AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

February 11, 2015

Docket Management Facility:
U.S. Department of Transportation, 1200
New Jersey Avenue S.E., West Building
Ground Floor, Room W12–140,
Washington, DC 20590–0001

RE: Docket No. FTA-2014-0024

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 Transit Administration's (FTA) Notice of availability of additional proposed circular chapters on Americans with Disabilities Act: Proposed Circular Amendment 2, published November 12, 2014 at 79 FR 67234.

About APTA

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including public transit systems; high-speed intercity passenger 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.

The draft confuses statutory and regulatory requirements with perceived best practices

The purpose of FTA circulars is to "provide instructions to grantees or other stakeholders on how FTA grants will be administered. This guidance provides grantees with direction on program specific issues and statutory requirements. Grantees are required to comply with all circulars after signing the agreement accepting federal financial assistance." http://www.fta.dot.gov/legislation_law/12316_183.html. In this proposed circular, FTA has elected to attempt integration of best or recommended practices, contrary to its own understanding of the nature of circulars.

In our comments on prior draft chapters, we have noted the almost inevitable confusion that flows from this practice, as well as the likelihood that FTA, its contractors, grantees or the public might confuse examples of practices that work well for some grantees as actual requirements. We recommended instead that FTA move toward a sample practices manual, much like that FTA maintained for many years to assist grantees conducting procurements. APTA Comments, FTA docket 2014-003, dated April 21, 2014.

APTA and its members are committed to accessibility. Our public agency members consistently work with their riders with disabilities to ensure the numerous local choices flowing from the Americans with Disabilities Act (ADA) and its implementing regulations are made to provide individual communities optimum service. These local choices reflect the vastly different operating environments of transit agencies across the country and the preferences of those agencies' riders, including their customers with disabilities. The prescriptive nature of this draft circular cuts to the very heart of the flexibility the drafters of the Act and its implementing regulations clearly recognized. By supplanting local choice, FTA effectively substitutes its judgment for that of local agencies and their riders and prescribes a one-size-fits-all approach that is directly contrary to the intent of the Act and regulations. This approach ignores the fact that what may be a "good practice" in community A may be absolutely counterproductive in community B.

In response to our earlier comments, FTA adopted a requirement/discussion format and added language in the beginning of proposed chapter 3 to the effect that the circular is not intended to alter statutory or regulatory requirements in any way. While we applaud this attempt to alleviate the issues raised, we believe the efforts have been unsuccessful. We have very serious concerns about many of the new requirements that are inappropriately introduced in the draft Circular and will have dire consequences for our member transit agencies and their customers in terms of safety, state of good repair, and service reliability. In addition to bypassing the local planning process, the new de facto regulations will have significant cost impacts and should be subject to evaluation under Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives.

Throughout the latest draft chapters, the discussion sections cite regulatory passages and often provide that grantees "should" or "must" act in some particular way. Given the frequent lack of transit experience of many of FTA's contractors, and the importance of the ADA regulations to transit agencies and their customers, it is critical that the circular be cleansed of any language that can potentially be construed as implementing new requirements. Interspersing requirements, using "should" and "must," and describing detailed expectations in these discussion sections will continue to confuse FTA regional personnel, their contractors, grantees, and the riding public and result in FTA findings that conflict with policies and procedures developed through close collaboration with communities we serve. We reiterate our recommendation that FTA abandon attempts to create a circular and instead adopt a sample practices manual in consultation with grantees and their riders with disabilities.

FTA should re-publish proposed amendments prior to finalizing any portion of a circular

FTA has stated it "will not publish final versions of individual chapters, but rather will publish one final circular after receiving comments on all individual chapters." 79 FR 67235. This suggests FTA intends to move to a final circular without benefit of notice and comment on a consolidated draft. To the extent that is FTA's intent, we strongly object. The interdependent nature of the proposed chapters, as well as the shift in format already made, strongly point to a requirement to review a complete proposal. Moreover, the likelihood of regulatory changes between now and the final publication date, including guidelines from the US Access Board and, potentially, long proposed amendments to the Department of Transportation's (DOT) ADA regulations, will require changes to the text.

The draft circular inappropriately requires "reasonable modification"

DOT has attempted, since September 2005, to graft the concept of reasonable modification through reinterpretation of the phrase "origin to destination" and by ignoring years of practice and precedent. The Department proposed a change to its ADA regulation in February, 2006, but has not yet promulgated a final rule requiring reasonable modification. Multiple Federal Courts – both trial and appellate – have found no statutory or regulatory basis exists for requiring reasonable modification both before the Department's 2005-2006 actions and in the ensuing nine years. Despite this, draft chapter 9 requires reasonable modification through the word "must" in the discussion of curb-to-curb and door-to- door service. This requirement flies in the face of established case law; is wholly inappropriate where the Department has failed to act in nine years; and should be excised from the draft.

