



**American Public Transportation Association**

# **Funding, Finance, and Tax Policy and Federal Procedures and Regulations Subcommittees**

## **Agenda**

**Sunday, October 8, 2023  
8:00 a.m. - 9:30 a.m. ET**

**Hyatt Regency Orlando  
Room: Orlando Ballroom L (Convention Level)**

**1. Introductory Remarks—**

Christopher P. Boylan, FP & R Subcommittee Chair  
Richard J. Bacigalupo, FP & R Subcommittee Vice Chair  
Kate Mattice, FP & R Subcommittee Vice Chair

**2. Federal Transit Administration (FTA) Update—**

- a. U.S. Department of Transportation Flexible Funding Opportunities—Matthew Welbes, Executive Director, FTA
- b. FTA Regional Initiatives—Jamie Pfister, Associate Administrator, Office of Regional Services, FTA

**3. APTA Regulatory Reform Initiative Update—Stacie Tiongson, Senior Director, APTA Government Affairs and Advocacy**

**4. Buy America Act Implementation—Ward McCarragher, Vice President, APTA Government Affairs and Advocacy**

**5. Open Discussion**

**6. Adjourn**

## **ENCLOSED DOCUMENTS**

- APTA FACT SHEET Government Shutdown Impacts (10.08.2023)
- APTA FACT SHEET on Real Property Acquisition (10.08.2023)
- APTA FACT SHEET National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) Requirements for Bus Shelters (10.08.2023)
- APTA FACT SHEET Drug and Alcohol Testing for Marijuana (10.08.2023)
- APTA FACT SHEET FTA Spare Ratio Requirement (10.08.2023)
- APTA FACT SHEET Commercial Driver's License (CDL) Testing Requirements (10.08.2023)
- APTA FACT SHEET Build America, Buy America Act (10.08.2023)



## Government Shutdown Impacts on Public Transportation

October 8, 2023

### Executive Summary

On September 30, 2023, Congress enacted a continuing appropriations act, or Continuing Resolution (CR), preventing a government shutdown. The CR expires November 17. At this point, it is unclear if Congress will reach a bipartisan, bicameral agreement on annual appropriations acts or a subsequent CR by this date. If Congress is unable to reach a future agreement, there would be a lapse in appropriations.

The impacts of a government shutdown on U.S. Department of Transportation (DOT) agencies vary considerably. Federal Transit Administration (FTA) operations will continue and none of its 700 employees will be furloughed. FTA will be able to reimburse transit agencies for previously approved projects. However, it is not clear that FTA will be able to approve new grants.

Conversely, 350 employees (35 percent) of the Federal Railroad Administration (FRA) would be furloughed during a government shutdown. Remaining FRA personnel would be focused primarily on activities necessary to protect life and property (e.g., FRA safety inspections). Similarly, 455 employees (25 percent) of the Office of the Secretary of Transportation would also be furloughed.

### Background

Congress will not complete appropriations action prior to October 1, 2023. The Antideficiency Act (31 U.S.C. §§ 1341-1342, 1511-1519) generally bars the obligation or expenditure of federal funds in the absence of appropriations. As a result, Congress must enact a CR to provide interim budget authority and prevent a government shutdown. If a funding gap occurs, federal agencies are generally required to begin a shutdown of affected projects and activities, which includes the prompt furlough of non-excepted personnel.<sup>1</sup>

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<sup>1</sup> See Congressional Research Service, [Federal Funding Gaps: A Brief Overview](#), Report No. RS20348 (September 7, 2023).

The impacts of a government shutdown on DOT agencies vary considerably. Agencies are allowed to continue activities involving the safety of human life or the protection of property.<sup>2</sup> For instance, FRA safety inspectors and other personnel necessary to protect life and property continue to work during the government shutdown. In addition, the personnel of some agencies, such as FTA and the Federal Highway Administration, are financed by budget resources other than annual appropriations (e.g., the Highway Trust Fund). Therefore, these employees are not subject to a government shutdown.

## Federal Transit Administration

According to DOT, during a government shutdown, FTA operations will continue because the personnel are financed by the Highway Trust Fund or advance appropriations under the Infrastructure Investment and Jobs Act (IIJA).<sup>3</sup> Therefore, none of FTA's 700 employees will be furloughed.<sup>4</sup>

The impact on FTA activities is less clear. FTA has sufficient liquidating cash to support several months of reimbursements for previously approved projects.<sup>5</sup> In addition, activities funded from IIJA advance appropriations will continue during a lapse in annual appropriations.<sup>6</sup> However, it is not clear that FTA will be able to approve new grants. In particular, to the extent that FTA activities involve other agencies, the personnel of those agencies (e.g., Environmental Protection Agency, U.S. Department of Labor (DOL), U.S. Department of the Interior) may be furloughed, which could stop progress on projects. For instance, according to DOL, during a government shutdown, the Office of Labor-Management Standards will furlough all employees and suspend all operations,<sup>7</sup> which could affect DOL's certification of Section 13(c) employee protective arrangements for FTA grants pursuant to 49 U.S.C. § 5333(b)).

