



Funding, Finance, and Tax Policy and Federal Procedures and Regulations Subcommittees Agenda

**Sunday, October 9, 2022
8:00 a.m. - 9:30 a.m. (PT)**

**Sheraton Grand Seattle
Room: Jefferson (Union Tower, 4th Floor)**

1. Introductory Remarks—

Sharon Greene, FF & T Subcommittee Chair
Michael McLaughlin, FF & T Subcommittee Vice Chair
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 Update

- a. FTA Safety Initiatives—Joseph DeLorenzo, Associate Administrator for Transit Safety and Oversight and Chief Safety Officer
- b. FTA Compliance Review—Hope Jensen, Director, Program Oversight and Division Chief for Compliance Programs

3. U.S. Department of Transportation Build America Bureau Update—

- a. Build America Bureau Initiatives—Daniel Schned, Head of Project Development

4. Inflation Reduction Act—Ward McCarragher, Vice President, APTA Government Affairs and Advocacy

5. Regulatory Update—Stacie Tiongson, Senior Director, APTA Government Affairs and Advocacy

6. Open Discussion

7. Adjourn

ENCLOSED DOCUMENTS

- APTA Legislative Update (10.01.2022)
- APTA SUMMARY Inflation Reduction Act (10.01.2022)
- APTA SUMMARY Build America, Buy America Act (10.01.2022)
- APTA Draft Comments on DOT NPRM Disadvantaged Business Enterprise Program Implementation Modifications (10.__.2022)



American Public Transportation Association

LEGISLATIVE UPDATE

APTA is focused on three major initiatives in fall 2022:

- aggressively advocating for public transportation investment in the Transportation, Housing and Urban Development, and Related Agencies Appropriations bill (THUD Appropriations bill);
- actively working to ensure successful implementation of the Infrastructure Investment and Jobs Act (IIJA) (P.L. 117-58), commonly referred to as the Bipartisan Infrastructure Law, and the Inflation Reduction Act (P.L. 117-169); and
- preparing a holistic outreach effort to every new and returning Representative and Senator in the new Congress, which begins in January 2023.

Aggressively Advocating for Public Transportation Investment in the THUD Appropriations Bill

In September 2022, Congress passed and President Biden signed the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023 into law (P.L. 117-___). The Act provides continued funding for the federal government, including public transportation programs, at Fiscal Year (FY) 2022 funding levels through December 16. After the midterm elections, Congress may develop an Omnibus Appropriations bill that includes the 12 separate appropriations bills.

With regard to the THUD Appropriations bill, APTA is aggressively advocating that Congress provide the highest possible funding for public transportation and that it complete action on a bipartisan, bicameral agreement this fall. In March 2022, Congress provided \$20.5 billion for public transit in FY 2022, an increase of \$7.6 billion (58 percent) from the FY 2021 enacted level. Congress also provided \$16.6 billion for passenger and freight rail, an increase of \$13.7 billion (475 percent) from the FY 2021 enacted level.

In July 2022, the House of Representatives passed its THUD Appropriations bill (H.R. 8294), and the Senate introduced its companion version of the bill (S. 4670). Both the House and Senate THUD Appropriations bills appropriate the overwhelming majority of public transit and passenger rail authorizations of the IIJA. However, the House THUD Appropriations bill provides significantly more public transit and passenger rail funding than the Senate bill.

The House THUD Appropriations bill, together with the IJA's advance appropriations, provides **\$21.7 billion** for public transit in FY 2023, which exceeds the IJA authorization and is an increase of **\$1.2 billion (6 percent)** from the FY 2022 enacted level. The House bill provides **\$621 million** more for public transit than the Senate bill. The primary difference between the bills is funding for Capital Investment Grants (CIG). The House bill provides \$3.0 billion for CIG, equal to the IJA authorization, which is more than \$500 million more than the Senate THUD appropriation.

The House THUD Appropriations bill, together with advance appropriations, provides **\$17.1 billion** for passenger and freight rail in FY 2023, an increase of **\$489 million (3 percent)** from the FY 2022 enacted level. The House bill provides **\$164 million** more for passenger rail than the Senate bill. The House bill provides more funding for the Federal-State Partnership for Intercity Passenger Rail Grants and the Senate bill provides more funding for Amtrak Northeast Corridor grants. Both bills provide less than the \$19.9 billion authorized for passenger and freight rail in the IJA.

In addition, both House and Senate THUD Appropriations bills include important policy provisions. Both bills block the Rostenkowski Test to prevent a possible across-the-board cut of FY 2023 transit formula funds to each public transit agency. Both bills also prohibit the U.S. Department of Transportation (DOT) from impeding or hindering a project from advancing or approving a project seeking a CIG federal share of more than 40 percent. Finally, the Senate THUD Appropriations bill allows Consolidated Rail Infrastructure and Safety Improvements (CRISI) grants to be used for commuter railroad projects that implement or sustain positive train control systems. The House THUD Appropriations bill does not authorize commuter rail project eligibility for CRISI funds.

APTA is aggressively advocating that the FY 2023 THUD Appropriations bill fully fund the IJA and provide additional resources for targeted investments. APTA also urges Congress to appropriate at least **\$129 million** of emergency appropriations to the Federal Transit Administration's (FTA) Public Transportation Emergency Relief program (49 U.S.C. § 5324) to help public transit agencies offset the significant costs of providing emergency transportation services, rebuilding damaged infrastructure, and replacing vehicles destroyed from recent natural disasters, including floods, hurricanes, wildfires, and earthquakes. APTA continues to collect additional information from public transit agencies on unmet funding needs as a result of recent natural disasters.

Working to Ensure Successful Implementation of the Bipartisan Infrastructure Law and the Inflation Reduction Act

Bipartisan Infrastructure Law

On November 15, 2021, President Joseph Biden signed the IIJA into law. The IIJA provides \$108.2 billion for public transit over five years (FY 2022 through FY 2026), an increase of \$42.4 billion (64 percent) from current levels. These historic increases in public transit investment include \$91.2 billion of guaranteed funding (i.e., contract authority and advance appropriations) and \$17.0 billion of General Fund authorizations for CIG and other grants.

The legislation also provides \$102.1 billion for passenger and freight rail over five years, an increase of \$86.7 billion (561 percent) from current levels. These historic passenger rail investments include \$66.0 billion of guaranteed funding (advance appropriations) and \$36.1 billion of General Fund authorizations for Amtrak and other programs. In addition, the IIJA provides significant funding for multimodal investments (e.g., Rebuilding American Infrastructure with Sustainability and Equity (RAISE) and Mega grants) that include public transit and passenger rail as essential elements.

