



Federal Transit Administration Proposes New State Safety Oversight Rule

06.16.2015 | By **Ann-Therese Schmid**

On February 27, 2015, the Federal Transit Administration ("FTA") published a Notice of Proposed Rulemaking ("NPRM") in the Federal Register requesting comment on a proposed rule that the FTA believes would strengthen State Safety Oversight of rail transit systems. The NPRM identifies three key changes necessary to strengthen State Safety Oversight: 1) States' assumption of greater responsibility for the safety oversight of rail transit; 2) FTA approval of SSO Programs ("SSOP"); and 3) financial penalties for non-complying states. The proposed rule would replace the current SSO regulations¹ in their entirety.

Subsequent to a number of fatal accidents in the last decade at rail transit properties, Congress sought to bolster the State Safety Oversight of rail transit operations. Congress felt it was necessary to strengthen State Safety Oversight after identifying shortcomings in State Safety Oversight under its original structure, specifically based on the fact that the FTA did not have authority to address the mode of operation of mass transportation systems.² Effectively, Congress adopted the Government Accountability Office's ("GAO") assessment that State Safety Oversight lacked clarity, identifiable enforcement authority, and funding.³ The most recent surface transportation authorization bill, Moving Ahead for Progress in the 21st Century ("MAP-21") directed the FTA to establish a public transportation safety program, which would include a national public transportation safety plan; a training and certification program for public employees with safety responsibility; transit agency safety plans; and an enhanced SSOP.⁴

The February 27 NPRM only applies to State Safety Oversight⁵, which is a program that applies only to FTA grant recipients that operate a rail transit (rail fixed guideway) system that does not fall under the jurisdiction of the Federal Railroad Administration. State Safety Oversight applies to the transit agency, the state in which the rail transit system operates, and the State Safety Oversight Agency ("SSOA") that conducts the SSOP.⁶ The costs of State Safety Oversight are eligible for FTA assistance under its grant programs.⁷

State Responsibility. Under the NPRM, states will assume greater responsibility for State Safety Oversight. This greater assumption of responsibility includes the following:

1. The state must submit its SSOP to the FTA for approval;
2. The SSOA must be legally and financially independent from the transit agency that operates the rail transit system. The SSOA cannot be reimbursed for its expenses by the rail transit agency that it oversees and cannot be the parent organization of the agency that operates the rail fixed guideway system. Further, the SSOA may not employ any individuals who are also responsible for the administration of the rail fixed guideway system that is the subject of the SSOA's oversight; and
3. The SSOA must have investigative and enforcement authority under state law; audit the rail transit system at least triennially; and provide an annual status report to the FTA, the Governor of the State, and the transit agency's board. The SSOA will have increased authority to conduct inspections, investigations, audits, and examinations; test equipment, facilities, rolling stock, and operations of rail transit systems; make reports and issue directives with respect to safety; issue subpoenas and take depositions from any employee of a rail transit system who is responsible for safety; require production of documents; and issue regulations for State Safety Oversight through public notice and comment.⁸

FTA Approval. The approval of the FTA is required for each state's SSOP. In order to gain the FTA's approval, the state must include the following:]

1. The state must assume responsibility for safety oversight of rail transit systems;
2. The state must adopt federal and state safety laws;
3. The state must determine the proper staffing for the designated SSOA; and
4. SSOA staff must be properly trained and certified.⁹

Financial Penalties. The FTA is granted the ability to assess financial penalties against states that are not certified to conduct State Safety Oversight. As stated above, under the proposed rule the FTA has authority to conduct the following:

1. Inspections, investigations, audits, and examinations of the SSOP;
2. Tests of equipment and facilities;
3. Submission of reports and issuance of directives;
4. Issuance of subpoenas and taking of depositions;
5. Document production; and
6. Issuance of regulations.¹⁰

The FTA believes the proposed rules would strengthen State Safety Oversight. State Safety Oversight is an unusual framework for regulation of transit safety. The federal government does not directly regulate safety, but it also does not leave states free to do so. Instead, for recipients of federal funding, Congress has mandated that the Secretary of Transportation (acting through the FTA) promulgate *federal* rules about how states arrange for *state* oversight of transit safety.

The comment period for the NPRM closed on April 28, 2015. The FTA received comments from more than 50 organizations and individuals, including many state Departments of Transportation, transit agencies, and industry organizations. For example, the American Public Transportation Association's comment suggests that the proposed rule would create a logjam of investigations; that the definition of serious injuries is unnecessarily broad and reporting of serious injuries should be amended; that the compliance clock should be delayed to coincide with other safety regulations; and that FTA should clarify next steps should an

agency disagree with an SSOA's determinations.

There is no stated schedule for the completion of the final rule.

1 49 C.F.R. Part 659.

2 Senate Committee on Banking, Housing and Urban Affairs, *Report on the Public Transportation Safety Act of 2010, 111th Congress, S. REP. NO. 111-232 at 2 (2010)*. In 2009, accidents occurred on rail fixed guideway systems in Boston, MA; Washington, DC; and San Francisco, CA. The accidents generally occurred due to operations mistakes or equipment malfunctions.

3 Senate Committee on Banking, Housing and Urban Affairs, *Report on the Public Transportation Safety Act of 2010, 111th Congress, S. REP. NO. 111-232 at 3 (2010)*. Specifically, the GAO found that the State Safety Oversight regime needed more clarity regarding how oversight of rail fixed guideway systems that operate in more than one state should be handled; that both the FTA and state SSOAs needed more enforcement authority; and that SSOAs needed more expertise, staff resources, and funding to carry out their duties.

4 *Moving Ahead for Progress in the 21st Century, Pub. L. No. 112-141, 126 Stat. 405*.

5 The FTA published an Advanced Notice of Proposed Rulemaking ("ANPRM") related to the national public transportation safety plan, public transportation safety certification training program, and public transportation agency safety plans on October 3, 2013 (see 78 Fed. Reg. 61251 (October 3, 2013)). Subsequent to the ANPRM, the FTA issued interim safety certification training program provisions (see 79 Fed. Reg. 24363 (April 30, 2014)) and final interim safety certification training program provisions (see 80 Fed. Reg. 10619 (February 27, 2015)).

6 *State Safety Oversight, 80 Fed. Reg. 11002, 11003 (February 27, 2015) (amending 49 C.F.R. Part 659)*.

7 *State Safety Oversight, 80 Fed. Reg. 11002 (February 27, 2015) (amending 49 C.F.R. Part 659)*.

8 *State Safety Oversight, 80 Fed. Reg. 11002, 11006 (February 27, 2015) (amending 49 C.F.R. Part 659)*.

9 *Ibid.*

10 *Ibid.*