Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Transit Administration
Docket No. FTA - 2013-0030
Advance Notice of Proposed Rulemaking
Regarding
The National Public Transportation Safety Plan, Public Transportation Agency Safety Plan, and the Public Transportation Safety Certification Training Program;
Transit Asset Management

December 31, 2013

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming ("we" or "our") respectfully submit these joint comments in response to the Advance Notice of Proposed Rulemaking in this docket, published by the Federal Transit Administration (FTA) at 78 Federal Register 61251 *et seq.* (October 3, 2013).

<u>Overview – Limit Regulation of States and Subrecipient Rural Bus Systems</u>

In implementing the safety and asset management provisions of MAP-21[1], FTA must limit regulatory burdens on States and their subrecipient transit agencies, particularly those that receive funding for rural transit pursuant to 49 USC 5311. This approach is warranted because of the excellent safety record of rural transit. In addition, this approach will enable these subrecipient operators to focus scarce resources on delivery of transit services, not on regulatory compliance.

As FTA well knows, the impetus for the new safety provision resulted from high profile accidents on fixed rail transit systems in large metropolitan areas. In implementing the provision, FTA should focus any new requirements where there is a problem and not impose significant, time consuming, and costly paperwork and other requirements on, for example, small, subrecipient rural bus transit systems. A subrecipient rural transit system might be comprised of two vans and two part-time drivers that have been providing on demand service, without fatalities, or even accidents, for years. If implementation of the new safety and asset management provisions is not carefully tailored to avoid imposing unnecessary requirements on small systems, inevitably, many small bus transit systems will have to shift funds and personnel effort from the actual delivery of service to compliance with rules developed in light of the circumstances of rail transit systems in large metropolitan areas.

The diversion of scarce funds to regulatory work would have negative consequences. Rural transit agencies, operating within very tight budgets, provide vital public transportation in their service areas, allowing the elderly and disabled to remain in their

[1] For safety, see section 20021 of MAP-21, amending 49 USC 5329, and for transit asset management, see section 20019 of MAP-21, amending 49 USC 5326.

own homes and maintain active lifestyles in their communities. Additionally, they offer access to dialysis and other medical services, connect people to employment opportunities, transport children to educational and recreational activities, and keep the general public connected and mobile. We do not want to see a reduction in these vitally important services. Moreover, an increase in administrative and regulatory cost burden that could result from a rule in follow-up to this ANPRM may be difficult for a State to administer within revised 49 USC 5311(e), as MAP-21 reduced the portion of 5311 funds that a State may use for program administration from 15 percent to 10 percent. FTA should not contemplate developing rules that cannot be implemented within available funding for administration and technical assistance to subrecipients.

MAP-21 and its history make clear that Congress has provided FTA with the tools to accommodate the circumstances of small bus systems in implementing the new law. As FTA knows, the safety section of MAP-21 was derived from S. 3638, reported in 2010 by the Senate Committee on Banking, Housing, and Urban Affairs in the 111th Congress (S. Rep. No. 111-232). While the exigencies of the legislative process did not result in detailed committee reports for MAP-21, the Banking Committee noted in its 2010 report on S. 3638 (at page 4) that the “intent is that rail fixed guideway systems should be the priority in preparing a National Safety Plan [for transit]” and that “rail fixed guideway systems require the most immediate attention.” Further, that report noted (at pages 4-5) that the Executive Branch should take a “measured approach” not a “one size fits all” approach to implementation.

Further, in MAP-21, Congress specifically provided the opportunity for a State to draft and certify a safety plan for small systems within the State. This reflects understanding by the Congress that it could be a considerable burden for a small system to have to prepare such a plan. See 49 USC 5329(d)(3).

Moreover, the statutory scheme does not preclude FTA from allowing States to undertake other tasks on behalf of small systems. For example, operators of small transit systems have long had data, including asset data, reported to the FTA’s National Transit Database (NTD) by the State on their behalf, even without express statutory authorization. See 49 USC 5335. That approach should be continued, not abandoned, in the implementation of the asset management provision of MAP-21, as applied to subrecipients.

Allowing a State to prepare reports and certifications on behalf of subrecipient and small transit systems will result in economies of scale and scope, as well as use the State’s expertise. FTA should welcome that expertise and efficiency with open arms in the implementation of the new safety and asset management provisions. Taking that approach will help ensure that small operators can continue to focus on delivery of service and not on new regulatory requirements.

Moreover, as noted above, MAP-21 reduced the maximum portion of 49 USC 5311 funds that a State may dedicate to program administration and technical assistance to subrecipients from 15 percent to 10 percent. That, we suggest, is a further indication that

Congress did not intend for FTA to burden these small systems with significant new regulatory requirements.

In this docket FTA also explores how it should define the "state of good repair" (SOGR) of assets. As explained below, FTA's implementation of SOGR provisions of MAP-21 should be clear that the term is being defined for purposes of data reporting only, to be used by recipients as a planning tool. It is not intended to be used, and should not be used to determine whether a vehicle is safe to operate or to determine investment choices by States with limited 5311 funds to apply across a range of subrecipient systems.

