RTD Comments on Tate and Rodriguez DRAFT BILL dated 1.21.20

Title: “Concerning the Regional Transportation District”

- A very broad title that could be subject to late amendments and strike-throughs without the opportunity for public and stakeholder review. Suggestion: “Additional State Oversight of the Regional Transportation District”

Section 1 – amending CRS 32-9-107 – Mass Transportation System.

- Section (3)(a) sets requirements that elected officials (RTD Board) “shall [i.e., must always] consider” a list of eleven factors, plus many additional sub-factors. Numerous factors are very difficult to quantify or prove. Proof that factors were considered may be difficult to demonstrate without a lengthy record at meetings. Certain listed factors contradict other factors. Does not indicate whether it applies to temporary actions (e.g., strike planning). Does not clearly include whether the District can afford to do something – i.e., has funding – as a factor.

- Section (3)(b) states that no one factor can ever be dispositive. However, in actuality there may be times when one factor is as a practical matter dispositive.

- The changes proposed for this section are generally consistent with RTD’s Service Standards, which are based on national best practices, and guide service planning for the District. Per RTD’s service standards, and based on input from elected officials and community stakeholders, our service planners largely already consider, and will continue to consider the impacts described in the legislation. Where those impacts are in conflict with each other, RTD will, in cooperation with its Board of Directors and community stakeholders, weigh the trade-offs of its options before coming to a decision. RTD currently adheres to numerous Federal requirements that pertain to service changes and fares and will be required to continue to do so. However, as currently written, this section seems to direct that each of the considerations be given equal consideration – that is at best a challenge and at worst a potential conflict with Federal Title VI and competitive funding requirements.

- The Reimagine RTD process will delve deeply into many of the impacts described in the legislation and allow RTD to make even more informed and thoughtful decisions than its planners have been able to make in the past. Reimagine RTD is an open and transparent process that has begun substantial outreach in the District, which will continue over the two-year process.

- Regarding the specific reference to Greenhouse Gas Emissions, RTD is committed to having a positive impact on Colorado’s environment and, specifically, to reducing greenhouse gas emissions. However, calculations of
service change impacts to direct, and particularly indirect, greenhouse gas emissions could prove infeasible given the difficulty of measuring or estimating those metrics.

**Section 2 – amending CRS 32-9-107.5 – Discrimination prohibited – civil action**

- This provision of the statute (Section 107.5) is already in use for another purpose – Regional Fixed Guideway Mass Transit Authorization. Please clarify what statutory provision is being amended.

- RTD would like to propose an alternative Section 2. This section does not serve the intent to provide better service for transit-dependent riders. If RTD is subject to ongoing claims and litigation costs, this could impact RTD’s ability to provide transit service. RTD wants to find a solution that encourages RTD’s continued compliance with ADA and civil rights laws but that does not unduly burden its ability to provide transit service to transit-dependent riders.

- Section (2)(a) – Prohibiting discrimination on the basis of disability, race, color and national origin in connection with the provision of transportation service is redundant of existing state law, CRS § 24-34-601, 24-34-802. These existing CO statutes already specifically incorporate in federal ADA law. CRS § 24-34-601(4). Colorado Department of Regulatory Agencies, Civil Rights Division already receives and investigates complaints of discrimination based on public accommodations including transportation services provided by RTD. DORA provides mediation and a remedy for resolution of a discrimination complaint; in this context, discrimination includes both disparate treatment and disparate impact claims. DORA or RTD could advertise the availability of this process more widely.

- Delete subsections 2(a)(I)-(IV). These provisions (specifically stating 4 circumstances that would constitute discrimination) are not included in federal statutory law. Including these specific examples of what constitutes discrimination on the basis of a disability could cause state law to come into conflict with federal law, creating uncertainty, confusion, and liability for RTD. Subsection (IV), which talks about a request for a reasonable modification, omits two exceptions that are included in federal regulations for denying a reasonable modification: undue financial and administrative burden. This highlights the risk of inconsistency and confusion. If reasonable modification is specifically codified in state statute, it should be consistent and have all of the same exceptions that the existing federal regulations provide.

