

SECTION 1

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**TRANSIT-RELATED  
GOVERNMENTAL INSTITUTIONS**

## A. INTRODUCTION

Transit has become an increasingly important means of mobility for Americans. Transit plays an important role in assuring American mobility, relieving highway congestion, and reducing energy consumption and environmental pollution. According to the American Public Transportation Association, in 2012, Americans took 10.5 billion trips on public transportation.<sup>1</sup> Each week-day, passengers board public transportation vehicles more than 32 million times.<sup>2</sup> In 2010, transit accounted for more than 50 billion annual passenger miles.<sup>3</sup>

Both federal and state laws are important to the practice of Transit Law.<sup>4</sup> 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.<sup>5</sup> The relevant regulations promulgated by the Federal Transit Administration (FTA) are in Title 49 of the Code of Federal Regulations

(C.F.R.), though DOT regulations in Title 23 are sometimes applicable.<sup>6</sup>

In the decade prior to enactment of the Urban Mass Transportation Act of 1964<sup>7</sup> [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.<sup>8</sup> 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<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.”<sup>12</sup> 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).<sup>13</sup> 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

<sup>1</sup> American Public Transportation Association Web site, available at <http://www.apta.com/mediacenter/ptbenefits/pages/default.aspx> (visited Jan. 9, 2013).

<sup>2</sup> Agency data may be harvested from the FTA’s National Transit Database with transit ridership through 2012 at <http://www.ntdprogram.gov/ntdprogram/>. APTA also provides transit ridership data on its Web site in the Public Transportation Factbook 2014 at <http://www.apta.com/resources/statistics/Pages/transitstats.aspx> (visited Nov. 9, 2013. Requires log-in).

<sup>3</sup> 2010 National Transit Database Highlights, PowerPoint presentation available at [http://www.fta.dot.gov/documents/2012\\_06-11\\_2010\\_NTD\\_Data\\_Highlights.pptx](http://www.fta.dot.gov/documents/2012_06-11_2010_NTD_Data_Highlights.pptx) (visited Nov. 11, 2013).

<sup>4</sup> The first U.S. Supreme Court decision to recognize the concept of “transit law” was *Underground Railroad of the City of New York v. City of New York*, 193 U.S. 416, 24 S. Ct. 494, 48 L. Ed. 733 (1904).

<sup>5</sup> Title 23 of the U.S. Code is also relevant to transit law. Note, for example, TEA-21, 112 Stat. 107, 105 Pub. Law 178 (1998), contains a provision at Section 3037 that authorizes the Job Access and Reverse Commute (JARC) Grants program. Although this section was not codified in Chapter 53 of Title 49, U.S.C., it was combined with §§ 5307 and 5311.

<sup>6</sup> FTA rules apply to grant recipients, not private companies. “Regulations promulgated by the Office of the Secretary of Transportation governing transit authorities (FTA Regulations) work to establish ‘uniform administrative rules for Federal grants and cooperative agreements and subawards...’ 49 C.F.R. § 18.1. FTA Regulations apply only to recipients of FTA grants; they do not apply to private companies.” *Isobunkers, L.L.C. v. Easton Coach Co.*, 2010 U.S. Dist. LEXIS 11201, at 11 (E.D. Pa. 2010).

<sup>7</sup> Pub. L. No. 88-365, 78 Stat. 302.

<sup>8</sup> Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302. H.R. REP. NO. 88-204, at 9 2571 (1963).

<sup>9</sup> Pub. L. No. 87-70, 75 Stat. 149.

<sup>10</sup> William G. 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).

<sup>11</sup> PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 312 (1986).

<sup>12</sup> U.S. DEPT OF TRANSP., URBAN TRANSPORTATION PLANNING IN THE UNITED STATES: AN HISTORICAL OVERVIEW 46 (3d ed. 1988) (hereinafter referred to as U.S. DEPT OF TRANSP.).

<sup>13</sup> EDWARD WEINER, URBAN TRANSPORTATION PLANNING IN THE UNITED STATES 42 (1999).

of 1964).<sup>14</sup> 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.<sup>15</sup>

The Urban Mass Transportation Assistance Act of 1970<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

The Federal-Aid Highway Act of 1973<sup>19</sup> 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 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, bus shelters, and parking facilities.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> The Department of Transportation (DOT) could not approve the projects unless it concluded that they were based on the continuing, comprehensive, and cooperative (3-C) planning process and developed cooperatively by the states and local communities.<sup>24</sup>

The National Mass Transportation Assistance Act of 1974<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

The Surface Transportation Assistance Act of 1978<sup>28</sup> was the first federal Act to combine highway, public transportation, and safety authorizations in a single piece of legislation.<sup>29</sup> 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.<sup>30</sup>

The 1980s were marked by decentralization of authority and responsibility, reduced federal involvement, and increased flexibility for state and local governments.<sup>31</sup>

ISTEA<sup>32</sup> 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....”<sup>33</sup> 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

<sup>14</sup> 49 U.S.C. § 5333(b).

<sup>15</sup> Dennis Gardner, *Federal Assistance for Local Public Transit*, 27 URB. LAW. 1015 ABA (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).

<sup>16</sup> Pub. L. No. 91-453, 84 Stat. 962.

<sup>17</sup> *Id.* DEMPSEY & THOMS, *supra* note 11, at 313.

<sup>18</sup> U.S. DEPT OF TRANSP., *supra* note 12, at 85–6.

<sup>19</sup> Pub. L. No. 93-87, 87 Stat. 250.

<sup>20</sup> *Id.* DEMPSEY & THOMS, *supra* note 11, at 313.

<sup>21</sup> MARK SOLOF, HISTORY OF METROPOLITAN PLANNING ORGANIZATIONS, pt. II 4, New Jersey Transportation Planning Agency (1998).

<sup>22</sup> *Id.* at pt. III 7.

<sup>23</sup> U.S. DEPT OF TRANSP., *supra* note 12, at 97-98.

<sup>24</sup> County of Los Angeles v. Adams, 574 F.2d 607 (1978).

<sup>25</sup> Pub. L. No. 93-503, 88 Stat. 1565.

<sup>26</sup> DEMPSEY & THOMS, *supra* note 11, at 313.

<sup>27</sup> U.S. DEPT OF TRANSP., *supra* note 12, at 100.

<sup>28</sup> Pub. L. No. 95-599, 92 Stat. 2689.

<sup>29</sup> WEINER, *supra* note 13, at 109.

<sup>30</sup> U.S. DEPT OF TRANSP., *supra* note 12, at 128.

<sup>31</sup> U.S. DEPT OF TRANSP., *supra* note 12, at 185–86.

<sup>32</sup> Pub. L. No. 102-240, 105 Stat. 1914 (1991).

<sup>33</sup> See Joseph Thompson, *ISTEA Reauthorization and the National Transportation Policy*, 25 TRANSP. L.J. 87, 99 (1997). 49 U.S.C § 101.

efficiently maximize mobility of people and goods within and through urbanized areas and minimize transportation-related fuel consumption and air pollution.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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).<sup>37</sup> 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.”<sup>38</sup> 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 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.<sup>39</sup> 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.<sup>40</sup> ISTEA also gave the states greater authority by exempting a large number of projects from “full” FHWA oversight.<sup>41</sup>

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.<sup>42</sup>

ISTEA also established additional funding sources for addressing air quality issues.<sup>43</sup>

<sup>40</sup> U.S. FEDERAL HIGHWAY ADMINISTRATION, *supra* note 38, at 9–10.

<sup>41</sup> U.S. GEN. ACCOUNTING OFFICE, *TRANSPORTATION INFRASTRUCTURE: MANAGING THE COSTS OF LARGE-DOLLAR HIGHWAY PROJECTS 30–36* (Feb. 1997), available at <http://www.gao.gov/assets/160/155775.pdf>.

