



# Federal Register

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**Thursday,  
February 15, 2007**

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**Part III**

## **Department of Transportation**

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**Federal Transit Administration**

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**49 CFR Part 604  
Charter Service; Proposed Rule**

**DEPARTMENT OF TRANSPORTATION****Federal Transit Administration****49 CFR Part 604**

[Docket No. FTA-2005-22657]

RIN 2132-AA85

**Charter Service****AGENCY:** Federal Transit Administration, DOT.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Pursuant to the direction contained in the Joint Explanatory Statement of the Committee of Conference, for section 3023(d), "Condition on Charter Bus Transportation Service" of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005, the Federal Transit Administration (FTA) established a committee to develop, through negotiated rulemaking procedures, recommendations for improving the regulation regarding unauthorized competition from recipients of Federal financial assistance. The proposed revisions contained in this notice of proposed rulemaking (NPRM) represent a complete revision to the charter service regulations contained in 49 CFR part 604. The NPRM contains the consensus work product of the Charter Bus Negotiated Rulemaking Advisory Committee (CBNRAC), which was able to reach consensus on a majority of the regulatory language. Where the CBNRAC was unable to reach consensus, FTA proposes revisions to the charter service regulations based on the open, informed exchange of information that took place during meetings with the CBNRAC.

**DATES:** Comments must be received by April 16, 2007. Late filed comments will be considered to the extent practicable.

**ADDRESSES:** You may submit comments by any of the following methods:

*Federal e-Rulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

*Web site:* <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.

*Fax:* 202-493-2251.

*Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, PL-401, Washington, DC 20590-0001.

*Hand Delivery:* Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC,

between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Instructions:* When submitting comments electronically to Department's Docket Management System (DMS) Web site located at <http://dms.dot.gov>, you must use docket number 22657. This will ensure that your comment is placed in the correct docket. If you submit comments by mail, you should submit two copies and include the above docket number. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed stamped postcard. Note that all comments received will be posted without change to <http://dms.dot.gov>. This means that if your comment includes any personal identifying information, such information will be made available to users of DMS. You may review the Department's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****I. Statutory Authority**

Pursuant to the direction contained in the Joint Explanatory Statement of the Committee of Conference, for section 3023(d), "Conditions on Charter Bus Transportation Service" of SAFETEA-LU, FTA established a Federal Advisory Committee on May 5, 2005, to develop recommendations through negotiated rulemaking procedures for improvement of the regulation regarding unauthorized competition from recipients of Federal financial assistance.

**II. Advisory Committee**

The Charter Bus Negotiated Rulemaking Advisory Committee (CBNRAC) consisted of persons who represented the interests affected by the proposed rule (i.e., charter bus companies, public transportation agencies—recipients of FTA grant funds), and other interested entities.

The CBNRAC included the following organizations:

American Association of State Highway and Transportation Officials;  
American Bus Association;  
American Public Transportation Association;  
Amalgamated Transit Union;  
Capital Area Transportation Authority;  
Coach America;  
Coach USA;  
Community Transportation Association of America;  
FTA;  
Kansas City Area Transportation Authority;  
Lancaster Trailways of the Carolinas;  
Los Angeles County Municipal Operators Association  
Monterey Salinas Transit;  
National School Transportation Association;  
New York State Metropolitan Transportation Authority;  
Northwest Motorcoach Association/  
Starline Luxury Coaches;  
Oklahoma State University/The Bus Community Transit System;  
River Cities Transit;  
Southwest Transit Association;  
Taxicab, Limousine & Paratransit Association;  
Trailways; and  
United Motorcoach Association.

The CBNRAC met in Washington, DC on the following dates:

May 8-9  
June 19-20  
July 17-18  
September 12-13  
October 25-26  
December 6-7

FTA hired Susan Podziba & Associates to facilitate the CBNRAC meetings and prepare meeting summaries. All meeting summaries, including materials distributed during the meetings, are contained in the docket for this rulemaking (#22657). During the first meeting of the CBNRAC, the committee developed ground rules for the negotiations, which are summarized briefly below:

- The CBNRAC operates by consensus, meaning that agreements are considered reached when there is no dissent by any member. Thus, no member can be outvoted.
- Work groups can be designated by the CBNRAC to address specific issues or to develop proposals. Work groups are not authorized to make decisions for the full CBNRAC.
- All consensus agreements reached during the negotiations are assumed to be tentative agreements contingent upon additional minor revisions to the language until members of the CBNRAC

reach final agreement on regulatory language. Once final consensus is achieved, the CBNRAC members may not thereafter withdraw from the consensus.

○ Once the CBNRAC reaches consensus on specific provisions of a proposed rule, FTA, consistent with its legal obligations, will incorporate this consensus into its proposed rule and publish it in the **Federal Register**. This provides the required public notice under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and allows for a public comment period. Under the APA, the public retains the right to comment. FTA anticipates, however, that the pre-proposal consensus agreed upon by this committee will effectively address virtually all the major issues prior to publication of a proposed rulemaking.

○ If consensus is reached on all issues, FTA will use the consensus text as the basis of its NPRM, and the CBNRAC members will refrain from providing formal negative comments on the NPRM.

○ If the CBNRAC reaches agreement by consensus on some, but not all, issues, the CBNRAC may agree to consider those agreements as final consensus. In such a case, FTA will include the consensus-based language in its proposed regulation and decide all the outstanding issues, taking into consideration the CBNRAC discussions regarding the unresolved issues and reaching a compromise solution. The CBNRAC members would refrain from providing formal negative comments on sections of the rule based on consensus regulatory text, but would be free to provide negative comments on the provisions decided by FTA.

○ In the event that CBNRAC fails to reach consensus on any of the issues, FTA will rely on its judgment and expertise to decide all issues of the charter regulation, and CBNRAC members may comment on all components of the NPRM.

○ If FTA alters consensus-based language, it will identify such changes in the preamble to the proposed rule, and the CBNRAC members may provide formal written negative or positive comments on those changes and on other parts of the proposed rule that might be connected to that issue.

A complete description of the ground rules is contained in the docket for this rulemaking.

Finally, the CBNRAC reached consensus on the issues the committee would consider during its negotiations. The committee agreed to consider the four issues included in the Conference Committee report:

1. Are there potential limited conditions under which public transit agencies can provide community-based charter services directly to local governments and private non-profit agencies that would not otherwise be served in a cost-effective manner by private operators?

2. How can the administration and enforcement of charter bus provisions be better communicated to the public, including the use of Internet technology?

3. How can enforcement of violations of the charter bus regulations be improved?

4. How can the charter complaint and administrative appeals process be improved?

The CBNRAC also agreed to consider four additional issues:

1. A new process for determining if there are private charter bus companies willing and able to provide service that would utilize electronic notification and response within 72 hours.

2. A new exception for transportation of government employees, elected officials, and members of the transit industry to examine local transit operations, facilities, and public works.

3. Review and clarify, as necessary, the definitions of regulatory terms.

4. FTA policies relative to the enforcement of charter rules and the boundary between charter and mass transit services in specific circumstances, such as university transportation and transportation to/from special events.

### III. Overview

The negotiated rulemaking process is fundamentally different from the usual process for developing a proposed rule. Negotiation allows interested and affected parties to discuss possible approaches to various issues rather than simply being asked in a regular notice and comment rulemaking proceeding to respond to details on a proposal already developed and issued by an agency. The negotiation process involves the mutual education of the parties on the practical concerns about the impact of various regulatory approaches.

The negotiated rulemaking process for the charter service regulation resulted in a complete overhaul of the regulation. This was done in response to longstanding concerns that the existing regulation is hard to understand because it is unclear about what activities constitute "charter service." In addition, members of the CBNRAC agreed that the existing exceptions to the prohibition on charter service should be clarified. Concerns were also raised about the complaint process. Some members felt

that complaints were filed in a vindictive manner and without a substantive basis. Others felt that once a complaint was filed, the standard contained in the existing regulation made it nearly impossible to receive the relief requested. All members of the CBNRAC felt that the complaint and appeal process takes too long.

What follows is a description of the decisions reached on each of the issues that the CBNRAC agreed to consider during negotiations. Each issue raised sub-issues that the committee agreed were also worth considering, and those sub-issues are also discussed. If consensus was reached on an issue (or sub-issue), we explain the consensus. If consensus was not reached, we explain the relative positions of the two main groups: the public transit caucus and the private charter caucus, and then offer a proposal by FTA. We encourage interested parties to review the meeting summaries in the docket for a more complete description of the positions of the caucuses and the negotiations of the CBNRAC.

Furthermore, two major changes are worth noting at the outset. First, the CBNRAC agreed to discard the concept of "willing and able," that had persisted for more than 20 years. As a result, private charter operators interested in performing requests for charter service received by recipients would now be "registered charter providers." This term is appropriate because, as explained in further detail later in this document, private charter operators would register on an Internet site. This website, known as the FTA Charter Registration Website, would store the names of private charter operators interested in receiving notice from recipients. This new process would replace the old "willing and able" process.

Second, the existing regulation contains very limited requirements regarding complaints, hearings, and appeals. This proposal contains a more robust complaint, hearings, and appeals process. This would ensure that FTA has an appropriate mechanism for weeding out frivolous or vindictive complaints while ensuring that substantive complaints contain the necessary information to inform all parties involved. Further, while the existing regulations contain an option for a hearing, there are no procedures for a hearing. This NPRM contains procedures for a hearing if a complaint merits one.

To summarize, the proposals contained in this NPRM represent consensus language and informed decisions by FTA. The complete rewrite

of part 604 has been a long time in the making, and is necessary. It is the hope of FTA that the clarifications made in this proposal will assist public transit agencies in complying with charter service regulations and ensure that all parties understand when compliance has been achieved.

#### IV. Conference Committee Report Issues

##### *Issue #1: Limited Exceptions for Providing Community-Based Charter Services*

Under the current regulations governing charter service, an FTA recipient is generally prohibited from providing charter service unless one of the exceptions applies. The existing exceptions are: (1) When there is no "willing and able" private charter operator; (2) leasing equipment; (3) rural hardship; (4) special events; (5) non-profit organizations serving individuals with disabilities; (6) non-profit social service agencies listed in Appendix A; (7) non-profit organizations serving low-income or transit-dependent persons; (8) rural non-profit organizations serving the elderly; and (9) formal agreement with all willing and able private charter operators.

The CBNRAC agreed that the revised regulation should also contain exceptions. The committee reached consensus on six exceptions: (1) Government officials; (2) qualified human service organizations; (3) leasing equipment; (4) events of regional or national significance; (5) when no registered charter provider responds to notice from a recipient; and (6) agreement with registered charter providers. We discuss each of these exceptions below. We also discuss one exception where the committee could not reach consensus, which was the "hardship" exception. We have added an exception that the committee did not consider, but due to past and recent events, we believe should be added; an exception for the Administrator. Finally, we discuss three sub-issues for all exceptions: Reporting requirements, fully allocated costs, and recipients with 1,000 or more buses in peak hour service.

##### (a) Government Officials

This is a new exception to the charter regulations and would allow recipients to provide charter service to government officials for non-transit related purposes as long as the recipient provides the service in its geographic service area, does not generate revenue (except as required by law), and records the trip. The CBNRAC also agreed that there

should be an hourly annual limit for this exception, but could not reach consensus on the number of hours. The public transit caucus proposed an annual limit of 125 charter service hours. The private charter caucus proposed an annual limit of 80 charter service hours. Neither caucus explained why one limit should prevail over the other.

Since this is a new exception to the charter regulations, FTA proposes to accept the private charter caucus' annual limit of 80 hours of charter service to government officials for non-transit related purposes within the recipient's geographic service area. In accepting this proposal, however, FTA believes that extenuating circumstances may arise where additional hours may be necessary. As a result, FTA added a provision to allow for additional charter service hours under this exception, at the Administrator's discretion, in rare or unusual circumstances, if the recipient submits a written request: (1) Describing the event; (2) explaining why registered charter providers in the geographic service area cannot perform the service (e.g., equipment, time constraints, or other extenuating circumstances); (3) describing the number of charter service hours requested to perform the service; and (4) presenting evidence that the recipient has sent the request for additional hours to registered charter providers in its geographic service area. FTA would review the request and respond to the recipient. The recipient would then be responsible for emailing FTA's response to the registered charter providers in its geographic service area. As with all exceptions under the proposed regulation, the recipient would be responsible for recording the service in an electronic log.