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<sup>2</sup> The Antideficiency Act includes certain exceptions, such as activities involving the "safety of human life or the protection of property." *Id.*

<sup>3</sup> U.S. Department of Transportation, [Plans for Operations During a Lapse in Annual Appropriations And/or Federal Aviation Administration Authorization Plans by Operating Administration](#) (DOT Plans for Operations During a Lapse in Appropriations) (August 3, 2023) at 13.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 14.

<sup>6</sup> *Id.* at 13-14.

<sup>7</sup> U.S. Department of Labor, [Plan for the Continuation of Limited Activities During a Lapse in Appropriations](#) (September 27, 2023) at 44-45.

## Federal Railroad Administration

According to DOT, 350 (35 percent) of FRA's 1,006 employees would be furloughed during a government shutdown.<sup>8</sup> Remaining FRA personnel would be focused primarily on activities necessary to protect life and property. For instance, FRA staff that manage rail accident/incident investigations would continue working. The continuous inspector presence on railroad property allows for the proactive review and identification of unsafe operations. When safety hazards are identified, FRA railroad safety personnel ensure uniform and consistent feedback to railroads on noncompliance violations of federal safety laws and regulations. These activities would continue during a lapse in appropriations.<sup>9</sup> Employees of the Office of Railroad Development would also continue working during a lapse in appropriations on activities funded under FRA's Oversight account related to the award, administration, oversight, and technical assistance of FRA programs.<sup>10</sup>

FRA would not continue any of its unfunded core agency functions. No contracts, purchase orders, or other documents obligating funds would be executed. FRA would not advance any rulemakings, including those related to railroad safety.<sup>11</sup>

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<sup>8</sup> DOT Plans for Operations During a Lapse in Appropriations at 15.

<sup>9</sup> *Id.* at 15-16.

<sup>10</sup> *Id.* at 16.

<sup>11</sup> This limitation does not apply to regulatory activity funded from FRA's Oversight account. *Id.* at 17.

**AMERICAN PUBLIC TRANSPORTATION ASSOCIATION**  
**FACT SHEET**  
**REAL PROPERTY ACQUISITION**  
*October 8, 2023*

## **Issue Summary**

Many public transit agencies face difficulties purchasing real property for operations and maintenance facilities because Federal Transit Administration (FTA) policies restrict the purchase of real property where federal funds will be, or are anticipated to be, used for the purchase or development of that property. In most cases, transit agencies cannot acquire such real property until National Environmental Policy Act (NEPA) processes are completed.

Expanded flexibility for early real property acquisition for public transportation projects is needed to reduce delays and associated costs of projects and to create certainty in property rights with a view toward future use.

## **APTA Recommendation**

- **Urge Congress to adopt section 168 of S. 2437, the “Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2024” (THUD Appropriations Act), which expands public transit agencies’ authority to acquire land prior to the completion of NEPA review.**

On June 11, 2023, the APTA Legislative Steering Committee endorsed this proposal, as outlined in President Biden’s Fiscal Year (FY) 2024 Budget Request.

## **Background**

On July 11, 2022, FTA sent a Dear Colleague letter to remind project sponsors that the purchase of real property outside of existing transit corridors cannot proceed until the NEPA process is completed or until FTA has either determined that the project is exempt as a Categorical Exclusion (CE) (i.e., corridor preservation or there will be no substantial changes); issued a decision that there is “Finding of No Significant Impact”; or issued a combined or separate final Environmental Impact Statement and or Record of Decision, ultimately clearing the project.

On March 9, 2023, President Biden released his FY 2024 Budget Request, including a legislative proposal to add flexibility to FTA’s policy on land acquisition prior to NEPA by amending 49 U.S.C. § 5323(q) to include “real property interests” to existing authority allowing the purchase of right-of-way for “corridor preservation”. This proposal would bring FTA’s authority into parity with the Federal Highway Administration’s property acquisition authority. The Senate THUD Appropriations bill adopts a similar approach by amending 49 U.S.C. § 5323(q) to replace the term “right-of-way” with “real property interests”, thereby expanding the opportunity for broader property acquisition prior to the completion of environmental reviews.

**AMERICAN PUBLIC TRANSPORTATION ASSOCIATION**  
**FACT SHEET**  
**NEPA AND NHPA REQUIREMENTS FOR BUS SHELTERS**  
*October 8, 2023*

## Issue Summary

Many public transit agencies face difficulties funding and installing bus shelter projects in certain Federal Transit Administration (FTA) regions due to National Environmental Policy Act (NEPA) and National Historical Preservation Act (NHPA) requirements. Under NEPA, many bus shelter projects are exempt as Categorical Exclusions (CE) if they are located in the right-of-way. However, NHPA continues to apply and grant applicants must work with FTA to determine if the NHPA Section 106 review process must be utilized.