<sup>42</sup> Intermodal Surface Transportation Efficiency Act of 1991, Conference Report, H.R. No. 102-404, at 47 (1991).

<sup>43</sup> 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*, Commemorative Edition 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 39. For federally-funded transportation projects, MPOs within

<sup>34</sup> 23 U.S.C. § 134(a).

<sup>35</sup> Jayne Daly, *Transportation and Clean Air: Making the Land Use Connection*, Commemorative Edition 1995, PACE L. REV. 141, 148 (1995).

<sup>36</sup> 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).

<sup>37</sup> FEDERAL HIGHWAY ADMINISTRATION, *A GUIDE TO THE CONGESTION MITIGATION AND AIR QUALITY IMPROVEMENT PROGRAM 1* (1994).

<sup>38</sup> FEDERAL HIGHWAY ADMINISTRATION, *AIR QUALITY PROGRAMS AND PROVISIONS OF THE INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991* (hereinafter referred to as “U.S. FEDERAL HIGHWAY ADMINISTRATION”), at 6 (1993).

<sup>39</sup> Theodore Taub & Katherine Castor, *ISTEA—Too Soon To Evaluate Its Impact*, ALI-ABA Land Use Institute (hereinafter Taub & Castor) (Aug. 16, 1995).

The Transportation Equity Act for the 21st Century of 1998 (TEA-21)<sup>44</sup> reaffirmed and retained 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.<sup>45</sup> For example, under the \$217 billion authorization bill (then the largest infrastructure bill in U.S. history), funding was significantly increased for the Congestion Mitigation and Air Quality Program<sup>46</sup> (by 35 percent), as well as for transit (by 50 percent).<sup>47</sup> 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;
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.<sup>48</sup> In addition to considerations of air quality, an

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TMA 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 38, at 13.

<sup>44</sup> Pub. L. No. 105-178, 112 Stat. 107.

<sup>45</sup> William C. Vantuono, *TEA 21: Uncomplicated Answers for Complicated Questions*, RAILWAY AGE, Vol. 199, Issue 9, Sept. 1, 1998, at 16; AMERICAN PUBLIC TRANSIT ASS'N, *TEA 21: A SUMMARY OF TRANSIT RELATED PROVISIONS* 6 (1998).

<sup>46</sup> 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.

<sup>47</sup> Bud Shuster, *Shuster Applauds Gore's "Better America Bonds"*, Press Release, (Jan. 11, 1999).

<sup>48</sup> Policy in Transit Joint Development, 62 Fed. Reg. 12,266 (Mar. 14, 1997).

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 required 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 required 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.<sup>49</sup> Though it gives States and MPOs greater flexibility to select transportation projects that best address their needs, TEA-21 provided 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.<sup>50</sup> TEA-21 required that MPOs and state and transit agencies cooperate in the development of financial estimates that support the plan and TIP development. It also modified the procedures for designating multiple MPOs in urbanized areas, adding a requirement for concurrence by the MPO and the Governor.<sup>51</sup>

In August 2005, the President signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).<sup>52</sup> It built on the foundation established by ISTEA and TEA-21. With a budget of \$286 billion,<sup>53</sup> SAFETEA-LU was the largest investment in surface transportation in the nation's history. The legislation included \$52.6 billion in support for federal transit programs—a 46 percent increase over TEA-21. Among its principal objectives, it

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<sup>49</sup> See Matthew W. Ward, Kenneth A. Brown, & David B. Lieb, *National Incentives for Smart Growth Communities*, 13 NAT. RESOURCES & ENV'T, Vol. 13, No. 1, 325, 328 (1998).

<sup>50</sup> Vantuono, *supra* note 45.

<sup>51</sup> *Federal Highway Administration, TEA-21—Transportation Equity Act for the 21st Century*, Pub. L. No. 106-159, 23 U.S.C. § 104 (1998).

<sup>52</sup> Pub. L. No. 109-59, 119 Stat. 1144 (2005). The SAFETEA-LU Technical Corrections Act of 2008, Pub. L. No. 110-244, 112 Stat. 1572, was signed into law in June 2008. A copy is available at <http://www.gpo.gov/fdsys/pkg/PLAW-109publ59/html/PLAW-109publ59.htm> (visited Nov. 9, 2013).

<sup>53</sup> U.S. Department of Transportation Federal Trade Administration, 2012 Reauthorization of SAFETEA-LU, available at [http://www.fta.dot.gov/sitemap\\_12348.html](http://www.fta.dot.gov/sitemap_12348.html) (visited Nov. 9, 2013).

addressed safety, traffic congestion, efficiency in freight movement, the need for intermodal connectivity, and environmental protection. State and local decisionmakers were given more flexibility for solving transportation issues facing their communities. Among the most significant changes imposed by SAFTEA-LU were the following:

- SAFETEA-LU nearly doubled the funds for infrastructure safety and required strategic highway safety planning.
- SAFETEA-LU created a new Equity Bonus Program to help rationalize each state's return on its share of contributions to the Highway Trust Fund.
- SAFETEA-LU sought to encourage private sector participation in transportation infrastructure projects by including eligibility for private activity bonds, flexibility to use tolls to finance infrastructure improvements, and more flexible TIFIA and SIB loan policies.
- SAFETEA-LU gave states more flexibility to use road pricing to manage congestion.
- SAFETEA-LU provided significant investment in core federal-aid programs and programs to improve interregional and international transportation, address regional needs, and fund certain high-cost transportation infrastructure projects.
- SAFETEA-LU established the Highways for LIFE pilot program to advance longer-lasting highways using innovative technologies and practices to expedite construction of efficient and safe highways and bridges.
- SAFETEA-LU retained and increased funding for environmental programs.
- SAFETEA-LU improved and streamlined the environmental process for transportation projects.<sup>54</sup>

On July 6, 2012, President Obama signed into law the Moving Ahead for Progress in the 21st Century Act (MAP-21).<sup>55</sup> Unlike its predecessors, MAP-21 funded surface transportation programs for only 2 years, through September 30, 2014. It authorized more than \$105 billion for fiscal years (FY) 2013 and 2014. MAP-21 also authorized the transfer of \$18.8 billion in general funds to make up the shortfall in the Highway Trust Fund. It retains the 80/20 percent highway/transit allocation.<sup>56</sup>

<sup>54</sup> Federal Highway Administration, A Summary of Highway Provisions in SAFETEA-LU (Aug. 25, 2005), <http://www.fhwa.dot.gov/safetealu/summary.htm>; see also FTA Environmental Impact and Related Procedures Update, Final Rule Feb. 2013, available at [http://www.fta.dot.gov/12347\\_15129.html](http://www.fta.dot.gov/12347_15129.html), and U.S. Department of Transportation Updates Environmental Review Process to Cut Red Tape and Move Critical Transit Projects Ahead More Quickly and Efficiently (Press Release), Jan. 30, 2013, available at <http://www.dot.gov/briefing-room/us-department-transportation-updates-environmental-review-process-cut-red-tape-and>.

<sup>55</sup> Pub. L. No. 112-141, 126 Stat. 405 (2012).

