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: Final rule.

SUMMARY: This final rule amends regulations which govern the provision of charter service by recipients of Federal funds from the Federal Transit Administration (FTA). 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, FTA established a committee to develop, through negotiated rulemaking procedures, recommendations for improving the regulation regarding unauthorized competition from recipients of Federal financial assistance. This final rule clarifies the existing requirements, sets out a new definition of ''charter service,'' allows for electronic registration of private charter providers, which replaces the old ''willing and able'' process, includes a new provision allowing private charter operators to request a cease and desist order, and establishes more detailed complaint, hearing, and appeal procedures.

DATES: *Effective Date:* April 30, 2008.

ADDRESSES: A copy of this rule and comments and material received from the public, as well as any documents indicated in the preamble as being available in the docket, are part of docket FTA–2005–22657 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building Ground Floor, Room W12–140, Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may retrieve the rule and comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.* Enter docket number 22657 in the search field. The FDMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may also reach the Office of the Federal Register's home page at: *http://www.nara.gov/fedreg* and the Government Printing Office's Web page at: *http://www.gpoaccess.gov/fr/index.html.*

FOR FURTHER INFORMATION CONTACT: Crystal Frederick, Ombudsman for Charter Services, Federal Transit Administration, 1200 New Jersey Ave., SE., Room E54–410, Washington, DC 20590, (202) 366–4063 or *ombudsman.charterservice@dot.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

1. Statutory History

The Federal Transit Administration was established by the Urban Mass Transportation Act of 1964 (UMT Act, the Act).[1] The Act provided funds for ''mass transportation'' purposes, defined as: ''transportation by bus or rail or other conveyance, either publicly or privately owned, serving the general public (but not including school buses or charter or sightseeing service) and moving over prescribed routes.''[2] This provision illustrates the balance Congress sought to strike between the public and private sectors of the economy. Congress acted to provide Federal funding for the continued existence of urban fixed route providers by enacting a capital program to acquire private transit companies and establish new public transportation agencies. The charter services provided by private companies were still profitable; accordingly, Congress excluded charter service from the definition of ''mass transportation.''

The Federal Aid Highway Act of 1973 placed an additional restriction on the use of federally funded buses for charter service. The 1973 Act prohibited Federal assistance unless the applicant had entered into an agreement with the Secretary of Transportation that it would not engage in charter bus operations in competition with private bus operators outside of the area in which the applicant provided regularly scheduled mass transportation services.

In 1974, however, Congress eased the 1973 restriction by allowing an applicant to provide charter services outside the urban area where it provided regularly scheduled mass transportation if it entered into an agreement with the Secretary of Transportation that provided ''fair and equitable arrangements'' to ensure that federally assisted operators did not compete with private operators of intercity charter bus service where such private operators were willing and able to provide the service.[3] In other words, Federal financial assistance should not enable applicants to foreclose private operators from the intercity charter bus industry where there are private charter operators willing and able to provide the service.

2. Regulatory History

FTA proposed its first regulation regarding charter service on June 13, 1975.[4] This proposal set out policies and procedures governing the provision of charter bus services and the reporting of charter bus revenues and expenses under the UMT Act. The proposed regulations required public operators to take into account both the direct and indirect costs of operating charter service, without regard to the receipt of Federal financial assistance, when developing their charter rates. The proposed regulations also compelled public operators to generate revenues equal to or greater than the cost of providing the charter bus service.[5] FTA finalized this regulation on April 1, 1976.[6]

Public transportation agencies complained that this final regulation created an undue administrative burden on them. Private charter companies complained that publicly funded operators, using federally financed equipment, were forcing them out of business.

In response, FTA issued an Advance Notice of Proposed Rulemaking (ANPRM) in 1976, which sought to clarify the duties of recipients who engaged in charter bus operations outside their urban area and provide more reliable protection to private operators in the intercity charter bus industry while reducing paperwork burdens on recipients.[7]

Another ANPRM was published in 1982, which sought to take a fresh look at the charter regulations.[8] The ANPRM contained four proposals for safeguarding the use of transit equipment and protecting the health of the private intercity charter industry.

[1] Pub. L. No. 88–365.

[2] UMT Act, Section 2(b).

[3] Pub. L. 93087, Section 164(a), August 13, 1973.

[4] ''Charter and School Bus Operations,'' 40 FR 25304, June 13, 1975.

[5] Id. at 25305.

[6] ''Charter and School Bus Operations,'' 41 FR 14123, April 1, 1976.

[7] 41 FR 56680, December 29, 1976.

[8] 41 FR 5394, January 19, 1981.

After reviewing the comments received, FTA determined that none of the four proposals adequately addressed the problem. So, in 1986, FTA issued a NPRM with a brand new proposal. This proposal would prohibit a recipient from performing any charter bus operations to the extent that there was a private charter operator willing and able to provide such charter service in the area in which the recipient desired to provide charter bus operations. This proposal also included exceptions that allowed a public transportation agency to provide charter service in the event there were no willing and able private charter operators, if private charter operators did not have capacity, if private charter operators were unable to provide accessible equipment, or for non-urbanized areas, or if the private charter operator providing the service would create a hardship for the customer.[9] This proposal was finalized in 1987.[10]

The 1976 regulation and the 1987 regulation are fundamentally different in their approaches and provisions. The 1976 regulation distinguished between charter service that a recipient provided in its service area (intracity service) and charter service a recipient provided outside its service area (intercity service). The 1976 regulation made this distinction because of the new provisions of the UMT Act, which restricted only a recipient's intercity charter service. The rule required recipients to certify all costs that were attributable to the recipient's charter bus operations and maintain records that justified their costs.

In contrast, the 1987 rule did not provide different requirements for intercity and intracity service. The 1987 rule eliminated this distinction because the UMT Act definition of ''mass transportation'' excluded all charter operations, thereby requiring protection for all private charter operators from recipients, not just those providing intercity operations or those that earned in excess of a certain amount. Instead, the 1987 rule focused on prohibiting all charter service by a recipient if there was a willing and able private charter operator who could perform the service.

In 1988, Congress directed FTA to amend the charter service regulation to permit non-profit social service agencies with a clear need for affordable and/or accessible equipment to seek bids for charter service from publicly funded operators. On December 30, 1988, FTA amended the charter service regulations to provide for three new exceptions.[11] The first exception allowed recipients to provide direct charter service to non-profit social service agencies. The second exception, limited to recipients in non-urbanized areas, allowed recipients to provide direct charter service to non-profit social service organizations if more than fifty percent of the passengers were elderly. The third exception allowed recipients to provide direct charter services where there was a formal agreement between the recipient and all private operators it had determined to be willing and able through its annual public charter notice. The addition of these exceptions brought the total number of exceptions contained in the rule to eight.[12] The rule has remained essentially unchanged since this amendment in 1988.

3. Demonstration Project and GAO Report

Since lingering concerns remained about the charter service regulation and FTA's enforcement of the rule, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) directed FTA to issue regulations implementing a charter service demonstration program in not more than four states.[13] A report evaluating the effectiveness of the demonstration program was to be submitted in three years. The conference report accompanying ISTEA explained that the demonstration program was directed in response to concerns expressed by local transit operators regarding the existing charter service regulation. Many public operators were concerned that certain groups were not being served under the existing regulation, that they were not able to provide service to local government entities that provided support to the local agency, and that they were not permitted to provide service to support local economic development activities. The demonstration program was to be designed to allow public operators in several locations greater flexibility to meet local charter needs without creating undue competition for privately owned charter operators. Congress required FTA to collect data on the impact of the change.

In September 1997, FTA submitted its report to Congress regarding the demonstration program.[14] The report concluded that there was no need for FTA to substantially revise its charter service regulation. The demonstration did not support public operators' claims of unmet needs for the groups for which the demonstration was primarily intended: government, civic, charitable and other community activities. The charter service provided during the demonstration did not serve a significant number of these groups or significantly increase the level of service to these groups.

Congress also directed the Government Accounting Office (GAO) to analyze FTA's charter service regulations. GAO conducted a nationwide survey of public transportation operators, private charter operators, and customers.[15] GAO's report showed that local charter regulation differed across localities. GAO found that most public operators stated that the FTA regulation was too strict, but that they had not extensively used the available exceptions to provide charter service. Their reasons for not using the exceptions ranged from being unfamiliar with the exceptions to the exceptions being too cumbersome for the relatively small amount of charter service that they were interested in providing.[16] When asked what they would change about the regulation, suggestions varied depending on whether the public transportation agency was in an urban or rural area. Urban public transportation providers would change the rule to allow them to provide charter service to local government officials and non-profit community organizations. Rural operators would change the rule to allow direct charter services to nonprofit and community organizations, but also requested clarification of the rule.[17]

GAO found that most private charter operators were satisfied with FTA's charter service regulations. Some private charter operators did, however, express concern about the complaint process. Specifically, some private charter operators stated that the burden of proof fell on them when a public operator violated the regulation, the burden of proof fell on them and that the complaint process was lengthy and expensive. Further, some were skeptical

[9] 51 FR 7891, March 6, 1986.

[10] 52 FR 11916, April 13, 1987.

[11] H. Report 110–498, p. H 122787 as printed in the Congressional Record, December 21, 1987.

[12] ''Charter Service; Amendment,'' 53 FR 53348, December 30, 1988.

[13] Section 3040, ''Intermodal Surface Transportation Efficiency Act of 1991,'' Pub. L. No. 102–240, December 19, 1991.

[14] ''Evaluation of the Charter Bus Demonstration,'' Federal Transit Administration, Department of Transportation, September 1997.

[15] ''Charter Bus Service: Local Factors Determine the Effectiveness of Federal Regulation, GAO Report to Congressional Committees,'' GAO/RCED–93–162, September 7, 1993.

[16] Id. at 3.

[17] Id. at 4.

that recipients were accurately calculating their fully allocated costs (i.e., all labor, capital, and material costs) of providing charter service. As a result some private charter operators believed that public transportation agencies were charging lower rates than they should.[18]

The GAO also interviewed customers of charter service to find out their concerns with FTA's charter service regulation. GAO found two user groups that were dissatisfied with the regulation: those who needed accessible transportation and those who needed a large number of vehicles to serve local conventions and economic development activities.[19]

The GAO report concluded that its data did not provide compelling evidence that there were serious widespread needs for charter service that could not be met under the current regulation. The data showed that the current exceptions to the regulation, such as contracting with private providers, were not widely used. GAO believed that many public operators, particularly those in rural areas, were unfamiliar with the process for obtaining exceptions.[20]

B. SAFETEA–LU

Congress next addressed concerns regarding FTA's charter service regulation in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), which was enacted on August 10, 2005. The statute amended the statutory provision regarding charter service found at 49 U.S.C. 5323(d). Specifically, with respect to remedies, the SAFETEA–LU amendment provides that, ''in addition to any remedy specified in the agreement, the Secretary shall bar a recipient or an operator from receiving Federal transit assistance in an amount the Secretary considers appropriate if the Secretary finds a pattern of violations of the agreement.'' Previously, the statute used permissive language, ''may,'' rather than mandatory language, ''shall,'' with respect to withholding funds. Further, the previous statutory language did not state that the Secretary could determine an appropriate amount to withhold when the Secretary found a pattern of violations. Rather, if a pattern of violations was found, the Secretary only had the option to bar the recipient from receiving all of its Federal funds.

Additionally, the Joint Explanatory Statement of the Committee of Conference, for section 3023(d), ''Conditions on Charter Bus Transportation Service'' of SAFETEA–LU, stated ''the conferees are aware that both public transportation providers and private charter bus providers have expressed strong concerns about the 1987 FTA rule enforcing section 5323(d) regarding charter bus service. The conferees direct the FTA to initiate a negotiated rulemaking seeking public comment on the regulations implementing section 5323(d).'' The report also directed FTA to consider the following issues during the negotiated rulemaking:

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?

C. Federal Advisory Committee

In response to the direction contained in the Conference Committee Report, FTA established a federal advisory committee to develop, through negotiated rulemaking procedures, recommendations for improving the regulation regarding charter bus services. FTA established a Federal Advisory Committee on May 5, 2006. 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, Lansing, Michigan;
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 Metropolitan Transportation Authority;
Northwest Motorcoach Association/ Starline Luxury Coaches;
Oklahoma State University/The Bus Community Transit System;
River Cities Transit, Pierre, South Dakota;
Southwest Transit Association;
Taxicab, Limousine & Paratransit Association;
Trailways; and
United Motorcoach Association.

The CBNRAC met in Washington, DC, on the following dates in 2006:
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

[18] Id. at 37.
[19] Id. at 38.
[20] Id. at 11.

(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, noted in the previous section of this preamble, and these 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.

1. Facilitator's Final Report

The facilitator, Susan Podziba, submitted her report to FTA on March 6, 2007. The final report summarizes the proceedings of the CBNRAC including the agreement reached on regulatory language for the NPRM and identifies outstanding issues. The facilitator noted in her final report that:

> As a result of the negotiated rulemaking process initiated by FTA, the revised Charter Service regulations will account for the interests, concerns, and nuances that were raised by all CBNRAC members. Though the negotiations remained difficult, and, at times, antagonistic throughout the seven months of meetings, CBNRAC members remained committed and worked hard to identify consensus solutions for each issue. As a result of the intensive discussions and multiple proposals and counter-proposals offered to resolve the twelve outstanding sub-issues, FTA has a clear understanding of the interest and concerns of both the public transit and private charter stakeholders as well as the range of options available for deciding those issues. (Final Report, page 20.)

We would like to underscore the facilitator's conclusion and thank all members of the CBNRAC for their efforts. We also agree with the facilitator that, as a result of the negotiations, we have a clear understanding of the interests involved with the revision of the Charter Service regulations.

D. NPRM

On February 15, 2007, FTA published a NPRM in the **Federal Register** (72 FR 7526). The NPRM was a complete revision of 49 CFR part 604. According to the agreement established during the negotiations, FTA included in the NPRM all of the provisions on which the CBNRAC reached consensus. This amounted to a little more than 80 percent of the rulemaking. For the other 20 percent, FTA used its discretion, informed by the discussions during the negotiations, to develop its proposals.

1. Overview of Comments Received on the NPRM

We received over 300 comments in response to our NPRM. We heard from 160 public transit agencies, 65 private charter operators, 25 public associations, 16 members of the public, 13 state departments of transportation, 11 private charter associations, 11 cities, 10 universities, four public officials, three air transport groups, and three anonymous comments.

We received several comments from participants on the CBNRAC. Some comments were in full support of the proposals contained in the NPRM and other comments rejected the proposals. Even though some of the comments submitted by members of the CBNRAC did not conform to the agreement reached on December 6, 2006, FTA retained much of the consensus language. In addition, we received many helpful comments on ways to improve the regulatory language and we made changes based on those comments.

2. General Comments

There were a number of comments on cross-cutting issues that we address before the section-by-section analysis. Specifically, we received comments about the lack of appendices in the NPRM, fully allocated costs, and when a customer specifies the type of equipment. In addition, we received several comments questioning our intentions regarding some of the proposals included in the NPRM.

a. Lack of Appendices

When we published the NPRM, we made reference to appendices we intended to include in the final rule. Appendix A would be a list of the 64 Federal programs discussed and provided during the CBNRAC negotiations. This list is not unique; rather, other Federal agencies reference this list and the list is available on FTA's public Web site, *http://www.fta.dot.gov*. In addition, the list of Federal programs was provided to all of the members of the CBNRAC during negotiations and is in the docket for these proceedings. Appendix B would provide guidance on what FTA would consider when removing a registered charter provider or qualified human service organization from the FTA Charter Registration Web site. Appendix C would be a list of questions and answers to provide guidance to recipients regarding the new provisions of the rule.

Regarding the lack of appendices in the NPRM, a large public transportation association and several public transit agencies stated ''we are troubled by the absence of a draft Appendix A (listing the federal programs that would qualify a social service agency to receive services under an exception). Although we anticipate that all of the more than five dozen federal programs under the United We Ride umbrella will be included, we believe FTA should state

as much or provide a draft Appendix A for comment.''

