

BEFORE THE  
FEDERAL TRANSIT ADMINISTRATION

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DOCKET NO. FTA—2023—0007:  
PUBLIC TRANSPORTATION AGENCY SAFETY PLANS

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PETITION FOR RECONSIDERATION OF FINAL RULE  
SUBMITTED BY THE  
THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

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May 13, 2024

Pursuant to 49 C.F.R. § 601.34, the American Public Transportation Association (APTA),<sup>1</sup> on behalf of its public transit agency members, submits this petition for reconsideration of the Federal Transit Administration's (FTA) final rule, Public Transportation Agency Safety Plans, published in the *Federal Register* at 89 FR 25694 on April 11, 2024.<sup>2</sup> Petitioner seeks reconsideration of FTA's final rule provisions regarding: (1) the prohibition in 49 C.F.R. § 673.19(c)(8) preventing the Accountable Executive of a transit agency from serving in a tiebreaking role as part of Safety Committee dispute resolution procedures under any circumstance; and (2) the removal of an Accountable Executive's decision-making authority regarding safety risk mitigations in the safety risk reduction program in 49 C.F.R. § 673.23 (d)(1). In addition, FTA failed to adequately account for the additional cost burdens on transit agencies to implement these new Public Transportation Agency Safety Plan requirements. Last, APTA requests that FTA reconsider the implementation timeframe for the final rule's provisions and extend it by one year to May 13, 2025.

APTA believes FTA's final action regarding these provisions and compliance with the final rule is not practicable, is unreasonable, and is not in the public interest.

**Procedural Background**

In 2012, Congress directed FTA to establish a comprehensive Public Transportation Safety Program, one element of which is the requirement for a Public Transportation Agency Safety Plan (PTASP), in the Moving Ahead for Progress in the 21st Century Act (Pub. L. 112-141; July 6, 2012), which was reauthorized by the Fixing America's Surface Transportation Act (Pub. L.

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<sup>1</sup> APTA is a nonprofit international trade association of more than 1,500 public- and private-sector member organizations, including public transit systems; high-speed and intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation.

<sup>2</sup> FTA, Public Transportation Safety Plans Final Rule, 89 Fed. Reg. 25694 (April 11, 2024) (PTASP Final Rule).

114-94; December 4, 2015).<sup>3</sup> To implement the requirements of 49 U.S.C. 5329(d), FTA issued a final rule on July 19, 2018, which added part 673, “Public Transportation Agency Safety Plans”, to title 49 of the Code of Federal Regulations.<sup>4</sup> In 2021, Congress passed the Infrastructure Investment and Jobs Act, also known as the Bipartisan Infrastructure Law (BIL) (Pub. L. 117-58). The BIL continues the Public Transportation Safety Program and adds to the PTASP requirements for public transportation systems that receive Federal financial assistance under 49 U.S.C. Chapter 53. Specifically, the BIL requires public transit agencies that serve large, urbanized areas to form a Safety Committee consisting of an equal number of management and front-line transit workers who are tasked with approving an Agency Safety Plan.<sup>5</sup>

In 2022, shortly after enactment of the BIL, FTA issued a Dear Colleague Letter informing transit agencies of the statutory changes to PTASP requirements and set compliance dates for transit agencies to establish joint labor-management Safety Committees and revise Agency Safety Plans (ASP) in cooperation with frontline employee representatives.<sup>6</sup>

To implement BIL requirements regarding Safety Committees and other provisions related to assaults on transit workers and vehicular and pedestrian accidents involving buses, FTA published an April 26, 2023 Notice of Proposed Rulemaking (NPRM) for Public Transportation Agency Safety Plans seeking comment on proposed new PTASP Safety Committee and other requirements, with comments due on June 26, 2023.<sup>7</sup> APTA submitted comments on the FTA’s PTASP NPRM on June 26, 2023.<sup>8</sup>

## **Statement of the Complaint**

- I. FTA Violated Its Notice Obligations Because Some of the Final Rule Provisions are not Logical Outgrowths of the Proposed Rule**
  - a. The § 673.19(c)(8) prohibition of an Accountable Executive being designated to resolve disputes within a Safety Committee is unsupported by the statute and runs counter to FTA’s proposed language on Safety Committee procedures.**

The Administrative Procedure Act (APA), 5 U.S.C. § 553(b), requires a “[g]eneral notice of proposed rulemaking shall be published in the Federal Register.... The notice shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”

Furthermore, on March 19, 2024, the Department of Transportation published a “Logical

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<sup>3</sup> MAP-21 codified this new requirement in 49 U.S.C. § 5329(d).