<sup>56</sup> See generally, U.S. Department of Transportation, Federal Transit Administration MAP-21 Web site,

MAP-21 is the first long-term highway authorization legislation enacted since 2005. It extended SAFETEA-LU through September 30, 2012, and went into effect October 1, 2012. The policies expressed in MAP-21 include the following:

- (1) provide funding to support public transportation;
- (2) improve the development and delivery of capital projects;
- (3) establish standards for the state of good repair of public transportation infrastructure and vehicles;
- (4) promote continuing, cooperative, and comprehensive planning that improves the performance of the transportation network;
- (5) establish a technical assistance program to assist recipients under this chapter to more effectively and efficiently provide public transportation service;
- (6) continue Federal support for public transportation providers to deliver high quality service to all users, including individuals with disabilities, seniors, and individuals who depend on public transportation;
- (7) support research, development, demonstration, and deployment projects dedicated to assisting in the delivery of efficient and effective public transportation service; and
- (8) promote the development of the public transportation workforce.<sup>57</sup>

Additionally, MAP-21 seeks to promote “the cooperation of both public transportation companies and private companies engaged in public transportation.”<sup>58</sup>

MAP-21 created the following new programs:

- Public Transportation Safety Program;<sup>59</sup>
- State of Good Repair Grants,<sup>60</sup>

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<http://www.fta.dot.gov/map21/>, and U.S. Department of Transportation, Federal Transit Administration MAP-21 Frequently Asked Questions, available at [http://www.fta.dot.gov/legislation\\_law/about\\_FTA\\_14937.html](http://www.fta.dot.gov/legislation_law/about_FTA_14937.html).

<sup>57</sup> 49 U.S.C. § 5301(b).

<sup>58</sup> 49 U.S.C. § 5301(a).

<sup>59</sup> 49 U.S.C. § 5329.

<sup>60</sup> 49 U.S.C. § 5337. This is a new grant program designed to maintain public transportation systems in a state of good repair, replacing the fixed guideway modernization program of 49 U.S.C. § 5309. The State of Good Repair Program is effectively “the successor to the [Fixed Guideway Modernization] program, in that the SGR program will support many of the same types of projects that were funded under the FGM program.” Capital Project Management, 78 Fed. Reg. 16,460 (Mar. 15, 2013).

Eligible projects include those designed to repair or replace the following:

- (A) rolling stock;
- (B) track;
- (C) line equipment and structures;
- (D) signals and communications;
- (E) power equipment and substations;

- Transit Asset Management;<sup>61</sup>
- Bus and Bus Facilities Formula Grants;<sup>62</sup>
- Public Transportation Emergency Relief Program;<sup>63</sup>
- Technical Assistance and Standards Development;<sup>64</sup> and
- Transit Oriented Development Planning Pilot Grants.<sup>65</sup>

MAP-21 *eliminated or transformed* the following programs:

- Clean Fuels Grants;<sup>66</sup>

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(F) passenger stations and terminals;

(G) security equipment and systems;

(H) maintenance facilities and equipment;

(I) operational support equipment, including computer hardware and software;

(J) development and implementation of a transit asset management plan; and

(K) other replacement and rehabilitation projects the Secretary determines appropriate.

49 U.S.C. § 5337 (b).

<sup>61</sup> 49 U.S.C. § 5326. MAP-21 imposes upon FTA the responsibility to define the term “state of good repair” and create objective standards to measure the condition of capital assets. Based on the definition it develops, FTA must also develop the performance measures that FTA grantees will be required to meet. FTA grantees and their subrecipients must develop transit asset management plans. These must be incorporated into MPO and statewide transportation plans and TIPs.

<sup>62</sup> 49 U.S.C. § 5339. MAP-21 created this formula grant program to replace the previous 49 U.S.C. § 5309 discretionary Bus and Bus Facilities program to replace, rehabilitate, and purchase buses and related equipment, and to build bus-related facilities.

<sup>63</sup> 49 U.S.C. § 5324. This program assists states and public transportation providers with emergency-related expenses. An emergency is defined as

a natural disaster affecting a wide area (such as a flood, hurricane, tidal wave, earthquake, severe storm, or landslide) or a catastrophic failure from any external cause, as a result of which—

(A) the Governor of a State has declared an emergency and the Secretary has concurred; or

(B) the President has declared a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170).

49 U.S.C. § 5324(a)(2).

<sup>64</sup> 49 U.S.C. § 5314. Discretionary funding subject to appropriations by Congress has been authorized for a variety of technical assistance activities and development of voluntary standards and best practices. This is a new section under MAP-21.

<sup>65</sup> MAP-21 § 20005(b). Comprehensive planning activities in corridors with new rail, bus rapid transit, or core capacity projects are eligible for this pilot grant.

<sup>66</sup> 49 U.S.C. § 5308. Under SAFETEA-LU, the Clean Fuel Grants program was available for projects in nonattainment or maintenance areas for purchasing or leasing clean fuel buses, constructing or leasing clean fuel buses or electrical recharging

- Job Access and Reverse Commute (JARC);<sup>67</sup>
- New Freedom Program;<sup>68</sup>
- Paul S. Sarbanes Transit in the Parks;<sup>69</sup>
- Alternatives Analysis;<sup>70</sup>
- Over-the-Road Bus;<sup>71</sup>

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facilities and related equipment for such buses, or constructing new or improving existing public transportation facilities to accommodate clean fuel buses. It could include a project located in a nonattainment or maintenance area relating to clean fuel, bio-diesel, hybrid electric, or zero emissions technology buses that exhibit equivalent or superior emissions reductions. The Clean Fuels Program was repealed under MAP-21.

<sup>67</sup> 49 U.S.C. § 5316. Prior to MAP-21, JARC funding was available to states and public bodies, private nonprofit organizations, state or local governments, and operators of public transportation services, including private operators of public transportation services, for purposes of capital, planning, and operating expenses for projects that transport welfare recipients and eligible low-income individuals to and from jobs and activities related to their employment, as well as for reverse commute projects (“from urbanized areas and rural areas to suburban employment locations”). 49 U.S.C. § 5302(a)(9). Pursuant to MAP-21, funding for JARC projects may be available through the Urbanized Area Formula Grants program, 49 U.S.C. § 5307(a)(1)(c), or the Rural Area Formula program, 49 U.S.C. § 5311(b)(1)(D).

<sup>68</sup> 49 U.S.C. § 5317. The New Freedom program was available to states, public bodies and eligible private nonprofit organizations, State or local governments, and operators of public transportation services, including private operators of public transportation services, to reduce barriers to transportation services and expand the transportation mobility options available to people with disabilities beyond the requirements of the ADA. Activities formerly under the New Freedom program are now eligible under the Enhanced Mobility of Seniors and Individuals with Disabilities program of 49 U.S.C. § 5310.

<sup>69</sup> 49 U.S.C. § 5320. The Paul Sarbanes Transit in the Parks program was available to federal land management agencies that managed federally owned or managed parks, refuges, or recreational areas open to the general public and state, tribal, or local governmental authorities with jurisdiction over land in the vicinity, to support capital and planning expenses for new or existing alternative transportation systems in the vicinity. MAP-21 repealed the the Transit in Parks program effective on October 1, 2012. *See* 77 Fed. Reg. 52131 (Aug. 28, 2012). However, public transportation investments in national parks and other federal lands remain eligible under FHWA’s Federal Lands Transportation program. *See* <http://flh.fhwa.dot.gov/>.

<sup>70</sup> 49 U.S.C. § 5339. Alternatives analysis funding was available to public agencies for financing the evaluation of all reasonable modal and multimodal alternatives and general alignment options for identified transportation needs in a particular, broadly defined travel corridor. Funds could be used to assist state and local governmental authorities in conducting alternatives analyses when at least one of the alternatives was a new fixed guideway systems or an extension to an existing fixed guideway system. The Alternatives Analysis program was repealed under MAP-21.

<sup>71</sup> TEA-21 § 3038. The Over-the-Road Bus program funding was available to assist intercity fixed-route, commuter, charter, and tour bus service operators in complying with the requirements of “Transportation for Individuals with Disabilities” (49 CFR Part 37, Subpart H), to include capital for adding lifts and

- Urbanized Area Formula Grants<sup>72</sup> (now includes JARC);<sup>73</sup>
- Rural Area Formula Grants<sup>74</sup> (now includes JARC); and
- Enhanced Mobility of Seniors and Individuals with Disabilities<sup>75</sup> (New Freedom).

