or she is seeking a job from an employer receiving federal financial assistance, and (5) "reasonable accommodation" can be made by the employer for the handicap.[384]

### *b. The Americans with Disabilities Act*

The ADA[385] extends to private employers the prohibition against employment discrimination of people with disabilities.[386] Title I of the ADA prohibits employment

[376] N.Y. City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

[377] 951 F.2d 511 (2d Cir. 1991).

[378] 951 F.2d at 515.

[379] 951 F.2d at 517.

[380] 951 F.2d at 518 [citations omitted].

[381] 45 C.F.R. § 84.12-13 (2002).

[382] 41 C.F.R. § 60-741.6 (2000).

[383] Pub. L. No. 95-602, 92 Stat. 2955 (1978). 29 U.S.C. § 794a (2000). Jones v. Metropolitan Atlanta Rapid Transit Auth., 681 F.2d 1376 (11th Cir. 1982).

[384] Martin Schiff, *The Americans With Disabilities Act, Its Antecedents, and Its Impact,* 58 MO. L. REV. 869 (1993). The Reasonable Accommodation under the Rehabilitation Act requires the employer to assess the potential employee's ability to perform essential job functions and then make accommodations, which may include a mechanical, electrical, or human device that compensates for an individual's disability, unless such accommodation would impose undue hardship on the employer. "Reasonable accommodation" under the Americans with Disabilities Act is similar: the definition of disability is borrowed from the Rehabilitation Act, demands accommodation such as modifying facilities and equipment, and does not require accommodation when accommodation would impose undue hardship on the operation of the business (*see* notes 384–86).

[385] 42 U.S.C. § 12101 *et seq*., Pub. L. No. 101-336, 104 Stat. 328 (2000).

[386] Elizabeth Morin, *Americans With Disabilities Act of 1990: Integration Through Employment*, 40 CATH. U. L. REV. 189 (1990). The U.S. Supreme Court has had occasion to interpret the ADA in recent years, concluding:

• Punitive damages are not available under § 202 of the ADA. Barnes v. Gorman, 122 S. Ct. 2097 (2002); however, employers who act with malice or reckless indifference to employee's Title VII rights may be subject to punitive damages under the Civil

discrimination against disabled individuals who can do a particular job with or with out reasonable accommodation. "Disability" is defined as it was in the Rehabilitation Act of 1973, as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual."[387] A "major life activity" is one that an average person can perform relatively effortlessly, such as walking, breathing, seeing, speaking, hearing, learning, and working.

A "qualified employee with a disability" is one who satisfies the skill, experience, and other job-related qualifications of a position, and who can perform the essential functions of the position, with or without reasonable accommodation.[388] A "reasonable accommodation" may include such things as making existing facilities accessible to and usable by persons with disabilities, modification of work schedules, acquiring or modifying equipment, and providing qualified readers or interpreters. But it does not include removing the essential functions of the job.[389] An employer is required to make reasonable accommodations for its handicapped employees unless doing so would impose an undue hardship on the operation of the business. An "undue hardship" is an action that is significantly difficult or expensive given the business's size, financial resources, and the nature and structure of its operations.[390]

The duty to provide a reasonable accommodation does not require the employer to displace incumbent employees to make room for a disabled employee, where it would violate the other employees' seniority rights under a CBA.[391] Generally speaking, reasonable accommodation also does not require an employer to provide a disabled employee with an alternative job when he or she is unable to meet the demands of the present position.[392] It need merely reasonably accommodate an employee's handicap so as to enable him or her to perform the positions he or she is currently holding. If the employee is unable to satisfy federal safety regulations for a bus driver, because of deteriorating eye sight for example, the employer may be unable to reasonably accommodate him or her in that position.[393]

The ADA protects employees against discrimination because of the disability, but not discrimination on other bases, such as the refusal of a transit employee to provide a urine sample for purposes of drug testing.[394] Moreover, the ADA explicitly excludes from the definition of "disability" those employees or applicants cur-

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Rights Act of 1991. Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999);

• Employment may be denied to one whose exposure to working conditions would pose a direct threat to the employee's own health. Chevron USA, Inc v. Echanzabal, 122 S. Ct. 2045 (2002);

• Reasonable accommodation under the ADA does not require an employer to violate established seniority rules. U.S. Airways v. Barnett, 122 S. Ct. 1516 (2002);

• Once a charge has been filed, the EEOC enjoys exclusive authority over the choice of forum and prayer for relief. EEOC v. Waffel House, 534 U.S. 279 (2002);

• To be substantially impaired in performing manual tasks, the individual must have an impairment that prevents or severely restricts his ability from performing tasks essential to most people's daily lives. Toyota Motor MFG., KY, Inc v. Williams, 534 U.S. 184 (2002);

• Attorneys' fees are not recoverable unless the moving party is the recovering party, even though the lawsuit brought about the desired change by the employer. Buckhannon Board & Care Home v. W. Va. Dep't of Health, 532 U.S. 598 (2001);

• States need not make special accommodations for the disabled so long as their actions toward them have a rational basis. Board of Trustees v. Garrett, 531 U.S. 356 (2001).

[387] 42 U.S.C. § 12102 (2000). A physical or mental impairment is defined as

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (2000).

[388] Nash v. Chicago Transit Auth., 1998 U.S. Dist. Lexis 12668 (N.D. Ill. 1998).

[389] Irby v. N.Y. City Transit Auth., 2000 U.S. Dist. Lexis 15822 (D. N.Y. 2000). In this case, the essential functions of the job in question are the essential functions of a bus driver. The court dismissed the claim of accommodation, suggesting that accommodation does not include elimination of any of the essential functions of the job. The plaintiff had requested reassignment as a result of polycystic kidney and polycystic liver disease, which caused absences.

[390] U.S. Equal Employment Opportunity Commission, *supra* note 219. The EEOC suggests that a finding of undue hardship is supported by an individualized assessment of current circumstances that show that a specific reasonable accommodation will cause significant difficulty or expense. For a list of factors considered, *see* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (last modified June 27, 2001), http://www.eeoc.gov/docs/accommodation.html#contents13.

[391] Eckles v. Consolidated Rail, 94 F.3d 1041 (7th Cir. 1996). AMERICAN BAR ASS'N, THE RAILWAY LABOR ACT 241 (BNA Supp. 2000).

[392] Bates v. Long Island R.R. Co., 997 F.2d 1028, 1035 (2d Cir. 1993).

[393] Christopher v. Laidlaw Transit, 899 F. Supp. 1224 (S.D. N.Y. 1995). The legislative history of the ADA shows that epilepsy and other conditions are considered disabilities under the ADA. *See* H. R. Rep. No. 101-485, pt. III, at 51. *See* Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208 (2d Cir. 2001) (epilepsy, which prevented employee from obtaining a driver's license, was not enough to sustain summary judgment on the question of reasonable accommodation). *See* Spradley v. Custom Campers, Inc., 68 F. Supp. 2d 1225 (KS 2001) (plaintiff failed to establish a prima facie case under the ADA where he could not show that he could perform the essential functions of the job without endangering himself or others).

[394] Beharry v. M.T.A. N.Y. City Transit Auth., 1999 U.S. Dist. Lexis 3157 (E.D. N.Y. 1999).

rently engaged in the illegal use of drugs.[395] Federal regulations describe certain critical functions, such as driving a bus, as a safety-sensitive duty, and provide that once one tests positive for certain drugs, one must cease performing such safety-sensitive functions.[396] Thus, a transit bus driver who tests positive for cocaine has no cognizable ADA claim for being removed from performing the safety-sensitive function of bus driving.[397]

An employer of 15 or more individuals may not discriminate against any "otherwise qualified" individual on the basis of mental or physical disability. A qualified individual is one "with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position…and who, with or without reasonable accommodation, can perform the essential functions."[398] The "otherwise qualified" standard assumes that job qualifications are readily ascertainable and measurable as "job related" and "consistent with business necessity."[399] Such qualifications should be measured by criteria necessary for and substantially related to an employee's ability to perform essential job functions.[400] Hence, it is critically important for the employer to have a written job description for every position within the organization. The job description should be reviewed by counsel experienced with the ADA, and should reflect review of the EEOC guidance[401] as to what job descriptions should/should not contain. The ADA provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[402] Thus, a qualification that a bus driver or airline pilot have 20/20 correctable vision would be deemed "job related" and "consistent with business necessity," not subjecting an employer to a discrimination claim under the ADA.[403]

The employment provisions of the ADA are enforced by the EEOC; it has authority to use the remedies available under Title VII of the Civil Rights Act of 1964 to compel compliance, including the ability to initiate suits on behalf of employees against employers.[404] Under the ADA, the claimant must file a charge of discrimination with the EEOC within 180 days of the alleged unlawful action; if the claimant has already filed a complaint with the state or local equal employment agency, he or she has 300 days from the alleged discriminatory action to file a claim with the EEOC.[405] To make out a *prima facie* case of employment discrimination under the ADA, the plaintiff must show that he or she (1) is a disabled person within the meaning of the ADA, (2) is a qualified individual with a disability (i.e., that with or without reasonable accommodation he or she is able to perform the essential functions of the job), and (3) suffered an adverse employment decision because of the disability.[406] But empirical research reveals that plaintiffs lost 92 percent of all ADA discrimination claims

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[395] 42 U.S.C. § 12114 (2000).

[396] 49 C.F.R. pt. 655 (1999). See § 10.413 for various transportation agencies' definitions of "safety-sensitive."

[397] Redding v. Chicago Transit Auth., 2000 U.S. Dist. Lexis 14557 (E.D. Ill. 2000).

[398] 29 C.F.R. § 1630.2(m) (2000).

[399] Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans With Disabilities Act,* 38 S. TEX. L. REV. 907 (1997).

[400] Schiff, *supra* note 384.

[401] *See* http://www.eeoc.gov/qs-employers.html (visited Jan. 8, 2002) for a comprehensive list of issues for which EEOC offers advice.

[402] 42 U.S.C. § 12111 (2000); Carr v. Reno, 23 F.3d 525, 529 (D.C. Cir. 1994) (upholding summary judgment for defendant on ground that predictable attendance was an essential function of the job for which accommodation was impossible); Swanks v. Wash. Metro. Area Transit Auth., 179 F.3d 929, 934 (D.C. Cir. 1999) (employer's official policy of requiring the ability to obtain a special police commission was used as the measure of the essential function of the job and the employer was not permitted to contradict its official policy by terminating the employee).

[403] *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 493–94 (1999) (holding that the plaintiffs did not allege their severe myopia was a disability and did not demonstrate that the defendant's vision requirement substantially limited them in working as a major life activity).

[404] Elizabeth Morin, *Americans With Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U.L. REV. 189, 200 (1990). However, the ability to use Title VI to support a private right of action was effectively eliminated in Alexander v. Sandoval, 532 U.S. 275 (2001).

[405] 42 U.S.C. §§ 2000e-5(e)(1), 12117(a) (2000).

[406] 42 U.S.C. §§ 12101(2)(A) – (C), 12111(8), 12112(a) (2000). White v. York Int'l Co., 45 F.3d 357, 360–61 (10th Cir. 1995); Christopher v. Laidlaw Transit, 899 F. Supp. 1224 (S.D. N.Y. 1995). In Laidlaw, Christopher failed to establish that he was a qualified individual with a disability because Department of Transportation regulations prevented him from operating a school bus because of his disability. The Court found that reasonable accommodation does not require reassignment to another position. However, "Once the plaintiff produces evidence sufficient to make a facial showing that accommodation is possible, the burden of production shifts to the employer to present evidence of its inability to accommodate." White v. York Int'l Co., 45 F.3d 357, 361 (10th Cir. 1995).

> Once plaintiff establishes his prima facie case, defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified handicapped person, that is one who is able to meet all of the program's requirements in spite of his handicap, or that his rejection from the program was for reasons other than his handicap.

Pushkin v. Regents of University of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981) (summarizing Southeastern Community College v. Davis, 442 U.S. 397 (1979)). The next step: "The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants' reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself."

taken to court, and 86 percent of all claims handled by the EEOC.[407]

## F. TRANSPORTATION DISCRIMINATION

### 1. Racial Discrimination

Federal efforts to arrest discrimination in the provision of transportation services began in the 19th century. As early as 1887, the ICC found that racial discrimination by railroads violated the antidiscrimination provisions of the Interstate Commerce Act.[408] The ICC attempted to devise a policy requiring all passengers to be treated equally, though served separately. Thus was born the concept of "separate but equal" endorsed by the U.S. Supreme Court in 1896 in *Plessy v. Ferguson*.[409] When blatant acts of discrimination and inequality arose, the ICC took action to assure substantial equality in treatment of passengers.[410] As the motorbus industry grew, it followed a similar pattern.[411] Many states passed "Jim Crow" laws mandating racially separate but equal facilities.[412] Yet it became increasingly apparent that separate transportation accommodations inherently could not be equal.

In 1955, Rosa Parks took a seat in the "colored" section of a Montgomery City Lines bus in Montgomery, Alabama. The bus driver subsequently demanded that Ms. Parks and several other Negro patrons on the row surrender their seats to a recently boarded white patron. Ms. Parks refused, and was arrested. The arrest and trial of Rosa Parks led the African-American community of Montgomery to stage a 382-day boycott of the bus company beginning December 5, 1955. The boycott was led by Dr. Martin Luther King, Jr. Since 70 percent of the bus patrons were black, and most of those honored the boycott, the impact was profound. To deal with the losses, the bus company cut service, then distanced itself from its earlier embrace of segregation. In April 1956, the bus company president declared, "We would be tickled if the [Alabama and Montgomery Jim Crow discrimination laws] were changed. We are simply trying to do a transportation job, no matter what the color of the rider." The bus company then directed its drivers to discontinue enforcing segregation, a move met by fierce opposition by the Montgomery city and Alabama state governments. Ultimately, the federal courts invalidated the city ordinance and state statute compelling segregation of intrastate passenger transportation.[413]

Relying on the U.S. Supreme Court decision in *Brown v. Board of Education*[414] (which struck down the "separate but equal" doctrine in public education), the ICC held that providing separate but equal transportation facilities could be countenanced no longer.[415] In 1961, the ICC promulgated regulations prohibiting carriers under its jurisdiction from separating their facilities so as to segregate patrons on the basis of race or color.[416]

The U.S. Supreme Court affirmed and expanded these actions, concluding that it was an "undue or unreasonable prejudice" under the Interstate Commerce Act for a railroad to divide its dining car by curtains, partitions, and signs in order to segregate passengers according to race.[417] Further, the Court extended the Act's discriminatory prohibition not only to interstate bus common carriers, but to unaffiliated restaurants at which bus companies stopped.[418] The "separate but equal" doctrine came crashing down in public and private transportation venues.[419] State and local laws mandating segregation in transportation facilities were struck down, and injunctions were issued prohibiting their enforcement.[420] Transit and municipal and inter-

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[407] Jessica Barth, *Disability Benefits and the ADA After Cleveland v. Policy Management Systems*, 75 IND. L.J. 1317, at 1338 (2000). *See generally* Luther Sutter, *The Americans With Disabilities Act: A Road Too Narrow,* 22 U. ARK. LITTLE ROCK L. REV. 161 (2000).

[408] Councill v. Western & Atlantic R.R. Co., 1 I.C.C. 339 (1887); Heard v. Georgia R.R. Co., 1 I.C.C. 428 (1888).

[409] 163 U.S. 537 (1896).

[410] *See* Mitchell v. United States, 313 U.S. 80 (1941).

[411] Day v. Atlantic Greyhound Corp., 171 F.2d 59 (4th Cir. 1948).

[412] *See, e.g.,* Corporation Comm'n v. Transportation Comm. of the N.C. Comm'n on Interracial Cooperation, 198 N.C. 317, 151 S.E. 648 (1930).

[413] Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989); CATHERINE BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT (1983). *See also* Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Richard Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake*, 108 HARV. L. REV. 1085 (1995); Michael Klarman, *Brown v. Board of Education: Facts and Political Correctness*, 80 VA. L. REV. 185 (1994).

[414] 347 U.S. 483 (1954).

[415] National Assoc. for A.O.C.P. v. St. Louis-S.F. Ry. Co., 297 I.C.C. 335 (1955). Examining this history, the Commission concluded:

> [I]n the early days of regulation this Commission went to great lengths in attempting, within the confines of the prevailing social and legal philosophy, to end racial discrimination in services, and facilities in the transportation industry. We are proud of the fact that our policy, once plainly enunciated and firmly established, has resulted in prompt and effective compliance by all phases of the industry. Subsequently, over the years complaints alleging racial discrimination in services and facilities have been virtually nonexistent.

*Equal Opportunity in Surface Transportation*, 353 I.C.C. 425 at 940, 441 (1977).

[416] United States v. City of Shreveport, 210 F. Supp. 708 (D. La. 1962).

[417] Henderson v. United States, 339 U.S. 816 (1950).

[418] Boynton v. Va., 354 U.S. 454 (1960).

[419] Morgan v. Va., 323 U.S. 373 (1946); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd*, Gayle v. Browder, 352 U.S. 903 (1956). The "Separate but Equal" doctrine was rejected in Brown v. Board of Educ., 347 U.S. 483 (1954).

[420] *See, e.g.,* United States v. City of Shreveport, 210 F. Supp. 708 (W.D. La. 1962).

city companies were ordered to desegregate on Constitutional equal protection and commerce clause grounds.[421] Both public and private facilities were desegregated under the Civil Rights Act of 1964.

As noted above, Title VI of the Civil Rights Act of 1964 became the legislative authority for DOT regulations prohibiting discrimination. DOT regulations provide that,

> No person or group of persons shall be discriminated against with regard to the routing, scheduling or quality of service…on grounds of race, color, or national origin. Frequency of service, age and quality of vehicles assigned to routes, quality of stations serving different routes, and location of routes may not be determined on the basis of race, color or national origin.[422] Affirmative action and elimination of disparate impact discrimination are also required by the regulations. One source notes that, "DOT has the authority to enact regulations requiring transit grantees to take affirmative action to ensure that the grantees' activities do not have an unjustified disparate impact on minorities, thereby excluding them from the benefits of federally assisted programs without an appropriate justification."[423]

In this context, one must understand the grantee's civil rights program and the role of the FTA Office of Civil Rights. The civil rights program is a vital part of the grantee's operation. The grantee's civil rights program includes both obligations to its employees and compliance with the grantee's civil rights obligations to the public, including those under Title VI, EEO, DBE, and ADA. Grantees must submit programs or plans for approval as a prerequisite to FTA's award of grant funds. Historically, a regional Civil Rights officer has worked in a give-and-take relationship with transit recipients to facilitate compliance, with back-up from FTA in Washington. Much of FTA's work in this area is in the form of guidance and technical assistance rendered to grantees.

Transit grantees are required to maintain records proving compliance with their nondiscrimination obligations. DOT reviews the practices of grantees to determine their compliance. Moreover, procedures exist for the filing of complaints against a transit grantee by anyone who believes they have been subjected to discrimination by the grantee. Notice of the charge to the grantee and a written response by the grantee typically follow the filing of a complaint. If a DOT investigator concludes that the grantee is in noncompliance, it will be so notified, and efforts will be made to resolve the matter informally. If informal means of dispute resolution are unsuccessful, the grantee's federal funds may, after hearing, be suspended or terminated. The grantee may appeal an adverse decision to the Secretary of Transportation, who must report to Congress 30 days before such suspension or termination of federal grant funds.[424]

Complaints based on Title VI of the Civil Rights Act were filed against state and local transportation agencies in Macon, Georgia, on grounds that, for example, they have over-funded the road network (used primarily by nonminorities) while under-funding the bus system (used primarily by minorities). Allegations of discrimination have been levied against the disproportionate funds spent on commuter rail projects (primarily frequented by nonminorities) in Los Angeles, while less money has been spent on buses (primarily used by minorities). It was also alleged in New York and Philadelphia that it is discriminatory to force minority passengers to pay, in higher fares, a relatively higher percentage of the costs of the transit system, while nonminority and more affluent passengers pay a lower percentage of the costs of the heavy rail system.

Though the complaining parties were able to show a disparate impact, in every case the transportation agency showed a legitimate (nondiscriminatory) business justification. Nevertheless, it has been observed, "Transit agencies should be aware that there is an increasing likelihood that proposed increases or changes in their fare structures or in their routes will subject them to litigation if such changes are perceived to have an unjustified adverse impact on minorities."[425] The recipient is required to conduct a meaningful public participation process, which includes legal notice published in newspaper of general circulation and newspapers serving or directed to minority populations; notice mailed to social service agencies that serve minority populations; a meaningful public hearing; and the opportunity to submit written comments that will be considered on the same basis as comments at the public hearing. The agency must explain its decision as to meaningful comments and suggestions submitted during the public participation process.

Transportation equity requires equality of service to minority and nonminority passengers. Minority passengers are primarily serviced by inner-city transportation systems and nonminority passengers are primarily serviced by suburban transportation systems.[426] Minority groups have alleged discrimination in service based on fare increases, inequitable transportation improvements, and inequitable transportation funding.[427]

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[421] *See, e.g.,* Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); Morgan v. Va., 328 U.S. 373 (1946); Lewis v. Greyhound Corp., 199 F. Supp. 210 (N.D. Ala. 1961).

[422] 49 C.F.R. pt. 21, App. C(a)(3)(iii).

[423] Van de Walle, *supra* note 54, at 16.

[424] Van de Walle, *supra* note 54, at 16.

[425] *Id*. at 21.

[426] Kevin J. Klesh, *Urban Sprawl: Can the "Transportation Equity" Movement and Federal Transportation Policy Help Break Down Barriers To Regional Solutions?*, 7 ENVTL. L. 649, 671 (2001).

[427] Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth., 263 F.3d 1041 (9th Cir. 2001) (holding that the transportation authority was obligated to comply with the consent decree to remedy discrimination and not just use its best efforts); N.Y. Urban League, Inc. v. N.Y., 71 F.3d 1031 (2d Cir. 1995) (holding that an injunction was an improper remedy to prevent a fare increase); Committee for a Better North Phila. v. Southeastern Pa. Transp. Auth., Civ. A. No. 88-1275, 1990 WL

In 1994, President Clinton signed an Executive Order to ensure that federal agencies address the disproportionate environmental effects on minority and low-income populations.[428] In 1997, DOT issued its own order with guidelines for incorporating the Executive Order into transportation planning.[429] The DOT order seeks to achieve environmental justice by integrating NEPA and Title VI in the planning of all transportation projects.[430] The DOT order specifically requires that transportation agencies address "adverse effects" on minority and low-income populations.[431] Adverse effects include the following:

- Bodily impairment, infirmity, illness, or death.
- Air, noise, and water pollution and soil contamination.
- Destruction or disruption of man-made or natural resources.
- Destruction or diminution of aesthetic values.
- Destruction or disruption of community cohesion or a community's economic vitality.
- Destruction or disruption of the availability of public and private facilities and services.
- Vibration.
- Adverse employment effects.
- Displacement of persons, businesses, farms, or nonprofit organizations.
- Increased traffic congestion, isolation, exclusion, or separation of minority or low-income individuals within a given community or from the broader community.
- The denial of, reduction in, or significant delay in the receipt of, benefits of DOT programs, policies, or activities.[432]

DOT and other transit authorities must address environmental justice and equity under the Executive Order, DOT order, and DOT regulations. However, transportation agencies do not consistently achieve the aspirational requirements of environmental justice and transportation equity.

In 1994, minority bus riders of the Los Angeles County MTA filed a class action lawsuit under Title VI and the 14th Amendment.[433] The plaintiffs alleged that the MTA spent a disproportionate amount of its budget on suburban rail lines and buses and neglected inner city buses while increasing bus fares.[434] The catalyst for the lawsuit was the MTA's intention to increase bus fares by 23 percent from $1.10 to $1.35 per trip, and the elimination of the low cost monthly bus pass.[435] The plaintiffs presented evidence that approximately 94 percent of the MTA's clients were bus riders and 80 percent of those riders were persons of color.[436] In addition, only 30 percent of the MTA's resources were spent on buses and the remaining 70 percent were spent on the rails, which serviced only 6 percent of the total riders.[437] The plaintiffs also presented MTA documents that acknowledged severe overcrowding on buses up to 140 percent above allowable capacity.[438] The plaintiffs documented a "history of discrimination" in the MTA dating back to the 1964 race riots and spurred in part by transportation and social inequities.[439]

Eventually, in 1996, the parties signed a consent decree to settle the lawsuit.[440] The consent decree required that the MTA purchase 248 additional buses to prevent overcrowding and continue the low monthly and daily fares.[441] However, 14 months after signing the consent decree the MTA failed to meet its requirements.[442] Specifically, the MTA had not acted to reduce the overcrowding problems on the buses.[443] The MTA argued that it had insufficient funds to purchase new buses and therefore could not meet its targeted goal.[444] In 2001, the Ninth Circuit affirmed an earlier district court decision and ordered the MTA to comply with the consent decree.[445] Therefore, in this case, minority passengers were successful under Title VI and achieved a degree of transportation equality.

In *New York Urban League, Inc. v. New York*, the Second Circuit Court of Appeals frustrated minority passengers' attempt to enjoin subway and bus fare in-

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121177 (E.D. Pa. 1990), affirmed without opinion 935 F.2d 1280 (staying a motion for summary judgment pending settlement negotiations regarding the use of federal subsidies in transportation planning).

[428] *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994).

[429] *DOT Order on Environmental Justice to Address Environmental Justice in Minority Populations and Low-Income Populations*, DOT Order No. 5610.2 (1997).

[430] U.S. Dep't of Transp., *Environmental Justice—Facts* (visited Nov. 18, 2001), http://www.fhwa.dot.gov/environment/ejustice/facts/index.htm.

[431] *Id*.

[432] *Id*. *DOT Order on Environmental Justice to Address Environmental Justice in Minority Populations and Low-Income Populations*, DOT Order No. 5610.2 (1997).

[433] Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth., 263 F.3d 1041, 1043 (9th Cir. 2001).

[434] *Id*.

[435] Environmental Defense, *Fighting for Equality in Public Transit: Labor Community Strategy Center v. MTA* (visited Nov. 24, 2001), http://environmentaldefense.org/programs/Transportation/Equity/e_case.html.

[436] *Id*.

[437] *Id*.

[438] *Id*.

[439] *Id*. Among the documented inequities in services provided by the MTA were bus fare increases; development of rail lines in nonminority areas, which benefited only a small percentage of the MTA ridership; no new rail lines to service predominantly minority areas; and the absence of rail stops in minority areas.

[440] Labor/Community Strategy Center v. L.A. County Metro. Transp. Auth., 263 F.3d at 1044–45.

[441] *Id*.

[442] *Id*. at 1045.

[443] *Id*.

[444] *Id*. at 1049.

[445] *Id*. at 1051.

creases.[446] Plaintiffs challenged the state and metropolitan transit authority's 20 percent increase in fares on subways and buses at a time when it imposed only an 8.5 percent increase on the suburban commuter lines.[447] In addition, the plaintiffs challenged the allotment of transportation funds between buses and the commuter lines as disparities in subsidies and a violation of DOT regulations implementing Title VI.[448] The subways and buses served the predominantly minority, inner-city population and the commuter lines served a primarily suburban, white population.[449] The district court found a disparate impact on the protected minority plaintiffs and entered a preliminary injunction to enjoin the fare increases.[450] However, on appeal the Second Circuit reversed the district court's decision and held the plaintiffs were not likely to succeed on the merits of the case.[451]

The Second Circuit looked beyond the fare increases and examined the larger administrative and financial situation of the transportation authorities.[452] The court held that there were insufficient findings of a disparate impact on minority passengers and that enjoining the fare increase was an inappropriate remedy as the ultimate issue was the disparities in subsidies.[453] The court found "substantial legitimate justification" for the fare increases based on financial analysis, including encouraging suburban commuters to use public transportation, which would increase use of the buses and subways and benefit minority riders through indirect subsidies.[454] This decision continued what some experts find to be a "legacy of inequity" in the New York transportation system.[455]

As a result of the litigation in New York, Los Angeles, and other cities like Philadelphia and Atlanta, "[t]ransit agencies should be aware that there is an increasing likelihood that proposed increases or changes in their fare structures or in their routes will subject them to litigation if such changes are perceived to have an unjustified adverse impact on minorities."[456] Although the existing transportation equity litigation was generally brought under Title VI, regulations promulgated pursuant to President Clinton's Executive Order promoting environmental justice may provide minorities with additional avenues of access to the courthouse in the future. The Executive Order requires that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations…."[457] Federal agencies such as DOT have adopted environmental justice strategies and promulgated regulations to accomplish the goals of the Executive Order.[458] Transportation equity litigants have yet to focus upon DOT regulations for environmental justice, but the regulations are a valuable tool to be used in conjunction with Title VI to promote transportation equality.

### 2. Disabilities Discrimination

#### *a. Development of the Law of the Handicapped in Transportation: The Long and Winding Road*

This section provides a historical overview of the law and regulation addressing the transportation of disabled patrons, leading up to promulgation of the ADA of 1990.