Appendices are not regulatory text and do not carry the force and effect of law. In fact, the Office of Federal Register specifically prohibits an appendix from containing regulatory requirements:

> Rules and proposed rules. Use an appendix to improve the quality or use of a rule but not to impose requirements or restrictions.
>
> *Use an appendix to present:* (a) Supplemental, background, or explanatory information which illustrates or amplifies a rule that is complete in itself; or (b) Forms or charts which illustrate the regulatory text.
>
> You may not use the appendix as a substitute for regulatory text. Present regulatory material as an amendment to the CFR, not disguised as an appendix.
>
> *Material in an appendix may not:* (a) Amend or affect existing portions of CFR text; or (b) Introduce new requirements or restrictions into your regulations.[21]

Further, as noted above, an appendix is explanatory, and, therefore, according to the Administrative Procedure Act, notice and comment is not required:

> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) To interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[22]

Based on the above, and the fact that proposed information for the appendices was widely available to the public before publication of the NPRM, we made the decision not to include appendices at the NPRM stage.

b. Fully Allocated Costs

Our proposed rulemaking did not include a requirement for recipients to calculate their fully allocated costs. We decided not to include the provision primarily because a fully allocated cost requirement has the potential to interfere with our efforts to support public transit agencies as mobility managers within their communities. In addition, we are very concerned that a fully allocated cost requirement would hinder our attempts to negotiate with other federal agencies to develop cost allocation principles to share fairly the cost of human service transportation.

Private charter operators submitted comment urging us to reconsider our proposal. One comment, which represents a consolidated opinion of several of the private charter operators on the CBNRAC, stated that ''the admonition to develop 'fair charges' and to recover some percentage of marginal operating costs consistent with the public purpose of the service is useless as either a regulatory tool or guidance to transit agencies. It also provides no protection to private operators. The need for transit agencies to recover fully allocated costs is present even for service provided under one of the many exceptions in this proposed rule.'' They contend that, like other social programs, if the Federal Government wishes to subsidize charter service for certain social service organizations, it can make direct subsidy payments to those organizations instead of creating subsidized public bus service that undercuts the price structure in the private market.

In addition, one international private charter association suggested that FTA impose a new fully allocated cost requirement: ''A system-wide cost per revenue hour dollar figure (approved operating budget divided by revenue hours of bus service) is the fairest and simplest way of estimating what it would cost per hour to provide bus service to a third party. This method does not necessarily capture the capital cost consumed, overtime driver hours or preparation time or the infrastructure shared to make this service available to a third party, but on balance a system-wide cost per revenue vehicle hour times total hours of the requested service is the closest to what the actual cost would be to provide the service.''

We understand this point of view, but disagree that requiring fully allocated costs is necessary. The rule as written prohibits a public transit agency from providing charter service if a private charter operator expresses interest in providing the service. In addition, the exceptions contained in the rule are areas of charter service that the private charter coalition conceded are areas where public transit agencies can provide community-based charter services that would not otherwise be served in a cost-effective manner by private operators.

Not including fully allocated cost provisions in the final rule is appropriate given our efforts to establish coordinated public transit human service transportation and the protections provided for private charter operators in the final rule such as notification procedures and cease and desist orders.

c. When a Customer Specifies Equipment

In the NPRM, we did not address specifically what would occur if a customer specifies certain equipment in their request for charter service. The only reference we made to specific equipment was in the preamble where we discussed the fact that rubber tire trolley buses are considered buses for purposes of this rulemaking.

We received several comments on this topic unrelated to our discussion of including rubber tire trolley buses within the scope of buses generally. Public transit agencies encouraged us to allow a customer to specify the type of equipment they would like use. A member of the public encouraged us to exclude electrically powered trolleys from the scope of the rule. Another member of the public suggested that the notice recipients send to private providers ''should also include a description of the specific equipment requested by the customer and not just 'buses or vans.' This comment goes on to state ''any new rule allows the purchaser of the service to decide what kind of equipment it needs. To that end, the notice to private providers should allow for a reasonable amount of specificity regarding the requirements for a particular service.''

Another comment echoed the above sentiment by stating ''I should not be forced to obtain services from private charter operators who do not have the proper coach equipment, to spend more money for single door highway coaches, with high floors that take longer to load and unload, that are not geared for city street/shuttle operations, thereby forcing me to obtain more equipment for frequency of service * * *.''

The comments regarding types of equipment raise a tricky issue in balancing protections for private charter operators with the need for transit agencies to satisfy community demands. In order to provide attractive ''fun'' alternatives to encourage downtown employees or tourists to use transit in congested corridors, transit agencies may acquire rubber tire replica trolleys. These trolleys can become a popular enough local attraction that they may be sought for private leisure charters such as weddings. The statute, however, addresses charter without regard to equipment type. The FTA regulation relates to the provision of transportation service, not entertainment, which is why sightseeing is also excluded from the statutory definition of ''public transportation.'' If there is sufficient demand for such equipment, private charter operators may eventually

[21] National Archives and Records Administration, Office of the Federal Register, Federal Register Document Drafting Handbook, page 7.9 (October 1998).

[22] 5 U.S.C. section 553(b).

acquire new equipment to serve this emerging market. In the meantime, however, FTA sees no reason to amend the rule to allow an exception under which a customer may specify the type of vehicle beyond requesting a bus or a van.

Likewise, if there were sufficient public demand for low-floor, double door vehicles, or size compatibility with streets to be traveled, and private charter operators do not have that equipment, then private charter operators may eventually acquire new equipment to serve that market as well. But, again we decline to amend the rule to allow for such an exception for public transit agencies.

d. Other Concerns

We received several comments questioning the intentions of the FTA in proposing the NPRM provisions that we did. One comment from a transit agency stated ''The tone of this proposed rule suggests a presumption of 'guilt' on the part of all transit providers.'' Another transit agency put it this way: ''Transit providers should not have to prove, on a daily basis, that they are following the rules.'' One public citizen asked: ''When was legislation passed that authorized FTA to stop supporting transit.'' Or, as a Midwestern transit agency stated ''I am opposed to federal requirements that squash our attempt to generate some extra revenue to support the transit system.''

FTA went to great lengths to involve all of the affected and interested parties in the CBNRAC negotiations. We prepared background materials, brought in speakers to assist the committee, and hired a highly competent and effective facilitator to assist throughout the process. In addition, all of the materials and notes were posted to the docket so that members of the public could follow the proceedings and each meeting had a public comment period should any member of the public wish to make comments about the proceedings. We were able to reach consensus on 80 percent of the rulemaking. This means the CBNRAC, which included small, medium, and large transit agencies from the West, South, Midwest, North and East, were able to agree on a vast majority of the regulatory text for the NPRM. The provisions were developed with the intention of promoting public transit and protecting the private charter industry. As indicated in the history section of this document, achieving the right balance has been a challenge for many years. We accepted this challenge because a negotiated rulemaking was a novel approach to addressing the issues that have plagued this regulation for years.

Given the above, we regret that some commenters perceived the proposed rule to be anti-transit. The tone of this rulemaking is the same as the current regulation and the same as any regulation that prescribes certain behavior. We are in the business of promoting and supporting transit agencies in their mission to provide community-based services. We recognized and promulgated exceptions to the charter service regulation that support transit agencies providing charter services to the elderly, persons with disabilities, and people with low income.

In addition, we carefully considered the interests of parties impacted by this rulemaking. The negotiated rulemaking was a powerful tool for collecting that information. We also considered all of the comments received on the proposal and modified some of the regulatory text based on the suggestions included in comments.

2. Section-by-Section Analysis

In addressing the comments received, we divided the comments according to the applicable rulemaking section. For each section for which we received substantive comments, we provide a brief summary of the purpose of the regulatory text, we summarize the relevant and representative comments received, and then we describe our decision whether to modify that particular provision. If we modified the provision, then we describe the modification. If we decided not to accept the proposed modification, then we explain why and adopt the language as proposed in the NPRM. For sections of the rule where we did not receive substantive comments, those provisions are hereby adopted as final.

Subpart A—General Provisions

Section 604.2—Applicability

The purpose of this provision was to state early on in the regulation that is required to comply with this rulemaking, who is exempt from the rule's requirements, and to set out certain situations in which this rule does not apply.

One public transportation association noted that ''the draft rule provides for application to all activities of FTA grantees that are public transit agencies, without regard to the presence or absence of federal funding * * *'' We also heard this comment from several public transit agencies. In addition, one transit agency suggested that this rulemaking not apply to those that receive a minimal amount of Federal funds.

Agency Response: We note that in order to be an ''FTA grantee'' a transit agency has accepted Federal funds from FTA. The commenter correctly notes that to conclude otherwise would ''exceed FTA's authority and its stated purpose of protecting private entities from federally-assisted competition.'' Thus, as stated in the NPRM, this rulemaking applies to those that receive Federal financial assistance from FTA.

We do not believe setting a minimum amount of Federal funding to trigger application of this rule is necessary. A transit agency always has the option to segregate locally funded and maintained vehicles and use those vehicles to provide charter service. To be clear, however, it is not just purchasing a vehicle with Federal dollars that triggers the application of these requirements. Housing the vehicle in FTA-funded facilities or using FTA-funded equipment to maintain the vehicle also triggers application of this rule. A complete segregation is necessary to avoid the application of the requirements of this rule.

We also received a comment from a state association asking us whether the charter service regulations apply to tribal nations. Under our Notice of Funding Availability for the Tribal Transit Program, published in the **Federal Register** on August 15, 2006 (71 FR 46959), the charter service regulation applies to tribal nations under that program. The charter service regulations also apply to tribes that receive FTA grants as recipients or subrecipients under other programs. That being said, however, the final rule provides an exemption for section 5311 recipients, which encompasses many tribal programs that use FTA-funded equipment for program purposes (defined as: ''transportation that serves the needs of either human service agencies or targeted populations (elderly, individuals with disabilities, and/or low income individuals); this does not include exclusive service for other groups formed for purposes unrelated to the special needs of the targeted populations.'').

FTA considered the comments on this subsection, but does not believe the comments warrant a change to the proposed language, and, therefore, the language is adopted as proposed.

Section 604.2(c)—Private Charter Exemption

This provision exempts from the rule's coverage private charter operators who receive Federal financial assistance either directly or indirectly under 49

U.S.C. sections 5307, 5309, 5310, 5311, 5316, and 5317, or section 3038 of the Transportation Equity Act for the 21st Century (TEA–21).

The main comment received regarding this subsection stated: ''In removing private charter operators from its scope, it excludes up to 40 percent of the rural transit network from these rules, thus forcing half the network to follow rules and procedures that are waived for the private sector partners.'' Another transit agency stated ''we do not believe that private charter operators should be treated different from other organizations that receive Federal funds. Allowing some private charter operators to not comply with the charter regulation and receive Federal funds put those private charter operators at a competitive advantage over other private operators that do not receive Federal dollars. Either the receipt of Federal funds is an important factor or it isn't.''

Agency Response: We respond to these comments by noting our rationale in the NPRM for including this provision: ''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 federally subsidized public transit agencies. To subject private charter operators to the charter service regulations undermines the very purpose of these regulations.'' We cite three reasons in support of this analysis.

First, we think some comments may have confused the many private not-for-profit agencies that provide public transit service in rural areas with the private charter operators protected by this rule. It is not FTA's intent to apply the requirements of the rule differently to public transit agencies depending on whether they are governmental or non-governmental entities.

Second, FTA's Over-the-Road Bus Program is specifically designed to provide Federal assistance to private charter operators so that they can retrofit their vehicles to make them accessible and comply with the Americans with Disabilities Act. This is a federally sanctioned activity, and, thus, to apply the charter regulations would run counter to this Federal program. The same argument also holds true for those private charter operators that receive Federal funds under 49 U.S.C. section 5311(f), which provides a limited amount of Federal support for running routes in rural areas. The point here is that there are clear situations under which the Federal government sees a benefit to providing Federal tax dollars to private charter operators.

Third, public transit agencies may enter into a contract with private charter operators to purchase transportation services using the private charter operator's vehicles. The fact that a private charter operator contracts with a public transit agency should not have the unintended consequence of preventing the operator from using those vehicles, or other vehicles in its fleet, to provide charter service. If a private charter operator, however, provides fixed route public transportation using federally funded buses or vans under contract to a transit agency or other public entity such as a State Department of Transportation, the private charter operator stands in the shoes of the transit agency and is subject to the charter service regulations in regard to the use of those FTA-funded vehicles. That private charter operator, however, would not be prevented from using other vehicles in its private fleet to provide charter service.

Finally, the comment regarding this section's provisions placing one private charter operator in a competitive advantage over another private charter operator strikes us as disingenuous. No private charter operator raised this issue, and if it truly was a concern, we have to believe at least one private charter operator would have raised it.

Thus, while FTA rejects the proposed modifications to this section, we include language to clarify that the charter service regulations do not apply to private charter operators that receive, directly or indirectly, Federal financial assistance under the programs listed or to the non-FTA funded activities of private charter operators that receive assistance under section 3038 of TEA–21.

Subsection 604.2(e)—Exemption for Transit Agencies

This provision exempts from the charter service regulation recipients who receive funds under 49 U.S.C. sections 5310, 5316, or 5317 and provide charter service consistent with the Federal program purpose.

We heard from numerous public transit agencies encouraging us to expand this provision. The most common request was to expand this provision to include recipients under 49 U.S.C. section 5311. The second most common request was to expand the provision to exclude 49 U.S.C. section 5307 recipients that operate 50 or fewer buses in peak hour service.

Agency Response: The CBNRAC considered the request to expand the exemption to section 5311 recipients. The private charter caucus opposed this provision because it believed it would lead to abuse because there is no effective way to limit those activities. The second request regarding 5307 recipients is a new one. We considered both options and the concerns raised with expanding the coverage of this section.

We believe that this section can be expanded safely to include recipients of section 5311 funds for two reasons. First, section 604(2)(e) already limits the exception ''to program purposes only.'' We added a definition of program purposes that states: ''transportation that serves the needs of either human service agencies or targeted populations (elderly, individuals with disabilities, and or low income individuals); this does not include exclusive service for other groups formed for purposes unrelated to the special needs of these targeted populations.''

Second, we believe this expansion is appropriate given FTA's efforts to support coordinated public transit human service transportation activities. Some of the comments received noted that without the exemption this provision could have a chilling effect on those activities, which is something FTA wants to avoid. Thus, limiting section 5311 recipients'' provision of charter service to program purposes, as defined in the regulations, provides a limitation on those services we believe will protect private charter operators. In addition, the revised enforcement provisions will also provide a counterbalance to this expansion if it is abused.

We reject the second request—excluding 5307 recipients with 50 or fewer buses—because the change might unduly weaken the protections provided by the rule to private charter operators. In an urbanized area, even one served by a small transit system with 50 or fewer vehicles, there are more likely to be private charter operators available than in rural areas. In other instances, the transit system would be able to provide charter service under other exceptions of the rule, so this new exception would be unnecessary.

We have therefore amended 604.2(e) to include 49 U.S.C. section 5311 in the list of programs exempted from the requirements of the charter service regulation when the charter service provided supports program purposes.

Section 604.2(f)—Emergency Exemption

This proposed provision exempts recipients from the charter service requirements in the event of a national,

regional, or local emergency lasting fewer than three business days.

We heard from several public transit agencies regarding the three day limitation. Many expressed disappointment that the provision would limit a public transit agency's ability to assist in the event of an emergency. Others expressed concern that local emergencies are not included, but could pose an equal amount of danger to the surrounding community. One example provided was a train derailment where noxious fumes engulfed the community where public transit is the logical choice for evacuating the community quickly and efficiently. Another comment asked why this provision does not include security training exercises.

Agency Response: Considering the concerns raised, we have decided to amend this section to allow for transit agencies to respond to declared emergencies. We will add the following language to 604.2(f): ''Actions directly responding to an emergency declared by the President, Governor, or Mayor or in an emergency requiring immediate action prior to a formal declaration.'' In addition, we felt it necessary to provide a time limitation and so we are changing the three day limit to 45 days. Thus, a transit agency has 45 days to assist with emergency response before having to report its activity to the emergency response docket created under subpart D of 49 CFR part 601. Security training exercises are covered by the emergency preparedness exemption in section 604.2(d).

Section 604.3—Exemption

This provision sets up a mechanism by which transit agencies may ''opt out'' of the charter service regulations.

We heard from transit agencies that this provision is not necessary, the certification procedures were burdensome, and there appears to be no purpose for the affidavit.

Agency Response: While we thought this provision would assist a public transit agency to clearly and unambiguously state it does not intend to provide charter services, we are convinced by the comments that this provision is unnecessary. Therefore, we have removed the exemption section from the final regulation.

Section 604.4—Definitions

This provision sets out the applicable definitions for this part. Since the section contains several definitions, we will only discuss those definitions where the public submitted comments. All other definitions are adopted as proposed. We also added several new definitions as a result of changes we made to the regulation based on the comments we received.