MAP-21 *modified* the following programs:

- Fixed Guideway Capital Investment Grants;<sup>76</sup>
- Metropolitan and Statewide and Nonmetropolitan Transportation Planning;<sup>77</sup>
- Research, Development, Demonstration, and Deployment Projects;<sup>78</sup> and
- Human Resources and Training.<sup>79</sup>

other accessibility components to new vehicle purchases and purchasing lifts and associated components to retrofit existing vehicles. MAP-21 replaces the discretionary Bus and Bus Facilities program with a formula-based Bus and Bus Facilities program. 49 U.S.C § 5339.

<sup>72</sup> 49 U.S.C. § 5307. Funding is determined by a formula based on population, the level of transit service, and other factors. MAP-21 also expands the ability to use Urbanized Area Formula funds to cover operating expenses.

<sup>73</sup> Pursuant to MAP-21, Urbanized Area Formula Grants will fund transit capital and planning projects and may also be used to fund the JARC program. 49 U.S.C. § 5307(a)(1)(c).

<sup>74</sup> 49 U.S.C. § 5311. The Rural Area Formula program provides capital, planning, and operating assistance for public transportation in rural areas. Rural areas are defined as those with fewer than 50,000 residents. Funding is based on a formula that examines population, land area, and transit service.

<sup>75</sup> 49 U.S.C. § 5310. Under the Enhanced Mobility of Seniors and Individuals with Disabilities program, formula funds are distributed based on each state's share of the targeted populations and are now apportioned to both States (for areas with populations less than 200,000) and large urbanized areas (of more than 200,000). The former New Freedom program projects of 49 U.S.C. § 5317 are now eligible under this program.

<sup>76</sup> 49 U.S.C. § 5309. This program is also known as "New Starts/Small Starts." It awards grants on a competitive basis for major investments in new and expanded rail, bus rapid transit (BRT), and ferry systems. MAP-21 adds eligibility for core capacity improvement projects (i.e., projects that expand capacity by at least 10 percent in existing fixed guideway corridors at or above capacity, or that are expected to be at capacity within 5 years. In addition, the Alternatives Analysis requirements have been eliminated in favor of reviewing alternatives performed during the metropolitan planning and environmental review processes. Fixed-guideway modernization and bus and bus facilities projects are no longer funded under this section. See State of Good Repair Program (Section 5337) and Bus and Bus Facilities Program (Section 5339) for funding information for such projects.

<sup>77</sup> 49 U.S.C. §§ 5303-05. MAP-21 established a performance-based planning process under this program and also authorized a transit-oriented development pilot program, among other changes.

<sup>78</sup> 49 U.S.C. § 5312. Former 49 U.S.C. § 5312 (Research, development, demonstration, and deployment projects) and 49 U.S.C. § 5314 (National research programs) have been consolidated by MAP-21 into one program..

One major change introduced by MAP-21 is a shift in emphasis to a performance- and outcome-based approach for transportation planning and implementation.<sup>80</sup> Another innovation is an effort to expedite and simplify the administrative process.<sup>81</sup>

The impact of sequestration legislation that became effective in March 2013 had a limited impact on transit funding, since the Highway Trust Fund, including the Mass Transit Account, was exempt. However, programs financed through the General Fund, including New Starts, FTA operations, FTA research, and Hurricane Sandy emergency relief funds, were subject to the effects of sequestration.

The remainder of this section attempts to divide the issues discussed here along subject matters.

## C. THE FEDERAL TRANSIT ADMINISTRATION

In 1968, UMTA (since renamed FTA)<sup>82</sup> was created within DOT.<sup>83</sup> The FTA is one of the 10 modal administrations within DOT. The FTA is headed by an Administrator appointed by the President of the United States and confirmed by the U.S. Senate. The FTA operates from its headquarters in Washington, DC, 10 regional offices, and 5 metropolitan offices that assist public transportation agencies in all 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, Northern Mariana Islands, American Samoa, and in federally recognized Indian tribal areas.<sup>84</sup>

Most federal transit laws are codified at Title 49 of the United States Code at Chapter 53.<sup>85</sup> Congress amends FTA's authorizing legislation every 4 to 6 years. However, MAP-21 (at this writing, the most recent authorizing legislation) provides only 2 years of authorization.<sup>86</sup> Regardless of the organization's struc-

<sup>79</sup> 49 U.S.C. § 5322. Funding has been authorized under MAP-21 for FTA to enter into contracts for human resource and workforce development programs as they apply to public transportation activities, including employment training, an outreach program to increase minority and female employment in public transportation activities, research on public transportation personnel and training needs, and training and assistance for minority business opportunities.

<sup>80</sup> 49 U.S.C. § 5303(h)(2).

<sup>81</sup> Congress intended to "expedite project delivery while protecting the environment." Summary of Moving Ahead for Progress in the 21st Century (MAP-21), [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=6d1e2690-6bc7-4e13-9169-0e7bc2ca0098](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=6d1e2690-6bc7-4e13-9169-0e7bc2ca0098).

<sup>82</sup> As previously noted, UMTA was renamed FTA with the promulgation of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Pub. L. No. 102-240, 105 Stat. 1914 (1991).

<sup>83</sup> A particularly useful Web site for the transit lawyer is <http://www.fta.dot.gov>, which includes a rich posting of relevant governmental documents.

<sup>84</sup> FTA Regional Offices, [http://www.fta.dot.gov/12317\\_1119.html](http://www.fta.dot.gov/12317_1119.html) (visited Nov. 9, 2013).

<sup>85</sup> Certain provisions of Title 23 of the U.S. Code are also relevant.

<sup>86</sup> A copy of MAP-21 is available at <http://www.gpo.gov/>



ture, 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 90 percent of a capital project's cost.<sup>87</sup> Demonstration grants fund as much as 100 percent of the cost of a demonstration project.<sup>88</sup>

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)<sup>89</sup> or administrative requirements (e.g., method of selection of architect/engineer).<sup>90</sup> 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.<sup>91</sup> Though it enforces a multitude of unfunded mandates<sup>92</sup> that have been imposed by Congress

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),<sup>93</sup> with the possibility of suspending or terminating funds for non-compliance. However, local transit providers can avoid some (but not all) of them simply by declining to accept federal dollars. For example, certain civil rights nondiscrimination requirements are imposed irrespective of receipt of federal funds,<sup>94</sup> whereas labor protection provisions are required only upon receipt of FTA funds.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> The FTA Administrator or the Administrator's designee also serves on the Intermodal Transportation Advisory Board.<sup>98</sup>

FTA is comprised of 10 regional offices and 8 headquarters offices, which function under the overall direction of the Federal Transit Administrator and Deputy Administrator:

1. *The Office of Administration* provides general administrative support services for FTA, including organization and management planning, contracting and procurement, administrative services, financial management, personnel administration, and audit, pro-

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fdsys/pkg/BILLS-112hr4348enr/pdf/BILLS-112hr4348enr.pdf.

<sup>87</sup> Federal Transit Administration, Capital Investment Program: New Starts, Small Starts and Core Capacity Improvements, available at [http://www.fta.dot.gov/12347\\_5221.html](http://www.fta.dot.gov/12347_5221.html) (visited Nov. 9, 2013). See 49 U.S.C. §§ 5307, 5309; Federal Transit Administration, Urbanized Area Formula Program (5307), available at [http://www.fta.dot.gov/grants/13093\\_3561.html](http://www.fta.dot.gov/grants/13093_3561.html).

