AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

December 7, 2012

U.S. Department of Transportation
Docket Operations
M–30 West Building Ground Floor
1200 New Jersey Avenue, SE
Room W12–140
Washington, DC 20590

RE: FRA-2011-0060, Notice 1

Dear Docket Clerk:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comments on the Federal Railroad Administration's (FRA) Notice of Proposed Rulemaking (NPRM) concerning the System Safety Program (SSP) published September 7, 2012, at 77 FR 55372.

About APTA

APTA is a non-profit international trade association of 1,500 public and private member organizations, including public transit systems; high-speed rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

General Comment on the Development of System Safety Programs

APTA's involvement in creating, developing and advocating for System Safety Programs spans several decades as does its partnership with the FRA in support of a systemic approach to managing safety. APTA is pleased to be able to use this history and experience gained to respond to this Notice of Proposed Rulemaking on System Safety Plans. In the early 1970s, APTA rail passenger operators began using the concept of System Safety Plans to guide the design, construction and operational safety on their properties. From this initial successful experience, APTA members created a "Manual for the Development of a Rail Transit System Safety Program Plan" in 1987 as an industry guide for transit and commuter rail systems. The Federal Transit Administration (FTA) adopted the APTA Manual in the early 1990s and used it as the basis for the promulgation of 49 CFR Part 659, incorporating it by reference. Transport Canada also incorporates the APTA Manual by reference in its Railroad Safety Management System regulation. In 1996, APTA modified its rail safety manual to create an additional guideline, the "Manual for the Development of System Safety Program Plans for Commuter Railroads", which included an

external triennial audit program and used both these plans in partnership with the FRA to institute system safety concepts in the industry as a voluntary program. In 2007, APTA requested that FRA move from a voluntary program and regulate system safety for commuter railroads. The RSAC process was chosen to accomplish this task. Shortly after beginning the RSAC working group, the *Rail Safety Improvement Act of 2008* (RSIA) was enacted and FRA saw the opportunity to utilize the RSAC system safety effort to satisfy the requirements of the Risk Reduction Program (RRP).

General Comments on FRA's Approach to Safety Management Systems

APTA has long served as a driving force in creating and implementing an industry-wide system safety program in partnership with the FRA. We support FRA's efforts to develop this rule and offer the comments herein to assist FRA in creating a strong program applicable to the wide range of passenger rail operations across the country.

APTA understands that FRA's goal is to treat this rule as a safety management system that is more performance based than specification based, to the extent possible under Congressionally-mandated aspects of the program. Nevertheless, we found the proposed rule to be more directive in significant respects than current FRA practices. We caution that this level of specificity diminishes the flexibility needed by railroads to adapt their SSP plans to local conditions and maximize safety. It can also divert the attention of railroads from assessing their operational risk to instead assessing regulatory compliance risk. This would serve only to expand the amount of paper and bureaucracy needed to comply with the rule and provide little to no gain in safety of operations. Moreover, broadening the elements of the APTA program, as FRA has proposed, threatens to divert attention from core safety practices and the highest risk aspects of railroad operations.

Specifically, instances include the requirements associated with scheduling, reporting, and conducting consultation with directly affected employees in section 270.102 and Appendix B; sections 270.103(c),(v) on defining, outlining, measuring and promoting a positive safety culture (since there is no universally accepted understanding of what safety culture is and therefore a lack agreement on the corresponding characteristics and attributes that would be used to establish whether or not the culture is "positive"); and the concept of "fully implemented" and establishment of milestones to track progress. What would be considered fully implemented for a small property may be inappropriate or inadequate for a large property. These examples and others discussed herein introduce subjectivity into the process and do not lend themselves to a regulatory framework.

APTA recommends that FRA stratify this rulemaking, using a layered approach wherein there are identified core safety elements that are considered fundamental and must be a part of every passenger railroad program. The next step would identify those elements that represent recommended industry practice that should be added as another layer to any SSP, when conditions warrant. Another layer would be to establish optional elements and pilot programs such as FRA has proposed for Confidential Close Call Reporting and Clear Signal for Action programs which would be expected to enhance and strengthen an already proven safety effort.

Transport Canada's "Railway Safety Management System" regulation and the accompanying guidance document are excellent examples of how this method can work effectively in a regulatory structure.

Proposed Regulatory Provisions

Training and Education Requirements

We generally support the intent and proposed requirements of draft section 270.103(j) concerning training of personnel with specific responsibilities in the SSP plan and the education criteria for others who perform supporting safety duties. We believe subsection (4) correctly recognizes the need for latitude in determining what training and education media best match local situations and the examples are helpful.