Section 604.3(c)—Definition of ''charter service''

This is a key provision in the charter service regulation. The definition of charter service identifies what service by public transit agencies is considered charter service.

Generally, public transit agencies voiced concern that the proposed definition does not ''recognize the realities of local public transportation service by having the flexibility to add and modify service for temporary situations, such as community events and employers opening temporary facilities.'' A member of the public submitted a comment that noted the proposed definition ''potentially undermines coordinated efforts between local governments and risks decreasing the efficiency and cost-effectiveness of service while jeopardizing ridership incentives for universities and transit systems.'' In addition, several transit agencies submitted comments stating ''while the proposed rulemaking does address the issues raised in the conference committee report, it also far exceeds what seems to be the intent of Congress by providing a vague and poorly explained definition of charter that could have the impact of redefining the very definition of public transportation.''

In fact, most transit agencies submitted concerns about the definition not including the term ''exclusive.'' One public transportation association noted that ''the concept of exclusivity—often referred to as ''closed door'' service—has been integral to the definition of charter service for more than 20 years and is necessarily the primary means of determining whether transportation is public transportation or a private service.'' A public transit agency warned that ''the failure to include exclusivity in the charter definition has the potential to change the definition of public transportation.'' One airport ground transportation association requested that ''the proposed federal definition of charter service not supersede local state, city and airport regulatory definitions currently in place for private motor carriers of passengers to and from airports by maintaining the concept of exclusivity.''

Some public transit agencies offered alternatives to the proposed definition of charter service. A Midwestern city provided the American Bus Association's quick reference guide on the definitions of charter, mass transportation, and sightseeing. Three members of the public suggested that the definition should be ''a point to point service that is not open to the public, and not of a routine nature.'' An air transport company recommended that the definition include ''at a fixed charge for a motor vehicle.'' An east coast public transit authority set forth the following indicia of charter service: ''for the sole use of a distinct group of people; routing and frequency of service solely determined by those people using the service or their sponsor; not open to the general public; identification or affiliation required to board; one-time, nonrecurring event, with no regular pattern; and service not on a pre-published schedule or Web site.''

We also heard from public transit agencies that the examples included in the definition of charter service should be removed. Several public transit agencies stated the examples were unclear and inconsistent. One east coast public transit association noted that ''there is no simple, rigid template that can simply and routinely be applied to every situation to determine whether or not a service is or is not mass transit. Attempting to impose one at the federal level will inevitably result in a great disservice to the public at large. However, reasonable and fair guidelines would be appropriate and useful to all involved parties.''

From the private sector side, we heard from two private charter operator coalitions regarding the definition of charter service. They stated that while the CBNRAC did not reach consensus on the definition, the parties did agree that ''charter service has three components: (1) Transportation of a group of persons pursuant to a single contract with a third party; (2) a fixed charge; and (3) according to an itinerary determined by someone other than the public transit agency.'' In addition, the coalitions urged FTA to not ''impose a black or white approach to defining charter service, but should continue to look at the intent of the service and whom the service is designed to benefit.'' They also noted that the lack of a written contract should not be dispositive in determining that service is charter service. One of the coalitions recommended a definition of charter service as ''providing transportation service, using buses or vans, principally to benefit a group of riders with mutual purpose and destinations.'' This association also questioned the need to indicate who controls the service as it may conflict with interpretations and the intention of the rules: ''Who 'controls' the itinerary has certainly been an interpretation recipients have long abused, particularly in special

events.'' This association also recommended that ''fixed charge'' should be removed because it is often abused.

Agency Response: By far, this section received the most comments. Since the CBNRAC could not reach a consensus on the definition of charter service, we also received comments from several of the committee members regarding our proposed definition. Considering all of the comments received regarding the definition of charter service, we decided to shorten and simplify the definition, while maintaining flexibility in determining the intent of the charter service.

First, we added back the concept of exclusivity to the definition of charter service. In the past, this word has caused problems because a few public transit agencies have used the term as a loophole to avoid the requirements of this rule. We address this issue by adding a definition of ''exclusive''—service that a reasonable person would conclude is intended to exclude members of the public—to the list of definitions. Further while we do not agree that a 20 year history is reason enough to add the term exclusive back in the definition, we do believe that exclusivity is a good indication of intent to perform charter service.

Second, we removed all of the examples included in the definition of charter service. Instead, we provide factors that we will consider in determining the intent of the service. We also believe that this revised definition will allow transit agencies the flexibility needed to provide public transportation to address traffic mitigation associated with an event, as well as being able to serve community-based public transportation.

Third, we make clear in the definition that it does not apply to demand response services provided to an individual. We also provide a definition of ''demand response,'' which is discussed in the next section.

Finally, we have added a provision to the definition of charter service to address events that are limited in duration and for which the public transit agency charges a premium fare or for which a third party pays for the service in whole or in part. While the new definition does not prevent a public transit agency from establishing, on its own, temporary or irregular routes to respond to community demands, we believe that the nature of such service should be to fulfill a public purpose. Thus, the definition of charter service includes service by a public transit that is irregular or on a limited basis for a premium fare that is greater than the usual or customary fixed route fare or service for which a third party pays all or part of the costs for the service. We believe service that fits in either of those categories represents an opportunity for private sector participation, and, therefore, if the public transit agency wishes to provide such service it must give prior notification to registered charter providers in its geographic service area.

Section 604.3(g)—Definition of ''demand response''

This section is new and is based on comments we receiving asking us to define the term as used in the definition of ''charter service.''

We have taken the definition of ''demand response'' from our New Freedom Circular, which states: ''any non-fixed route system of transporting individuals that requires advanced scheduling by a customer, including services provided by public entities, nonprofits, and private providers.''

Section 604.3(h)—Definition of ''interested party''

This provision defines who is an interested party for purposes of filing a complaint with FTA.

We received only one comment regarding this definition and it stated that the definition was overly broad and hard to determine who, in fact, could file a complaint.

Agency Response: This particular provision represents consensus language from the CBNRAC. We believe that the parties identified in the list of ''interested parties'' are clear, and, therefore, the provision is adopted as proposed.

Section 604.3(k)—Definition of ''pattern of violations''

This provision defines what constitutes a pattern of violations for purposes of 49 U.S.C. section 5323, which states in relevant part: ''In addition to any remedy specified in the agreement, the Secretary shall bar a recipient or an operator from receiving Federal transit assistance in an amount the Secretary considers appropriate if the Secretary finds a pattern of violations of the agreement.''

We received several comments expressing concern about our proposal to define pattern of violations as ''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.''

Comments received focused on two aspects of this proposed definition. First, most were concerned that a finding of non-compliance should be for the same provision and not different provisions. Second, several comments stated that it was unfair to examine 72 months and the time period should be two or three years at the most. There was also a misconception that the new rule would retroactively look back over a recipient's compliance record. One comment, which is typical of the comments we received from recipients, stated the issue as follows: ''We suggest that the definition be revised to indicate that there must be at least three violations in three years and the application of this new definition should occur when the rule is final. Also, the violations must be related in nature (i.e., not totally disparate issues) in order to show a pattern.''

Private charter operators, on the other hand, agreed with the proposed definition, but requested that FTA settle the issue of whether a single complaint against a recipient can establish a pattern of violations.

Agency Response: We understand recipients' concerns regarding this definition and the potential finding of a pattern of violations for not complying with paperwork requirements. In addition, we agree with the suggestion that violations should be related and not completely disparate. Thus, we have amended the definition of ''pattern of violations'' to require that only unauthorized charter service violations can constitute a pattern of violations. We believe that mandatory withholding of Federal funding should only be reserved for those cases involving unauthorized charter service only. This does not mean, however, that there can never be a situation in which FTA will not withhold funds for paperwork (e.g., failure to record charter service or failure to post quarterly reports) violations. Rather, we are simply stating that for mandatory withholding of Federal funds under the new statutory provision contained in SAFETEA–LU, the pattern of violations must be established based on unauthorized charter service.

That being said, it is possible to establish a pattern of violations in one complaint. For instance, if one complaint properly documents three distinct charter service trips that are in violation of Part 604, then FTA could consider those three allegations as constituting a pattern of violations. We believe this is a reasonable resolution to the concern of private charter operators that a single complaint could establish a pattern of violations.

To be clear, however, each instance of a charter service violation must be related to an event and not a single

instance of unauthorized charter service. In other words, the provision of charter service for a flower show that is not in conformance with these regulations would be an event. A single complaint alleging unauthorized charter service, in order to properly assert a pattern of violations, would have to include more than unauthorized service to a flower show. In order to assert a pattern of violations, a single complaint would have to include facts demonstrating unauthorized charter service to a flower show, a golf tournament, and an auto exhibition, for example.

In addition, we decline to shorten the examination period to two or three years. While we considered including a three year period to correspond with triennial reviews, not all recipients are subject to triennial reviews and the six year period is consistent with other operating administrations within the Department of Transportation that examine a six year compliance history. Thus, we retain the six year period, which begins on the effective date of this rule.

Section 604.4(o)—Definition of ''recipient''

This provision defines who is a recipient.

We received several comments about this definition because some were confused as to whether the term includes ''subrecipients.''

Agency Response: We have amended the definition to state ''including subrecipients'' to make clear that the regulation applies to direct recipients of FTA financial assistance as well as subrecipients of FTA financial assistance.

Section 604.4(t)—Definition of ''violation''

This is a new provision to the final rule and it would define what constitutes a violation for purposes of the charter service regulations.

Several public transit agencies asked us to define what a ''violation'' is.

Agency Response: We added a new definition to this section to define violation as ''a finding by FTA of a failure to comply with one of the requirements of this Part.''

Section 604.5—Charter Service Agreement

This section discusses the terms of the Charter Service Agreement which is part of the Certifications and Assurances recipients are required to enter into as a condition of receiving Federal funds (49 U.S.C. section 5323(d)).

One transportation association noted that there was an inconsistency between our intention not to apply the charter service requirements to third party contractors and the terms of the charter service agreement.

Agency Response: In order to address this inconsistency, we have added the clarification that this provision applies only to a third party contractor when they are using vehicles purchased with FTA funds.

Subpart B—Exceptions

Section 605.6—Government Officials on Official Government Business

This provision set out an exception for recipients to provide charter service to government officials on official business. We also proposed not to apply this provision to transit agencies with 1,000 or more buses in peak hour service.

We received numerous comments from public transit agencies on this provision to limit the number of bus hours to 80 annually, as proposed by the private charter caucus.

Comments we received were along the following lines: ''The limit is arbitrary and does not support or respect local cooperation. The transportation of public officials by a public agency should not be considered charter.'' One comment on this topic stated: ''How about whoever wrote this NPRM comes on down here to tell our government officials who sponsor the taxes that keep our transit systems operating that they have limited number of hours that they can utilize the charter service of the transit system.'' The same comment stated that they do not have resources ''to conduct boarding surveys that distinguish the government officials from anyone else that may join them on a charter trip.'' Some public transit agencies applauded our effort to recognize this service as an exception and felt the provision to allow the Administrator to grant additional hours was sufficient. Those who were not pleased with the NPRM suggested that FTA modify the provision to allow for a greater number of hours for public transit agencies located in state capitols. Others suggested that the limit be based on the size of the recipient's geographic service area.

A private charter operator coalition objected to our provision to allow additional hours upon request from a recipient. They urged that such additional hours should only be granted in extenuating circumstances, which should be ''invoked very rarely.'' They also warned that this exception should not ''swallow up the general prohibition'' of recipients providing charter service. This commenter also requested at least 72 hours notice of all requests for additional hours under this exception.

Finally, regarding our proposal not to apply this provision to recipients with 1,000 or more buses in peak hour public transit service, we heard from three of the largest east coast transit agencies that strongly opposed the provision. Specifically, they noted opposition to ''any regulatory change that imposes a different application based on the size of the transit property.''

Agency Response: To be very clear, transporting a group of government officials for official government purposes is charter service under the existing definition of charter service. Government officials that happen to board a fixed-route vehicle would not count toward the 80-hour exception. This exception is targeted at government field trips such as visiting a new stadium or wastewater processing facility. It could also mean transporting City Council officials to a site or business officials, accompanied by government officials, touring a city for economic development purposes.

This exception is designed to allow recipients to provide charter service to government officials for official government business. Recipients may not provide charter service to governmental officials for non-governmental purposes. We have added language to the regulatory text to clarify this point. We have also added a definition of government official, which states '' 'government official' means an individual appointed or elected at the local, state, or Federal level.''

Since the transportation of government officials for government purposes is charter service under the current regulations, as noted in the NPRM, we believe that the 80 charter service hours per year is appropriate because it is the baseline number of hours the private charter operators on the CBNRAC agreed to. On the other hand, we recognize that there may be special circumstances that might arise that could call for additional bus hours during the year. If these circumstances arise, we have a provision that allows the FTA Administrator flexibility to allow those additional hours in extenuating circumstances. Private charter operators requested that they have the opportunity to comment on any request for additional hours. To address this concern, we will add a Government Officials docket (*http://www.regulations.gov*; FTA–2007–0020) for the purpose of logging these requests for additional hours. Private charter

operators can sign up for notification when FTA places a request in the docket. If the request raises serious concerns, the private charter operator can contact the Ombudsman for Charter Services (*ombudsman.charterservice@dot.gov*) to express those concerns. The decision to grant a particular request is completely within the discretion of the FTA Administrator.

Regarding the exception of transit agencies with 1,000 or more buses in peak hour service, this provision was the subject of consensus during the CBNRAC. During the negotiations, a CBNRAC member urged this exception to prevent large public transit agencies from being inundated with requests for charter service from government officials and qualified human service organizations. Private charter operators on the CBNRAC agreed to this provision. The response to this proposal, however, was negative. We heard from three large east coast transit agencies and we are convinced by their argument that large transit agencies should not be treated differently, and, therefore, we removed this provision from the final rule.

To conclude, we decline to modify the 80-hour annual limit. Since the transportation of government officials for government purposes was unauthorized charter service when provided by recipients under the old regulation, we believe the 80-hour limit per year is a legitimate threshold number for the new exception. In addition, we have eliminated the language treating transit agencies with more than 1,000 buses in peak hour public transit service differently.

Section 604.7—Qualified Human Service Organizations

This section provides an exception to the prohibition against recipients providing charter service if they provide charter service to qualified human service organizations (QHSO). We also proposed not to apply this provision to transit agencies with 1,000 or more buses in peak hour service.

The CBNRAC reached consensus on this provision because it recognized FTA's efforts to establish coordinated public transit human service transportation planning. In addition, this provision recognizes the President's Executive Order on coordinated transportation (Executive Order on Human Service Transportation Coordination, February 24, 2004).

The comments we received on this section primarily centered on the assertion that charter service provided to QHSOs should be completely exempt from the charter service regulations. Specifically, comments stated ''although the negotiators agreed that services could appropriately be provided to qualified social service agencies, the draft process is unnecessarily complicated and incomplete.'' These comments went on to state ''it is unclear how these additional criteria are to be evaluated (i.e., would a qualified social service agency certify such a mission? Would a public transit agency be obligated to investigate the basis for such a claim?) and it is unclear why FTA perceives a need for the additional criteria at all.'' These public transit agencies and associations advocated that the additional criteria should be eliminated from the rule. We also heard from several Midwestern transit agencies supporting our provision on QHSOs: ''We fully support the exceptions in 604.7 and 604.8 for government officials and qualified human service organizations.'' A private charter operator expressed a similar sentiment: ''FTA's new disclosure procedures for human service agencies and public operator trips are a positive step forward.''

Finally, we received several comments asking us to define the term ''struggling for self-sufficiency.''

Agency Response: The language in this section represents a consensus from the CBNRAC. The criteria included in the NPRM were the subject of much discussion during the negotiations and the subject of a special presentation from FTA ''United We Ride'' staff. The criteria are a reflection of the requirement of the President's Executive Order on transportation coordination.

In addition, regarding the comment as to whether a transit agency must investigate information provided by a QHSO, the FTA Charter Registration Web site is a tool for tracking registered charter providers and QHSOs. There is no requirement for public transit agencies to independently verify the information submitted by a registered charter provider or QHSO. Further, since registration on the Web site constitutes submission of information to the government, false submissions would be subject to sanctions under 18 U.S.C. section 1001, which includes potential criminal fines and imprisonment.

Regarding the exemption of transit agencies with 1,000 or more buses in peak hour service, we removed this provision from this exception based on comments received. (See discussion under ''Government Officials'' exception above.)