The Urban Mass Transportation Assistance Act of 1970 declared it national policy that elderly and handicapped people have the same right as other people to use mass transportation facilities and services, and that special efforts should be made in the planning and design of mass transit facilities and services so that their availability to the elderly and handicapped will be assured.[459] The National Mass Transportation Assistance Act of 1974 enacted the current requirement that fares for elderly and handicapped persons not exceed half the general rate during peak hours.[460]

Section 504 of the Rehabilitation Act of 1973—commonly known as "the civil rights bill of the disabled"—provides: "No otherwise qualified individual with handi-

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[446] N.Y. Urban League, Inc. v. N.Y., 71 F.3d 1031 (2d Cir. 1995).

[447] *Id*. at 1035.

[448] *Id*.

[449] *Id*.

[450] *Id*. at 1035, 1037.

[451] *Id*. at 1036.

[452] *Id*. at 1037.

[453] *Id*. at 1040.

[454] *Id*. at 1039.

[455] Klesh, *supra* note 426, at 649, 677.

[456] *See* Van de Walle, *supra* note 54, at 456; *see also* Committee for a Better North Phila. v. Southeastern Pa. Transp. Auth., Civ. A. No. 88-1275, 1990 WL 121177 (E.D. Pa. 1990) (challenging the use of federal subsidies in transportation planning); Klesh, *supra* note 426, at 649, 678–80 (discussing the DOT administrative complaint brought by the Metropolitan Atlanta Transportation Equity Coalition alleging Atlanta's transportation authority's violations of Title VI of the Civil Rights Act of 1964 and the ADA).

[457] *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994).

[458] *See* Environmental Justice Section 3.150 for a discussion of the regulations promulgated by the DOT to comply with the Executive Order.

[459] 49 U.S.C. § 1612(a) (1982).

[460] *Id*. at 327. The Half-Fare Program benefits are available only to persons who meet the statutory definition of an "individual with handicaps." Colautti v. Franklin, 439 U.S. 379 (1979); Marsh v. Skinner, 922 F.2d 112 (2d Cir. 1990) (plaintiff who suffered from unspecified mental illness held ineligible because the disability required no special planning, facilities, or design). Blindness is considered a handicap under this Program; deafness is not, and mental illness is generally not. Temporary handicaps (of less than 90-days in duration) also are not. The Program is also available to elderly persons, which include at least persons 65 years of age or older. 49 C.F.R. § 609.23 (1999).

rovides: "No otherwise qualified individual with handicaps in the United States….shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under program or activity receiving Federal financial assistance."[461]

But in the ensuing years, disabled plaintiffs were unsuccessful arguing that they had a fundamental right to public transportation that requires transit authorities to purchase buses accessible to wheelchairs.[462] In 1976, Section 165 was added to the Federal-Aid Highway Act of 1973 authorizing the Secretary of Transportation to require that a mass transit system aided by grants from highway funds "be planned designed, constructed, and operated to allow effective utilization by elderly or handicapped persons."[463]

Today, to establish a *prima facie* case of discrimination under the Rehabilitation Act, a plaintiff must prove: (1) defendant received federal financial assistance; (2) plaintiff suffers from a disability as defined under the Act; (3) plaintiff is "otherwise qualified" for the program; and (4) the plaintiff is exposed to discrimination solely because of his or her disability.[464] As we shall see, Title II of the ADA explicitly was modeled after Section 504 of the Rehabilitation Act; thus requirements for claims under the ADA are virtually identical for those under the Rehabilitation Act.[465] Often, public transit claims are brought under both statutes.[466]

Acting under the Rehabilitation Act and Section 16 of the Urban Mass Transportation Act, UMTA adopted regulations in 1976 that required local transit agencies receiving federal funds to make "special efforts" to accommodate the transportation needs of the disabled, but largely left to the local agencies the responsibility to determine how to implement these requirements.[467] Many devoted resources to purchasing new buses with wheelchair lifts. Others found that alternative too costly due in large part to the cost of wheelchair lifts and high maintenance costs arising from the breakdown of early generation lifts, and decided to provide paratransit or "dial-a-ride" services, whereby a van would be dispatched to pick up disabled persons and take them to their destinations (door-to-door or curb-to-curb service).

In 1978, the U.S. Department of Health, Education, and Welfare issued guidelines requiring that federally-funded programs be accessible, as a whole, to disabled persons, essentially requiring federally-funded programs to "mainstream" disabled persons.[468] The guidelines specifically required retrofitting of subways and buses to make them fully accessible to the handicapped.[469] But HEW acknowledged that its guidelines did not "preclude in all circumstances the provision of specialized services as a substitute for, or supplement to, totally accessible services."[470]

In response, UMTA promulgated new rules in 1979 mandating equal access, embracing the assumption that mass transit should be available both to people with disabilities and those free from them.[471] This required that all new fixed route buses be made accessible to the disabled (including those confined to wheelchairs), and that rail transit facilities be retrofitted for accessibility.[472] One half of peak-hour buses were required to be accessible within 3 years (10 years for

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[461] 29 U.S.C. § 794(a) (1973).

[462] PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC POLICY IN REGULATION 328 (1986).

[463] 23 U.S.C. § 142 (1982). PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 329 (Quorum 1986). This requirement was reaffirmed in more recent legislation. Special efforts must be made in the planning and design of transit facilities and services so these are available to and can be effectively utilized by elderly persons and persons with disabilities. 49 U.S.C. § 5310 (2000), (formerly § 16(a) of the FT Act), (tit. III of Pub. L. 102-240, ISTEA).

[464] Knapp v. Northwestern Univ., 101 F.3d 473, 478, *cert. denied*, 520 U.S. 1274, 117 S. Ct. 2454 (1997).

[465] Hamlyn v. Rock Island County Metro. Mass Transit Dist., 986 F. Supp. 1126 (C.D. Ill. 1997) (transit authority's reduced fare program violates the Rehabilitation Act because it discriminates against passengers with AIDs).

[466] *See, e.g.,* James v. Peter Pan Transit Management, Inc., 1999 U.S. Dist. Lexis 2565 (E.D. N.C. 1999). The Court found that Peter Pan Transit failed to: adequately maintain wheelchair lifts, prevent a pattern of lift breakdowns, ensure that all equipment contained the necessary parts to operate in its intended fashion, repair broken lifts promptly, or train its employees how to proficiently operate the wheelchair lifts.

[467] Martha McCluskey, *Rethinking Equality and Difference,* 97 YALE L.J. 863, 873 (1988); 55 Fed. Reg. 40, 762 (1990); DEMPSEY & THOMS, *supra* note 463, at 329–30. Three examples of satisfactory "special efforts" with respect to people using wheelchairs are: (1) spending a minimum proportion of federal aid on wheelchair accessible service; (2) buying only wheelchair accessible buses until one-half of the vehicles in system were accessible, or providing a comparable substitute service for wheelchair users; (3) establishing a system of individual subsidies so that every wheelchair user could purchase round trips per week from any accessible service at prices equal to "regular fares." 97 YALE L. J. at 873.

[468] 45 C.F.R. §§ 85.57(a), 85.58(a) (1978). DEMPSEY & THOMS, *supra* note 463, at 330.

[469] 45 C.F.R. §§ 85.57(b), 85.58 (1978).

[470] 43 Fed. Reg. 2,134 (1978).

[471] McCluskey, *supra* note 467. The DOT made this change in adopting an equal access approach in the new rules in response to rules issued in 1978 by the Department of Health, Education, and Welfare (HEW), which had authority to coordinate other agencies' implementation of Section 504. The HEW guidelines required federally-funded programs to be accessible as a whole, to people with disabilities. Following HEW's guidelines, DOT's 1979 rules required all new fixed route buses to be accessible to people with disabilities, including those using wheelchairs. Within 3 years, or 10 years for modifying existing vehicles or facilities or making expensive structural changes, transit systems had to make at least one half of peak-hour bus service accessible.

[472] 55 Fed. Reg. 40, 778 (Oct. 4, 1990); DEMPSEY & THOMS, *supra* note 463, at 330.

modification of existing vehicles or facilities requiring extensive structural changes).[473]

These rules were struck down in 1981 as beyond the scope of DOT's authority because of their requirement of extensive structural changes that imposed undue financial burdens on transit authorities.[474] In response, DOT withdrew the challenged regulations, and substituted interim rules similar to the "special efforts" regulations it had adopted in 1977.[475]

Congress responded by promulgating the STAA of 1982[476] that required that DOT issue a new rule identifying minimum service criteria for the disabled. The legislation did not, however, require equal access or comparable service for disabled persons.[477]

DOT issued final rules to implement Section 504 in 1986 that gave local transit agencies the option of (1) requiring installation of wheelchair lifts in buses, (2) establishing a "special service" or paratransit system, or (3) establishing a mixed system of accessible buses and paratransit as an option for making public transportation available to the disabled.[478] The rule also contained six service criteria: (1) nondiscriminatory eligibility; (2) maximum response time; (3) no restrictions or priorities based on trip purpose; (4) comparable fares to those for the general public; (5) comparable hours and days of service; and (6) comparable service area.[479]

Although it could be segregated, service for disabled persons would have to be "comparable." In order to avoid the "undue burdens" problems that had scuttled the 1977 rules, the 1986 rules also allowed a local transit agency to limit its expenditure on transportation for the handicapped to 3 percent of its annual operating budget, even if it failed to meet the rule's service criteria.[480] Although holding that DOT could take costs into account in formulating a rule, a federal court deemed this 3 percent "cost cap" arbitrary and capricious in 1988.[481] DOT subsequently deleted the 3 percent "cost cap" expenditure on handicapped facilities.[482]

Nevertheless, DOT's decision not to implement mainstreaming, but to allow local transit authorities to use accessible buses, paratransit, or mixed systems, was upheld as reasonable.[483] Mainstreaming was not required under the legislation that then existed, for there was no right, legislative or constitutional, of equal access.[484]

With two steps forward and one step back, progress was made, albeit gradually. The percentage of new bus purchases accessible to those in wheelchairs grew to more than 50 percent annually. By 1990, 35 percent of the nation's public transit buses were accessible to disabled persons.[485]

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[473] McCluskey, *supra* note 467 at 863, 874.

[474] American Public Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981); DEMPSEY & THOMS, *supra* note 463, at 331. American Public Transit Ass'n v. Lewis held that a section of the rules governing specific requirements for mass transit was beyond the scope of DOT's authority under Section 504 because it mandated expensive structural change. The D.C. Circuit based its decision in this case on Southeastern Community College v. Davis, 442 U.S. 397 (1979), the U.S. Supreme Court's first decision interpreting Section 504's substantive requirements. Davis upheld a nursing program's rejection of an applicant with impaired hearing, holding that Section 504 does not require substantial modifications of programs to accommodate people with disabilities. The Court did not define "substantial modification," but held that section does not require a fundamental alteration in the nature of a program, such as eliminating clinical courses for a nursing student. 442 U.S. 409–414.

[475] McCluskey, *supra* note 467, at 863, 875. Believing that these rules would not result in sufficient access, Congress promulgated a statute requiring DOT promptly to issue final rules that would establish clear minimum standards for accessible transportation service. Before DOT issued those final rules, the U.S. Supreme Court again considered the extent of accommodations required by Section 504. In Alexander v. Choate, 469 U.S. 287 (1985), the Court refused to limit Section 504 to simple equal treatment, but left unanswered questions about when Section 504 would forbid unequal results. The Court assumed that Section 504 in some situations required accommodations to eliminate disparate impacts. The Court concluded that policies with harmful effects on people with disabilities may be lawful if "meaningful and equal access" still exists. The Court feared that "because the handicapped typically are not similarly situated to the nonhandicapped," "the disparate impact approach in some situations could lead to 'a wholly unwieldy administrative and adjudicative burden.'" McCluskey, at 875.

[476] 49 U.S.C. §§ 1601, 1612(d). The statute added Section 1612(d) to the Urban Mass Transit Act.

[477] 55 Fed. Reg. 40,762 (2002). The new section required the Department to issue a new rule containing minimum service criteria for service to disabled passengers.

[478] 51 Fed. Reg. 18,994 (1986). 49 C.F.R. § 27.95 (1987). McCluskey, *supra* note 467, at 86, 876. The transit agencies were required to meet these minimum service requirements as soon as reasonably feasible, as determined by UMTA, but in any case within 6 years of the initial determination by UMTA concerning the approval of its program. The rules established minimum service requirements governing fares, area and time of service, restrictions on eligibility and trip purpose, and waiting periods. Under these rules, service for people with disabilities was required generally to be "comparable" to service for nondisabled people, but could still be somewhat inferior.

[479] 49 C.F.R. § 27.95 (1987).

[480] McCluskey, *supra* note 467, at 863, 877 (1988). The DOT claimed that this cost limit on required accommodations would prevent undue burdens that were beyond its authority to impose under Section 504, particularly in light of APTA, while still requiring improved service for people with disabilities.

[481] ADAPT v. Dole, 676 F. Supp. 635 (E.D. Pa. 1988). The decision was affirmed by the Third Circuit in ADAPT v. Skinner, 881 F.2d 1184 (3d Cir. 1989) (en banc).

[482] 55 Fed. Reg. 40,762 (2002). This rule deletes the 3 percent "cost cap," the provision of the rule which the courts invalidated. The effect of this amendment will be to require any FTA recipient electing to meet its Part 27 obligations through a special service system to meet all service criteria.

[483] ADAPT v. Skinner, 881 F.2d 1184, 1198 (3d Cir. 1989) (en banc).

[484] *Id.*

[485] 136 CONG. REC. H2421, H2435 (daily ed. May 17, 1990) (statement of Rep. Anderson).

*b. Purposes of the Americans with Disabilities Act*

Described as the most sweeping civil rights legislation in a quarter century, the ADA seeks to eliminate bias by private and public enterprises in areas of employment, public accommodations, transportation, and telecommunications.[486] The legislation created federally mandated rights and responsibilities for a class of beneficiaries unparalleled since the 1960s.

The ADA mandates accessibility and nondiscriminatory service.[487] It provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations…."[488]

The transportation provisions of the ADA were among the most hotly contested, primarily because of the cost of compliance.[489] In a nutshell, the ADA requires that all new vehicles purchased by public and private transportation firms be equipped with lifts and other facilities to accommodate access by disabled passengers.[490] This includes the construction of facilities, acquisition of rolling stock or other equipment, undertaking of studies or research, or participation of any program or activity receiving or benefiting from FTA financial assistance.[491]

Although much of the legislation is devoted to issues of employment discrimination, its transportation provisions are also quite important. The fundamental thrust of the ADA is to integrate disabled persons into the mainstream of the nation. The ADA is civil rights legislation. It establishes disability as a civil right. Consequently, Congress provided no funds for compliance. The ADA finds that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness…."[492] During debate, one Congressman stated the purpose of the ADA's provisions on transportation as to "open up mainline transportation systems to people with disabilities. It is designed to make the America of the future accessible to all our citizens."[493]

A poll of disabled persons relied upon during the legislative debate of the ADA found that half viewed employment discrimination as the cause of their unemployment, and 28 percent blamed transportation barriers. More than half of those with severe disabilities identified transportation barriers as limiting their social activity.[494] Transportation access is essential for many of the human activities nondisabled persons take for granted—employment, education, shopping, recreation, and political participation.[495] As will be seen, each of these activities except political participation are defined "major life activities" in the ADA paratransit regulations.

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[486] *Will Disabilities Law Produce Litigation*, NAT'L L.J., Aug. 13, 1990, at 3. The bill was signed into law by President George Bush on July 26, 1990. *See generally* PERRETT, AMERICANS WITH DISABILITIES ACT HANDBOOK (1990) [*hereinafter* ADA Handbook].

[487] The ADA provides that discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities. 42 U.S.C. § 12182(b)(2)(A)(ii) (2000). Discrimination also includes "failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." *Id*. § 12182(b)(2)(A)(iii).

[488] 42 U.S.C. § 12182(a) (2000).

[489] Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. No. 4, 923, 933 (1989) [hereinafter *Overview*]. For example, Greyhound Corporation argued that compliance with the ADA would cost $40 million a year, "a sum that dwarfs its expected 1989 profit of $8.5 million." Disabled rights advocates, however, contended that the cost estimates cited by the transportation companies are unrealistic. For example, during Congressional hearings on the ADA, Greyhound alleged that it costs $35,000 to purchase one lift for an over-the-road bus, while others indicated that lifts could be purchased for less than $8,000. Transit systems opposed the proposed ADA regulations on the basis of the cost of lifts and the maintenance cost of lifts. Transit systems were being required to make the system accessible with no new funds being provided by FTA. It was an unfunded mandate. Transit agencies argued that they should have the choice at the local level of lift-equipping fixed route buses, operating door-to-door paratransit service, operating curb-to-curb paratransit service, or a mixed system. Wheelchair lifts at that time were unreliable and often broke down, leaving a bus inoperative. Maintenance costs for fixed route lifts were high, and smaller lift-equipped paratransit vehicles were considered by a significant number of transit systems to be more reliable. Many specialized transportation advisory committees preferred curb-to-curb paratransit service to lift-equipping the fixed route fleet because paratransit provided a higher quality/direct service.

[490] 49 U.S.C. § 5301(d) expresses the Federal policy that the elderly and persons with disabilities have the same right as other persons to use mass transportation service and facilities. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, also prohibits discrimination on the basis of handicaps.

[491] 49 C.F.R. pts. 27, 37, and 38 (2002). However, an individual or firm can use its own funds to purchase a bus and not make it accessible, so long as the vehicle is not used for public transportation service.

[492] Americans with Disabilities Act of 1990, Pub. L. No. 101-596, § 2(a)(7), 104 Stat. 3000 (1990) [hereinafter ADA].

[493] 136 CONG. REC. H2599, H2608 (daily ed. May 22, 1990) (statement of Rep. Fish.).

[494] 134 CONG. REC. S5106, S5115 (daily ed. April 28, 1988) (statement of Sen. Simon). The 1980 census revealed that 20 percent of our citizens have a disability. Even the number with severe disabilities constitutes a sizable minority. Six million Americans have mobility problems sufficiently severe to require a mobility aid such as a wheelchair, a walker, crutches, or a prosthesis.

[495] McCluskey, *supra* note 467, at 863, 864.

*c. Definition of "Disability"*

The ADA begins with a Congressional finding that 43 million Americans "have one or more physical or mental disabilities."[496] Nearly one in five of all Americans, according to Congress, are disabled. The ADA defines a disability as any physical or mental impairment that "substantially limits a major life activity."[497] An individual with a disability is a person who (a) has a physical or mental impairment that substantially limits one or more major life activities; (b) has a record of such an impairment; or (c) is regarded as having such an impairment.[498]

While courts interpreting Section 504 of the Rehabilitation Act of 1973[499] have construed the term "handicapped" as including transsexuals and compulsive gamblers, the ADA specifically excludes them.[500] In fact, the ADA excludes a number of categories of human condition, including homosexuality, bisexuality, transvestism, transsexualism, other sexual disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substantive use disorders resulting from the consumption of illegal drugs.[501] A current substance abuser is not a "disabled person" within the definition of the ADA. However, alcoholics or former/recovering drug users are persons with a disability. But as noted above in Section 7—Safety, DOT drug and alcohol testing regulations prohibit persons who test positive for certain substances from performing safety sensitive duties. Hence, the ADA allows an employer to prohibit the illegal use of drugs and alcohol in the workplace.

Both the Senate and House of Representatives Committee Reports on the ADA specify that the legislation covers persons with AIDS or HIV.[502] DOT regulations define a disability as a "physical or mental impairment that substantially limits one or more of the major life activities…."[503]

The requirements for establishment of a *prima facie* case of discrimination under the ADA are the same as those described above under the Rehabilitation Act: (1) plaintiff has a disability within the meaning of the ADA; (2) the plaintiff is otherwise qualified for the program; and (3) the plaintiff was subjected to discrimina-

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[496] ADA, *supra* note 493 § 2(a).

[497] *Will Disabilities Law Produce Litigation*, NAT'L L.J., Aug. 13, 1990, at 3.

[498] Interesting issues arise at the intersection of ADA and workers' compensation laws. As one scholar noted:

> Workers' compensation laws provide a system of settling employee claims for occupational injury or illness against an employer in a fair and speedy manner. The definitions of disability under these laws emphasize the lost earning capacity of the worker because of compensable injury rather than ability to perform work with or without accommodation. The laws vary from state to state, but they ordinarily classify disabilities based on severity or extent of injury, as well as duration of the disability. The EEOC claims that the main focus of these laws is earning capacity rather than ability to perform essential job functions.
>
> The EEOC's criticisms of workers' compensation laws are not wholly misplaced. However, the differentiated levels of disability suggest that full individualized consideration of the disability is made under this regime. The concern that a workers' compensation claimant can receive disability benefits while working would lead to the conclusion that reasonable accommodations are possible and that some individuals labeled "disabled" under workers' compensation definitions are still covered by the ADA. Therefore, those individuals should not be denied coverage under the ADA based on workers' compensation definitions of "total" disability.

Kimberly Jane Houghton, *Having Total Disability and Claiming It, Too: The EEOC's Position Against the Use of Judicial Estoppel in Americans With Disabilities Act Cases May Hurt More than It Helps*, 49 ALA. L. REV. 645, 629 (1998) [citations omitted]. *See also* Carla R. Walworth et al., *Walking a Fine Line: Managing the Conflicting Obligations of the Americans with Disabilities Act and Workers' Compensation Laws*, 19 EMPLOYEE REL. L.J. 221, 231–32 (1993), and Joan T.A. Gabel, Nancy R. Mansfield, & Robert W. Klein, *The New Relationship Between Injured Worker And Employer: An Opportunity For Restructuring The System*, 35 AM. BUS. L.J. 403 (1998).

[499] 29 U.S.C. §§ 794 (1982 & Supp. V 1987). *See* Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans With Disabilities Act and Related Legislation*, 19 TRANSP. L.J. 309, 321 (1991).

[500] Gary Lawson, *Aids, Astrology, and Airline: Towards a Casual Interpretation of Section 504*, 17 HOFSTRA L. REV. 237 (1989); Leonard, *AIDS and Employment Law Revisited,* 14 HOFSTRA L. REV. 11 (1985); *Application of Handicap Discrimination Laws to AIDS Patients,* 22 U. SO. FLA. L. REV. 317 (1988). An ongoing illness like tuberculosis is considered a disability, thus subject to protection against discrimination. School Bd. of Nassau County v. Arline, 480 U.S. 273 (1986). Since AIDS is also an ongoing illness like tuberculosis, then the Arline should apply to AIDS patients as well.

[501] 29 U.S.C. § 705(E) (2000); 42 U.S.C. § 12211 (2000). Tucker, supra *note* 489, at 923, 925–26.

[502] *See* Dempsey, *supra* note 499, at 322.

[503] 49 C.F.R. § 37.3 (2002). A physical or mental impairment is defined to include the following:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or endocrine;

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(iii) The term "physical or mental impairment" includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; mental retardation; emotional illness; specific learning disabilities; HIV disease; tuberculosis; drug addiction; and alcoholism;

(iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.

49 C.F.R. § 37.3(1) (1999). Originally, the regulations provided that drug addiction did not include "the current use of illegal drugs," nor did the definition of physical or mental impairment include alcoholism or HIV disease. "Major life activities" was originally defined to include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working….

tion because of the disability.[504] The major difference is that the Rehabilitation Act is triggered by the receipt of federal financial assistance; the ADA is not.

"The ADA affects public transportation providers both as employers (as are all employers) and as providers of transportation services." Public transportation firms would be well advised to prepare written job descriptions that specify the essential physical characteristics of positions of a physically demanding nature or those that are safety related. In preparing such job descriptions, the employer must keep in mind the reasonable accommodations that could be made to enable a disabled person to perform the essential characteristics of the position.[505] But it is the requirements of public transportation companies as providers of transportation services with which the instant discussion is focused.

The ADA divides transportation firms into two categories: public and private.[506] The rules promulgated by DOT to implement the ADA prohibit discrimination by public and private entities against individuals with disabilities. They forbid denial of the opportunity to use the transportation system if the person is capable of using it. They require that vehicles and equipment be accessible.[507] The individual must be capable of using the grantee's transportation service. For example, neither fixed route buses nor paratransit vehicles are required to carry specialized equipment that would enable a person to ride. If a person can get to the curb or the stop and carries an oxygen bottle, the person must be allowed to ride; the public transportation provider is not required to provide hookups for oxygen. Personnel must be trained and supervised so that they "treat individuals with disabilities who use the service in a courteous and respectful way."[508]

### *d. Public Transit Providers: Discrimination*

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[509] The ADA also includes a blanket antidiscrimination provision applicable to public and private firms: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[510] A "public accommodation" is defined to include "a terminal, depot, or other station used for specified public transportation…."[511] Included among the prescribed conduct is denial of the opportunity "to participate in or benefit from the goods, services, facilities, privileges, or accommodation…."[512] A public entity is defined to include a state or local government or its agencies (meaning essentially public bus and rail transit systems) and Amtrak.[513] Both public school transport and aviation are excluded from the definition of public transportation, in the latter case because the Air Carrier Access Act prohibits discrimination in air travel.[514] Public, private, and religious schools are subject to the same standard—whether, when viewed in their entirety, transportation services are "provided in the most integrated setting appropriate to the needs of the individual and is equivalent to the service provided other individuals."[515]

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[504] 42 U.S.C. § 12101(2) (2000). Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1264–65 (4th Cir. 1995).

[505] *See* Dempsey, *supra* note 486, at 323 and 1990 U.S. C.C.A.N. 267, 339. Initially, the act only applied to firms employing more than 25 employees. That number dropped to 15 employees on July 26, 1994.

[506] *William Kenworthy, Legislative Update* (address before the Transportation Law Institute, Washington, D.C., Nov. 5, 1990), at 10.

[507] 49 C.F.R. § 37.5(b) and (d) (2002).

[508] 49 C.F.R. § 37.7 (1990).

[509] ADA at § 202. The regulations provide that, "No entity shall discriminate against an individual with a disability in connection with the provision of transportation service." 49 C.F.R. § 37.5(a) (2002). Certain specific prohibitions are also enumerated, including denial to any disabled individual "the opportunity to use the entity's transportation service for the general public, if the individual is capable of using that service," imposing special charges on disabled individuals, or those with wheelchairs. 49 C.F.R. § 37.5(b), (d) (1999).

[510] ADA at § 302(a).

[511] *Id*. at § 301(7).

[512] *Id*. at § 302(b). *See* Parker v. Universidad de P.R., 225 F.3d 1 (1st Cir. 2000). In Parker, plaintiff brought suit against defendant University Botanical gardens for failure to accommodate disability under ADA. The First Circuit overturned summary judgment in favor of the University on ground that plaintiff stated a case for discrimination under the ADA. Specifically, in terms of the duty of a public entity, the court held: "Congress emphasized in enacting the ADA that 'the employment, transportation, and public accommodations sections of [the ADA] would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets.' H. Rep. No. 101-485 (1990), pt. 2, at 84." The court also ruled that there must exist at least one route for safe travel by wheelchair absent a defense that may excuse such duty. In dicta, the court suggests that the defendant may have prevailed by asserting that other than backpay there are no compensatory damages available under the ADA or Rehabilitation Act. Also in dicta, the court suggests that the defendant may have prevailed by asserting an 11th amendment sovereign immunity defense. *See also* Gorman v. Bartch, 152 F.3d 907 (8th Cir. 1998) (ruling that ADA applies to police departments when transporting paraplegic prisoner).

[513] ADA § 201(1).

[514] *Id*. § 221(2). The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in Section 241)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

[515] 49 C.F.R. § 37.105 (1999); 61 Fed. Reg. 25416 (May 21, 1996).

In *Burkhart v. Washington Metropolitan Area Transit Authority*,[516] the U.S. Court of Appeals for the D.C. Circuit reversed a jury verdict finding the WMATA directly liable for violations of the ADA and the Rehabilitation Act of 1973. The case involved a deaf patron, Eduardo Burkhart, who boarded a Metrobus in Arlington, Virginia. Upon boarding, Mr. Burkhart placed a 30 cent token in the fare box; the correct fare for a passenger for disabilities was 50 cents. As they pulled away from the curb, the driver called to Burkhart to pay the correct fare. But because he was deaf, he did not understand the driver's request. The dispute escalated into physical violence.

The court noted that both the ADA and the Rehabilitation Act prohibit discrimination "by reason of" a disability.[517] But the court found the evidence that Burkhart was discriminated "by reason of his deafness," thin. In fact, the court concluded that it was the driver's general rudeness that caused Burkhart to suffer humiliation, not discrimination by reason of Burkhart's disability. "Unfortunately for Burkhart," said the court, "general rudeness towards all does not violate either the ADA or the Rehabilitation Act."[518] However, the decision should not be read as permitting a transit system to permit its drivers to be rude. Under the ADA paratransit regulations, drivers of both fixed route and paratransit vehicles (as well as dispatchers, schedulers, supervisors, and other persons who come into contact with disabled riders on a regular basis) must take a specified level of training as to how to deal courteously and efficiently with persons with disabilities. Training is required in part because drivers voice many complaints about persons with disabilities. Grantee managers and supervisors receive large numbers of complaints from disabled persons of driver rudeness, insensitivity, and ADA violations, such as a failure to call out stops. The prudent grantee will recognize the potential exposure under the ADA, and establish protocols to deal effectively and promptly with complaints as to driver rudeness and driver conduct.