While we believe FRA's intent was to allow for similar latitude in selecting training methods, the text, as drafted, does not support this intent. We recommend FRA clarify this in the final rule to remain consistent with the discussion in the preamble. Simply noting that the methods are not exhaustive would accomplish this. Additionally, we recommend FRA add a brief mention of 'train the trainer' methods within that non-exhaustive list which would be instructive on how training might be transferred from the railroad to its contractors and other entities with significant responsibilities under the SSP but with no formal employment relationship with the railroad.

We support this performance based requirement as it provides individual passenger railroads with the flexibility to design training programs with sufficient level of detail that fit their needs without having to meet fixed and arbitrary schedules and curricula.

Implementation Schedule and Consultation Requirements

APTA believes that the proposed implementation schedule, particularly regarding consultation requirements, is impractical and may not be possible. As drafted, the schedule includes:

Publication date
Pre-initial consultation notice (at least 60 days)
Initial consultation – days 61-180
Effective date of section 270.105 protection – day 365
Protected consultations – days 365-395
Effective date – day 395

The requirement to notify directly affected employees and/or their union representatives 60 days in advance of the initial meeting is reasonably achievable. The requirement to conduct initial consultation to those employees and representatives within 180 days of the effective date of the rule is not. Even under ideal circumstances, no initial consultation could take place before

day 61. A large property with thousands of directly affected employees, as many as 20 unions, non-unionized employees, and – in some cases – even unionized management employees would be hard pressed to meet this deadline. Simply requiring the initial consultation process to *begin* within the first 180 days, rather than to be completed, would serve to keep the process moving and allow railroads time to develop meaningful dialogue with affected employees rather than simply checking a box.

Similarly, leaving just 30 days for consultation protected by proposed section 270.105 is too short to be meaningful, effective, or practical. We propose the post-section 270.105 consultations be allowed to continue for up to 180 days, thus extending the deadline for submission of final plans. This extension is necessary to provide adequate time for discussion and consultation as intended in proposed Appendix B, ensuring the best prospects for success of the program in the future.

The same conditions apply to the requirement for new starts to conduct their consultations and file their plan within 90 days of their commencement of operations date, if that date falls before 270.105 becomes effective. In addition, passenger railroads funded by FTA will have SSPs in effect until revenue service begins; however, railroads that don't receive FTA funding are not required to have an SSP and FRA should consider having an SSP in place much earlier than 90 days.

Finally, the proposed SSP rule 270 and the Risk Reduction Program (RRP) rule 271 share the same language for section 270.105. If the effective date for 270.105 is not the same as the effective date of the RRP, this could further complicate and extend this process. To avoid this situation, there should only be one date that initiates the legal provisions in both the SSP and RRP rules. APTA's preference is for the legal protections to be based upon the published date of either the SSP or RRP rule, whichever is published first.

One of the unique aspects of this rulemaking is that the system safety concept extends the traditional roles and responsibilities for safety beyond the railroad and employee or union relationship to be inclusive of host railroads, contractors and other entities with significant safety responsibilities to the operation of passenger railroads. While FRA has proposed considerable detail for the consultation process to be followed between the railroad, its directly affected employees and their labor organizations, consultation with these other entities is less well defined. There may be contract language which can provide division of duties and responsibilities for contractors providing safety services (either existing or negotiated into a contract modification), there is likely little or no such contract language to build upon with the host railroads or the other entities.

As drafted, the regulation would not require anyone other than the passenger railroads to consult in good faith and the railroad may have no authority or leverage to successfully bring them to the table or guidance concerning these consultations. While FRA has proposed specific provisions for penalties in 270.9(b) to apply to host railroads, contractors and other entities or persons, these penalties would not be effective at the negotiation stage. FRA should modify its consultation process to be inclusive of all parties with significant safety responsibilities, provide

the structure for working collaboratively in development of the SSP, and a methodology to handle disputes or reasonable differences in opinion on how to implement the plan.

Safety Certification

In draft section 270.103(u), FRA has proposed requirements for safety certification to be included within a SSP plan. Safety certifications are not common in commuter rail applications, largely because commuter rail operations follow FRA regulations and standards. Passenger railroads conform to these regulations and standards to establish the safety of their systems.