Finally, we changed the phrase ''struggling for self-sufficiency'' to ''low income,'' which is a more commonly understood term in the transportation industry.

This section is modified to remove the exception for recipients with 1,000 or more buses in peak hour public transit service, and change ''struggling for self-sufficiency'' to ''low income.''

Section 604.8—Hardship

In this provision we proposed to allow a transit agency in a non-urbanized area to provide charter service to an organization if a registered charter provider imposes minimum trip duration or the registered charter provided would have deadhead time that exceeds the total trip length.

Public transit agencies support this exception, but requested that it be extended to small urban areas with populations under 200,000. One public transit agency commented that ''FTA's proposed hardship exception is well-crafted and provides a reasonable objective standard for determining whether available private charter providers are too far away to be expected to provide cost-efficient service and scale that definition to the size of a particular charter. Expanding that provision to, at minimum, small, urban areas would allow those areas to be better served without impinging on the interests of private charter operators.''

Private charter operators opposed this exception. They contend that ''hardship is largely a myth and any rule addressing 'hardship' is likely obsolete and more likely to be used to harm private operators than relieve 'hardship.' '' In addition, they assert that the rule as written assumes the private market may not desire to serve certain needs, even if fulfilling the service may be at an economic loss and businesses routinely discount services, have sales, offer loss leaders, and utilize yield-pricing strategies. In theory, a recipient creates a ''hardship dependency'' when failing to allow the marketplace to respond.

Agency Response: We believe there is merit to retaining the hardship exception. Rural providers are in a unique position of not having many options to rely upon. Private operators are usually located in urban areas and the high number of deadhead hours is a reality for many rural communities.

On the other hand, we recognize that businesses often set minimum trip durations and to allow public transit agencies to provide charter service simply because the minimum trip duration exceeds the trip duration of the requested charter service could have a

negative impact on small, rural private providers.

Therefore, we amended the regulatory text to include small urbanized areas under 200,000 in population and removed the provision that would allow a rural public transit agency to provide service when the minimum trip duration exceeds the length of the requested service. In addition we collapsed this provision into a new section called ''Petitions to the Administrator,'' which is located in section 604.11. Because we have established a docket for this exception (Petitions to the Administrator docket *http://www.regulations.gov;* FTA–2007–0022), we have removed the reporting requirements for the hardship exception. Interested persons may simply track these requests through the docket system.

Section 604.9—Leasing FTA Funded Equipment and Drivers

This section discusses the ability of a public transit agency to lease equipment to a private charter operator.

Private charter operators submitted comments requesting that FTA advise ''recipients it is their responsibility to comply with the [leasing exception requirements] with emphasis placed on the requirement to certify the registered charter provider has exhausted all available vehicles of all registered charter providers in the recipient's geographic service area.''

Public transit agencies responded to this provision with the general concern that a recipient does not have the ability to determine if the private charter operator has capacity: ''The grantee should not be responsible for verifying the validity of any information provided by the leasing charter operator.'' Another comment stated it slightly differently: ''FTA will require public agencies to maintain proof offered by the lessor that no privately owned equipment is available but is unclear on whether the public agency must investigate independently or may take the proffer at face value.'' Yet another comment pointed out that ''while this is a well-intentioned and defensible condition, the rule should make it clear that recipient's obligation in this area is to ask whether this has been done and that a recipient may rely on the private charter operator's representation that it has, supported by documentation provided by the charter operator.''

Finally, one additional comment submitted by a public transit agency advocates against this exception because of the impact it will have on small private charter operators: ''There are two problems with this proposed exception. First it would be difficult to impossible for any private operator to guarantee that it has exhausted all of the available vehicles of all registered charter providers in a large municipal area. This would force recipients out of the charter leasing business and thereby deprive the recipient of much needed funds. Second, this provision also severely impacts smaller private charter operators who would either have to pay whatever fee is set by the larger private operator or turn away business. Such a scenario could eventually force smaller private charter operators out of business, which would then impact FTA's certification that this regulation would not have an impact on small businesses.''

Private charter operators also expressed concern with this provision. One of the consolidated responses for private charter operators who participated on the CBNRAC expressed concern that the current leasing provision allowed for sham transactions between a private charter operator with no vehicles and a public transit agency. The consolidated response noted support for the new provision because a private charter operator should have the first opportunity to provide charter bus service in the geographic service area.

Agency Response: We agree with the comments submitted regarding the concern about a public transit agency's obligation to investigate whether a registered charter provider has exhausted all of the available private charter vehicles in the geographic area. We have modified the proposed language to include a requirement that in order for a recipient to lease vehicles to a private charter operator, the operator must be registered on FTA's Charter Registration Web site.

Furthermore, we added a requirement that a private charter operator identify the number of vehicles it owns when it registers. Then, when a registered charter provider certifies that it has exhausted all of the private vehicles in the area, a recipient need only go to the Charter Registration Web site, note all of the registered charter providers in the geographic service area and the number of vehicles identified in the registration to verify that the registered charter provider's certification is accurate. No independent verification beyond this process is required by the regulations.

In addition, if the registered charter provider fails to exhaust the vehicles of other registered charter providers in the geographic service area, then the registered charter provider may be subject to a complaint for removal from the FTA Charter Registration Web site.

We have retained the requirement to exhaust all available privately owned vehicles in the geographic service area. This is a protection that the private charter caucus requested during the CBNRAC negotiations and the public transit caucus agreed to. We received a couple of comments indicating that a private charter operator should not have to contract with another private charter operator known to be ineffective. In order to address this concern we do not require a registered charter provider to lease vehicles from another registered charter provider against whom the first registered charter provider has filed a complaint for removal from FTA's Charter Registration Web site. To succeed on this point, however, a registered charter provider would have to allege facts sufficient to support removal as set out in 49 CFR section 604.21. (See also Appendix C for examples.)

Finally, since we moved the hardship exception to the new Petitions to the Administrator exception, the leasing exception has been renumbered to section 604.8.

Section 604.10—Events of Regional or National Significance

This section allows for the provision of charter service by public transit agencies for events of regional or national significance.

Private charter operators supported this provision, but requested that any petitions received by the Administrator should be subject to a notice and comment provision for registered charter providers. They also requested that FTA provide a clarification that only if all private operator vehicles have been exhausted should a recipient be allowed to provide charter service.

Public transit agencies were concerned that this provision would apply to events that have already been planned. In addition, one public transit agency stated ''public transit providers should be able to provide public transportation services for special events in their locality that promote economic development and show their community without the express approval of the Administrator or the requirement for consultation with private charter operators.'' One east coast transit agency stated ''This provision does not account for those events that are time sensitive in which the public transit agency does not have time to consult with all of the private charter operators in their area, for example, a presidential inauguration.''

Agency Response: This section is now included in the ''Petitions to the Administrator'' section located in

section 604.11. In response to the private charter operators' comments, we note the establishment of a ''Petitions to the Administrator'' docket. Private charter operators are able to view requests through this Web site (*http://www.regulations.gov*, FTA–2007–0022). We are not offering a public comment period, but if a request egregiously misstates facts, a registered charter operator could contact the Ombudsman for Charter Services (*ombudsman.charterservice@dot.gov*) to raise specific concerns.

In addition, in response to the public transit agencies comments, for events in the planning process, any service provided by a public transit agency after the effective date of this rule must conform to the requirements of the rule, including the requirement for the recipient to exhaust all available vehicles of registered charter providers. In other words, if the event will occur after the effective date of this rule and the public transit agency intends to provide service to that event, then the service must meet the special events requirements contained in section 604.11. If the event occurs before the effective date of this rule, then the requirements of the rule do not apply.

We have also added a requirement that the request for this exception include the date of the event. We added this requirement to make it clear that the approval, if granted, would be for a one time event only.

Section 604.11—When No Registered Charter Provider Responds to Notice From a Recipient

This section sets out the requirements for public transit agencies when no registered charter provider responds to a notice requesting charter service.

Public transit agencies submitted a variety of comments on this provision. Some disagreed with the proposed time frames included in the regulation. Others complained that providing notice was essentially providing free advertising/dispatch services to registered charter providers. Still others requested that FTA consider modifying the proposed language to allow a public transit agency to provide the service in the event that the registered charter provider and customer are unable to agree upon terms.

Private charter operators agreed with the provisions of this section and noted that ''many recipients confuse the public by inasmuch as they [sic] advertise charter service to the degree consumers may not discern between a transit agency and a private provider. This often has the effect of artificially creating 'demand' and allowing transit agencies to inject their tax subsidized pricing in the private market equation, thereby indirectly stifling operating margins.'' This comment went on to state ''the proposed rule further establishes the 'first option' to offer charter service inasmuch [sic] that recipients are not required to notify registered charter parties of all inquiries regarding charter bus service.''

Agency Response: We recognize the need to clarify that public transit agencies are not required to provide notice to registered charter providers of all requests for charter service. Notice is only given for those requests that do not fit within one of the exceptions and for which the public transit agency is still interested in providing that service. Only in this instance is a public transit agency required to provide notice to the list of registered charter providers in its geographic service area. Other than that, the private charter comments are correct that a public transit agency cannot provide the requested charter service if a registered charter provider responds affirmatively to the notice provided. This is true even if the customer and the registered charter provider are not able to agree upon a price.

We added language to this section clarifying that upon receipt of a request for charter service that does not fit within one of the exceptions outlined in subpart B, and the recipient is interested in providing the charter service, the recipient shall provide notice to registered charter providers in the recipient's geographic service area. Further, due to the fact that we have moved the hardship and special events exceptions, this provision is renumbered as section 604.9.

Section 604.12—Agreement With Registered Charter Providers

This section allows a public transit agency to provide charter service in its geographic service area if it obtains an agreement from all of the registered charter providers in the geographic service area.

Private charter operators recognized that this exception is a continuation of an existing exception, but objected to the provision because ''the rule as proposed places an unfair and unintended restriction and subjects taxpayer subsidized competition on new registered charter parties. It is our assertion that on the date new private charter operators register, existing agreements will no longer permit recipients to continue under those agreements until an agreement may be obtained from all registered charter parties.'' The comment goes on to propose that an agreement can be fulfilled if a contractual obligation is completed no later than thirty days from the date a newly registered charter provider becomes registered. Further, this comment goes on to state that the charter service agreement should be a fluid document that represents a meeting of the minds.

Public transit agencies submitted comments opposing the timeframes of January 30th of each year and February 15th of each year.

Agency Response: This language represents CBNRAC consensus language developed by the private charter caucus. Since both private charter operators and public transit agencies oppose the January 30th and February 15th timeframes, we modified the regulatory text to indicate that a recipient has 90 days to enter into an agreement with a newly registered charter provider after an initial agreement with previously registered providers. If no agreement is reached, the recipient may not provide charter service under this exception. Further, a registered charter provider may cancel the agreement at any time after providing the recipient a 90-day notice. In addition, because of other changes to this subpart, this provision has been renumbered to section 604.10.

Section 604.13—Administrator's Discretion

This new section is designed to provide the Federal Transit Administrator with the discretion to allow public transit agencies to provide charter service in certain extraordinary situations.

We did not receive comments from public transit agencies on this new exception, but we did hear from private charter operators who are opposed to the exception. Specifically, they believe this exception ''may serve as an impediment to the private sector filling the needs, while ultimately creating an unwarranted entitlement.'' They base this belief on the fact that the examples provided of the funerals of Presidents Reagan and Ford required advanced planning for those events and the private sector could have been involved if the public transit agency had contacted the private sector. Furthermore, the private charter operator coalition noted that this exception is ''a solution in search of a problem'' because there is no reason private charter operators couldn't receive notice of the request for service and provide buses for these kinds of events should they arise unexpectedly.

Agency Response: This section is now called the ''Petitions to the Administrator'' exception and is located at section 604.11. The new section

contains not only requests for discretionary exceptions to the charter service regulations, but also the hardship and events of regional or national significance, which were both discussed earlier in this preamble.

The basis for the discretionary exception is to provide the Administrator with discretion to respond to extraordinary circumstances—those events where there is no time for prior planning. While some preparations may be made in anticipation, we believe the actual day of the event would not be known in advance and the capability of a particular city to handle the event would likewise not be known in advance. We intend to allow this exception only under extraordinary circumstances. Private charter operators may track these requests and FTA's responses through the Petitions to the Administrator docket (*http://www.regulations.gov*; FTA–2007–0022).

In addition, we added a requirement to identify the date of the event because we want to make absolutely clear that the approval is only for the date specified in the request.

Section 604.12—Reporting Requirements for All Exceptions

This section set out the reporting requirements for public transit agencies that provide charter service pursuant to an exception. We proposed quarterly electronic reporting of standard information regarding charter service trips.

Private charter operators supported this provision as providing the type of transparency necessary to ensure that public transit agencies are not providing unauthorized charter service. While some raised concern about the ability to omit origination and destination for safety and security reasons, if the reason is recorded, then most thought this exception would be acceptable. In addition, we heard from one association that encouraged us to increase the time period from three years to six years for maintaining the records electronically. To support this request, they point to the fact that our definition of pattern of violations examines the past six years and to maintain records less than six years would be inconsistent with this provision.

Public transit agencies opposed this provision because they believe it to be too onerous. In addition, one commenter suggested that the reporting provisions be consolidated so that the same information in the same format is submitted. Other comments submitted requested that the public Web site for storing the reports be replaced with a local Web site for the agency or with records kept at the transit agency's place of business, which would be publicly available. One public transit agency stated it this way: ''Only basic information should be reported under the exceptions. If the reporting is made too onerous, grantees will have to charge the administrative cost to the human service or government entity. For the other exceptions, that information is reported through other mechanisms and this additional reporting is unnecessary.'' Others recommended maintaining the records in a single charter log. A Midwestern state department of transportation stated: ''We recommend that the charter logs required by 604.7(a)(3), 604.8(d), 604.9(b), 604.10(b) and 604.12(c) be consolidated into a single charter log. The information that must be maintained according to the regulations can be categorized and tracked in a spreadsheet or database.''

Agency Response: The purpose of the public Web site is to ensure that all reports are easily available to members of the public, in particular, private charter operators. Maintaining these records at the transit agency does not allow for 24-hour availability. We also believe that all of the information can be consolidated into one log. With the exception of the special events and leasing exceptions, the information required is the same. Thus, a single Word document or Excel spread sheet could serve as a recipient's quarterly report.

In addition, by limiting the applicability of this regulation—excluding recipients of section 5311 funds when providing charter service for program purposes serving the elderly, persons with disabilities, or persons with low income—we have substantially reduced the reporting burden on rural and non-urbanized areas for most of the service they operate.

Furthermore, we decline to extend the reporting period to six years. We believe the private charter operators are confusing complaints with reports. When we examine six years of the recipient's compliance history we are looking at complaints filed. Since FTA maintains the Charter Registration Web site, we will have access to quarterly reports for purposes of reviewing a recipient's compliance history. The regulatory requirement simply applies to a grantee's retention of its quarterly reports, not FTA's retention of quarterly reports.

Subpart C—Procedures for Registration and Notification

Section 604.13—Registration of Private Charter Operators

This section sets out the required information a private charter provider must submit in order to be considered a registered charter provider.

We received comments from public transit agencies urging us to limit where a private charter operator can register. Specifically, one representative comment stated that it trusts ''FTA will be vigilant and act quickly to correct abuses by removing private operators that act in bad faith * * * but such a process will not address the scenario in which a registered private operator who cannot in actuality provide service responds to a recipient's notice.''

Agency Response: Private charter operators may register with FTA at *http://www.fta.dot.gov/laws/leg_reg_179.html*. We also believe that a private charter operator should be able to register in any geographic service area. This means that a company could register with all public transit agencies across the United States. We believe that since this rule affords protections to registered charter providers, the threat of losing that registration will be deterrent enough for private charter operators to act in a commercially reasonable manner and in good faith when negotiating with a customer sent to them by the public transit agency. Removal from the Charter Registration Web site carries with it a three year period of receiving no notice from public transit agencies. This is no small consequence and, therefore, it will protect public transit agencies from ''vindictive'' private charter operators. Further, as noted in the history section of this document, our findings as well as GAO's findings have not found an ''unmet need'' with respect to the provision of charter services. Thus, we believe that this provision is protective of those situations in which a private charter operator is acting in a vindictive manner.

In addition, the Web site is designed to allow quick and efficient removal of a private charter operator once a decision has been made that satisfies the requirements of section 604.26, ''Removal.'' We have, therefore, adopted as final the proposed language.