### *e. Public Transit Providers: Accessibility Requirements*

Unless FTA issues a waiver,[519] compliance with the following requirements is a condition of receiving federal financial assistance from DOT.[520]

**New Vehicles.** The ADA requires that new vehicles (e.g., buses and light and rapid rail cars) purchased and new facilities constructed by entities that operate fixed route systems must be accessible to disabled persons, including those who use wheelchairs.[521] New public buses and rail cars must be fitted with lifts or ramps

[516] 112 F.3d 1207 (D.C. Cir. 1997).

[517] 42 U.S.C. § 12132; 29 U.S.C. § 794 (2000).

[518] 112 F.3d at 1215.

[519] For example, the FTA Administrator may waive the paratransit requirements if the cost of providing fully compliant service constitutes an "undue burden." 49 C.F.R. §§ 37.151 – 37.155 (2002). In practice, however, such discretion has only been rarely conferred.

[520] 49 C.F.R. § 27.19 (2002).

[521] ADA *supra* §§ 222(a), 226, 242.

> Common wheelchairs and mobility aids means belonging to a class of three or four wheeled devices, usable indoors, designed for and used by persons with mobility impairments which do not exceed 30 inches in width and 48 inches in length, measured 2 inches above the ground, and do not weigh more than 600 pounds when occupied.

36 C.F.R. § 1192.3 (2002). 49 C.F.R. § 37.3 (2002) of the DOT's ADA regulation defines a "common wheelchair" as a three wheeled or four wheeled mobility device that does not exceed a maximum dimension of 30 inches x 48 inches, and does not exceed 600 pounds when fully loaded. This broad definition includes the traditional "Ironside" manually-powered four-wheeled chairs, the newer electric wheelchairs, and three-wheeled scooters. Although riders with bicycles, go-karts, and riding lawn mowers that meet the weight and dimensional requirements of the regulation have been denied boarding because they are not viewed as "common wheelchairs" in the common sense meaning of the term, at this writing, none of those riders have filed complaints with FTA.

Transit operators must board and attempt to secure such chairs to the best of their ability. A transit operator cannot deny boarding to a rider based on the operator's concerns that the chair cannot be secured to his satisfaction. Securement requirements are at the discretion of the transit operator. As 49 C.F.R. § 37.165 (2002) states, a transit operator *may* require that all riders secure their wheelchairs. On some systems, such as in Chicago, wheelchair riders have the freedom to ride unsecured. Transit operators are caught in a bind—they want to secure wheelchairs to avoid injuries and to limit claims from riders, yet they don't want to pay for a wheelchair that was damaged by an employee who improperly secured the wheelchair. See http://www.fta.dot.gov/office/civrights/adainfo.html for further FTA guidance on this subject.

The accessible vehicle dimensions in 48 C.F.R. pt. 38 (see http://www.fta.dot.gov/library/legal/fr9691a.htm) are all based on this 30 inch x 48 inch dimension. However, riders with chairs that are 30 inches wide (particularly those with limited dexterity) may have difficulty manuevering on a ramp or lift that complies with the 30 inch requirement. To address this situation, Thomas Built Buses has developed a bus with a wider ramp width (see http://www.thomasbus.com/products/commercial/slf200.asp), and numerous transit agencies (and the Bryce Canyon National Park) are purchasing them because the wider passageways facilitate wheelchair boarding and disembarking. In addition, a bus with an ADA-compliant 48 inch long securement location may prove difficult for a rider with a chair that is 48 inches long. Also, because the wheel wells of these new low-floor buses protrude into the passenger compartment of the bus, a passenger using a wheelchair will need to make a 90-degree turn to maneuver down a narrow 30 inch wide passageway between the wheel housings. For passengers who have limited dexterity, and especially for passengers who use less-maneuverable electric wheelchairs that cannot perform a 90-degree turn, low-floor buses, while ADA-compliant, pose a logistical nightmare. To address this problem, some transit operators have moved the lift and securement location to the rear of the vehicle, but it makes it difficult for the driver to walk to the rear of the bus to provide assistance with the equipment and to secure the chair, and to collect the fare from the passenger. And thirdly, the ADA allows part of the 30 inch x 48 inch floor space to be beneath the back of the seat ahead of

and fold-up seats or secured spaces that accommodate wheelchairs.[522] FHWA has also promulgated proposed safety standards addressing requirements for platform lifts, and a vehicle standard for all vehicles equipped with such lifts.[523] Today, all new transit buses must be equipped with lifts.[524]

The regulations defining specifications of accessibility for buses, vans, and systems are meticulously detailed, addressing such minutia as the design load of the lift (600 pounds),[525] the platform barriers, surface, gaps, entrance ramp and deflection, stowage, handrails, priority seating signs, lighting (2-foot candles of illumination), and the location of the fare box.[526] Regulations governing rapid rail,[527] light rail,[528] commuter rail cars,[529] intercity rail cars, and systems[530] are detailed as well, specifying everything from the door width (32 inches when open); to the gap between the door and the platform (no more than 3 inches); the height of the platform vis-à-vis the vehicle floor (plus or minus 5/8 inch); the height and width between characters on priority seating signs (5/8 inch and 1/16 inch, respectively); and the diameter of handrails and space of knuckle clearance to the nearest adjacent surface (1 and ¼ inch and 1 and ½ inch, respectively). Regulations applicable to over-the-road buses,[531] automated guideway transit,[532] high speed rail cars and monorails,[533] and trams and similar systems[534] are far less detailed. Nevertheless, the respective regulations contain technical specifications that the grantee must ensure are incorporated into each purchase of rolling stock.

Some small cities and rural communities provide demand-responsive systems. In general, such transit authorities must purchase accessible new equipment.[535] But they need not if their systems, when viewed in their entirety, provide equivalent levels of service both to disabled persons and persons without disabilities.[536] Thus, the delays from the moment service is requested to the time it is provided must be equivalent for handicapped and nonhandicapped passengers.[537] Once the rural grantee has a "fully accessible system," as that term is defined in the ADA regulations, the grantee need not purchase 100 percent accessible vehicles so long as the system continues to be "fully accessible."

The rules governing acquisition of new, used, and remanufactured rapid and light rail vehicles parallel those for the purchase of buses and vans, except that remanufacturing triggers an obligation for modification of intercity and commuter rail vehicles that extends the useful life for 10 (as opposed to 5) years.[538]

**Used Vehicles.** In buying or leasing used vehicles, public entities must also make a good faith effort to find used vehicles accessible to disabled persons.[539] Under DOT rules, this requires that the public entity specify accessibility in bid solicitations, conduct a nationwide search, advertise in trade periodicals, and contact trade associations.[540] However, unlike the new vehicle rules, no formal waiver need be requested from DOT.[541]

**Remanufactured Vehicles.** Vehicles remanufactured to extend their useful life for 5 years or more (or 10 years, in the case of rail cars) shall, "to the maximum extent feasible," be made accessible to disabled persons.[542] Exceptions are made for historical vehicles.[543]

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the securement location (see 49 C.F.R. pt. 38, fig. 2). Manual wheelchair users can easily maneuver their footrests into this space, but users of full-frame wheelchairs and electric scooters (due to the forward steering column) need the full vertical clearance over the 48 inches of floor space.

[522] 49 C.F.R. § 37.71 (2002). Tucker, *supra* note 489.

[523] 58 Fed. Reg. 46,228 (July 27, 2000). 65 Fed. Reg. 46228.

[524] 55 Fed. Reg. 40,770 (1990). The definition of "operates" in the ADA makes it clear that a private entity that contracts with a public entity stands in the shoes of the public entity for purposes of determining the application of ADA requirements.

[525] 55 Fed. Reg. 40,767-68 (2002). A number of transit authorities either refuse to carry scooters and other nonstandard devices or carry the devices but require the passenger to transfer out of his or her own device to a vehicle seat. This latter requirement typically is imposed when the transit provider believes it can successfully secure the mobility device but not the passenger while sitting in the device.

[526] 49 C.F.R. §§ 38.1–38.39 (2002).

[527] 49 C.F.R. §§ 38.51–38.63 (2002).

[528] 49 C.F.R. §§ 38.71–38.87 (2002).

[529] 49 C.F.R. §§ 38.91–38.109 (2002).

[530] 49 C.F.R. §§ 38.111–38.127 (2002).

[531] 49 C.F.R. §§ 38.151–38.157 (2002).

[532] 49 C.F.R. § 38.173 (2002).

[533] 49 C.F.R. § 38.175 (2002).

[534] 49 C.F.R. § 38.179 (2002).

[535] ADA § 224.

[536] *Id.*; 55 Fed. Reg. 40,772 § 37.27.

[537] 55 Fed. Reg. 40,773 (2002). For example, the time delay between a phone call to access the demand responsive system and pick up of the individual is not to be greater because the individual needs a lift or ramp or other accommodation to access the vehicle.

[538] 55 Fed. Reg. 40,774-75 (2002).

[539] *Id.* §§ 222(b), 242(c).

[540] 55 Fed. Reg. 40,771 (2002). The purpose of the waiver provision in the ADA, as the Department construes it, is to address a situation in which, because of a potentially sudden increase in demand for lifts, lift manufacturers are unable to produce enough units to meet the demand in a timely fashion. This is, as the title of the ADA provision involved suggests, a temporary situation calling for "temporary relief." A waiver should allow a transit provider meeting the statutory standards to bring vehicles into service without lifts. But there is not reason related to the purpose of this provision of the ADA why the vehicle should remain inaccessible throughout its life. A lift should be installed as soon as it becomes available.

[541] *Id.*

[542] ADA §§ 222(c) (1), 242(d). 49 C.F.R. § 37.75 (1999).

[543] ADA § 222(c)(2). Memphis built a trolley system from scratch after the ADA became effective, using vintage trolley cars from Melbourne and Portugal. All were required to be ADA accessible. But the exception for historical vehicles is extremely limited. One should not conclude that buying a vintage piece of rolling stock allows the grantee to automatically place it in service without making it ADA compliant. Though

In remanufacturing used vehicles to extend their useful life for 5 years or more, the ADA requires they be made accessible to the handicapped. While they need not be modified in a way that adversely affects their structural integrity, the cost of modification is not a legitimate consideration and will not justify a grantee failing to make a modified vehicle accessible.[544] The House Report states that "remanufactured vehicles need only be modified to make them accessible to the extent that the modifications do not affect the structural integrity of the vehicle in a significant way."[545]

Historical vehicles need not be made accessible if they operate on a fixed route that is on the National Register of Historic Places, and making the vehicle accessible would significantly alter its historic character.[546] Thus, the San Francisco cable cars and the New Orleans streetcar named "Desire" need not be modified for wheelchair access, even if they are rehabilitated to extend their useful life for 5 years.

**Facilities.** New facilities (including those used in intercity and commuter rail transportation) must be made readily accessible to and usable by disabled individuals.[547] In remodeling or altering existing facilities, those areas renovated must be accessible to disabled persons.[548] The path of travel to the altered area and the bathrooms, telephones, and drinking fountains must be readily accessible to disabled individuals, including those using wheelchairs, unless the cost or scope of doing so would be disproportionate (i.e., more than 20 percent of the cost of the alteration).[549] Transit authorities were given 3 years in which to ensure their key rapid and light rail stations[550] are accessible to the handicapped,[551] unless structural changes are extraordinarily expensive, in which case they may receive ex-

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the San Francisco and New Orleans systems discussed below fall into this exception, they may be the only systems that will ever fall into this exception. Memphis purchased used trolley cars from New Orleans and made them accessible before placing them into service.

[544] 55 Fed. Reg. 40,772 (2002). The legislative history provides that remanufactured vehicles need to be modified to make them accessible only to the extent that the modifications do not significantly effect the vehicle's structural integrity. The final rule provides that it is considered feasible to remanufacture a vehicle to be accessible, unless an engineering analysis indicates that specified accessibility features would have a significant adverse effect on the structural integrity of the vehicle. That it may not be economically advantageous to remanufacture a bus with accessibility modifications does not mean it is unfeasible to do so, in the engineering sense that Congress intended. Accordingly, the rule does not include economic factors among those that may be considered in determining feasibility.

[545] 55 Fed. Reg. 40,772 (2002). 104 ADA *supra* § 223.

[546] 55 Fed. Reg. 40,772 (2002).

[547] 49 C.F.R. § 37.41 (2002)

[548] ADA *supra* § 227(a).

[549] 49 C.F.R. § 37.43 (2002).

[550] 49 C.F.R. § 37.51 (2002) defines a "key station" for commuter rail systems as follows:

> (a) The responsible person(s) shall make key stations on its system readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. This requirement is separate from and in addition to requirements set forth in § 37.21 of this part.
>
> (b) Each commuter rail authority shall determine, in consultation with responsible persons involved and with individuals with disabilities and organizations representing them, which stations on its system are key stations, taking into consideration the following criteria:
>
> (1) Stations where passenger boardings exceed average station passenger boardings by at least fifteen percent; (2) Transfer stations on a rail line or between rail lines; (3) Major interchange points with other transportation modes, including stations connecting with major parking facilities, bus terminals, intercity or commuter rail stations, or airports; (4) End stations, unless an end station is close to another accessible station; and (5) Stations serving major activity centers, such as employment or government centers, institutions of higher education, hospitals or other major health care facilities, or other facilities that are major trip generators for individuals with disabilities.
>
> (c)(1) Except as provided in this paragraph, the responsible person(s) shall achieve accessibility of key stations as soon as practicable, but in no case later than July 26, 1993.
>
> (2) The Secretary may grant an extension of this deadline for key station accessibility for a period up to July 26, 2010. Extensions may be granted as provided in paragraph (e) of this section.
>
> (d) The commuter authority and responsible person(s) for stations involved shall develop a plan for compliance for this section. The plan shall be submitted to the Secretary by January 26, 1992.
>
> (1) The commuter authority and responsible person(s) shall consult with individuals with disabilities affected by the plan. The commuter authority and responsible person(s) shall also hold at least one public hearing on the plan and solicit comments on it. The plan submitted to the Secretary shall document this public participation, including summaries of the consultation with individuals with disabilities and the comments received at the hearing and during the comment period. The plan shall also summarize the responsible person(s) responses to the comments and consultation.
>
> (2) The plan shall establish milestones for the achievement of required accessibility of key stations, consistent with the requirements of this section.
>
> (3) The commuter authority and responsible person(s) of each key station identified in the plan shall, by mutual agreement, designate one of the parties involved as project manager for the purpose of undertaking the work of making the key station accessible.
>
> (e) Any commuter authority and/or responsible person(s) wishing to apply for an extension of the July 26, 1993, deadline for key station accessibility shall include a request for an extension with its plan submitted to the Secretary under paragraph (d) of this section. Extensions may be requested only for extraordinarily expensive modifications to stations (e.g., raising the entire passenger platform, installation of an elevator, or a modification of similar magnitude and cost). Requests for extensions shall provide for completion of key station accessibility within the time limits set forth in paragraph (c) of this section. The Secretary may approve, approve with conditions, modify, or disapprove any request for an extension.

Similar requirements are imposed for key stations in light and rapid rail systems. 49 C.F.R. § 37.47 (2002).

[551] 49 C.F.R. § 37.47 (2002).

tensions up to 20 years.[552] The 500 existing intercity rail (Amtrak) stations shall be made accessible to the disabled in not less than 20 years.[553] Failure to make "key stations" in rapid rail systems readily accessible to disabled individuals, including those in wheelchairs, constitutes discrimination under the ADA.[554]

In *Hassan v. Slater*,[555] a disabled person complained that the decision of the LIRR and MTA to close a train station near his home violated the ADA. According to the plaintiff, appearing *pro se*, the defendants have "forced residents to rely on private cars and drive to mega stations…and have abandoned those without cars and physically unable to drive cars or even afford cars. It's their fascist yuppie mentality to reinvent things in their image."[556] According to MTA, after extensive hearings, 10 stations were closed on the grounds of low customer volume, their need for substantial capital investment, nearby alternative transportation, and little or no market growth potential.[557] The court held that Hassan's ADA claim failed as a matter of law. He was not prevented from using any other LIRR station nor any other mode of transportation by reason of his disability. That the next closest station was 4½ miles away, and therefore less convenient than the station that was closed, was held not to state a claim of exclusion or discrimination.

**Paratransit.** Access to available fixed route transit is the primary goal of the transportation provisions of the ADA. The ADA regulations are framed so as to require that able-bodied disabled persons use fixed route service and that paratransit service is made available to disabled persons who are not able to use fixed route accessible service. The ADA recognizes that some disabled persons will be unable to use fixed route services, even if they are fully accessible. It therefore requires complementary paratransit service to provide transportation to those persons who cannot be transported in the fixed route system.[558] The ADA requires that public entities providing fixed route systems operate nondiscriminatory paratransit services,[559] comparable in both the level of service and response time as are provided individuals without disabilities, unless such services would impose an undue financial burden on the public entity.[560] An applicant for FTA funding must certify that its demand responsive service offered to persons with disabilities, including persons who use wheelchairs, is equivalent to the level and quality of service offered to persons without disabilities.

Public entities must plan for[561] and implement origin-to-destination paratransit service for those unable to use the normal fixed route system.[562] Door-to-door service is not required. When viewed in its entirety, the applicant's service for persons with disabilities must be provided in the most integrated setting feasible and be equivalent with respect to: (1) response time, (2) fares, (3) geographic service area, (4) hours and days of service, (5) restrictions on trip purpose, (6) availability of information and reservation capability, and (7) constraints on capacity or service availability.[563]

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[552] ADA §§ 227(b), 242(e); 49 C.F.R. § 37.47(b)(2) (2002). Transit authorities were to have made key stations accessible within 3 years of the ADA's passage, unless the accessibility modifications required extraordinarily expensive structural modifications. In such situations, transit operators were given up to 30 years to complete the work, provided that two-thirds of the key stations were made accessible within 20 years. Operators were to submit their key station reports to FTA by July 26, 1992. Based on those reports, FTA provided key station operators with time extensions that transit operators felt were realistic. However, as time progressed, transit operators appeared to have been overly optimistic and received additional time extensions to complete the projects. Yet even those requests turned out to be optimistic, as transit operators proceeded to violate their own set deadlines. Transit operators that have consistently failed to meet their own self-provided deadlines leave themselves vulnerable to litigation by the disabled because of their noncompliance.

[553] *See* ADA § 242(e).

[554] 49 U.S.C. §§ 12132, 12147(b)(1) (2000).

[555] 41 F. Supp. 2d 343 (E.D. N.Y. 1999).

[556] *Id*.

[557] 41 F. Supp. 2d at 345.

[558] *See* FEDERAL TRANSIT ADMIN., ADA PARATRANSIT ELIGIBILITY MANUAL 2 (1993); *see also* R. THATCHER & J. GAFFHEY, ADA PARATRANSIT HANDBOOK: IMPLEMENTING THE COMPLEMENTARY PARATRANSIT SERVICE REQUIREMENTS OF THE AMERICANS WITH DISABILITIES ACT OF 1990 (1991).

[559] ADA § 223.

[560] *Id*. The FTA Administrator may grant a waiver from these provisions if they impose an "undue financial burden." Procedures for waiver on the basis of undue financial burden are set forth in 49 C.F.R. § 37.151–37.155 (2002). *See also* Tucker, *supra* note 490, at 932. Undue financial burden requests must be signed by the highest ranking public official in the grantee's area. FTA will rarely grant undue financial burden waivers, and those waivers granted will be of finite duration.

[561] 49 C.F.R. § 37.137 (2002).

[562] 49 C.F.R. § 37.121 (2002). *William Kenworthy, Legislative Update* (address before the Transportation Law Institute, Washington, D.C., Nov. 5, 1990), at 10.

[563] DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," at 49 C.F.R. §§ 37.77, 37.105 (2002). One case concluded that "trip denial" exists only when a rider requests service from all the transit authority's contracted paratransit providers, and is denied by all. Bacal v. Southeastern Pa. Transp. Auth., 1999 U.S. Dist. Lexis 8700 (E.D. Pa. 1998).

FTA and grantees alike deal on a daily basis with the service criteria because disability advocacy groups and citizens raise the issue. A violation of any of the seven ADA paratransit service criteria would constitute non-compliance with the regulation. A sampling of FTA's letters of finding (LOFs) on these and other compliance issues are posted on the Internet at http://www.fta.dot.gov/office/civrights/lof/lof.html. In some instances, FTA has recommended corrective actions to the transit operator. In addition, private litigation brought by the disability community (e.g., in Philadelphia, Harrisburg, NYC, Rochester, and Hampton Roads, VA) has proven effective in forcing transit operators to address their deficiencies and to bring their systems into compliance.

Public entities that operate paratransit services must develop a formal process for certifying ADA paratransit eligible patrons.[564] It is not just the existence of the disability that makes one eligible for paratansit service. Eligibility is directly related to the inability of a disabled person to use the existing fixed route system.[565] In making this assessment, account must be taken of: (1) the applicant's disability; (2) the accessibility of the fixed route transportation system; and (3) architectural barriers or environmental conditions that, when combined with the applicant's disability, prevent use of the fixed route system.[566] There are three categories of eligibility:

- **Category I Eligibility**—These are disabled persons unable to use fully accessible fixed route services. Examples include persons with a mental disability or vision impairment who cannot "navigate the system," persons who cannot stand on a crowded bus or rail car when seats may not be available, or wheelchair-bound patrons who cannot get on or off the lift or to or from the wheelchair securement area without assistance.[567]
- **Category II Eligibility**—These are persons with ambulatory disabilities (e.g., who need a wheelchair, walker, leg braces, or canes), who therefore need a wheelchair lift to board a bus or rail car. Eligibility depends on the accessibility of the vehicles and stations; they are eligible if the fixed route to their destination is not accessible. A transit provider may accommodate their needs with an on-call bus program, designating an accessible vehicle to their route at a time when they need to travel.[568]
- **Category III Eligibility**—These are disabled patrons with specific impairment-related conditions that prevent them from traveling to a boarding or from a disembarking point on the system.[569] Two points determine eligibility. First, environmental conditions and architectural barriers not in the control of the public entity do not, in themselves, confer eligibility. But if travel to or from the boarding location is prevented when these factors are paired with the person's disability, they are entitled to paratransit service. Second, the impairment-related condition must prevent (as opposed to make more difficult) the person from using the fixed route system.[570] Examples of eligibility include a blind person unable to cross a major highway intersection not equipped with assistive devices; a person with a cardiac condition sensitive to extremely hot weather who cannot stand outside waiting for a bus; and a person with a manual wheelchair, walker, or braces who cannot negotiate steep terrain if using a fixed route system required traversing a hilly area. Paratransit ineligible individuals would include persons with a disability who prefer not to use a fixed route service because of the possibility of crime, or when it is raining, or a child with a disability who is unable to use the fixed route service because of age, rather than disability.[571]

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[564] Transit operators are obliged to establish a written eligibility policy that should detail how the ADA paratransit eligibility determination process is structured. 49 U.S.C. § 37.125 (2002). There must be an administrative appeal process for applicants deemed ineligible for complementary paratransit service. 49 C.F.R. § 37.125(g) (2002).

[565] FEDERAL TRANSIT ADMIN., *supra* note 558, at 3.

[566] *Id*. at 15.

[567] *Id*. at 4.

[568] *Id*. at 6–7.

[569] 49 C.F.R. 37.123(e)(3) (1999).

[570] FEDERAL TRANSIT ADMIN., *supra* note 558, at 7–8.

[571] *Id*. at 10. Transit providers that wish to implement broader eligibility criteria are free to do so. *Id*. at 23. Because the purpose of the ADA was to integrate Americans with disabilities into the mainstream, the ADA's emphasis is on making the nation's transit systems, vehicles, and facilities accessible to the general public, including individuals with disabilities. That's why every new bus, station, or rail vehicle must have lifts, ramps, elevators, accessible signage, text telephones, and other features to make it accessible to their disabled passengers. But as a safety net, the ADA required paratransit service for those individuals whose disabilities are so severe that he or she cannot use the fixed route system, and as a penalty for those transit systems whose vehicles and facilities were not yet accessible. ADA paratransit was never intended as a transportation option for persons with disabilities. Rather, it was intended to be a safety net.

Some transit operators have been soft-hearted by providing paratransit service to elderly passengers and anyone certifying themselves as "disabled." However, these ineligible riders consume valuable capacity that need to be made available for those who truly need the service. In Bacal v. Southeastern Pa. Transp. Auth., 1998 U.S. Dist. Lexis 8700 (E.D. Pa. 1998), a federal judge forced SEPTA to ensure that it met its obligations to those who had a right to the service before providing service to non-eligible riders. And given the high cost of paratransit ($10-$20 per trip) and the low farebox recovery ratio (fares are capped by 49 C.F.R. § 37.131(c) (1999) at twice the fixed route fare), transit operators have a financial incentive to restrict eligibility, particularly since the regulation prohibits a transit operator from placing a ceiling on the number of trips a rider may make. (To illustrate, in Los Angeles, a delivery service hired an ADA paratransit rider to make their deliveries, figuring that $2.00 for a paratransit-subsidized delivery was cheaper than using UPS, FedEx, or a local courier service! It was also a testament to the service provider's reliability.) Transit operators that complain about the high cost of ADA paratransit service need to re-examine their eligibility criteria and to re-evaluate their riders, as the regulation permits. (SEPTA has done so, though it experienced much opposition from its existing paratransit riders).

With regard to eligibility determinations, FTA appears to take the position that those decisions are best made by those in the front lines. Transit operators are best equipped to perform in-person functional evaluations, to conduct face-to-face interviews, and to know what local features may prevent an individual with a specific set of disabilities from accessing the fixed route system. One might liken FTA's role to that of a court of appeals—to ensure that an individual's due process rights were protected—does the transit operator's eligibility policy conform with the regulation's minimum criteria? Was the applicant informed that he or she had a right to an appeal? Was the appeal board constituted consistent with the ADA regulation? The transit lawyer may find guidance at the FTA's letter of findings Web site at http://www.fta.dot.gov/office/civrights/lof/lof.html.

**Conditional certifications.** Since paratransit is only required when trips cannot be made on the fixed route system, a paraplegic individual may be able to use accessible fixed route buses most of the year, but be unable when there are significant accumulations of snow.[572] Such a rider would be certified as conditionally eligible for paratransit.

**Temporary certifications.** Those who suffer temporary disabilities and paratransit eligible individuals who travel outside the region where they live are also eligible for complementary transportation.[573]

**Personal care attendants (PCAs).** Each paratransit rider is allowed to be accompanied by one PCA, who may not be charged for transportation.[574] A family member or friend riding with an eligible disabled patron is not considered a PCA unless performing the role of a PCA. A PCA is someone employed or designated to assist the disabled person in meeting his or her personal needs, such as eating, drinking, using the toilet, or communicating.[575] A PCA is not required to have specialized medical training. For example, a parent may serve as the PCA for an adult child with a disability.

Though transit operators are obliged to establish a formal process for establishing (and revoking) paratransit eligibility, they largely are free to develop procedures that suit them. Transit agencies have utilized a variety of methods to determine eligibility. Examples include:

- The Madison (Wisconsin) Metro Transit System relies primarily on a self-certification process;
- Baltimore's MTA, Seattle's METRO, and the Utah Transit Authority obtain information from both the applicant and a professional;
- The Riverside Transit Agency usually requires an in-person assessment;
- The Regional Transportation Authority of Chicago combines self-certification with in-person assessments, as needed; and
- The Oshkosh (Wisconsin) Transit System uses self-certification with personal verification, as needed, but also uses two local human service agencies for verification.[576]

Operators of demand-responsive systems must establish a system of frequent and regular maintenance of wheelchair lifts.[577] A failure to check lifts regularly and frequently, or a pattern of lift breakdowns resulting in stranded passengers or lack of vehicles to pick up scheduled passengers, constitutes a violation of the ADA paratransit regulations.[578] Damaged or inoperable accessibility features, such as lifts or tie-downs, must be repaired promptly, and if not repaired because of the unavailability of parts, the vehicle must be taken out of service altogether after 3 days.[579]

Personnel must be trained to operate the vehicles and equipment safely and properly, and treat disabled patrons in a courteous and respectful way.[580] The problems of lack of driver training and driver rudeness are serious. Grantees receive numerous complaints of driver rudeness. It's a two-way street: drivers communicate many complaints of unruly, angry, impolite passengers. The ADA regulations place the burden on the grantee to operate a paratransit system in a manner that provides courteous and respectful service to patrons. One real problem is driver turnover. The cost of training a paratransit driver is significant. The driver often goes through the grantee's training, obtains his or her CDL, and leaves shortly thereafter for a higher paying commercial driving job.

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The FTA is not in the business of overruling transit operators' judgment calls, especially if those assessments were performed in good faith. If a paratransit applicant believes that the transit operator's assessment was incorrect, the applicant is free to resubmit an application with any information that was not revealed in the initial application. In a few instances where an applicant believed that the transit operator was in error, he or she was invited to contact their local disability bar. At this writing, no court decision overruling a transit operator's assessment of a rider's functional capabilities has been discovered. Moreover, based on the Supreme Court's decision Toyota v. Williams, 534 U.S. 184, 2002 U.S. Lexis 400 (2002) (holding that to be substantially limited in performing manual tasks under the ADA, an individual must have an impairment that prevented or severely restricted him or her from performing activities that were of central importance to most people's daily lives—such as tending to personal hygiene and carrying out personal or household chores—and the impairment's impacts were required to be permanent or long-term), transit operators likely are justified in restricting paratransit to those who truly need it, rather than providing it to anyone meeting the ADA's broad definition of "disabled."