- Subsection 3(a): The term “ethnicity” should be omitted. If the intent is to incorporate federal Title VI requirements, this bill goes beyond Title VI, which does not include ethnicity as a protected class. Similarly, existing state discrimination statutes do not include ethnicity as a protected class. CRS § 24-34-601.
Subsection 3(a) also adds disparate impact as a private right of action under Title VI. The US Supreme Court held that there is no private right of action for disparate impact claims, so this provision provides greater remedies than are available in the federal system and is not available in any other state that RTD is aware of. This opens RTD up to additional litigation – costly litigation because a disparate impact claim must be supported by expert testimony showing the statistically significant impact on the protected class and because it is likely to be class actions, which are more expensive to litigate in order to certify the class. This is why the federal statute has not allowed for a private right of action.

Section (4)(a)(III) – providing for "compensatory damages for other pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." These additional damages are excessive and go beyond the current state statute, CRS 24-34-802(2)(a), or federal law, which provides for compensatory damages only after proof of intentional discrimination. See Havens v. Colorado Department of Corrections, 897 F.3d 1250, 1262–71 (10th Cir. 2018) (noting that deliberate indifference is sufficient to satisfy the intentional discrimination required for compensatory damages under § 504 and that intentional discrimination can be inferred from deliberate indifference, the court affirmed summary judgment against the plaintiff because the plaintiff failed to establish deliberate indifference; plaintiff, an "incomplete quadriplegic," claimed that certain decisions and policies of the Colorado Department of Corrections caused him to be excluded from access to facilities and services that were available to able-bodied inmates of the Colorado prison system; however, the court agreed with the district court's reasoning and view that meaningful access and the question of whether accommodations are reasonable must be assessed through the prism of the prison setting, which requires prison officials to consider security and other factors unique to the prison environment in making their decisions); Barber ex rel. Barber v. Colorado Dept. of Revenue, 562 F.3d 1222, 1229-33, 22 A.D. Cas. (BNA) 17 (10th Cir. 2009) (in order to recover compensatory damages under § 504, the plaintiff must show that the discrimination was intentional, and intentional discrimination "can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights," i.e., (1) knowledge that a harm to a federally protected right is substantially likely, and (2) a failure to act upon that likelihood; the court concluded that the defendant in this case did not act with deliberate indifference in a dispute over how to satisfy the requirement that a "parent, step-parent or guardian" supervise a minor's driving practice, as required by an instruction permit, where the custodial parent is blind).

Presumably the intent is to create an incentive for plaintiffs’ attorneys who take cases on a contingency fee to represent individuals to remove a barrier of representation. However, the unintended consequence is that it exposes RTD to open-ended liability and may force RTD to settle meritless claims because of the potential risk of such damages and the costs of litigation; the result is not resolution of the substantive issues that could improve transit service. It diverts
public funds to plaintiffs’ attorneys who profit from bringing questionable claims in order to obtain a quick settlement.

- Section 4(b), which provides “If the plaintiff is the prevailing party in an action under this subsection (4), the court shall award reasonable attorney fees and costs to the plaintiff.” That means that the court has no discretion in awarding fees and costs and has no ability to determine what costs are reasonable. In addition, courts have held that a party is a prevailing party if it wins on any portion of a case. That means that, for example, if a party asserts 5 issues and prevails only on one, even if it is the most minor and the plaintiff has no damages, it would require an award of fees and costs. This provision goes beyond the remedies in the current CO statute, which provides a permissive award to the prevailing party of “reasonable attorney fees and costs.” CRS §§ 24-34-802(3), 24-34-505.6. Similarly this proposal goes beyond federal law, which under Title II of the ADA, reasonable attorney fees and costs are allowed in the court’s discretion for the prevailing party. This provision further substantiates RTD’s concerns in the prior bullet point: that such an open ended risk would prevent a fair litigation of the merits of claim, drive quick settlements, and thereby encourage plaintiffs’ attorneys to file more questionable claims.