##### (b) Qualified Human Service Organizations

This exception would essentially collapse three exceptions contained in the existing regulation pertaining to the elderly, individuals with disabilities, and low-income individuals into one exception for "qualified human service organization." Consistent with the President's Executive Order on Human Service Transportation Coordination (February 24, 2004), the CBNRAC reached consensus on allowing recipients to provide charter service to "persons with mobility limitations related to advanced age, persons with disabilities, and persons struggling for self-sufficiency \* \* \*" If an organization serving the above individuals also receives funds from one or more of the 65 Federal programs to be listed in Appendix A to the

regulation, then the recipient would only need to record the charter service in order to provide it. If the organization does not receive Federal funds from the programs listed in Appendix A, but serves individuals described in this section, then the organization would need to register on FTA's Charter Registration Web site and the recipient would need to record the charter service. FTA will provide Appendix A in the final rule and will update it from time to time as new Federal programs are created to assist individuals and organizations covered by this exception or when a party sends a petition to the Administrator requesting an update to Appendix A.

##### (c) Leasing FTA-Funded Equipment and Drivers

The existing exception under the charter regulations allows for a recipient to lease equipment to a private charter operator if the private charter operator receives a request that exceeds its capacity, or the private charter operator does not have equipment accessible to the elderly or individuals with disabilities. The CBNRAC reached consensus on maintaining this exception with a few minor changes. First, the private charter operator would have to be registered on the FTA Charter Registration Website. Second, the private charter operator would have to own and operate a charter service business. Third, the private charter operator would have to exhaust all available vehicles from other private charter operators in the recipient's geographic service area. Fourth, the recipient would have to record the vehicles leased and retain the documentation provided by the private charter operator that demonstrates compliance with the first three requirements.

##### (d) Events of National or Regional Significance

This exception in the current regulation requires a petition to the Administrator personally in order to provide charter service for a special event. The only limitation is that the service can be provided "to the extent that private charter operators are unable to provide the service." The CBNRAC reached consensus on retaining this exception, but with a more formal process for petitioning the Administrator. The revised exception would require recipients to first consult with private charter operators registered in the recipient's geographic service area. After consultation, the recipient may petition the Administrator only if the recipient (1) submits the petition at

least 90 days before the event; (2) describes the importance of the event, the amount of charter service needed, and how private charter operators will be utilized; and (3) files the petition in the special events docket. The Administrator would review the petition, request any additional information necessary to make a decision, and then post the decision in the special events docket. The Administrator's approval of a petition under this exception would be limited to the event described in the petition.

(e) When No Registered Charter Provider Responds to Notice From a Recipient

The existing regulation allows a recipient to provide any and all charter service to the extent that there are no private charter operators interested in providing the service. The CBNRAC reached consensus on retaining this exception, but with a modification designed to make the whole process more responsive. As noted earlier, the implementation of an FTA Charter Registration Website would allow recipients and registered charter providers to respond in real time regarding charter service requests. Under this exception, a registered charter provider would have 72 hours to respond to a request for charter service to be provided in less than 30 days and 14 days to respond to a request for charter service to be provided in more than 30 days. If a registered charter provider responds to the request, then the recipient may not provide the service, even if the registered charter provider and the customer are not able to agree upon a price. Alternatively, if no registered charter provider responds to a request, then the recipient may provide the service so long as it records the proper information in an electronic log.

(f) Agreement With Registered Charter Providers

This exception in the current regulation allows a recipient to enter into an agreement with all private charter operators in its geographic service area to allow it to provide charter service directly to a customer. The CBNRAC reached consensus on retaining this exception with certain modifications to account for the use of the Charter Registration Website instead of the annual willing and able process. Under the revised exception, the recipient would have to ascertain registered charter providers in its geographic service area from the Charter Registration Website by January 30th of each year. The recipient would have to

enter into an agreement with those registered charter providers by February 15th of each year.

1. Additional Exceptions

(i) "Hardship"

The CBNRAC was unable to reach consensus regarding the "hardship" exception that currently exists in the charter regulation. This exception is intended to allow non-urbanized (rural) areas to provide charter service if a private charter operator's provision of this service would create a hardship on the customer because the private charter operator imposes a minimum duration that is longer than the trip length or the private charter operator is located "too far" from the origin of the charter service.

The CBNRAC could not reach consensus on what constitutes "too far." The private charter caucus proposed retaining the exception as is. The public transit caucus offered to replace "too far" with "deadhead time exceeding total trip time from initial pick-up to final drop-off."

FTA proposes to retain the hardship exception and replace "too far" with the public transit caucus' proposal. We believe that this proposal sufficiently clarifies what is meant by "too far" without opening up the exception to abuse.

(ii) Administrator's Discretion

FTA proposes to add a new exception to address unique situations in which it may not be practical or feasible to provide notice to registered charter providers. Specifically, FTA proposes an Administrator's discretion exception that would allow the Administrator to personally approve a recipient's use of Federally-funded assets to provide charter service for such events as funerals of local, regional, or national significance. Such an event is unanticipated and requires an immediate response. For example, the deaths of Presidents Ronald Reagan and Gerald Ford underscore the need for flexibility when using Federally-funded assets to assist in funeral preparation activities and on the day of the funeral. Thus, FTA proposes an Administrator's discretion exception to the charter regulations. A recipient would have to submit a written request, by facsimile or e-mail, that describes the event, describes the charter service requested, explains the time constraints for providing the charter service, describes the anticipated number of charter service hours needed for the event, the type of equipment requested, approximate number of vehicles

needed, duration of the event, and explains how provision of the charter service is in the public's interest. Recipients granted an exception under this section would need to retain the record of approval from the Administrator for three years and include the approval in its electronic records for quarterly reporting on the Charter Registration Web site.

(2) Reporting Requirements for All Exceptions

The CBNRAC agreed that for most of the exceptions a recipient must record certain information about the charter service provided. Specifically, the committee reached consensus on reporting that would require recipients to record an organization's name, address, phone number, e-mail address, date and time of service, number of passengers, destination, trip length (miles and hours), fee collected, and vehicle number. This would be required for charter service provided under the exceptions for government officials, qualified human service organizations, hardship, and when no registered charter provider responds to a notice. For the leasing equipment exception, the recipient would have to record the registered charter provider's name, address, telephone number, number of vehicles leased, types of vehicles leased, vehicle identification numbers, and documentation presented to the recipient in support of the rule's requirements. A recipient would have to retain this information in an electronic format and for at least three years. The recipient would also identify in the record the exception that the recipient relied upon when providing charter service.

The CBNRAC could not reach consensus on whether or not the above electronic records should be posted on the Charter Registration Web site. The public transit caucus believes that posting their electronic records to a public Web site may implicate privacy concerns. That caucus instead favors the provision of records via e-mail upon request. The private charter caucus insisted that electronic records should be posted to the Web site in order to facilitate transparency. FTA agrees with the private charter caucus, but also recognizes that there may be some situations where certain information should not be posted on the Web site. Thus, FTA proposes to include a provision in the regulation that allows recipients to provide only generalized origin and destination information when safety or security is an issue.

## (3) Fully Allocated Costs

The CBNRAC was unable to reach consensus on whether the concept of “fully allocated costs” should apply to public transit agencies that provide charter service. The public transit caucus felt as though the requirement would be a barrier to providing community-based transportation, but the private charter caucus argued that the requirement is necessary to protect private charter operators.

In the past, FTA required public transit agencies to recover fully allocated operating and capital costs and ensure that the charter service did not interfere with the intended use of the asset. FTA allowed this “incidental use” because it believed the charter service provided supported the mission of FTA.

We propose to eliminate the concept of “fully allocated costs.” The exceptions included in the proposed regulation would allow recipients to provide charter service that is in the public interest, and is consistent with the overall mission of public transit operators as mobility managers within their communities. Hence, the charter service that would be allowed under the proposed rule would be an incidental use of FTA-funded equipment and facilities, and the recovery of fully allocated costs would not be required.

Further, in the case of service provided to “qualified human service organizations,” the Federal Interagency Coordinating Council on Access and Mobility is currently engaged, in cooperation with the Office of Management and Budget, in developing cost allocation principals to share fairly the costs of human service transportation. To require FTA recipients to recover fully allocated costs from those qualified human service organizations, including a share of capital costs already subsidized by FTA, would impose unfair conditions on those interagency deliberations.

That being said, FTA encourages and expects recipients that provide charter services under the provisions of part 604 to develop fair charges to recover as much as possible of the marginal operating cost of the service, consistent with the public purpose of the charter service, and the ability of the requesting entity to pay. As noted earlier, under section 604.12, if a registered charter provider responds to the request for charter service, the recipient may not provide the service, even if the private charter operator’s fee for the service prevents the requester from purchasing the trip. This provision protects the private charter industry from

competition with transit operators that receive subsidies from FTA.

## (4) 1,000 or More Buses in Peak Hour Service

The CBNRAC reached consensus on limiting the application of two exceptions—qualified human service organizations and government officials—to recipients with 1,000 or more buses in peak hour service. The public transit caucus requested this limitation, but the private charter caucus wholly supported it because of the potentially negative impact on private charter operators in urban areas where there are higher concentrations of qualified human service organizations and government officials. Both caucuses viewed the potential number of requests as problematic and felt that it was in each caucuses’ interest to place a limitation on those two exceptions. FTA requests comments from qualified human service organizations and governmental officials on the practical impact of this limitation in the final regulation.

*Issue #2: How Can We Better Communicate Charter Administration and Enforcement to the Public?*

The CBNRAC reached consensus on the use of Internet technology to improve communications regarding the charter service regulations. Members of the committee acknowledged that virtually all private charter companies and public transit agencies have access to the Internet and to email. The ability to maintain lists of private charter companies, informing the public about allowable activities for public transit under the charter service regulations, and posting FTA decisions and complaints were all cited as valuable ways to use the Internet.

To effectuate the Internet-based approach, FTA would develop a Charter Registration Web site that would serve as a single point of contact for private charter operators, recipients, and members of the public to obtain information regarding charter service in their geographic area. In addition, while FTA currently posts decisions regarding charter complaints on its Web site, under the revised regulation, we propose to make better use of the Department’s Docket Management System (DMS) by establishing an exemption docket, special event docket, advisory opinion docket, complaint docket, and hearing docket. These dockets would be available 24 hours a day and seven days a week. Further, DMS has listserv capabilities so that the public can receive notice each time the government places a document in the

docket. We believe this level of transparency would go a long way toward informing the public as to which transit agencies do not provide charter service (exemption docket); private charter operators as to when a public transit agency requests a special event exception (special event docket); when FTA provides formal advice to private charter operators and recipients (advisory opinion docket); when a complaint has been filed against a transit agency (complaint docket); and when a complaint has been referred for a hearing (hearing docket). The CBNRAC reached consensus on this issue.

*Issue #3: How Can Enforcement of Violations of the Charter Bus Regulations Be Improved?*

The CBNRAC reached consensus on improved enforcement of charter service regulations by focusing on deterrence of risky behavior. Members of the committee noted that the seminal question regarding enforcement is: “What is charter service?” For the public transit caucus, it is important to protect the public transit agency’s ability to provide public transportation and serve its community. This includes the ability to modify routes to address congestion or improve mobility for the elderly, disabled or low-income populations. For the private charter caucus, charter service by public transit agencies should not be “dressed up” to look like public transportation. The private charter caucus believed that service for special events of an irregular nature constitutes charter service and the public transit agencies should be prohibited from providing such service unless there is no private charter operator interested in performing the service.

The proposed regulation would implement a new remedial scheme, giving the decision-maker discretion to determine the type and amount of the remedy based on a number of relevant factors, including, but not limited to, the gravity of the violation, the revenue earned by providing charter service, and the operating budget of the recipient. The remedy could take the form of withholding a “reasonable percentage” of available Federal financial assistance, a complete bar on receiving future Federal funds, or a refund to the U.S. Treasury of revenue collected in violation of the rule.

Besides flexibility in the assessment of a remedy, the CBNRAC reached consensus on several other ways to improve the enforcement process, specifically (1) issuing advisory opinions and (2) conducting

investigations. The CBNRAC could not reach consensus on whether the following measures should be included in a new and improved charter service enforcement regime: (1) Cease and desist orders, (2) using neutral decision-makers, and (3) considering a pattern of violations as an aggravating factor to any remedy assessed. We discuss each of these issues below.

#### (a) Advisory Opinions

CBNRAC reached consensus that the new rule should incorporate a provision enabling public transit agencies and registered charter providers to obtain advisory opinions on a case-by-case basis regarding whether or not a particular type of transportation would constitute charter service. These advisory opinions would serve as a mechanism for expedited review by FTA before the recipient performs the service. Through this mechanism, recipients and registered charter providers alike would receive formal advice about compliance with charter service requirements. An advisory opinion would represent the formal position of FTA on a matter and may be used in administrative or court proceedings. The advisory opinion would be limited, however, to the factual circumstances described in the request and would not be binding upon a decision-maker adjudicating a charter complaint.