Transit agencies must develop and provide the necessary additional information to determine NHPA Section 106 applicability and, as a result, experience delays and increased costs, including loss of local match, for bus shelter projects.

## APTA Recommendation

- **Support the Federal Transit Administration’s efforts to create a Programmatic Agreement to streamline the NEPA and NHPA processes for bus shelter projects to reduce delays and simplify the application process.**

## Background

NEPA and NHPA require different types of reviews for federally-funded projects.<sup>1</sup> The NEPA review process is designed to identify and evaluate the potential environmental impacts of a project and to consider alternatives that may reduce or avoid those impacts. The NHPA Section 106 review process is designed to identify historic properties that may be affected by a project and to assess the impact of the project on those properties.<sup>2</sup>

In 2018, FTA Region 5 published a summary of a webinar it held regarding compliance with Section 106 of the NHPA.<sup>3</sup> In response to a question on the applicability of Section 106 for

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<sup>1</sup> 42 U.S.C. § 4321 et. seq. and 54 U.S.C. § 306108, respectively.

<sup>2</sup> Section 106 of the NHPA requires federal agencies to consider the effects of their undertakings on historic properties. The NHPA Section 106 consultation process involves feedback and community outreach between the federal agency, such as FTA, State and or Tribal Historic Preservation Offices, including the Advisory Council on Historic Preservation, to fully evaluate and consider the project proposal and potential adverse effects, through a Programmatic Agreement.

<sup>3</sup> See Region 5 Webinar Summary, [Section 106 of the National Historic Preservation Act -- Overview and Compliance](#) (May 31, 2018) (Region 5 Section 106 Overview), describing the documentation necessary to make a Section 106 determination, as follows: “FTA will need to see a scope of work, images of the existing shelter, renderings of the proposed shelter, a description of any ground disturbing activities, and any other relevant information . . . to make a determination whether Section 106 review is required.” Note that the Region 5 Section

sidewalks in a right-of-way, FTA Region 5 noted that “[p]roject infrastructure does not have to occur within the boundaries of a historic property to affect that property. A new project located entirely within the right-of-way could visually affect adjacent historic properties.”<sup>4</sup>

Specifically, in an answer to a question on bus shelter replacement at an existing bus stop, FTA Region 5 stated that: “[i]n the case of new shelter installation at an existing bus stop that currently only has a pole and flag indicator, the new shelter is an increase in infrastructure. The shelter introduces a new visual element to the streetscape, which could alter the viewsheds to and from the proposed location. Thus, there are potential [sic] for visual effects on historic properties assuming such properties are present. Further, the new shelter may require ground disturbance as part of installation. Ground disturbance could have to the potential to effect archaeological resources that could be historic properties afforded protection under Section 106, if such properties exist.”<sup>5</sup>

A letter exchange between an APTA member and then-FTA Acting Administrator K. Jane Williams in 2018 confirmed that, “The NEPA and Section 106 are Federal cross-cutting requirements that apply to all FTA projects when FTA is providing funding or approvals for the project, regardless of the project’s size. The result of these legal requirements is that, even for a bus shelter project in an existing right-of-way that typically is subject to a categorical exclusion under NEPA, FTA needs to collect certain basic information before it can make that [Section 106] determination.”<sup>6</sup>

FTA is currently working to finalize a Section 106 Programmatic Agreement with the Illinois State Historic Preservation Office (SHPO) that would cover bus shelter installation in an existing right-of-way. The Illinois SHPO is expected to post the document for public comment in early October. If successful, the Programmatic Agreement could be used as the basis for developing Programmatic Agreements with other SHPO offices in any state.

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106 Overview addresses other questions related to Section 106 and bus shelters, including shelter designs that do not fit the historic district look, lighting, replacement shelters, and removal and replacement after a lapse of time.

<sup>4</sup> *Id.* at 2. As noted above, many bus shelter projects are exempt as CEs if they are located in a right-of-way. *See* 23 C.F.R. § 771.118; *see also*, FTA, [Guidance for Implementation of FTA’s Categorical Exclusions](#) (23 C.F.R. § 771.118) (January 2023) at 8.

<sup>5</sup> Region 5 Section 106 Overview at 3.

<sup>6</sup> Then-FTA Acting Administrator K. Jane Williams letter to Mr. Mark Donaghy, CEO, Greater Dayton Regional Transit Authority (October 22, 2018).