- Subsection 6 – report to the Transportation Legislation Review Committee describing how it will ensure compliance with the requirements of this section. This provision implies RTD is out of compliance. RTD is currently in compliance with the ADA and Title VI. FTA regularly (and thoroughly) audits RTD to ensure compliance on both statutes and has determined that RTD is in compliance. RTD has requested specific details about what aspects of the ADA or Title VI it is not in compliance with.

- Amending § 32-9-107.7 – Legislative Oversight. This provision of the statute (Section 107.7) is already in use for another purpose – Regional Fixed Guideway Mass Transit Systems – construction – authorization. Please clarify what statutory provision is being amended. If the intent is to provide public testimony on compliance with ADA and Title VI, RTD is concerned that this public testimony will discourage individuals from making complaints to RTD and that RTD would not have the opportunity to investigate each complaint. It is important that RTD receive timely complaints so that it can respond within the very short timeframe allowed under the collective bargaining agreement to hold operators accountable for complying with RTD policies that enforce ADA compliance.

- RTD provides the following other methods of dispute resolution for passengers on these specific issues:
  - RTD currently has two ADA-related working committees that are designed to support people with disabilities and the disabled community as a whole: the Advisory Committee for People with Disabilities (ACPD), and the Access-a-Ride Paratransit Advisory Committee (APAC). Through these committees, RTD consistently and responsibly addresses concerns they
may have and ideas for improved services. APAC is designed to assist with concerns and improvements to the Access-a-Ride paratransit program. APAC currently has 13 members and meets every other month. ACPD addresses all other RTD disability related transportation matters outside of APAC. ACPD currently has 13 members and meets once a quarter.

- RTD has a Civil Rights division that reports directly to the General Manager/CEO. The Sr. Manager, Civil Rights reports regularly on compliance efforts to the Board of Directors. Within that division, there is an ADA manager who is responsible for ADA compliance throughout the RTD organization and reports on RTD's compliance efforts to the FTA. In addition, there is also an ADA investigator who is responsible for investigation of ADA complaints, review of trends in ADA complaints, and actions in response to complaints.

- RTD has a Title VI manager who is responsible for Title VI compliance and reporting to the FTA. He conducts and oversees equity analysis for any fare or service change. He also receives and investigates Title VI complaints.

- Lastly, the Colorado Civil Rights Division receives and investigates complaints alleging discrimination in public accommodations including transportation services. These complaints can be for discrimination on the basis of disparate treatment or disparate impact. RTD investigates and responds to these complaints as well. The CCRD provides an opportunity for mediation.

Section 3 – amending CRS 32-9-109.5 Board of directors

- Subsection (2)(b). Elected directors represent all constituencies already; designating appointed directors to represent two specific constituencies opens the door for other groups. General concerns about the manageability of a board of this size to conduct RTD business. No provisions for removal of the two appointed directors, whether by the Governor or through recall (recall is inapplicable to appointed persons). First Amendment concerns in specifying that appointed persons “must” show a “demonstrated history” of “advocating” for specific policy positions. “History of advocating” is vague. “Interest in” equitable transportation planning is a vague requirement. Subsection (2)(b)(I)(A) says that an appointee must have a demonstrated history of advocating for the “full” public accommodation – not “reasonable” accommodation – of people with disabilities. Such specific restrictions on the Governor’s ability to appoint persons is unusual and could implicate separation of powers issues. Requirement that the Governor “shall consult” with “constituency groups” raises similar issues of separation of powers and First Amendment concerns. What if an appointee, after being appointed, changes personal philosophy? Could have unintended effect of other directors ceding interest in or responsibility for these issues to the two appointees. Danger of these appointees becoming “single issue” members disclaiming responsibility for other goals and values. Depending on where the
appointees reside, would skew geographic representation (and possibly all three appointees could reside in one elected Director district, thus seriously skewing geographic representation). Making these appointees ex officio could alleviate some of these concerns.

- Subsection (2)(b)(III). Appointed directors must live within the district boundaries.