<sup>4</sup> See FTA, Public Transportation Agency Safety Plans, 83 Fed. Reg. 34418 (2018).

<sup>5</sup> 49 U.S.C. § 5329(d)(5).

<sup>6</sup> See FTA, “[Dear Colleague Letter: Bipartisan Infrastructure Law Changes to PTASP Requirements](#)” (February 17, 2022).

<sup>7</sup> See FTA, Public Transportation Agency Safety Plans, Notice of Proposed Rulemaking, 88 FR 25336 (April 26, 2023) (PTASP NPRM).

<sup>8</sup> See APTA Comments on FTA PTASP NPRM (June 26, 2023) (APTA PTASP NPRM Comments).

Outgrowth Memo”<sup>9</sup> discussing the concept of logical outgrowth in rulemakings and noting that it is “a judicially created interpretation ensuring a balance between flexibility for agencies to respond to public comments and adequate notice to interested parties of the subjects that could be addressed in a final rule.”<sup>10</sup> The memo also notes that “to be valid, changes made in a final rule from the measures contained in the proposed rule must be within scope of the notice provided by the proposed rule and reasonably foreseeable by interested parties.”<sup>11</sup> The memo goes on to cite court cases stating an agency fails to provide APA notice when “a final rule would provide commenters their “first occasion to offer new and different criticisms which the agency might find convincing,” the final rule is not a logical outgrowth of the proposed rule”.<sup>12</sup>

In its PTASP NPRM, FTA stated in § 673.19(c)(7) that an agency’s PTASP must address “How the Safety Committee will manage disputes and tie votes to ensure it carries out its operations.”<sup>13</sup> In the NPRM, FTA indicated that the decision-making as to who can be designated to resolve disputes should be left to the Safety Committees:

[S]ection 673.19(c), which requires that certain policies and procedures about the composition, responsibilities, and operations of the Safety Committee be included or incorporated by reference in the ASP. One of these proposed policies and procedures addresses how the Safety Committee will manage disputes and tie votes to ensure it carries out its operations. Through outreach meetings with FTA, *some stakeholders voiced concerns that Safety Committees could become deadlocked. This has the potential to delay the development or update of an agency’s ASP and the operation of the agency’s SMS. FTA finds this concern to be valid and therefore proposes that ASPs include policies or procedures to address this situation* (emphasis added).<sup>14</sup>

In its comments to the NPRM, APTA strongly recommended that FTA explicitly identify in § 673.19 that the Accountable Executive is the final decisionmaker in all matters concerning the Safety Committee, from adopting dispute resolution rules to executing the tie-breaking vote in the event of an impasse in the Committee. This approach is entirely consistent with the definition of Accountable Executive in proposed 49 C.F.R. § 673.5, which states that the Accountable Executive is the “single, identifiable person who has ultimate responsibility for carrying out the Public Transportation Agency Safety Plan of a transit agency....”<sup>15</sup>

APTA’s comments also pointed out that FTA has previously supported this interpretation. In an earlier version of FTA’s PTASP Frequently Asked Questions for the “New Bipartisan Infrastructure Law Requirements, Safety Committees” (Question 10 on FTA’s website), FTA included the following guidance in answer to a question regarding implementation of Safety

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<sup>9</sup> See DOT, [Logical Outgrowth Memo Final 3\\_19-2024.pdf \(transportation.gov\)](#)

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 14.

<sup>13</sup> See FTA, PTASP NPRM at 25349.

<sup>14</sup> FTA PTASP NPRM at 25340.

<sup>15</sup> See APTA PTASP NPRM Comments at 3.

Committee recommendations:

Q10: Is our agency required to implement whichever measures the Safety Committee recommends?

A10: No. The Bipartisan Infrastructure Law does not require the agency to implement the risk-based mitigations or strategies recommended by the Safety Committee. *The Accountable Executive, ultimately, must determine whether to implement the risk-based mitigations or strategies recommended by the Safety Committee* (emphasis added).