APTA is actively working with DOT on implementation of the Bipartisan Infrastructure Law. This year, APTA expects DOT to **advance \$18.4 billion of FY 2022 competitive grants** that include public transit and passenger rail eligibility, including:

- **Awards (\$5.5 billion).** To date, DOT and FTA have awarded \$5.5 billion of competitive grants, including \$2.3 billion for RAISE grants; \$1.1 billion for Low and No Emission Bus grants; \$547 million for Buses and Bus Facilities grants; and \$1.5 billion for INFRA grants.
- **Notices of Funding Opportunities (NOFOs) (\$5.3 billion).** DOT, FTA, and the Federal Railroad Administration (FRA) have issued numerous NOFOs for an additional \$5.3 billion of competitive grants that include public transportation eligibility, including: \$1.0 billion of Mega grants, \$350 million of All Stations Accessibility Program grants, and \$573 million for Railroad Crossing Elimination Grants.
- **Upcoming NOFOs (\$7.6 billion).** This fall, we expect FRA and FTA to issue an additional \$7.6 billion for competitive grants, including \$7.3 billion for the Federal-State Partnership for Intercity Passenger Rail program and \$300 million for the Rail Vehicle Replacement program.

In addition, DOT, FTA, FRA, and other agencies have issued Notices of Proposed Rulemaking, Guidance, Dear Colleague letters, and Requests for Information regarding IIJA implementation. APTA has actively engaged in this regulatory process and provided numerous Comments on IIJA implementation, including Comments on Buy America, CIG, Public Transportation Agency Safety Plan Safety Requirements, and Railroad Capital Projects.

To assist APTA members in tracking IIJA funding apportionments and competitive grant opportunities and policy actions, APTA has developed a [Smart Guide to the Bipartisan Infrastructure Law](#) on its website. The APTA Smart Guide includes funding and apportionment tables, section-by-section analyses, and DOT guidance, regulations, and NOFOs. Finally, the Smart Guide includes advocacy and media toolkits to help APTA members tell their Bipartisan Infrastructure Law success stories. APTA has also developed a [Regulatory Matrix](#) on its website to track all regulatory and other administrative action.

Inflation Reduction Act

On August 16, 2022, President Biden signed the Inflation Reduction Act of 2022 into law. The Act includes numerous important provisions that benefit public transportation, including alternative fuel tax credits and significant new investments in climate, zero-emission technology, equity, and environmental streamlining. The Inflation Reduction Act:

- Extends the excise tax credits for alternative fuels, biodiesel, and renewable diesel;
- Extends and substantially restructures the alternative fuel vehicle property credit;
- Establishes a new commercial clean vehicle tax credit; and
- Provides significant new investments in climate, zero-emission technology, equity, and environmental review, including \$27 billion for a Greenhouse Gas Reduction Fund; \$3.2 billion for Neighborhood Access and Equity Grants; and \$2 billion for Low-Carbon Transportation Materials Grants.

APTA is actively working with DOT, the U.S. Department of the Treasury, and other agencies on implementation of the Inflation Reduction Act. In particular, APTA is focused on implementation of the new commercial clean vehicle tax credit and the new grant programs. Section 13403 of the Act creates a new tax credit (up to \$40,000) for commercial clean vehicles (e.g., zero-emission buses). Commercial clean vehicles include battery electric and fuel cell vehicles. This 10-year tax credit takes effect in 2023. The section requires the Secretary of the Treasury to issue regulations or guidance as necessary to implement the provision. APTA is actively working to ensure that public transit agencies may benefit from this provision and receive a direct payment in lieu of a tax credit.

APTA is also working with agencies on implementation of several new programs created by the Inflation Reduction Act. For example, APTA wants to ensure public transportation eligibility under the new \$27 billion Greenhouse Gas Reduction Fund. This Fund will provide capital for both a national and state “green banks” to provide financial support for zero-emission technologies and projects that reduce or avoid greenhouse gas emissions. The Fund provides \$20 billion for a national green bank and \$7 billion to finance state and local green banks. Under the program, EPA will make competitive grants, loans, other financial assistance, and technical assistance available to states and local governments to enable communities, particularly low-income and disadvantaged communities, to reduce or avoid greenhouse gas emissions and deploy or benefit from zero-emission technologies.

Preparing a Holistic Outreach Effort to the New Congress

Finally, APTA is preparing a holistic outreach effort to every new and returning Representative and Senator in the 118th Congress, which begins in January 2023. At the beginning of the new Congress, APTA will undertake a comprehensive outreach effort that includes:

- Sending each Member of Congress, totaling 541 offices, a personalized packet that contains background information about the public transportation industry; a copy of their Congressional District or State Transit Industry Footprint; and APTA's legislative priorities.
- Meeting with each new Representative and Senator to ensure that they understand our industry and APTA's priorities for the 118th Congress.
- Urging all APTA members to contact their new and returning Members of Congress to introduce themselves, outline the role that public transportation plays in your community and the nation's economy, and educate them on the need to honor the IIJA and provide increased investment in public transportation.

In addition, APTA continues to redouble our outreach efforts to build greater support for public transportation among Republican Members of Congress. In 2022, we are specifically focusing on 32 Republican Members of Congress (18 Representatives and 14 Senators), who are more likely to support public transportation or hold critically important leadership and committee positions. APTA will continue this targeted outreach in the 118th Congress. We will also continue efforts to expand APTA's grassroots advocacy tools, such as APTA's Advocacy Engagement Tool.



AMERICAN PUBLIC TRANSPORTATION ASSOCIATION
FACT SHEET
INFLATION REDUCTION ACT OF 2022
PUBLIC TRANSPORTATION TAX CREDITS AND CLIMATE INVESTMENTS
October 1, 2022

On August 16, 2022, President Joseph Biden signed the Inflation Reduction Act of 2022 (IRA) into law (P.L. 117-169).¹ The Act includes alternative fuel tax credits and significant new investments in climate, zero-emission technology, equity, and environmental streamlining.

The IRA includes several important provisions that benefit public transportation. The Act:

- **Extends the excise tax credits for alternative fuels, biodiesel, and renewable diesel;**
- **Extends and substantially restructures the alternative fuel vehicle property credit;**
- **Establishes a new commercial clean vehicle tax credit; and**
- **Provides significant new investments in climate, zero-emission technology, equity, and environmental review**, including \$27 billion for a Greenhouse Gas Reduction Fund; \$3.2 billion for Neighborhood Access and Equity Grants; and \$2 billion for Low-Carbon Transportation Materials Grants.

The bill extends alternative fuel tax credits and establishes new clean vehicle tax credits.

Extends the Alternative Fuels Excise Tax Credit. Section 13201 extends the \$0.50 per gasoline gallon equivalent excise tax credits for alternative fuels from 2021 through 2024. Public transit agencies that fuel their vehicles with compressed natural gas (CNG), liquefied natural gas (LNG), or liquified hydrogen benefit from this tax credit. Transit agencies may file a claim for payment equal to the amount of the alternative fuel credit. The credit is first applied to the applicable excise tax liability under section 26 U.S.C. § 4041 or 26 U.S.C § 4081, and any excess credit may be taken as a payment. The provision creates a special rule to address claims regarding excise tax credits and claims for payment for alternative fuel used during the period beginning January 1, 2022, through the date of enactment.

Extends the Biodiesel and Renewable Diesel Excise Tax Credit. This section also extends the \$1.00 per gallon excise tax credits for biodiesel and renewable diesel from 2022 through 2024. Transit agencies may file a claim for payment equal to the amount of the biodiesel or renewable diesel tax credit.