- General concerns about consistency with the RTD Board’s Bylaws.

- General concerns here and elsewhere about whether provisions apply solely to regular and special meetings of the full Board, or to Board committees as well. (Many of the RTD Board committees are committees of the whole – the Board meets one Tuesday a month for regular meetings, but Board committees of the whole generally meet on most other Tuesdays. This also lends to confusion.)

- Subsection (4) – “each member of the Board retains the right to have full access to the District’s documents and records without cost”. Needs to be subject to reasonable privacy and security concerns. Should not allow individual Board members to have full access to individual employees’ personnel files, confidential litigation files, files for which nondisclosure agreements are required, etc. Should be limited to access for official purposes, not just because an individual member wants to use materials for private purposes. Board should be allowed to set reasonable restrictions to prevent unreasonable demands by one member. Use of the term “documents” is inconsistent with other CO laws.

- To be clear that making available RTD records does have a cost; this provision is likely intended to mean no out of pocket or additional costs to the director. “Retains the right” is unclear, because currently no individual Board members have such unfettered rights to access all Board records whatsoever without regard to costs. No other governmental entity has this type of provision; this is a matter better left to the Board to determine through Bylaws or procedural rules.

**Section 4 – amending CRS 32-9-111 Election of directors**

- Confusion in having elected directors serve four year terms and Governor-appointed directors serve three year terms; multiple swearings-in. No provision for substitute appointments if appointing Governor leaves office. No provision for Governor removing or substituting appointees.

**Section 5 – amending CRS 32-9-112 Vacancies**

- Amendment retains current provision allowing for voter recall of elected Board members; however, there is no provision for removal or recall of appointed Board members – not even by the Governor who appoints them.

**Section 6 – amending CRS 32-9-114 Board administrative powers**
• General concerns about inconsistency with RTD Bylaws.

• Subsection (1)(c) – what if the position of chair becomes vacant? Normally the chair pro tem would become the chair, but under these proposed statutes some other sort of order of succession might be required if an appointed director holds an officer position, since the chair is limited to an elected director.

• Subsection (1)(g) – publish in “languages spoken by residents of the district”. This is overbroad and places an undue burden on RTD. There are numerous languages spoken within the District. The languages in which RTD provides information are determined by a federal oversight process. RTD would like to provide suggested language to ensure that this obligation does not extend beyond its federal requirements for Limited English Proficiency. Otherwise, this provision would be cost prohibitive to RTD.

• Subsection (2) – provisions allowing for directors to remove an elected or appointed director “for good cause” is problematic and raises risk of legal challenges. Even if all 16 other directors vote to remove a director “for good cause,” there can be a legal challenge as to whether in fact there was good cause. “Good cause” is not defined.

Section 7 – amending CRS 32-9-115 Records of board – audits

• Eliminate “for all employees are comparably managed and offer comparable benefits for all employees”. This creates an obligation on RTD for which it does not have legal authority to comply. The pension fund for employees within the collective bargaining unit (employees represented by the union) is independent of RTD, meaning it is governed by a 6-person trust (RTD appoints 3 trustees and the Union appoints 3 trustees); this pension plan is not considered a District Retirement Benefit Plan. Therefore, RTD cannot legally ensure that all employees receive comparable benefits or that their separate plans are comparably managed.

• The Salaried Employee’s Pension Plan is valued from an actuarial standard every year and that information is presented to the RTD Board of Directors in the Spring of each year. The two salaried plans are not comparable benefits and RTD is aware of that. RTD closed the Salaried Employees Pension plan in 2007 because of the cost and set up the Defined Contribution plan for those employees starting after January 1, 2008. It would be cost prohibitive for RTD to contribute to the Salaried Employees Defined Contribution at the same level as what is contributed to the Salaried Employees Pension plan.

• Please clarify the purpose of the compensation and benefits audit to ensure alignment with the local labor market.

• The state audit per current statute is required to audit RTD at least once every 5 years. The State Auditor determines the focus of the audit. We are currently
being audited by the State Auditor at this time. We are very supportive of the state auditor being paid for from the general funds instead of RTD's funds.