Advisory opinions represent a more formalized "letter of determination," which is currently issued when private charter operators or recipients seek regulatory advice from FTA before providing charter service. This more formal process would provide transparency and consistency regarding FTA's advice. The CBNRAC reached consensus on this issue.

#### (b) Investigations

Another way to improve enforcement is to ensure that a complaint filed has a substantive basis. Members of the CBNRAC raised concerns regarding the filing of incomplete complaints or frivolous complaints. Thus, the proposed regulation includes a new provision allowing FTA ninety days to conduct an investigation regarding a complaint. This provision is consistent with the statutory requirement: "On receiving a complaint about a violation of an agreement, the Secretary of Transportation shall investigate and decide whether a violation has occurred." 49 U.S.C. 5323(d) (2). Thus, the CBNRAC reached consensus on revised regulatory language that would allow FTA to conduct an investigation after a registered charter provider files a

complaint. The proposed revision would also allow FTA to investigate on its own initiative. After an investigation is complete, FTA may dismiss the complaint, issue an initial decision based on the pleadings to date, or refer the matter to a neutral decision-maker for a hearing.

#### (c) Cease and Desist Orders

The CBNRAC was unable to reach consensus on whether advisory opinions should also offer an opportunity to request a cease and desist order. The public transit caucus worried that such an order could be issued wrongfully, thus preventing public transit agencies from providing public transportation. The private charter caucus encouraged the inclusion of a cease and desist provision as a way to prevent financial harm to private charter operators without going through a full-blown complaint and hearing process.

This NPRM does not include a cease and desist provision. While FTA believes that a properly worded cease and desist provision would protect against "wrongfully" issued cease and desist orders, we are reluctant to implement a cease and desist process because FTA does not have the human resources to administer a cease and desist provision. FTA is concerned that interested parties would inundate the agency with cease and desist requests. Furthermore, we believe that revisions to the charter service definition, coupled with clear exceptions and strong remedies for violations of the regulation provide sufficient protection of a private charter operator's financial interest.

#### (d) Neutral Decision-Maker

During the CBNRAC negotiations, members of the committee expressed the deeply held belief that FTA decisions regarding charter service complaints are inconsistent. Both caucuses described experiences of receiving inconsistent decisions from FTA regarding whether a particular service is prohibited charter service. The private charter caucus also stated that FTA was biased in favor of public transit agencies by advising agencies on how to tailor the charter service so as to look like public transportation. As a consequence, members of the committee agreed that decision-making regarding charter service complaints should be removed from the regional offices and sent to FTA headquarters. The caucuses differed, however, on who should render a determination once a complaint is sent to FTA headquarters. The public transit caucus favored

having FTA headquarters make the initial decision regarding the complaint. The private charter caucus contended that FTA headquarters is biased in favor of public transit agencies regarding charter service complaints. Thus, the private charter caucus favors the use of an Administrative Law Judge (ALJ) to make the initial decision regarding a complaint.

After careful consideration of the above positions, and considering FTA's limited resources, we propose to include a new provision in the proposed regulation that would allow a headquarters office to make an initial decision regarding a charter service complaint or to refer the matter to a neutral decision-maker (Presiding Official) for a hearing. The Presiding Official might be an Arbitrator or other hearing officer and the parties to the proceeding would be the public transit agency and the complaining party. The Presiding Official would then issue a recommended decision to an appropriate headquarters office that would reject, ratify, or adopt with modifications the recommended decision. Any initial decision may be appealed to the Administrator. This proposed process allows FTA to make a determination that a hearing is unnecessary and issue an immediate decision based on the pleadings to date or to refer the matter for a hearing. We believe that this approach is less resource intensive but still provides a neutral decision-maker for more serious cases that require a hearing.

#### (e) Pattern of Violations

As part of the revised rule's more rigorous enforcement scheme, the proposed regulation contains language that would increase any remedy ordered if the decision-maker determines that there is a "pattern of violations." The CBNRAC could not reach consensus on this issue. The private charter caucus believed that more than one violation of the charter service regulations should incur a severe penalty. The public transit caucus believed that more than one violation of the same requirement should be treated more severely. The public transit caucus argued that more than one violation of different charter service requirements should not constitute a pattern of violations, because the public transit agency is unlikely to know what constitutes a violation of the charter service regulations until FTA informs the public transit agency of the violation.

As will be discussed later in the definitions section of this NPRM, we propose to define a pattern of violations as: "more than one finding of non-

compliance of this Part by FTA beginning with the most recent finding of noncompliance and looking back over a period of 72 months." We intend to apply this definition in the "remedies" section of the rule. Under that section, if the decision-maker determines there is a pattern of violations, then the decision-maker "shall bar a recipient from receiving Federal transit assistance in an amount \* \* \* considered appropriate." This means that a public transit agency violating the charter service regulation for the first time would be treated differently, and less severely, than a public transit agency that has violated the charter service regulations more than once over the past six years. Further, we determined that looking at a six year period would be sufficient to determine whether the public transit agency has a history of non-compliance with the charter service regulations. FTA believes that the new provision on "pattern of violations" would deter conduct that leads to complaints, would reduce the number of complaints, and would promote consultation with FTA.

*Issue #4: How Can the Charter Complaint and Administrative Appeals Process Be Improved?*

All CBNRAC members agreed that the complaint process should be designed so as to produce consistent decisions on charter bus complaints. The perceived inconsistency in past charter decisions by FTA was attributed in part to region-based adjudication under the current rule. The committee expressed concern over the diverse approaches for addressing charter violations taken by different regions. To this end, the committee recommended that regional offices should no longer handle charter complaints. Instead, complaining parties would bypass the regional offices and file their complaints directly with the FTA Office of the Chief Counsel. FTA headquarters would receive complaints, post complaints in a complaint docket, and investigate alleged violations.

Furthermore, the committee reached consensus on a more detailed complaint process. The existing rule only requires the filing of a complaint that "is not without obvious merit and that \* \* \* states grounds on which relief may be granted." This generalized pleading process has led to frivolous filings or complaints that do not contain enough information to determine the violation of the charter service regulations. The revised regulations would require a complainant to identify the specific provisions of the charter service regulation allegedly violated, provide a

complete and concise statement of the facts relied upon in filing the complaint, and submit all documents offered in support of the complaint.

Additionally, the CBNRAC reached consensus on new filing and service provisions. In the past, there were instances where the complainant failed to notify the public transit agency. Instead, the FTA regional office sent the complaint. The revised regulation would require a complainant to file the complaint with the public transit agency and send proof of service to FTA headquarters. Furthermore, the committee agreed that associations may file a complaint as a duly authorized representative of a registered charter provider. The private charter caucus advocated for this position so that registered charter providers who work with public transit agencies would not have to file a complaint directly. Even so, the association would have to identify on whose behalf the complaint is filed.

Moreover, we would appreciate comments on how to address State involvement in the complaint process. For instance, in the case of a complaint against a rural transit operator funded as a subrecipient of a State under section 5311, we propose that the private charter provider should submit a complaint with the State Department of Transportation (FTA's direct recipient) first. If the State Department of Transportation cannot resolve the complaint, then the private charter operator would proceed under subpart F. This option was not presented to the CBNRAC and we have not revised regulatory text to reflect this proposal. We would, however, appreciate comment on the topic.

In addition to a more detailed complaint process, the CBNRAC agreed that the appeals process should have more flexibility, the conciliation period should be eliminated, parties should be able to complain about a private charter operator or qualified human service organization's registration on the FTA Charter Registration Web site, and it should be easier for FTA to dismiss incomplete or non-substantive complaints. Each of these points is discussed below.

(a) Appeals

The CBNRAC reached consensus on an improved appeals process that gives the Administrator discretion to take an appeal or modify an initial decision. Previously, the Administrator could only consider an appeal if "the appellant presents evidence that there are new matters of fact or points of law that were not available or not known

during the investigation of the complaint." 49 CFR 604.20(b). Members of the committee viewed that provision as too limiting, and advocated for broader discretion. Thus, the new provision would allow an appeal so long as the appellant meets the relevant deadlines. Further, even if the appellant has not filed an appeal, the Administrator, on his or her own motion, may review an initial decision. As noted earlier, the initial decision would be made either by a headquarters office or by an Arbitrator after a hearing and ratification by a headquarters office. Additionally, the new regulation would set out specific timeframes for FTA to make decisions regarding the complaint and appeal. Specifically, the initial decision would have to be issued 110 days after the investigation is complete. A decision on an appeal would have to be made within 30 days.

(b) Conciliation Period

The committee also determined that the mandatory conciliation period in the existing rule was almost never used and had no effect other than delaying the adjudicatory process. The committee recommended that FTA remove this requirement from the new rule and instead include a statement that encourages the parties to resolve their dispute informally before filing a complaint. Thus, we proposed not to include a conciliation period in the revised regulation.

(c) Removal From Charter Registration Web Site

The CBNRAC reached consensus on providing a new provision that allows registered charter providers or recipients to file a complaint challenging the registration of a private charter operator or qualified human service organization on the Charter Registration Web site. Members of the committee approved of this provision because it would allow the removal of private charter operators that act vindictively when responding to requests for charter service. In other words, a private charter operator that responds affirmatively to a notice from a recipient requesting charter service but then does not contact the customer or negotiates in bad faith with the customer could be removed from the Web site and not receive future requests for charter services. The proposed regulation sets out specific reasons why FTA could remove a registered charter provider from the registration list. In addition, we plan to develop an Appendix B that would set out examples of each basis for removal.

On the other hand, a registered charter provider could file a complaint to remove a qualified human service organization from the registration list. FTA may remove a qualified human service organization for the same reasons a registered charter provider may be removed from the registration list (e.g., bad faith and lack of documentation).

Thus, under this new process, a complaint would be filed electronically in the complaint docket and a response would be required in seven days. FTA would then consider the complaint and response and issue a decision in ten business days. FTA's decision would be posted in the complaint docket and would identify the reasons for removing or allowing the private charter operator or qualified human service organization on FTA's Charter Registration Web site. If removal is ordered, the decision would identify the length of time for removal and when the party may reapply for registration.

#### (d) Dismissals

Furthermore, to ensure the integrity of the complaints filed, the CBNRAC reached consensus on new provisions that would allow FTA to dismiss a complaint, without prejudice, if it is incomplete. FTA may also dismiss a complaint, with prejudice, if the complaint, on its face, is outside the jurisdiction of FTA, fails to state a claim that warrants further investigation, or if the complainant lacks standing to file the complaint.

#### V. Additional Issues Considered by the CBNRAC

##### *Issue #5: A New Process for Determining If There Are Private Charter Bus Companies Willing and Able To Provide Service That Would Utilize Electronic Notification and Response*

The CBNRAC discussed this issue because the private charter caucus and public transit caucus were close to an agreement on this issue during previous negotiations before the formation of the CBNRAC. Essentially, the committee viewed the current "willing and able" process as protection for private charter operators from unsuccessful negotiations with customers who might expect lower prices from public transit agencies. The current process also allows public transit agencies to provide charter service when there is no private charter operator interested in performing the service. Even so, the committee recognized that the existing willing and able process is outdated and agreed to eliminate it in favor of a web-based registration process.

The Charter Registration Web site would serve as a database of private charter operators who are interested in receiving notice from recipients regarding requests for charter service. In order to register, private charter operators would have to answer several questions about their business and the geographic areas they serve. Recipients, upon receiving a request for charter service that a recipient is interested in providing, would be required to send an email to registered charter providers listed on FTA's Charter Registration Web site in the recipient's geographic service area. The notification would have to be sent by close of business on the day the recipient receives the request, unless the recipient received the request after 2 p.m., in which case the recipient would have to send the notice by the close of business the next business day. The recipient may then provide charter service if no registered charter provider responds to the notice within 72 hours for charter service requested to be provided in less than 30 days; or within 14 calendar days for charter service requested to be provided in 30 days or more. The recipient would have to retain an electronic copy of the notice and the list of registered charter providers notified of the requested charter service for a period of at least three years from the date the notice was sent. The recipient would also record certain information about the charter service for purposes of quarterly reporting. Members of the CBNRAC expressed approval of this real-time notification process.

The CBNRAC could not reach consensus on whether a private charter operator should be required to answer whether it would provide free or reduced rate services to qualified human service organizations. The public transit caucus argued in favor of such a requirement while the private charter caucus argued against a requirement and advocated instead that it be optional.

The proposed regulation includes language that would make it optional for a private charter operator to indicate whether they would provide free or reduced rate charter services to qualified human service organizations. We believe that private charter operators wish to support their communities in the same way that many recipients support their communities and that they would likely take advantage of this option because qualified human service organizations can conduct a search on the Charter Registration Web site to look only for those private charter operators with free or reduced rates. We do not

believe, however, that private charter operators should be required to provide such information.