Some state court decisions have upheld the transit provider's paratransit ineligibility determinations. *See, e.g.,* Bradley v. East Bay Paratransit Consortium, 2001 Cal. App. Unpub. Lexis 823 (2001); Sell v. N.J. Transit Corp., 689 A.2d 1386 (N.J. 1997); Pfister v. City of Madison, 542 N.W.2d 237 (1995). The first and last of these three decisions are unpublished, and therefore of no precedental value.

[572] *Id*. at 15–16.

[573] A person with a temporary disability, such as a broken leg, a temporary cognitive disability, or who has undergone an operation and is unable to use the fixed route system is eligible. *Id*. at 13. Disabled individuals certified by a public entity as eligible for paratransit service who travel outside the region in which they live are eligible for paratransit service by another transit agency for up to 21 days. *Id*. at 11.

[574] One personal care attendant (PCA) traveling with the disabled person is eligible to accompany the disabled patron, provided the eligible individual regularly makes use of a PCA and the companion is actually acting in that capacity. 49 C.F.R. § 37.123(f) (2002).

[575] 49 C.F.R. § 37.123(f)(1)(ii) (2002); 59 Fed. Reg. 37208 (July 21, 1994).

[576] FEDERAL TRANSIT ADMIN., *supra* note 558, at 40–41 (Sept. 1993). However, one must recognize certification procedures change based on operational considerations, fraud, and abuse.

[577] 49 C.F.R. § 37.163(b) (2002).

[578] *Id*.

[579] 49 C.F.R. §§ 37.161, 37.163 (2000).

[580] 49 C.F.R. § 37.173 (2000).

Other drivers leave because of rude and belligerent passengers. In one case, a disabled plaintiff was able to establish a *prima facie* case of intentional discrimination and reckless indifference to her right to public transportation upon proof that she encountered inoperable lifts on 15 occasions in less than a 2-year period, that the paratransit provider put vehicles with inoperable lifts into service for longer than a week, that it did not regularly inspect the lifts, and that some of its employees could not proficiently operate the lifts.[581] In another, a transit authority successfully suspended disabled patrons from additional service where they had refused to exit a paratransit van on grounds that it failed to provide reasonably prompt service.[582] The regulations also permit suspension (after hearing, and for a reasonable time) of "No Shows"—those persons who establish a "pattern or practice" of missing scheduled rides.[583] The ADA paratransit regulations in essence require zero tolerance provision of accessible service.

ADA paratransit service is much more costly to operate than fixed route service. "No Shows" strain the resources of the grantee; the slot of the No Show could have been used to serve another patron. Often the second patron negotiated a revised pickup and/or return time that would not have been necessary had the No Show had the common courtesy to cancel the trip. No Shows often tell transit agencies that it is so difficult to schedule trips at preferred times that they feel compelled to make multiple reservations and then try to make arrangements with the destination.

**Half fare requirement for elderly and disabled persons.** Applicants for FTA funding must provide assurance that rates charged elderly and handicapped persons during nonpeak hours will not exceed one-half of the rates generally applicable to other persons at peak hours.[584] One who does not fall within the definition of a disabled or elderly person does not qualify for the half fare program.[585] Many transit agencies face problems of fraud and abuse by persons attempting to obtain the half fare. One attempted control is to require identification with the Medicare card; another is to provide the half fare upon presentation of the agency's ADA paratransit photo card, which the agency will issue upon presentation of a Medicare card. FTA has taken the position that a transit operator can require an elderly or handicapped person to comply with an eligibility certification procedure. It can require that eligible individuals carry an identification card, and deny half fare treatment to those without it. However, the FTA does not endorse this practice.[586]

A private entity that contracts with public entities for the provision of public transit "stands in the shoes of the public entity for purposes of determining the application of ADA requirements." In other words, a grantee cannot avoid either its obligations under the ADA or the ADA paratransit regulations by contracting out the work to a third party contractor. *James v. Peter Pan Transit Management* held that a city may not avoid its obligations under Title II of the ADA by contracting with an independent contractor.[587] Title II of the ADA prohibits discrimination by public entities; Title III prohibits discrimination by private entities. When a public entity contracts with a private entity to provide a public service, the public entity must contractually ensure the private entity will provide service in compliance with Title II, and ensure that the private entity complies with the contract.[588]

### *f. Private Transit Providers: Discrimination*

The ADA provides that discrimination includes the "failure of a private entity…to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities."[589] The regulations prohibit discrimination by private entities "against any individual on the basis of disability in the full and equal enjoyment of specified

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[581] James v. Peter Pan Transit Management, Inc., 1999 U.S. Dist. Lexis 2565 (E.D. N.C. 1999).

[582] Collins v. Southeastern Pa. Transp. Auth., 69 F. Supp. 2d 701 (E.D. Pa. 1999).

[583] 49 C.F.R. § 37.125(h) (2002).

[584] 49 C.F.R. § 609.23 (2002); 41 Fed. Reg. 18239 (Apr. 30, 1976); 49 U.S.C. §§ 5307(d) and 5308(b); 23 U.S.C. §§ 134, 135, and 142; 29 U.S.C. § 794; 49 C.F.R. 1.51 (1999). FTA fund recipients must ensure that elderly or handicapped persons, or any person presenting a Medicare card pursuant to title II or title XVIII of the Social Security Act (42 U.S.C. § 401 *et seq*. or 42 U.S.C. § 1395 *et seq*.), will be charged for transportation during non-peak hours using or involving a facility or equipment of a project financed with federal assistance authorized for 49 U.S.C. § 5307 or for Section 3037 of the Transportation Equity Act for the 21st Century (TEA-21), 49 U.S.C. § 5309 note, not more than 50 percent of the peak hour fare. Special statutory requirements also exist for elderly and persons with disabilities formula projects. These include 49 U.S.C. § 5310(a)(2) (eligible subrecipients); 49 U.S.C. § 5310, FTA Circular 9070.1E (state procedures); 49 U.S.C. § 5310(h) (eligible project activities); and 49 U.S.C. §§ 5334(g), 5311 (transfer of assets).

[585] Marsh v. Skinner, 922 F.2d 112 (1990).

[586] 49 C.F.R. pt. 609, App. A, Question 11.

[587] "When a public entity enters into a contract…with a private entity…the public entity shall ensure that the private entity meets the requirements…that would apply to the public entity if the public entity itself provided the service." 49 C.F.R. § 37.23 (2002). 55 Fed. Reg. 40, 776 (2002). This rule deleted the 3 percent "cost cap," the provision of the rule, which the courts invalidated. The effect of this amendment required any FTA recipient electing to meet its Part 27 obligations through a special service system to meet all service criteria.

[588] CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: TITLE III TECHNICAL ASSISTANCE MANUAL III-1.7000, at 7 (1993). The private entity must also ensure that it complies with Title III. The FTA's Office of Chief Counsel and Office of Civil Rights provide influential guidance in their letters of interpretation.

[589] 42 U.S.C. § 12182(b)(2)(C)(i) (2000).

transportation services."[590] There is a critical distinction between the two types of private transportation companies: (1) private transportation companies that provide service to the public for a fee, such as Greyhound, taxi companies, and so forth, and (2) private companies that provide transportation service under contract with a grantee. The latter stand in the shoes of the grantee, and are subject to the identical ADA requirements as the grantee.

*g. Private Transit Providers: Accessibility Requirements*

Changes in physical structure, design layout, and equipment in existing buildings must be made only if they are reasonable accommodations designed to satisfy the needs of disabled job applicants and employees. However, any sections of the business open to customers or the general public must be made accessible if the cost is minor.

The ADA imposes more stringent accessibility requirements when a "commercial facility" is renovated or newly built. These rules apply to all businesses, regardless of size. Major renovations of commercial facilities must, to the maximum extent feasible, be made accessible to the disabled.

The most stringent rules dealing with physical accessibility apply to the construction of new commercial facilities whose first occupancy occurred on or after January 26, 1993.[591]

Further, the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people…."[592] Such enterprise may not purchase a new vehicle (other than an automobile or van seating fewer than eight passengers) that is not readily accessible to individuals with disabilities, unless it is used in a demand responsive system and such system provides service equivalent to that provided the general public.[593] Thus, taxi cabs are exempt from the vehicular requirements,[594] though they are not exempt from the nondiscrimination requirements in providing service.[595]

Similar requirements are imposed for the purchase of new rail cars, and the remanufacture of such cars so as to extend their life for 10 or more years.[596] Certain historical or antiquated rail cars more than 30 years old, with a manufacturer that is no longer in the business, are exempt.[597]

Private companies operating "fixed route systems" (operating vehicles along a prescribed route according to a fixed schedule), must purchase or lease new vehicles (seating 16 passengers or more) that are accessible to individuals with disabilities, including those using wheelchairs.[598] If they do purchase a vehicle inaccessible to the handicapped, it shall be considered discrimination for them to fail to operate their systems so, that, when viewed in their entirety, the system provides a level of service to individuals with disabilities that is equivalent to the level of service provided to those without disabilities.[599]

However, retail and service businesses that are not in the principal business of transporting people, but do offer transportation, must also comply with several provisions of the ADA. Examples of such organizations are hotels and motels that offer airport pick-up services.

When purchasing new vehicles seating more than 16 people, private entities not primarily engaged in transportation (e.g., airport shuttles operated by hotels, rent-a-car companies, or ski resorts) must acquire vehicles accessible to disabled persons, including those who use wheelchairs, unless the system, when viewed in its entirety, provides equivalent service to disabled persons and nondisabled persons.[600] Thus, a private firm need not equip all of its vehicles with wheelchair lifts if its system will accommodate wheelchairs adequately as a whole. Private entities not primarily engaged in the transportation of people and operating demand-responsive systems that purchase vehicles with a capacity of 16 or fewer must provide equivalent service to individuals with disabilities.[601]

**Accessibility requirements for over-the-road buses—Background.** The U.S. Office of Technology Assessment was commissioned by the ADA to undertake a 3-year study of the most cost-effective means of achieving access in over-the-road buses (Greyhound-type buses with an elevated passenger deck over a baggage compartment), and to recommend legislation.[602] Within a year after the study was completed, DOT was required to promulgate regulations identify-

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[590] 49 C.F.R. § 37.5(f) (1999). However, it is not discrimination to refuse service to a disabled individual because he or she "engages in violent, seriously disruptive, or illegal conduct." But denial of service cannot be predicated solely on the basis that the disability "results in appearance or involuntary behavior that may offend, annoy, or inconvenience employees…." *Id*. at § 37.5(h).

[591] J. Frierson, Major Changes May Be Needed to Conform to the Americans With Disabilities Act 15–16 (1990) (unpublished monograph).

[592] ADA, *supra* note 493 § 304(a).

[593] *Id*. § 304(b)(3).

[594] Paul Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73 (1996).

[595] Taxi companies may not discriminate against disabled individuals in such areas as "refusing to provide service to individuals with disabilities who can use taxi service, and charging higher fares or fees for carrying individuals with disabilities and their equipment than are charged to other persons." 49 C.F.R. § 37.29(c) (2002).

[596] ADA § 304(b) (6)-(7).

[597] *Id*. § 304(c).

[598] 42 U.S.C. § 12181(4).

[599] 42 U.S.C. § 12181(b)(2)(B)(i).

[600] ADA § 302(b)(2)(B) & (D); 55 Fed. Reg. 40,774 (2002); 49 C.F.R. § 37.101 (2002).

[601] 61 Fed. Reg. 25409 (May 21, 1996). 49 C.F.R. § 37.101(e) (2002).

[602] ADA § 305.

ing how over-the-road buses shall comply with the ADA.[603] Compliance was targeted for 7 years for small providers and 6 years for others.[604] In the interim, DOT could not require retrofitting-structural changes to existing over-the-road buses in order to obtain access for the disabled.[605] Such regulations also could not require installation of accessible restrooms in the buses if that would result in a loss of seating capacity.[606]

**Accessibility requirements for over-the-road buses—DOT 1999 regulations.** DOT promulgated extensive rules governing the design features of over-the-road buses[607] to be accessible to persons with wheelchairs and other mobility aids.[608] DOT also promulgated an over-the-road accessibility rule[609] that, *inter alia,* imposed the following requirements:

- **Class I Fixed Route**[610] **Common Carriers** (those with gross operating revenues of $5.3 million annually or more)—Beginning in 2000, all new buses were required to be accessible, with wheelchair lifts and tie-downs that permit passengers to ride in their own wheelchairs. By 2012, their entire fleets must be wheelchair-accessible.
- **Small Fixed Route Common Carriers** (those with gross operating revenue of less than $5.3 million annually)—Beginning in October 2001, new buses were required to be wheelchair-accessible, but there is no overall deadline for total fleet accessibility. They may also provide equivalent service in lieu of obtaining accessible buses.
- **Charter and Tour Carriers—**Beginning in 2001, charter and tour companies were required to provide service in a wheelchair-accessible bus on 48 hours notice. Small carriers that provide primarily charter and tour service, and secondarily fixed route service, also must comply under these rules.[611]

Attempting to ameliorate the economic burden imposed by DOT rules, Congress included a provision[612] in TEA-21 that made $24.3 million available to private over-the-road bus operators to finance the incremental capital and training costs of compliance.[613]

The bus industry sought judicial review of DOT's over-the-road accessibility rules. The U.S. Court of Appeals for the D.C. Circuit[614] upheld all the regulations save one—a requirement that bus operators compensate disabled patrons when required vehicles or service are not provided.[615] DOT later withdrew the requirement.[616]

### *h. Remedies*

The ADA provides the remedies available under Section 505 of the Rehabilitation Act of 1973 (which incorporates those available under Title VII of the Civil Rights Act, including back pay, damages, attorney's fees, and injunctions).[617] Courts have held that plaintiffs may recover compensatory damages if they can prove intentional discrimination,[618] and under the Rehabilitation Act, punitive damages if they can prove malice or reckless indifference.[619] Prevailing parties may also recover reasonable attorney's fees in the discretion of the court.[620]

In the employment context, the ADA also gives disabled persons the remedies and procedures already available under Title VII of the Civil Rights Act of 1964 to those suffering racial discrimination.[621] Title VII outlaws discrimination based on race, color, religion, sex, or national origin. Job applicants or employees can file complaints with the EEOC, which can investigate and file charges. If the EEOC does not file charges, the individual who complained is permitted to file a lawsuit. Back pay, reinstatement, court-ordered accommodations, and attorneys' fees may be granted. Thus, vio-

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[603] *Id*. § 306(a)(2)(B).

[604] H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. 79 (1990).

[605] *Id*.

[606] ADA § 306(a)(2)(C).

[607] An "over-the-road bus" is one with an elevated passenger deck located over a baggage compartment. 64 Fed. Reg. 6165 (Feb. 8, 1999).

[608] 36 C.F.R. pt. 1192 (1999). TEA-21, § 3038 of 49 U.S.C. § 5310 (2000). U.S. DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. pt. 37, subpt. H, "Over-the-Road Buses," joint U.S. Architectural and Transportation Barriers Compliance Board/U.S. DOT regulations, "Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 36 C.F.R. pt. 1192 and 49 C.F.R. pt. 38 (1999).

[609] 49 C.F.R. pt. 37 (2002).

[610] "Fixed route" service is regularly scheduled bus service available to the general public that operates with limited stops connecting two or more urban areas not in close physical proximity, transports passengers and baggage, and has the ability to make meaningful connections to other distant points. 64 Fed. Reg. 6165 (Feb. 8, 1999).

[611] 64 Fed. Reg. 6165 (Feb. 8, 1999).

[612] TEA-21 § 3038.

[613] 64 Fed. Reg. 18476 (Apr. 11, 1999); 64 Fed. Reg. 23896 (May 4, 1999); 64 Fed. Reg. 46224 (Aug. 24, 1999); 65 Fed. Reg. 2772 (Jan. 18, 2000); 68 Fed. Reg. 8060 (Jan. 26, 2001).

[614] American Bus Ass'n v. Slater, 231 F.3d 1 (D.C. Cir. 2000).

[615] 49 C.F.R. 37.199 (1999).

[616] 66 Fed. Reg. 9048 (Feb. 6, 2001). DOT retained all other requirements, but amended the information collecting requirements to provide for a 5-year record retention period. *Id*. 49 C.F.R. § 37.213 (2002).

[617] 29 U.S.C. § 794a (1976).

[618] W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995); Pandazides v. Va. Bd. of Educ., 13 F.3d 823, 832 (4th Cir. 1994); Moreno v. Consolidated Rail Corp., 99 F.3d 782, 789 (6th Cir. 1996).

[619] Pandazides v. Va. Bd. of Educ., 13 F.3d 823, 832 (4th Cir. 1994).

[620] 42 U.S.C. § 12205 (2000). *See* Collins v. Southeastern Pa. Transp. Auth., 69 F. Supp. 2d 701 (E.D. Pa. 1999).

[621] 42 U.S.C. §§ 2000a-3(a), 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9 (1964); *Rights Law for Disabled,* N.Y.L.J., July 26, 1990, at 5.

lations of the physical accessibility rules may be handled by EEOC complaint, private lawsuit, or action by the U.S. Attorney General.[622]

Transportation complaints may be filed with FTA, which analyzes allegations of ADA deficiencies by the service provider. If deficiencies are found, they are presented to the transit providers with an offer of assistance to correct them. If they are not corrected, FTA may refer the matter to the Justice Department for enforcement.[623]

Injunctive relief is also available.[624] Moreover, the U.S. Attorney General may investigate alleged violations of the ADA.[625] A court may assess civil penalties up to $50,000 for the first violation, and up to $100,000 for any subsequent violation, plus damages.[626] However, punitive damages are specifically excluded.[627]

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[622] Frierson, *supra* note 591, at 16.

[623] A complaint form is published at Federal Transit Admin., *Office of Civil Rights Complaint Form* (visited Apr. 13, 2001), http://www.fta.dot.gov/office/civil/adacf.htm. Some FTA decisions are published on its Web site. *See, e.g.,* Federal Transit Admin. (last modified Oct. 30, 2000), http://www.fta.dot.gov/office/civrights/lof/lof103000a.html (finding the LYNX complimentary paratransit program consistent with ADA requirements), and Federal Transit Admin. (last modified Oct. 30, 2000), http://www.fta.dot.gov/office/civrights/lof/lof103000c.html (finding action by the WMATA to fill gaps between WMATA rail cars and platform areas consistent with the ADA).

[624] ADA § 308(a)(2). In the case of violations of § 302(b)(2)(A)(iv) and § 303(a), injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

[625] *Id*. § 308(b)(i)(A).

[626] *Id*. § 308(b)(2)(B)-(C).

[627] *Id*. § 308(b)(4). The ADA issues in this section are also addressed in Paul Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans With Disabilities Act and Related Legislation*, 19 TRANSP. L.J. 309 (1991).

SECTION 11

# LIABILITY

## A. INTRODUCTION

Common carriers, transportation equipment manufacturers, governmental agencies, and others may find themselves liable for injury or death to passengers or property under common law doctrines of negligence, warranty, strict liability, trespass, and nuisance. With increasing frequency, common carriers and governmental agencies are defending claims based on federal and state Constitutional causes of action (e.g., invasion of privacy, unlawful search and seizure). A carrier can find that liability settlements and awards can consume a significant portion of operating revenue. For example, one survey of transit organizations found that tort liability payments consumed between 1.45 percent and 12.14 percent of rider fees, with the average being 4.65 percent.[1] This Section begins with an examination of the principal theories of and defenses to carrier liability for personal injury.

Other issues of liability were addressed in earlier Sections—Section 3 addressed environmental liability and Section 10 addressed Constitutional, employment, and disabilities issues, for example. This Section focuses principally on the law of torts, including issues surrounding products liability and contractual warranties. To be an effective advocate on behalf of a transit agency, the transit lawyer must be acquainted with both sides of the case—the plaintiff's *prima facie* case, and defenses thereto. Hence, the discussion elucidates the litigation issues from both perspectives.

## B. NEGLIGENCE

### 1. Common Carriage

A common carrier has been defined as "one who engages in the transportation of persons or things from place to place for hire, and who holds himself out to the public as ready and willing to serve the public, indifferently, in the particular line in which he is engaged."[2] Courts have held that common carriers have a duty to their passengers higher than that of reasonable care.

The common law rule imposing a higher duty of care upon common carriers is of ancient origin. It found wide application against railroads in the 19th century. As one court noted, common carriers "…are held to the strictest responsibility of care, vigilance and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it."[3] Other courts, and some statutes, have described the duty as the "highest" degree of care, "extraordinary" care,[4] or "utmost" care commensurate with the hazards involved,[5] or some similar formulation, such as the "highest degree of vigilance, care, and precaution for safety" of passengers.[6] Though a carrier is neither absolutely liable for, nor an insurer of, a passenger's safety,[7] some courts have held common carriers liable for the "slightest negligence causing injury to a farepaying passenger."[8] Some have shifted the burden of proof to a carrier (such as a transit provider) where, "there is proof of injury to a fare-paying passenger on a public conveyance and the failure to reach his/her destination safely."[9] In actions brought against common carriers, some courts have also found defenses of plaintiff's contributory negligence,[10] or comparative negligence,[11] inapplicable.

A carrier has a duty to exercise a high degree of care and diligence in selecting a safe place to discharge its passengers, and fulfills that duty when they are so discharged.[12] A bus or street car carrier discharges its duty to a passenger when it deposits him or her in a usual and reasonable place for alighting and crossing the street.[13] However, a carrier is only subject to a standard of reasonable care before the carrier/passenger relationship has been formed or after it has terminated.[14]

A standard of ordinary reasonableness also has been imposed in areas beyond carriage, such as in the construction and design of facilities or vehicles.[15] Transit

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[1] LARRY THOMAS, STATE LIMITATIONS ON TORT LIABILITY FOR PUBLIC TRANSIT OPERATORS (TCRP Legal Research Digest No. 3, 1994).

[2] Burnett v. Riter, 276 S.W. 347, 349 (Tex. App. 1925) (citation omitted).

[3] Farwell v. Boston & Worcester R.R. Corp., 45 Mass. 49, 58, 59, 4 Met. 49 (1842).

[4] "A carrier of passengers must exercise extraordinary diligence to protect the lives and persons of his passengers but is not liable for injuries to them after having used such diligence." GA. CODE ANN. § 46-9-132 (2000).

[5] Lindsey v. D.C. Transit Co., 140 A.2d 306, 309 (D.C. App. 1958).

[6] Orr v. New Orleans Pub. Serv., Inc., 349 So. 2d 417, 419 (La. App. 1977).

[7] McCullough v. Regional Transit Auth., 593 So. 2d 731, 739 (La. App. 1992).

[8] Smith v. Regional Transit Auth., 559 So. 2d 995, 996 (La. App. 1990); Lincoln Traction v. Wilhelmina Webb, 102 N.W. 258 (Neb. 1905).

[9] McCollough v. Regional Transit Auth., 593 So. 2d 731, 739 (La. App. 1992).

[10] Galena & Chicago Union R.R. v. Jacobs, 20 Ill. 478, 496–97 (1858). However, in Alvis v. Ribar, 85 Ill. 2d l, 421 N.E.2d 886, 898 (Ill. 1981), the Illinois Supreme Court adopted pure comparative negligence. However, the Illinois Legislature later replaced that rule with a statue applying modified comparative negligence. 735 Ill. Comp. Stat. 5/2-1107.1.

[11] Albrecht v. Groat, 91 Wash. 2d 257, 588 P.2d 229 (1978). This court applied strict liability principles against the carrier.

[12] Columbus Transp. Co. v. Curry, 104 Ga. App. 700, 122 S.E.2d 584, 588 (Ga. App. 1961); Wells v. Flint Trolley Coach, Inc., 352 Mich. 35, 88 N.W.2d 285, 287 (Mich. 1958).

[13] Knight v. Atlanta Transit Sys., Inc., 137 Ga. App. 667, 224 S.E. 2d 790, 792 (Ga. App. 1976).

[14] THOMAS, *supra* note 1.

[15] ROBERT HIRSCH, POTENTIAL TORT LIABILITY FOR TRANSIT AGENCIES ARISING OUT OF THE AMERICANS WITH DISABILITIES ACT (TCRP Legal Research Digest, 1998). *See, e.g.,* Wash.

operators also have been plaintiffs in product liability claims against vehicle manufacturers, and have occasionally found themselves as defendants in product liability actions.[16]

### 2. Elements of Negligence

Duty, breach, causation, and damages are the four elements of proof that an injured plaintiff must satisfy by a preponderance of the evidence to establish liability. As to causation, the plaintiff must prove both cause-in-fact and proximate cause.[17]

### 3. Reasonably Prudent Person

The issue of whether one has engaged in negligent conduct is often determined by comparing the defendant's behavior against an objective standard of reasonableness—what a reasonably prudent person would do under like or similar circumstances. As one early court defined it, "such reasonable caution as a prudent man would have exercised under such circumstances."[18] Another early formulation of the standard provided, "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."[19]

Due care, or ordinary care, has been defined as "that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger,"[20] and "that degree of care which under the same or similar circumstances the great mass of mankind would ordinarily exercise."[21]

It is an objective test, though children are held to a standard of children of similar age and experience, and individuals with physical disabilities are held to a standard of an ordinary reasonable person with such disabilities. As Oliver Wendall Holmes said,

> A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for an injury to another.[22]

In certain professions, a party may be held to a higher standard of having the knowledge, experience, and education of individuals trained in that profession—the standard of qualified specialists in that field. Thus, a railroad engineer or an airline pilot would be held to the knowledge prevalent in their respective fields. A bus driver must exercise "all the care and caution which a motorman of reasonable skill, foresight, and prudence could fairly be anticipated to exercise…."[23] As one court noted,

> "WMATA, like any common carrier, owes a duty of reasonable care to its passengers." This requires "all the care and caution which a bus driver of reasonable skill, foresight, and prudence could be fairly expected to exercise," and "[w]hat is reasonable depends upon the dangerousness of the activity involved. The greater the danger, the greater the care which must be exercised." [citation omitted].[24]

Similarly, the duty has been extended to operators of rail vehicles, or as one court stated, "it is the duty of the operators of street cars to exercise proper care, depending upon the condition of the street and of traffic at any particular point, especially at crossings."[25] In an emergency, such as a traffic accident, one is expected to respond as a reasonably prudent person would under the circumstances, given that one may not have time to make the optimum decision. According to one court, "The sudden emergency doctrine was developed by the courts to recognize that a person confronted with sudden or unexpected circumstances calling for immediate action is not expected to exercise the judgment of one acting under normal conditions."[26]

### 4. Calculus of Risk

An even more objective standard of negligence, one involving economic analysis, is the "calculus of risk" developed by Judge Learned Hand in *United States v. Carroll Towing Co.*,[27] under which the probability of injury (P) and the gravity of the injury (L) is assessed against the burden of taking adequate precautions to avoid the harm (B). Negligence is deemed to exist wherever B<PL. Professor Terry summarized the concept of negligence in these terms:

> To make conduct negligent the risk involved in it must be unreasonably great; some injurious consequences of it must be not only possible or in a sense probable, but unreasonably probable. It is quite impossible in the business of life to avoid taking risks of injury to one's self or others, and the law does not forbid doing so; what it requires is that the risk be not unreasonably great. The essence of

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Metro. Area Transit Auth. v. L'Enfant Plaza Properties, Inc., 448 A.2d 864 (D.C. App. 1982).

[16] *See, e.g.*, Salvatierra v. Via Metro. Transit Auth., 974 S.W.2d 179 (Tex. App. 1998).

[17] Palsgraff v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[18] Vaughan v. Menlove, 3 Bing. (N.C.) 468, 472, 132 Eng. Rep. 490, 492 (C.P. 1837).

[19] Blyth v. The Co. of Proprietors of the Birmingham Water Works, 156 Eng. Rep. 1047, 1049 (Ex. 1856).

[20] Brown v. Kendall, 60 Mass. 292, 296 (1850).

[21] Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372, 375–76 (Wis. 1931).

[22] OLIVER W. HOLMES, THE COMMON LAW 109 (1881).

[23] Lindsey v. D.C. Transit Co., 140 A.2d 306, 309 (D.C. App. 1958).

[24] Pazmino v. Wash. Area Metro. Transit Auth., 638 A.2d 677, 678–79 (D.C. App. 1994).

[25] Schmidt v. Phila. Rapid Transit Co., 253 Pa. 502, 98 A. 691, 693 (Pa. 1916).

[26] Young v. Clark, 814 P.2d 364, 365 (Colo. 1991).

[27] 159 F.2d 169, 173 (2d Cir. 1947).