Extends and Substantially Restructures the Alternative Fuel Vehicle Refueling Property Credit. Section 13404 extends the alternative fuel vehicle refueling property credit from 2021 through 2032, and substantially restructures the credit. Refueling property is property for the storage or dispensing of clean-burning fuel or electricity into the vehicle fuel tank or battery. Clean-burning fuels include CNG, LNG, electricity, and hydrogen. The bill clarifies that

¹ P.L. 117-169, [Inflation Reduction Act of 2022](#).



bidirectional charging equipment is eligible property. Tax credits for refueling property used in a trade or business are part of the general business credit. Generally, in the case of refueling property sold to a tax-exempt entity, the taxpayer selling the property may claim the tax credit.

This section also substantially restructures the tax credit. Under current law, taxpayers may claim a 30 percent credit for an alternative fuel property up to \$30,000 per location. The bill provides a base credit of six percent up to \$100,000 per project. In addition, it provides a bonus credit totaling 30 percent for expenses up to \$100,000 for each project if the taxpayer satisfies Davis-Bacon prevailing wage requirements during construction of the project. In addition, under the bill, the alternative fuel property is only eligible for the credit if the property is placed in service in a low-income community (under 26 U.S.C. § 45D(e)) or rural census tract.

Under the provision, the 2021 rules of the alternative fuel vehicle refueling property credit apply in 2022. In 2023 and subsequent years, the restructured tax credit will apply.

Establishes a new Commercial Clean Vehicle Tax Credit. Section 13403 creates a new tax credit for commercial clean vehicles (e.g., zero-emission buses). The amount of the credit with respect to a qualified commercial electric vehicle is equal to the lesser of 30 percent of the cost of the vehicle or the incremental cost of the vehicle. The limit of the credit is \$7,500 for a vehicle that weighs less than 14,000 pounds and \$40,000 for all other vehicles. Commercial clean vehicles include battery electric and fuel cell vehicles. This 10-year tax credit takes effect in 2023 and expires December 31, 2032. The section requires the Secretary of the Treasury to issue regulations or guidance as necessary to implement the provision. APTA is working to ensure that the provision enables tax-exempt entities to benefit from the credit by receiving a direct payment.

New Investments in Climate, Zero-Emission Technology, and Equity

Provides \$27 Billion for a new Greenhouse Gas Reduction Fund. Section 60103 provides \$27 billion to the Environmental Protection Agency (EPA) to establish a new Greenhouse Gas Reduction Fund. This Fund will provide capital for both a national and state “green banks” to provide financial support for zero-emission technologies and projects that reduce or avoid greenhouse gas emissions. The Fund provides \$20 billion for national green bank and \$7 billion to finance state and local green banks. Under the program, EPA will make competitive grants, loans, other financial assistance, and technical assistance available to states, municipalities, Indian tribes, and certain nonprofit organizations to enable communities, particularly low-income and disadvantaged communities, to reduce or avoid greenhouse gas emissions and deploy or benefit from zero-emission technologies. The provision requires EPA to implement the program no later than 180 days after the date of enactment of this section.

Provides \$1 Billion for Clean Heavy-Duty Vehicles. Section 60101 provides \$1 billion to EPA to carry out a new Clean Heavy-Duty Vehicles program. Under the program, EPA will make grants and rebates to states, municipalities, Indian tribes, and eligible contractors to replace Class 6 or Class 7 heavy-duty vehicles as defined in 40 CFR 1037.801 (i.e., vehicles with a gross vehicle weight between 19,501 pounds and 33,000 pounds) with zero-emission vehicles.

The grants may pay up to 100 percent of costs for:

- the incremental cost of replacing eligible vehicles with zero-emission vehicles;
- purchasing, installing, operating, and maintaining zero-emission infrastructure;
- workforce development and training for zero-emission vehicles; and
- planning and technical activities to support adoption and deployment of zero-emission vehicles.

The provision requires EPA to implement the program no later than 180 days after the date of enactment of this section.

Provides \$3.2 Billion for Neighborhood Access and Equity Grants. Section 60501 provides \$3.2 billion to the Federal Highway Administration (FHWA) to establish a new Neighborhood Access and Equity Grant program. The program provides competitive grants to states, local governments, Indian tribes, public authorities with a transportation function, and metropolitan planning organizations:

- to improve walkability, safety, and affordable transportation access through construction of projects that are context-sensitive;
- to mitigate or remediate negative impacts from surface transportation facilities that create an obstacle to connectivity within a community (e.g., grade separation) or are a source of pollution or other burden to disadvantaged or underserved communities; and
- for planning and capacity building in disadvantaged or underserved communities.

The program sets aside 40 percent (\$1.2 billion) of these funds for communities that are economically disadvantaged, underserved, or located in an area of persistent poverty. The federal share is 80 percent, except that the federal share of projects in disadvantaged or underserved communities may be up to 100 percent. These funds may not be used for projects that result in additional through travel lanes for single occupant passenger vehicles.

Provides \$2 Billion for Low-Carbon Transportation Materials Grants. Section 60506 provides \$2 billion to FHWA for a new Low-Carbon Transportation Materials Grants program. On Federal-aid highway projects, FHWA may reimburse or provide incentives to states, local governments, Indian tribes, public authorities, and metropolitan planning organizations for the use of construction materials and products that have substantially lower levels of embodied greenhouse gas emissions compared to estimated industry averages. FHWA may reimburse or provide incentives payments (2 percent) for the increased incremental cost of using low-carbon materials and provide a federal share of up to 100 percent.



These reimbursements or incentives may not be used for projects that result in additional through travel lanes for single occupant passenger vehicles.

New Investments in Environmental Review

Provides \$350 Million for Environmental Review Improvement Fund. Section 70007 provides \$350 million to the Federal Permitting Improvement Steering Council Environmental Review Improvement Fund to help the Council coordinate a more efficient and effective federal environmental review and permit authorization process for major infrastructure projects, including public transportation projects.

Provides \$100 Million for FHWA Development and Review of Environmental Review Documents. Section 60505 provides \$100 million to facilitate the development and review of documents for the environmental review process for proposed surface transportation projects and for administrative expenses of FHWA.



AMERICAN PUBLIC TRANSPORTATION ASSOCIATION
FACT SHEET
INFRASTRUCTURE INVESTMENT AND JOBS ACT
BUILD AMERICA, BUY AMERICA TITLE
October 1, 2022

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.¹ The IIJA’s Build America, Buy America (BABA) Title also encourages strengthening the Buy American Act regarding federal government procurement.² Under IIJA Buy America requirements, each federal agency must:

- within 60 days, submit to the Office of Management and Budget (OMB) a report that identifies each federal financial assistance program for infrastructure administered by the agency. The report must identify all domestic content procurement requirements applicable; assess the applicability of domestic content procurement preference requirements in current law; provide details on any applicable domestic content procurement preference requirements and any exceptions or waivers; and describe the types of infrastructure projects that receive funding under the program. In addition, the report must identify programs for which the domestic content procurement preference does not apply or is subject to a waiver.³
- within 180 days, “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.

¹ P.L. 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* (Jan. 25, 2021).

² On March 7, 2022, the Administration issued a final rule on new Buy American requirements. Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements, 87 Fed. Reg. 12780 (Mar. 7, 2022).