Most, if not all, of the safety certifications that have been performed on commuter railroads were required by the FTA as part of funding agreements. FTA does not have a set of regulations and standards to allow operation on the General System that is applicable to all the railroads under their jurisdiction as the FRA does. Lacking national standards, the FTA and transit properties rely on "Design Criteria" and best engineering practices. Because these Design Criteria differ at each rail transit agency, the use of safety certification is the method relied upon to prove the system is safe.

We anticipate it would be the rare occasion when a commuter railroad would be required to initiate a safety certification under Part 270 on a project. However, the language provided in subsection (u) uses the term "Major Project" without elaboration. Not every project will need safety certification unless it falls outside of existing FRA Standards. We recommend clarification of the term "Major Projects" by adding, at the end of the sentence "not otherwise addressed by existing FRA Standards."

Risk Analysis and Mitigation

In the preamble and within the rule text pertaining to the Risk Based Hazard Management Plan (section 270.103(r)) and Risk Based Hazard Analysis (270.103(q)), there is no discussion of the variety of controls or the flexibility allowed passenger railroads to choose to employ classical as well innovative procedures to eliminate or control risks. Throughout the RSAC working group process this was a major topic and consumed many hours of discussion and deliberation. The RSAC working group recognized that there are many methods to apply to keep the risk as low as reasonably practicable. Generally, these were grouped into non-formal analysis methods (such as the 5 Y method), use of existing or new programmatic controls to manage risks, and the use of formal hazard analysis methods (such as Fault Trees and cut sets). Since much of the draft RSAC language and definitions associated with these functions were dropped from the NPRM, FRA should clarify that those understandings reached and voted as consensus are still available as tools to the industry and have not been replaced by only formal analysis. We note FRA's estimate (77 FR 55400) that of the 30 passenger railroads, only 10 hazard analyzes are expected to be performed industry wide per year. Since hazard analysis is an ongoing effort, we believe this reference speaks only to those instances requiring formal analysis and all other requirements will be satisfied using informal and programmatic levels of controls. FRA should affirmatively note that it did not purposely exclude the main methods the industry currently uses to mitigate risks.

Reciprocal and Shared Use of SSP Plans

The discussion of how to operate under another railroad's SSP plan and the use of joint SSP plans or multiple SSP plans as discussed in the RSAC working group was omitted from the NPRM. APTA recommends that FRA address the coordination issues whereby a railroad can adopt and operate under another entity's SSP plan, allow a SSP plan to be developed for a jointly served facility, and allow properties with multiple host railroads to hold SSP plans specific to each of the territories that a host railroad supports.

Protection from Discovery and Admission into Evidence

While FRA has gone to great lengths in the preamble to explain its intent in draft section 270.105, the plain language of the draft suggests a number of unintended consequences and could reasonably be expected to prompt protracted litigation over its meaning and effect.

Use of the term "solely" in the draft, while intended to mean the "original purpose," is not adequately explained in the text of the proposed regulation. While preamble language is often helpful, it is not the regulation and will not receive the same deference in a litigation context. FRA should use a more appropriate term, whether it be "primarily," "initially," or something else. In the absence of a satisfactory term, FRA should define "solely" within the four corners of the regulation, not simply in the preamble. In choosing a term or defining "solely," we believe FRA must remain mindful of the fact that a sister program under the Federal Transit Administration will likely utilize almost the exact same information where agencies operate multiple transportation modes with shared corridors, facilities, and practices. Failing to protect safety information simply because it is used in a broader safety program would frustrate Congressional intent and limit the value of the SSP.

Additionally, while we understand and support FRA's purpose in reserving protection to the safety-critical information that will feed an SSP, we believe the exclusions in subsection (b), as drafted, would incentivize railroads with existing safety programs approximating the SSP to shut down their programs in anticipation of the regulation's effective date. Excluding information that had been collected in the past for a pre-SSP safety program and that continues to be collected, albeit now within the SSP, would not qualify for protection, essentially negating all future protection for a mature safety program that continues through and after the effective date. FRA should affirmatively recognize this situation and extend protection to information collected on or after the effective date if it otherwise qualifies.

Request for Comments on Specific Proposals

In addition to its regulatory proposals, FRA requested comment on a number of issues beyond the scope of this rulemaking. While we have provided comments on these general questions, we anticipate FRA will publish concrete proposals subject to notice and comment prior to issuance of any final rule on these matters.