> negligence is unreasonableness; due care is simply reasonable conduct.…[28]

### 5. Duty

A plaintiff in a tort case has the responsibility of proving that the defendant owed him a duty of exercising due care. Courts view the issue of whether a duty exists as a question of law for the judge to decide, while the issue of whether facts exist to prove a breach of such duty a question for the trier of fact (the jury, where one is impaneled) to decide. One court summarized the considerations to be weighed in determining whether a duty exists:

> The determination of duty…is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." [citing Professor William Prosser]. Any number of considerations may justify the imposition of a duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. However, foreseeability of the risk is a primary consideration in establishing the element of duty.…"[29]

Nonetheless, the concept of duty is not the same as a standard of conduct. Once a duty is deemed to exist, the question is whether the plaintiff's conduct fell below the standard of care and therefore breached its duty.[30] Numerous examples exist of situations where transit operators have been held to have breached their duty of care—(e.g., a transit provider has a duty to not negligently hire, supervise, or retain an individual with a poor driving record as a bus operator; not to be negligent in training or supervising an employee under circumstances where it is foreseeable that the employee's acts could cause injury; and to provide transit police in a terminal in a high crime area because it was foreseeable that the patron could be assaulted).[31]

A bus driver has a duty to take "all the care and caution which a bus driver of reasonable skill, foresight, and prudence could be fairly expected to exercise."[32] Thus, for example, the collision of a bus with a negligently driven automobile may nonetheless constitute a breach of the duty to a standing passenger thrown (as a result of the collision) from the rear of the bus to the fare box in the front of the bus.[33]

### 6. Custom

Justice Holmes noted, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."[34] Thus, courts find that compliance with a customary practice is not necessarily conclusive as to the issue of negligence; before it can be, the jury must be satisfied with the reasonableness of the customary practice.[35] In a case involving the alleged negligence of a tug operator for failing to equip his tug with a radio, Judge Learned Hand concluded, "in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices."[36]

However, an industry standard or custom can be evidence of negligence where the defendant's conduct falls below it. For example, where it is the industry practice to have pilots warn passengers of oncoming turbulence and to instruct them to fasten their seat belts, the failure to do so may constitute negligence. Similarly, a transit provider must comply, at a minimum, with prevailing customary practices in the industry, and such customary practices are usually admissible at trial.[37]

In *Garrison v. D.C. Transit System, Inc.,*[38] a case in which a passenger was injured when the driver suddenly slammed on the brakes, the court held that the driver's violation of the transit company's driver instruction manual was admissible as some evidence of negligence, but did not constitute negligence per se. But in *Lesser v. Manhattan and Bronx Surface Transit Operating Authority*,[39] a case in which an 81-year-old patron slipped on snow while exiting a bus, the court held the company's operating manual inadmissible because it imposed a standard of care higher than that required by law. According to the court,

> the duty of a common carrier to provide safe passage is not akin to that of a municipal landowner to clear snow. A common carrier is required to exercise that care "which a reasonably prudent carrier of passengers would exercise

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[28] Terry, *Negligence*, 29 HARV. L. REV. 40, 42 (1915).

[29] Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 173 Cal. Rptr. 468 (Cal. 1975) (citation omitted).

[30] Coburn v. City of Tucson, 143 Ariz. 50 691 P.2d 1078, 1080 (Ariz. 1984).

[31] *See, e.g.,* Lockett v. Bi-State Transit Auth., 94 Ill. 2d 66, 455 N.E.2d 310, 314 (Ill. 1983); Watson by Hanson v. Metropolitan Transit Comm'n, 553 N.W.2d 406, 414 (Minn. 1996); Kirk v. Metropolitan Transp. Auth., 2001 U.S. Dist. Lexis 2786 p. 23 (S.D. N.Y 2001).

[32] D.C. Transit System Inc. v. Carney, Inc., 254 A.2d 402, 403 (D.C. App. 1969).

[33] Pazmino v. Wash. Metro. Area Transit Auth., 638 A.2d 677 (D.C. App. 1994).

[34] Texas & Pacific Ry. Co. v. Behymer, 189 U.S. 468, 470, 23 S. Ct. 622, 49 L. Ed. 905 (1903) (citation omitted).

[35] Trimarco v. Klein, 56 N.Y.2d 98, 36 N.E.2d 502, 506, 451 N.Y.S.2d 502 (N.Y. 1982).

[36] The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932), *cert. denied*, 287 U.S. 662 (1932).

[37] McCummings v. N.Y. City Transit Auth., 177 A.D.2d 24, 580 N.Y.S.2d 931 (N.Y. App. 1992), 580 N.Y. Supp. 981 (1992); Lesser v. Manhattan & Bronx Surface Transit Operating Auth., 157 A.D.2d 352, 556 N.Y.S.2d 274, 278 (N.Y. App. 1992) (dissent).

[38] 196 A.2d 924, 925 (D.C. App. 1964).

[39] 157 A.D.2d 352, 556 N.Y.S.2d 274 (N.Y. App. 1990).

> under the same circumstances, in keeping with the dangers and risks known to the carrier or which it should reasonably have anticipated."[40]

### 7. Statutory Violation

Common carriers are governed by a multitude of federal, state, and local statutes, regulations, and ordinances. For example, the ADA requires that transit operators maintain the accessibility of their vehicles and facilities "in operative condition,"[41] while other federal regulations impose specific safety standards upon rail equipment and operation. However, courts have held that "when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted."[42] These standards create legal obligations that may form the basis of establishing the "duty" requirement in tort law.

Various jurisdictions have adopted different approaches regarding the weight to be accorded a violation of a statutory obligation in assessing a defendant's negligence. Some courts view it as "some evidence," or "merely evidence" of negligence, to be considered by the jury with all the other evidence adduced.[43] Others treat a statutory violation as "prima facie evidence" or a presumption of negligence, meaning that if the defendant fails to rebut it, he is liable.[44]

For example, in a case involving a truck driver's violation of a statutory requirement to display clearance lights on his parked truck (though he did hang a kerosene lamp up to warn approaching vehicles), the court held,

> a violation of the statute in question gives rise to a rebuttable presumption of negligence which may be overcome by proof of the attendant circumstances if they are sufficient to persuade the jury that a reasonable and prudent driver would have acted as did the person whose conduct is in question.[45]

Still other jurisdictions treat a statutory violation as "negligence per se," or conclusive evidence of negligence.

A majority of jurisdictions follow the rule laid down by Judge Benjamin Cardozo in *Martin v. Herzog,*[46] a case involving the question of whether the violation of a statutory obligation not to drive without lights constituted negligence:

> [T]he unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway…. [T]o omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform.[47]

But Cardozo was careful to distinguish proof of negligence from proof of causation. Said he: "We must be on our guard, however, against confusing the question of negligence with that of the causal connection between negligence and the injury. A defendant who travels without lights is not to pay damages for his fault, unless the absence of lights is the cause of the disaster."[48]

In the transit context, courts have attempted to draw these distinctions in cases involving the failure to wear seat belts,[49] the failure of the operator to have a valid license, and so on.

Nonetheless, impossibility of performance is accepted as a defense to the notion that breach of a statutory obligation constitutes negligence. For example, in *Bush v. Harvey Transfer Co.*,[50] it was held that the failure of vehicle lights caused by a fuse blow-out was excused because it was impossible for the defendant, under the circumstances, to comply with the statute. A statutory obligation may also be excused where the obligations it imposes create greater danger than alternative, statutory-violating conduct. The Restatement of Torts notes:

> Many statutes and ordinances are so worded as apparently to express a universally obligatory rule of conduct. Such enactments, however, may in view of their purpose and spirits be properly construed as intended to apply only to ordinary situations and be subject to the qualifications that the conduct prohibited thereby is not wrongful if, because of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment…. The provisions of statutes, intended to codify and supplement the rules of conduct which are established by a course of judicial decision or by custom, are often construed as subject to the same limitations and exceptions as the rules which they supersede. Thus, a

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[40] *Id*. at 276 (citation omitted).

[41] HIRSCH, *supra* note 15.

[42] Hurley v. Motor Coach Indus., 222 F.3d 377, 383 (7th Cir. 2000); *See also* Geier v. American Honda Motor Co., 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000).

[43] Gill v. Whiteside-Hemby Drug Co., 197 Ark. 425, 122 S.W.2d 597, 601 (Ark. 1938); Smith v. Wash. Metro. Area Transit Auth., 133 F. Supp. 2d 395, 402 (D. Md. 2001).

[44] For example, CAL. EVID. CODE § 669(a) imposes a presumption of negligence where (a) a statute ordinance or regulations were violated, (b) such violation proximately caused death or injury, (c) the statute was designed to prevent the death or injury complained of, and (d) the statute ordinance or regulation was intended to protect the class of person or property injured. Steering Comm. v. United States, 6 F.3d 572, 576 (9th Cir. 1993).

[45] Seeehan v. Nims, 75 F.2d 293, 294 (2d Cir. 1935).

[46] Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920).

[47] *Id*. at 815.

[48] *Id*. at 816.

[49] Kircher, *The Seat Belt Defense—State of the Law* (Symposium), 53 MARQ. L. REV. 172 (1970); Snyder, *The Seat Belt as a Cause of Injury,* 53 MARQ. L. REV. 211 (1970); Pollock, *The Seat Belt Defense—A Valid Instrument of Public Policy*, 44 TENN. L. REV. 119 (1976); Timmons & Silvas, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. MIAMI L. REV. 737, 775 (1974); Roethe, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288 (1967).

[50] 146 Ohio St. 654, 67 N.E.2d 851 (Ohio 1946).

> statute or ordinance requiring all persons to drive on the right side of the road may be construed as subject to an exception permitting travelers to drive upon the other side, if so doing is likely to prevent rather than cause the accidents which it is the purpose of the statute or ordinance to prevent.[51]

In some states, violation of a statute is negligence per se if the harm is of the kind the statute is designed to prevent, if the person is among the class designed to be protected, and if the statute is designed to promote safety rather than governance.[52] Some courts hold that violation of a statute is negligence per se, whereas violation of a regulation is only prima facie evidence of negligence.[53] In New York,

> It is now beyond cavil that a violation of a statute that imposes specific safety standards of its own constitutes conclusive evidence of negligence and results in absolute liability. Where, however, a statute provides generally for [safety] and vests in an administrative body the authority to determine how such safety mandates will be achieved, a violation of a regulation promulgated pursuant to that statutory mandate merely constitutes some evidence of negligence, and a jury is entitled to consider the plaintiff's comparative negligence.[54]

Many cases focus on the issue of whether the plaintiff is a member of the class of persons that the statute was intended to protect. Others focus on the purpose of the statute more broadly, rather than a breach of the literal language of the statute, and causation, asking whether plaintiff would have suffered injury had the statutory purpose been obeyed.[55] For example, in *Gorris v. Scott*,[56] a suit was brought against a ship owner whose negligent failure to comply with the Contagious Diseases (Animal) Act of 1869 led to the loss of plaintiff's sheep, which washed overboard. The court found that the purpose of the statute was to prohibit overcrowding of livestock to guard against contagious disease, rather than to prevent animals from drowning. Because the damage complained of was different from the purpose of the statute, the court held that the action was not maintainable.

Many regulations specify the duty of care to be observed by pilots, engineers, or vehicle drivers.[57] Nonetheless, courts have rejected the notion that the pilot is always negligent when an air crash occurs.[58] The duty imposed upon pilots has been described as a duty to exercise vigilance to see and avoid other aircraft.[59] Others have declined to hold that the regulatory "vigilance" requirement imposes an elevated standard of care, concluding that it "denotes the care that a reasonably prudent pilot would exercise under the circumstances."[60]

Where a safety statute has been violated, the judge ordinarily plays a greater role in resolving issues that, in other contexts, might be left to the jury. Safety statutes reduce general standards of reasonableness into particular standards of conduct. The judge, as interpreter of the legislative intent, steps in to play a greater role than would be the case where there is no statutory violation. In a jurisdiction where a statutory violation is negligence per se, and there is no dispute as to whether a violation occurred or caused defendant's harm, the judge will decide the negligence question as a matter of law; where violation is disputed, the jury is relegated to the narrow factual issue of whether a violation occurred.[61] In a jurisdiction where a statutory breach is deemed to be only evidence of negligence, the judge will still play a more influential role in evaluating defendant's conduct.[62]

### 8. Res Ipsa Loquitur

*Res ipsa loquitur* is a legal rule allowing the plaintiff to shift the burden of proof on the negligence issue to the defendant.[63] The plaintiff must ordinarily prove three elements in order to shift the burden of proof to the defendant under *res ipsa loquitur*: (1) the accident is of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.[64] If all three elements are satisfied, the jury may infer negligence on circumstantial evidence alone, even where there is no direct evidence of defendant's

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[51] AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS § 286, comment (c), *quoted in* Telda v. Ellman, 280 N.Y. 124, 19 N.E.2d 987, 991 (N.Y. 1939).

[52] Flechsig v. United States, 991 F.2d 300, 304 (6th Cir. 1993); *but see* Smith v. Wash. Metro. Area Transit Auth., 133 F. Supp. 2d 395, 402 (D. Md. 2001).

[53] Carlson v. Meusberger, 200 Iowa 65, 204 N.W. 432, 439 (1925); *but see* Bevacqua v. Union Pacific R.R., Co., 289 Mont. 36, 960 P.2d 273, 286 (Mont. 1998).

[54] Bauer v. Female Academy of the Sacred Heart, 275, A.D.2d 809 712 N.Y.S.2d 706, 708 (N.Y. App. 2000) (citations omitted).

[55] *See* Brown v. Shyne, 242 N.Y. 176, 151 N.E. 197, 198 N.Y. (1926); and Ross v. Hartman, 139 F.2d 14, 15 (D.C. Cir. 1943).

[56] 9 L.R. (Exch.) 125 (1874).

[57] *E.g.,* 14 C.F.R. § 91.3.

[58] Foss v. United States, 623 F.2d 104, 106 (9th Cir. 1980).

[59] Transco Leasing Corp. v. United States, 896 F.2d 1435, 1447 (5th Cir. 1990), amended 905 F.2d 61 (5th Cir. 1990).

[60] Steering Comm. v. United States, 6 F.3d 572, 579 (9th Cir. 1993).

[61] Wiggins v. Capital Transit Co., 122 A.2d 117, 119 (D.C. 1956); Battle v. Wash. Metro. Area Transit Auth., 796 F. Supp. 579 (D. D.C. 1992).

[62] Tollisen v. Lehigh Valley Transp. Co., 234 F.2d 121 (3d Cir. 1956). JAMES HENDERSON, JR. ET AL., THE TORTS PROCESS (5th ed. 1999). WEINER, THE CIVIL JURY TRIAL AND THE LAW-FACT DISTINCTION, 54 CALIF. L. REV. 1867, 1885–86 (1966).

[63] The English translation of the Latin phrase is "the thing speaks for itself."

[64] Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687, 689 (Cal. 1944); Colmenares Vivas v. Sun Alliance Ins. Co., 807 F.2d 1102 (1st Cir. 1986). Some states only require the first two prongs of the test. *See, e.g.,* McGonigal v. Gearhart Indus., Inc., 788 F.2d 321, 326 (5th Cir. 1986). *See also* AMERICAN LAW INSTITUTE, *supra* note 51 § 3280.

negligence.[65] Defendant has the burden of proving plaintiff assumed the risk of injury, or was contributorily negligent.

*Res ipsa* has been alleged against common carriers, including transit operators as, for example, where a bus stopped abruptly, throwing a standing passenger against the windshield;[66] or where a passenger exiting a stopped bus that suddenly accelerated was thrown under the wheels;[67] where the heels of the passenger's sandals were grabbed by escalator treads;[68] or where an infant was injured in his mother's arms while descending a subway escalator.[69]

## C. CAUSE-IN-FACT

### 1. The But-For Test

In order to prevail, the plaintiff must prove that the defendant caused the plaintiff's harm by responding to one or two points: (1) "But for the defendant's act, would the plaintiff nevertheless have suffered the harm?,"(2) And was the defendant's conduct a "substantial factor" in producing the plaintiff's harm?[70] Causation may be proven by direct or circumstantial evidence.[71] For example, in the transit context, juries have been asked to decide whether the failure to provide adequate lighting,[72] the placement and maintenance of a bus stop near a busy intersection,[73] the failure of a streetcar motorman to sound a warning to pedestrians,[74] or injuries sustained when rear-ended by a bus[75] were substantial factors in causing plaintiffs' injuries.

### 2. Multiple Tortfeasors

Where there are concurrent tortfeasors, and indivisible injury, either or all may be subject to liability for the plaintiff's injury; the burden of proof may be shifted to the defendants to absolve themselves if they can.[76] Under a theory of "enterprise liability," where there are multiple producers of a commodity that causes harm, and plaintiff is unable to determine which among them produced the commodity that actually caused the harm, the plaintiff may bring suit against each member of that industry and seek joint and several liability against them all.[77]

In *Kingston v. Chicago & N.W. Ry. Co.,*[78] the defendant railroad was charged with starting a fire. It merged with another fire started by an unknown person, and the merged fire destroyed the plaintiff's property. Either alone would have achieved the same result. The court held:

> It is settled in the law of negligence that any one of two or more tortfeasors, or one of two or more wrongdoers whose concurring acts of negligence result in injury, are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence. This rule also obtains "where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other…."[79] [citation omitted]

The court held that the burden was on the defendant railroad to prove that the fire set by it was not the proximate cause of the damage.[80]

### 3. Vicarious Liability

Under the doctrine of *respondeat superior,* an employer can be held vicariously liable for the torts of its employees. Thus, the negligence of a driver or mechanic is imputed directly to the carrier for which such employee works, so long as they are acting within the "scope of employment," and not on a "frolic and detour."[81] Section 1983 claims are discussed in Section

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[65] Colmenares Vivas v. Sun Alliance Ins. Co., 807 F.2d 1102, 1104–5 (1st Cir. 1986).

[66] *See, e.g.,* Wash. Metro. Area Transit Auth. v. L'Enfant Plaza Properties, Inc., 448 A.2d 864 (D.C. App. 1982); Lindsey v. D.C. Transit Co., 140 A.2d 306 (D.C. App. 1958).

[67] Robles v. Chicago Transit Auth., 235 Ill. App. 3d 121, 601 N.E.2d 869 (Ill. App. 1992).

[68] Londono v. Wash. Metro. Area Transit Auth., 766 F.2d 569# (D.C. 1985). *See also* D.C. Transit Sys. v. Slingland, 266 F.2d 465 (D.C. Cir. 1959).

[69] Garcia v. Mass. Bay Transit Auth., 1994 Mass. Super. Lexis 87 (1994).

[70] *See* Maupin v. Widling, 192 Cal. App. 3d 568, 573, 237 Cal. Rptr. 521, 524 (1987).

[71] Hoyt v. Jeffers, 30 Mich. 181, 189–90 (1874).

[72] Kenny v. Southeastern Pa. Transp. Auth., 581 F.2d 351 (3d Cir. 1978); Merino v. N.Y. City Transit Auth., 89 N.Y.2d 824, 675 N.E.2d 1222, 653 N.Y.S.2d 270 (N.Y. 1996).

[73] Bonanno v. Cent. Contra Costa Transit Auth., 89 Cal. App. 4th 1398, 107 Cal. Rptr. 20916 (Cal. App. 2001). At this writing, the case is on appeal to the California Supreme Court, 31 P.3d 1270 (Ca. 2001).

[74] Evans v. Capital City Transit Co., 390 A.2d 869 (D.C. 1944).

[75] Cipolone v. Port Auth. Transit Sys., 667 A.2d 474 (Pa. 1995).

[76] Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 13 (Cal. 1948). Some courts have embraced a "concert of action" theory for multiple tortfeasors acting tortuously pursuant to a common design, particularly where the information necessary to prove which of several defendants caused plaintiff's injury lies peculiarly within defendants' control. Ybarra v. Spangard, 75 Cal. 2d 486, 154 P.2d 687, 690 (Cal. 1944). Where fungible commodities are produced by several manufacturers, some courts have used "market share" as a proxy for ascribing fault, each defendant being held liable for its proportion of the judgment represented by its share of the market. Sindell v. Abbot Lab., 26 Cal. 3d 588, 607 P.2d 924, 936 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

[77] Hall v. DuPont de Nemours & Co., 345 F. Supp. 353, 373 (E.D. N.Y. 1972).

[78] 191 Wis. 610, 211 N.W. 913 (Wis. 1927).

[79] *Id*. at 914. The court noted that there would be no liability had the railroad's fire united with a fire of natural origin. *Id*.

[80] *Id*.

[81] Penn. Central Transp. Co. v. Reddick, 398 A.2d 27, 29–30 (Pa. 1979). Ira S. Bushey & Sons, Inc. v. United States, 398

10—Civil Rights. Most governmental employers avail themselves of the case law holding the governmental entity not liable under respondeat superior for 1983 claims, absent gross neglect or indifference.[82] In the civil rights context and in claims arising from willful actions by employees—assault, rape, beating of passenger—employers customarily put the employee on notice that it will not defend or indemnify the employee for a judgment if the proof shows that the employee acted outside the course and scope of his or her employment, or willfully. The employer may, however, seek indemnification against the employee for any damages paid as a result of the employee's negligence.

Typically, under the "coming and going rule," an employer is not liable for negligence of his or her employee in causing third party injury while commuting to and from work. However, more and more employers are encouraging their employees to engage in rideshare or other vanpool services in order to improve their organization's compliance with environmental obligations. To the extent that such services may benefit the employer, the argument can be made that they fall within the "scope of employment," for which vicarious liability may be imposed.[83] Some transit systems are responsible for the rideshare program. Some states have enacted laws exempting employers who participate in such programs from liability under workers' compensation laws.[84]

However, if the tortfeasor is an independent contractor (a non-employee not controlled by the other person, who has independence in the manner and method of performing the work),[85] liability may flow to the independent contractor, rather than the person for whom the work is done.[86] Even here, however, the employer of the contractor may be held liable: (1) for negligence in selecting, instructing, or supervising the independent contractor; (2) where the duty is nondelegable; or (3) where the work to be performed is inherently dangerous.[87] This has significance with transit systems contracting out work or services. Other transit systems are so-called "Memphis formula" systems for Section 13(c) reasons, and all transit workers are private sector employees.[88] Is the transit system liable under respondeat superior or agency? Some tort liability statutes condition the removal of immunity and/or the tort liability cap on the individual being a governmental employee.

## D. PROXIMATE CAUSE

### 1. Foreseeability

While the cause-in-fact element of liability focuses on the link between the defendant's conduct and the plaintiff's harm, proximate (or legal) cause focuses on the link between the defendant's negligence and the plaintiff's harm. As one court put it, "Proximate or legal causation is that combination of 'logic, common sense, justice, policy and precedent' that fixes a point in the chain of events, some foreseeable and some unforeseeable, beyond which the law will bar recovery."[89] A key element of proximate causation is foreseeability—whether defendant reasonably should have foreseen that his conduct might cause harm to plaintiff. The seminal case is Justice Benjamin Cardozo's opinion in *Palsgraf v. Long Island R.R. Co.*[90]

In *Palsgraf*, railroad employees tried to assist a man boarding a moving train. The man dropped a package which, unbeknownst to the railroad employees, contained explosives. The explosion rocked the platform and threw heavy scales on Helen Palsgraf, who was standing some distance away. Cardozo found that "the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty." He concluded, "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."[91] Though the railroad employees may have been negligent with respect to the man boarding the train with his package, the railroad was in no way negligent to the plaintiff, Helen Palsgraf, for it could not foresee her within the zone of danger in assisting a man boarding a moving train.

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F.2d 167, 170 (2d Cir. 1968). A slight or minor deviation is not a "frolic and detour." *See* AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF AGENCY §§ 220, 229 (1958).

[82] *See, e.g.,* Kirk v. Metropolitan Transp. Auth., 2001 U.S. Dist. Lexis 2786 at 30–31 (S.D. N.Y 2001).

[83] Moreover, "the more involved a [rideshare] organizer becomes in administering a rideshare program or in encouraging use of a particular rideshare program, the closer it comes to the kind of control that may give rise to a duty [to the employee for foreseeable harm in negligence]." RUSSELL LIEBSON & WILLIAM PENNER, SUCCESSFUL RISK MANAGEMENT FOR RIDESHARE AND CARPOOL-MATCHING PROGRAMS (TCRP Legal Research Digest, 1994).

[84] Claros v. Highland Employment Agency, 643 A.2d 212, 214 (R.I. 1994); Boyce v. Potter, 642 A.2d 1342, 1343–44 (Me. 1994).

[85] Sanford v. Goodridge, 234 Iowa 1036, 13 N.W.2d 40, 43 (Iowa 1944).

[86] *But see* AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS § 427, which imposes liability upon the employer of an independent contractor where the work involves special dangers to others that is inherent in the nature of the work.

[87] *See, e.g.,* Wash. Metro. Area Transit Auth. v. L'Enfant Plaza Properties, Inc., 448 A.2d 864, 868 (D.C. App. 1982) (transit authority held responsible for damaged water line in proximity of subway station); HENDERSON, JR. ET AL., *supra* note 62, at 155.

[88] Under the so-called "Memphis formula," a transit operator contracts out to a private management company, which may enter into a collective bargaining agreement with the union enabling the employees to have essentially the same rights accorded to them when they were private employees. Macon v. Marshall, 439 F. Supp. 1209, 1215 (M.D. Ga. 1977).

[89] People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. 246, 495 A.2d 107 (N.J. 1985).

[90] 248 N.Y. 339, 162 N.E. 99 (1928).

[91] 162 N.E. at 100 (citations omitted).

The element of foreseeability has been an important criterion in evaluating the issue of whether the defendant owes a duty to the plaintiff. *Berry v. The Borough of Sugar Notch*[92] offers an interesting illustration. The Borough of Sugar Notch had passed an ordinance limiting rail transit cars to a speed of eight miles an hour. On the day in question, the driver was proceeding at a speed well in excess of the speed limit, which caused him to reach a point on the street at which a large chestnut tree, blown by a fierce wind, came crashing down on the transit car, injuring the plaintiff. Plaintiff argued that the transit line's speed was the immediate cause of plaintiff's injuries, since but for the defendant's excessive speed, the car would not have arrived at the place where and when the chestnut tree fell. Describing this argument as "sophistical," the court acknowledged that while speeding in violation of the ordinance may well be negligence, the fact that the "speed brought him to the place of the accident at the moment of the accident was the merest chance, and not a thing which no foresight could have predicted." In *dictum*, the court conceded that had the tree blown down across the tracks before the transit car arrived there, the excessive speed may have rendered it impossible for the driver to have avoided a collision that he either foresaw or should have foreseen.

Negligence, therefore, does not always lead to liability. Another passenger transportation case that offers useful illustration is *Central of Georgia Ry. Co. v. Price*,[93] a case in which the railroad failed to inform a passenger of her stop. The train proceeded several stations beyond before the mistake was realized. The conductor escorted the passenger to a hotel. That evening, the kerosene lamp beside her bed exploded, caught her mosquito netting afire, and she was burned. The court held that the railroad's negligence in passing the station where the plaintiff was to alight was too remote from the plaintiff's injuries in being burned. Between the negligence of the carrier in failing to leave the passenger at the proper stop, and her physical injury, there was the interposition of the negligence of the hotel in providing a defecting lamp—an intervening, superceding cause, if you will. Hence, the injuries the plaintiff suffered "were not the natural and proximate consequences of carrying her beyond her station, but were unusual, and could not have been foreseen or provided against by the highest practicable care."[94] Numerous cases exist in which passengers disembark from the bus, cross a street, and are struck by a vehicle. They sue the transit system, and the case often turns on the foreseeability of the injury.[95]

Yet another passenger injury case that illustrates the relationship between negligence, foreseeability, and intervening causes is *Hines v. Garrett*.[96] As in *Price,* the negligence of the railroad lay in carrying the passenger beyond her stop. It was night, and she was forced to walk about a mile through an "unsettled area" to get to her destination. On her journey home, she was raped twice, once by a soldier and once by a hobo. The court recognized the prevailing doctrine that one is not ordinarily held liable where the independent act of a third party intervenes between defendant's negligence and plaintiff's injury. Nonetheless, the court held, "this proposition does not apply where the very negligence alleged consists of exposing the injured party to the act causing the injury." Holding the railroad liable, the court concluded, "wherever a carrier has reason to anticipate the danger of an assault upon one of its passengers, it rests under the duty of protecting such passenger against the same."[97]

Transit providers have been held liable where a passenger is foreseeably assaulted,[98] hit,[99] shot,[100] or a victim of an attempted rape,[101] or pickpocketed by another passenger.[102] Typically, these cases hold that a common carrier is bound to exercise extraordinary care to protect its passengers when the carrier knows or should know that a third person threatens injury to, or might be anticipated to injure, the passenger.[103] But when the carrier cannot reasonably anticipate that one passenger might injure another, it owes no such duty. For example, one court held that allowing a passenger to board a train in an intoxicated state would not give rise to knowledge on the part of the carrier that the intoxicated passenger would later viciously attack another passenger.[104]

Yet another illustrative proximate cause case is *Smith v. Washington Metropolitan Area Transit Authority*,[105] which involved a wrongful death suit brought by the parents of a passenger who suffered a heart attack climbing a 107-foot out-of-order escalator in 90-degree heat exiting a Metro station. Because the elevator was ill equipped to handle the passenger demand, and the plaintiff's medical expert testified that

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[92] 191 Pa. 345, 348, 43 A. 240 (Pa. 1899).

[93] 106 Ga. 176, 32 S.E. 77 (Ga. 1898).

[94] *Id*. at 78.

[95] *See, e.g.,* Tollisen v. Lehigh Valley Transp. Co., 234 F.2d 121 (3d Cir. 1956).

[96] 131 Va. 125, 108 S.E. 690 (Va. 1921).

[97] *Id*. at 695.