As just one example, the language in the discussion sections of draft chapter 9 suggest that transit agencies will be required to provide not only curb-to-curb service and door-to-door service when necessary, but also what is commonly referred to as "door through door" or "hand to hand" service. As stated earlier, we do not believe that the ADA or a full reading of Appendix D of the regulation originally intended to require transit agencies to provide more than curb-to- curb service, which meets the statutory requirement that transit agencies provide paratransit service that is comparable to the level of service provided to those who use the fixed route system. Transportation for customers whose disabilities warrant something closer to hand to hand service would be more appropriately funded and regulated through another federal agency, such as the US Department of Health and Human Services. However, even if one were to accept the FTA's premise that the ADA requires transit agencies to provide door-to-door service when curb-to-curb service does not meet the needs of a particular individual due to his or her disability, we believe that requiring transit agencies to provide even higher levels of service such as "door through door" or "hand to hand" service, where a driver would be required to go into a passenger's home, place of employment, doctor's office, etc., is not only inconsistent with the original intent of the law and regulations, but potentially unsafe and onerous as well and also costly to the transit provider. Two examples demonstrate this fact. First, we believe it is unsafe to expect a driver to lose sight of their vehicle (which may be occupied by other paratransit passengers) in order to go inside a building for the purpose of assisting their next passenger. Second, we believe it is potentially dangerous for both drivers and passengers to require drivers to go into the homes of passengers where there may be no witnesses to observe, prevent, or report any inappropriate actions by either party. It is true that many transit agencies, in collaboration with the communities they serve and consideration of risks and costs, have created policies and procedures for delivering higher levels of service, including door through door. However, we believe that the decision on the levels of service to provide and the operational approach for doing so should be made by each local transit agency, based on its operating environment and the needs of its community, as laid out in the DOT regulations more than two decades ago.

Beyond our general comments above, the following comments generally follow the numerical order of FTA's "Chapter" outline, with the proposed monitoring provisions combined at the end.

Draft section 3.1.2 inappropriately creates a new, open-ended responsibility for transit agencies

The statement "Transit agencies are expected to coordinate with other entities, especially during the design and construction or alteration of transportation facilities, to ensure accessibility to the maximum extent practicable" is an open ended requirement not supported by law or regulation. While Access Guideline 810.2.2, for example, states that "Public entities shall ensure that the construction of bus boarding and alighting areas comply with 810.2.2, to the extent the construction specifications are within their control," draft section 3.1.2 would hold agencies accountable to "coordinate" with both public and private entities throughout a service area. The language preceding this requirement, while recognizing outside control, would not relieve agencies of actively monitoring virtually every sidewalk, road, and construction project – whether public or private – in their service areas.

Draft section 3.2.4 conflicts with existing regulations for station platforms

This section states that USDOT standards require the gap for rapid rail systems must be plus or minus 5/8" vertical and 3" horizontal. This statement should be clarified to indicate that the existing regulations in 49 CFR 38.53(d) apply to new vehicles operating in new stations. Similar clarification is required to align with 49 CFR 37.42

Proposed section 3.4 adds regulatory requirements related to alterations and contradicts statutory requirement to consider disproportionate cost

Proposed section 3.4 would create an entirely new paradigm for determining accessibility requirements in conjunction with alterations, conflicts with existing law, long-standing precedent, and is inconsistent with other US DOT priorities. Relying on a single federal case, the FTA has chosen to expand the accepted notion of the term "usability" to vastly expand the circumstances which require the installation of vertical access. The draft ignores the concept of disproportionate costs and provides a prime example of where the discussion portions of the draft redefine and establish requirements. Throughout this section, "usability of the facility" and the concept of "disproportionate costs" are ignored in favor of expanded requirements that would require agencies to add an elevator any time even minor repairs are made to stairs or escalators. Even the single case FTA proposes to support this new requirement is mischaracterized. *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transportation Authority* reviewed unique circumstances including renovation of a stairwell that had long since been decommissioned. That case can hardly be the basis for the sweeping new requirements proposed by FTA. This section must be re-written completely to eliminate this bias. Further, this requirement would counter the ADA's focus on locally-developed plans in determining where new vertical circulation should be implemented.

The discussion of "maximum extent feasible" also should be rewritten to better align with 49 CFR 37.43. That regulatory provision requires that component repairs must be made to ensure the final product complies with US DOT specifications for that specific component to the maximum extent feasible. FTA and its contractors have inappropriately expanded its interpretation of this requirement to require that transit agencies install new elements such as ramps or elevators and requiring a technical infeasibility analysis in circumstances where one should not be required, either because the new element is more than 20% of the total project cost or because the new element should not be required per the existing regulations that focus on components.