<sup>88</sup> See, e.g., *Government Security News, 29 Million in Grants for Demos in Operational Safety Response and Recovery and All-Hazards Communications*, Oct. 2013, available at <http://www.gsnmagazine.com/node/33522> (visited Nov. 9, 2013). Operational assistance is also sometimes permitted under 49 U.S.C. §§ 5307 and 5311. See Urbanized Area Formula (5307), available at [http://www.fta.dot.gov/grants/13093\\_3561.html](http://www.fta.dot.gov/grants/13093_3561.html).

<sup>89</sup> 49 U.S.C. § 5323(j); 49 C.F.R. Part 661 (Buy America Requirements).

<sup>90</sup> See *Best Practices Procurement Manual*, Chapter 4—Methods of Solicitation and Selection, available at [http://www.fta.dot.gov/documents/BPPM\\_fulltext.pdf](http://www.fta.dot.gov/documents/BPPM_fulltext.pdf).

<sup>91</sup> 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 *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555, 586, 105 S. Ct. 1005, 1020. 83 L. Ed. 2d 1016, 1036 (1985).

<sup>92</sup> 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 sec-

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tor, and with the more recent promulgation of the Americans With Disabilities Act, access by individuals with disabilities.

<sup>93</sup> See the Appendix hereto for a list of the statutory and regulatory obligation with which compliance must be certified.

<sup>94</sup> The Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988), restored institution-wide protection of the Civil Rights Act if any part of the institution received federal funds.

<sup>95</sup> Section 13(c) of the Federal Transit Act, which is codified at 49 U.S.C. § 5333(b). See also G. KENT WOODMAN, JANE SUTTER STARKE & LESLIE D. SCHWARTZ, *TRANSIT LABOR PROTECTION—A GUIDE TO SECTION 13(C) FEDERAL TRANSIT ACT* (Legal Research Digest, No. 4, Transportation Research Board, 1995), available at [http://onlinepubs.trb.org/onlinepubs/terp\\_lrd\\_04.pdf](http://onlinepubs.trb.org/onlinepubs/terp_lrd_04.pdf). See the Appendix hereto for a list of requirements triggered by receipt of FTA funds and those not contingent on receipt of federal money.

<sup>96</sup> 49 U.S.C. § 107(c).

<sup>97</sup> 49 C.F.R. § 601.4.

<sup>98</sup> 49 U.S.C. § 5502(b)(5).

curement, logistical, and management information systems services.<sup>99</sup>

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.<sup>100</sup>

3. *The Office of Communications and Congressional Affairs* advises and assists the Administrator in the area of public relations and in the dissemination of information about FTA programs, projects, and activities to the public and news media.<sup>101</sup>

4. *The Office of 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.<sup>102</sup>

5. *The Office of Program Management* reviews and processes all applications for transit capital and operating assistance grants and loans. It executes grant contracts, loan agreements, and amendments with respect to approved capital and operating grants, loans, and advanced land acquisition loans projects. 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 pas-

sengers and employees through technical assistance and training and dissemination of information.<sup>103</sup>

6. *The Office of Planning and Environment* administers a national program of planning assistance that provides funding, guidance, and technical support to state and local transportation agencies. In partnership with FHWA, this office oversees a national program of planning assistance and certification of metropolitan and statewide planning organizations, implemented by FTA Regional Offices and FHWA Divisional Offices. The office provides national guidance and technical support in emphasis areas, including planning capacity building, financial planning, transit oriented development, joint development, project cost estimation, travel demand forecasting, and other technical areas. This office also oversees the federal environmental review process as it applies to transit projects throughout the country, including implementation of the National Environmental Policy Act (NEPA), the Clean Air Act, and related laws and regulations. The office provides national guidance and oversight of planning and project development for proposed major transit capital fixed guideway projects, commonly referred to as the New Starts program. In addition, this office is responsible for the evaluation and rating of proposed projects based on a set of statutory criteria and applies these ratings as input to the Annual New Starts Report and funding recommendations submitted to Congress, as well as for the FTA approval required for projects to advance into preliminary engineering, final design, and full funding grant agreements.<sup>104</sup>

7. *The Office of Research, Demonstration and Innovation* provides transit industry leadership in delivery of solutions that improve public transportation. The office undertakes research, development, and demonstration projects that help to increase ridership, improve capital and operating efficiencies, enhance safety and emergency preparedness, and better protect the environment and promote energy independence. The office leads FTA programmatic efforts under MAP-21's new Research, Development, Demonstration, and Deployment Projects.<sup>105</sup>

8. *The Office of Civil Rights* ensures full implementation of civil rights and equal opportunity initiatives by all recipients of FTA assistance, and ensures nondiscrimination in the receipt of FTA benefits, employment, and business opportunities. The office advises and assists the Administrator and other FTA officials in ensuring compliance with applicable civil rights regulations, statutes and directives, including but not limited to the Americans with Disabilities Act of 1990 (ADA), the Civil Rights Act of 1964, Disadvantaged Business Enterprise (DBE) participation, and Equal Employment Opportunity, within FTA and in the conduct of Federally-assisted

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<sup>99</sup> 49 C.F.R. § 601.3(a).

<sup>100</sup> 49 C.F.R. § 601.3(c); *See also* [http://www.fta.dot.gov/12317\\_13065.html](http://www.fta.dot.gov/12317_13065.html).

<sup>101</sup> 49 C.F.R. § 601.3(e).

<sup>102</sup> 49 C.F.R. § 601.3(b). *See also* [http://www.fta.dot.gov/12317\\_13065.html](http://www.fta.dot.gov/12317_13065.html).

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<sup>103</sup> 49 C.F.R. § 601.3(g).

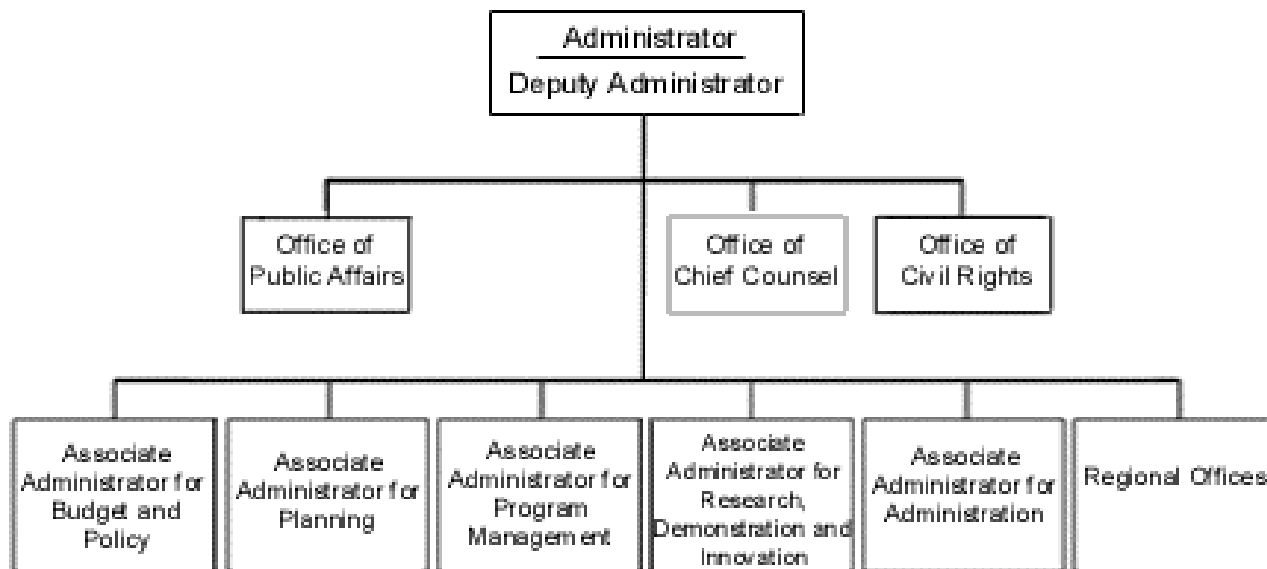
<sup>104</sup> 49 C.F.R. § 601.3(f).