Section 8 – amending CRS 32-9-116 Meetings of the board

- RTD already is required to provide, and does, reasonable accommodations to allow persons with disabilities to attend board meetings.

- Subsection (1.5)(b) – Recommend changing to “each regular or special meeting of the board.” Note: Need to consider applicability to meetings of committees of the whole. Also, executive sessions need to be excluded.

- Subsection (4) – Board “may” adopt rules for absent members. Recommend that adoption not be limited to Bylaws but be permitted as part of procedures. Who determines whether a “medical condition that prevents a member from being physically present” has been adequately “documented”? Does the chair make the call, or does the Board vote on whether there is adequate documentation? Raises privacy and confidentiality concerns (example: “I have AIDS and it is preventing me from being present”). If applied to committees of the whole, will restrict current practice where Board members can call in to discuss and cast their votes.

- General concerns with consistency with RTD Bylaws. Subsection (4).

Section 9 – amending CRS 32-9-117 Compensation of directors

- Subsection 2(b), Board shall adopt ... Concerns re infringement on RTD board to adopt its own bylaws. The term “guidelines and procedures” is unclear. Mechanics for reducing pay due to past absences are unclear.

Section 10 – amending CRS 32-9-118 Conflicts of interest

- Subsection (1) – RTD did not advocate for removal from Amendment 41; to the contrary, RTD merely sought a ruling from the Independent Ethics Commission as to whether or not RTD was subject to Amendment 41.

- (2) – “Any person may file a written complaint with the independent ethics commission ... asking whether a director or employee . . . has failed to comply with the requirements...” This is overbroad. The complaint must meet the same minimum threshold standards that any complaint filed with the independent ethics commission; there is no need for separate rules applicable solely to RTD, once RTD has been deemed subject to Amendment 41.

- Elsewhere this draft defines RTD as a local government, but does not define RTD directors as local government officials.

Section 11 – amending 32-9-119.7 Farebox recovery ratios
• No comments at this time. RTD is supportive of this change.

Section 12 – amending 32-9-119.8 Provision of retail goods

• No comments at this time. RTD supports the expanded ability to provide retail and commercial goods and services at transfer facilities. This change could create opportunities for RTD and increases RTD’s flexibility.

• Subsection 2.5 – seems reasonable to me to ask the CDOT ED for approval of use on property that CDOT owns and leases to RTD but RTD would not support expanding this requirement beyond CDOT-owned property.

Section 13 – amending 32-9-124.5 Notice to board of intent to borrow – supplemental appropriation

• “The officers of the District shall notify the Board at least 30 days prior ...” The Board members are officers of the District. Please clarify, such as “The Board of Directors shall be notified at least 30 days prior ...”

Section 14 – amending CRS 2-3-110.5 Fraud hotline

• Concern regarding whether the State Auditor has such jurisdiction pursuant to CRS 2-3-103. Ability to audit political subdivisions like RTD is limited. Consider whether it is necessary to call out only RTD. RTD should be treated consistently with other special districts.

• As worded, will authorize investigations of all contractors of RTD, including contractors operating bus and commuter rail services. Is that the intent?

Section 15 – amending CRS 24-18-102, State Ethics Code

• “A statutory district created in Title 32” means not just RTD but all statutory districts under any articles – i.e., not just Title 32, article 9 (RTD Act).

Section 16 – amending CRS 24-18.5-101 Ethics commission

• If the term “local government” is defined to include RTD (as is done elsewhere in this draft) and local government official to include RTD directors, then RTD does not need to be specifically called out.

Sections 17 and 18 – amending CRS 24-114-101 et seq. Whistleblower protections
• This provision is greatly improved from prior drafts – thank you. The provision that this is amending is intended to serve the legislative purpose of addressing government competition with private enterprise. Is this provision aligned with the original purpose of the statute? RTD should be treated consistently with all other statutory districts.

• This will extend whistleblower provisions to employees of all private contractors of RTD. Is this the intent?