³ *See* OMB Memorandum M-22-08 (Dec. 20, 2021).

Please note that the IJIA 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.

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.

Before a federal agency may grant a waiver, it must make it publicly available and provide at least 15 days for public comment. Waivers issued after the date of enactment of this program will be reviewed every five years.⁴

The IJIA requires the Secretary of Transportation, before granting a waiver, to consult with the Director of the Hollings Manufacturing Extension Partnership regarding whether there is a domestic entity that can provide the material that is the subject of a waiver request.⁵

DOT Report on Infrastructure Programs Subject to BABA

On February 7, 2022, the Department of Transportation (DOT) published its report on [DOT's Identification of Federal Assistance Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act](#).⁶

⁴ Please note that existing product-specific general applicability waivers issued more than 180 days prior to the date of enactment of this program are not subject to the review or public comment period for five years.

⁵ In addition, the legislation requires the Secretary of Transportation to enter into a technical assistance partnership with the Secretary of Commerce to: ensure the development of a domestic supply base to support intermodal transportation in the United States (e.g., high-speed passenger rail and public transportation); ensure compliance with Buy America laws that apply to a project receiving assistance from a DOT modal program; encourage technologies developed with the support of and resources from the Secretary to be transitioned into commercial market and application; and establish procedures for consultation with the Hollings Manufacturing Extension Partnership.

⁶ 87 Fed. Reg. 6943 (Feb. 7, 2022).

In its report, DOT finds that none of its programs, including public transit and passenger rail programs, is currently fully consistent with BABA requirements.⁷ DOT states:

...the mode-specific Buy America(n) statutes applied by most DOT agencies cover iron, steel and manufactured products, in ways that are generally consistent (or that in some cases exceed) that standards found in the BABA. **However, none of those statutes specifically cover construction materials**, other than to the extent that such materials would already be considered iron, steel, or manufactured products.⁸ (emphasis added)

OMB Initial Implementation Guidance

The IIJA directs the OMB to issue guidance to assist in identifying deficient programs and applying new domestic content procurement standards, and to define the term “all manufacturing processes” in the case of construction materials (except for the exempt materials listed above).

On April 18, 2022, OMB issued a Memorandum providing Initial Implementation Guidance on applying Buy America preferences for infrastructure (“OMB Initial Implementation Guidance”).⁹ The OMB Initial Implementation Guidance states that agencies must ensure that all applicable programs include Buy America requirements in each award for an infrastructure project.¹⁰ It also outlines the process for issuing Buy America waivers.¹¹

On April 21, OMB issued a Notice of Listening Sessions and Request for Information (RFI) seeking public comment on BABA implementation. The RFI contains specific questions regarding construction materials.¹² OMB subsequently extended the comment period to June 6, 2022.¹³

On June 6, [APTA filed comments](#) to OMB’s Buy America RFI seeking input on construction materials produced in the U.S.

DOT Temporary Waiver of Buy America Requirements for Construction Materials

On April 28, 2022, DOT published a notice seeking comment on whether it should use its authority, in accordance with § 70914(b)(1) of BABA, to provide a temporary waiver of the Buy America requirement for construction materials on DOT-assisted infrastructure projects, on the

⁷ *Id.* at 19.

⁸ *Id.* at 21.

⁹ OMB, Memorandum-22-11, [Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#) (April 18, 2022).

¹⁰ *Id.* at 2.

¹¹ *Id.* at 6-13.

¹² OMB, [Notice of Listening Sessions and Request for Information](#), 87 Fed. Reg. 23888 (April 21, 2022).

¹³ OMB, [Construction Materials Used in Federal Financial Assistance Projects for Infrastructure and End Products Manufactured in the United States under the Build America, Buy America Act; Request for Information](#), 87 Fed. Reg. 32063 (May 26, 2022).

basis that applying the domestic content preference for these materials would be inconsistent with the public interest.

On May 13, [APTA filed comments](#) strongly supporting DOT's proposed temporary waiver of the Buy America requirements for construction materials. The request for a waiver acknowledges that the requirement will take time to implement in an already constrained supply chain that threatens to implode if further uncertainty is injected into the contracting process. APTA also recommends that neither the Federal Transit Administration (FTA) nor the Federal Railroad Administration (FRA) make any changes to the rigorous rolling stock and final assembly requirements under current law and regulation. In addition, options in rolling stock contracts should be subject to the same Buy America requirements as the base contract.

On May 19, DOT issued a [Temporary Waiver of Buy America Requirements for Construction Materials](#) for a period of 180 days beginning on May 14, 2022, and expiring on November 10, 2022.¹⁴ DOT is establishing this transitional waiver to prepare for compliance with the new Buy America standards for construction materials. During this time, DOT expects states, industry, and other partners to begin developing procedures to document compliance.¹⁵

On June 21, APTA, together with Coalition partners, sent a [letter](#) to Mitch Landrieu, Senior Advisor to the President for Infrastructure Coordination, to request an extension of the 180-day temporary BABA waiver for construction materials. The letter states that before BABA requirements for construction material take effect, it is critical for DOT to conduct a thorough analysis of domestic manufacturing capabilities, provide sufficient opportunity for public comment on draft rules, and provide adequate time for public and private entities to adjust and comply with final rules. Rushing through this process could further drive inflation, result in significant delays to projects, and further constrain the supply chain.

DOT Request for Information on Construction Materials

On July 28, 2022, DOT published a notice requesting information on construction materials used in federal financial assistance projects for transportation infrastructure in the U.S. under BABA.¹⁶ On August 18, [APTA filed comments](#) to DOT's RFI on the construction materials requirement under BABA. APTA urged DOT to consider applying the Buy America requirement to construction materials that DOT has found to have sufficient domestic supply and require it only after OMB has issued its final guidance. APTA also urged the Federal government to take the lead in creating a list or database of domestically produced construction materials and certify that those listed are Buy America and BABA compliant.

¹⁴ 87 Fed. Reg. 31931 (May 25, 2022).

¹⁵The waiver is applicable to awards that are obligated on or after May 14, 2022, and before November 10, 2022. Unless extended, the waiver expires on November 10, 2022.

¹⁶ DOT, [Construction Materials Used in Federal Assistance Projects for Transportation Infrastructure in the United States Under the Build America, Buy America: Request for Information](#), 87 Fed. Reg. 45396 (July 28, 2022).

DOT Notice of Proposed Waiver for Electric Vehicle Chargers

On August 31, 2022, the Federal Highway Administration (FHWA) published a notice¹⁷ seeking comments on a proposal under its Buy America waiver authorities¹⁸ to: modify its existing general applicability waiver for manufactured products to remove electric vehicles (EV) chargers; and waive certain Buy America requirements under FHWA regulations and BABA for the steel, iron, manufactured products, and construction materials in EV chargers in a manner that, over a deliberate transitional period, reduces the scope of that waiver.