[98] McCoy v. Chicago Transit Auth., 69 Ill. 2d 280, 371 N.E.2d 625 (Ill. 1977); Kenny v. Southeastern Pa. Transp. Auth., 581 F.2d 351 (3d Cir. 1978).

[99] Carswell v. Southeastern Pa. Transp. Auth. 259 Pa. Super 167, 393 A.2d 770 (Pa. 1978).

[100] Martin v. Chicago Transit Auth., 128 Ill. App. 3d 837, 471 N.E.2d 544 (Ill. App. 1984).

[101] Weiner v. Metropolitan Transp. Auth., 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (N.Y. 1982).

[102] Eagan v. Chicago Transit Auth., 240 Ill. App. 3d 784, 608 N.E.2d 292, 181 Ill. Dec. 219 (Ill. App. 1992).

[103] McPherson v. Tamiami Trail Tours, Inc., 383 F.2d 527, 531–32 (5th Cir. 1967) [unprovoked attack by a Caucasian passenger on an African-American passenger].

[104] German-Bey v. National R.R. Passenger Corp., 703 F.2d 54 (2d Cir. 1983).

[105] 133 F. Supp. 2d 395 (D. Md. 2001).

the combination of the high temperature and the enormous length of the climb aggravated his heart disease and caused the heart attack, the court held that the passenger's collapse, heart attack, and death withstood a summary judgment challenge and posed a question for the jury to determine.[106] The court went on to identify the duty held by carriers with respect to ingress and egress:

> The duty of a common carrier to provide a safe means of ingress and egress is widely recognized. This is particularly true in the instance of an underground railway where the common carrier controls the avenues of entrance and exit. The passengers cannot tunnel out of the ground on their own. They are confined to the routes the carrier provides.[107]

### 2. Substantial Factor

The seminal case of *Palsgraf* is also notable for its dissent. In it, Judge Andrews argued that one owes a duty to the world at large to refrain from those actions that unreasonably threaten the safety of others, and that duty extends even to those generally thought to be outside the danger zone. According to Andrews, foreseeability is only one part of a more comprehensive assessment of proximate cause, which includes such things as whether there is a continuous sequence of events directly traceable between cause and effect, whether one is a substantial factor in producing the other, and whether there were intervening causes, or remoteness in time and space. Andrews argued that the determination of liability depends on the line drawn by courts on the basis of convenience, public policy, and a rough sense of justice.

The *Restatement of Torts*, in fact, embraces much of Andrews' methodology. Under the *Restatement,* an actor's negligent conduct is a legal (or proximate) cause of harm to another if his conduct is a substantial factor in bringing about the harm.[108] In determining whether an actor's conduct is a substantial factor in causing harm, the *Restatement* suggests analysis of other factors that contributed in producing the harm, whether there was a continuous and active sequence of events linking the defendant's conduct with the plaintiff's injury, and the lapse of time between the two.[109] For example, in *Merino v. New York City Transit Authority*,[110] where the intoxicated plaintiff fell on rail tracks and was hit by an oncoming train, the transit authority's failure to have adequate lighting at the platform was found not to have been a substantial factor in the loss of plaintiff's arm. Yet in *Hoeft v. Milwaukee & Suburban Transport Corp*.,[111] the court held that the inability of a bus driver to avoid a collision with an intoxicated pedestrian was a substantial factor in the plaintiff's injuries.

### 3. Rescue

In another railroad case, Justice Cardozo introduced the doctrine of "danger invites rescue." In *Wagner v. International Railway,* the court found that the railroad owed a duty not only to a passenger who fell off a train as a result of the defendant's negligence, but also to another passenger who fell off a trestle in his search for the fellow who fell off the train.[112] The rescue doctrine allows a rescuer to recover from the person whose negligence placed the person to be rescued in peril so long as (1) a reasonable person would, in balancing the risk against the utility, have acted as did the rescuer, and (2) the rescuer carried out the rescue attempt in a reasonable manner. Fulfilling these two requirements establishes a causal nexus between the defendant's negligent conduct and the rescuer's injury, and relieves the rescuer of the defense of contributory negligence.[113]

Note, however, that the common law imposes no duty of rescue absent a special relationship between the parties (e.g., parent-child, common carrier-passenger);[114] conduct by the defendant that put the plaintiff in peril; or the failure to complete a rescue once begun.[115]

### 4. Direct Consequences

Under the "thin skull" rule, once it is established that defendant has injured a plaintiff to whom he owes a duty, defendant is liable for the full personal damages sustained even if the extent of the damages was not foreseeable.[116] This doctrine was applied to property damage in *Petition of Kinsman Transit Co*., which involved flooding caused when a large grain barge broke loose of its moorings in the Buffalo River, collided with another moored vessel, and the two rammed into a drawbridge, and dammed the river. The court held that the cause of the damage was precisely that which was foreseen—ice, water, and the physical mass of the vessels. The court held, "The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct,' and the damage, although other and greater than expectable, is of the same general sort that was risked."[117]

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[106] *Id*.

[107] *Id*. at 133. F. Supp. 2d at 406. Judgment vacated and case remanded, 290 F.3d 201 (4th Cir. 2002).

[108] AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF TORTS § 432 (1996).

[109] *Id*. § 433.

[110] 89 N.Y.2d 824, 675 N.E.2d 1222, 653 N.Y.S.2d 270 (N.Y. 1996).

[111] 42 Wis. 2d 699, 168 N.W.2d 134 (Wis. 1969).

[112] Wagner v. International Ry., 232 N.Y. 146, 133 N.E. 437 (N.Y. App. 1921).

[113] Solomon v. Shuell, 435 Mich. 104, 457 N.W.2d 669, 683 (Mich. 1990).

[114] Milone v. Washington Metro. Area Transit Auth., 91 F.3d 229 (D.C. Cir. 1996).

[115] Sibley v. City Serv. Transit Co., 2 N.J. 458, 66 A.2d 864, 867 (N.J. 1949).

[116] One transit case on point is Westervelt v. St. Louis Transit Co., 222 Mo. 325, 121 S.W. 114, 116–17 (Mo. 1909).

[117] 338 F.2d 708, 724 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1964).

Other courts have come out differently on the comparison between the harm risked and the harm that resulted. In another seminal case, *Polemis & Furness, Withy & Co.*,[118] the arbitrator had found that while some damage to the ship could have been foreseen (by the negligence of defendant's servants in dropping a plank into the hold), it could not have been foreseen that the dropped plank would cause a spark that would ignite benzene in the hold, and consume the vessel. The court nevertheless held for the plaintiffs, in adopting a "direct consequences rule." Said the court,

> if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to independent causes having no connection with the negligent act….[119]

*Polemis* was overruled in *Wagon Mound No. 1*,[120] which involved a fire that resulted from an oil spill by defendant's oil burning vessel in Sydney Harbor. Plaintiffs, whose wharf was destroyed by the fire, alleged that defendant's spill was negligent in that it was foreseeable that it would foul bilge pumps, shipways, and other equipment. The court held for the defendants based on the specific finding of the trial court that the ignitability of the oil was not foreseeable, saying,

> it does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be "direct."[121]

In a subsequent case arising out of the same fire, *Wagon Mound No. 2*,[122] the court allowed defendants (whose vessels had been damaged in the fire) to recover because evidence had been adduced that the risk of fire would have been foreseeable to defendants. Though these seminal cases were decided decades ago, they still influence the law of torts today.

Proximate cause is not necessarily the next or immediate cause of plaintiff's injury. In *Marshall v. Nugent,* the court found a trucking company liable under circumstances where a passenger, who had been earlier run off the road as a result of the truck driver's cutting a corner too sharply, was subsequently hit by an automobile driver when trying to warn oncoming vehicles that there was a truck obstructing the highway. The court concluded that the truck driver's "negligence constituted an irretrievable breach of duty to the plaintiff. Though this particular act of negligence was over and done with…still the consequences of such past negligence were in the bosom of time, as yet revealed."[123]

### 5. Intervening Causes

An intervening, superceding cause can break the causal chain between defendant's negligence and plaintiff's harm. In *Watson v. Kentucky & Ind. Bridge and Ry. Co.,*[124] plaintiff was injured as a result of an explosion of gasoline that escaped from defendant's railway tank car. A third party had thrown a match into the gasoline, causing the explosion. The railroad argued that it was not liable for the action of this individual. The court held,

> the mere fact that there have been intervening causes between the defendant's negligence and the plaintiff's injuries is not sufficient in law to relieve the former from liability…the defendant is clearly responsible where the intervening causes…were set in motion by his earlier negligence, or naturally induced by such wrongful act or omission, or even…if the intervening acts or conditions were of a nature the happening of which was reasonably to have been anticipated….[125]

The court observed that, "A proximate cause is that cause which naturally led to and which might have been expected to produce the result."[126] The court held that the railroad should reasonably have foreseen that if it negligently dumped gasoline onto a street, another person might inadvertently or negligently light and throw a match upon it, and that such an act would be a proximate cause of plaintiff's injury; but, the railroad could not foresee that one might maliciously do such an act. An intervening, intentional, and criminal act will usually sever the liability of the original tortfeasor, unless such act is reasonably foreseeable.[127] Thus, in *Felty v. New Berlin Transit*, *Inc.,*[128] the court held that a jury could find it foreseeable that a third party might come into contact with overhead streetcar electric wires. In *Robinson v. Chicago Transit Authority*,[129] the court held that it is foreseeable that a driver of an automobile might make a sharp turn into a gasoline station, so that when a bus rear-ended her and shoved the third-party's vehicle into plaintiff's oncoming lane of traffic, the line of causation between defendant's negligence (inability to bring the bus to stop) and plaintiff's collision (with the third-party vehicle) was not broken.

### 6. Emotional Injury

Courts have struggled with the issue of whether plaintiff should recover for emotional harm on grounds

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[118] [1921] 3 K.B. 560 (C.A.).

[119] *Id*. at 577.

[120] Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., [1961] 1 All E.R. 404.

[121] *Id*. at 413.

[122] Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. Ltd., [1966] 2 All E.R. 709.

[123] Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955).

[124] 126 S.W. 146 (Ky. 1910).

[125] *Id*. at 150.

[126] *Id*.

[127] Kush v. City of Buffalo, 59 N.Y.2d 26, 449 N.E.2d 725, 729, 462 N.Y.S.2d 831 (N.Y. 1983).

[128] 71 Ill. 2d 126, 374 N.E.2d 203, 205, 15 Ill. Dec. 768 (Ill. 1978).

[129] 69 Ill. 3d 1003, 388 N.E.2d 163, 26 Ill. Dec. 539 (Ill. 1979).

of duty and proximate cause.[130] Pain and suffering or mental anguish is universally recognized as an element of damages in tort cases. Many states now recognize psychological injury as a separate form of injury.

The early English cases involved railroad defendants.[131] The courts adopted the "impact rule,"—a plaintiff was prohibited from recovering for emotional damages unless he or she had suffered an actual impact.[132] Gradually, some courts moved to the "zone of danger rule," whereby a plaintiff could recover for emotional injury where plaintiff was not actually injured, but nearly was.[133]

For example, in a case involving a mother's emotional injury occurring when defendant negligently killed her child on the highway, the court denied recovery on grounds that otherwise "liability [would be] wholly out of proportion to the culpability of the negligent tortfeasor, would put an unreasonable burden upon users of the highway, open the way to fraudulent claims, and enter a field that has no sensible or just stopping point."[134]

In *Rickey v. Chicago Transit Authority*,[135] plaintiff, a minor, brought a negligence and strict products liability action against the Chicago Transit Authority and the United States Elevator Company for emotional distress suffered when his 5-year-old brother's clothing became entangled at the base of the escalator, where he was choked and fell into a coma. Because the emotional harm was unaccompanied by contemporaneous physical injury to or impact on the plaintiff, the lower courts held for the defendant. But on appeal, the Illinois Supreme Court remanded the case, adopting the "zone of danger" rule, saying,

> under it a bystander who is in a zone of physical danger and who, because of defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that a by-stander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact.[136]

Other courts have decried "the hopeless artificiality of the zone of danger rule," and instead adopted an analysis that focuses on the proximity of the plaintiff to the injured person in terms of time, space, and relationship.[137] But even the California courts have stepped back, concluding that "reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages are for an intangible injury."[138] Finding it necessary "to avoid limitless liability out of all proportion to the degree of a defendant's negligence…the right to recover for negligently caused emotional distress must be limited."[139] Thus, many courts have drawn lines on proximate cause grounds precluding recovery for intangible injuries in such circumstances.

### 7. Economic Injury

Another issue that has troubled courts is whether one should recover for purely consequential economic loss in situations where no tangible personal or property damage occurred. In *Barber Lines A/S v. M/V Donau Maru*,[140] the owners of the vessel Tamara brought an action to recover the economic injury they incurred because they were unable to dock at a scheduled berth due to a negligent fuel oil spill from the vessel Donau Maru. Damages included extra labor, fuel, transport, and docking costs incurred as a result of such negligence. Writing for the court, Judge Breyer upheld the traditional common law rule prohibiting recovery for negligently caused financial harm except in special circumstances—physical injury to plaintiffs or their property. Breyer noted that the number of persons suffering foreseeable financial harm in an accident would likely be far greater than those suffering traditional physical harm. Thus, allowing recovery under such circumstances would flood the courts with litigation.

Similarly, in *Petitions of Kinsman Transit Co. (Kinsman No. 2),*[141] a case whose facts are discussed above, the court held that the defendant who negligently moored his ship (which broke loose and collided with another ship and a bridge) would not be held liable because the downed bridge made the Buffalo River impassible, thereby prohibiting them from delivering grain and unloading their cargo. Relying on Judge Andrews' dissent in *Palagraf* (also discussed above), the court held that the connection between defendant's negli-

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[130] *See, e.g.,* Pentoney v. St. Louis Transit Co., 108 Mo. App. 681, 84 S.W. 140 (Mo. App. 1904).

[131] Victoria Rys. Comm'rs v. Coultas, [1888] 13 A.C. 222. *See also* Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (N.Y. 1896).

[132] Marchica v. Long Island R.R., 31 F.3d 1197, 1202 (2d Cir. 1994).

[133] Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E. 2d 1, 5, 75 Ill. Dec. 211 (Ill. 1983); Gillman v. Burlington Northern R.R. Co., 878 F.2d 1020, 1023 (7th Cir. 1989).

[134] Waube v. Warrington, 216 Wisc. 603, 258 N.W. 497, 501 (Wis. 1935). Many courts have insisted that, in order to recover for emotional harm unrelated to physical harm, there must nonetheless be a physical manifestation of emotional harm (e.g., hair falling out, hives, shingles). Waube was abandoned in Wisconsin in Bowen v. Lumbermen's Mut. Cas. Co., 183 Wis. 2d 627, 517 N.W.2d 432 (Wis. 1994), where it was found that "the physical manifestation requirement has encouraged extravagant pleading, distorted testimony, and meaningless distinctions between physical and emotional symptoms. *Id*. at 443.

[135] 98 Ill. 2d 546, 457 N.E.2d 1 75 Ill. Dec. 211 (Ill. 1983).

[136] 457 N.E. at 5.

[137] Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 920 69 Cal. Rptr. 72 (Cal. 1968).

[138] Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865, 877 (1989).

[139] *Id*. 257 Cal. Rptr. at 877–78.

[140] 764 F.2d 50 (1st Cir. 1985).

[141] 388 F.2d 821 (2d Cir. 1968).

gence and plaintiff's injury is too tenuous and remote to permit recovery. As Andrews said, proximate cause…"is all a question of expediency…of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."[142] In *Sacramento Regional Transit District v. Grumman Flexible,*[143] it was held that the transit district could not recover for economic losses caused by defective buses because plaintiff failed to allege physical injury to its property apart from the defect.

A majority of courts have retreated from the restrictive view of *Barber,* limiting recovery of economic injury to the "special circumstances" of accompanying physical injury or property damage, though there has been little agreement on where to draw the line.[144] One case that struggled with the question was *People Express Airlines, Inc. v. Consolidated Rail Corp*.,[145] where an airline was forced to evacuate its terminal because of the negligent release of toxic chemicals by defendant railroad. The court acknowledged that the traditional common law rule was motivated by the desire to limit damages to the reasonably foreseeable consequences of negligent conduct. The physical harm requirement "acts as a convenient clamp on otherwise boundless liability."[146] Nonetheless, the court noted the countervailing policies of fairness, which subordinate the threat of potential baseless claims, to the right of an aggrieved person to pursue a just and fair claim for redress in the courts. One objective of the tort process is to assure that innocent victims enjoy legal redress, absent a contrary, overriding public policy—those wronged should recover for their injuries, while those responsible for the wrong should bear the costs of their tortuous conduct.

The court in *People Express* sought to split the baby. It adopted a rule that one may recover for economic losses, even where there was no physical injury, if the particular plaintiff(s) comprise "an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct."[147] The court emphasized that an identifiable class, so defined, is not simply a foreseeable class of plaintiffs. According to the court:

> [P]ersons traveling on the highway near the scene of a negligently-caused accident…who are delayed in the conduct of their affairs and suffer varied economic losses, are certainly a foreseeable class of plaintiffs. Yet their presence within the area would be fortuitous, and the particular type of economic injury that could be suffered by such persons would be hopelessly unpredictable and not realistically foreseeable. Thus, the class itself would not be sufficiently ascertainable. An identifiable class of plaintiffs must be particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty of predictability of their presence, the approximate members of those in the class, as well as the type of economic expectations disrupted.[148]

The court in *People Express* noted the close proximity of the airline's terminal to the railroad freight yard, the obvious nature of the plaintiff's operations, and the particular foreseeability of economic losses it would incur if forced to evacuate its facilities, as well as the railroad's knowledge of the volatile properties of ethylene oxide. In remanding the case to trial, the court instructed the trial judge to be exacting in ensuring that "damages recovered are those reasonably to have been anticipated in view of the defendant's capacity to have foreseen that this particular plaintiff was within the risk created by their negligence."[149]

*Sacramento Regional Transit District v. Grumman Flexible*[150] was a products liability action brought against the manufacturer of transit buses that had cracked fuel tank supports. Noting that where damages consist purely of economic losses, the court found that the defect and the damage are one and the same, and recovery on a theory of strict liability is precluded.[151] The court also noted that under negligence, a manufacturer's liability is limited to damages for physical injury, and recovery may not be had for economic injury alone.[152]

## E. DEFENSES

### 1. Contributory Negligence

According to the *Restatement (Second) of Torts*, "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm."[153] The first case to recognize the doctrine was *Butterfield v. Forrester*,[154] a case involving an injury to the plaintiff who, "riding violently" on his horse after leaving a public house, collided with defendant's pole negligently left in the highway. The court held that, "Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." Thus, the contributory negligence of the plaintiff would absolutely bar recovery.

Under the doctrine of avoidable consequences, the failure of a plaintiff to fasten his seat belt may preclude

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[142] *Id*. at 825.

[143] 158 Cal. App. 3d 289, 204 Cal. Rptr. 736 (Cal. App. 1984).

[144] HENDERSON, JR. ET AL., *supra* note 62, at 406.

[145] 100 N.J. 246, 495 A.2d 107 (N.J. 1985).

[146] *Id*., 495 A.2d at 110.

[147] *Id*. at 116.

[148] *Id*.

[149] *Id*. at 118.

[150] 158 Cal. App. 3d 289 (Cal. App. 1984).

[151] *Id*. at 293.

[152] *Id*. at 298.

[153] AMERICAN LAW INSTITUTE, *supra* note 108 § 463.

[154] 11 East. 60, 61 103 Eng. Rep. 926 (K.B. 1809).

his recovery.[155] Courts accepting the "seat belt defense" typically have embraced one of three approaches to the subject:

> (1) plaintiff's nonuse is negligent per se; (2) in failing to make use of an available seat belt, plaintiff has not complied with a standard of conduct which a reasonable prudent man would have pursued under similar circumstances, and therefore he may be found contributorily negligent; and (3) by not fastening his seat belt, plaintiff may, under the circumstances of a particular case, be found to have acted unreasonably and in disregard of his or her best interests and, therefore, should not be able to recover those damages which would not have occurred if his or her seat belt had been fastened.[156]

However, some states do not prohibit recovery for one who fails to wear a seat belt if state law does not require a driver to wear one.[157] Others hold that though the failure to wear a seat belt does not bar recovery, it is of relevance to the issue of damages.[158]

Pulling one's vehicle in front of an oncoming bus may constitute contributory negligence.[159] Pedestrians stepping into the path of an oncoming bus may be contributorily negligent as well.[160] Traditionally, the common law imposed an absolute bar to recovery where the plaintiff's own negligence contributed to his injury, or where the plaintiff had voluntarily assumed a known risk of injury.[161]

### 2. Last Clear Chance

The harshness of the contributory negligence doctrine led many courts to adopt various means of avoiding it, such as concluding that the plaintiff was not contributorily negligent or had not assumed the risk, by finding the defendant's conduct willful and wanton, or by developing the doctrine of last clear chance.[162] The doctrine of last clear chance allows a plaintiff to recover, despite the fact he was contributorily negligent, where the defendant was or should have been aware of the helplessness or inattentiveness of the plaintiff and could have avoided the injury with the exercise of due care.[163] As one court observed, "Were this not so, a man might justify the driving over goods [negligently] left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."[164] However, jurisdictions that adopt comparative negligence abolish the doctrine of last clear chance as being inconsistent with the apportionment of fault among all tortfeasors.

### 3. Assumption of Risk

A similar defense is assumption of risk, where the plaintiff voluntarily accepted a known risk of injury. For example, a passenger who stands up on a bus or streetcar may assume the risk of some normal movement of the vehicle, but may not assume the risk of abnormal jerking or jolting of the vehicle.[165] Some courts have distinguished between "primary" and "secondary" assumption of risk. Primary assumption of risk involves a situation where the defendant was not negligent—either he owed no duty to the plaintiff, or did not breach a duty owed. Secondary assumption of risk is really a form of contributory negligence, where the plaintiff incurred a risk, or behaved in a manner that a reasonable person would not.[166] But the *Restatement of Torts* takes the position that assumption of risk is a separate defense, barring recovery by a person who explicitly agrees to accept the risk of defendant's negligence.[167] In states that have adopted one of the forms of comparative fault, the doctrine of assumption of risk has been limited or abolished.

### 4. Comparative Fault

Many modern courts and state legislatures have ameliorated the harsh rule of contributory negligence by adopting the doctrine of comparative fault, which now governs a solid majority of jurisdictions.[168] Typically, the statutes require the jury to issue a special verdict specifying the amount of damages and the degree of fault of each party as a percentage of the total fault.[169]

Some jurisdictions have adopted a modified form of comparative negligence, allowing plaintiff to recover only where his negligence is no greater than (or, in

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[155] Evra Corp. v. Swiss Bank Corp., 673 F.2d 951, 958 (7th Cir. 1982).

[156] Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447, 453 (Fla. 1984). (citations omitted).

[157] Smith v. Regional Transit Auth., 559 So. 2d 995 (La. App. 1990) (transit driver recovery prohibited where she was not required by state law or applicable procedures to wear a seat belt).

[158] Normoyle v. N.Y. City Transit Auth., 181 A.D.2d 498, 581 N.Y.S.2d 28 (N.Y. App. 1992).

[159] Capitol Transit Co. v. Hedin, 222 F.2d 41 (D.C. App. 1955); McGuire v. San Diego Transit Sys., 143 Cal. App. 2d 509, 299 P.2d 905 (Cal. 1956); D.C. Transit Sys., Inc. v. Harris, 284 A.2d 277 (D.C. App. 1971).

[160] Bilams v. Metropolitan Transit Auth., 371 So. 2d 693 (Fla. App. 1979).

[161] *See, e.g.,* RICHARD EPSTEIN, CASES AND MATERIALS ON TORTS (5th ed. 1990).

[162] *See, e.g.,* Capital Transit Co. v. Smallwood, 162 F.2d 14, 16 (D.C. App. 1947).

[163] *Id*. As to last clear chance, *see* AMERICAN LAW INSTITUTE, *supra* note 108 §§ 479–80. Lappin v. Alameda-Contra Costa Transit Dist., 233 Cal. App. 2d 634, 43 Cal. Rptr. 785 (Cal. App., 1965).

[164] Davies v. Mann, 152 Eng. Rep. 588, 587 (1842).

[165] Zawicky v. Flint Trolley Coach Co., 288 Mich. 655, 286 N.W. 115 (Mich. 1939).

[166] Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90, 93 (N.J. 1959).

[167] AMERICAN LAW INSTITUTE, supra note 108 § 496B.

[168] *See, e.g.,* Li v. Yellow Cab Co. of Cal., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (Calif. 1975).

[169] *See, e.g.,* IDAHO CODE 6-801 (1979); COLO. REV. STAT. §§ 13-21-111(2), 13-21-111.5. S*ee* Cleveland v. Piper Aircraft Corp., 890 F.2d 1540, 1555 (10th Cir. 1989); and Williamson v. Piper Aircraft Corp., 968 F.2d 380 (3d Cir. 1992).

some jurisdictions, is less than) the fault of the defendant.[170] In some jurisdictions, the jury can be informed of the impact of its allocation of fault on recovery, which might lead plaintiff-sympathetic juries to allocate fault differently. But some modified comparative fault jurisdictions will not allow the plaintiff to recover where he was as culpable as the defendant. In such jurisdictions, plaintiff would recover only if his negligence was less than 50 percent of the cause of his injuries.[171]

### 5. The Federal Employers' Liability Act

One federal statute that has imposed pure comparative fault is FELA, which applies to negligence[172] that causes damages or death of the employees of interstate rail common carriers. FELA provides that the employee's "contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."[173]

FELA is a major liability issue for transit providers operating commuter rail systems. Transit systems go to great pains to avoid FELA liability, if practicable, because of the large difference in cost of a FELA claim as compared to a workers' compensation claim. For example, the U.S. Supreme Court has held that causes of action for negligent infliction of emotional harm are cognizable under FELA.[174] Though it does not impose strict liability for workplace injuries, violations of a statutory safety requirement are deemed negligence per se.[175] Assumption of risk is eliminated as a defense under FELA.[176]

SEPTA avoided FELA liability by showing that, though one of its four divisions provided interstate commuter rail service, the one in which the injured plaintiff employee worked did not. The Third Circuit held, "Congress did not intend to extend FELA to employees of an intrastate transportation entity…even though it is organizationally affiliated with an interstate carrier, which is subject to FELA, such as SEPTA's Regional Rail Division."[177] The WMATA also avoided FELA by proving that the Interstate Compact giving it birth exempted it from nonsafety federal laws.[178]

Many state statutes also impose liability upon railroads for personal injury or wrongful death of their employees.[179]

### 6. Sovereign Immunity

English common law adopted the ancient Roman law maxim that "the King can do no wrong." Essentially, since the King, in effect, made and enforced the law, he could not be deemed subject to it. American common law courts embraced the doctrine as well, and many states and some local governments codified it. But in recent decades, the doctrine has endured some constriction by both the common and statutory law.

*Sovereign Immunity of Federal Agencies.* Sometimes, the question arises whether an institution of the federal government (such as the DOT or one of its modal administrations) is liable for injuries it may cause. Congress has codified the circumstances under which a federal agency will be liable for its torts. The Federal Tort Claims Act provides: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."[180]

Often, the most significant exception is for a "governmental function" versus "proprietary function."[181] Specifically, the Act's provisions do not apply, *inter alia*, to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation…or based on the exercise or performance or the failure to exercise or perform a discre-

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[170] 42 PA. CONS. STAT. ANN. § 7102(a) (Purdon 1982).

[171] Colorado is such a state. *See* COLO. REV. STAT. § 13-21-111 (2000). So is Illinois. Ill. REV. STAT., ch. 110, para. 2-1116 (2001). Mrowca v. Chicago Transit Auth., 317 Ill. App. 3d 784 740 N.E.2d 372, 374, 251 Ill. Dec. 29 (Ill. App. 2000), and New York. N.Y. CIV. PRAC. L. & R. § 1411 (Consol. 2001). Michigan has a statute so providing for railroad employees. MICH. STAT. ANN. § 419.52 (2000).

[172] Though the statute literally requires negligence for recovery, *see* Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949), which required only the thinnest evidence of negligence of rail common carriers under FELA. Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 506, 79 S. Ct. 448, 1 L. Ed. 2d 493 (1957).

[173] 45 U.S.C. § 53. However, neither contributory negligence nor assumption of risk shall bar recovery where the carrier's negligence in violating any statute enacted for the safety of employees contributed to his injury or death. 45 U.S.C. §§ 53-54.

[174] Consolidated Rail Corp. v. Gotshall, 512 U.S. 532, 543, 114 S. Ct. 2396, 129 L. Ed. 2d 424 (1994). *But see* Gillman v. Burlington Northern R.R. Co., 878 F.2d 1020, 1023 (7th Cir. 1989) ("FELA does not create a cause of action for tortuous harms brought about by acts which lack physical contact or the threat of physical contact….").

[175] Ries v. National R.R. Passenger Corp., 960 F.2d 1156, 1159 (3d Cir. 1992).

[176] 57 F.3d 1269, 1080 (3d Cir. 1995).

[177] Felton v. Southeastern Pa. Transp. Auth., 952 F.2d 59, 61 (3d Cir. 1991). *See also* Strykowski v. Northeast Ill. Regional Commuter R.R. Corp., 1994 U.S. App. Lexis, 16236 (7th Cir. 1994) [unpublished, not to be cited].