Section 604.14—Recipient's Notification to Registered Charter Providers

This section requires public transit agencies to provide notice to registered charter providers when the public transit agency is interested in providing the requested charter service.

We heard from public transit agencies and a public transit association indicating that a clarification is necessary in this section. Specifically, according to the association, ''as drafted, section 604.14(b) would require pre-notification to private charter providers upon receiving a request for service under any exception. We believe this is a drafting error since it is inconsistent with the language immediately proceeding in section 604.14(a) and our understanding of the intent of the negotiators.'' In addition, the association raised a concern regarding when an e-mail is returned ''undeliverable.'' A transit agency stated ''the regulations require that the transit agency provide notice of a request for service by the close of business if the request is received before 2 p.m. that day, or the next business day if received after 2 p.m. This short time does not allow the public transit provider to evaluate the request and make sure that all the information is complete, before notifying the registered private charter companies.'' One Midwestern transit agency commented that ''the Web site will greatly reduce the private operator's financial risk. They will no longer need to market, advertise, or promote their business. Every morning they can just log on to FTA's version of 'Make Me a Millionaire' Web site to see what contracts they can bid.''

Agency Response: We believe the language as proposed is clear that only requests for charter service that do not fit within one of the exceptions require notification to registered charter providers. In other words, the notification procedures apply in the event one of the exceptions does not. Even so, we decided to add a clarification to indicate that upon receipt of a request for charter service that does not fit within one of the exceptions in subpart B, a recipient interested in providing the charter service shall provide notice to registered charter providers registered in its geographic service area.

Further, we are not convinced that the time period provided does not give public transit agency enough time to decide whether it is interested in providing the requested charter service. The time frames included in this particular provision were developed by the CBNRAC, which included small, medium, and large public transit agencies. Therefore, we retain that provision and adopt it as final.

In addition, we agree with the transportation association that a clarification should be added to the regulatory text to take into account when an e-mail is returned as ''undeliverable.'' In those instances, we have required a public transit agency to also send notification of the requested charter service by facsimile. In that instance, the public transit agencies must maintain a record of the ''undeliverable'' e-mail notification and confirmation that a facsimile was sent to the number provided by the registered charter provider.

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

Section 604.15—Registration of Qualified Human Service Organizations

This section set forth the registration requirements for qualified human service organizations (QHSO). Besides the basic information of organization name, address, and telephone, etc., the requirements also include basic financial information and a certification that funding received from a state or local program includes funding for transportation.

We heard from several public transit agencies regarding these registration requirements. Most opposed the requirement to certify that state or local funds include funds for transportation. One transportation association stated ''it is the lack or dearth of transportation funding that keeps these social service agencies from contracting with private charter providers.'' This association requests that the requirement be eliminated from the rule because ''the rule's new complaint and appeals process is sufficient to ensure that non-deserving organizations do not receive service.''

Regarding the requirement to certify funds for transportation, one transportation authority noted that ''many agencies may not know the terms of the original federal grant and social service agencies that are funded for transportation would not necessarily need the free or reduced cost services this system is intended to facilitate.'' Another transit agency stated: ''[the requirement presents a problem] since most federal funds are passed through one or more levels of state and local government with no indication of the original purposes. Social services organizations that are funded for transportation would not necessarily need the free or reduced cost services this system is intended to facilitate.''

From the private charter operator side, we received comments from an association urging us to ''place the burden of qualification on the recipient and make clear that a failure to qualify an organization will result in a finding of violation and enforcement action.''

Agency Response: We find the arguments from the public transit agencies regarding QHSO funding to be persuasive. Furthermore, the emphasis on human service transportation coordination planning requires us to be mindful of any impediments to accomplishing that goal. As such, we are modifying the proposed language to remove the requirement that a QHSO certify that state and local funds include funding for transportation.

We also added a clarification in the final rule that a QHSO is required to provide certain information and demonstrate that it is qualified. Public transit agencies should ensure that the QHSO has a valid registration in the FTA Charter Registration Web site that was provided at least sixty days in advance of the requested service before providing charter services to that organization.

Finally, we added a clarification in the final rule that a QHSO, as part of its registration, must explain what types of future requests for charter service it may request from a recipient and how those charter service trips are related to the QHSO's mission.

Section 604.16—Duties for Recipients With Respect to Charter Registration Web Site

This section provides minimum requirements for recipients of FTA funds with respect to the Charter Registration Web site.

We received comments from public transit agencies urging us to provide training and a training manual for the new Web site.

Agency Response: We agree with these comments and, have delayed the effective date of the rule in order to give us time to provide the necessary training and distribute an electronic user guide to public transit agencies. We will also encourage transit agencies to use the site before the effective date of the final rule and the Ombudsman for Charter Services will assist transit agencies with any questions or problems they may encounter (*ombudsman.charterservice@dot.gov*).

We have also modified the language of this provision to require a public transit agency to ensure that its employees and contractors affected by this regulation have the competency to effectively use the Web site.

Subpart E—Advisory Opinions

This subpart allows for public transit agencies and private charter operators to request an advisory opinion from the Office of the Chief Counsel at FTA.

We heard from several public transit agencies opposing this provision. A large public transportation association went so far as to challenge whether the CBNRAC reached consensus on this provision. Other public transit agencies said that FTA should ''withdraw the provision on advisory opinions because this means advice will be given on a regional basis which will lead to inconsistencies.'' Another comment stated ''while the intent of the advisory opinions portion of the rule is laudable as a practical matter, our management believes it has the potential to create more problems than it solves so we urge FTA to eliminate it.''

Private charter operators support the advisory opinion provision. Specifically, one southern private charter operator stated ''I commend the committee on the consensus reached in the Advisory Opinion issue. This rule should be invaluable to both the private and the public operator in obtaining a clear opinion from FTA on the appropriateness of a proposed charter movement. If executed timely, this avenue will give a transit operator the opportunity to refrain from providing an illegal charter.''

On the other hand, we also heard from several private charter operates expressing concern over FTA's decision to not include cease and desist provisions in the rule. One private charter operator stated its concern as ''our main disagreement with the FTA proposed rule is the lack of a process by which a complainant may apply to FTA for a cease and desist order to stop a publicly funded transit agency from beginning an illegal charter. Allowing private operators to apply for a cease and desist order prior to the charter would prevent the operator from filing and the transit agency from responding to the full complaint, hearing, and appeals process. FTA's reluctance to propose a cease and desist process stems solely from the agency's estimation of the workload and human capital required to implement it. While we are mindful of the agency's budget constraints we feel that a cease and desist order process need not be, and should not be long and drawn out.''

Another private charter association noted that ''since FTA cannot recoup lost revenues when recipients are found in violation of the Charter Service rules, it is imperative the FTA maintain a cease and desist provision and not to include such a provision is inconsistent with FTA's duty and fails to protect the private charter operator.''

Agency Response: We decline to remove this provision based on the comments received from public transit agencies. The inclusion of an advisory opinion provision allows for a more consistent, organized, and transparent process than the one that currently exists. Further this section was a consensus item during the CBNRAC negotiations, and, therefore, we are reluctant to remove it.

Further, we are also persuaded by the comments from the private charter operators requesting a cease and desist provision. This provision was considered during the CBNRAC negotiations, but no consensus was reached on this point. We rejected the provision in the NPRM because we believed it would be too burdensome. Since then, we have examined our practices, especially with respect to past decisions, and confirmed that we have provided cease and desist orders in the past. Therefore, we have included in the Advisory Opinion section a provision to allow private charter operators the option of requesting a cease and desist order. We have created an Advisory Opinion/Cease and Desist Order docket at *http://www.regulations.gov*; FTA–2007–0023 to keep track of all advisory opinions and cease and desist orders granted or denied.

We have also included a provision to require that registered charter providers seeking a cease and desist order serve a copy of the request on the affected public transit agency by e-mail or facsimile. In addition, the registered charter provider must certify that it telephoned the public transit agency and informed an appropriate official of the submission of the request for cease and desist order in its request for an advisory opinion.

Subpart F—Complaints

Section 604.27—Complaints, Answers, Replies and Other Documents

This section sets out the content requirements for complaints and provides timeframes for the filing of complaints, answers, replies, and rebuttals. This section also allows a complainant to withdraw its complaint at any time.

We received a variety of comments on this section. Generally, most public transit agencies expressed concern over the new, detailed complaint procedures. One southern public transit agency stated ''the complaint process appears to be unwieldy, complicated, and potentially expensive for small operators.'' A southern association of regional councils stated ''the complaint process is overly harsh. As written, private providers can ''tie up'' a public provider with litigation for almost any perceived wrong. Public providers are left to stand alone and incur significant legal fees to defend every complaint.'' This comment also advocated for a process that addresses honest mistakes, is administrative in nature and is free of any need for lawyers. One state representative submitted a comment on behalf of his public transit agency constituents stating the ''NPRM is nine and one half pages and five of the pages address the procedures for filing a complaint that cannot be done without the services of an attorney. The additional administrative requirements will result in significant additional costs—direct and indirect.'' In addition, we heard from public transit agencies that complaints should be filed within a certain time frame. One western transit district suggested ''FTA's jurisdiction over complaints should be limited to complaints that are filed within the earlier of: (a) 90 days after the event giving rise to the complaint or (b) 30 days after the complainant knew or should have known about the event that is the subject of the complaint.''

Private charter operators were supportive of the proposed complaint provisions. A private charter operator stated that the ''FTA charter bus complaint and appeals process required revision in order to achieve consistent and timely decisions. The new process will require additional information on the part of the complainant and should result in complaints with enough information to determine the violation of the charter regulations.''

Agency Response: We disagree with comments that the new complaint process is ''unwieldy and unduly burdensome.'' We are also unconvinced by comments asserting that the new complaint process will be more expensive for public transit agencies. In fact, the new complaint process places a heavier burden on registered charter providers than on recipients. Recipients have no greater burden under the new regulation when it comes to responding to a complaint than they did under the old regulation. In other words, a public transit agency still has the obligation to respond timely to a complaint filed against it, which is exactly the same obligation it had under the old charter service rule. This final rule, however, plainly states the burden on a transit agency when responding to a complaint, the timeframe for responding to a complaint, and provides clearer appeal procedures. All of these improvements were agreed upon by all parties during the CBNRAC negotiations.

Further, the new complaint provision requires a registered charter provider to provide specific factual allegations regarding an alleged charter violation.

Before the public transit agency has to respond to that complaint, FTA looks at the complaint to ensure that it has met all of the regulatory requirements. In the past, the only standard for filing a complaint was that it ''is not without obvious merit,'' which allowed an incomplete complaint to move forward just as easily as a complete complaint, which did tie up public transit agencies unnecessarily. Now, a complaint must be legally sufficient before it moves forward to the transit agency for a response.

On the other hand, we agree with comments submitted that only ''ripe'' complaints should be considered. Thus, we modified the language in the final rule to require that a complaint must be filed within 90 days of the date the alleged unauthorized charter service.

Further, we asked for comment regarding the role of state departments of transportation in the complaint process. We proposed to allow a state department of transportation to make a first attempt to resolve a complaint between a private charter operator and a sub-recipient. We heard from several state transportation departments that did not agree with our proposal. We heard from one state transportation department that did support the idea of allowing a state to attempt to resolve the matter initially.

Private charter operators did not support state involvement in the complaint process. Just like the public transit comments, private charter operators saw state involvement as leading to inconsistent decisions and a lengthier process.

We agree with the majority of comments received and will retain the proposed language in the final rule. The requirement in the final rule would notify a state department of transportation that a complaint has been filed against a sub-recipient. There are no requirements for the state in the complaint process.

Finally, we added a clarification that complaints for removal of registered charter provider or QHSO must be submitted within 90 days of discovering facts that merit removal. This 90-day deadline does not mean, however, that QHSOs that register and then are not challenged within 90 days after registration cannot later be challenged. Rather, when a registered charter provider or recipient finds evidence supporting removal, then the 90-day clock begins.

Subpart H—Decisions by FTA and Appointment of a Presiding Official (PO)

Section 604.34—Decisions by the Chief Counsel and Appointment of a PO

This provision allows FTA to appoint a presiding official (PO) in the event that a hearing is necessary.

Public transit agencies submitted comments expressing concern that the qualifications of a PO were not set out in the proposed rule. Specifically, ''without reasonable criteria, vetted through public comment, the credibility and qualifications of any particular PO will necessarily be the first order of business in any proceeding. Must a PO be neutral and detached? Is FTA Regional Counsel available for assignment as a PO? Other FTA personnel? Is there a means of challenging a PO for cause, bias, or prejudice?''

Conversely, private charter operators support this provision and ''presume that such officials will have no predisposed transit affiliation and have proper training and experience that will instill confidence in the complaint process.''

Agency Response: We believe anyone appointed to serve in the PO capacity would stand in the shoes of FTA, and therefore, it is within FTA's discretion to appoint an appropriate person to serve as a PO. This internal decision is not subject to notice and comment. Even so, we note that a PO will be appointed only in those rare cases where a complaint warrants a hearing. A PO will not review initial complaints. That function will be performed by the Office of Chief Counsel in headquarters. In the event that a PO is appointed to conduct a hearing, the PO's recommended decision will have to be adopted by the Chief Counsel's Office.

To address the comments received, we modified the language with respect to a PO to indicate that a PO will be appointed for hearing purposes only, and, regarding qualifications, we have added language that the official or agency representative appointed to preside as a PO shall be a person who has had no previous contact with the parties concerning the issue in the proceeding.

Section 604.35—Separation of functions

This section requires that FTA personnel involved in proceedings under this subpart must not be involved with other matters relating to the same case.

Public transit agencies raised a concern that ''could one FTA attorney prosecute a complaint before another FTA attorney? The internal inconsistency appears based on the iterative nature of the drafting process. Both sections of the rule clearly place responsibility for prosecution of any complaint on the complainant.'' In addition, several transit agencies asked the question of who bears the costs of litigation before a PO: ''FTA has created a substantial quasi-judicial forum and process that will almost certainly be expensive to comply with. Who will be responsible for litigation costs?''

Agency Response: Addressing the last comment first, as with all litigation, and as is the case under the old charter service regulation, the parties each bear its litigation costs. As noted earlier, FTA will appoint a PO. In addition, FTA will provide a suitable location to hold a hearing and hire a court reporter to transcribe the proceedings. As in most cases, a transcript becomes a matter of public record, and, therefore, would be available to all parties after the proceeding. If a party wishes to expedite transcription, then that party would bear the additional expense of an expedited transcript.

While these new hearing procedures may appear ''substantial'' in comparison to the existing hearing procedures, which are nonexistent, the procedures set out in the new rule set out a basic framework for conducting a hearing. The new provisions cover all of the basics of a hearing in the rare event that one is necessary.

Section 604.41—Standard of Proof

This section sets out the standard of proof that must be met during a hearing and before a PO can rule in favor of a party.

An east coast transit agency recommended that the standard of proof should not be ''substantial evidence'' rather it should be ''a preponderance of the reliable and probative evidence contained in the record and is in accordance with the law.''

Agency Response: After considering the comments received on this point, we agree that a preponderance of the evidence standard is more consistent with other administrative proceedings. We have amended this section accordingly.

Section 604.42—Burden of Proof

This section sets out the burden of proof in a hearing asserting noncompliance with this Part.

A transportation association submitted a comment that this section does not give an ''indication of what affirmative defense might be available in the complaint process. FTA must clarify when it feels a complainant no longer

carries the burden of proof in its administrative proceedings.''

Agency Response: In response to this comment, we have set out the burden of proof for a complaint as: ''A complainant must show by a preponderance of the evidence that a recipient provided charter service, as defined in this Part, and that such service did not fall within one of the exemptions or exceptions contained in this Part.'' If the complainant meets this burden, then the burden shifts to the recipient to demonstrate, by a preponderance of the evidence, that the service provided was authorized under the charter service regulations. Providing this burden shifting clarification should address the commentor's concern and, therefore, we have removed the affirmative defenses subparagraph.

Section 604.47—Remedies

This section set out the remedies that FTA may pursue if a recipient is found in noncompliance with this Part.