The proposed waiver would initially waive all Buy America requirements for EV chargers and all components of EV chargers and then phase-out the waiver in calendar years 2023 and 2024:

- Beginning on January 1, 2023, FHWA proposes to remove from the waiver EV chargers whose final assembly process does not occur in the U.S. FHWA also proposes to remove from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 25 percent of the cost of all components. Thus, in 2023, FHWA proposes the waiver would be applicable only if: (1) final assembly occurs in the U.S.; and (2) the cost of components manufactured in the U.S. exceeds 25 percent of the cost of all components.
- Beginning on January 1, 2024, and thereafter, FHWA proposes to remove from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components. Thus, in 2024, and thereafter, FHWA proposes the waiver would be applicable only if: (1) final assembly occurs in the U.S.; and (2) the cost of components manufactured in the U.S. exceeds 55 percent of the cost of all components.¹⁹

On September 30, APTA, together with Coalition partners, sent a [letter](#) to FHWA in support of the proposed waiver of Buy America requirements for EV chargers. The letter states that the waiver will help provide adequate time for a proper ramp-up in domestic capacity for the long-term deployment of the EV charging network. The timeline provided in the notice allows U.S. companies to both fully utilize the first-to-market advantage while shifting manufacturing capacity to the U.S., creating good jobs domestically without stunting the growth of the industry by waiting for manufacturing capacity to grow before they can fully scale construction and deployment.

¹⁷ FHWA, [Notice of Proposed Waiver of Buy America Requirements for Electric Vehicle Chargers](#), 87 Fed. Reg. 53539 (August 31, 2022).

¹⁸ 23 U.S.C. § 313(b)(1) and [23 CFR 635.410\(c\)](#).

¹⁹ In accordance with Section 70914(d)(1) of BABA, FHWA would commence a review of the waiver not less than five years after the date on which the waiver is issued.

Recent Congressional Oversight on State-Owned Enterprise Compliance with Buy America

On September 21, 2022, House Committee on Transportation and Infrastructure (T&I Committee) Republicans Leaders sent a letter to the DOT Inspector General (IG) urging the IG to initiate a review into the Southeastern Pennsylvania Transportation Authority's (SEPTA) compliance with FTA Buy America requirements regarding a railcar procurement contract.²⁰ In 2017, SEPTA awarded a contract to the China Railway Rolling Stock MA Corporation (CRRC MA), a subsidiary of CRRC Corporation Limited. In the letter, Republican Leaders express concern about whether CRRC MA has met Buy America requirements over the course of the contract to date and whether CRRC MA will be able to meet these requirements as the contract progresses.

On September 28, T&I Committee Chair Peter A DeFazio sent a letter to FTA requesting enhanced oversight of rolling stock procurements manufactured by State-Owned Enterprises (SOEs). He also urged FTA to help transit agencies improve their own oversight, more thoroughly track Buy America compliance, and verify whether the benefits of these rules are being realized under these procurements.²¹ In addition, Chair DeFazio urged FTA to undertake enhanced Buy America compliance reviews for all such procurements from SOEs and thorough use of its enforcement and oversight authority to verify SOEs compliance with Buy America.

²⁰ House Committee Republicans on Transportation and Infrastructure, [letter to the DOT IG on SEPTA compliance of the Buy America requirements](#) (September 21, 2022).

²¹ House Committee on Transportation and Infrastructure, Chairman Peter A. DeFazio, [letter to the DOT Administrator on SOE-manufactured rolling stock compliance of Buy America requirements](#). (September 28, 2022).

October __, 2022

Docket Operations
U.S. Department of Transportation
1200 New Jersey Avenue, SE
West Building, Ground Floor
Room W12-140
Washington, DC 20590-0001

Re: DOT-OST-2022-0051

Dear Docket Clerk:

The American Public Transportation Association (APTA) represents an \$80 billion industry that directly employs 450,000 people and supports millions of private-sector jobs. We are pleased to offer comments regarding the Department of Transportation's (DOT) Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications published in the *Federal Register* at 87 FR 43620 on July 21, 2022.

The DOT's Disadvantaged Business Enterprise (DBE) program was established through a series of legislative and regulatory initiatives to remedy past and current discrimination against minority and women-owned business to ensure that they are provided equal opportunity to compete for DOT-assisted highway, transit and airport contracts. APTA and its members are strong supporters of the DBE program, and are diligent in administering the program to promote DBE participation in Federal Transit Administration (FTA)-funded projects.

Over the past year, the public transportation industry has received historic funding levels, including \$70 billion in COVID relief and more than \$200 billion of federal infrastructure funds coming our way over the next five years. Our industry will be defined by the opportunities that we provide for minority and disadvantaged businesses to share in this historic funding. APTA members stand ready, willing and able to assist in this effort.

While certain revisions to the DBE program have long been sought, such as some of the proposed certification changes, other aspects of the DBE proposal appear to either complicate or substantially increase the burden on recipients and businesses who are seeking to comply with the DBE rules. APTA is concerned that the proposal focuses more on compliance as opposed to building a capacity-enhancing collaborative program designed to ensure the accessibility and success of DBE businesses competing for transit-related projects.

APTA surveyed its members and submits the following comments below.

I. DBE Administrative Requirements

a. Definitions

In § 26.5, DOT proposes to change the definition of DBE to mean a for profit small business concern engaged in “transportation-related industries.”¹ APTA is concerned the term “transportation-related industries” is not defined in the proposal, and could lead to differing interpretations among DBE certifiers. APTA suggests DOT include either a definition of “transportation-related industries” or guidance on how to evaluate whether a business is in a “transportation-related industry.”

b. Threshold Program Requirements (§ 26.21)

In § 26.21, DOT proposes to increase the prime contracts threshold from \$250,000 to \$670,000, below which FTA recipients would be required only to have a local DBE program, meeting certain requirements of 49 C.F.R. Part 26.² APTA supports increasing the prime contract threshold as it will help reduce the burden on FTA recipients awarding contracts with a low dollar value.

c. Unified Certification Program (UCP) Directories (§ 26.31)

APTA supports DOTs proposal to direct UCPs to expand their directories of DBE firms, allowing them to display other essential information about DBEs that attests to the firms’ ability, availability, and capacity to perform work.³ DOT proposes to require UCPs to amend their directories so that firms would have a “standard set of options for information they can choose to make public, such as a capability statement, state licenses held, pre-qualifications, personnel and firm qualifications, bonding coverage, recently completed project(s), equipment capability, and a link to the firm’s website.”⁴ Under the proposed rule, UCPs would be required to incorporate

¹ DOT, Disadvantaged Business Enterprise and Airport Concession Disadvantaged Business Enterprise Program Implementation Modifications (DBE NPRM), 87 Fed. Reg. 43620, 43669 (July 21, 2022).

² *Id.* at 43670.

³ *Id.* at 43627.

⁴ *Id.* at 43670-43671.

these information fields as additional criteria by which the public can search and filter the UCP directory. APTA agrees that creating additional categories in UCP directories would be very helpful and allow prime contractors to conducted targeted and meaningful outreach to DBE firms.