#### (a) Registration of Qualified Human Service Organizations

In addition to registering private charter operators, the Charter Registration Web site would also serve as a database for qualified human service organizations that do not receive funding from the Federal programs listed in Appendix A to the regulation. In order to register, qualified human service organizations would have to answer several questions about their organization, its funding, and its mission.

After registering, these qualified human service organizations would be eligible to receive free or reduced rate charter services from either recipients or registered charter providers. The committee reached consensus on this issue.

FTA requests comment from qualified human service organizations, not receiving funding from the Federal programs listed in Appendix A, on the practical impact of these registration requirements.

##### *Issue #6: A New Exception for Transportation of Government Employees, Elected Officials, and Members of the Transit Industry To Examine Local Transit Operations, Facilities, and Public Works*

The CBNRAC reached consensus on a new applicability provision for the charter service regulations. Under the new provision, the charter service regulations should not apply to a recipient transporting its own employees, other transit system employees, management officials, contractors and bidders, government officials and their contractors and official guests to or from transit facilities or projects within their geographic service area for the purpose of conducting oversight functions such as inspection, evaluation, or review.

During the discussions on this issue, members of the CBNRAC noted that movement of transit employees or officials for transit purposes is simply not charter service. Further, as discussed in greater detail in the next section, under the new definition of charter, movement of transit employees from one work station to another is also not charter service. The CBNRAC also reached consensus on the following applicability provisions:

(a) The charter service regulations would not apply to a recipient that transports its employees, or other transit system employees or officials for

emergency preparedness planning and operations.

(b) The charter service regulations would not apply to recipients of 49 U.S.C. 5310, 5316, or 5317 funds, when used for program purposes.

(c) The charter service regulations would not apply in the case of local, regional, or national emergencies lasting fewer than three days. Otherwise, the recipient would have to follow the provisions of 49 CFR part 601 subpart D.

(d) The charter service regulations would not apply to a non-urbanized area transporting its employees outside of its geographic service area for training purposes.

The CBNRAC could not reach consensus on whether the charter service regulations apply to private charter operators receiving funds, directly or indirectly, from programs under 49 U.S.C. 5307, 5309, 5310, 5311, 5316, 5317 or section 3038 of the Transportation Equity Act for the 21st Century. The private charter caucus requested this provision because it believes that the receipt of Federal funds should not hinder the private charter operator's ability to conduct its business. The public transit caucus asserted that private charter operators receiving Federal funds should be subject to the same limitations as public transit agencies.

We propose to include this provision because the receipt of funds from the Federal government should not interfere with a private charter operator's business. This regulation has its genesis in the protection of the private charter operators from unfair competition by public transit agencies. To subject private charter operators to the charter service regulations undermines the very purpose of these regulations.

*Issue #7: Review and Clarify, as Necessary the Definitions of Regulatory Terms*

One of the main points of contention for the CBNRAC was the definition of "charter service" and "pattern of violations." For all other definitions, the CBNRAC was able to reach consensus. Additionally, since the conclusion of the negotiations, we decided that definitions of "qualified human service organization" and "charter service hours" are necessary. Thus, what follows is a discussion of the negotiations regarding the definitions of charter service and pattern of violations. We also offer our proposed definitions of qualified human service organization, charter service hours, and special transportation.

(a) Definition of Charter Service

CBNRAC was unable to come to an agreement on the definition of the term "charter service." The controversy centered on a particular category of transportation service provided on an irregular basis for occasional local events such as golf tournaments, festivals, state fairs, July 4th celebrations, flower shows, home shows, and sporting events. The public transit caucus considers open-door bus service to these types of events to be public transportation that serves the community at large (by providing traffic mitigation and other public benefits) even though the transit agency may need to create new or modified routes on a temporary basis for the duration of the event in order to provide the service. The private charter caucus believes that such services constitute "charter service" because a third party event sponsor is usually involved through some type of contractual arrangement; a new, temporary route has to be created to transport people to and from the event (as opposed to published, regular transit routes); and because the service is not continuous, and lasts only for the duration of the event. Despite lengthy discussions and an exchange of various proposals between the two sides, these differences could not be resolved by the committee. We recommend that interested parties review the docket for the exact proposals offered by each caucus.

In response to the discussions held by the CBNRAC, we propose a definition of charter service that recognizes concerns raised by each caucus and provides examples of what would be considered charter service. In providing this definition of charter service, we note that the term "buses" includes rubber-tire replica trolleys.

First, the caucuses were able to agree, although they did not reach consensus, on the proposition that charter service has three components: The transportation of a group of persons pursuant to a single contract with a third party; a fixed charge; and an itinerary determined by someone other than the public transit agency. The CBNRAC agreed that these three elements would have to be present in order for a particular service to be considered charter service.

Second, members of the CBNRAC felt it was important to provide examples of what is and is not charter service. Thus, we propose a definition that includes three examples of charter service: (1) Use of buses or vans to transport school students, school personnel or school equipment; (2) shuttle service to events

that occur on an irregular basis or for limited duration; or (3) shuttle services limited to a group of individuals pursuant to a contract with an institution, university, corporation or government.

We also include in the definition examples of what is not charter service. Specifically, we propose that the following do not constitute charter service: (1) Adding equipment or days to an existing route; (2) extending service hours on an existing route; (3) demand-responsive service that is part of coordinated public transit human service transportation; and (4) new or modified service that is open to the public, where the recipient establishes and controls the route and the service continues from year to year.

In an effort to provide further clarification of what service would be considered charter service or public transportation, FTA will publish an Appendix C with the final rule that contains more examples and frequently asked questions. We would appreciate comments with questions that should be included in Appendix C.

(b) Definition of Pattern of Violations

The CBNRAC did not reach agreement on the definition of "pattern of violations." Some participants advocated that the term should mean "more than one instance of noncompliance with charter service regulations." Under this interpretation, FTA could find in a single decision that a transit agency engaged in a pattern of charter service violations. A pattern could be established, for instance, if the public transit agency's one-time provision of charter service violated several requirements of the charter service rule.

Others sought a more limited definition, whereby a recipient commits a pattern of violations of the charter service regulations only if FTA makes a series of findings of successive charter service violations over a period of time. Still others advocated a definition that recognizes a pattern only if the same regulation is violated more than once over a period of time.

We propose to adopt a definition of pattern of violations that looks at violations over a period of time. The violation need not be a violation of the same regulation, although it could be, in order for FTA to find a pattern of violations. Further, we propose to look at the recipient's six-year history to determine whether or not it has engaged in a pattern of violations. Thus, a violation in the year 2006 means that FTA could look back to the year 2000 to determine whether other violations

exist, which would constitute a pattern of violations. Violations found by FTA in 1999 could not be used to find a pattern of violations. This definition strikes a balance between the need to penalize recipients that routinely violate the charter service requirements and the need to place a time limit on how far back FTA may look for other violations. This definition, as with all provisions of this rulemaking, does not take effect until FTA issues a final rule.

(c) Definition of Qualified Human Service Organization

After the conclusion of negotiations, and as we began to make decisions about the outstanding issues, it became clear that we needed to include a definition of “qualified human service organization” in the proposed regulation. We believe this definition is necessary to elaborate on the exception for qualified human service organizations contained in the regulation with the Executive Order on Human Service Transportation Coordination signed by the President on February 24, 2004. Thus, we propose to define “qualified human service organization” as an organization that serves persons who qualify for human service or transportation-related programs or services due to disability, income, or advanced age.

(d) Definition of Charter Service Hours

We also did not present a definition of “charter service hours” to the CBNRAC. While the committee reached consensus that charter service hours is the appropriate measurement for the annual limit contained in the “government officials” exception, FTA did not provide a definition of charter service hours for review by the committee. Thus, we now propose to define charter service hours as the total hours operated by buses or vans while in charter service, including the hours operated while carrying passengers for hire and associated deadhead hours.

(e) Definition of Special Transportation

The CBNRAC did not discuss the definition of special transportation during its deliberations, but we believe the term should be defined to avoid confusion in the future. The statutory definition of “public transportation” includes a reference to “special transportation.” There is no definition of “special transportation” in statute or in the charter service regulations. Legislative history, however, indicates that the term includes service

exclusively for the elderly and persons with disabilities, and service for workers who live in the innercity but commute to a factory in the suburbs. See, H.R. Rep. No. 1785, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. Ad. & News 2941. In order to provide clarity, we believe it would be helpful to include a definition of “special transportation” in the proposed charter service regulation. Thus, we propose to define “special transportation” as demand response or paratransit service that is regular and continuous and is a type of “public transportation.”

*Issue #8: FTA Policies Relative to the Enforcement of Charter Rules and the Boundary Between Charter and Public Transit Services in Specific Circumstances, Such as University Transportation and Transportation to/from Special Events*

The committee reached consensus to include an appendix to the final rule that would provide specific examples of situations that do or do not qualify as charter service. In close cases, the parties affected by the rule could refer to these illustrative situations for guidance in making decisions about whether or not requested service would constitute charter or public transportation under the charter service regulation.

CBNRAC members reached consensus to include in the proposed rule a limited exception to allow transit operators to provide transportation to events of regional or national significance on a case-by-case basis. In order to take advantage of this exception, a recipient would petition the Administrator after first consulting with registered charter providers in the recipient’s geographic area to determine whether registered charter providers are capable of performing the service. To be eligible for the exception, the recipient would also have to satisfy a number of conditions set out in the rule. The Administrator would have full discretion to grant or deny the request.

## VI. Other Revisions to the Charter Service Regulations

The CBNRAC also reached consensus on the revision to the general purpose statement and the charter service agreement. The committee was unable to reach consensus on whether the regulation should contain an exemption provision.

The general purpose statement for the charter service regulation simply states

that the purpose of the regulation is to protect private charter operators from unauthorized competition with recipients of Federal financial assistance. There was no major discussion or disagreement on this provision, and, therefore, we propose the language developed by the CBNRAC.

The charter service agreement has not been updated for over twenty years. This regulation updates the charter service agreement, which is included in the Grant Agreement or Cooperative Agreement entered into by the recipient of Federal funds. The CBNRAC reached consensus that the charter service agreement should incorporate by reference the terms of the charter service regulations, and, therefore, we propose to include those provisions.

Finally, the CBNRAC was unable to agree to the terms of an exemption provision. An exemption provision would allow a recipient to make an affirmative declaration that it would not provide charter service, under any conditions, in or out of its geographic service area. This provision was developed to address concerns by the committee that recipients that do not wish to provide charter service should be readily identifiable by the public, other recipients, and private charter operators. The private charter caucus supported such a provision because such an exemption would assist private charter operators in determining when a recipient is in violation of the charter service regulations. The public transit caucus did not object to the specific terms of the provision, but believed that no public transit agency would utilize an exemption provision.

We propose to include an exemption provision. The process would be for the recipient to provide its declaration by the third week of September each year. The recipient would file this declaration in an exemption docket. Thus, a member of the public could easily determine which recipients have declared that they would not provide charter service. If after three years there are no recipients that use the exemption provision, FTA proposes to rescind that portion of the rule.

## Distribution Tables

For ease of reference, we provide a distribution table to indicate proposed changes in section numbering and titles.

Section Title and Number:

Old section	New section
(Subpart A)	(Subpart A)
Purpose ..... § 604.1	Purpose ..... § 604.1.
Applicability ..... § 604.3	Applicability ..... § 604.2.
Definitions ..... § 604.5	Definitions ..... § 604.3.
Charter Agreement ..... § 604.7	Charter Agreement ..... § 604.5.
Charter Service ..... § 604.9	Exceptions ..... (Subpart B).
§ 604.9(a) .....	..... § 604.12(b).
§ 604.9(b)(1) .....	..... removed.
§ 604.9(b)(2) .....	..... § 604.10.
§ 604.9(b)(3) .....	..... § 604.9.
§ 604.9(b)(4) .....	..... § 604.11.
§ 604.9(b)(5) .....	..... § 604.8.
§ 604.9(b)(6) .....	..... § 604.8.
§ 604.9(b)(7) .....	..... § 604.8.
§ 604.9(b)(8) .....	..... § 604.13.
Procedures for determining if there are any willing and able private charter operators. § 604.11	..... (Subpart C).
Reviewing evidence submitted by private charter operators. § 604.13	Registration of private charter operators. § 604.16.
Filing a complaint ..... (Subpart B)	..... removed.
§ 604.15(a) .....	Complaints ..... (Subpart F).
§ 604.15(b) .....	..... § 604.27(a).
§ 604.15(c) .....	..... removed.
§ 604.15(d) .....	..... § 604.27(b).
§ 604.15(e) .....	..... § 604.27(c).
§ 604.15(f) .....	..... § 604.34 or 46.
§ 604.15(g) .....	..... § 604.32 or 33.
§ 604.15(h) .....	..... (Subpart I).
§ 604.15(i) .....	..... § 604.36.
Remedies ..... § 604.17	..... § 604.37.
Appeals ..... § 604.19(a)	..... § 604.45.
§ 604.19(b) .....	Remedies ..... § 604.47.
§ 604.19(c) .....	Appeal to Administrator and final agency orders.
§ 604.19(d) .....	..... (Subpart J).
§ 604.19(e) .....	..... § 604.48(a).
Judicial Review ..... § 604.21	..... § 604.48(b).
	..... § 604.48(c).
	..... § 604.48(a).
	..... § 604.48(b).
	..... (Subpart K).
	..... § 604.50.