**AMERICAN PUBLIC TRANSPORTATION ASSOCIATION**  
**FACT SHEET**  
**DRUG AND ALCOHOL TESTING FOR MARIJUANA**  
*October 8, 2023*

## **Issue Summary**

Public transit agencies face significant workforce shortage challenges related to recruiting, hiring, and retaining transit operators and mechanics. In APTA's research on workforce shortage challenges, one issue identified is marijuana use by transit employees and job applicants.<sup>1</sup> To date, the U.S. Department of Transportation (DOT) has required transit agencies to use urine testing procedures to drug test safety-sensitive employees.<sup>2</sup> A urine test may detect prior marijuana usage for a lengthy period (e.g., up to 30 days). Thus, a urine test is not an accurate measurement of impairment due to marijuana usage.

DOT recently added oral fluid testing to the existing urine testing procedures, which may provide some relief given the shorter latency period for detection. However, oral fluid testing cannot be implemented until the U.S. Department of Health and Human Services (HHS) certifies two laboratories to conduct the drug testing. To date, HHS has not certified these laboratories.

## **APTA Recommendation**

- **Urge the U.S. Department of Health and Human Services to certify laboratories needed to conduct drug and specimen validity tests on oral fluid specimens.**

## **Background**

Marijuana is legal in many states and recreational use of marijuana has increased. However, federal law classifies marijuana as a Schedule I substance, a classification for the most illicit substances. Required marijuana testing has deterred potential transit operator and mechanic job candidates or made it difficult to retain a robust transit workforce, especially in those states where marijuana usage is legal.

On June 1, 2023, DOT's final rule amending the transportation industry drug testing program to add oral fluid testing procedures for safety-sensitive transportation employees went into effect.<sup>3</sup>

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<sup>1</sup> See APTA, [Transit Workforce Shortage Synthesis Report](#) (March 2023); see also [Transit Workforce Shortage: Root Causes, Potential Solutions, and the Road Ahead](#) (September 2022).

<sup>2</sup> See Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. §§ 45102, 45104.

<sup>3</sup> DOT, [Notice of Final Rule; Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Addition of Oral Fluid Specimen Testing for Drugs](#), 88 Fed. Reg. 27596 (May 2, 2023) (DOT Oral Fluid Testing Rule). Note that on April 26, 2022, APTA submitted comments in support of DOT's Notice of Proposed Rulemaking (NPRM) amending the transportation industry drug testing program procedures regulation to add oral fluid testing to the existing urine drug testing procedures. See [APTA Letter on DOT NPRM Oral Fluid Method for Drug and Alcohol Testing](#) (April 26, 2022).

Oral fluid testing may provide a better indicator of an employee’s recent use of marijuana because of its likely shorter latency period (up to 72 hours).<sup>4</sup>

In the preamble to the final rule, DOT addressed the question of whether marijuana should be included in the drug testing regime, arguing against limiting or removing such testing as a requirement. DOT stated that “it is important to remember that the beginning of DOT-regulated testing in 1988 was prompted by marijuana-related accidents that occurred in 1985 (two New York City subway accidents) and 1987 (one railroad accident in Chase, Maryland).”<sup>5</sup>

Although oral fluid testing is now allowed, it cannot be implemented until HHS certifies two laboratories to conduct testing: one to serve as a primary laboratory and a second to serve as a split-specimen laboratory. As of October 2, 2023, HHS has not provided an approved list of laboratories certified to conduct drug and specimen validity tests on oral fluid specimens.<sup>6</sup>

Separately, on August 29, 2023, HHS recommended to the Drug Enforcement Administration (DEA) that marijuana be rescheduled from Schedule I to Schedule III under the Controlled Substances Act.<sup>7</sup> According to the Congressional Research Service, “[a] move to any lower schedule would allow for medical use of marijuana while maintaining federal criminal control over the substance pursuant to the CSA.”<sup>8</sup> The DEA is evaluating the HHS recommendation.

At APTA’s request, the Transit Cooperative Research Program will undertake research to examine the landscape regarding transit workforce issues and marijuana use, including the status and potential timeline for drug testing options; issues surrounding rescheduling cannabis at the federal level; and drug testing regimes in other countries.

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<sup>4</sup> DOT Oral Fluid Testing Rule at 27601. *See, generally*, HHS, [Issuance of Guidelines on Mandatory Guidelines for Federal Workplace Drug Testing Programs—Oral/Fluid](#), 84 Fed. Reg. 57554, 57558 (October 25, 2019) (noting study results showing THC detection above the Oral Fluid Mandatory Guidelines confirmatory cutoff (i.e., 2ng/mL) for 32 hours with the occasional users and 72 hours with frequent users).

<sup>5</sup> DOT Oral Fluid Testing Rule at 27599.

<sup>6</sup> HHS, [Notice of Current List of HHS-Certified Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine and Oral Fluid Drug Testing for Federal Agencies](#), 88 FR 67786 (October 2, 2023).

<sup>7</sup> Congressional Research Service, [Department of Health and Human Services Recommendation to Reschedule Marijuana: Implications for Federal Policy](#) (September 13, 2023).

<sup>8</sup> *Id.* at 2.