In addition, APTA encourages DOT to require UCP DBE directories to be uniform in format as well as searchable. APTA members note that the ease of searching and downloading data differs by state. Each directory should have the ability to download data into a universal format (e.g., Excel) to allow both prime and general contractors to easily search for available DBEs. Some APTA members advise that California, New York, New Jersey and Pennsylvania are good models of organized, searchable and accessible UCP DBE directories. Uniform, easily accessed and downloadable DBE lists would assist in pairing contractors with available DBEs for infrastructure projects.

d. Monitoring, Reporting, and Prompt Payment Requirements

i. Monitoring and Reporting Requirements (§§ 26.11, 26.37)

Overall, DOT's DBE NPRM make several changes to both the reporting and monitoring requirements for FTA grant recipients, increasing the already heavy paperwork burden that recipients, vendors and DBEs currently experience participating in the program. APTA cautions that any additional administrative burden placed on DBE program requirements could result in fewer DBE businesses participating, resulting in less bids, less competition, and longer lead times for new capital projects.

In § 26.11, DOT proposes to require recipients to collect additional information such as names of DBE contractors that performed work and the work categories/trades performed, dollar value of contracts, number of firms that were listed at commitment but replaced (as well as an explanation for the replacement), and number of firms decertified during the reporting period for the Uniform Report.⁵ Gathering and consolidating the additional information will require more manpower hours and may require more funding for recipients to generate automated data into one report. Currently, there is no standard software or database that is used to comply with the DBE administrative requirements so recipients will be required to contract or develop software to collect and organize this data at substantial additional cost.

Moreover, in § 26.11(c), DOT proposes to require recipients to obtain "bidders list" information and submit it to a centralized database designated by the Department.⁶ While APTA agrees with the concept of a centralized database to capture this information, more research and information will be needed to understand the nature of the database that will be used to input and capture this data.

⁵ *Id.* at 43624, 43669-43670.

⁶ *Id.*

APTA also suggests that DOT create a standard form for “bidders list” data for recipients to use in collecting and uploading the information to its database, which would ensure that it receives the data it wants and make it easier for recipients to gather.

Last, APTA notes that much of DOT’s proposed changes will require additional data collection necessitating investment in software and systems to capture and report the data to the intended operating administrations and/or the public. APTA suggests that, in addition to creating a centralized “bidders list” database, the DOT consider creating a centralized database for other reporting requirements for all recipients, vendors, and subcontractors to use to administer the DBE program. Creation of such a centralized system would go a long way towards supporting the overall goals of the DBE program – that is, advancing equity and expanding access to federal contracting opportunities. In the alternative, DOT should make available grant monies to allow for the purchase and implementation of standardized software to collect and organize data to comply with these various administrative requirements.

ii. Prompt Payment Requirements (§ 26.29)

APTA members strongly support helping DBEs build the financial capacity to participate in FTA-assisted contracts. DOT notes in the preamble that “prompt payment” is a serious concern among DBE businesses and late payments can act as a barrier to DBEs successfully competing for contracts⁷. DOT proposes to require recipients to have “proactive monitoring and oversight” of a prime contractor’s compliance with subcontractor prompt payment (as well as lower-tier subcontractors) and return of retainage by the recipient. In addition, DOT specifically excludes reliance on complaints or notifications from subcontractors as to late payments as an insufficient method of oversight.⁸ While APTA agrees that tracking systems to address the flow of when payments are being made are an important component to address this issue, it is challenging to implement given the multiple projects, contractors, and subcontractors that each recipient would be required to oversee.

APTA suggests DOT consider the total payment ecosystem from the DBE business invoice, to the prime contractor, to the recipient or state DOT all of whom have a hand in ensuring invoices are submitted and are paid in an expeditious fashion. APTA members believe that prompt payments are a necessary and shared responsibility among all of the parties involved in this ecosystem, and the rules should reflect that relationship.

Moreover, APTA members are concerned that, especially for smaller recipients, the creation of new payment tracking systems will be a significant cost burden. While larger transit agencies might have access to commercial software to track payments, smaller transit agencies may not be able to afford software or other technologies to assume this close monitoring. This is especially true where a smaller agency may not be required each year to participate in the full DBE program, due to being below the new threshold.

⁷ *Id.* at 43628.

⁸ *Id.*

APTA suggests that DOT make available grant monies to allow for the purchase and implementation of software, and provide guidance on the methods to ensure prompt and expeditious payment that takes into consideration all of the participants in the payment ecosystem.

II. DBE Participation Counting Toward Goals

DOT's DBE NPRM makes sweeping changes to how materials and supplies are counted toward a recipient's DBE goals.

a. Overall Limitation on DBE Supplier Credit (§ 26.55(e)(6))

APTA members are concerned about the proposal to limit the total allowable credit for a prime contractor's expenditures with DBE suppliers (manufacturers, regular dealers, distributors, and transaction facilitators) to no more than 50 percent of the contract goal. The proposal includes an exception to the cap for material-intensive projects granted on a contract-by-contract basis.⁹ The proposed 50 percent overall limitation on supplier credit is arbitrary and does not take into consideration the unique characteristics of each project, the needs associated with each contract, and the availability of DBEs to meet those unique needs. **[APTA recommends that DOT remove this overall 50 percent limitation on DBE supplier contracts.]**

In its Regulatory Impact Analysis (RIA), DOT notes that capping the supplier credit may have a distributional effect of taking work away from DBE suppliers in favor of DBEs who perform other tasks.¹⁰ APTA members are concerned that the more complicated the schedule and counting of supplier credits, the less likely that DBE suppliers will be used to fulfill DBE contract goals. This would disadvantage those DBE businesses that have made substantial investments in supplies and equipment to compete for infrastructure contracts.

If DOT opts to keep this overall limit, it must provide more detail as to the parameters required for the DOT Operating Administration(s) (e.g., FTA) to approve exceptions. The proposed rule notes only that exceptions may be granted on "material intensive" contracts, with no other information provided. APTA also suggests that a lack of DBEs to perform specialized subcontract work (e.g., signal work) on a particular contract also be included as a parameter to waive the 50 percent limit on material supplier credit.

b. Supplier Credit Calculations (§ 26.55 (e)(1)-(5))

At the outset, APTA members are concerned that DOT's changes in supplier credits will make it harder for recipients to keep track of suppliers and accurately count the value toward the contract goal. In addition to limiting the overall supplier credit to no more than 50 percent of the contract goal, DOT also proposes to further limit the supplier credit depending upon the type of supplier on a

⁹ *Id.* at 43674.

¹⁰ DOT, Regulatory Impact Analysis to accompany DBE NPRM (May 20, 2022), at 22.

per contract basis (i.e., 100 percent for a manufacturer, 60 percent for a non-manufacturer supplier, 40 percent for distributors, and fees and commissions for transaction facilitators).¹¹

APTA is concerned that the new counting rules are confusing, could lead to inconsistent application by transit agencies, and impact the ability to meet contract goals. **[Do we have any suggestions?]** In addition, while some of the larger transit agencies likely have access to commercial software to assign values to DBE manufacturers and suppliers, smaller transit agencies may not be able to afford software or other technologies to accurately track these percentages and allocate them correctly. This is especially true where a smaller agency may not be required each year to participate in the full DBE program. DOT should also make it clear how recipients should differentiate between supplier versus broker when assigning credit.