[178] McKenna v. Wash. Metro. Area Transit Auth., 829 F.2d 186, 188 (D.C. Cir. 1987). FELA also includes an exemption for street railways. *Id*.

[179] *See, e.g.,* MICH. STAT. ANN. § 419.51 (2000).

[180] 28 U.S.C. § 2674.

[181] Beatty v. Washington Metro. Area Transit Auth., 860 F.2d 1117, 1126 (D.C. Cir. 1988).

> tionary function or duty…whether or not the discretion be abused.[182]

The seminal federal case on the discretionary function exemption is *United States v. S.A. Empresa de Viacao Aereo. Rio Grandese (Varig)*,[183] a case involving the issue of whether the FAA should be liable for its alleged negligent failure to inspect a Boeing 707 aircraft that it had certified as airworthy but that crashed near Paris, France, when the lavatory caught fire. The U.S. Supreme Court held that it is "the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies…."[184] The purpose of the exemption was to "prevent judicial 'second guessing' of legislative and administrative decisions [of federal agencies] grounded in social, economic, and political policy through the medium of an action in tort."[185]

Other U.S. Supreme Court decisions assessing the "discretionary function" exemption from liability have noted that conduct cannot be discretionary unless it involves an element of judgment or choice:[186] "Where there is room for policy judgment and decision there is discretion."[187] The exemption applies "only to conduct that involves the permissible exercise of policy judgment."[188]

Because the WMATA is a creature created by an Interstate Compact statutorily approved by Congress, it too enjoys sovereign immunity.[189] The Compact provides that WMATA "shall not be liable for any torts occurring in the performance of a governmental function." Quintessential governmental functions, such as "police activity," falls within the exemption.[190] For those activities not quintessential governmental functions, immunity depends on whether the activity is discretionary or ministerial—the former immune, and the latter not. If a federal statute, regulation, or policy leaves room for choice, the action is discretionary, and immune; but if it decrees a particular course of action for an employee to follow, the function is ministerial, and not immune. WMATA has been held immune for discretionary activity such as the negligent hiring, training, and supervising of employees;[191] negligent termination of employees; [192] and the design, construction, and location of its facilities.[193] However, it was deemed not immune for the faulty maintenance and operation of fare collection machines,[194] or its failure to maintain a station escalator.[195]

Certain statutes also place caps on liability. For example, Congress has placed a ceiling on personal injury and wrongful death liability for rail passenger transportation, including a commuter authority or operator, of $200 million per occurrence.[196]

*Sovereign Immunity Under State Law.* In *Salvatierra v. Via Metropolitan Transit Authority*,[197] it was alleged that a VIA driver negligently caused his bus to "jump the curve" and run over a 3-year-old child, crushing his leg. VIA successfully exerted the Texas sovereign immunity statute, which limited its liability to $100,000. The court upheld the statute as limiting liability in two ways—(1) circumscribing the types of claims that can be brought against a governmental entity, such as VIA; and (2) placing a cap on damages.[198]

But state tort immunity legislation has been strictly construed in many states. As a waiver of the sovereign's immunity, the requirements for asserting immunity must be strictly followed, and the scope of the immunity waived is not to be construed liberally. Most state common law, and many state statutes, recognize the discretionary function exemption to liability for government functions that involve discretion in weighing social, economic, and political policies and objectives. Many such activities are involved in the planning, design, and construction of transit or highway facilities. As one source noted:

> [A] transit agency is less likely to be held liable for negligence when it is engaged in making design and construction decisions deciding to build or update a structure;

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[182] 28 U.S.C. § 2680(a). Another exemption applies to combatant military activities during time of war. *Id*. § 2680(j).

[183] 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984).

[184] *Id*. at 813.

[185] *Id*. at 814. In Varig, the Supreme Court observed that Congress had given the FAA broad authority to establish and implement a comprehensive program of enforcement and compliance with aircraft safety standards, and held that the FAA's policy of "spot-checking" aircraft was acceptable based on the need of its employees "to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." *Id*. at 820. Such discretionary acts were shielded from liability under the FTCA because they fell within the range of choices permitted by the Federal Aviation Act and were the results of policy determinations.

[186] Dalehite v. United States, 346 U.S. 15, 34, 73 S. Ct. 956, 97 L. Ed. 1429 (1953): The exception protects "the discretion of the executive or the administrator to act according to one's judgment of the best course."

[187] *Id*. at 36.

[188] Berkovitz v. United States, 486 U.S. 531, 539, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

[189] Pub. L. 89-774, 80 Stat. 1324 (1966); amended Pub. L. 94-306, 90 Stat. 672 (1976).

[190] Dant v. District of Columbia, 829 F.2d 69, 73 (D.C. Cir. 1987).

[191] Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1217 (D.C. Cir. 1997). *But see* Griggs v. Washington Metro. Area Transit Auth., 66 F. Supp. 2d 23, 29-30 (D. D.C. 1999), which appears to hold the opposite.

[192] Sanders v. Washington Metro. Area Transit Auth., 819 F.2d 1151, 1156–58 (D.C. Cir. 1987).

[193] Souders v. Washington Metro. Area Transit Auth., 48 F.3d 546 (D.C. Cir. 1995).

[194] Dant v. District of Columbia, 829 F.2d 69, 74–75 (D.C. Cir. 1987).

[195] Wainwright v. Washington Metro. Area Transit Auth., 903 F. Supp. 133 (D. D.C. 1995).

[196] 49 U.S.C. § 28103 (2000).

[197] 974 S.W.2d 179 (Tex. App. 1998).

[198] *Id*. at 182.

> changing a route; collecting data; engaged in certain, but not all, inspection and maintenance activities; or, in some situations, providing training for personnel. The agency is more likely to be held liable when it engages in non-policy-level planning or merely implements a previously approved plan, fails to give an adequate warning under the circumstances of a dangerous condition, negligently conducts an inspection, or negligently repairs or maintains property.[199]

The immunity applies only where the government actually participates in discretionary design decisions, either by designing the product itself or approving specifications prepared by the contractor.[200] Courts have distinguished between quantitative specifications that detail precise requirements to be satisfied in manufacture, which enjoy the immunity, and general qualitative specifications promulgated during the early stages of procurement, which do not.[201] They have also drawn a line between the government's thorough review and critique of the contractor's work at various stages of design, testing, and performance, which enjoy the immunity, and rubber stamping the contractor's design, which does not.[202] However, the exemption will not apply when a "statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive."[203]

Another line drawn in this arena delineating liability is the distinction between governmental functions, which are immune from liability, and proprietary functions, which are not.[204] The provision of transportation services by a governmental institution has been deemed by many courts a proprietary function, ineligible for sovereign immunity.[205] In contrast, the provision and maintenance of a transit police force has been deemed a governmental function, eligible for sovereign immunity.[206] Of course, absent sovereign immunity, the negligence of governmental institutions can make them legitimate targets of tort litigation.[207]

## F. TRESPASS AND NUISANCE

Trespass constitutes an interference with the exclusive possession of land.[208] It involves an unauthorized physical entry onto another's land. Such physical invasion need not involve entry by persons or tangible objects, and may instead constitute such things as smoke, gases, and odors. [209]

Trespass may be intentional or unintentional. If the defendant's action consists of an *intentional trespass*, harm and mistake are irrelevant, and typically nominal damages are recoverable (in addition to actual damages, where proven). Some courts have held that one with knowledge or reason to know of physical entry commits an intentional trespass.[210]

*Beausoleil v. Massachusetts Bay Transportation Authority*[211] was a wrongful death action brought by the estate of a 13-year-old girl killed by an oncoming train while trying to cross the tracks at the Attleboro, Mass., rail station. The court noted that a landowner owes a foreseeable trespasser a duty only to refrain from willful, wanton, or reckless behavior. Liability may exist "for injuries sustained while crossing railroad tracks outside of a public crossing only if the railroad took affirmative action which would warrant a reasonable belief that a passenger had a right to cross at that location."[212] Though many jurisdictions hold that a landowner owes no duty to a trespasser for ordinary negligence (though it may be liable for willful and wanton injury, or where the landowner knows the trespasser is trapped and in peril),[213] some recognize an exception to the "no duty" rule under the permissive use/frequent trespass doctrine. As one court noted, "A typical case is the frequent use of a 'beaten path' that crosses a railroad track, which is held to impose a duty

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[199] LARRY THOMAS, STATE LIMITATIONS ON TORT LIABILITY FOR PUBLIC TRANSIT OPERATIONS (TCRP Legal Research Digest No. 3, 1994).

[200] Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1320 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990).

[201] Kleeman v. McDonnell Douglas Corp., 890 F.2d 698, 703 (4th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990).

[202] Stout v. Borg-Warner Corp., 933 F.2d 331, 336 (5th Cir. 1991), *cert. denied*, 502 U. S. 981 (1991).

[203] Berkovitz by Berkovitz v. United States, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

[204] Szadkowski v. Washington Metro. Area Transit Auth., 1998 U.S. App. Lexis 5033 at 6 (4th Cir. 1998); Weiner v. Metropolitan Transp. Auth., 55 N.Y.2d 175, 433 N.E.2d 124, 127–27, 448 N.Y.S.2d 141 (N.Y. 1982). *But see* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457 (Cal. 1961), which abrogated the governmental/proprietary distinction in California. *See also* discussion in Pacific Tel. & Tel. v. Redevelopment Agency, 75 Cal. App. 3d 957, 142 Cal. Rptr. 584 (1977), in relation to utility relocation. Public transportation has been determined to be a "governmental" function by most modern courts presented with the issue. See discussion in Northwest Natural Gas v. City of Portland, 300 Ore. 291, 711 P.2d 119 (Ore. 1985) (also regarding utility relocation).

[205] THOMAS, *supra* note 1. *See, e.g.,* Dant v. District of Columbia, 829 F.2d 69 (D.C. Cir. 1987).

[206] *See, e.g.,* Heffez v. Wash. Metro. Area Transit Auth., 569 F. Supp. 1551, 1553 (D. D.C. 1983), *aff'd*, 786 F.2d 431 (D.C. Cir. 1986); Keenan v. Washington Metro. Transit Auth., 643 F. Supp. 324, 328 (D. D.C. 1986).

[207] *See, e.g.,* Pan American World Airways v. Port Auth. of N.Y. and N.J., 995 F.2d 5 (2d Cir. 1993).

[208] Kayfirst Corp. v. Washington Terminal Co., 813 F. Supp. 67, 71 (D. D.C. 1993).

[209] Davis v. Georgia-Pacific Corp., 251 Ore. 239, 445 P.2d 481, 483 (Ore. 1968).

[210] McGregor v. Barton Sand & Gravel, Inc., 62 Ore. App. 24, 660 P.2d 175, 178 (Ore. 1983). Injunctions may be issued against an intentional trespass. La Motte v. United States, 254 U.S. 570, 41 S. Ct. 204, 65 L. Ed. 410 (1921).

[211] 138 F. Supp. 2d 189 (D. Mass. 2001).

[212] *Id*. at 197.

[213] Jad v. Boston & Maine Corp., 26 Mass. App. Ct. 564, 530 N.E.2d 197, 199 (Mass. App. 1988).

of reasonable care as to the operation of trains."[214] Even one who rises to the level of a licensee in crossing trolley tracks still has a responsibility to avoid contributory negligence by not stepping onto the path of an oncoming vehicle.[215] But an enhanced duty of care arises under the doctrine of "attractive nuisance" to child trespassers who, because of their immaturity, are unable to discover or comprehend the danger, and for example, wander onto commuter rail tracks.[216] However, some states have exempted railroads from liability of pedestrians walking upon their tracks, even where the trespassers are minors.[217]

Recovery for an *unintentional trespass* may be had for actual harm suffered by recklessness, negligence, or an ultrahazardous activity. For an unintentional trespass, nominal damages are not awarded, and plaintiff must prove actual damages suffered.[218] Injunctions for an unintentional trespass may be denied if it was made innocently, or the cost of removal would be greatly disproportionate to the harm suffered.[219] The social value of defendant's conduct is typically not considered in assessing compensatory damages, though it may be relevant on the issue of punitive damages.[220] The duty of care a landowner owes to an unintentional trespasser is higher. Thus, in *Demand v. New York Central & Hudson River Railroad Co.*,[221] it was held that a railroad engineer, having seen the decedent plaintiff trying to remove his horse some 1,300 feet before hitting him with the train, should have used "reasonable efforts and care to avoid injuring the latter even though primarily and originally he may have been a technical trespasser…."[222]

A nuisance constitutes an interference with the quiet use and enjoyment of land.[223] To recover, there need be no physical entry onto the land, but actual damages must be proven.

Nuisances are of two types, public and private. A *public nuisance* is an unreasonable interference with rights common to the general public, particularly those involving public health, safety, peace, comfort, or convenience.[224] A government body may enjoin such a nuisance, though an individual may bring an action against a public nuisance where he has suffered a harm of a different kind than that suffered by the public generally.[225]

A *private nuisance* constitutes a nontrespassory invasion of the private use and enjoyment of land. It may be intentional and unreasonable (essentially meaning the gravity of the harm outweighs the utility of the conduct),[226] or negligent, reckless, or abnormally dangerous.[227] Under nuisance (as opposed to trespass), courts are generally more willing to engage in a balancing approach,[228] focusing on the reasonableness of one interest yielding to another.[229] As one court observed, "The law of nuisance affords no rigid rule to be applied in all instances. It is elastic. It undertakes to require only that which is fair and reasonable under all circumstances."[230] Most courts will authorize damages, but not an injunction, in a nuisance case where the utility of defendant's conduct outweighs the gravity of plaintiff's harm.[231] Some courts have issued an injunction requiring the nuisance be abated where damages will not adequately remedy the substantial and irremediable injury plaintiff suffers.[232] Other courts, embracing the notion of inverse condemnation, have imposed equitable servitude on plaintiff's land, forcing offending defendants to pay damages for past, present, and future harm caused by the offending nuisance.[233]

In *Brumer v. Los Angeles County Metropolitan Transportation Authority*,[234] for example, the court rejected a claim that store-front property had been condemned when the transit authority constructed a rail line on the street adjacent to it, eliminating curbside parking or traffic on the part of the street nearest the property. The court held there was no actionable inter-

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[214] Miller v. General Motors Corp., 207 Ill. App. 3d 148, 152 Ill. 2d 432 565 N.E.2d 687, 691 152 Ill. Dec. 154 (Ill. App. 1990). *See also* Lee v. Chicago Transit Auth., 152 Ill. App. 2d 432 605 N.E.2d 493, 498, 178 Ill. Dec. 699 (Ill. 1992).

[215] *See, e.g.,* Gara v. Phila. Rapid Transit Co., 320 Pa. 497, 182 A. 529 (Pa. 1936).

[216] *See, e.g.,* Colls v. City of Chicago, 212 Ill. App. 3d 904, 571 N.E.2d 951, 965, 156 Ill. Dec. 971 (Ill. App. 1991).

[217] Jad v. Boston & Maine Corp., 361 Mass. 91, 530 N.E.2d 197, 201 (Mass. App. 1988).

[218] AMERICAN LAW INSTITUTE, *supra* note 108 § 165.

[219] Peters v. Archambault, 361 Mass. 91, 278 N.E.2d 729 (Mass. 1972).

[220] Davis v. Georgia-Pacific Corp., 251 Ore. 239, 251 Ore. 239, 445 P.2d 481, 483 (Ore. 1968).

[221] 187 N.Y. 102, 91 N.E. 259 (N.Y. 1910).

[222] 91 N.E. at 261.

[223] Beatty v. Wash. Metro. Area Transit Auth., 860 F.2d 1117, 1122 (D.C. Cir. 1988).

[224] AMERICAN LAW INSTITUTE, *supra* note 108 § 821B.

[225] *Id*. § 821C.

[226] *Id*. § 822.

[227] *Id*. § 822.

[228] Fisher v. Capital Transit Co., 246 F.2d 666 (D.C. Cir. 1957).

[229] Atkinson v. Bernard, Inc., 223 Ore. 624, 355 P.2d 229 (Ore. 1960).

[230] Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371, 373 (Mass. 1914); Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (Ariz. 1972) (holding that having brought people to the nuisance by building homes in close proximity of defendant's cattle feedlot to defendant's foreseeable detriment, plaintiff Webb would have to indemnify defendant for a reasonable amount of the cost of moving or shutting down).

[231] *See* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 874, 309 N.Y.S.2d 312 (N.Y. 1970).

[232] Crushed Stone Co. v. Moore, 1962 Okla. 65, 369 P.2d 811, 815 (Okla. 1962).

[233] Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 874 309 N.Y.S.2d 312 (N.Y. 1970).

[234] 36 Cal. App. 4th 1738, 43 Cal. Rptr. 2d 314 (Cal. App. 1995).

ference with access.[235] In *Anderson v. Washington Metropolitan Area Transit Authority*,[236] a case in which a resident alleged that the renovation and expansion of a transit bus garage across the street caused noise and vibration that constituted a private nuisance, a federal court held,

> Liability for private nuisance will lie only if the act was intentional or if it was the result of negligence or reckless conduct…. If the defendants knew or were on notice that such construction was likely to interfere with [plaintiffs'] use and enjoyment of their property, the invasion is intentional.[237]

Generally speaking, temporary injuries, inconveniences, annoyances, and discomfort resulting from construction of public improvements are not compensable provided such interferences are not unreasonable—that is, occasioned by actual construction work. It is often necessary to break up pavement, narrow streets, and block ingress and egress to adjoining property when streets are being repaired or improved, or transit facilities are being constructed. As one court noted,

> It would unduly hinder and delay or ever prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement.[238]

## G. STRICT LIABILITY

Strict liability was once the dominant rule of liability in tort law. Negligence, now the dominant common law doctrine, did not emerge until the 19th century. Though negligence now dominates, major areas still fall under the liability doctrine of strict liability.

One famous English case, *Fletcher v. Rylands*,[239] involved the flooding of plaintiff's mine shafts by water escaping from a reservoir constructed on defendant's land. The court held,

> the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.[240]

The court recognized that the rule of liability on the highways was one of negligence:

> Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near to it to some inevitable risk; and, that being so, those who go on the highway…may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger…[and cannot] recover without proof of want of care or skill occasioning the accident; …."[241]

On appeal, the court focused on the distinction between "natural" and "non-natural" uses of land. The first *Restatement of Torts* focused on whether the activity was "ultrahazardous," while the second *Restatement* focused on whether it was "abnormally dangerous."[242] In determining whether an activity is abnormally dangerous, the following factors are considered:

> existence of a high degree of some harm…;
>
> likelihood that the harm…well;
>
> inability to eliminate the risk by the exercise of reasonable care;
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> extent to which the activity is not a matter of common usage;
>
> inappropriateness of the activity to the place where it is carried on; and
>
> extent to which its value to the community is outweighted by its dangerous attributes.[243]

Some transportation cases, however, have resulted in the application of strict liability, particularly when injury results from the transportation of dangerous commodities. In *Siegler v. Kuhlman*,[244] a young woman unknowingly drove an automobile into an area on the highway where a vehicle had accidentally spilled a large quantity of gasoline. An explosion ensued, and she was burned alive. Applying *Fletcher,* and noting that evidence necessary to prove negligence would have been lost in the explosion, the court noted:

> When gasoline is carried as cargo…it takes on uniquely hazardous characteristics, as does water impounded in large quantities. Dangerous in itself, gasoline develops even greater potential for harm when carried as freight—extraordinary dangers deriving from sheer quantity, bulk and weight, which enormously multiply its hazardous properties….[245]
>
> We have a situation where a highly flammable, volatile and explosive substance is being carried at a comparatively high rate of speed, in great and dangerous quantities as cargo upon the public highways, subject to all the hazards of high-speed traffic, multiplied by the great dangers inherent in the volatile and explosive nature of the substance, and multiplied by the quantity and size of the load….[246]

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[235] *Id*. at 1748.

[236] 1991 U.S. Dist. Lexis 12877 (D. D.C. 1991).

[237] *Id*. at 3 (citations omitted).

[238] Orpheum Bldg. Co. v. S.F. Bay Area Rapid Transit Dist., 80 Cal. App. 3d 863, 869 146 Cal. Rptr. 5 (1978), quoting from Heiman v. City of L.A., 30 Cal. 2d 746, 755, 185 P.2d 597 (Cal. 1947).

[239] [1861-73] All E. R. Rep. 1.

[240] *Id*. at 7. The court recognized exceptions from liability if the cause of harm was the plaintiff's, or an act of God.

[241] *Id*. at 11.

[242] AMERICAN LAW INSTITUTE, *supra* note 108 § 519.

[243] *Id*. § 520.

[244] 81 Wash. 2d 448, 502 P.2d 1181 (1972).

[245] *Id*. at 1184.

[246] *Id*. at 1186.

> Transporting gasoline as freight by truck along the public highways and streets is obviously an activity involving a high degree of risk; it is a risk of great harm and injury; it creates dangers that cannot be eliminated by the exercise of reasonable care….[247]

In *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*,[248] a case involving a spill of 20,000 gallons of highly flammable, toxic, and possibly carcinogenic acrylonitrile, Judge Posner noted that strict liability would provide "an incentive, missing in the negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident."[249] Nevertheless, the court concluded that negligence would be adequate to remedy and deter its accidental spillage.[250]

There are, however, limitations on liability even for harm caused by ultrahazardous activities. Liability is limited to harm resulting from that which makes the activity ultrahazardous to begin with, and not for harm resulting from the plaintiff's abnormal sensitivity to defendant's conduct.[251] Assumption of risk and contributory negligence are also defenses,[252] though in comparative fault jurisdictions, they may not be absolute bars to liability. Actual and proximate causation must also be proven by the plaintiff.

### 1. Products Liability

Transit providers typically are purchasers of expensive, sophisticated, and complex products, such as buses, rail cars, and communications systems. When passengers are injured, they may sue both the transit operator, under negligence, and the manufacturer of the vehicle, under strict liability. Transit agencies may also find themselves as plaintiffs against equipment manufacturers in products liability litigation.

[247] *Id*. at 1187. The court applied Section 519 of the *Restatement (Second) of Torts*, which provides that "One who carries on abnormally dangerous activity is subject to liability for harm…although he has exercised the utmost care to prevent the harm."

[248] 916 F.2d 1174 (7th Cir. 1990).

[249] *Id*. at 1177.

[250] *Id*. at 1179. Transporters of explosives are frequently held strictly liable for the harms they cause. Rejecting the argument that the railroad was authorized by law to transport explosives, in Chevez v. Southern Pacific Co., 413 F. Supp. 1203 (E.D. Cal. 1976), the court applied strict liability when 18 bomb-loaded boxcars exploded in defendant's switching yard.

[251] Foster v. Preston Mill Co., 44 Wash. 2d 440, 268 P.2d 645, 648 (Wash. 1954); AMERICAN LAW INSTITUTE, *supra* note 108 § 524A.

[252] AMERICAN LAW INSTITUTE, *supra* note 108 § 523. Contributory negligence is a defense only if the plaintiff "knowingly and unreasonably subject[ed] himself to the risk of harm." *Id*. § 524(2).

### 2. Metamorphosis of the Law of Torts and Contracts

The development of the modern concept of products liability (or "enterprise" liability, as some refer to it) has proceeded through several stages. The steps in the metamorphosis were these:

1. During the early Industrial Revolution, products liability was characterized by an emphasis on "privity" between buyer and seller,[253] with the remote manufacturer ordinarily being shielded from direct liability.[254]

[253] Early 19th century common law in the United States followed that of England, which appeared to favor the position of defendants in personal injury cases on grounds of fostering the development of cottage industry. *See* Priestly v. Fowler, 3 Mees. & Wels 1, 150 Eng. Rep. 1030 (1837); Albro v. The Agawam Canal Co., 60 Mass. (6 Cushing) 75 (1850). One exception of this pro-defendant bias was the doctrine of *respondeat superior*, pursuant to which a master would be held liable for his servant's negligence causing injury to a stranger. Farwell v. Boston & Worcester R.R. Corp., 45 Mass. (4 Met.) 49, 57 (1842). Most courts during the early common law period denied recovery for personal injury where the plaintiff could show no privity of contract with the defendant. Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842); Hasbrouck v. Armour & Co., 139 Wis. 357, 121 N.W. 157, 160 (Wis. 1909); Lebourdais v. Vitrified Wheel Co., 194 Mass. 341, 80 N.E. 482 (Mass. 1907). That is to say, no party could recover from another unless he had purchased the product directly from him.

Even where privity existed, courts often denied recovery based upon the doctrine of *caveat emptor* ("let the buyer beware"). Thus, plaintiffs could not recover for contractual claims for latent defects unless they could prove a breach of express warranty, or the existence of fraud. Seixas v. Woods, 2 Caines 48, 52-3 (S. Ct. N.Y. 1804). The buyer could protect himself contractually in arm's-length bargaining with the seller, or so it was assumed. In most cases, the buyer could examine the product before tendering the purchase price. If he hadn't the sense to insist upon the inclusion of a warranty in the contract of sale, and if the seller hadn't defrauded him, the buyer was simply stuck without a remedy, even where he was personally injured by the defective nature of the product he had purchased.

[254] RICHARD EPSTEIN, ET AL., CASES AND MATERIALS ON TORTS 611 (5th ed. 1991). *See* Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842), where a driver injured by a defective coach was barred from recovering because of the absence of privity of contract. Judge Abinger noted,

> There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

*Id*. at 405. As one court noted, Huset v. J.I. Case Threshing Mach., 120 F. 865, 867–68 (8th Cir. 1903), "The liability of the contractor or manufacturer for negligence in the construction or sale of the articles which he makes or vends is limited to the persons to whom he is liable under his contracts of construction or sale…. The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence…." As the case law evolved, these rigid distinctions became blurred. For example, an exploding steam boiler causing only property damage was

2. Exceptions to this strict rule gradually were carved out for (a) "an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind," (b) "an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises," and (c) "one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not."[255]

3. With Justice Cardozo's New York decision in *MacPherson v. Buick Motor Co.*,[256] courts began to jettison privity as a bar to recovery against remote manufacturers under negligence law.[257]

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deemed not to be a dangerous instrument; no duty arising out of contract or law (tort) was deemed owed the plaintiff. Losee v. Clute, 51 N.Y. 494 (1873). But as courts became more sympathetic to the plight of plaintiffs suffering personal injury, they discovered means of sweeping aside traditional common law liability limitations based on the absence of privity of contractual relations between the parties.

[255] Liberalization of these strict rules began in cases where the defendant performed an act of negligence imminently dangerous to human life. Thomas and Wife v. Winchester, 6 N.Y. 397, 410 (1852). Where the defendant's negligence put human life in imminent danger, he was held to have a duty of exercising caution beyond that arising out of the contract of sale. *Id*. Early distinctions were made between dangerous instruments, or products that in their nature were dangerous, and those that were not, the former requiring a higher degree of care, and therefore imposing upon their manufacturers (or sellers) a higher degree of potential liability. Longmeid v. Holliday, 155 Eng. Rep. 752 (1852). On an *ad hoc* basis, courts during this period attempted to develop liability regimes based upon the nature of the commodity that caused the injury. Thus, poison, gunpowder, spring guns, and torpedoes were deemed dangerous instruments; flywheels were not. Loop v. Litchfield, 42 N.Y. 351 (N.Y. 1870).

Gradually, the courts began to focus on the issue of foreseeability of injury with respect to certain types of products as a basis for imposing a duty to exercise a higher standard of care. For example, in Devlin v. Smith, 89 N.Y. 470 (N.Y. 1882), a 19th century New York decision, the court found the defendant liable for the death sustained by a carpenter who fell from a scaffold negligently built by it; there was no privity between the parties. The court found that a duty was nevertheless owed the carpenter because "Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence to the builder's negligence…such negligence is not an act imminently dangerous to human life." Although a scaffolding was arguably not a "dangerous instrument" per se, unless properly constructed it was a "most dangerous trap." *Id*. at 478. Hence the act, not just the product, could be of such danger as to sweep aside the privity barrier. This was the beginning of the infamous assault on the citadel of privity. Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 401 (N.Y. 1962). 226 N.Y.S.2d 363.

Other decisions broke through the traditional contract defenses such as *caveat emptor* by, for example, finding an implied warranty that the work was suitable and proper for the purposes for which the producer knew it was to be used. Kellogg Bridge Co. v. Hamilton, 110 U.S. 108, 112 3 S. Ct 537, 28 L. Ed. 86 (1884); Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918).

But other courts were still reluctant to go so far, limiting liability where there was no privity or fraud, or where the product was not imminently dangerous to human life or health. Burkett v. Studebaker Bros. Mfg. Co., 126 Tenn. 467, 150 S.W. 421 (Tenn. 1912). One was quite prophetic in its rationale:

> [I]f suits of the kind were sanctioned against manufacturers there would be no end to litigation, and practically no means, in the great majority of the cases, for the manufacturer to protect himself, and therefore that useful class of producers would be so loaded with litigation that their labor, skill, and enterprise would be greatly discouraged, if not destroyed, to the great detriment of the public welfare.

*Id*. at 423. Nonetheless, 2 years later the same court allowed recovery for the ingestion of a cigar stub in a Coca-Cola bottle on grounds that, "All medicines, foods, and beverages are articles of such kind as to be imminently dangerous to human life or health unless care is exercised in their preparation." Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 177 S.W. 80, 81 (Tenn. 1914).