*Rulemaking Analyses and Notices*

All comments received on or before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, we will continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period.

**Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures**

FTA has determined preliminarily that this rulemaking is not a significant

regulatory action within the meaning of Executive Order 12866, and is not significant under Department of Transportation regulatory policies and procedures. This NPRM contains revisions that are clarifying in nature. Where possible, we have adopted provisions to lessen the burden on public transit agencies while ensuring that those entities do not engage in unfair competition with private charter operators.

FTA has not conducted a cost analysis for this rulemaking because the changes proposed do not impose any cost on the industry. Since this rulemaking is designed to protect private charter operators from unfair competition by public transit agencies, the changes should increase opportunities for private charter operators when the requested service is not subject to one of the community-based exceptions.

FTA welcomes comments on whether there are economic impacts from this proposed regulation. Comments regarding specific burdens, impacts, and costs would be most welcome and would aid us in more fully appreciating whether there are cost impacts for this proposed rule.

**Regulatory Flexibility Act**

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis,” which will “describe the impact of the proposed rule on small entities.” (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

The nature of this rulemaking is to prevent unfair competition by public transit agencies with private charter operators. Thus, any economic impact on small entities will be a positive one. FTA hereby certifies that the proposals for the charter service regulation contained in this NPRM, if adopted, would not have a significant economic impact on a substantial number of small entities. FTA invites comment from members of the public who believe there will be a significant impact on small entities.

#### **Unfunded Mandates Reform Act of 1995**

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure of non-Federal funds by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$120.7 million in any one year (2 U.S.C. 1532).

#### **Executive Order 13132 (Federalism)**

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and FTA has determined that this proposed action would not have sufficient federalism implications to warrant the preparation of a Federalism assessment. FTA has also determined that this proposed action would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions. Comment is solicited specifically on the Federalism implications of this proposal.

#### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations.

FTA has an existing approved information collection (OMB Control Number 2132-0543) that expires on December 31, 2007. FTA has determined that revisions in this proposal will require an update to the information collection request. However, FTA believes that any increase in burden hours per submission is more than offset by decreases in the frequency of collection for these information requirements and the use of electronic technology.

#### **Executive Order 13175 (Tribal Consultation)**

FTA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believe that the proposed action would not have substantial direct effects on one or more Indian Tribes; would not impose substantial direct compliance costs on Indian Tribal governments; and would not preempt Tribal laws. Therefore, a Tribal summary impact statement is not required.

#### **Executive Order 13211 (Energy Effects)**

We have analyzed this action under Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," dated May 18, 2001. We have determined that it is not a significant energy action under that order and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

#### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

#### **List of Subjects in 49 CFR Part 604**

Charter Service.

In consideration of the foregoing, FTA proposes to revise title 49, Code of Federal Regulations, part 604 as set forth below:

#### **Title 49—Transportation**

1. Revise Part 604 to read as follows:

### **PART 604—CHARTER SERVICE**

#### **Subpart A—General Provisions**

Sec.

- 604.1 Purpose.
- 604.2 Applicability.
- 604.3 Exemption.
- 604.4 Definitions.
- 604.5 Charter service agreement.

#### **Subpart B—Exceptions**

- 604.6 Purpose.
- 604.7 Government officials.
- 604.8 Qualified human service organizations.
- 604.9 Hardship.
- 604.10 Leasing FTA funded equipment and drivers.
- 604.11 Events of regional or national significance.

- 604.12 When no registered charter provider responds to notice from a recipient.
- 604.13 Agreement with registered charter providers.
- 604.14 Administrator's discretion.
- 604.15 Reporting requirements for all exceptions.

#### **Subpart C—Procedures for Registration and Notification**

- 604.16 Registration of private charter operators.
- 604.17 Notification to registered charter providers.

#### **Subpart D—Procedures for Registration of Qualified Human Services Organizations and Duties for Recipients Regarding Charter Registration Web Site**

- 604.18 Registration of qualified human service organizations.
- 604.19 Duties for recipients with respect to charter registration Web Site.

#### **Subpart E—Advisory Opinions**

- 604.20 Purpose.
- 604.21 Request for an advisory opinion.
- 604.22 Processing of advisory opinions.
- 604.23 Effect of an advisory opinion.
- 604.24 Special considerations.

#### **Subpart F—Complaints**

- 604.25 Purpose.
- 604.26 Complaints and decisions regarding removal of private charter operators or qualified human service organizations from registration list.
- 604.27 Complaints, answers, replies, and other documents.
- 604.28 Dismissals.
- 604.29 Incomplete complaints.
- 604.30 Filing.
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- 604.32 Investigation of complaint.
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- 604.48 Appeal from a headquarters office initial decision.
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- 604.50 Judicial review.

Authority: 49 U.S.C. 5323(d); 49 CFR 1.51

## Subpart A—General Provisions

### § 604.1 Purpose.

(a) The purpose of this Part is to implement 49 U.S.C. 5323(d), which protects private charter operators from unauthorized competition from recipients of Federal financial assistance under the Federal Transit Laws.

(b) This subpart specifies which entities shall comply with the charter service regulations; defines terms used in this Part; explains procedures for an exemption from this Part; and sets out the contents of a charter service agreement.

### § 604.2 Applicability.

(a) The requirements of this Part shall apply to recipients of Federal financial assistance under the Federal Transit Laws, except as otherwise provided in paragraphs (b) through (g) of this section.

(b) The requirements of this Part shall not apply to a recipient transporting their employees, other transit system officials, transit management officials, transit contractors and bidders, government officials and their contractors and official guests, to or from transit facilities or projects within their geographic service area or proposed geographic service area for the purpose conducting oversight functions such as inspection, evaluation, or review.

(c) The requirements of this Part shall not apply to private charter operators that receive, directly or indirectly, Federal financial assistance under any of the following programs: 49 U.S.C. 5307, 49 U.S.C. 5309, 49 U.S.C. 5310, 49 U.S.C. 5311, 49 U.S.C. 5316, 49 U.S.C. 5317 or section 3038 of the Transportation Equity Act for the 21st Century, as amended.

(d) The requirements of this Part shall not apply to a recipient transporting their employees, other transit system employees, transit management officials, transit contractors and bidders, government officials and their contractors and official guests, for emergency preparedness planning and operations.

(e) The requirements of this Part shall not apply to a recipient that uses Federal financial assistance from FTA, for program purposes only, under 49 U.S.C. 5310, 49 U.S.C. 5316, or 49 U.S.C. 5317.

(f) The requirements of this Part shall not apply to a recipient in the event of a national, regional, or local emergency lasting fewer than three business days. If an emergency exists that the recipient

expects to last longer than three business days, the recipient shall follow the procedures set out in subpart D of 49 CFR part 601.

(g) The requirements of this Part shall not apply to a recipient in a non-urbanized area transporting their employees, other transit system employees, transit management officials, transit contractors and bidders to or from transit training outside its geographic service area.

### § 604.3 Exemption.

(a) Recipients, who do not engage or intend to engage in charter services using equipment or facilities funded under the Federal Transit Laws, may file an affidavit certifying that they will not provide charter services covered by this Part.

(b) If a recipient files an affidavit described in this section, the recipient shall not provide charter service under any of the exceptions contained in subpart B and shall be exempt from the notification requirements of subpart C.

(c) The affidavit described in this section shall state:

I, (insert name and title), hereby swear or affirm that (insert name of applicant or recipient) and all contractors or recipients through (insert name of applicant or recipient) will not provide charter service that uses equipment or facilities funded under the Federal Transit Laws.

I, (insert name and title), also understand that by swearing out this affidavit, (insert name of applicant or recipient) and all contractors or recipients through (insert name of applicant or recipient) could be subject to the penalties contained in 18 U.S.C. 1001 for submitting false information to the government and may subject (insert name of applicant or recipient) and all contractors or recipients through (name of applicant or recipient) to a withholding of Federal financial assistance as described in 49 CFR part 604 subpart I.

(d) The affidavit described in paragraph (c) of this section shall be notarized and an original copy sent to: Office of the Chief Counsel, TCC–20, Room 9316, Washington, DC 20590. In addition, the above affidavit shall be submitted electronically to <http://dms.dot.gov> and placed in the Charter Service Exemption Docket number xxxxx.

(e) An affidavit described in this section shall be sent to FTA by the third week of September each year.

(f) A recipient may revoke an affidavit filed under this part by sending a notice to the address and docket identified in paragraph (d) of this section indicating they revoke the affidavit and agree to comply with charter service requirements of this Part.

### § 604.4 Definitions.

All terms defined in 49 U.S.C. 5301 *et seq.* are used in their statutory meaning in this Part. Other terms used in this Part are defined as follows:

(a) The term “Federal Transit Laws” means 49 U.S.C. 5301 *et seq.*, and includes 23 U.S.C. 103(e)(4), 142(a), and 142(c), when used to provide assistance to public transit agencies for purchasing buses and vans.

(b) The term “Administrator” means the Administrator of the Federal Transit Administration or their designee.

(c) The term “charter service” means providing transportation service using buses or vans to a group of riders pursuant to a single contract with a third party, for a fixed charge, and according to an itinerary determined by someone other than the recipient.

(1) The term charter service includes, but is not limited to, the following when the conditions in paragraph (c) of this section are met:

(i) The use of buses or vans for the exclusive transportation of school students (*e.g.*, elementary, secondary, university, or trade), school personnel, or school equipment;

(ii) Shuttle service to events such as festivals, sporting events, conventions, and similar functions that occur on an irregular basis or for a limited duration; or

(iii) Shuttle services limited to a specific group of individuals, provided under an agreement with an institution, such as a university, corporation, or government.

(2) The term charter service does not include the following:

(i) Addition of equipment or days to an existing route;

(ii) Extending service hours for an existing route;

(iii) Demand responsive service that is part of coordinated public transit human service transportation;

(iv) New or modified service that is open to the public, where the recipient establishes and controls the route, and the service continues from year to year; or

(v) The transportation of transit employees from one work location to another work location.

(d) The term “charter service hours” means total hours operated by buses or vans while in charter service including (1) hours operated while carrying passengers for hire, plus (2) associated deadhead hours.

(e) The term “Chief Counsel” means the Office of the Chief Counsel within the Federal Transit Administration.

(f) The term “days” means calendar days. The last day of a time period is included in the computation of time

unless the last day is a Saturday, Sunday, or legal holiday, in which case, the time period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(g) The term “FTA” means the Federal Transit Administration.

(h) The term “interested party” means an individual, partnership, corporation, association, or other organization that has a financial interest that is affected by the actions of a recipient providing charter service under the Federal Transit Laws. This term includes states, counties, cities, and their subdivisions, and tribal nations.

(i) The term “registration list” means the current list of registered charter providers and qualified human service organizations maintained on FTA’s charter registration website.

(j) The term “geographic service area” means the entire area in which a recipient is authorized to provide public transportation service under appropriate local, state, and Federal law.

(k) The term “pattern of violations” means more than one finding of non-compliance with this Part by FTA beginning with the most recent finding of non-compliance and looking back over a period of 72 months.

(l) The term “public transportation” has the meaning set forth in 49 U.S.C. 5302(a)(10).

(m) The term “qualified human service organization” means an organization that serves persons who qualify for human service or transportation-related programs or services due to disability, income, or advanced age. This term is used consistent with the President’s Executive Order on Human Service Transportation Coordination (February 24, 2004).

(n) The term “registered charter provider” means a private charter operator that wants to receive notice of charter service requests directed to recipients and has registered on FTA’s charter registration website.

(o) The term “recipient” means an agency or entity that receives Federal financial assistance, either directly or indirectly, under the Federal Transit Laws. This term does not include third-party contractors.

(p) The term “special transportation” means demand response or paratransit service that is regular and continuous and is a type of “public transportation.”