Confidential Close Call Reporting and Clear Signal for Action Programs

FRA sought comment on the usefulness and proper placement of a Confidential Close Call Reporting (C3R) program and a Clear Signal for Action (CSA) program within a passenger railroad SSP. Over the past decade APTA has promoted industry efforts to develop new methods for continuous improvement in safety including behavior based safety and near miss reporting initiatives similar to the CSA and C3R programs identified in the NPRM. Many of these industry best practices have been showcased in APTA conferences and while some have had great success others have not met goals or expectations. We have found that each of these initiatives' success has been predicated on the unique organizational structures, resources, personnel, and internal support of an individual railroad. While we share FRA's appreciation for the C3R and CSA programs, we believe they should remain optional so as not to divert railroads from developing strong, successful core programs. Given the substantial requirements of the SSP, mandatory C3R and CSA programs would not be helpful. We recommend FRA establish the C3R and CSA programs as options within a "layered" safety approach.

Voluntary Compliance

FRA sought comment on whether a regulatory provision concerning voluntary compliance by railroads not required to participate would be helpful. We believe the *Rail Safety Improvement Act of 2008* envisions voluntary participation. APTA supports the concept of a voluntary compliance with the SSP rule. The FRA intends the SSP to establish a higher level of safety for passenger railroads than required under the RRP. Any railroad that voluntarily complies with the SSP would be increasing safety.

Additionally, FTA now exercises regulatory authority on safety matters. This authority, effective October 1, 2012, substantially changes the situation from that which existed when FRA and FTA entered into a Memorandum of Understanding (MOU) concerning the regulation of passenger railroads on joint track and joint corridors and requirements for waiver applications. This creates an environment of competing regulatory safety systems overlaid on multi-modal rail systems. Since some of these agencies currently voluntarily comply with some or all of the FRA regulations and others are operating under FRA waivers, the option of voluntary compliance with the SSP may be a preferred course of action for some agencies.

Additionally, the draft references FTA's regulation at 49 CFR Part 659 and incorporates definitions from the FTA rule. With this overlap and the likely deep philosophical differences between the FRA and FTA safety programs, we urge FRA and FTA to revisit the MOU. Specifically, we request the agencies agree that compliance with one federal system will be deemed compliance with the other. The alternative would severely limit multi-modal agencies' ability to maintain a robust, effective, efficient safety program, contrary to what FRA, FTA, and the passenger railroads all desire.

Definitions

FRA sought comment on the definitions used, those that they chose not to incorporate from the RSAC working group draft, and any others that might be appropriate. APTA believes that the definitions provided are sufficient for passenger railroads and the implementation of the SSP rule. The definitions are consistent with the APTA *Manual for Development of Commuter Railroad System Safety Program Plans* which has been in use by the industry for 15 years and was last approved by the FRA's Chief Safety Officer in 2007. Many of the definitions that the FRA has chosen not to include in the rule are in current use by industry or found in the APTA Manual glossary of terms. Two definitions, "Plant Railroad" and "Positive Train Control," are provided in support of other regulations (49 CFR Parts 209 and 236) and are not necessary within the context of the SSP. Finally, we note the definition for "Fully Implemented" includes two sentences. Each states the same information but in different context which can lead to confusion as to how it should be applied. APTA recommends that one or the other be used, but not both.

Consultation

FRA sought comment on its proposed approach to the consultation requirements of the *Rail Safety Improvement Act of 2008.* We believe the statutory provisions related to employee consultation are sufficient without the extensive framework FRA has proposed. In fact, this proposed framework would likely prove counter-productive, interfering with long established business relationships. While FRA has recognized the importance of separating its functions from those of the National Labor Relations Board (NLRB), among others, the proposed consultation provisions appear to blur the line between FRA and NLRB responsibilities.

As proposed, the employee consultation process shifts responsibilities, applies different standards to the parties, and presumes failure to reach agreement to be based in bad faith on the part of the railroad. While the statute provided a means for directly affected employees to file statements with the Secretary concerning areas of non-agreement, proposed subsections 270.102(b)(1), (b)(2), and (b)(3) effectively shifts the burden to railroads. Also, the requirement to consult in an honest, fair, and reasonable way is applied only to the railroads, not the employees, and only the railroads are subject to penalty should they fail to do so. Finally, the draft presumes that if no agreement can be reached, the SSP is deficient, and does not consider the possibility that the SSP could be adequate but the parties simply disagree. The result of this presumed deficiency would be an additional presumption that the railroad failed to act in good faith. Clearly, this series of presumptions is inappropriate, at best. To be fair, balanced, and complete, the guidance need say no more than:

> The good faith obligation requires all parties subject to safety critical responsibilities in the SSP plan to be consulted in a manner that is honest, fair, and reasonable, and to genuinely pursue agreement on the contents of an SSP plan. If any party consults merely in a perfunctory manner, without genuinely pursuing agreement, it will not have met the good faith requirement.