**AMERICAN PUBLIC TRANSPORTATION ASSOCIATION  
FACT SHEET**

**FTA SPARE RATIO REQUIREMENT**

*October 8, 2023*

## **Issue Summary**

For three decades, the Federal Transit Administration (FTA) has recommended a “spare ratio” to public transit agencies that sets aside a percentage of their total bus fleet as reserve rolling stock. Pursuant to an FTA Circular, the spare ratio rule requires that for every five fixed-route vehicles in an agency’s active fleet, it can only have one bus (20 percent) as a spare vehicle. FTA assesses grant applicants’ compliance with the spare ratio rule when reviewing applications for federal funds to replace, rebuild, or add vehicles to an agency’s fleet. Failure to meet the spare ratio requirements can result in the denial of funds and affect future procurements.

FTA currently provides no spare ratio exception or special consideration for zero-emission or alternative fuel buses. As a result, some public transit agencies have faced difficult fleet management choices as needed vehicles surpass their useful life and agencies transition their fleets to zero-emission buses, which have different operating characteristics (e.g., range limitations, fueling requirements) than other vehicles. Currently, transit agencies cannot assume that zero-emission buses can replace traditionally fueled buses at a 1:1 ratio. As transit agencies transition to zero-emission buses, it is more difficult to meet FTA spare ratio requirements.

## **APTA Recommendation**

- **Develop an assessment of the impact of the Federal Transit Administration’s spare ratio requirement on public transit agencies’ ability to transition to zero-emission buses.**

## **Background**

For three decades, FTA has recommended a “spare ratio” to public transit agencies that sets aside a percentage of their total bus fleet as reserve rolling stock.<sup>1</sup> For a public transit agency’s bus fleet, FTA’s spare ratio requirement applies to grantees operating 50 or more fixed-route revenue vehicles.<sup>2</sup> FTA defines spare ratio as the total number of spare vehicles available for fixed-route service divided by the total number of fixed-route vehicles required for annual maximum service (regardless of type).<sup>3</sup> FTA does not set a specific spare ratio for smaller operators, but expects the number of spare buses to be reasonable.<sup>4</sup>

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<sup>1</sup> FTA, [Transit Vehicle Innovation Deployment Centers Advisory Panel, Overview and Conclusions \(Appendix A\)](#), FTA Report No. 0182 (January 2021) (FTA TVIDC Report Appendix A), at 23.

<sup>2</sup> FTA, Circular C 5010.1E, [Award Management Requirements](#) (FTA C5010.1E) (07.16.2018), at page IV-28.

<sup>3</sup> *Id.* Note that FTA permits recipients of buses recently procured to seek short-term deviations (i.e., no more than two years) from the spare ratio requirements. Recipients seeking such a waiver must provide FTA with a justification for the deviation. *See id.* at page IV-29.

<sup>4</sup> *Id.* at page IV-28.

APTA has engaged FTA on issues associated with spare ratio and the impact on transit agencies' ability to manage fleets for more than a decade. In 2010, APTA requested that FTA consider changes to the spare bus ratio guidelines. This request initiated a dialogue between APTA and the FTA, though no changes to FTA guidelines were ultimately made.<sup>5</sup> On July 7, 2020, during the COVID-19 pandemic, APTA requested that FTA issue a two-year waiver of spare ratio policies to provide greater certainty concerning decisions to replace, rebuild, add, or retire vehicles during an active pandemic. FTA denied APTA's request, stating that existing policies provide sufficient flexibility.

FTA currently provides no spare ratio exception or special consideration for zero-emission or alternative fuel buses.<sup>6</sup> As a result, some public transit agencies have faced difficult fleet management choices as needed vehicles surpass their useful life and agencies transition their fleets to zero-emission buses, which have different operating characteristics (e.g., range limitations, fueling requirements) than other vehicles. Currently, transit agencies cannot assume that zero-emission buses can replace traditionally fueled buses at a 1:1 ratio.<sup>7</sup> As transit agencies transition to zero-emission buses, it is more difficult to meet FTA spare ratio requirements.<sup>8</sup>

In 2019, APTA recommended statutory change to the spare ratio calculation to exclude vehicles that have surpassed their minimum useful life and low-or-no emissions vehicles in its *APTA Recommendations on Surface Transportation Law*.<sup>9</sup> In 2020, APTA successfully advocated for an amendment to waive the spare ratio requirement for two years in H.R. 2, the "INVEST in America Act", as passed by the U.S. House of Representatives. Unfortunately, the spare ratio waiver provision was not included in the final legislation, the Infrastructure Investment and Jobs Act.<sup>10</sup>

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<sup>5</sup> See National Academies of Sciences, Engineering, and Medicine, [System-Specific Spare Bus Ratios Update](#) (The National Academies Press, 2014).

<sup>6</sup> FTA TVIDC Report Appendix A at 24.

<sup>7</sup> *Id.* at 23.