#### **§ 604.5 Charter service agreement.**

(a) A recipient seeking Federal assistance under the Federal Transit Laws to acquire or operate any public transportation equipment or facilities shall enter into a “Charter Service

Agreement” as set out in paragraph (b) of this section.

(b) A recipient shall enter into a Charter Service Agreement if it receives Federal funds for equipment or facilities under the Federal Transit Laws. The terms of the Charter Service Agreement are as follows:

The recipient agrees that it, and each of its subrecipients and third party contractors at any tier, may provide charter service using equipment or facilities acquired with Federal assistance authorized under the Federal Transit Laws only in compliance with the regulations set out in 49 CFR part 604 *et seq.*, the terms and conditions of which are incorporated herein by reference.

(c) The Charter Service Agreement is contained in the certifications and assurances published annually by FTA for applicants for Federal financial assistance. Once a recipient receives Federal funds, the certifications and assurances become part of their Grant Agreement or Cooperative Agreement for Federal financial assistance.

#### **Subpart B—Exceptions**

##### **§ 604.6 Purpose.**

The purpose of this subpart is to identify the limited exceptions under which recipients may provide community-based charter services.

##### **§ 604.7 Government officials.**

(a) Except for a recipient with 1,000 or more buses in peak hour service, a recipient may provide charter service to government officials (Federal, State, and local) for non-transit related purposes, if the recipient:

- (1) Provides the service in its geographic service area;
- (2) Does not generate revenue from the charter service, except as required by law; and
- (3) Records the charter service in a separate log that identifies the purpose of the trip, date, time, destination, number of government officials on the trip and vehicle number.

(b) A recipient that provides charter service under this section shall be limited annually to 80 charter service hours for providing trips to government officials for non-transit related purposes.

(c) A recipient may petition the Administrator for additional charter service hours only if the petition contains the following information:

(1) Description of the event and the number of charter service hours requested;

(2) Explanation of why registered charter providers in the geographic service area cannot perform the service (*e.g.*, equipment, time constraints, or other extenuating circumstances); and

(3) Evidence that the recipient has sent the request for additional hours to registered charter providers in its geographic service area.

##### **§ 604.8 Qualified human service organizations.**

(a) Except for a recipient with 1,000 or more buses in peak hour service, a recipient may provide charter service to a qualified human service organization serving persons:

- (1) With mobility limitations related to advanced age;
- (2) with disabilities; or
- (3) struggling for self-sufficiency.

(b) If an organization serving persons described in paragraph (a) of this section receives funding, directly or indirectly, from the programs listed in Appendix A of this Part, the organization shall not be required to register on the FTA charter registration Web site.

(c) If an organization serving persons described in paragraph (a) of this section does not receive funding from any of the programs listed in Appendix A of this Part, the organization shall register on the FTA charter registration Web site in accordance with § 604.18.

(d) A recipient providing charter service under this exception shall record the qualified human service organization’s name, address, phone number, e-mail address, date and time of service, number of passengers, origin, destination, trip length (miles and hours), fee collected, if any, and vehicle number.

##### **§ 604.9 Hardship.**

(a) A recipient in a non-urbanized area may provide charter service to an organization if the charter service provided by a registered charter provider would create a hardship on the organization because:

- (1) The registered charter provider imposes a minimum trip duration and the requested charter service is less than the minimum trip duration; or
- (2) The registered charter provider has deadhead time exceeding total trip time from initial pick-up to final drop-off.

(b) A recipient providing charter service under this section shall record the organization’s name, address, phone number, e-mail address, date and time of service, number of passengers, destination, trip length (miles and hours), fee collected, if any, and vehicle number.

##### **§ 604.10 Leasing FTA funded equipment and drivers.**

(a) A recipient may lease FTA-funded equipment and drivers for charter service only if the following conditions exist:

(1) The private charter operator is registered on the FTA charter registration Web site;

(2) The registered charter provider owns and operates a charter service business;

(3) The registered charter provider received a request for charter service that exceeds its available capacity either of the number of vehicles operated by the registered charter provider or the number of accessible vehicles operated by the registered charter provider; and

(4) The registered charter provider has exhausted all of the available vehicles of all registered charter providers in the recipient's geographic service area.

(b) A recipient leasing vehicles and drivers to a registered charter provider under this provision shall record the registered charter provider's name, address, telephone number, number of vehicles leased, types of vehicles leased, vehicle identification numbers, and documentation presented by the registered charter provider in support of paragraph (a)(1) through (3) of this section.

**§ 604.11 Events of regional or national significance.**

(a) A recipient may petition the Administrator for an exception to the charter service regulations in order to provide charter service directly to a customer for a special event of regional or national significance. In order to petition the Administrator under this exception, a recipient shall first consult with registered charter providers in the geographic service area to determine whether or not registered charter providers are capable of providing the service.

(b) After completing the consultation required in paragraph (a) of this section, a recipient may petition for an exception under the following conditions:

(1) The recipient shall submit its petition for an exception to the Administrator at least 90 days before the first day of the special event;

(2) The recipient's petition shall describe the event, explain how it is special and of regional or national significance, explain the amount of charter service that registered charter providers are not capable of providing, explain how registered charter providers will be utilized for the event; and

(3) File the petition in the Special Events Docket number XXXX at <http://dms.dot.gov>.

(c) Upon receipt of a petition that meets the conditions set forth in paragraphs (a), (b)(1), (b)(2), and (b)(3) of this section, the Administrator shall review the materials and issue a written

decision denying or granting in whole or in part the request. In making this decision, the Administrator may seek such additional information as the Administrator deems necessary.

(d) Any exception granted by the Administrator under this procedure shall be effective only for the special event identified in paragraph (b)(2) of this section.

**§ 604.12 When no registered charter provider responds to notice from a recipient.**

(a) A recipient may provide charter service to a customer if no registered charter provider responds to the notice issued in § 604.17:

(1) Within 72 hours for charter service requested to be provided in less than 30 days; or

(2) Within 14 calendar days for charter service requested to be provided in 30 days or more.

(b) A recipient shall not provide charter service under this section if a registered charter provider indicates interest in providing the charter service set out in the notice issued pursuant to § 604.17.

(c) A recipient shall record the charter service in a separate log that identifies the customer name, address, phone number, email address, date and time of trip, origin and destination, number of passengers, trip length (miles and hours), fee collected, if any, and vehicle number.

**§ 604.13 Agreement with registered charter providers.**

(a) A recipient may provide charter service directly to a customer after entering into an agreement with all registered charter providers in the recipient's geographic service area.

(b) For purposes of entering into an agreement with all registered charter providers as described in paragraph (a) of this section, a recipient shall determine the registered charter providers in its geographic service area each year before January 30th.

(c) A recipient shall enter into an agreement with all registered charter providers in its geographic service area under this section before February 15th of each year.

**§ 604.14 Administrator's discretion.**

(a) A recipient may petition the Administrator personally for an exception to the charter service regulations in order to provide charter service directly to a customer for a unique and time sensitive event, usually funerals of local, regional, or national significance. In order to petition the Administrator under this exception, a

recipient shall submit a request with the following information:

(1) A description of the event and why it is unique and time sensitive;

(2) The type of charter service requested and the type of equipment;

(3) The anticipated number of charter service hours needed for the event;

(4) The anticipated number of vehicles and duration of the event; and

(5) A description of how provision of the requested charter service is in the public's interest.

(b) Upon receipt of a petition that meets the requirements set forth in paragraph (a) of this section, the Administrator shall review the materials and issue a written decision under his or her own signature denying or granting in whole or in part the request. In making this decision, the Administrator may seek such additional information as the Administrator deems necessary.

(c) Any exception granted by the Administrator under this procedure shall be effective only for the unique event identified in paragraph (a) of this section.

(d) A recipient shall send the request to the Administrator by facsimile or email.

(e) A recipient shall retain a copy of the Administrator's approval for a period of at least three years and shall include it in the recipient's quarterly report posted on the charter registration Web site.

**§ 604.15 Reporting requirements for all exceptions.**

(a) A recipient that provides charter service in accordance with one or more of the exceptions contained in this subpart shall maintain the notice and records required electronically and for a period of at least three years from the date of the charter service or lease.

(b) The records required under this subpart shall include a clear statement identifying which exception the recipient relied upon when it provided the charter service.

(c) Starting the first quarter after the effective date of this rule, a recipient providing charter service under these exceptions shall post the records required under this subpart on the FTA charter registration Web site 30 days after the end of each calendar quarter (*i.e.*, January 30th, April 30th, July 30th, and October 30th).

(d) In unusual circumstances described in the record for the service, a recipient may record generalized origin and destination information for safety or security reasons.

### Subpart C—Procedures for Registration and Notification

#### § 604.16 Registration of private charter operators.

(a) Private charter operators shall provide the following information to be considered a registered charter provider:

(1) Company name, address, phone number, email address, and facsimile number;

(2) Federal or State motor carrier identifying number;

(3) The geographic service areas of public transit agencies that the private charter operator is able to provide charter service in;

(4) A certification that the private charter operator has valid insurance; and

(5) A private charter operator may also indicate whether they are willing to provide free or reduced rate charter services to registered qualified human service organizations.

(b) A private charter operator that provides valid information in this subpart is a “registered charter provider” for purposes of this Part and shall have standing to file a complaint consistent with subpart F.

(c) A recipient, a registered charter provider, or their duly authorized representative, may challenge a registered charter provider’s registration and request removal of the private charter operator from FTA’s charter registration Web site by filing a complaint consistent with subpart F.

(d) FTA shall refuse to post a private charter operator’s information if the private charter operator fails to provide all of the required information as indicated on the FTA charter registration Web site.

(e) Registered charter providers shall provide current and accurate information on FTA’s charter registration Web site, and shall update that information no less frequently than every two years.

#### § 604.17 Notification to registered charter providers.

(a) Upon receiving a request for charter service, a recipient may:

(1) Decline to provide the service and refer the requestor to FTA’s charter registration Web site;

(2) Provide the service pursuant to an exception set out in subpart B of this Part; or

(3) Provide notice to registered charter providers as set out in this section and provide the service pursuant to the exception contained in § 604.12.

(b) Upon receipt of a request for charter service, a recipient interested in providing the charter service shall

provide notice to registered charter providers in the recipient’s geographic service area in the following manner:

(1) Notice of the request shall be sent by the close of business on the day the recipient receives the request unless the recipient received the request after 2 p.m., in which case the recipient shall send the notice by the close of business the next business day;

(2) Notice sent to the list of registered charter providers shall include:

(i) Customer name, address, phone number, and email address (if available);

(ii) Requested date of service;

(iii) Approximate number of passengers;

(iv) Whether the type of equipment requested is (are) bus(es) or van(s); and

(v) Trip itinerary and approximate duration.

(c) A recipient shall retain an electronic copy of the notice and the list of registered charter providers that were sent notice of the requested charter service for a period of at least three years from the date the notice was sent.

### Subpart D—Registration of Qualified Human Service Organizations and Duties for Recipients Regarding Charter Registration Web site

#### § 604.18 Registration of qualified human service organizations.

(a) Qualified human service organizations that do not receive funds from Federal programs listed in Appendix A but serve individuals described in § 604.8, shall register on FTA’s charter registration Web site by submitting the following information:

(1) Name of organization, address, phone number, email address, and facsimile number;

(2) The geographic service area of the recipient in which the qualified human service organization resides;

(3) Basic financial information regarding the qualified human service organization and whether the qualified human service organization is exempt from taxation under sections 501(c)(1), (3), (4), or (19) of the Internal Revenue Code, or is a unit of Federal, State or local government;

(4) Whether the qualified human service organization receives funds directly or indirectly from a State or local program, and if so, which program(s); and

(5) A narrative statement describing how the requested service is consistent with the mission of the qualified human service organization.

(b) A qualified human service organization is eligible to receive charter services from a recipient if the qualified human service organization:

(1) Registers on the FTA Web site in accordance with paragraph (a) of this section at least 60 days before the date of the requested charter service;

(2) Verifies FTA’s receipt of its registration by viewing its information on the FTA charter registration Web site; and

(3) Certifies that the funding received from a state or local program includes funding for transportation.

(c) A registered charter provider may challenge a qualified human service organization’s status to receive charter services from a recipient by requesting removal of the qualified human service organization from FTA’s charter registration Web site by filing a complaint consistent with subpart F.

(d) A qualified human service organization shall provide current and accurate information on FTA’s charter registration, and shall update that information no less frequently than every two years.

#### § 604.19 Duties for recipients with respect to charter registration Web site.

A recipient that provides charter service allowed under this Part shall train its affected employees and contractors on how to use the FTA charter registration Web site.