The use of Appendix B guidance inappropriately extends the reach of the regulation, establishing mere guidance as de facto regulatory requirements. Proposed subsections 270.102(a)(4), (b)(1), (b)(2), and (b)(3), along with Appendix B, should be excised from the regulation.

In contrast, consultation between other stakeholders in the SSP program consisting of the host railroad and contractors or others who have safety critical responsibilities to implement provisions of the SSP are minimally addressed and lacking in any description of a consultation process to be followed if agreement cannot be reached. These relationships are often not as developed and mature as that between a railroad and its employees and we urge FRA to shift its attention from employee consultations to these more tenuous yet extremely critical consultations.

Identifying Other Users

FRA sought comment on whether the SSP plan should identify those entities who utilize significant safety related services. General considerations can be given for the customers, motorists using highway rail crossings and the communities served by safe alternative transportation, but there is no useful purpose for including this provision in the rule.

FRA Relationship with OSHA

FRA sought comment on whether or not it should clarify its intention to not displace OSHA's jurisdiction through this rulemaking. We believe that would be appropriate and help railroads and their employees stay cognizant of this sometimes unclear jurisdictional boundary. Much as we have urged FRA to review its MOU with FTA, we believe FRA should likewise review its MOU with OSHA to further clarify this jurisdictional line.

Electronic Submission of Plans

FRA sought comment on whether it should accept submissions of railroad SSP plans electronically. APTA favors the ability to submit any of the public documents required under this proposed rulemaking electronically as documents, manuals, and procedures can be quite large and costly to reproduce or mail in paper format. The electronic files submitted to meet regulatory requirements should be received and stored in a secure data storage format with a return receipt acknowledgment that confirms the documents were transmitted and received correctly. A transmittal form might be all that is necessary to provide traceability of the documents.

Treatment of Small Businesses

FRA sought comment on the burden of this proposed rule on small business entities. We believe FRA has applied faulty criteria in determining only two railroads should be treated as small entities.

There is both a regulatory burden and a cost that this proposed rule represents that can be unequally applied if small properties are measured with the same safety performance measures as applied to large properties. We have identified flaws in several of the categories that were used to establish FRA's estimated impact to small entities.

- We believe the calculation of compliance burdens is underestimated.
- FRA's assertion that this rule would create no conflict with FTA's regulatory and oversight practices is inaccurate. Many commuter railroads are part of multimodal public transportation agencies which will be required to comply with this new regulation and FTA's new regulatory authority.
- FRA's assertion that the economic impact for passenger railroads will be "marginal" is erroneous. Although railroads do similar work now, many small railroads have agreements in place that allow contractors to perform these functions or allow their passenger railroad to operate under the SSP plan of a host railroad or another railroad. For example, the Connecticut DOT (ConnDot) owns commuter service but operates one line under Amtrak's SSPP and another line under Metro North's SSPP. The impact to ConnDot and others could be significant because the new regulation does not recognize these practices.

FRA should ensure that this proposed rule's requirements are commensurate to the size of the entity. Defining small entities so narrowly skews that concept. Compliance with this proposed rule should include flexibility, scalability, and program maturity as relevant factors to determine whether a program is "fully implemented".

Economic Impact

FRA sought comment on its methods and conclusions reached in analyzing the impact of the proposed regulation. We believe FRA's estimates of the compliance burden significantly understate the impact on regulated entities. For instance, FRA's estimate concerning the burden of consultation with directly affected employees envisions four consultations per year and only estimates four hours per consultation. With 28 affected passenger railroads, up to 20 or more unions involved with larger railroads, and numerous unrepresented employees, and the proposed intricacy of consultations proposed in Appendix B, 16 hours per year is wildly erroneous. The estimate should realistically account for all these consultations, the hours of each railroad employee involved, and the likely time a meaningful consultation will require.

We appreciate the opportunity to assist the Administration in solving these important issues and would be happy to provide any additional information necessary to complete this process. For additional information, please contact James LaRusch, APTA's chief counsel and vice president corporate affairs, at (202) 496-4808 or jlarusch@apta.com.

Sincerely yours,

Michael P. Melaniphy
President & CEO

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