We heard from public transit agencies on a variety of issues regarding this section. First, some recipients asserted that FTA has no statutory authority to order a recipient to refund funds to the U.S. Treasury. Another argument is that FTA can only withhold a portion of funds if a pattern of violations is found. Further, others stated that remedies should only be ordered for violations of the same provisions and not dissimilar provisions. A private charter operator pointed out that ''shall mitigate the remedy'' should be ''may mitigate the remedy.'' Another comment submitted requested that FTA include a provision indicating where the funds will go. Others urged FTA to be reasonable in assessing remedies because any withdrawal of funds from a public transit agency will mean a lessening of public transit services. Another comment submitted requested that FTA provide a range of remedies so as to provide public transit agencies with an idea of how a violation of this Part will result in a certain amount of withheld funds.

Agency Response: We agree with the comment stating that we could not order a recipient to refund funds to the Treasury. Therefore, we have removed this as a potential remedy. Also in response to comments received from public transit agencies, we added the fact that FTA may pursue as a remedy the suspension and/or debarment of a recipient, its employees and contractors, for a violation of the charter service regulation.

Further, we believe that we do have the authority to withhold funds for a single violation of this Part. Comments on this topic do not take into account the statutory provision on remedies. Specifically, the statute provides: ''If the Secretary decides that a violation has occurred, the Secretary shall correct the violation under terms of the agreement.'' 49 U.S.C. 5323((d)(2)(B). The agreement referenced in the statute is the Master Agreement and the terms and conditions that all recipients agree to in order to receive financial assistance from FTA. (See Master Agreement, Section 11—Right of Federal Government to Terminate: ''Upon written notice, the Recipient agrees that the Federal Government may suspend or terminate all or any part of the Federal assistance to be provided if the Recipient has violated the terms of the Grant Agreement or Cooperative Agreement for the Project including this Master Agreement * * *.'') Thus, under the terms of the agreement, FTA can withhold financial assistance for a single violation of the charter service regulations. We view the new statutory provision as direction from Congress that Federal financial assistance must be withheld if a pattern of violations is found. In contrast, previously under the Master Agreement, FTA had the discretion to determine whether to withhold Federal financial assistance for a pattern of violations. Now the Master Agreement reflects the new statutory provision regarding ''Additional Remedies,'' which states FTA ''shall bar a recipient or an operator from receiving Federal transit assistance in an amount the Secretary considers appropriate if the Secretary finds a pattern of violation of the agreement.'' 49 U.S.C. 5323(d)(2)C). We view the ''Additional Remedies'' section of SAFETEA–LU to mean that this remedy is in addition to the remedies specified in the Master Agreement. We therefore adopt these remedies as proposed.

In response to the concern that the violations must be similar in nature in order to constitute a pattern of violations, we believe this concern has merit. It is FTA's intention to view paperwork violations differently from service violations. Thus, we have clarified in the final rule that only unauthorized service violations can be counted toward a pattern of violations. In determining the remedy to be applied, however, we will consider whether the violation is service, paperwork, or reporting.

We also believe that the examination period of six years is appropriate to determine a pattern or practice. For urbanized area recipients, FTA conducts triennial reviews of compliance with FTA requirements. The six year period allows FTA to look at findings in two consecutive compliance reviews. The six year period will provide a true picture as to whether a public transit agency consistently violates the charter service regulations. Moreover, we know that a vast majority of transit agencies diligently comply with the charter service regulations. So, we doubt there will be many cases in which this provision will come into play.

We also want to respond to the private charter companies' concern that a single complaint could establish a pattern of violations. We believe that a single instance of unauthorized charter service cannot establish a pattern of violations. If a public transit agency provides unauthorized charter service for the flower show, then that is one instance of unauthorized charter service even though the flower show lasts for one week. In other words, multiple days of unauthorized charter service for a single event does not establish a pattern or practice of violating the charter service regulations. A complaint may, however, include several distinct instances of potential charter violations. In that case, the several distinct violations mentioned in the single complaint could form a basis for a finding of a pattern.

That being said, with the addition of a cease and desist provision to the final rule, registered charter providers can protect their interests in advance of an event. In addition, we will consider the issuance of a cease and desist order as an aggravating factor—if the recipient ignores the order and provides the service despite the issuance of a cease and desist order—in determining the amount of remedy to apply.

Public transit agencies also wanted to know where the withheld funds will go if FTA finds a violation of the charter service regulations. If FTA finds a violation of the charter service regulations, FTA will make every effort to ensure that the funds may be used by other recipients for transit services. For example, in instances where there are multiple recipients in a large urbanized area, FTA could withhold funds from the violating transit agency, while still allowing the funds to flow to other transit providers in the same urbanized area to which the funds were apportioned. For funds apportioned to the State for small urbanized areas, FTA could penalize one recipient while still allowing the Governor to allocate the funds to other urbanized areas in the State. Similarly, if a rural transit system were penalized for violations of the charter rule, the State could allocate the funds to other rural transit systems. In

an instance where the violator was the only eligible recipient, formula funds would ultimately lapse and be reallocated in a subsequent apportionment among all areas. Funds de-obligated from a grant, as a penalty, after their lapse date, would be similarly reapportioned.

Finally, we agree with the comments requesting notice of the range of penalties that may be applied for a violation. We have created a new Appendix D that contains a matrix of a range of potential remedies. While each case is fact specific and FTA will decide what remedy to apply on a case-by-case basis, this matrix provides guidance to recipients as to what FTA may withhold.

Rulemaking Analyses and Notices

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

This rulemaking is not a significant regulatory action within the meaning of Executive Order 12866, and, therefore, this rulemaking was not reviewed by the Office of Management and Budget. Further, this rule is not significant under Department of Transportation regulatory policies and procedures. This final rule 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.

This rule is not anticipated to adversely affect, in a material way, any sector of the economy. This rulemaking clarifies and sets forth provisions 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. Likewise, we have adopted provisions to be the least burdensome on small transit agencies—many of these agencies are now exempted from the rule's reporting requirements when they provide charter services in accordance with program purposes, as defined in the regulation, under 49 U.S.C. 5310, 5311, 5316, and 5317. In addition, this proposed rule would not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

FTA estimates the costs associated with this rule to be minimal. This rule simply clarifies existing procedures and sets out more efficient procedures for reporting, registration, and notification. The only costs we have identified for this rulemaking are the training costs to familiarize employees with the FTA Charter Registration Web site so that they can properly find the registered charter providers in their geographic service areas. Even so, FTA will provide training manuals for a recipient's use, which should further minimize a recipient's training costs.

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. We have added provisions that are also supportive of small governmental entities. Thus, any economic impact on small entities will be a positive one. FTA hereby certifies that the final rule for the charter service regulation will not have a significant economic impact on a substantial number of 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 final 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 final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and FTA has determined that the final rule would not have sufficient federalism implications to warrant the preparation of a Federalism assessment. FTA has also determined that this final rule would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions.

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 January 31, 2008. FTA has determined that the revisions in this final rule will require an update to the information collection request. However, FTA believes there will be a decrease in burden hours per submission because of the use of electronic technology.

Executive Order 13175 (Tribal Consultation)

FTA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that the final rule does not have substantial direct effects on one or more Indian Tribes; does not impose substantial direct compliance costs on Indian Tribal governments; and does 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 this final rule 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.

Distribution Tables

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

SECTION TITLE AND NUMBER

Old section (Subpart A)		New section (Subpart A)	
Purpose	§ 604.1	Purpose	§ 604.1

SECTION TITLE AND NUMBER—Continued

Old section (Subpart A)		New section (Subpart A)	
Applicability	§ 604.3	Applicability	§ 604.2
Definitions	§ 604.5	Definitions	§ 604.3
Charter Agreement	§ 604.7	Charter Agreement	§ 604.4
Charter Service	§ 604.9	Exceptions	(Subpart B)
	§ 604.9(a)		§ 604.9
	§ 604.9(b)(1)		removed
	§ 604.9(b)(2)		§ 604.8
	§ 604.9(b)(3)		§ 604.11
	§ 604.9(b)(4)		§ 604.11
	§ 604.9(b)(5)		§ 604.7
	§ 604.9(b)(6)		removed
	§ 604.9(b)(7)		§ 604.10
	§ 604.9(b)(8)		removed
Procedures for determining if there are any willing and able private charter operators.	§ 604.11		(Subpart C)
		Registration of private charter operators	§ 604.16
Reviewing evidence submitted by private charter operators.	§ 604.13		removed
		Procedures for Registration of Qualified Human Services Organizations and Duties for Recipients Regarding Charter Registration Web site.	(Subpart D)
		Advisory Opinions and Cease and Desist Orders	(Subpart E)
Filing a complaint	(Subpart B)	Complaints	(Subpart F)
	§ 604.15(a)		§ 604.27(a)
	§ 604.15(b)		removed
	§ 604.15(c)		§ 604.27(b)
	§ 604.15(d)		§ 604.27(c)
	§ 604.15(e)		§ 604.34 or 46
	§ 604.15(f)		§ 604.32 or 33
		Investigations	(Subpart G)
		FTA Initial Decisions and Referrals to a Presiding Official (PO).	(Subpart H)
	§ 604.15(g)		(Subpart I) § 604.36
	§ 604.15(h)		§ 604.37
	§ 604.15(i)		§ 604.45
Remedies	§ 604.17	Remedies	§ 604.47
		Appeal to Administrator and final agency orders	(Subpart J)
Appeals	§ 604.19(a)		§ 604.48(a)
	§ 604.19(b)		§ 604.48(b)
	§ 604.19(c)		§ 604.48(c)
	§ 604.19(d)		§ 604.48(a)
	§ 604.19(e)		§ 604.48(b)
Judicial Review	§ 604.21		(Subpart K) § 604.50

List of Subjects in 49 CFR Part 604

Administrative practice and procedure, Charter service, Mass transportation.

■ In consideration of the foregoing, FTA amends chapter VI of title 49 of the Code of Federal Regulations as set forth below:

Title 49—Transportation

■ 1. Revise part 604 to read as follows:

PART 604—CHARTER SERVICE

Subpart A—General Provisions

Sec.

Subpart B—Exceptions

Subpart C—Procedures for Registration and Notification

Subpart D—Registration of Qualified Human Service Organizations and Duties for Recipients With Respect to Charter Registration Web Site

Subpart E—Advisor Opinions and Cease and Desist Orders

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 its employees, other transit system employees, transit management officials, transit contractors and bidders, government officials and their contractors and official guests, to or from transit facilities or projects within its geographic service area or proposed geographic service area for the purpose of 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 section 3038 of the Transportation Equity Act for the 21st Century, as amended, or to the non-FTA funded activities of private charter operators that receive, directly or indirectly, FTA 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, or 49 U.S.C. 5317.

(d) The requirements of this part shall not apply to a recipient transporting its 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. 5311, 49 U.S.C. 5316, or 49 U.S.C. 5317.

(f) The requirements of this part shall not apply to a recipient, for actions directly responding to an emergency declared by the President, governor, or mayor or in an emergency requiring immediate action prior to a formal declaration. If the emergency lasts more than 45 days, the recipient shall follow the procedures set out in subpart D of 49 CFR 601.

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

§ 604.3 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) *''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) *''Administrator''* means the Administrator of the Federal Transit Administration or his or her designee.

(c) *''Charter service''* means, but does not include demand response service to individuals:

(1) Transportation provided by a recipient at the request of a third party for the exclusive use of a bus or van for a negotiated price. The following features may be characteristic of charter service:

(i) A third party pays the transit provider a negotiated price for the group;

(ii) Any fares charged to individual members of the group are collected by a third party;

(iii) The service is not part of the transit provider's regularly scheduled service, or is offered for a limited period of time; or

(iv) A third party determines the origin and destination of the trip as well as scheduling; or

(2) Transportation provided by a recipient to the public for events or functions that occur on an irregular basis or for a limited duration and:

(i) A premium fare is charged that is greater than the usual or customary fixed route fare; or

(ii) The service is paid for in whole or in part by a third party.

(d) *''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) *''Chief Counsel''* means the Chief Counsel of FTA and his or her designated employees.

(f) *''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) *''Demand response''* means any non-fixed route system of transporting individuals that requires advanced scheduling by the customer, including services provided by public entities, nonprofits, and private providers.

(h) *''Exclusive''* means service that a reasonable person would conclude is intended to exclude members of the public.

(i) *''FTA''* means the Federal Transit Administration.

(j) *''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) *''Government official''* means an individual elected or appointed at the local, state, or Federal level.

(l) *''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.

(m) *''Pattern of violations''* means more than one finding of unauthorized charter service under this part by FTA beginning with the most recent finding of unauthorized charter service and looking back over a period not to exceed 72 months.

(n) *''Presiding Official''* means an official or agency representative who conducts a hearing at the request of the Chief Counsel and who has had no previous contact with the parties concerning the issue in the proceeding.

(o) *''Program purposes''* means transportation that serves the needs of either human service agencies or targeted populations (elderly, individuals with disabilities, and or low income individuals); this does not include exclusive service for other groups formed for purposes unrelated to the special needs of the targeted populations identified herein.

(p) *''Public transportation''* has the meaning set forth in 49 U.S.C. 5302(a)(10).

(q) *''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).

(r) *''Recipient''* means an agency or entity that receives Federal financial assistance, either directly or indirectly, including subrecipients, under the Federal Transit Laws. This term does not include third-party contractors who use non-FTA funded vehicles.

(s) *''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 Web site.

(t) *''Registration list''* means the current list of registered charter providers and qualified human service organizations maintained on FTA's charter registration Web site.

(u) *''Special transportation''* means demand response or paratransit service that is regular and continuous and is a type of ''public transportation.''

(v) *''Violation''* means a finding by FTA of a failure to comply with one of the requirements of this Part.

§ 604.4 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 level who use FTA-funded vehicles, 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 604, 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 its Grant Agreement or Cooperative Agreement for Federal financial assistance.

Subpart B—Exceptions

§ 604.5 Purpose.

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

§ 604.6 Government officials on official government business.

(a) A recipient may provide charter service to government officials (Federal, State, and local) for official government business, which can include 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) After providing such service, records the following:

(i) The government organization's name, address, phone number, and e-mail address;

(ii) The date and time of service;

(iii) The number of passengers (specifically noting the number of government officials on the trip);

(iv) The origin, destination, and trip length (miles and hours);

(v) The fee collected, if any; and

(vi) The vehicle number for the vehicle used to provide the service.

(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 official government business.

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

(1) Date and description of the official government 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.

(d) FTA shall post the request for additional charter service hours under this exception in the Government Officials Exception docket, docket number FTA–2007–0020 at *http://www.regulations.gov*. Interested parties may review the contents of this docket and bring questions or concerns to the attention of the Ombudsman for Charter Services. The written decision of the Administrator regarding the request for additional charter service hours shall be posted in the Government Officials Exception docket and sent to the recipient.

§ 604.7 Qualified human service organizations.

(a) A recipient may provide charter service to a qualified human service organization (QHSO) for the purpose of serving persons:

(1) With mobility limitations related to advanced age;

(2) With disabilities; or

(3) With low income.

(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 QHSO shall not be required to register on the FTA charter registration Web site.

(c) If a QHSO 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 QHSO shall register on the FTA charter registration Web site in accordance with § 604.15.

(d) A recipient providing charter service under this exception, whether or not the QHSO receives funding from Appendix A programs, and after providing such charter service, shall record:

(1) The QHSO's name, address, phone number, and e-mail address;

(2) The date and time of service;

(3) The number of passengers;

(4) The origin, destination, and trip length (miles and hours);

(5) The fee collected, if any; and

(6) The vehicle number for the vehicle used to provide the service.

§ 604.8 Leasing FTA funded equipment and drivers.

(a) A recipient may lease its FTA-funded equipment and drivers to registered charter providers 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 buses or vans in 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:

(1) The registered charter provider's name, address, telephone number, and e-mail address;

(2) The number of vehicles leased, types of vehicles leased, and vehicle identification numbers; and

(3) The documentation presented by the registered charter provider in support of paragraphs (a)(1) through (4) of this section.

(c) In accordance with § 604.26, if a registered charter provider seeking to lease vehicles has filed a complaint requesting that another registered charter provider be removed from the FTA charter registration Web site, then the registered charter provider seeking to lease vehicles is not required to exhaust the vehicles from that registered charter provider while the complaint is pending before leasing vehicles from a recipient.

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

(a) A recipient may provide charter service, on its own initiative or at the request of a third party, if no registered charter provider responds to the notice issued in § 604.14:

(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 an interest in providing the charter service set out in the notice issued pursuant to § 604.14 and the registered charter provider has informed the recipient of its interest in providing the service.