### Subpart E—Advisory Opinions

#### § 604.20 Purpose.

The purpose of this subpart is to set out the requirements for requesting an advisory opinion from FTA regarding specific, factual events. Advisory opinions are intended to give formal advice to a recipient, registered charter providers, or their duly authorized representative, regarding the requirements of this Part. This subpart also describes the conditions under which an advisory opinion may be used in subsequent proceedings.

#### § 604.21 Request for an advisory opinion.

(a) A recipient, a registered charter provider, or their duly authorized representative, may request an advisory opinion from the Chief Counsel on a matter regarding specific, factual events only.

(b) A request for an advisory opinion shall be submitted in the following form:

[Date]

Chief Counsel, Federal Transit Administration, 400 Seventh Street, SW., Room 9316, Washington, DC 20590

Re: Request for Advisory Opinion

The undersigned submits this request for an advisory opinion of the FTA Chief Counsel with respect to [the general nature of the matter involved].

## A. Issues involved.

[A concise statement of the issues and questions on which an opinion is requested.]

## B. Statement of facts and law.

[A full statement of all facts and legal points relevant to the request.]

The undersigned certifies that, to the best of his/her knowledge and belief, this request includes all data, information, and views relevant to the matter, whether favorable or unfavorable to the position of the undersigned, which is the subject of the request.

[Signature]

[Printed name]

[Title of person making request]

[Mailing address]

[Telephone number]

[email address]

(c) A request for an advisory opinion may be denied if:

(1) The request contains incomplete information on which to base an informed advisory opinion;

(2) The Chief Counsel concludes that an advisory opinion cannot reasonably be given on the matter involved;

(3) The matter is adequately covered by a prior advisory opinion or a regulation;

(4) The Chief Counsel otherwise concludes that an advisory opinion would not be in the public interest.

**§ 604.22 Processing of advisory opinions.**

(a) A request for an advisory opinion shall be sent to the address indicated in § 604.21(b) of this subpart; filed electronically at <http://dms.dot.gov> or sent to the docket office located at 400 Seventh Street SW., PL-401, Washington, DC 20590, in the Charter Service Advisory Opinion Docket number xxxx; and sent to the recipient, if appropriate.

(b) The Chief Counsel shall make every effort to respond to a request for an advisory opinion within ten days of receipt of a request that complies with § 604.21(b). The Chief Counsel will send the response to the requestor, the docket, and the recipient, if appropriate.

(c) The Chief Counsel may respond to any request to FTA for regulatory guidance as a request for an advisory opinion, in which case the request will be filed in the Charter Service Advisory Opinion Docket, and a copy sent to the recipient, if appropriate.

**§ 604.23 Effect of an advisory opinion.**

(a) An advisory opinion represents the formal position of FTA on a matter, and except as provided in § 604.24 of this subpart, obligates the agency to follow it until it is amended or revoked.

(b) An advisory opinion may be used in administrative or court proceedings to illustrate acceptable and unacceptable procedures or standards, but not as a legal requirement and is limited to the factual circumstances described in the request for an advisory opinion. The Chief Counsel's advisory opinion shall not be binding upon a Presiding Official conducting a proceeding under subpart I of this Part.

(c) A statement made or advice provided by an FTA employee constitutes an advisory opinion only if it is issued in writing under this section. A statement or advice given by an FTA employee orally, or given in writing, but not under this section, is an informal communication that represents the best judgment of that employee at the time but does not constitute an advisory opinion, does not necessarily represent the formal position of FTA, and does not bind or otherwise obligate or commit the agency to the views expressed.

**§ 604.24 Special considerations.**

Based on new facts involving significant financial considerations, the Chief Counsel may take appropriate enforcement action contrary to an advisory opinion before amending or revoking the opinion. This action shall be taken only with the approval of the Administrator, who may not delegate this function.

**Subpart F—Complaints****§ 604.25 Purpose.**

This subpart describes the requirements necessary for filing a complaint with FTA regarding the provision of charter service by recipients or filing a complaint challenging the listing of a private charter operator or qualified human service organization on the FTA charter registration Web site. **Note:** FTA expects all parties to attempt to resolve matters informally before beginning the official complaint process, which can be time-consuming and expensive to all parties involved.

**§ 604.26 Complaints and decisions regarding removal of private charter operators or qualified human service organizations from registration list.**

(a) A recipient, a registered charter provider, or their duly authorized representative, may challenge the listing of a registered charter provider or qualified human service organization on FTA's charter registration Web site by filing a complaint that meets the following:

(1) States the name and address of each entity who is the subject of the complaint;

(2) Provides a concise but complete statement of the facts relied upon to substantiate the reason why the private charter operator or qualified human service organization should not be listed on the FTA charter registration website;

(3) Files the complaint electronically by submitting it to the Charter Service Complaint Docket number xxxx; and

(4) Serves the complaint by email (or facsimile number if no email address is available) and attaches documents offered in support of the complaint upon all entities named in the complaint.

(b) The private charter operator or qualified human service organization shall have 7 days to answer the complaint and shall file such answer and all supporting documentation in the Charter Service Complaint Docket number xxxxx.

(c) A recipient, qualified human service organization, or a registered charter provider, or their duly authorized representative, shall not file a reply to the answer.

(d) FTA shall determine whether to remove the private charter operator or qualified human service organization from the FTA charter registration website based on probative evidence of one or more of the following:

(1) Bad faith;

(2) Fraud;

(3) Lapse of insurance;

(4) Lapse of other documentation; or

(5) The filing of more than one complaint, which on its face, does not state a claim that warrants an investigation or further action by FTA.

(e) A determination whether or not to remove a private charter operator or qualified human service organization from the registration list shall be sent to the parties within 30 days of the date of the response required in paragraph (b) of this section. FTA's decision, after consultation with the Chief Counsel, shall state:

(1) Reasons for allowing the continued listing or removing the private charter operator or human service organization from the registration list;

(2) if removal is ordered, the length of time (not to exceed three years) the private charter operator or qualified human service organization shall be barred from the registration list; and

(3) the date by which the private charter operator or qualified human service organization may re-apply for registration on the FTA charter registration website.

(f) FTA's determination in this section shall not be subject to review under subparts J or K of this Part.

**§ 604.27 Complaints, answers, replies, and other documents.**

(a) A registered charter provider, or their duly authorized representative ("complainant"), affected by an alleged noncompliance of this Part may file a complaint with the Office of the Chief Counsel.

(b) Except as provided otherwise in § 604.26, complaints filed under this subpart shall—

(1) Title the document "Notice of Charter Service Complaint;"

(2) State the name and address of each recipient who is the subject of the complaint and, with respect to each recipient, the specific provisions of the Federal Transit Laws that the complainant believes were violated;

(3) Serve the complaint in accordance with § 604.31, along with all documents then available in the exercise of reasonable diligence, offered in support of the complaint, upon all recipients named in the complaint as being responsible for the alleged action(s) or omission(s) upon which the complaint is based;

(4) Provide a concise but complete statement of the facts relied upon to substantiate each allegation;

(5) Describe how the complainant was directly and substantially affected by the things done or omitted by the recipients; and

(6) Identify each registered charter provider associated with the complaint.

(c) Unless the complaint is dismissed pursuant to § 604.28 or § 604.29, FTA shall notify the complainant, respondent, and state recipient, if applicable, within 30 days after the date FTA receives the complaint that the complaint has been docketed.

Respondents shall have 30 days from the date of service of the FTA notification to file an answer.

(d) The complainant shall file a reply within 20 days of the date of service of the respondent's answer.

(e) The respondent may file a rebuttal within 10 days of the date of service of the reply.

(f) The answer, reply, and rebuttal shall, like the complaint, be accompanied by supporting documentation upon which the parties rely.

(g) The answer shall deny or admit the allegations made in the complaint or state that the entity filing the document is without sufficient knowledge or information to admit or deny an allegation, and shall assert any affirmative defense.

(h) The answer, reply, and rebuttal shall each contain a concise but complete statement of the facts relied upon to substantiate the answers, admissions, denials, or averments made.

(i) The respondent's answer may include a motion to dismiss the complaint, or any portion thereof, with a supporting memorandum of points and authorities.

(j) The complainant may withdraw a complaint at any time after filing by serving a "Notification of Withdrawal" on the Chief Counsel and the respondent.

**§ 604.28 Dismissals.**

(a) Within 20 days after the receipt of a complaint described in § 604.27, the Office of the Chief Counsel shall provide reasons for dismissing a complaint, or any claim in the complaint, with prejudice under this section if:

(1) It appears on its face to be outside the jurisdiction of FTA under the Federal Transit Laws;

(2) On its face it does not state a claim that warrants an investigation or further action by FTA; or

(3) The complainant lacks standing to file a complaint under subparts B, C, or D of this Part.

**§ 604.29 Incomplete complaints.**

If a complaint is not dismissed pursuant to § 604.28, but is deficient as to one or more of the requirements set forth in § 604.27, the Office of the Chief Counsel will dismiss the complaint within 20 days after receiving it. Dismissal shall be without prejudice and the complainant may re-file after amendment to correct the deficiency. The Chief Counsel's dismissal shall include the reasons for the dismissal without prejudice.

**§ 604.30 Filing.**

(a) Filing address. Unless provided otherwise, the complainant shall file the complaint with the Office of the Chief Counsel, 400 Seventh Street, SW., Room 9316, Washington, DC 20590 and file it electronically at <http://dms.dot.gov> or mail it to the docket at 400 Seventh Street, SW., PL-401, Washington, DC 20590. Filings sent to the docket shall include the Charter Service Complaint docket number xxxx.

(b) Date and method of filing. Filing of any document shall be by personal delivery or U.S. mail. Unless the date is shown to be inaccurate, documents to be filed with FTA shall be deemed filed:

(1) On the date of personal delivery;

(2) On the mailing date shown on the certificate of service;

(3) On the date shown on the postmark if there is no certificate of service; or

(4) On the mailing date shown by other evidence if there is no certificate of service and no postmark.

(c) E-mail. A party may also send the document by facsimile or email, but delivery by either facsimile or email shall not constitute service as described in § 604.31.

(d) Number of copies. Unless otherwise specified, an executed original shall be filed with FTA.

(e) Form. Documents filed with FTA shall be typewritten or legibly printed. In the case of docketed proceedings, the document shall include a title and the docket number of the proceeding on the front page.

(f) Signing of documents and other papers. The original of every document filed shall be signed by the person filing it or the person's duly authorized representative. Subject to the enforcement provisions contained in this subpart, the signature shall serve as a certification that the signer has read the document and, based on reasonable inquiry, to the best of the signer's knowledge, information, and belief, the document is—

(1) Consistent with this part;

(2) Warranted by existing law or that a good faith argument exists for extension, modification, or reversal of existing law; and

(3) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the administrative process.

**§ 604.31 Service.**

(a) Designation of person to receive service. The initial document filed by the complainant shall state on the first page of the document for all parties to be served:

(1) The title of the document;

(2) The name, post office address, telephone number; and

(3) The facsimile number, if any, and email address(es), if any.

If any of the above items change during the proceeding, the person shall promptly file notice of the change with FTA and the Presiding Official, if appropriate, and shall serve the notice on all other parties to the proceeding.

(b) Docket numbers. Each submission identified as a complaint under this Part by the submitting party shall be filed in the Charter Service Complaint docket number xxxx.

(h) Who must be served. Copies of all documents filed with FTA shall be served by the entity filing them on all parties to the proceeding. A certificate of service shall accompany all

documents when they are tendered for filing and shall certify concurrent service on FTA and all parties. Certificates of service shall be in substantially the following form:

I hereby certify that I have this day served the foregoing [name of document] on the following persons at the following addresses and email or facsimile numbers (if also served by email or facsimile) by [specify method of service]:

[list persons, addresses, and email or facsimile numbers]

Dated this \_\_\_ day of \_\_\_, 20\_\_.  
[signature], for [party]

(i) Method of service. Except as otherwise provided in § 604.26, or agreed by the parties and the Presiding Official, as appropriate, the method of service is personal delivery or U.S. mail.

(j) Presumption of service. There shall be a presumption of lawful service—

(1) When acknowledgment of receipt is by a person who customarily or in the ordinary course of business receives mail at the address of the party or of the person designated under this section; or

(2) When a properly addressed envelope, sent to the most current address submitted under this section has been returned as undeliverable, unclaimed, or refused.

### Subpart G—Investigations

#### § 604.32 Investigation of complaint.

(a) If, based on the pleadings, there appears to be a reasonable basis for investigation, FTA shall investigate the subject matter of the complaint.

(b) The investigation may include a review of written submissions or pleadings of the parties, as supplemented by any informal investigation FTA considers necessary and by additional information furnished by the parties at FTA request. Each party shall file documents that it considers sufficient to present all relevant facts and argument necessary for FTA to determine whether the recipient is in compliance.