<sup>8</sup> *Id.*

<sup>9</sup> APTA recommended that the spare ratio calculation exclude vehicles that have surpassed their minimum useful life and low-or-no emissions vehicles by adding a new section at the end of 49 U.S.C. § 5339 requiring the FTA to amend Circular 5010.1E "to not consider vehicles operating beyond the minimum useful life in the spare ratio calculation; and (b) to not consider low- or no-emission vehicles in the spare ratio calculation." [APTA Recommendations on Surface Transportation Law](#), at 33.

<sup>10</sup> Pub. L. No. 117-58 (2021).

**AMERICAN PUBLIC TRANSPORTATION ASSOCIATION**  
**FACT SHEET**  
**COMMERCIAL DRIVER'S LICENSE TESTING REQUIREMENTS**  
*October 8, 2023*

## Issue Summary

Public transit agencies have identified the Federal Motor Carrier Safety Administration's (FMCSA) Commercial Driver's License (CDL) Pre-Trip Vehicle Inspection Rules, or "under-the-hood" requirement, as an impediment to hiring bus operators. This rule requires CDL applicants to identify each safety-related part and explain what needs to be inspected within the engine compartment (e.g., loose hoses, oil, and coolant levels). Many otherwise qualified candidates may be intimidated by this knowledge test. Moreover, this test increases costs and extends new operator training time for transit agencies, which also impacts the ability to hire.

## APTA Recommendation

- **Submit a request to the Federal Motor Carrier Safety Administration for a five-year exemption to allow States to waive the under-the-hood requirement for Commercial Driver's License applicants seeking to operate vehicles in public transportation.**
- **Work with Coalition partners to seek legislative changes that would exempt Commercial Driver's License applicants seeking to operate vehicles in public transportation from the under-the-hood requirement.**

## Background

The transit industry experienced a nationwide driver shortage during the COVID-19 public health emergency, and agencies are still struggling to keep and maintain their workforce. According to a recent APTA workforce shortage survey and report, 96 percent of agencies reported experiencing a workforce shortage, 84 percent of which said the shortage affects their ability to provide service.<sup>1</sup> Furthermore, 33 percent of respondents surveyed identified CDL testing and requirements as a barrier to hiring.<sup>2</sup>

FMCSA is charged with developing and issuing standards for state testing and licensing of CDL holders.<sup>3</sup> States, based on the rules set by FMCSA, issue CDLs after an applicant passes state-administered knowledge tests. Applicants applying for a passenger (P) endorsement, which allows CDL holders to operate passenger vehicles, must pass knowledge and skills tests, including the under-the-hood test.<sup>4</sup> While perhaps necessary for over-the-road driver applicants (e.g., truck drivers) who maintain their own vehicles, the "under-the-hood" test is unnecessary for transit agency bus operators. Typically, if there is a mechanical issue with a transit bus, the

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<sup>1</sup> APTA, [Transit Workforce Shortage Synthesis Report](#) (March 2023), at 1; see also [Transit Workforce Shortage: Root Causes, Potential Solutions, and the Road Ahead](#) (September 2022).

<sup>2</sup> *Id.* at 18.

<sup>3</sup> See FMCSA, [CDL Drivers: Endorsements and Restrictions](#) (accessed on September 21, 2023).

<sup>4</sup> *Id.* See also FMCSA, Commercial Driver's License Standards, [49 CFR § 383.113\(a\)\(1\)](#).

agency will send its trained mechanics to either fix or tow the vehicle to the agency maintenance shop.

Similarly, CDL applicants that seek to operate school buses must obtain a School Bus (S) endorsement, which also requires successfully passing the under-the-hood test. On January 3, 2022, FMCSA issued a temporary 90-day waiver allowing States to waive the under-the-hood requirements for CDL applicants seeking S and P endorsements with the K (Intrastate) restriction, in response to the significant driver shortage brought on by the COVID-19 public health emergency. It then issued two subsequent 90-day waiver extensions on March 28, 2022, and June 30, 2022.<sup>5</sup>

On June 24, 2022, the National School Transportation Association (NSTA) submitted a five-year exemption application to FMCSA, noting that the “Under the Hood testing requirement is a barrier to entry for new school bus drivers, contributing to the nationwide driver shortage.”<sup>6</sup> On October 27, 2022, FMCSA granted a two-year exemption to allow States to waive the under-the-hood requirement for CDL applicants seeking S and P endorsements, subject to a K restriction through November 27, 2024.<sup>7</sup> The exemption is narrow, and drivers issued a CDL under this exemption are “restricted to the intrastate operation of school buses only.”<sup>8</sup>

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<sup>5</sup> FMCSA, [Commercial Driver's License: Application for Exemption; National School Transportation Association](#), 87 Fed. Reg. 65114 (October 27, 2022) (FMCSA CDL Exemption).