(c) After providing the service, a recipient shall record:

(1) The group's name, address, phone number, and e-mail address;

(2) The date and time of service;

(3) The number of passengers;

(4) The origin, destination, and trip length (miles and hours);

(5) The fee collected, if any; and

(6) The vehicle number for the vehicle used to provide the service.

§ 604.10 Agreement with registered charter providers.

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

(b) If a new charter provider registers in the geographic service area subsequent to the initial agreement, the recipient may continue to provide charter service under the previous agreement with the other charter providers up to 90 days without an agreement with the newly registered charter provider.

(c) Any of the parties to an agreement may cancel the agreement at any time after providing the recipient a 90-day notice.

§ 604.11 Petitions to the Administrator.

(a) A recipient may petition the Administrator for an exception to the charter service regulations to provide charter service directly to a customer for:

(1) Events of regional or national significance;

(2) Hardship (only for non-urbanized areas under 50,000 in population or small urbanized areas under 200,000 in population); or

(3) Unique and time sensitive events (e.g., funerals of local, regional, or national significance) that are in the public's interest.

(b) The petition to the Administrator shall include the following information:

(1) The date and description of the event;

(2) The type of 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

(i) For an event of regional or national significance, the petition shall include a description of how registered charter providers were consulted, how registered charter providers will be utilized in providing the charter service, a certification that the recipient has exhausted all of the registered charter providers in its geographic service area, and submit the petition at least 90 days before the first day of the event described in paragraph (b)(1) of this section;

(ii) For a hardship request, a petition is only available if the registered charter provider has deadhead time that exceeds total trip time from initial pick-up to final drop-off, including wait time. The petition shall describe how the registered charter provider's minimum duration would create a hardship on the group requesting the charter service; or

(iii) For unique and time sensitive events, the petition shall describe why the event is unique or time sensitive and how providing the charter service would be in the public's interest.

(c) Upon receipt of a petition that meets the requirements set forth in paragraph (b) of this section, the Administrator shall review the materials and issue a written decision denying or granting the request in whole or in part. In making this decision, the Administrator may seek such additional information as the Administrator deems necessary. The Administrator's decision shall be filed in the Petitions to the Administrator docket, number FTA–2007–0022 at *http://www.regulations.gov* and sent to the recipient.

(d) Any exception granted by the Administrator under this section shall be effective only for the event identified in paragraph (b)(1) of this section.

(e) A recipient shall send its petition to the Administrator by facsimile to (202) 366–3809 or by e-mail to *ombudsman.charterservice@dot.gov*.

(f) 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.

§ 604.12 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 required notice and records in an electronic format for a period of at least three years from the date of the service or lease. A recipient may maintain the required records in other formats in addition to the electronic format.

(b) In addition to the requirements identified in paragraph (a) of this section, 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) Beginning on July 30, 2008, 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). A single document or charter log may include all charter service trips provided during the quarter.

(d) A recipient may exclude specific origin and destination information for safety and security reasons. If a recipient excludes such information, the record of the service shall describe the reason why such information was excluded and provide generalized information instead of providing specific origin and destination information.

Subpart C—Procedures for Registration and Notification

§ 604.13 Registration of private charter operators.

(a) Private charter operators shall provide the following information at *http://www.fta.dot.gov/laws/leg_reg_179.html* to be considered a registered charter provider:

(1) Company name, address, phone number, e-mail address, and facsimile number;

(2) Federal and, if available, state motor carrier identifying number;

(3) The geographic service areas of public transit agencies, as identified by the transit agency's zip code, in which the private charter operator intends to provide charter service;

(4) The number of buses or vans the private charter operator owns;

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

(6) Whether 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 may 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) A registered charter provider 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.

§ 604.14 Recipient's notification to registered charter providers.

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

(1) Decline to provide the service, with or without referring the requestor to FTA's charter registration Web site (*http://www.fta.dot.gov/laws/leg_reg_179.html*);

(2) Provide the service under an exception provided in subpart B of this part; or

(3) Provide notice to registered charter providers as provided in this section and provide the service pursuant to § 604.9.

(b) If a recipient is interested in providing charter service under the exception contained in § 604.9, then upon receipt of a request for charter service, the recipient shall provide e-mail notice to registered charter providers in the recipient's geographic service area in the following manner:

(1) E-mail 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) E-mail notice sent to the list of registered charter providers shall include:

(i) Customer name, address, phone number, and e-mail 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; and

(3) If the recipient intends to provide service that meets the definition of charter service under § 604.3(c)(2), the e-mail notice must include the fare the recipient intends to charge for the service.

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

(d) If a recipient receives an ''undeliverable'' notice in response to its e-mail notice, the recipient shall send the notice via facsimile. The recipient shall maintain the record of the undeliverable e-mail notice and the facsimile sent confirmation for a period of three years.

Subpart D—Registration of Qualified Human Service Organizations and Duties for Recipients With Respect to Charter Registration Web site

§ 604.15 Registration of qualified human service organizations.

(a) Qualified human service organizations (QHSO) that seek free or reduced rate services from recipients, and do not receive funds from Federal programs listed in Appendix A, but serve individuals described in § 604.7 (i.e., individuals with low income, advanced age, or with disabilities), shall register on FTA's charter registration Web site by submitting the following information:

(1) Name of organization, address, phone number, e-mail 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, and whether it 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 the types of charter service trips the qualified human service organization may request from a recipient and how that 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 it:

(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; and

(2) Verifies FTA's receipt of its registration by viewing its information on the FTA charter registration Web site (*http://www.fta.dot.gov/laws/leg_reg_179.html*).

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

(d) A QHSO 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.

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

Each recipient shall ensure that its affected employees and contractors have the necessary competency to effectively use the FTA charter registration Web site.

Subpart E—Advisory Opinions and Cease and Desist Orders

§ 604.17 Purpose.

The purpose of this subpart is to set out the requirements for requesting an advisory opinion from the Chief Counsel's Office. An advisory opinion may also request that the Chief Counsel issue a cease and desist order, which would be an order to refrain from doing an act which, if done, would be a violation of this part.

§ 604.18 Request for an advisory opinion.

(a) An interested party 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, 1200 New Jersey Ave. SE., Room E55–302, Washington, DC 20590
Re: Request for Advisory Opinion
The undersigned submits this request for an advisory opinion from the FTA Chief Counsel with respect to [the general nature of the matter involved].
A. A full statement of all facts and legal points relevant to the request
B. An affirmation that the undersigned swears, 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.
C. The following certification: ''I hereby certify that I have this day served the foregoing [name of document] on the following interested party(ies) at the following addresses and e-mail or facsimile numbers (if also served by e-mail or facsimile) by [specify method of service]: [list persons, addresses, and e-mail or facsimile numbers]''
Dated this _____ day of ____ , 20____.
[Signature]
[Printed name]
[Title of person making request]
[Mailing address]
[Telephone number]
[e-mail address]

(c) The Chief Counsel may request additional information, as necessary, from the party submitting the request for an advisory opinion.

(d) 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.

§ 604.19 Processing of advisory opinions.

(a) A request for an advisory opinion shall be sent to the Chief Counsel at *ombudsman.charterservice@dot.gov*, and filed electronically in the Charter Service Advisory Opinion/Cease and Desist Order docket number FTA–2007–0023 at *http://www.regulations.gov* or sent to the dockets office located at 1200 New Jersey Ave., SE., West Building Ground Floor, Room W12–140, Washington, DC 20590, for submission to that docket.

(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 § 604.18(b). The Chief Counsel shall send his or her decision to the interested party, the docket, and the recipient, if appropriate.

§ 604.20 Effect of an advisory opinion.

(a) An advisory opinion represents the formal position of FTA on a matter, and except as provided in § 604.25 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.

§ 604.21 Special considerations for advisory opinions.

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.

§ 604.22 Request for a cease and desist order.

(a) An interested party may also request a cease and desist order as part of its request for an advisory opinion. A request for a cease and desist order shall contain the following information in addition to the information required for an advisory opinion:

(1) A description of the need for the cease and desist order, a detailed description of the lost business opportunity the interested party is likely to suffer if the recipient performs the charter service in question, and how the public interest will be served by avoiding or ameliorating the lost business opportunity. A registered charter provider must distinguish its loss from that of other registered charter providers in the geographic service area.

(2) A detailed description of the efforts made to notify the recipient of the potential violation of the charter service regulations. Include names, titles, phone numbers or e-mail addresses of persons contacted, date and times contact was made, and the response received, if any.

(b) A request for a cease and desist order may be denied if:

(1) The request contains incomplete information on which to base an informed a cease and desist order;

(2) The Chief Counsel concludes that a cease and desist order cannot

reasonably be given on the matter involved;

(3) The matter is adequately covered by a prior a cease and desist order; or

(4) The Chief Counsel otherwise concludes that a cease and desist order would not be in the public interest.

(c) A recipient who is the subject of a request for a cease and desist order shall have three business days to respond to the request. The response shall include a point-by-point rebuttal to the information included in the request for a cease and desist order.

(d) The time period for a response by the recipient begins once a registered charter provider files a request in the Advisory Opinion/Cease and Desist Order docket (FTA–2007–0023 at *http://www.regulations.gov*) or with the FTA Chief Counsel's Office, whichever date is sooner.

§ 604.23 Effect of a cease and desist order.

(a) Issuance of a cease and desist order against a recipient shall be considered as an aggravating factor in determining the remedy to impose against the recipient in future findings of noncompliance with this part, if the recipient provides the service described in the cease and desist order issued by the Chief Counsel.

(b) In determining whether to grant the request for a cease and desist order, the Chief Counsel shall consider the specific facts shown in the signed, sworn request for a cease and desist order, applicable statutes and regulations, and any other information that is relevant to the request.

§ 604.24 Decisions by the Chief Counsel regarding cease and desist orders.

(a) The Chief Counsel may grant a request for a cease and desist order if the interested party demonstrates, by a preponderance of the evidence, that the planned provision of charter service by a recipient would violate this part.

(b) In determining whether to grant the request for a cease and desist order, the Chief Counsel shall consider the specific facts shown in the signed, sworn request for a cease and desist order, applicable statutes, regulations, agreements, and any other information that is relevant to the request.

Subpart F—Complaints

§ 604.25 Purpose.

This subpart describes the requirements for filing a complaint challenging the registration of a private charter operator or qualified human service organization on the FTA charter registration Web site and filing a complaint regarding the provision of charter service by a recipient. Note: To save time and expense for all concerned, FTA expects all parties to attempt to resolve matters informally before beginning the official complaint process.

§ 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 its 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 Web site;

(3) Files electronically by submitting it to the Charter Service Removal Complaint docket number FTA–2007–0024 at *http://www.regulations.gov*;

(4) Serves by e-mail or facsimile if no e-mail address is available, or by overnight mail service with receipt confirmation, and attaches documents offered in support of the complaint upon all entities named in the complaint;

(5) Files within 90 days of discovering facts that merit removal of the registered charter provider or qualified human service organization from the FTA Charter Registration Web site; and

(6) Contains the following certification:

I hereby certify that I have this day served the foregoing [name of document] on the following persons at the following addresses and e-mail or facsimile numbers (if also served by e-mail or facsimile) by [specify method of service]:
[list persons, addresses, and e-mail or facsimile numbers]
Dated this ____ day of ____, 20__.
[signature], for [party].

(b) The registered charter provider or qualified human service organization shall have 15 days to answer the complaint and shall file such answer, and all supporting documentation, in the Charter Service Removal Complaint docket number FTA–2007–0024 at *http://www.regulations.gov* and e-mail such answer to *ombudsman.charterservice@dot.gov*.

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

(d) FTA shall determine whether to remove the registered charter provider or qualified human service organization from the FTA charter registration Web site based on a preponderance of the 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) FTA's determination whether or not to remove a registered charter provider 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 and shall state:

(1) Reasons for allowing the continued listing or removal of the registered charter provider or qualified 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 Web site.

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

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

(b) Complaints filed under this subpart shall:

(1) Be titled ''Notice of Charter Service Complaint'';

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

(2) Be served 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;

(3) Provide a concise but complete statement of the facts relied upon to

substantiate each allegation (complainant must show by a preponderance of the evidence that the recipient provided charter service and that such service did not fall within one of the exemptions or exceptions set out in this part);

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

(5) Identify each registered charter provider associated with the complaint; and

(6) Be filed within 90 days after the alleged event giving rise to the complaint occurred.

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

(d) The complainant may 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 the supporting documentation upon which the submitter relies.

(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.

(b) [Reserved]

§ 604.29 Incomplete complaints.

If a complaint is not dismissed under § 604.28, but is deficient as to one or more of the requirements set forth in § 604.27, the Office of the Chief Counsel may 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 complaints.

(a) *Filing address.* Unless provided otherwise, the complainant shall file the complaint with the Office of the Chief Counsel, 1200 New Jersey Ave., SE., Room E55–302, Washington, DC 20590 and file it electronically in the Charter Service Complaint docket number FTA–2007–0025 at *http://www.regulations.gov* or mail it to the docket by sending the complaint to 1200 New Jersey Ave., SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

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

(1) The date of personal delivery;

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

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

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

(c) *E-mail or fax.* A document sent by facsimile or e-mail 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, as established by the Chief Counsel or Presiding Official, 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 e-mail 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 FTA–2007–0025.

(c) *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 e-mail or facsimile numbers (if also served by e-mail or facsimile) by [specify method of service]:

[list persons, addresses, and e-mail or facsimile numbers]

Dated this _____ day of _____, 20____.

[signature], for [party]

(d) *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.

(e) *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 last known address 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 under these regulations, 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—Decisions by FTA and Appointment of a Presiding Official (PO)

§ 604.34 Chief Counsel decisions and appointment of a PO.

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

(1) Issue a decision based on the pleadings filed to date;

(2) Appoint a PO to review the matter; or

(3) Dismiss the complaint pursuant to § 604.28.

(b) If the Chief Counsel appoints a PO to review the matter, 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 a recommended decision.

§ 604.35 Separation of functions.

(a) Proceedings under this part shall be handled by an FTA attorney, except that the Chief Counsel may appoint a PO, who may not be an FTA attorney.

(b) After issuance of an initial decision by the Chief Counsel, the FTA employee or contractor engaged in the performance of investigative or prosecutorial functions in a proceeding under this part shall not, in that case or a factually related case, participate or give advice in a final decision by the Administrator or his or her designee on written appeal, and shall 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.

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 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 a recommended 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 according to the filing and service procedures contained in § 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 recommended decision and for the final agency decision by the length of time in the PO's extension.

§ 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 a recommended decision or shall rule in a party's favor only if the decision or ruling is supported by a preponderance of the evidence.

§ 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 the 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.

§ 604.43 Offer of proof.

A party whose evidence has been excluded by a ruling of the PO, during a hearing in which the respondent had an opportunity to respond to the offer of proof, 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://www.regulations.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 a recommended 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 the Chief Counsel for ratification or modification not later than 110 days after the referral from the Chief Counsel.

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

§ 604.47 Remedies.

(a) If the Chief Counsel determines that a violation of this part occurred, he or she may take one or more of the following actions:

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

(2) Order the withholding of a reasonable percentage of available Federal financial assistance; or

(3) Pursue suspension and debarment of the recipient, its employees, or its contractors.

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

(1) The nature and circumstances of the violation;

(2) The extent and gravity of the violation (''extent of deviation from regulatory requirements'');

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

(4) The operating budget of the recipient;

(5) Such other matters as justice may require; and

(6) Whether a recipient provided service described in a cease and desist order after issuance of such order by the Chief Counsel.

(c) The Chief Counsel office may mitigate the remedy when the recipient can document corrective action of alleged violation. The Chief Counsel'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 Chief Counsel finds a pattern of violations, the remedy ordered shall bar a recipient from receiving Federal transit assistance in an amount that the Chief Counsel considers appropriate.

(e) The Chief Counsel may make a decision 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 Chief Counsel decision.

(a) Each party adversely affected by the Chief Counsel's office decision may file an appeal with the Administrator within 21 days of the date of the Chief Counsel's issued his or her 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 based on the record that either accepts, rejects, or modifies the Chief Counsel's decision 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 this part, the final agency order shall include a statement of corrective action, if appropriate, and identify remedies.

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

(d) The failure to file an appeal is deemed a waiver of any rights to seek judicial review of the Chief Counsel's decision that becomes a final agency decision by operation of paragraph (c) of this section.

§ 604.49 Administrator's discretionary review of the Chief Counsel's 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 of the Chief Counsel's decision that contains the following information:

(1) The notice sets forth the specific findings of fact and conclusions of law in the 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 Chief Counsel's 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 this part, the final agency order shall include a statement of corrective action, if appropriate, and identify remedies.