(c) The Chief Counsel shall send a notice to complainant(s) and respondent(s) once an investigation is complete, but not later than 90 days after receipt of the last pleading specified in § 604.27 was due to FTA.

#### § 604.33 Agency initiation of investigation.

(a) Notwithstanding any other provision of law, FTA may initiate its own investigation of any matter within the applicability of this Part without having received a complaint. The investigation may include, without limitation, any of the actions described in § 604.32.

(b) Following the initiation of an investigation under this section, FTA

sends a notice to the entities subject to investigation. The notice will set forth the areas of FTA's concern and the reasons; request a response to the notice within 30 days of the date of service; and inform the respondent that FTA will, in its discretion, invite good faith efforts to resolve the matter.

(c) If the matters addressed in the FTA notice are not resolved informally, the Chief Counsel may refer the matter to a Presiding Official.

### Subpart H—Initial Decisions by FTA and Referrals to a Presiding Official (PO)

#### § 604.34 Initial decisions and referrals to a PO.

(a) After receiving a complaint consistent with § 604.27, and conducting an investigation, the Chief Counsel may:

(1) Issue an initial decision, signed by a headquarters office, based on the pleadings filed to date;

(2) Refer the matter to a PO; or

(3) Dismiss the complaint pursuant to § 604.28.

(b) If the Chief Counsel refers the matter to a PO, the Chief Counsel shall send out a hearing order that sets forth the following:

(1) The allegations in the complaint, or notice of investigation, and the chronology and results of the investigation preliminary to the hearing;

(2) The relevant statutory, judicial, regulatory, and other authorities;

(3) The issues to be decided;

(4) Such rules of procedure as may be necessary to supplement the provisions of this Part;

(5) The name and address of the PO, and the assignment of authority to the PO to conduct the hearing in accordance with the procedures set forth in this Part; and

(6) The date by which the PO is directed to issue an initial decision.

#### § 604.35 Separation of functions.

(a) Proceedings under this Part shall be handled by an FTA attorney.

(b) After issuance of an initial decision by a headquarters office, the FTA employee or contractor engaged in the performance of investigative or prosecutorial functions in a proceeding under this Part will not, in that case or a factually related case, participate or give advice in a final decision by the Administrator or designee on written appeal, and will not, except as counsel or as witness in the public proceedings, engage in any substantive communication regarding that case or a related case with the Administrator on written appeal, or FTA employees advising those officials in that capacity.

### Subpart I—Hearings

#### § 604.36 Powers of a PO.

A PO may:

(a) Give notice of, and hold, pre-hearing conferences and hearings;

(b) Administer oaths and affirmations;

(c) Issue administrative subpoenas and issue notices of deposition requested by the parties;

(d) Limit the frequency and extent of discovery;

(e) Rule on offers of proof;

(f) Receive relevant and material evidence;

(g) Regulate the course of the hearing in accordance with the rules of this part to avoid unnecessary and duplicative proceedings in the interest of prompt and fair resolution of the matters at issue;

(h) Hold conferences to settle or to simplify the issues by consent of the parties;

(i) Dispose of procedural motions and requests;

(j) Examine witnesses; and

(k) Make findings of fact and conclusions of law, and issue an initial decision.

#### § 604.37 Appearances, parties, and rights of parties.

(a) Any party to the hearing may appear and be heard in person and any party to the hearing may be accompanied, represented, or advised by an attorney licensed by a State, the District of Columbia, or a territory of the United States to practice law or appear before the courts of that State or territory, or by another duly authorized representative. An attorney, or other duly authorized representative, who represents a party shall file a notice of appearance in accordance with § 604.30 and § 604.31.

(b) The parties to the hearing are the respondent(s) named in the hearing order, the complainant(s), and FTA, as represented by the PO.

(c) The parties to the hearing may agree to extend for a reasonable period of time the time for filing a document under this Part. If the parties agree, the PO shall grant one extension of time to each party. The party seeking the extension of time shall submit a draft order to the PO to be signed by the PO and filed with the hearing docket. The PO may grant additional oral requests for an extension of time where the parties agree to the extension.

(d) An extension of time granted by the PO for any reason extends the due date for the PO's initial decision and for the final agency decision by the length of time in the PO's decision.

**§ 604.38 Discovery.**

(a) Permissible forms of discovery shall be within the discretion of the PO.

(b) The PO shall limit the frequency and extent of discovery permitted by this section if a party shows that—

(1) The information requested is cumulative or repetitious;

(2) The information requested may be obtained from another less burdensome and more convenient source;

(3) The party requesting the information has had ample opportunity to obtain the information through other discovery methods permitted under this section; or

(4) The method or scope of discovery requested by the party is unduly burdensome or expensive.

**§ 604.39 Depositions.**

(a) For good cause shown, the PO may order that the testimony of a witness may be taken by deposition and that the witness produce documentary evidence in connection with such testimony. Generally, an order to take the deposition of a witness is entered only if:

(1) The person whose deposition is to be taken would be unavailable at the hearing;

(2) The deposition is deemed necessary to perpetuate the testimony of the witness; or

(3) The taking of the deposition is necessary to prevent undue and excessive expense to a party and will not result in undue burden to other parties or in undue delay.

(b) Any party to the hearing desiring to take the deposition of a witness according to the terms set out in this subpart, shall file a motion with the PO, with a copy of the motion served on each party. The motion shall include:

(1) The name and residence of the witness;

(2) The time and place for the taking of the proposed deposition;

(3) The reasons why such deposition should be taken; and

(4) A general description of the matters concerning which the witness will be asked to testify.

(c) If good cause is shown in the motion, the PO in his or her discretion, issues an order authorizing the deposition and specifying the name of the witness to be deposed, the location and time of the deposition and the general scope and subject matter of the testimony to be taken.

(d) Witnesses whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to them. Each question propounded shall be recorded and the answers of the witness transcribed verbatim. The

written transcript shall be subscribed by the witness, unless the parties by stipulation waive the signing, or the witness is ill, cannot be found, or refuses to sign. The reporter shall note the reason for failure to sign.

**§ 604.40 Public disclosure of evidence.**

(a) Except as provided in this section, the hearing shall be open to the public.

(b) The PO may order that any information contained in the record be withheld from public disclosure. Any person may object to disclosure of information in the record by filing a written motion to withhold specific information with the PO. The person shall state specific grounds for nondisclosure in the motion.

(c) The PO shall grant the motion to withhold information from public disclosure if the PO determines that disclosure would be in violation of the Privacy Act, would reveal trade secrets or privileged or confidential commercial or financial information, or is otherwise prohibited by law.

**§ 604.41 Standard of proof.**

The PO shall issue an initial decision or shall rule in a party's favor only if the decision or ruling is supported by, and in accordance with, reliable, probative, and substantial evidence contained in the record and is in accordance with law.

**§ 604.42 Burden of proof.**

(a) The burden of proof of noncompliance with this Part, determination, or agreement issued under the authority of the Federal Transit Laws is on registered charter provider.

(b) Except as otherwise provided by statute or rule, the proponent of a motion, request, or order has the burden of proof.

(c) A party who has asserted an affirmative defense has the burden of proving the affirmative defense.

**§ 604.43 Offer of proof.**

A party whose evidence has been excluded by a ruling of the PO may offer the evidence on the record when filing an appeal.

**§ 604.44 Record.**

(a) The transcript of all testimony in the hearing, all exhibits received into evidence, all motions, applications, requests and rulings, and all documents included in the hearing record shall constitute the exclusive record for decision in the proceedings and the basis for the issuance of any orders.

(b) Any interested person may examine the record by entering the docket number at <http://dms.dot.gov> or

after payment of reasonable costs for search and reproduction of the record.

**§ 604.45 Waiver of procedures.**

(a) The PO shall waive such procedural steps as all parties to the hearing agree to waive before issuance of an initial decision.

(b) Consent to a waiver of any procedural step bars the raising of this issue on appeal.

(c) The parties may not by consent waive the obligation of the PO to enter an initial decision on the record.

**§ 604.46 Recommended decision by a PO.**

(a) The PO shall issue a recommended decision based on the record developed during the proceeding and shall send the recommended decision to a headquarters office for ratification or modification not later than 110 days after the referral from the Chief Counsel.

(b) The headquarters office shall ratify or modify the PO's recommended decision within 30 days of receiving the recommended decision. The headquarters office shall serve its initial decision, which is capable of being appealed to the Administrator, on all parties to the proceeding.

**§ 604.47 Remedies.**

(a) If the headquarters office determines that a violation of this Part occurred, the headquarters office shall take any of the following actions:

(1) Bar the recipient from receiving future Federal financial assistance from FTA;

(2) Order the refund of revenue collected in violation of this Part to the U.S. Treasury; or

(3) Order the withholding of a reasonable percentage of available Federal financial assistance.

(b) In determining the type and amount of remedy, the headquarters office shall consider the following factors:

(1) The nature and circumstances of the violation;

(2) The extent and gravity of the violation;

(3) The revenue earned by providing the charter service;

(4) The operating budget of the recipient; and

(5) Such other matters as justice may require.

(c) The headquarters office shall mitigate the remedy when the recipient can document corrective action of alleged violation. The headquarters office's decision to mitigate a remedy shall be determined on the basis of how much corrective action was taken by the recipient and when it was taken. Systemic action to prevent future

violations will be given greater consideration than action simply to remedy violations identified during FTA's inspection or identified in a complaint.

(d) In the event the headquarters office finds a pattern of violations, the remedy ordered shall bar a recipient from receiving Federal transit assistance in an amount that the headquarters office considers appropriate.

(e) The headquarters office may propose to withhold Federal financial assistance in a lump sum or over a period of time not to exceed five years.

#### **Subpart J—Appeal to Administrator and Final Agency Orders**

##### **§ 604.48 Appeal from a headquarters office initial decision.**

(a) Each party adversely affected by the headquarters office's initial decision may file an appeal with the Administrator within 21 days of the date of the headquarters office issued their initial decision. Each party may file a reply to an appeal within 21 days after it is served on the party. Filing and service of appeals and replies shall be by personal delivery consistent with §§ 604.30 and 604.31.

(b) If an appeal is filed, the Administrator reviews the entire record and issues a final agency decision and order based on the record within 30 days of the due date of the reply. If no appeal is filed, the Administrator may take review of the case on his or her own motion. If the Administrator finds that the respondent is not in compliance with the Federal Transit Laws or any regulation, or agreement the final agency order includes a statement of

corrective action, if appropriate, and identifies remedies.

(c) If no appeal is filed, and the Administrator does not take review of the initial decision by the headquarters office on the Administrator's own motion, the headquarters office's initial decision shall take effect as the final agency decision and order on the twenty-first day after the actual date the headquarters office's initial decision is issued.

(d) The failure to file an appeal is deemed a waiver of any rights to seek judicial review of a headquarters office initial decision that becomes a final agency decision by operation of paragraph (c) of this section.

##### **§ 604.49 Administrator's discretionary review of a headquarters office's initial decision.**

(a) If the Administrator takes review on the Administrator's own motion, the Administrator shall issue a notice of review by the twenty-first day after the actual date the headquarters office's initial decision that contains the following information:

(1) The notice sets forth the specific findings of fact and conclusions of law in the initial decision subject to review by the Administrator.

(2) Parties may file one brief on review to the Administrator or rely on their post-hearing briefs to the headquarters office. Briefs on review shall be filed not later than 10 days after service of the notice of review. Filing and service of briefs on review shall be by personal delivery consistent with § 604.30 and § 604.31.

(3) The Administrator issues a final agency decision and order within 30

days of the due date of the briefs on review. If the Administrator finds that the respondent is not in compliance with the Federal Transit Laws, regulations or agreement, the final agency order includes a statement of corrective action, if appropriate, and identifies remedies.

#### **Subpart K—Judicial Review**

##### **§ 604.50 Judicial review of a final decision and order.**

(a) A person may seek judicial review, in an appropriate United States District Court, of a final decision and order of the Administrator as provided in 5 U.S.C. 701–706. A party seeking judicial review of a final decision and order shall file a petition for review with the Court not later than 60 days after a final decision and order is effective.

(b) The following do not constitute final decisions and orders subject to judicial review:

(1) An FTA decision to dismiss a complaint as set forth in §§ 604.28 and 604.29;

(2) FTA's determination to remove or allow a listing on FTA's charter registration website in accordance with § 604.26;

(3) A recommended decision issued by a PO at the conclusion of a hearing;

(4) A headquarters office decision that becomes the final decision of the Administrator because it was not appealed within the stated timeframes.

Issued this 12th day of February, 2007.

**James S. Simpson,**  
*Administrator.*

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