<sup>6</sup> NSTA, *Request-Five Year Exemption from the Under the Hood Testing Requirements of 49 CFR §383.113(a)(1)(i)* (June 24, 2022).

<sup>7</sup> See FMCSA CDL Exemption at 65114.

<sup>8</sup> *Id.* at 65115.

**AMERICAN PUBLIC TRANSPORTATION ASSOCIATION**  
**EXECUTIVE SUMMARY**  
**INFRASTRUCTURE INVESTMENT AND JOBS ACT**  
**BUILD AMERICA, BUY AMERICA IMPLEMENTATION**  
*October 8, 2023*

On November 15, 2021, President Joseph Biden signed the Infrastructure Investment and Jobs Act (IIJA) into law, which includes a title addressing Buy America requirements for infrastructure projects.<sup>1</sup> Under the Build America, Buy America Act (BABA), each federal agency is required to “ensure that none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, and manufactured products and construction materials used in the project are produced in the United States.”

In this Act, “produced in the United States” means:

- For iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the U.S.;
- For manufactured products, that the product was manufactured in the U.S. and the cost of the product components mined, produced, or manufactured in the U.S. is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content applies; and
- For construction materials, that all manufacturing processes occurred in the U.S.<sup>2</sup>

A federal agency may waive the application of the domestic content procurement preference where:

- applying the preference would be inconsistent with the public interest;
- the types of iron, steel, manufactured goods, or construction materials are not produced in sufficient and reasonably available quantities or satisfactory quality; or
- the inclusion of the materials produced in the United States will increase the cost of the project by more than 25 percent.

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<sup>1</sup> Pub. L. No. 117-58, Division G, Title IX. This Title builds on [\*Executive Order 14005, Ensuring the Future is Made in All of America by All of America's Workers\*](#) (Order); signed by President Joseph Biden on January 25, 2021; see also APTA Fact Sheet, *Executive Order on Ensuring the Future is Made in All of America by All of America's Workers* (January 25, 2021).

<sup>2</sup> Please note that BABA excludes from the definition of construction materials: cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. In addition, the Act limits the standards under § 70915 (OMB Guidance) from including cement and cementitious materials; aggregates such as stone, sand, or gravel, or aggregate binding agents or additives as inputs of the construction materials.



## Office of Management and Budget Guidance for Grants and Agreements

On February 9, 2023, the Office of Management and Budget (OMB) issued a proposed rule to revise OMB Guidance for Grants and Agreements.<sup>3</sup> On March 8, OMB issued a correction to the notice indicating that OMB is issuing proposed guidance, not a proposed rule.<sup>4</sup> OMB proposed a new part 184 in 2 CFR chapter I to: support implementation of BABA provisions of the IIJA; clarify existing requirements to domestic preferences for procurements; and improve federal financial assistance management and transparency. This proposed guidance generally aligns with the OMB Initial Implementation Guidance.<sup>5</sup>

On March 13, [APTA filed comments](#) in response to OMB's proposed rule to revise its Guidance for Grants and Agreements. In those comments, APTA raised procedural concerns and provided comments regarding proposed 2 CFR part 184 amendments.

On August 23, OMB issued its final Guidance for Grants and Agreements.<sup>6</sup> The revisions implement the requirement for OMB to issue guidance to each federal agency to assist in the implementation of the requirements of BABA.<sup>7</sup>

As required by BABA, the new part 184 of 2 CFR provides guidance:

- to federal agencies about how to apply the domestic content procurement preferences set forth in BABA to federal awards for infrastructure projects, to include key terms such as iron or steel products, manufactured products, construction materials, and materials such as aggregates, and cement identified under § 70917(c) of BABA;
- for determining the cost of components of manufactured products. The part 184 text uses a modified version of the “cost of components” test found in the Federal Acquisition Regulation to provide a consistent approach for determining the cost of components of manufactured products for industry, with only minor modifications; and
- on the process that a federal agency should implement to allow recipients to request waivers and how to process them.

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<sup>3</sup> OMB, [Notice of Proposed Rule; Notification of Proposed Guidance](#), 88 Fed. Reg. 8374 (February 9, 2023).

<sup>4</sup> OMB, [Guidance for Grants and Agreements Correction](#), 88 Fed. Reg. 14514 (March 9, 2023).

<sup>5</sup> OMB, Memorandum-22-11, [Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#) (April 18, 2022).

<sup>6</sup> OMB, [Guidance for Grants and Agreements](#), 88 Fed. Reg. 57750 (August 23, 2023) (OMB Guidance for Grants and Agreements).

<sup>7</sup> Note that on September 21, 2023, OMB released for public inspection a notice of proposed rulemaking and proposed guidance, [OMB Guidance for Grants and Agreements](#), which is expected to appear in the Federal Register on October 5. In its notice, OMB proposes further revision to 2 CFR to: incorporate statutory requirements and administration priorities; reduce agency and recipient burden; clarify sections that recipients or agencies have interpreted in different ways; and rewrite applicable sections in plain language, improving flow, and addressing inconsistent use of terms. The comment period closes on December 5, 2023.