<sup>105</sup> 49 U.S.C. § 5312; 49 C.F.R. § 601.3(h).

public transportation projects and programs. The office monitors the implementation of and compliance with civil rights requirements, investigates complaints, conducts compliance reviews, and provides technical assistance to recipients of FTA assistance and members of the public.<sup>106</sup>

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<sup>106</sup> 49 C.F.R. § 601.3(d).



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.<sup>107</sup> They are located in: Cambridge, Massachusetts; New York, New York; Philadelphia, Pennsylvania; Atlanta, Georgia; Chicago, Illinois; Fort Worth, Texas; Kansas City, Missouri; Denver, Colorado; San Francisco, California; and Seattle, Washington.:

#### *Region 1*

*FTA Region 1 Office, Kendall Square, 55 Broadway, Suite 920, Cambridge, Massachusetts 02142-1093.*

*Telephone (617) 494-2055, Fax (617) 494-2865*

*(Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont)*

#### *Region 2*

*FTA Region 2 Office, One Bowling Green, Room 429, New York, New York 10004-1415.*

*Telephone (212) 668-2170, Fax (212) 668-2136*

*(New York, New Jersey)*

#### *Region 3*

*FTA Region 3 Office, 1760 Market Street, Suite 500, Philadelphia, Pennsylvania 19103-4124.*

*Telephone (215) 656-7100, Fax (215) 656-7260, TDD (215) 656-7269*

*(Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia)*

#### *Region 4*

*FTA Region 4 Office, 230 Peachtree NW, Suite 800, Atlanta, Georgia 30303.*

*Telephone (404) 865-5600, Fax (404) 865-5606*

*(Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, the Commonwealth of Puerto Rico, and the United States Virgin Islands)*

#### *Region 5*

*FTA Region 5 Office, 200 West Adams Street, Suite 320, Chicago, Illinois 60606.*

*Telephone (312) 353-2789, Fax (312) 886-0351*

*(Illinois, Indiana, Minnesota, Michigan, Ohio, and Wisconsin)*

#### *Region 6*

*FTA Region 6 Office, 819 Taylor Street, Room 8A36, Fort Worth, Texas 76102.*

*Telephone (817) 978-0550, Fax (817) 978-0575*

*(Arkansas, Louisiana, New Mexico, Oklahoma, and Texas)*

#### *Region 7*

*FTA Region 7 Office, 901 Locust Street, Suite 404, Kansas City, Missouri 64106.*

*Telephone (816) 329-3920, Fax (816) 329-3921*

*(Iowa, Kansas, Missouri, and Nebraska)*

<sup>107</sup> 49 C.F.R. § 601.2(b).

*Region 8*

FTA Region 8 Office, 12300 West Dakota Avenue, Suite 310, Lakewood, Colorado 80228-2583.

Telephone: (720) 963-3300, Fax: (720) 963-3333

(Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming)

*Region 9*

FTA Region 9 Office, 201 Mission Street, Suite 1650, San Francisco, California 94105-1839.

Telephone (415) 744-3133, Fax (415) 744-2726

(Arizona, California, Hawaii, Nevada, Guam, American Samoa, and North Marianas)

*Region 10*

FTA Region 10 Office, 915 Second Avenue, Suite 3142, Seattle, Washington 98174-1002.

Telephone (206) 220-7954, Fax (206) 220-7959

(Alaska, Idaho, Oregon, and Washington)<sup>108</sup>

**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),<sup>109</sup> which established a new cabinet-level executive branch agency, the Department of Homeland Security (DHS),<sup>110</sup> headed by

a Secretary of Homeland Security.<sup>111</sup> 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.<sup>112</sup>

In creating DHS, Congress consolidated 22 existing agencies that had combined budgets of approximately \$40 billion and employed some 170,000 workers.<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup> It is also to establish countermeasures for chemical, radiological, biological, and nuclear threats and incidents.<sup>116</sup> 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.”<sup>117</sup>

*Environmental Protection Agency*—Under the National Environmental Policy Act of 1969,<sup>118</sup> 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

<sup>111</sup> 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).

<sup>112</sup> Mimi Hall, *Deal Set on Homeland Department*, USA TODAY, Nov. 13, 2002, at 1, col. 2.

<sup>113</sup> *Id.*

<sup>114</sup> Homeland Security Act of 2002 § 402, 6 U.S.C. § 202 (2002).

<sup>115</sup> 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).

<sup>116</sup> Homeland Security Act of 2002 §§ 301–03, 6 U.S.C. §§ 181–83 (2013).

<sup>117</sup> Homeland Security Act of 2002 § 402(8), 6 U.S.C. § 202(8) (2013).

<sup>118</sup> Pub. L. No. 91-190, 83 Stat. 852 (1970).

<sup>108</sup> 49 C.F.R. § 601.2; see also <http://www.law.cornell.edu/cfr/text/49/601.2>; FTA Organizational Chart, [http://www.fta.dot.gov/about/about\\_FTA\\_241.html](http://www.fta.dot.gov/about/about_FTA_241.html).

<sup>109</sup> 107 Pub. L. No. 296, 116 Stat. 2135 (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.

<sup>110</sup> Homeland Security Act of 2002, 6 U.S.C. §§ 101 *et seq.* (2002).

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.<sup>119</sup> 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.

*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<sup>120</sup> 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.<sup>121</sup>

*Surface Transportation Board*—Created pursuant to the Interstate Commerce Commission (ICC) Termination Act of 1995,<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup>

## E. STATE AUTHORITY OVER TRANSPORTATION

### 1. State Departments of Transportation

As early as the 1960s states moved to convert their highway departments to departments of transportation along the federal model.<sup>125</sup> 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.

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."<sup>126</sup> Some are explicitly directed to encourage the development of public or mass transportation and rapid transit.<sup>127</sup> Overseeing, maintaining, and regulating local and regional transportation systems historically has been a state responsibility.<sup>128</sup> These functions are matters of a "peculiarly local nature."<sup>129</sup> State oversight of roads and plans and transit have been deemed governmental activities traditionally within the state's domain "from time immemorial."<sup>130</sup> Mass transit is an integral component of a state's transportation system.<sup>131</sup> 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).<sup>132</sup> 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.<sup>133</sup> For those provid-

<sup>125</sup> For example, the Washington State Highway Board and the Washington State Highways Department were established in 1905. In 1964, within a few years after the Interstate Highway System began to be built, Washington converted its Highways Department into the Washington State Department of Transportation. Similarly, the Michigan State Highway Department, founded in 1905, was renamed the Michigan Department of State Highways and Transportation in 1973. In some states, DOTs still function as highway departments, though some have embraced their intermodal mission more seriously.

<sup>126</sup> MINN. STAT. § 174.01 (2013).

<sup>127</sup> See, e.g., TEX. TRANSP. CODE § 455.001 (2000).

<sup>128</sup> *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979).

<sup>129</sup> *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523–24, 79 S. Ct. 962, 964, 3 L. Ed. 2d 1003, 1006 (1959).

<sup>130</sup> *Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841, 845–46 (1st Cir. 1982).

<sup>131</sup> *San Antonio Metro. Transit Auth. v. Donovan*, 557 F. Supp. 445 (W.D. Tex. 1983).