FTA rejected APTA's recommendation. Instead of following its previously articulated guidance and providing no warning of a contrary approach in the NPRM, FTA abandoned the guidance all together and adopted a specific prohibition stating the "Accountable Executive may not have a tiebreaking role in resolving Safety Committee disputes, because that would be inconsistent with the statutory requirements relating to the roles of Safety Committees."<sup>16</sup>

However, FTA's statutory interpretation is inaccurate. The BIL is silent regarding how Safety Committees resolve disputes. Accordingly, given that the BIL is silent on this point and no statutory authority was referenced by FTA in its final rule, APTA challenges the validity of this conclusion as unnecessary and inconsistent with the NPRM. Moreover, FTA did not provide APTA, other stakeholders, or the public the opportunity to comment on this significant revision to decision-making authority.

By promulgating a final rule provision that prohibits the Accountable Executive from being a designated tiebreaker, FTA has severely limited the transit agency's ability to enact policies and procedures unique to its operating environment.

Although FTA, and some commenters, may disfavor a tiebreaking role for an Accountable Executive, some Safety Committees would agree (and have agreed) to that role for an Accountable Executive. Section 673.19(c)(8) supplants the Safety Committee's ability to decide freely and independently how to resolve disputes and tie votes. In the preamble to the final rule, FTA notes that it "has determined that transit agencies and their Safety Committees should have the flexibility to establish the procedure best suited to their unique environments."<sup>17</sup> This statement contemplates the possibility that a Safety Committee could agree upon a process or procedure that maintains the balance between labor and management while still allowing an Accountable Executive to serve in a tiebreaking role.

FTA's final rule, however, removes this possibility without reference to its statutory authority to do so. Thus, this final rule provision is impracticable, unreasonable, and inconsistent with the underlying role of the Accountable Executive.

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<sup>16</sup> FTA PTASP Final Rule at 25696.

<sup>17</sup> *Id.* at 25715.

**b. FTA’s adoption of the requirement to mandate that an Accountable Executive implement any safety recommendations approved by the Safety Committee runs counter to BIL and FTA’s previous guidance on the topic.**

Transit agency Chief Executive Officers (CEOs) are required to sign off on FTA’s certifications and assurances annually, which typically include the responsibility to ensure compliance with a myriad of Federal laws such as Buy America, civil rights, etc. In that role, the CEO has decision-making authority on how to carry out that compliance. Furthermore, in the PTASP NPRM, FTA acknowledged this authority to oversee an agency’s resources and safety performance. Specifically, FTA’s proposed rule at § 673.20(a)(4), stated that:

When a Safety Committee recommends safety mitigations it has determined would reduce assaults on transit workers and injuries to transit workers based on a safety risk analysis . . . , the transit agency must implement one or more of those recommended mitigations to reduce risk to an acceptable level, *unless the Accountable Executive determines the mitigation will not improve the agency’s overall safety performance* (emphasis added).<sup>18</sup>

In discussing this provision in the preamble to the NPRM, FTA correctly notes that:

Consistent with existing PTASP regulation requirements, the Accountable Executive retains direction over the human and capital resources needed to develop and maintain the ASP and has ultimate accountability for the agency’s safety performance. Accordingly, if in exercising this responsibility the Accountable Executive determines that safety risk mitigations recommended by the Safety Committee are not feasible or effective in improving the agency’s overall safety performance, *it may decline to implement such mitigation* (emphasis added).<sup>19</sup>

In the final rule, however, FTA arguably removed all decision-making and discretion from the Accountable Executive with the language in § 673.23(d)(1)(i) that the: “Accountable Executive of a large urbanized area provider *must* implement safety risk mitigations for the safety risk reduction program that are included in the Agency Safety Plan under § 673.11(a)(7)(iv).”<sup>20</sup> (emphasis added). In the preamble language accompanying that requirement, FTA states that an “Accountable Executive does not have authority under part 673 to decline to implement elements of an approved ASP.”<sup>21</sup> This declaration is despite FTA’s acknowledgement that the “Accountable Executive retains control or direction over the human capital and resources needed

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<sup>18</sup> FTA, PTASP NPRM at 25350.

<sup>19</sup> *Id.* at 25340.

<sup>20</sup> FTA, PTASP Final Rule at 25742.

<sup>21</sup> *Id.* at 25713.

to maintain an agency's ASP."<sup>22</sup>

By adopting this provision, FTA arguably removed decision-making authority from the Accountable Executive, which runs counter to its own definition of an Accountable Executive in the final rule:

Accountable Executive means a single, identifiable person who has ultimate responsibility for carrying out the Public Transportation Agency Safety Plan of a transit agency; responsibility for carrying out the transit agency's Transit Asset Management Plan; and control or direction over the human and capital resources needed to develop and maintain both the transit agency's Public Transportation Agency Safety Plan, in accordance with 49 U.S.C. 5329(d), and the transit agency's Transit Asset Management Plan in accordance with 49 U.S.C. 5326.<sup>23</sup>

These two provisions are in conflict and therefore are not a logical outgrowth of FTA's proposal. It is not possible to maintain control or direction over the human and capital resources needed to develop and maintain an agency's PTASP, when the Safety Committee has ultimate authority to decide whatever safety mitigations it desires, and the final rule mandates the Accountable Executive must implement them.