Federal agencies providing financial assistance for infrastructure must implement the Buy America preference set forth in 2 CFR part 184 effective October 23, 2023, unless specified otherwise.<sup>8</sup>

## **DOT Proposed Waiver of Buy America Requirements for De Minimis Costs, Small Grants, and Minor Components**

On May 19, 2022, the U.S. Department of Transportation (DOT) issued a temporary waiver of the BABA construction materials requirement. The waiver expired on November 10. On November 15, concurrent with a notice not to extend the temporary BABA waiver for construction materials and a proposed waiver for [contracts and solicitation](#), DOT published a notice seeking comment on whether it should use its authority, in accordance with § 70914(b)(1) of BABA, to grant a waiver in the public interest for the Buy America requirement for De Minimis Costs, Small Grants, and Minor Components.<sup>9</sup>

DOT proposed to waive BABA Buy America requirements for iron, steel, manufactured products, and construction materials under a single DOT financial assistance award for which:

- The total value of the non-compliant products is no more than the lesser of \$1 million or five percent of total allowable costs under the Federal financial assistance award;
- The size of the federal financial assistance award is below \$500,000; or
- The non-domestically produced miscellaneous minor components comprise no more than five percent of the total material cost of an otherwise domestically produced iron or steel product.

On August 16, DOT issued a public interest [Waiver of Buy America Requirements for De Minimis Costs, Small Grants, and Minor Components](#). The waiver is applicable to awards that are obligated on or after August 16, 2023, for which:

- The total value of the non-compliant products is no more than the lesser of \$1 million or five percent of total applicable cost of the project; or
- The total amount of federal financial assistance applied to the project, through awards or subawards, is below \$500,000.

The waiver is applicable to both FTA's Buy America requirements for steel, iron, and manufactured products and to the BABA construction material requirements. It does not apply to items already subject to a product-specific waiver, such as FTA's partial waiver for vans and minivans.<sup>10</sup>

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<sup>8</sup> OMB Guidance for Grants and Agreements at 57750.

<sup>9</sup> DOT, [Notice of Proposed Waiver of Buy America Requirements for De Minimis Costs, Small Grants, and Minor Components](#), 87 Fed. Reg. 68576 (November 15, 2022).

<sup>10</sup> DOT, [Notice of Partial Buy America Waiver for Vans and Minivans](#), 87 Fed. Reg. 64534 (October 25, 2022).

## **DOT Limited Waiver of Buy America Requirement for Construction Materials for Certain Contracts and Solicitations**

On January 30, 2023, DOT issued a limited Waiver of Buy America Requirements for Construction Materials for Certain Contracts and Solicitation.<sup>11</sup> The new waiver exempts construction materials used in federally funded infrastructure projects based on the date of grant obligation, the date of contract execution for materials, and other factors. Specifically, this waiver exempts BABA domestic preference requirements for construction materials for:

- Any contract entered into before November 10, 2022; and
- Any contract entered into on or after November 10, 2022, and before March 10, 2023, if the contract results from a solicitation published prior to May 14, 2022.

This waiver applies only to:

- DOT awards obligated on or after January 30, 2023; and
- For awards that are obligated on or after November 10, 2022, but prior to January 30, 2023, expenditures for construction materials incurred on or after January 30, 2023.

For contracts executed after May 14, 2022, the waiver does not apply to any construction materials that a contractor or subcontractor takes delivery of on or after October 1, 2024.

## **DOT Notice of Waiver of Buy America Requirements for Electric Vehicle Chargers**

On February 21, 2023, the Federal Highway Administration (FHWA) published a notice establishing a temporary public interest waiver to waive BABA requirements for steel, iron, manufactured products, and construction materials in electric vehicle (EV) chargers.<sup>12</sup> The temporary waiver is effective beginning March 23, 2023.<sup>13</sup>

This short-term, temporary waiver enables EV charger acquisition and installation to immediately proceed while also ensuring the application of Buy America to EV chargers by the phasing out of the waiver in two phases.<sup>14</sup> As of the effective date of this waiver, FHWA is also removing EV chargers from its existing general applicability waiver for manufactured products.

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<sup>11</sup> DOT, [Notice of Waiver of Buy America Requirements for Construction Materials for Certain Contracts and Solicitations](#) (January 30, 2023).

<sup>12</sup> FHWA, [Notice of Temporary Waiver of Buy America Requirements for Electric Vehicle Chargers](#), 88 Fed. Reg. 10619 (February 21, 2023).

<sup>13</sup> As required by BABA, FHWA will revisit the temporary waiver and determine whether there is continued need for it within five years from March 23, 2023.

<sup>14</sup> The start date of the second phase is July 1, 2024.