APTA suggests that state DBE certificates and UCP directories list the counting values that are assigned to each DBE that is certified, as DBEs perform at multiple levels and at differing assigned values. A business can be both a manufacturer and a distributor depending upon the contract that it is performing. Having the counting value listed per function on the DBE certificate would help ensure that prime contractors are reporting the accurate counting values depending on the job that the DBE is actually performing under the contract.

c. Regular Dealer (§ 26.55 (e)(2))

DOT proposes to require recipients to establish a system to determine, prior to award, that DBE suppliers meet the fundamental characteristics of a regular dealer¹² In addition, a recipient would be required to ensure that each DBE supplier is eligible for 60 percent credit based on its demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer. Moreover, the proposal requires recipients to establish pre-award procedures to determine whether a DBE supplier submitted by the contractor/bidder as a regular dealer has demonstrated the ability and intent to perform as a regular dealer during the contract.¹³

APTA members suggest that any determination of whether a DBE is a regular dealer should come from, and be the responsibility of, UCPs, not individual recipients. Many public transit agencies lack the staff and resources to track every DBE to determine whether or not it is a regular dealer. Uniformity is needed to collect the information and ensure it is available to recipients prior to a contract award. As noted above, APTA supports DOT's proposal in §§ 26.31 and 26.81 to expand the information allowed to be entered into the UCP directories and encourages DOT to allow DBEs to include enough information into the business description to make it easily identifiable as to whether or not a business is a "regular dealer." This would reduce the need for duplicative reviews from transit agency recipients.

¹¹ *Id.* at 43673.

¹² In the preamble, the DOT describes this determination as one in which the DBE is "regularly engaged in the purchase or sale of items, or those of the general character called for in the contract." NPRM at 43632.

¹³ *Id.* at 43673.

d. Transit Vehicle Manufacturers (§ 26.49)

APTA appreciates the clarifications to § 26.5 for the definitions of transit vehicle, transit vehicle dealership and transit vehicle manufacturer. In addition, APTA supports changing the reference term “certified TVMs” to “eligible TVMs” in § 26.49(a)(1), as it much more accurately reflects the fact that no formal certification of a TVM is needed from FTA for the TVM to bid on a contract.¹⁴

DOT correctly notes in the preamble that the current “Uniform Report of DBE Awards/ Commitments and Payments” causes confusion and inconsistent reporting at the TVM level.¹⁵ APTA is supportive of the changes to § 26.49(c) to clarify that an eligible TVM must fulfill the relevant reporting requirements only for the years in which they are eligible. In addition, APTA suggests that for TVMs, the term “Awards/Commitments” in Section A of the Uniform Report, should only encompass those TVM-issued subcontracts/purchase orders to suppliers for work performed inside the United States and its territories, possessions, and commonwealths. This change would be consistent with the language in § 26.49(b) that excludes, for purposes of calculating TVM DBE goals, funds attributable to work performed outside the United States.

Last, APTA suggests TVMs should be required to submit their DBE goals in the same three-year interval as recipients. Many TVMs are small business cutaway builders that have very limited staff and whose job responsibilities are often split between DBE Liaison Officer and other company functions. This would greatly decrease the paperwork burden on these small TVMs and put them on the same reporting cycle as FTA recipients.

III. Good Faith Efforts Procedures for Contract Goals (§ 26.53)

APTA supports the proposed changes to § 26.53, which would require prime contractors responding to a Request for Proposal on a design-build procurement to submit an open-ended DBE Performance Plan (DPP) with the proposal.¹⁶ APTA believes this change will allow for enhanced opportunities for DBE participation, but suggests DOT encourage prime contractors to give commitments on those DBEs that they know they will use to perform the work up front and then the rest as the contract moves forward. Moreover, DOT should harmonize the DPP flexibilities it proposes with the semi-annual reports that recipients are required to submit so they do not result in shortfalls of the DBE goals.

The proposal also requires recipients to monitor the prime contractor’s adherence to the DPP and to evaluate good faith efforts throughout life of project. APTA members note that some agencies may not have the capacity to stand up tracking systems to monitor DPP plans. APTA suggests DOT

¹⁴ *Id.* at 43669, 43671-43672.

¹⁵ *Id.* at 43630.

¹⁶ *Id.* at 43672.

spearhead a program to develop easy to use tracking software or to otherwise implement grant programs to assist agencies in purchasing software to monitor these DPP programs.

APTA members also suggest DOT clarify how change orders and the accompanying DBE goals during the life of a project should be handled, including those that would be administered under the new DPP proposal. Most transit capital projects are multi-year, multi-staged efforts and are extremely complex. Once a contract is out for bid, teams are formed, and DBE goals are set. Oftentimes, change orders are required that may be significant in cost and may impact the DBE goals and thus the responsibilities associated with fulfilling those goals as a project is underway. More guidance and clarity are needed to address these realities.

IV. DBE Certification Proposals

a. Personal Net Worth (§ 26.68)

APTA applauds DOT's proposal to focus on increasing the Personal Net Worth (PNW) standard, which has remained unchanged since 2011. However, APTA believes the proposal to increase the PNW standard to \$1.6 million does not go far enough.

APTA is a proud member of the Equity in Infrastructure Project (EIP), whose goal is to create more opportunities for Historically Underutilized Businesses (HUBs) to build generational wealth and reduce the racial wealth gap by creating more prime, joint venture and equity contracting opportunities for these firms.¹⁷ EIP identified DOT's PNW certification requirement as needing change to help advance minority contracting opportunities, and has called for an increase from \$1.3 million to "at least \$2.6 million, but ideally \$5 million."¹⁸ APTA wholeheartedly supports such an increase to the PNW. Significantly increasing the PNW cap would ensure that cost of living and inflationary factors, which vary regionally, are taken into account and do not act as a barrier to potential DBEs entering the program.¹⁹ **[Additional data to support increased number?]**

In addition, many of our members believe that DOT should explore establishing regional PNW caps that would take into account cost of living and other regional factors. Many state and local Minority and Women Business Enterprise (M/WBE) programs rely on such an approach to setting the PNW standards for their programs. For example, the State of New York's PNW cap is \$15 million, the city of Chicago's PNW is \$2.5 million, and the State of Maryland's is \$1.8 million for 2022. Both Chicago and Maryland adjust their PNW caps annually based on the Consumer Price Index (CPI). A regional approach to setting the PNW would improve the business climate for DBEs including easier access to capital, bonding, and contracting opportunities. **[How does this work for**

¹⁷ See Equity In Infrastructure Project (EIP), [Home | The Equity in Infrastructure Project](#).

¹⁸ John Porcari, Co-Founder, EIP presentation, *APTA Kaleidoscope: Equity in Infrastructure Project: Taking Action Now* (August 24, 2022).

¹⁹ For example, one APTA member calculated that to keep up with inflation and cost of living factors in the northeast, a PNW of at least \$3 million would be needed.

Interstate Certification? Are we adding additional burden on transit agencies to certify and administer a regional approach?]

APTA strongly supports DOT's proposal to exclude retirement assets from the PNW calculation.²⁰ In addition, we are pleased that DOT continues to support the existing exclusion of the owner's equity in their primary residence (now without reference to state marital laws or community property rules) and interest in the applicant or certified firm.