The new requirements in Chapter 3 related to vertical circulation directly conflict with the objective outlined in the Moving Ahead for Progress in the 21st Century Act (MAP-21) that the transportation industry move toward a performance- and outcome-based program where investment decisions collectively make progress toward the achievement of the national goals, including state of good repair and safety. Transit agencies will be required to develop Transit Asset Management (TAM) plans that include an asset inventory, asset condition assessment, and process to prioritize projects. If agencies are required to add elevators whenever repairs are made to stairs or escalators, the end result would be to divert resources from state-of-good-repair projects to elevator installations at locations that the disability community may not have identified as critical to their needs. As such, the new requirement precludes agencies from utilizing performance-based planning to prioritize their capital needs and show progress toward targets mandated by MAP-21. Routine repairs to stairs are critical for the day-to-day safety of all customers, including riders with disabilities that don't require a mobility device.

The checklists included in the draft Circular include a number of erroneous citations and omit several sections that are part of US DOT's standards.

Draft section 6.5 inappropriately enlarges the regulatory requirements related to stop announcements

After citation to the pertinent regulatory language in the requirement portion of this section, the draft then expands the regulatory requirements by using "must" and "should" language, in addition to regulatory citations in the discussion portion. Requirements to announce intersecting route numbers or even the "ability to transfer" are not required by the regulation and would, in many cases, reduce stop announcements to an indecipherable cacophony.

The detailed forms and procedures for compliance monitoring described in the draft are also not required by the regulation. They should not be presented as a single 'best practice.' While the method presented may be appropriate for attention focused solely on stop announcements it would be cumbersome, at best, for systems doing routine monitoring that includes stop and route announcement among a variety of other operational issues.

Neither of the above issues as highlighted in the draft circular are statutory or regulatory requirements. This section should be replaced in its entirety and informed by a more balanced, practical approach, such as that in draft APTA recommended practice ACSDP-RP-002-08.

Draft section 6.7 creates confusion rather than clarity

The discussion portion of this section further confuses already poorly worded requirements. 49 CFR 37.167 creates an exception for elderly riders or riders with disabilities from being asked to vacate priority seating. While the provision does not technically protect those same riders from being asked to vacate a fold-down seat in a wheelchair securement position, it does not account for situations where priority seating and wheelchair securement positions occupy the same space. Moreover, the regulatory provision never envisioned the advent of low floor buses or all perimeter seating. We have already seen examples of this where the first forward facing seat in a low floor bus is up a stair at the rear of the bus.

While additional guidance is needed to address this situation, this circular is not the place to create that guidance, since that process would require research and discussion with industry and disability advocacy groups to find the most beneficial solutions.

There are new and evolving best practices related to this topic, such as multi-variegated signage and expanded priority seating locations, which should be considered in any new guidance. Meanwhile, the suggestion that transit agencies can simply adopt policies that compel certain passengers to move from wheelchair areas, especially when those areas may also be priority seating, is misleadingly simplistic, with no concrete examples given. Since the type of policies most likely to be enforceable are local or state laws – and law enforcement may be required to accomplish implementation – any new guidance must address this aspect of the envisioned solutions.

Draft section 7.4.2 creates a new, impractical requirement and attempts to control activities properly under DOJ's Title III jurisdiction

This draft section does not cite to any statutory or regulatory requirement, yet purports to create a duty on the part of transit agencies to monitor, among other things, response times when riders with disabilities use accessible taxis. While monitoring response times would be reasonable where the transit agency arranges the ride, there is no practical or reliable method to monitor response times where taxis are engaged directly by the rider.

Additionally, taxi services are under the DOJ regulatory scheme. FTA's jurisdiction and its circulars do not extend into Title III.

The route deviation guidance is incompatible with long-time FTA practice

FTA long considered service that allowed route deviation only for riders with disabilities as fully compliant with grantees' responsibilities. The practice provided riders with disabilities responsive, unplanned service and met the needs of the communities that adopted the practice. In a series of decisions, FTA first overturned years of practice by declaring such service impermissible, then allowed it. The latest interpretation was not announced in a public forum but through publication in FTA's triennial review guide and in a letter ruling.

The confusion over this policy, changed twice with no opportunity for notice and comment, is further aggravated by draft section 7.4.4. The section not only ignores this practice altogether, it suggests that transit agencies track the service ADA paratransit eligible riders receive separately from other dial-a-ride riders when route deviation is open to all passengers. Essentially, this suggests that boarding passengers be quizzed on whether they are paratransit eligible.