<sup>132</sup> See, e.g., TEX. CODE, tit. 6, ch. 451, Metropolitan Rapid Transit Authorities, available at <http://www.statutes.legis.state.tx.us/Docs/TN/htm/TN.451.htm>.

<sup>133</sup> 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

<sup>119</sup> Pub. L. No. 74-198, 49 Stat. 449 (1935).

<sup>120</sup> Pub. L. No. 91-518, 84 Stat. 1327.

<sup>121</sup> The AMTRAK Reform and Accountability Act of 1997, Pub. L. No. 105-134, 111 Stat. 2570, repealed the authority of Amtrak Commuter established under 49 U.S.C. § 24501 (formerly 45 U.S.C. § 581).

<sup>122</sup> Pub. L. No. 104-88, 109 Stat. 803 (1995).

<sup>123</sup> 49 U.S.C. § 701.

<sup>124</sup> 49 U.S.C. §§ 13101–14914. SURFACE TRANSPORTATION BOARD, 1996/1997 ANNUAL REPORT (1998).

ers, 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.

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.<sup>134</sup> In most, the state DOT is authorized to apply for federal transit funds.<sup>135</sup> Some state statutes require the state DOT to prepare a public transit plan.<sup>136</sup> Among the smorgasbord of requirements are the following:

- Transit operators must secure state DOT approval for construction on state highways;<sup>137</sup>
- Planning for transit systems must be coordinated with the state DOT;<sup>138</sup>
- Municipalities must secure state DOT approval before providing transportation services;<sup>139</sup> and
- Regional railroad authorities must secure state DOT approval before engaging in transit services.<sup>140</sup>

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.<sup>141</sup> Some of the underlying or motive-power services are provided by Amtrak or freight railroads with state subsidies.<sup>142</sup> 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.<sup>143</sup>

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authorizes municipal corporations to operate transportation systems for their inhabitants.

<sup>134</sup> 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. § 57-1-20 (1999) (transit is under the Division of Mass Transit); W. VA. CODE § 17-16C-2 (2013) (transit is under the Division of Public Transit).

<sup>135</sup> See, e.g., COLO. REV. STAT. 43-1-901 (2013).

<sup>136</sup> FLA. STAT. § 341.051 (2013).

<sup>137</sup> CAL. PUB. UTIL. CODE § 29031 (2013).

<sup>138</sup> CAL. PUB. UTIL. CODE § 130256 (2013).

<sup>139</sup> 35-A ME. REV. STAT. ANN § 3502. (2013)

<sup>140</sup> MINN. STAT. § 398A.04 (2013).

<sup>141</sup> See, e.g., N.Y. TRANSP. LAW § 14-c (Consol. 2013), which authorizes the New York Department of Transportation to contract with Amtrak for any intercity rail service deemed necessary.

<sup>142</sup> See generally, DEMPSEY & THOMS, *supra* note 11, at 277–88.

<sup>143</sup> CAMBRIDGE SYSTEMS, INC., NEW PARADIGMS FOR LOCAL PUBLIC TRANSPORTATION ORGANIZATIONS, Task 1 report 2–9

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.<sup>144</sup>

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.<sup>145</sup> Both must be prepared in cooperation and coordination with local governmental institutions and MPOs.

## 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.<sup>146</sup> 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."<sup>147</sup> Another said,

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(Transit Cooperative Research Project, Transportation Research Board, 1999).

<sup>144</sup> Pub. L. No. 89-774, 80 Stat. 1324 (1966).

<sup>145</sup> U.S. GEN. ACCOUNTING OFFICE, TRANSPORTATION INFRASTRUCTURE: MANAGING THE COSTS OF LARGE-DOLLAR HIGHWAY PROJECTS (GAO/RCED-97-47) 14–15 (Feb. 1997), <http://www.gao.gov/products/GAO/RCED-97-47>. 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).

<sup>146</sup> Constitutional issues are also discussed in JOSEPH VAN EATON, MATTHEW C. AMES, & MATTHEW K. SCHETTENHELM, FIRST AMENDMENT IMPLICATIONS FOR TRANSIT FACILITIES: SPEECH, ADVERTISING, AND LOITERING (Transit Cooperative Research Program, Legal Research Digest No. 29, 2009); Paul Stephen Dempsey, *Transportation and the United States Constitution*, in TRANSPORTATION LAW AND GOVERNMENT RELATIONS, SELECTED STUDIES IN TRANSPORTATION LAW, VOL. 8 (National Cooperative Highway Research Program, Transportation Research Board, 2007); and PAUL STEPHEN DEMPSEY, PRIVACY ISSUES WITH THE USE OF SMART CARDS (Legal Research Digest No. 25, Transportation Research Board, 2008).

<sup>147</sup> *Ex parte Tindall*, 102 Okla. 192 229 P. 125, 198 (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

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.<sup>148</sup>

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."<sup>149</sup>

Historically, the states have held certain inherent power to regulate activities designed to improve the health, safety, and welfare of their inhabitants.<sup>150</sup> 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 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....<sup>151</sup>

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laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal.

*Id.*

<sup>148</sup> *Bagg v. Wilmington, Columbia & Augusta Railroad Co.*, 109 N.C. 279, 14 S.E. 79, 80 (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.

<sup>149</sup> *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, 1372, 59 L. Ed. 2d 587, 610 (1979).

<sup>150</sup> See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 7 L. Ed. 412 (1829).

<sup>151</sup> *Leisy v. Hardin*, 135 U.S. 100, 108, 10 S. Ct. 681, 34 L. Ed. 128 (1890).

In *South Carolina Highway Department v. Barnwell Brothers, Inc.*,<sup>152</sup> 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....<sup>153</sup>

The court held that "few subjects are so peculiarly of local concern as is the use of state highways."<sup>154</sup> 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."<sup>155</sup> In resolving the latter inquiry, "the courts do not sit as legislatures...[in] weighing all the conflicting interests."<sup>156</sup> "[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...."<sup>157</sup> The court must assess, "upon the whole record whether it is possible to say that the legislative choice is without rational basis."<sup>158</sup>

In *Southern Pacific Co. v. Arizona*,<sup>159</sup> 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."<sup>160</sup> However, most state DOTs only

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<sup>152</sup> 303 U.S. 177, 185, 58 S. Ct. 510, 514, 82 L. Ed. 734, 739 (1938). In this case, the matter at issue was state size and length restrictions on trucks.

<sup>153</sup> "[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, 795, 54 L. Ed. 2d 664, 676 (1978).

<sup>154</sup> *Id.* at 187.

<sup>155</sup> *Id.* at 190.

<sup>156</sup> *Id.* at 190.

<sup>157</sup> *Id.* at 191.

<sup>158</sup> *Id.* at 191-92.

<sup>159</sup> 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.

<sup>160</sup> *Id.* at 783.



fund (rather than regulate or supervise) local transit providers.

In *Kassel v. Consolidated Freightways Corp.*,<sup>161</sup> 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.”<sup>162</sup>

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.<sup>163</sup> “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.<sup>164</sup> 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.”<sup>165</sup> The legitimate exercise of police power has not been deemed to constitute an unconstitutional taking of property without due process.<sup>166</sup>

## 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.<sup>167</sup> Metro-

<sup>161</sup> 450 U.S. 662, 101 S. Ct. 1309, 68 L. Ed. 2d 580 (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.

<sup>162</sup> *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).

<sup>163</sup> *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 523–24, 79 S. Ct. 962, 964–965, 3 L. Ed. 2d 1003, 1006–1007 (1959).

<sup>164</sup> *Kane v. State of N.J.*, 242 U.S. 160, 167, 37 S. Ct. 30, 32, 61 L. Ed. 222, 227 (1916).