In addition, APTA strongly recommends that DOT exclude household contents from the PNW calculation. DOT proposes that household contents be valued as "at least the total amount for which they are insured taking into account all policies, riders, amendments, and endorsements".²¹ However, this calculation does not take into account the depreciation of household contents over time or the fact that there is regional disparity in the way that insurance policies value household contents. Many insurance policies value household contents as a percentage of the house value. Depending upon where you live and your insurance policy, the value of a DBE applicant's house could drive up the value of the household contents for purposes of the PNW calculation. Adopting this approach is tantamount to including a DBE's equity in their primary residence, and could also negate the benefit of excluding retirement accounts from the calculation of the PNW.

If adopted, the proposal to include household contents based on insurance value could increase barriers to individuals to participating in the DBE program, and would increase the burden on certifiers tasked with administering these provisions. Accordingly, APTA strongly recommends excluding the value of household contents as a part of the PNW calculation.

b. Social and Economic Disadvantage (§ 26.67)

APTA appreciates the reorganization of §§ 26.5, 26.63, and 26.67 for clarity.

APTA supports DOT's replacement of the phrase "a long period of time" with a definitive time period of five years for determining the length of time an individual has held themselves out to be a member of a socially disadvantaged group in § 26.63(b)(1).

In § 26.67(c), evidence and rebuttal of social disadvantage, DOT proposes to replace the "Ability to Accumulate Substantial Wealth" standard and its six concomitant factors, with a "Reasonable Person" approach. Although DOT proposes some indicators to guide this "Reasonable Person" determination (e.g., ready access to wealth, lavish lifestyle, income or assets of a type or magnitude inconsistent with economic disadvantage, and disregard liabilities entirely), APTA members are

²⁰ *Id.* 43640, 43677.

²¹ *Id.* at 43676.

concerned this approach would be very subjective and it is unclear who would be responsible for making such determinations. Without identifying an objective standard of evaluation, adoption of this approach could result in a patchwork of inconsistent determinations depending on the State.

In addition, APTA members question the wholesale removal of Appendix E requirements for the Individualized Determinations of social and economic disadvantage (SED) status,²² fearing that it will result in an uneven application of the standards across the United States, culminating in a dilution of the DBE program with individuals who should not be eligible. Moreover, an inconsistent application of this determination could impact the certification of individuals in other states, further diluting the program. APTA suggests DOT review Appendix E and seek ways to revise it without dismissing it entirely from the certifier's tools of evaluation.

c. Ownership (§ 26.69)

APTA appreciates the simplification and reorganization of the "ownership" standards relating to business operations for the DBE program in new § 26.69(b).

However, APTA is concerned about DOT's proposal in § 26.69(b) to replace the concept of "real, substantial, and continuing" (RS&C) capital contributions and ownership with the requirement that transactions affecting ownership make "Reasonable Economic Sense" (RES). Much like the SED determination above, removing the RS&C for RES is fraught with potential inconsistencies, which could lead to haphazard application across the U.S.

d. Control (§ 26.71)

The proposed rule includes significant revisions to § 26.71 including that a company must have operations in the type of business it seeks to perform; the SEDO must be the "ultimate decision maker"; and the SEDO must "have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature."²³ DOT notes in the preamble that the proper inquiry into control is whether the "SEDO controls the firm through managerial oversight, revocable delegation of authority and critical and independent decision-making."²⁴ APTA supports the proposed changes in § 26.71 to demonstrate the elements of control for purposes of certification.

²² *Id.* at 43642.

²³ *Id.* at 43678.

²⁴ *Id.* at 43643.

V. Interstate Certification (§ 26.85)

APTA strongly supports DOT's proposal to streamline the interstate certification process by requiring reciprocity among states, reducing the required materials to be submitted for an interstate certification application, and by limiting the review to 10 business days by a state for which interstate certification is sought.²⁵ These long-overdue changes to ensure expedited processes for verifying and granting certifications will go a long way towards easing the burden for those DBEs that want to certify in more than one state. In addition, APTA agrees with the proposal to make permanent the virtual on-site visit flexibilities that were extended during the COVID-19 pandemic as it relates to certification proceedings.

VI. Annual Certification Requirements

Proposed § 26.85 (g)(3)(i) would require that a DBE submit an annual Declaration of Eligibility with documents of gross receipts to confirm small business size to the UCP of each state in which it is certified.²⁶ Requiring DBEs to certify annually to each state it is certified is a huge burden to both the DBE and the certifier, who must review each renewal. DOT suggests that a centralized database might be used to make the process more efficient.²⁷ APTA agrees with this concept.

APTA also requests that once a DBE is certified, resubmittal of the DOE take place every three years. Our members responsible for certifying report that many DBEs have gross sales well under the DOT's three-year gross sales threshold, and are also not likely to exceed the PNW threshold in any given year. For those DBEs in particular, submitting paperwork annually is unduly burdensome, especially where their circumstances are not likely to change over the year.

VII. Decertification Proceedings (§ 26.85)

DOT proposes in § 26.85(g)(4) to allow any UCP to take part in a decertification proceeding initiated by another state.²⁸ Moreover, proposed § 26.85(g)(4)(ii) states that after a UCP joins another state's decertification proceedings, then the decision applies to all states that are a party to the action. Under proposed § 26.85(g)(6), DOT states that if it upholds a UCP's decertification of a firm, then the firm is automatically decertified *in all states in which it is certified*. (emphasis added)²⁹ APTA strongly disagrees with this approach and requests that DOT revise § 26.85(g)(6) to ensure that any final decertification apply only to those states that are a party to the original

²⁵ *Id.* at 43680.

²⁶ *Id.*

²⁷ *Id.* at 43648.

²⁸ *Id.* at 43680, 43681.

²⁹ *Id.*

decertification action. Such a change would make it consistent with the proposed changes in § 26.85(g)(4)(ii).

VIII. Graduating DBEs from the Federal Program

To ensure that artificial barriers do not hamper the growth and success of the DBE program, DOT should consider creating a gradual phase out from the program for those DBE businesses that exceed either the PNW cap or business size, or both. For example, the City of Chicago has a graduation program for firms for which annual average gross receipts have surpassed the City's limits. Those firms continue to remain eligible to receive MBE or WBE credit at reduced levels for up to three years beyond the point at which the firms have become established businesses. Under that program, the firms receive 75 percent credit for participation in new city contracts in the first year, 50 percent credit in the second year, and then 25 percent credit during the third year if starting a new contract.³⁰

A program that allows for a gradual shift from the DBE program, as opposed to abruptly being dropped once certain thresholds are met, would serve to support DBE businesses to succeed outside of the program, which is the ultimate goal of the program.

APTA appreciates the opportunity to comment on this NPRM. As noted above, many of the changes to the DBE program have long been sought, and APTA urges DOT to make completing this rulemaking a top priority.

If there are any questions regarding this letter, please contact APTA's General Counsel, Linda Ford at lford@apta.com.

Sincerely yours,

Paul P. Skoutelas
President and CEO

³⁰ See City of Chicago, MBE/WBE GRADUATION PHASE-OUT PROGRAM (July 1, 2013), accessed at [MBEWBEGraduationPhaseOutProgram.pdf \(chicago.gov\)](https://www.chicago.gov/mbewbe/graduation-phase-out-program)