Discussion of Paratransit Monitoring Programs will have unintended consequences

Section 8.8.1 indicates that agencies should analyze the performance, including travel times, of all vehicle classes used for complementary paratransit and adjust their fleets accordingly to improve performance. This suggestion, which ignores that boarding and alighting takes longer for customers who use mobility devices, could result in increased exclusive customized service, which by its nature is faster, if more costly for the transit provider and also opposite to the comparable service provided to fixed route customers or inclusion in an integrated setting.

Discussion of Timely Determinations adds new requirements

Subsection 9.3.5 on Timely Determinations suggests that transit agencies should schedule interviews within 7-10 days of receipt of an application. The regulatory requirement is that if a determination of eligibility is not made within 21 days, the applicant shall be treated as eligible and provided service until and unless the entity denies the application. Given this requirement many agencies receive the application at the start of the interview process. While the draft Circular does not mandate that the interim step occur within 7-10 days, it should be a local decision how agencies process applications and address the 21-day determination window.

Draft section 9.4.2 adds costly requirement to transport applicants to appeal hearings

This section should be deleted to avoid confusion among FTA and its contractors about the regulatory requirement, which does not include providing paratransit service to eligibility appeal hearings or the provision of free paratransit for any purposes.

Draft section 9.7 imposes new requirements for no-show suspensions

After recognizing that agency policies should define a "pattern or practice" of missed trips, the draft proceeds to lay out a specific practice it will require for doing so. This practice, imposed already by FTA and its auditors in some reviews, would re-write the policies of many transit agencies that were developed in coordination with local communities and have long been considered compliant with the statutory and regulatory criteria, which simply require that if agencies choose to have a policy or process, it should be reasonable. In yet another example of mixing regulatory language, "should," and FTA opinions with what purports to be a best practice, FTA has removed all local control over no-show policy and implementation in favor of a one-size-fits-all approach that will not necessarily work in the widely divergent communities. Many of our members have found that a 30-day suspension is not sufficient to alter behavior that can be extremely costly to transit agencies. FTA and its auditors can be expected to impose this approach upon grantees. Moreover, this imposition of a particular practice flies in the face of the regulatory recognition that the "sanction system... would be developed through the public planning and participation process."

Feeder service discussion does not allow flexibility to consider local conditions

As noted throughout our comments, the suggested practices in this section may not be practical in all transit environments. Drop-off windows, maximum ride times, and minimum trip distances should be developed in coordination with the local community and consider the nature of the fixed route service in the locality.

Draft chapter 12 and the addenda to chapters 2 and 8 enlarge the regulatory requirements and create new monitoring obligations

Draft section 2.5 cites to no statutory or regulatory authority, then lists a number of actions agencies "should" take. These highly prescriptive requirements cannot be considered a best, recommended, or example practice.

While the addendum to chapter 8 starts by noting FTA "encourages" monitoring and begins to describe a "good practice," the draft then becomes prescriptive. The draft employs the word "should" repetitively, includes metrics for compliance and usurps local prerogative. This addendum should be removed or completely re-written.

Chapter 12 provides more examples of mixing requirements with recommended practices. In fact, section 12.8.4 starts by discussing "a good practice," followed by a bolded subheading of "Information *Requirements.*" (emphasis added). This chapter also appears to redraft applicable regulatory provisions.

We agree with FTA that it is important to have good data to monitor and analyze how our systems are performing -- for all passengers. The National Transit Database (NTD) should be an important mechanism for reporting and researching such information, yet many of our systems have faced years of frustration in trying to have a NTD that truly reflects "on the street" realities, especially for ADA complementary paratransit. Recently CalACT, APTA, and other agencies submitted comments on proposed updates to NTD (Docket #FTA-2014-0006), which have not yet been finalized. FTA should limit its monitoring provisions in the Circular (or preferably, good practices manual) to metrics for which there is a specific NTD reporting requirement.

The draft FTA complaint and enforcement provisions are inappropriate

The process described in draft section 12.7 would establish a thirty day "cure" period for most perceived deficiencies. This timeframe has no basis in law or regulation and should not be included in the draft circular. While a thirty day timeframe may be appropriate to correct a service practice, it would be clearly inappropriate in relation to a perceived deficiency in vehicle or facility design. Creating a standard of thirty days to "cure" a problem creates an unreasonable expectation among users and creating any standard in a circular is inappropriate.

Draft section 12.4 is inconsistent with applicable law and regulations. FTA should not attempt to paraphrase or interpret the provisions of 49 CFR 27.125, which allows Department officials to recommend punitive steps. Administrative guidance is no place to recast and expand FTA authority.

We appreciate the opportunity to assist FTA in this important endeavor. 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

MPM/jpl:jr