From these perspectives, we offer below some particular recommendations regarding how FTA can and should implement the safety and asset management provisions of the transit title of MAP-21 to limit the regulatory burden on operators of small and subrecipient public transit systems – something that can be done in accord with safety and quality asset management.

Safety Issues

Allow a State the Option to Develop the Safety Plan for Subrecipients. As called for in MAP-21, a State department of transportation should be allowed to draft a statewide safety plan to govern all of the State's section 5311 program subrecipients. See 49 USC 5329(d)(3). FTA should not create any barriers to the ability of a State to take this approach (and should allow a State the option to include other subrecipients in a statewide safety plan, as any other subrecipients are likely also small systems). A statewide plan would alleviate the expense and personnel effort needed to produce, evaluate and oversee individual plans for each subrecipient and allow the expertise of the State to be utilized. Subrecipients could be monitored during the Annual Program Review and existing inspection processes. The State, in turn, could be evaluated during the State Management Review.

Do Not Require SMS, Particularly for Subrecipient and Small Bus Systems. We oppose the imposition of a requirement for a Safety Management System (SMS), particularly for States and their subrecipients (e.g., 5311 and 5310 programs) as well as for other small bus systems. In opposing SMS, AASHTO has also noted (at page 4 of its filing in response to the ANPRM) that FTA's interest in requiring SMS stems from rail accidents and review of rail systems. On the other hand, the efforts of States and subrecipients in areas such as driver training, vehicle maintenance, and alcohol and drug compliance have produced safe bus transit results. Such practices should be construed as meeting any applicable statutory requirements. This is a straightforward opportunity for FTA to respect the statement in the 2010 committee report not to have one size fit all. FTA should allow a results oriented approach to implementation that would enable States to continue current bus practices even if FTA should make changes as to rail transit safety.

Use the NTD; Don't Create an Alternate or Overlapping Data Reporting System. The existing National Transit Database should continue as the safety reporting mechanism for section 5311 rural public transit subrecipients, eliminating the cost and redundancy of creating an additional safety monitoring and reporting process. Incident reporting requirements already exist under the NTD. This reporting practice is currently understood by all section 5311 rural public transit subrecipients. Creating additional safety reporting, developing a new process or mandating additional reporting requirements would be costly, redundant, and unnecessary.

Further, as AASHTO has noted, safety performance measures should be limited to those currently reported to the NTD, namely reportable incidents, fatalities, and injuries.[2] Adopting this limited number of transit safety performance measures would be consistent with MAP-21's approach to performance measures for highway safety, which requires only a few measures.

We also note that FTA asked (question 6 in the ANPRM) whether it should "consider establishing measures of near-collisions (or "close calls") to help identify circumstances that pose an increased risk of collisions." FTA should not establish any such measure. Tracking that data would be subjective and virtually impossible to confirm. Also, as transit is such a safe mode of travel, such an additional measure is unwarranted.

<u>Take a Practical Approach to the Safety Officer Provision</u>. In those cases where the State develops the safety plan for the subrecipients, the State transit safety plan should be considered as satisfying the safety officer requirement for itself and subrecipients, even if multiple officers or staff for the State have a role with respect to administration and implementation of the safety plan. If, however, the FTA chooses to implement 49 USC 5329(d)(1)(F) by requiring a designated safety officer at the State level, and/or even for each subrecipient, this position should not be required to be a full time or standalone position, nor required to report directly to the CEO. Many small rural transit providers have small staffs, often only one to three people. Hiring an additional person, to serve strictly as safety officer, would be detrimental, perhaps causing a small public transit system to eliminate a driver position and reduce service. Any safety officer position should be allowed to be a shared duty position, such as a driver whose duties include also serving as the safety officer. Again, however, we would not require designation of such an officer for a State or subrecipient systems in those cases where the State develops the transit safety plan for the subrecipients.

<u>"State of Good Repair" Should Be Defined in a Simple, Objective Manner Using NTD Data</u>. For bus systems, particularly small and/or subrecipient bus systems, we would limit federally required reporting of SOGR data to revenue vehicles and use age and miles as the data with respect to the revenue vehicles. This data is already reported to the NTD. Alternate approaches to a Federal SOGR definition that would use words such as whether the vehicle is "fit" or in "good condition" are more judgmental and less likely to produce consistent measurement across systems. Also, we would use the same approach to measuring SOGR whether the context is implementing a safety provision or an asset management provision.

---

[2] See AASHTO response to Question 2 and AASHTO filing at page 4.

We emphasize that this definition is for purposes of data reporting only, to be used by recipients as a planning tool. It is not intended to be used and should not be used to determine whether a vehicle is safe to operate or to determine investment choices by States with limited 5311 funds to apply across a range of subrecipient systems.

Remember the Circumstances of Rural Bus Systems. In one of its questions in this docket, FTA asks about training (question 27). In a rural setting, if any training is required away from a small rural system's service area, the result could be increased expense and reduced service during that period, as a key employee attends to training. On line training and other approaches should be allowed to ensure the ability of rural systems to continue service. This is just another aspect of providing transit service where rural systems face special challenges. We ask that FTA be sensitive to those circumstances as it develops rules in this docket.