<sup>165</sup> *Hendrick v. State of Md.*, 235 U.S. 610, 622, 35 S. Ct. 140, 142, 59 L. Ed. 385, 391 (1915).

<sup>166</sup> For example, a USDOT requirement that a power company move its line to make way for a transit line was deemed a legitimate exercise of police power and not an unconstitutional takings in *Northern States Power Co. v. FTA*, 358 F.3d 1050 (8th Cir. 2004).

<sup>167</sup> 23 U.S.C. §§ 134–35, available at <http://www.law.cornell.edu/uscode/text/23/134> (visited Nov. 9, 2013). See FTA, How to Succeed in Statewide and Metropolitan Planning, at

politan area boundaries must at minimum encompass the existing urbanized area and the area expected to be urbanized during the forecast period. For areas designated as non-attainment for carbon monoxide or ozone, the boundaries must be coterminous with the non-attainment area.<sup>168</sup>

ISTEA<sup>169</sup> 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. 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).<sup>170</sup> 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.<sup>171</sup> 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<sup>172</sup> and the Federal Transit Act, and be consistent with the long-range plan and the STIP. These procedures have been retained by subsequent legislation. The MPO planning process is 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 New York City Transit Authority is the largest mass transit agency in the United States, em-

[www.fta.dot.gov/documents/How\\_to\\_Succeed\\_in\\_Statewide\\_and\\_MPO\\_Transportation\\_Planning.doc](http://www.fta.dot.gov/documents/How_to_Succeed_in_Statewide_and_MPO_Transportation_Planning.doc) - 18k - 2011-09-08.

<sup>168</sup> 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 38, at 12.

<sup>169</sup> Pub. L. No. 102-240, 105 Stat. 1914 (1991).

<sup>170</sup> SOLOF, *supra* note 21, pt. IV, at 5.

<sup>171</sup> U.S. FEDERAL HIGHWAY ADMINISTRATION, *supra* note 38, at 14.

<sup>172</sup> 23 U.S.C. § 134.

ploying some 45,000 people, including about 10,000 bus operators and 3,000 train operators. It serves a population of more than 15 million people in a 5,000 sq mi area, providing 2.62 billion trips annually.<sup>173</sup>

### 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.<sup>174</sup> They are formed and organized in a variety of ways. In some states, transit organizations are formed by an act of the state legislature.<sup>175</sup> 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.<sup>176</sup> In still others, municipalities or counties are empowered to create transit districts within their boundaries, or to perform transit operations without creating a district.<sup>177</sup> Since metropolitan areas and traffic patterns sometimes straddle state lines, a few have been created by Interstate Compacts approved by Congress.<sup>178</sup> 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.<sup>179</sup>

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;<sup>180</sup>

- 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;<sup>181</sup> or

- Interstate compact.<sup>182</sup>

### 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,<sup>183</sup> by transit or transportation commissions,<sup>184</sup> or by the Governor.<sup>185</sup> 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*.<sup>186</sup> 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.<sup>187</sup> The selection of Metro Council members through a process of regional grouping of nonequal

<sup>173</sup> <http://web.mta.info/mta/network.htm>. The New York City Transit Authority (NYCTA) was created in 1953 pursuant to Title 9 of Article 5 of the New York Public Authorities Law. In 1968, the NYCTA was placed under the authority of the Metropolitan Transit Authority, which had been created 3 years earlier. *Id.* See also *United States v. New York City Transit Auth*, 2010 U.S. Dist. LEXIS 102704 (E.D.N.Y. 2010).

<sup>174</sup> See generally, DEMPSEY & THOMS, *supra* note 11, at 336–40.

<sup>175</sup> See, e.g., GA. CODE ANN. § 32-9-9 (2013).

<sup>176</sup> See, e.g., 70 ILL. COMP. STAT. ANN. § 3610/3.1 (2013).

<sup>177</sup> See, e.g., OHIO REV. CODE ANN. § 306.01 (2013); 30-A ME. REV. STAT. ANN. § 3502 (2013).

<sup>178</sup> 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 (2013).

<sup>179</sup> TRANSPORTATION RESEARCH BOARD, *supra* note 108, at 2-6.

<sup>180</sup> For example, the Memphis Area Transit Authority was organized and exists under and by virtue of Tennessee Code Annotated 7-56-101 *et seq.* (2013), and Memphis City Code Sections 2-336 *et seq.* (2000).

<sup>181</sup> For example, New Jersey Transit is such an institution.

<sup>182</sup> For example, the WMATA and Bi-State Development Agency are chartered by Congress and the laws of the relevant states.

<sup>183</sup> See, e.g., 30A ME. REV. STAT. § 3504 (2013); OHIO REV. CODE ANN. § 747.01 (Anderson 2013); WIS. STAT. § 66.943 (2013).

<sup>184</sup> 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 (2013); VA. CODE ANN. § 33.1-221.1:3 (2013).

<sup>185</sup> See, e.g., OR. REV. STAT. § 267.090 (2012).

<sup>186</sup> 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

<sup>187</sup> 751 F. Supp. 885 (W.D. Wash. 1990).

population districts was found to have resulted in impermissibly distorted representation.<sup>188</sup>

In many states, directors serve staggered terms of office.<sup>189</sup> 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 represent.<sup>190</sup> And some states require that board members serve without compensation.<sup>191</sup> In some states, directors can be removed by the appointing official at will;<sup>192</sup> in others, they can only be removed for malfeasance or nonfeasance in office.<sup>193</sup> 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;<sup>194</sup>
- 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."<sup>195</sup> Many statutes provide that the general manager serve at the pleasure of the board,<sup>196</sup> 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.<sup>197</sup>

Some statutes grant to the board the power to grant to the director such powers and responsibilities as it deems appropriate.<sup>198</sup> 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

<sup>188</sup> *Id.* See also *Jackson v. Nassau County Board of Supervisors*, 818 F. Supp. 509, 535 (E.D. N.Y. 1993).

<sup>189</sup> See, e.g., OHIO REV. CODE ANN. § 747.01 (2013); 30A ME. REV. STAT. ANN. § 3504 (2000).

<sup>190</sup> See, e.g., OR. REV. STAT. § 267.090 (2013).

<sup>191</sup> See, e.g., N.Y. CODE A-9 § 1201(3) (2013).

<sup>192</sup> See, e.g., OR. REV. STAT. § 267.090 (2013); 24 VT. STAT. ANN. § 5107 (2013).

<sup>193</sup> See, e.g., OHIO REV. CODE ANN. § 747.01 (2013).

<sup>194</sup> See, e.g., CAL. PUB. UTIL. CODE 120105 (2013).

<sup>195</sup> CAL. PUB. UTIL. CODE §§ 24927, 50096 (2013).

<sup>196</sup> See, e.g., CAL. PUB. UTIL. CODE § 24930 (2013).

<sup>197</sup> See, e.g., 74 PA. CONS. STAT. § 1719 (2013); CAL. PUB. UTIL. CODE § 100100 (2013); MINN. STAT. § 473.125 (2013).

<sup>198</sup> 24 VT. STAT. ANN. § 5107 (2013).

- To enter into such contracts and other agreements or to issue such rules and regulations as are necessary to carry out its authorized responsibilities.<sup>199</sup>

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 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.<sup>200</sup>

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<sup>199</sup> See, e.g., N.Y. PUB. AUTH. LAW §§ 1204, 1266 (2013); MD. TRANSP. CODE ANN. § 10-204 (2013); *Cunningham v. Metropolitan Seattle*, 751 F. Supp. 885, 889–90 (W.D. Wash. 1990).

<sup>200</sup> Ginny Chin, *Back Existing Transit Board*, ARIZ. REPUBLIC, June 23, 2001, at 4.

# Federal Transit Administration