Accordingly, FTA failed to give notice to the public that it might remove the authority of an Accountable Executive to make safety decisions consistent with its control and direction over human and capital resources, and, therefore, FTA's actions are not practicable, are unreasonable, and are not in the public's interest.

## **II. FTA Did Not Conduct a Proper Cost-Benefit Analysis to Take Into Account the Expanded Performance Targets, Compensation Policy, and Time Needed to Amend Safety Plans**

APTA asserts that the cost-benefit analysis significantly underestimated the costs of the final rule. Specifically, the NPRM only calculated the costs of de-escalation training requirements for all transit providers and requiring small public transit agencies to establish continuous improvement processes. The regulatory analysis estimates, such as frontline personnel de-escalation training of two hours in first-year costs and 0.5 hours in annual costs, woefully underestimate the time needed to conduct and track employee training. More importantly, this analysis excludes numerous discretionary elements that are imposed by FTA, such as costs associated with the Safety Committee establishing performance targets for up to 66 performance measures under the rule or the Accountable Executive being required to provide written

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 25738.

justification for any mitigation that they do not adopt and presenting it to both the Safety Committee and Board of Directors.

This regulatory analysis is woefully inadequate and does not reflect the costs of the final rule's requirements that are not statutorily required.

### **III. FTA Failed to Make Clear that Amendments to the Agency Safety Plan Should be Done According to the Agency's Previously Adopted Schedule for Amendments to the Agency Safety Plan.**

The FTA's final PTASP rule is effective on May 13, 2024. However, in the preamble to the final rule, FTA notes that: "the PTASP regulation requires transit agencies to review and update their ASPs annually to address needed changes, such as regulatory changes. FTA expects transit agencies to address the regulatory changes adopted in this final rule in their next ASP update based on their existing ASP update process documented in their ASP."<sup>24</sup>

However, as preamble language is essentially agency guidance and not binding on the parties,<sup>25</sup> and the effective date for the final rule is included in the regulation, APTA requests that FTA reconsider the effective date of the rule and extend it by one year to May 13, 2025, to allow public transit agencies sufficient time to enact these significant changes to the Safety Committee structure and requirements under the PTASP Final Rule.

APTA believes that the changes imposed by FTA's PTASP Final Rule will take many agencies months to implement. Multiple agencies may have to make major revisions to their bylaws, charters, and Board-approved policies to incorporate the elements of this final rule, especially those agencies whose Safety Committees have chosen to have an Accountable Executive as a final decisionmaker.

### **Conclusion**

APTA filed this petition for reconsideration pursuant to 49 C.F.R. § 601.34 because two provisions in the final rule—§ 673.19(c)(8) (tiebreaking by the Accountable Executive) and § 673.23(d)(1) (removal of decision-making by the Accountable Executive)—are not practicable, are unreasonable, and not in the public interest. This is because the final rule's regulatory language in §§ 673.19(c)(8) and 673.23(d)(1) were neither contemplated nor included in FTA's proposed rule. As such, FTA failed to put the public on notice that it would adopt provisions that are contrary to its previous guidance, not supported by BIL's plain language, and not included in the PTASP NPRM. Finally, FTA failed to conduct a cost benefit analysis that is reflective of the expanded reporting requirements and did not make clear in the final rule language that amendments to an agency's ASP should be done according to the agency's previously

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<sup>24</sup> *Id.* at 25704.

<sup>25</sup> Stack, K. M. (2016) Preambles as Guidance (<https://www.gwlr.org/wp-content/uploads/2016/09/84-Geo-Wash-L.Rev-1252.pdf>) ("Preambles were designed not only to provide the agency's official justification for the regulation, but also to offer guidance about the regulations meaning and application").

established schedule, but even so, APTA recommends that the effective date for the final rule should be a year from the final rule publication date.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Linda Ford". The signature is fluid and cursive, with the first name "Linda" being more prominent than the last name "Ford".

Linda Ford  
APTA General Counsel