Asset Management Issues

Most of the issues associated with asset management, particularly for subrecipient and other small bus transit systems, result from insufficient funding to replace and maintain aging fleets. Information regarding asset condition is not the issue; funding is. Accordingly, transit asset management rules should not be burdensome and allow systems, particularly subrecipient and small systems, to maximize the dedication of financial and personnel resources to improving transit service.

FTA should use the NTD as the asset management reporting mechanism, particularly for section 5311 rural public transit subrecipients. Asset reporting requirements already exist under NTD. This reporting practice is currently understood by section 5311 rural public transit subrecipients. Creating additional asset reporting, developing a new process or mandating additional reporting requirements would be costly and redundant. Moreover, even if FTA should, contrary to this recommendation, choose to require the reporting of additional asset data, it should do so as an increment to the current NTD reporting mechanism and not create a new, additional mechanism to implement the transit asset management provision of MAP-21.

FTA should allow a State the Option to Develop the Asset Management Plan for all section 5311 Subrecipients. FTA should allow a State the option to undertake the asset management plan for all section 5311 subrecipients (as well as the option to include other subrecipients). This planning would be burdensome for subrecipient and other small bus systems.

Further, and importantly, the principal source of funding for subrecipient bus systems is the State (which receives section 5311 apportionments). It is logical that asset management planning rest with the entity with access to funds and authority to allocate funds. To require section 5311 public transit subrecipients to develop asset management plans in the abstract, without access to meaningful funding, is not a practical planning requirement. In short, with existing requirements to report assets to the NTD, creating a new system would be unnecessary, burdensome and have the potential to divert scarce resources from the provision of transit service to regulatory compliance and planning. If anything, current requirements for asset reporting should be cut back. For 5311 subrecipients, it is not necessary to collect data beyond data regarding revenue vehicles and perhaps also buildings used to house and repair revenue vehicles.

Moreover, FTA should not only allow a State to develop a transit asset management plan (TAM) for subrecipients on a system by system basis but on a statewide basis. There could be separate statewide plans for section 5311 and 5310 subrecipients.

Therefore, we disagree with FTA's unexplained and conclusory statement that the statute "specifically exclude[s]" a statewide transit asset management plan. 78 Federal Register 61265. 49 USC 5326(a)(1) defines a transit asset management plan as a plan developed by a "recipient" of funding. Later, the law does refer to a requirement that recipients and subrecipients develop a "transit asset management plan," that phrase does use the term "transit asset management plan" which is defined as "<u>developed by a recipient</u>" (emphasis added). Thus, the statute clearly accommodates the possibility that a recipient of 5311 funds will fulfill the obligation for its subrecipients via a plan for all of its 5311 subrecipients.

<u>FTA must also ensure that asset management provisions are implemented solely as a planning tool, and not as imposing specific requirements for investment of funds</u>. When funding is insufficient to achieve given targets, the best asset management practices cannot achieve a target.

For example, a transit management plan for the combined fleets of all subrecipient bus systems in a rural State could propose that cutaway buses should be replaced every five to seven years, using the industry standard of useful life. If there were 300 such vehicles in the combined fleet of subrecipients in that State, use of the five to seven year useful life guideline would mean 40 to 60 buses should be replaced annually. Currently available funding cannot support annual replacement at that rate. So, asset management must be implemented as a planning tool, not as a requirement that is divorced from available funding. How FTA defines a state of good repair for various assets will impact the size of the gap between SOGR and what is achievable financially. However state of good repair is defined, it, too, must be implemented as a planning tool, not as a requirement that is divorced from available funding.

<u>Relationship of Any New Requirements to Planning Process</u>

At 49 USC 5304(d)(2)(D) (and its counterpart in 23 USC 134 & 135), the law provides that performance measures and targets "shall be <u>considered</u> by a State when developing policies, programs, and investment priorities reflected in the statewide transportation plan and the statewide transportation improvement program." (Emphasis supplied).

As FTA moves from the ANPRM to development of rules, it is important that the wording of the rules unambiguously respect that any performance measures, data, and targets, and any asset management information, are at most a "consideration" for the decision makers in finalizing both the long range plan and STIP. That information is not to become a formula that dictates the substance of the long range plan or the STIP. The comments received through the public involvement process, for example, are among the other inputs to be considered before long range plans and TIPS/STIPs are finalized. The information is to be provided to the planning process, and given consideration. The contents of plans and TIPs/STIPs are essential State and local prerogatives. The rules that will emerge from this ANPRM must not undercut those fundamental State and local prerogatives.

Conclusion

As we have explained, in developing any rules in this docket, requirements applicable to subrecipient bus systems should be kept truly minimal and flexibility provided to allow States the option to undertake certain planning with respect to the subrecipient systems. The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming thank FTA for its consideration. We respectfully request that any further action by FTA with respect to this docket be in accord with our comments.

****