[256] 217, N.Y. 382, 111 N.E. 1050 (N.Y. 1916).

[257] A significant expansion in the law of products liability, and perhaps the beginning of the modern era of the law, was marked by Justice Benjamin Cardozo's powerful decision in McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), involving a suit by the purchaser of a Buick against its manufacturer for a personal injury caused by a defective wheel made by a subcontractor. Cardozo rejected the traditional distinction between things "imminently dangerous to life" or "implements of destruction," such as poisons, explosives, and deadly weapons, and those not so dangerous. Instead, he emphasized the foreseeability of the injury if the product is negligently made, concluding that this foreseeability imposes upon the manufacturer a duty to exercise ordinary care. A neglect of such duty imposed liability for negligence.

Sweeping aside the privity limitation, Cardozo held that such a duty was extended to all persons for whose use the thing is supplied before there was a reasonable opportunity to discover the defect. But Cardozo saw an important distinction in liability based on proximity or remoteness:

> We are not required at this time to say that it is legitimate to go back to the manufacturer of the finished product and hold the manufacturers of the component part. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series is too remote to constitute, as to the ultimate user, an actionable wrong. We leave that question open.

*Id*. at 1053 [emphasis original citations omitted]. Thus, foreseeability of injury imposed a duty of ordinary care, the breach of which was actionable negligence, *see* Ash v. Childs Dining Hall Co., 231 Mass. 86, 120 N.E. 396 (Mass. 1918), unless there was no proximate cause. Cardozo would subsequently expand the notion of foreseeability, and the proximate cause limitation on duty and liability, in his seminal opinion in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928): "[N]egligence in the air, so to speak, will not do…. [T]he orbit of the danger as disclosed to the eye of reasonable vigilance [is] the orbit of the duty…. The risk reasonably to be perceived defines the duty to be obeyed…." *Id*., 162 N.E. at 100. Never-

4. Justice Traynor's concurring opinion provided the intellectual foundation for the movement toward strict liability in *Escola v. Coca-Cola Bottling Co*.,[258] in 1944. In addition to his focus on risk minimization (because the manufacturer is in a superior position to minimize the losses), and loss spreading (so that the cost of injury does not fall upon a single innocent consumer),[259] Traynor advanced several other rationales for strict products liability. He noted that although the doctrine of *res ipsa loquitur*, where applicable, offered an inference of defendant's negligence, nonetheless, that inference could be rebutted by an affirmative showing of proper care, often leaving the person injured by a defective product without an ability "to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is."[260]

5. Beginning with the New Jersey decision in *Henningsen v. Bloomfield Motors, Inc.* [261] in 1960, privity, as a bar to recovery against remote manufacturers, began to be swept aside in contracts actions, and implied warranties were extended to ultimate purchasers.[262] Standardized contractual disclaimers of liability were also swept aside in situations where the parties lacked equal bargaining power.[263]

6. With the 1962 decision of *Greenman v. Yuba Power Products Inc.,*[264] strict liability began to be adopted to the exclusion of negligence principles, a trend solidified by the adoption of Section 402A of the *Restatement (Second) of Torts* by the American Law Institute in 1965.[265]

7. After the adoption of 402A, defective design and duty to warn cases were expanded under traditional negligence doctrine.

8. Finally, heavily lobbied by insurance companies, beginning in the 1980s several state legislatures promulgated tort reform statutes limiting liability in various ways, including imposing limitations on damages and Statutes of Repose.[266]

### 3. Rationale for Expanded Liability

The rationale for the metamorphosis in the law reflected the change in the economy driven by the industrial revolution. The early common law was developed during a period where buyers and sellers were in close proximity, frequently in the same town. The seller was often also the craftsman who built or assembled the product. They stood in an arm's-length relationship in which both parties could look each other in the eyes and bargain on equal terms. Products themselves were relatively uncomplicated and conducive to inspection by a

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theless, some courts were reluctant to jump on board right away and sought to limit the expansion of liability to personal injury cases, holding that no such cause of action existed on such grounds where a loss to property (as opposed to personal injury) was suffered. Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 131 N.E. 454 (Mass. 1921). Other courts got round this limitation by holding that the breach of a duty imposed by a statute constituted negligence *per se*, as a matter of law, irrespective of whether recovery was sought for personal or property injury. Pine Grove Poultry Farm, Inc. v. Newton By-Products Mfg. Co., 248 N.Y. 293, 162 N.E. 84 (N.Y. 1928).

[258] 24 Cal. 2d 453, 150 P.2d 436 (Cal. 1944).

[259] As Judge Traynor was subsequently to observe, "The purpose of [strict products] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697 (Cal. 1963).

[260] Escola, 150 P.2d at 441. Traynor also noted that under already existing law, the retailer of a product was strictly liable to the consumer under an implied warranty of fitness for use and merchantable quality, which include a warranty of safety. The retailer forced to pay a judgment to an injured consumer could then bring suit against the manufacturer. This produced circuitous and wasteful litigation. Judicial efficiency could much be enhanced by allowing a direct suit by the consumer against the manufacturer based on its warranty. *Id*. at 441–42.

Escola v. Coca-Cola Bottling Co. of Fresno, 150 P.2d 436 (Cal. 1944).

> As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product….

*Id*.

[261] 32 N.J. 358, 161 A.2d 69 (N.J. 1960).

[262] Dean Prosser observed, "In the field of products liability, the date of the fall of the citadel of privity can be fixed with some certainty. It was May 9, 1960, when the Supreme Court of New Jersey announced the decision in Henningsen v. Bloomfield Motors Inc." Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[263] Still others held that actions brought for recovery under contractual warranties, express or implied, rather than tortuous negligence, continued to be limited by the requirement of privity of contract between the plaintiff and defendant. Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923). Nonetheless, some courts expanded the concept of privity to include family members of the individual who purchased the product. Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961). Others allowed the introduction of the warranty as evidence in negligence cases. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 412 (1932).

[264] 377 P.2d 897 (Cal. 1963).

[265] Section 402A provides:

> One who sells any product in a defective condition unreasonable dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

[266] *See* EPSTEIN, ET AL., *supra* note 254, at 611–12.

buyer seeking to evaluate their quality.[267] The pro-business bias of the judiciary reflected a desire to promote the cottage industries and small-scale commerce of the day.

As the nation expanded and industrial enterprise grew, purchasers were buying products made by large assembly-line manufacturers in distant cities. Producers were selling to wholesalers who sold to retailers who sold to consumers. Privity of contractual relations was no longer likely. With the development of radio and television, marketing was becoming a mass media affair. Disparity of bargaining power made *caveat emptor* a one-sided legal doctrine. Moreover, the types of products manufactured in the 20th century were more dangerous to human life—the automobile, for example, which could reach speeds well beyond those of the horses and carriages they replaced, and the airplane, which defied gravity. One court candidly noted the trend:

> Since the rule of *caveat emptor* was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer….[268]

Similarly, in a case holding that manufacturers' express warranties ran with the product to the ultimate purchaser, irrespective of privity, the court held:

> The world of merchandising is…no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity. Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer….[269]

The advantage of a contracts claim is that the plaintiff need not prove negligence; it need only prove breach of warranty, which now could be implied.[270] All the while, privity was shrinking as a barrier.

The policy rationale for imposing liability upon producers of defective products irrespective of negligence or warranty had been eloquently stated by Justice Traynor of the California Supreme Court in a concurring opinion to a 1944 decision:

> [A] manufacturer incurs absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings…. [Irrespective of the absence of privity of contract or negligence] public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is in the public interest to discourage the marketing of products having defects that are a menace to the public.[271]

Other courts focused on the need "to avoid injustice and for the protection of the public."[272]

Liability exposure discourages the production of dangerous goods, or conversely, encourages manufacturers to make them safer, forcing them to internalize the cost of production (e.g., capital, raw materials, and labor) and consumption (e.g., personal injury). This sends consumers superior pricing signals by increasing the price of goods relative to their respective dangers, thereby causing marginal demand to shift to comparable products having less risk.[273]

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[267] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (N.J. 1960).

[268] Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 412 (1932).

[269] Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 402, 226 N.Y.S.2d 363 (1962).

[270] *Id*.

[271] Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436, 441 (1944).

[272] Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

> [T]he erosion of the citadel of privity has been proceeding apace…all with the enthusiastic support of text writers and the authors of law review articles…. [A] The dynamic growth of the law in this area has been a testimonial to the adaptability of our judicial system and its resilient capacity to respond to new developments, both of economics and of manufacturing and marketing techniques. A developing and more analytical sense of justice, as regards both economics and the operational aspects of production and distribution has imposed a heavier and heavier burden of responsibility on the manufacturer….
>
> 298 N.E.2d at 626.

[273] Many commodities sold in the market do not reflect the full cost to society or even the costs imposed upon parties to the transaction. This leads to overconsumption. Alcohol…and firearms are prime examples, whose manufacturers escape the cost of health and life their products take. Our legal system assumes free will, and absolves these manufacturers from liability. But for a moment assume a different legal regime [, one which internalized the cost of such harm]…. Undoubtedly, this would have an inflationary impact on the price of [these commodities]. But the price would better reflect the costs incurred by society through the consumption of these products, and actually discourage marginal consumption.

Paul Dempsey, *Market Failure and Regulatory Failure As Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition*, 46 WASH. & LEE L. REV. 1, 20–21 (1989).

### 4. Criteria of Products Liability

Section 402A of the *Restatement (Second) of Torts* provides a modern formulation of the rule of products liability:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) the rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
>
> *Caveat*:
>
> The Institute expresses no opinion as to whether the rules stated in this Section may not apply:
>
> (1) to harm to persons other than users or consumers;
>
> (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or
>
> (3) to the seller of a component part of a product to be assembled.[274]

Thus, the existence of negligence or a warranty are irrelevant to a products liability claim under 402A. The comments that follow Section 402A reveal that: (1) the plaintiff has the burden of proving that the product was in a defective condition at the time it left the seller's hands;[275] (2) the seller can be a manufacturer, wholesaler, distributor, or retailer;[276] (3) the seller is not liable for abnormal handling of the product;[277] (4) contributory negligence in the form of the plaintiff's failure to discover the defect or guard against the possibility of its existence is not a defense to liability;[278] (5) however, assumption of risk in the form of "voluntarily and unreasonably proceeding to encounter a known danger" (sometimes known as "secondary assumption of risk") is a defense;[279] (6) the nonexistence of a warranty is irrelevant;[280] (7) the seller can avoid having his products deemed unreasonably dangerous with an appropriate warning;[281] and (8) some products are obviously dangerous in the eyes of an ordinary consumer, and are unreasonably dangerous only to the extent not contemplated by him.[282]

Every state has adopted its elements of proof on issues such as negligence, warranty, or products liability. The New York Court of Appeals has been particularly influential in the development of the law of products liability, and its formulation is therefore of particular interest.

Only a few years after the *Restatement's* formulation, the New York court adopted the following criteria:

> [U]nder a doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.[283]

### 5. The Three Categories of Defective Products

Liability can be imposed for products that are defective because of (1) The presence of a defect in the product at the time the defendant sold it (a manufacturing, production, or construction defect, sometimes termed the "lemon" product);[284] (2) A marketing defect—a failure of the defendant to warn the consumer of the risk (defective or nonexistent warning);[285] or (3) A design defect.[286]

### 6. Defective Design

Some courts have rejected the application of Section 402A in the area of design defects, concluding that although it contemplates that the producer will be liable in the production of a defective product even where it has "exercised all possible care in the preparation and sale of his product," nonetheless the "existence of a defective design depends upon the reasonableness of the manufacturer's action, and depends upon the degree of care which he has exercised…."[287] The consumer expec-

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[274] AMERICAN LAW INSTITUTE, *supra* note 108 § 402A (1966).

[275] *Id*. Comment g.

[276] *Id*. Comment f.

[277] *Id*. Comment h.

[278] *Id*. Comment n.

[279] *Id*.

[280] *Id*. Comment m.

[281] *Id*. Comments j and k.

[282] *Id*. Comment j.

[283] Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 628–29, 345 N.Y.S.2d 461 (1973).

[284] *See, e.g*., Pouncey v. Ford Motor Co., 464 F.2d 957, 961 (5th Cir. 1972).

[285] *See, e.g*., Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 812 (9th Cir. 1974).

[286] *See, e.g*., Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737, 747 (1974); Barker v. Lull Eng'g Co., 20 Cal. 3d 413; 573 P.2d 443, 446; 143 Cal. Rptr. 225 (1978).

[287] Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737, 747 (1974). *See* Keeton, *Manufacturer's Liability: The Meaning of "Defect in the Manufacture and Design of Products*," 20 SYRACUSE L. REV. 559 (1969), who would limit recovery of

tations test and the risk/utility test have dominated products liability analysis in design defect cases.

The *consumer expectations test* asks what reasonable consumers expect of the product, the assumption being that products should perform as reasonable consumers expect them to.[288] This test flows from Section 402A of the *Restatement (Second) of Torts*, which imposes liability for defective products that are "unreasonably dangerous…to an extent beyond that which would be contemplated by the ordinary consumer…."[289]

Consumers' expectations may also be developed by the producer's advertising, or its warranty with respect to the performance of the goods. Section 2-313 of the Uniform Commercial Code provides, *inter alia,* that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

A defense often raised is that consumer expectations cannot be high where the risks posed by the product are obvious. Under the *patent danger rule*, defendants argue that the obviousness of the risk should bar recovery for a design defect as a matter of law. A majority of courts have rejected this defense, one noting that an "[u]ncritical rejection of design defect claims in all cases wherein the danger may be open and obvious…contravenes sound public policy by encouraging design strategies which perpetuate the manufacture of dangerous products."[290]

The *Restatement (Third) of Torts* rejects the consumer expectations test as an independent standard for judging the defectiveness of product designs because "Consumer expectations, standing alone, do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety." Nonetheless, the *Restatement* recognized the usefulness of consumer expectations in "judging whether the omission of a proposed alternative design renders the product not reasonably safe."[291] The expectation of the consumer has not been deemed the exclusive means for determining design defect because the reasonable consumer often knows not what to expect. The California courts have held that:

> a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design [citations omitted].
>
> [A] jury may consider…the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design [citation omitted].[292]

These courts have embraced a hybrid test consisting of both consumer expectations and risk/utility analysis, concluding that design defects exist

> (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove…that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.[293]

The California courts have tried to draw a dividing line identifying the circumstances appropriate for the alternative analysis. In their view, the consumer expectations test "is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design.*" Under this approach, the consumer expectation test is appropriate whenever the product's design "performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers."[294] However, the risk/utility test is appropriate where "a complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance."[295] Under this approach, the risk/utility test must be used unless the facts establish that the design failed the consumer expectations test.

The risk/utility test requires application of a balancing process to determine whether the product is unreasonably dangerous—weighing the utility of risk inherent in the design against the magnitude of the risk. But in some cases the product is so inherently unreasonable that no balancing is necessary.[296]

In order to prevail in a product liability case based on a defective design, courts have considered the following criteria:

- The foreseeable risk of harm could have been reduced by a reasonable alternative design;

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defective products "to the case of an unintended condition, a miscarriage in the manufacturing process." *Id*. at 562.

[288] Heaton v. Ford Motor Co., 248, Or. 467, 435 P.2d 806, 808 (Or. 1967).

[289] AMERICAN LAW INSTITUTE, *supra* note 108 § 402A, comment i.

[290] Camancho v. Honda Motor Co., Ltd., 741 P.2d 1240, 1246 (Colo. 1987).

[291] AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF TORTS § 2, Comment g (1998).

[292] Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 430–31, 573 P.2d 443 (Cal. 1978).

[293] 20 Cal. 3d at 435.

[294] Soule v. General Motors Corp., 8 Cal. 4th 548, 882 P.2d 298, 309, 34 Cal. Rptr. 2d 607, 618 (1994).

[295] *Id*., 882 P.2d at 308.

[296] Troja v. Black & Decker Mfg. Co., 62 Md. App. 101, 488 A.2d 516, 519 (Md. App. 1985).

• The technological feasibility of manufacturing a product with the suggested safety device at the time the product was manufactured;
• The availability of the materials required;
• The chances of consumer acceptance of the device;
• The relative advantages and disadvantages of the product as designed and as it could have been designed;
• The effects of the alternative design on production costs;
• The effects of the alternative design on product longevity, maintenance, repair, and aesthetics; and
• The overall safety impact of the alternative design, not only on plaintiff, but on other users of the product.[297]

Though the feasibility of an alternative design may be proven by plaintiff, some courts do not insist that the plaintiff must prove the existence of a feasible alternative design in every case.[298] The *Restatement (Third) of Torts* states that, "reasonable alternative design is the predominant, yet not exclusive, method for establishing defective design."[299]

Another question in defective design cases is whether the court should assess the state of the art in the manufacturer's trade of business at the time of its design, or at the time of the litigation. Technology evolves rapidly, so that more recently designed products can be made safely. The dominant view on the issue was expressed in *Bruce v. Martin-Marietta Corp.*,[300] which measured the state of the art at the time the product (aircraft seats) entered the stream of commerce, in 1952 (at which time they satisfied FAA safety standards), rather than the prevailing safety standards at the time of the crash, in 1970. The court observed that the crucial question was the expectations of an ordinary consumer, who "would not expect a Model T to have safety features which are incorporated in automobiles today."

With respect to seat belts, courts have generally not imposed a duty upon carriers to provide vehicles equipped with seat belts as a matter of law, but have left the question open to the jury in assessing whether the defendant was negligent in providing defective equipment.[301]

One other issue that could result in liability for a transit provider is the extent to which the defective design flows from its RFP. If its engineers have laid out precise specifications for the type of equipment or structure to be supplied, and that design ultimately results in personal injury, the transit provider may find itself liable for its design. In many instances, it would be safer for the transit provider to specify the function and general dimensions of the equipment or structure, leaving it to the bidder to draw up the precise technological design specifications. The prudent transit attorney will insist on a process of prior legal review before any RFP is issued.

### 7. Defective Warning

A problem with a warning may exist either because the warning was deficient in failing to appraise consumers of the product's dangers, or because there was no warning given in a situation where there should have been. In determining whether a warning should have been given, courts focus on the knowledge, actual or constructive, of the defendant at the time the product was produced or sold, of its dangerous propensities. Thus, unlike other product liability cases that focus on the product, the failure to warn line of cases focuses on the conduct of the manufacturer, and is therefore more heavily grounded in negligence. Nonetheless, though in negligence the plaintiff must prove that the seller did not warn for reasons that fall below an appropriate standard of care, in strict liability, the reasonableness of defendant's failure to warn is immaterial. Strict liability requires the plaintiff to prove only that the defendant failed to warn of a risk that was known or knowable in light of generally accepted scientific or medical knowledge existing at the time of manufacture and distribution.[302] When one steps off of the London Underground rail cars, one hears and reads the warning, “Mind the Gap.”

But a warning may not always be an adequate defense. In a case where the plaintiff garbage man's leg was amputated when caught between the blade and compaction chamber on a garbage truck, the court held, "If a slight change in design would prevent serious, perhaps fatal, injury, the designer may not avoid liability by simply warning of the possible injury."[303] Where a commercially feasible alternative design would have avoided the injury, the existence of a warning is not an absolute bar to liability.[304]

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[297] Kirk v. Hanes Corp., 16 F.3d 705, 708 (6th Cir. 1994); AMERICAN LAW INSTITUTE, *supra* note 291 § 2, comment f.

[298] Potter v. Chicago Pneumatic Tool Co., 241 Conn. 199, 694 A.2d 1319, 1332 (Conn. 1997).

[299] AMERICAN LAW INSTITUTE, *supra* note 291 § 2(b), and comment b. In some cases, defendants have argued that an aircraft was not defective because its design had been approved by the Federal Aviation Administration (FAA), and it had been issued an FAA certificate of airworthiness. The courts have observed that the Federal Aviation Act provides that the FAA's standards shall constitute a mere minimum.

[300] 544 F.2d 442, 447 (10th Cir. 1976).

[301] As one court observed,

> [we have not imposed] a duty on common carriers to provide seat belts. Rather, the court[s have] left it for the jury to decide whether under the circumstances such a failure was a negligent act. These circumstances could vary in many respects including whether the common carrier was a taxicab, a full-size bus, or, as in this case, a smaller bus for the elderly and the disabled….”

Montgomery v. Midkiff and Transit Auth. of River City, 770 S.W.2d 689, 691 (Ky. App. 1989).

[302] Anderson v. Owens-Corning Fiberglass Corp., 53 Cal. 3d 989, 810 P.2d 549, 550, 281 Cal. Rptr. 528 (Cal. 1991).

[303] Uloth v. City Tank Corp., 376 Mass. 874, 384 N.E.2d 1188, 1192 (Mass. 1978).

[304] Eads v. R.D. Warner Co., 109 Nev. 113, 847 P.2d 1370, 1371 (Nev. 1993).

### 8. Sales vs. Services

Both *Restatement (Second) of Torts* Section 402A and the Uniform Commercial Code purport to apply only to sales transactions. However, the *Restatement (Third) of Torts* applies to commercial transactions "other than a sale," to one who distributes, provides products to others, or provides a combination of products and services.[305]

Some courts have also applied strict liability to lessors of products. For example, in *Cintrone v. Hertz Truck Leasing & Rental Service,*[306] the New Jersey Supreme Court applied strict liability to a truck lessor for injury caused by defective brakes. The court held that the commercial vehicle lessor impliedly warrants that its vehicles are in proper working order irrespective of the actual age of the vehicle. The *Restatement (Third) of Torts* also provides that "[a] commercial lessor of new and like-new products is generally subject to the rules governing new product sellers."[307]

### 9. Warranty

Though, as noted above, *caveat emptor* and privity no longer dominate contract law, contract law remains an alternative to tort law litigation of products liability cases.[308] The law of contracts has three potential advantages over tort law: (1) proving the existence and breach of a contractual warranty may be easier than proving duty and breach in a negligence action; (2) typically, contractual claims have longer statutes of limitations than tort actions; and (3) purely consequential economic losses are more easily recoverable under contract principles than in tort law.

Article 2 of the Uniform Commercial Code established three types of express warranties: (1) express warranties that the product will perform in a certain manner,[309] (2) implied warranties of merchantability, that the product is free of defects and is fit for the ordinary purpose for which such goods are used,[310] and (3) implied warranties of fitness for a particular purpose communicated to the seller at the time of the sale.[311] Note, however, that for agencies following the FAR, the contracts may provide for limited warranties, provided that all implied warranties of merchantability and fitness for a particular purpose are excluded.[312] FTA's Circular 4220.1D and Best Practices Manual also diverge from the UCC in certain respects.[313]

### 10. Causation

Whether a products liability action is brought in warranty, negligence, or strict liability, the plaintiff must prove cause-in-fact and proximate causation, as described above. To establish a *prima facie* case of products liability, plaintiff must prove that: (1) the product that caused his injury was distributed by the defendant; (2) the product was defective; (3) but for the defect the plaintiff would not have been injured; (4) the resulting harm to the plaintiff was within the range of foreseeable risks created by the defect; and (5) damages. Some courts, though, suggest different terminology for the issue of proximate causation in products liability cases. The Texas Supreme Court in *Union Pump Co. v. Allbritton* noted:

> Negligence requires a showing of proximate cause, while *producing cause* is the test of strict liability. Proximate

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[305] AMERICAN LAW INSTITUTE, *supra* note 291 § 20.

[306] 45 N.J. 434, 212 A.2d 769 (N.J. 1965).

[307] AMERICAN LAW INSTITUTE, *supra* note 291 § 20, comment c.

[308] *See, e.g.,* Southeastern Pa. Transp. Auth. v. General Motors Corp., 103 F.R.D. 12, 13 n.l (E.D. Pa. 1984).

[309] UCC § 2-313.

[310] UCC § 2-314.

[311] UCC § 2-315. However, an implied warranty may stand on a different footing where made by a supplier of a component part. The seminal case is Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S. 593 (1963), decided by the New York Court of Appeals. Goldberg involved an action for personal injury suffered in an American Airlines crash near LaGuardia Airport in New York. Goldberg brought suit against Kollsman Instrument Corp., the manufacturer of a defective altimeter on an aircraft assembled by Lockheed, but owned and flown by American Airlines, on breach of implied warranties of merchantability and fitness. Of course, there was no privity between the passenger (the purchaser of a service from American Airlines), and the manufacturer of the altimeter. The court noted that the traditional distinction between torts and contracts in the products liability arena had been blurred:

> A breach of warranty, it is now clear, is not only a violation of the sales contract…but is a tortuous wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer…. 191 N.E 2d at 82. [W]here an article is of such a character that when used for the purpose for which it is made it is likely to be a source of danger to several or many people if not properly designed and fashioned, the manufacturer as well as the vendor is liable, for breach of law-implied warranties, to the persons whose use is contemplated…. [I]t is no extension at all to include airplanes and the passengers for whose use they are built—and, indeed, decisions are at hand which have upheld complaints, sounding in breach of warranty, against manufacturers of aircraft where passengers lost their lives when the planes have crashed….

*Id*. at 84.

Although the New York Court of Appeals in *Goldberg* noted that other jurisdictions (including, notably, California) had adopted a strict tort liability regime wholly dispensing with the privity requirement, *See* Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 687 (1963), New York was not yet willing to go so far as to extend liability to a producer of a component part—"Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft." 191 N.E.2d at 84. Despite the *Restatement's* ambivalence on the question (noted above), most courts today allow recovery against manufacturers of component parts.

[312] 48 C.F.R. § 52.246-17(4), 18(6), and 19(10) (1999). These issues are also discussed in Section 5—Procurement.

[313] For example, the FTA's Best Practices Procurement Manual (6.3.1.2) notes that APTA's Guidelines on bus procurement warranty provisions should be followed.

> and producing cause differ in that foreseeability is an element of proximate cause, but not of producing cause. Proximate cause consists of both cause in fact and foreseeability. Cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury which would not otherwise have occurred. A producing cause is "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of, if any." Common to both proximate and producing cause is causation in fact, including the requirement that the defendant's conduct or product be a substantial factor in bringing about the plaintiff's injuries.[314]

Though the court thought that foreseeability was not a part of "producing cause" analysis, it nonetheless acknowledged that at some point defendant's conduct or product may be too remotely connected with plaintiff's injury to constitute legal causation; defining the limits of legal cause requires some line drawing based on policy considerations.

In *Lear Siegler, Inc. v. Perez*,[315] the Texas Supreme Court also embraced a restrictive view of proximate causation. Perez, a Texas Highway Department employee, had gotten out of his truck to fix a defective flashing sign which, after hit by a sleeping motorist, hit Perez. Finding that the connection between the defect in the sign was too attenuated with plaintiff's injuries, the court held that the defect in the sign was not the legal cause of Perez's injuries.

## H. COMPARATIVE NEGLIGENCE AND STRICT LIABILITY

Some courts have had difficulty in meshing the apples-to-oranges comparison of plaintiff's contributory negligence with defendant's strict liability, particularly after comparative fault methodology (described above, of reducing plaintiff's recovery by his degree of fault) was adopted by most jurisdictions. Strict liability focuses on the condition of the product, rather than the conduct of the defendant; the plaintiff need only prove the existence of a defect rather than any negligence that may have caused it. However, one may conceptualize strict liability as a fault-based system in the sense that the fault lies within the nature of the product itself—"The product is 'bad' because it is not duly safe; it is determined to be defective and (in most jurisdictions) unreasonably dangerous."[316] Nonetheless, though a defective product may be seen as "faulty," such a characterization is qualitatively different from the plaintiff's fault in contributing to his own injury.

Recognizing this conceptual difficulty, some courts have adopted a notion of "comparative causation," whereby the defendant is strictly liable for the harm caused by his defective product, but the plaintiff's recovery is discounted by the degree of his own fault—"how much of the injury was caused by the defect in the product versus how much was caused by the plaintiff's own actions."[317] Others have refused to apply comparative fault statutes to strict liability cases.[318]

## I. RISK MANAGEMENT

The Transit Cooperative Research Program has published several documents on risk management, urging transit providers to establish a Preventive Law approach to avoiding liability.[319] They should be consulted in terms of identifying “Best Practices” for transit providers.

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[314] Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995) [citations omitted and emphasis supplied].

[315] 819 S.W.2d 470 (Tex. 1991).

[316] Wade, *Products Liability and Plaintiff's Fault — The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 377 (1978).

[317] Murray v. Fairbanks Morse, 610 F.2d 149, 159 (3d Cir. 1979). The *American Law Institute, Restatement (Third): Apportionment of Liability* (Proposed Final Draft March 31, 1998) uses the term "proportionate allocation."

[318] Conti v. Ford Motor Co., 578 F. Supp. 1429, 1434 (E.D. Pa. 1983), *rev'd on other grounds*, 743 F.2d 195 (3d Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985).

[319] *See, e.g.,* LIEBSON & PENNER, *supra* note 83; MICHAEL KADDATZ, RISK MANAGEMENT FOR SMALL AND MEDIUM TRANSIT AGENCIES (National Academy Press 1995); and PATRICIA MAIER, IDENTIFYING AND REDUCING FRAUDULENT THIRD PARTY TORT CLAIMS AGAINST PUBLIC TRANSIT AGENCIES (National Academy Press 2000).

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