(b) If the Administrator takes review on the Administrator's own motion, the decision of the Chief Counsel is stayed pending a final decision by the Administrator.

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) FTA's decision to dismiss a complaint as set forth in § 604.29;

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

(3) A Chief Counsel decision that becomes the final decision of the Administrator because it was not appealed within the stated timeframes.

Appendix A to Part 604—Listing of Human Service Federal Financial Assistance Programs

FEDERAL PROGRAMS PROVIDING TRANSPORTATION ASSISTANCE

1	Food Stamp, Employment and Training Program.	Food and Nutrition Service	Department of Agriculture.
2	Voluntary Public School Choice	Office of Innovation and Improvement	Department of Education.
3	Assistance for Education of All Children with Disabilities—IDEA.	Office of Special Education and Rehabilitative Services.	Department of Education.
4	Centers for Independent Living	Office of Special Education and Rehabilitative Services.	Department of Education.
5	Independent Living for Older Individuals Who Are Blind.	Office of Special Education and Rehabilitative Services.	Department of Education.
6	Independent Living State Grants	Office of Special Education and Rehabilitative Services.	Department of Education.
7	Supported Employment Services for Individuals with Most Significant Disabilities.	Office of Special Education and Rehabilitative Services.	Department of Education.
8	Vocational Rehabilitative Grants	Office of Special Education and Rehabilitative Services.	Department of Education.
9	Social Service Block Grant	Administration for Children and Families	Department of Health and Human Services.
10 ...	Child Care and Development Fund	Administration for Children and Families	Department of Health and Human Services.
11 ...	Head Start	Administration for Children and Families	Department of Health and Human Services.
12 ...	Refugee and Entrant Assistance Discretionary Grants.	Administration for Children and Families	Department of Health and Human Services.
13 ...	Refugee and Entrant Assistance State Administered Programs.	Administration for Children and Families	Department of Health and Human Services.
14 ...	Refugee and Entrant Targeted Assistance ..	Administration for Children and Families	Department of Health and Human Services.
15 ...	Refugee and Entrant Assistance Voluntary Agency Programs.	Administration for Children and Families	Department of Health and Human Services.
16 ...	State Development Disabilities Council and Protection & Advocacy.	Administration for Children and Families	Department of Health and Human Services.
17 ...	Temporary Assistance to Needy Families	Administration for Children and Families	Department of Health and Human Services.
18 ...	Community Services Block Grant	Administration for Children and Families	Department of Health and Human Services.
19 ...	Promoting Safe and Stable Families	Administration for Children and Families	Department of Health and Human Services.
20 ...	Developmental Disabilities Projects of National Significance.	Administration for Children and Families	Department of Health and Human Services.

FEDERAL PROGRAMS PROVIDING TRANSPORTATION ASSISTANCE—Continued

21 ...	Grants for Supportive Services and Senior Centers.	Administration on Aging	Department of Health and Human Services.
22 ...	Programs for American Indian, Alaskan Native and Native Hawaii Elders.	Administration on Aging	Department of Health and Human Services.
23 ...	Medicaid	Centers for Medicaid and Medicare	Department of Health and Human Services.
24 ...	State Health Insurance Program	Centers for Medicaid and Medicare	Department of Health and Human Services.
25 ...	Home and Community Base Waiver	Centers for Medicaid and Medicare	Department of Health and Human Services.
26 ...	Community Health Centers	Health Resources and Services Administration.	Department of Health and Human Services.
27 ...	Healthy Communities	Health Resources and Services Administration.	Department of Health and Human Services.
28 ...	HIV Care Formula Program	Health Resources and Services Administration.	Department of Health and Human Services.
29 ...	Maternal and Child Health Block Grant	Health Resources and Services Administration.	Department of Health and Human Services.
30 ...	Rural Health Care Network	Health Resources and Services Administration.	Department of Health and Human Services.
31 ...	Rural Health Care Outreach Program	Health Resources and Services Administration.	Department of Health and Human Services.
32 ...	Health Start Initiative	Health Resources and Services Administration.	Department of Health and Human Services.
33 ...	Ryan White Care Act Programs	Health Resources and Services Administration.	Department of Health and Human Services.
34 ...	Substance Abuse Prevention and Treatment Block Grant.	Substance Abuse and Mental Health Services Administration.	Department of Health and Human Services.
35 ...	Prevention and Texas Block Grant	Substance Abuse and Mental Health Services Administration.	Department of Health and Human Services.
36 ...	Community Development Block Grant	Community Planning and Development	Department of Housing and Urban Development.
37 ...	Housing Opportunities for Persons with AIDS.	Community Planning and Development	Department of Housing and Urban Development.
38 ...	Supportive Housing Program	Community Planning and Development	Department of Housing and Urban Development.
39 ...	Revitalization of Severely Distressed Public Housing.	Public and Indian Housing	Department of Housing and Urban Development.
40 ...	Indian Employment Assistance	Bureau of Indian Affairs	Department of the Interior.
41 ...	Indian Employment, Training, and Related Services.	Bureau of Indian Affairs	Department of the Interior.
42 ...	Black Lung Benefits	Employment Standards Administration	Department of Labor.
43 ...	Senior Community Services Employment Program.	Employment Standards Administration	Department of Labor.
44 ...	Job Corps	Employment and Training Administration	Department of Labor.
45 ...	Migrant and Seasonal Farm Worker	Employment and Training Administration	Department of Labor.
46 ...	Native American Employment and Training	Employment and Training Administration	Department of Labor.
47 ...	Welfare to Work Grants for Tribes	Employment and Training Administration	Department of Labor.
48 ...	Welfare to Work for States and Locals	Employment and Training Administration	Department of Labor.
49 ...	Work Incentive Grants	Employment and Training Administration	Department of Labor.
50 ...	Workforce Investment Act Adult Services Program.	Employment and Training Administration	Department of Labor.
51 ...	Workforce Investment Act Adult Dislocated Worker Program.	Employment and Training Administration	Department of Labor.
52 ...	Workforce Investment Act Youth Activities Program.	Employment and Training Administration	Department of Labor.
53 ...	Homeless Veterans Reintegration Program	Veterans Employment & Training Service ...	Department of Labor.
54 ...	Veterans Employment Program	Veterans Employment & Training Service ...	Department of Labor.
55 ...	Elderly and Persons with Disability	Federal Transit Administration	Department of Transportation.
56 ...	New Freedom Program	Federal Transit Administration	Department of Transportation.
57 ...	Job Access and Reverse Commute Program.	Federal Transit Administration	Department of Transportation.
58 ...	Non-Urbanized Area Program	Federal Transit Administration	Department of Transportation.
59 ...	Capital Discretionary Program	Federal Transit Administration	Department of Transportation.
60 ...	Urbanized Area Formula Program	Federal Transit Administration	Department of Transportation.
61 ...	Automobiles and Adaptive Equipment	Veterans Benefits Administration	Department of Veterans Affairs.
62 ...	Homeless Provider Grants	Veterans Health Administration	Department of Veterans Affairs.
63 ...	Veterans Medical Care Benefits	Veterans Health Administration	Department of Veterans Affairs.
64 ...	Ticket to Work Program	Social Security Administration	Department of Veterans Affairs.

Appendix B to Part 604—Basis for Removal From Charter Registration Web Site

The following is an explanation of terms contained in Section 604.27(d) concerning reasons for which FTA may remove a private charter operator or a qualified human service from the FTA charter registration Web site.

What is bad faith?

Bad faith is the actual or constructive fraud or a design to mislead or deceive another or a neglect or refusal to fulfill a duty or contractual obligation. It is not an honest mistake. Black's Law Dictionary, Revised Fourth Edition, West Publishing Company, St. Paul, Minn., 1968.

For example, it would be bad faith for a registered charter provider to respond to a recipient's notification to registered charter providers of a charter service opportunity stating that it would provide the service with no actual intent to perform the charter service. It would not be bad faith for a registered charter operator to fail to provide charter service in response to a recipient's notification when it honestly mistook the date, place or time the service was to be provided.

What is fraud?

Fraud is the suggestion or assertion of a fact that is not true, by one who has no reasonable ground for believing it to be true; the suppression of a fact by one who is bound to disclose it; one who gives information of other facts which are likely to mislead; or a promise made without any intention of performing it. Black's Law Dictionary, Revised Fourth Edition, West Publishing Company, St. Paul, Minn., 1968.

Examples of fraud include but are not limited to: (1) A registered charter operator indicates that it has a current state or Federal safety certification when it knows that it does not in fact have one; (2) a broker that owns no charter vehicles registers as a registered charter provider; (3) a registered charter provider intentionally misrepresents its legal geographic service area.

What is a lapse of insurance?

A lapse of insurance occurs when there is no policy of insurance is in place. This may occur when there has been default in payment of premiums on an insurance policy and the policy is no longer in force. In addition, no other policy of insurance has taken its place.

Black's Law Dictionary, Revised Fourth Edition, West Publishing Company, St. Paul, Minn., 1968.

What is a lapse of other documentation?

A lapse of other documentation means for example, but is not limited to, failure to have or loss or revocation of business license, operating authority, failure to notify of current company name, address, phone number, e-mail address and facsimile number, failure to have a current state or Federal safety certification, or failure to provide accurate Federal of state motor carrier identifying number.

Black's Law Dictionary, Revised Fourth Edition, West Publishing Company, St. Paul, Minn., 1968.

What is a complaint that does not state a claim that warrants an investigation or further action by FTA?

A complaint is a document describing a specific instance that allegedly constitutes a violation of the charter service regulations set forth in 49 CFR 604.28. More than one complaint may be contained in the same document. A complaint does not state a claim that warrants investigation when the allegations made in the complaint, without considering any extraneous material or matter, do not raise a genuine issue as to any material question of fact, and based on the undisputed facts stated in the complaint, there is no violation of the charter service statute or regulation as a matter of law. Based on Federal Rules of Civil Procedure, Rule 56(c).

Examples of complaints that would not warrant an investigation or further action by FTA include but are no limited to: (1) A complaint against a public transit agency that does not receive FTA funding; (2) a complaint brought against a public transit agency by a private charter operator that is neither a registered charter provider nor its duly authorized representative; (3) a complaint that gives no information as to when or where the alleged prohibited charter service took place.

Appendix C to Part 604—Charter Service Questions and Answers

The following questions were taken from comments submitted to the Notice of Proposed Rulemaking. Some questions have been modified slightly from the original text.

(a) Applicability

(1) Q: How do I know if these charter regulations apply to my transit agency?

A: If your transit agency accepts FTA financial assistance, the charter regulations probably apply. Your next step is to look at the exemptions contained in section 604.2 (''Applicability''). If none of these exemptions apply, look at the definition of charter service contained in section 604.3 (''Definitions''). Determine if the activity your agency is about to engage in fits within that definition. If not, then the charter regulations do not apply. If the activity does fit within the definition of charter service, then you need to determine whether the activity fits within one of the exceptions contained in subpart B (''Exceptions''). Remember that you may not provide the service if a registered charter provider indicates an interest in providing the service. This is true even if the registered charter provider does not ultimately reach an agreement with the customer.

(2) Q: How are registered private charter providers identified? Is there some kind of proof requirement that charter operators can actually provide service to a particular area? Or, do charter operators have to have a history of providing service to the area they claim to serve?

A: A registered charter provider is a private operator who wishes to receive notification of pending charter service requests directed to public transit agencies and has registered on FTA's charter registration Web site. When registering, charter providers are required to provide specific information, including areas served. They are not required to provide proof of such service. Additionally, the entire registration process is a self-certification process; FTA does not confirm the representations or information that the registered charter provider provides. Finally, a registered charter provider also does not have to demonstrate a history of providing service in the areas it claims to serve.

(3) Q: Is there any geographical limitation on where a private charter operator can register?

A: No. There is no geographical limitation on which areas a private charter operator may register. This means a private charter operator may register for several states or across the United States. If a registered charter provider, however, indicates interest in providing charter service to a particular customer and fails to negotiate in good faith with the customer, and a public transit agency was willing to provide the service, then the public transit agency can file a complaint under 49 CFR section 604.26 against the registered charter provider.

(4) Q: Who is considered a ''private charter operator?'' What are the criteria to establish that classification?

A: A ''private charter operator'' is any private, for-profit entity (i.e., individual, group or company) that provides chartered transportation on a regular basis with its own equipment (e.g., bus and/or van).

(5) Q: Is there a definition of ''geographic service area?''

A: Yes. Geographic service area is defined under 49 CFR section 604.3(j) as, ''the entire area in which a recipient is authorized to provide public transportation service under appropriate local, state and Federal law.''

(6) Q: Do charter service hours include time spent waiting for passengers where the vehicle is not available for other services?

A: Yes. Charter service hours include both time spent transporting passengers and time spent waiting for passengers. Charter service hours also include ''deadhead'' hours which is the time spent getting from the garage to the origin of the trip and then the time spent from the trip's ending destination back to the garage, since the vehicle is unavailable during that time period as well.

(7) Q: Qualified Human Service Organizations (QHSOs) that do not receive funds from Federal programs listed in Appendix A are required to certify that their federal funds include funding for transportation. However, most Federal funds are passed through one or more levels of state and local government, so how can we be certain what the original purposes of the Federal funds were?

A: The regulation, 49 CFR 604.15(b), has been modified. That provision no longer requires QHSOs to certify that their funding included funding for transportation.

(8) Q: What is the status of sub-grantees and entities with equipment and operations not assisted with federal funds?

A: The regulations do not apply to equipment that is fully funded with local funds and is stored in a locally funded

facility and is maintained with only local funds.

(9) Q: Must a private charter provider that provides public transportation services under contract or agreement with a public transit agency abide by the limitations in the proposed rule?

A: Yes. Private charter providers that provide public transportation service under contract with a public transit agency are covered by the new regulation when they are operating FTA funded equipment or services. These private charter operators are standing in the shoes of the public transit agency, and therefore cannot use federally funded equipment to provide charter services. This does not mean, however, that a private charter operator that contracts with a public transit agency and uses one of the private charter operator's own vehicles is subject to the charter service regulations (see section 604.2(c)).

(10) Q: Does the analysis change under different contractual scenarios (e.g., turnkey operations, operation and maintenance of vehicles provided by the public transit agency, or operation of contractor owned buses maintained in a federally funded facility owned by a public transit agency)?

A: Yes. The regulations, however, only apply when the contract is funded with FTA funds or the buses are funded with FTA funds or the equipment is maintained in an FTA funded facility.

(11) Q: May a private charter operator that qualifies as a sub-grantee of a state, under an FTA-administered program, use vehicles purchased with federal assistance to provide private charter services?''

A: It depends. A private charter operator that receives FTA assistance can use FTA-funded equipment to provide service for program purposes (see section 604.2(e)), but not for other charter service. Under the provisions of section 604.2(c), however, the regulations do not apply to non-FTA funded activities of private charter operators that receive directly or indirectly FTA financial assistance under programs such as sections 5307, 5309, 5310, 5311, 5316, and 5317. Further, an intercity bus operator that receives assistance under section 5311(f) to provide rural intercity bus service may provide charter service using a FTA-funded vehicle only if one of the exceptions applies. A vehicle equipped with a lift using FTA assistance under section 3038 of TEA–21 may be used for charter service.

(12) Q: Is there an emergency charter exception for 'actual, imminent or anticipated possibility of injury, loss of life, or loss of property?' For instance, there could be a poison gas plume or threat of one from an industrial accident or railcar derailment. A transit agency could be called to do a rapid evacuation of an apartment, hospital, school, elder care facility or some other facility requiring group or individual evacuation. Must the public transit agencies wait for the Administrator to declare this incident an event of 'regional or national significance' so that transit buses can be used?

A: Yes, there is an exception for emergencies. Section 604.2(f) contains an exemption that allows for public transit agencies to respond to emergencies that last fewer than 45 days. If an emergency lasts longer than 45 days, the public transit agency must follow the procedures set out in subpart D of 49 CFR part 601. The Administrator does not declare an emergency. Rather, the President, Governor, or Mayor declares the emergency.

(13) Q: If an emergency is exactly 45 days long, is the emergency services exception still applicable?

A: Yes. If the emergency lasts exactly 45 days the emergency services exception is still applicable. The regulation refers to calendar days, not business days. Therefore, if the emergency lasts more than 45 calendar days, the public transit agency must follow the procedures set out in subpart D of 49 CFR part 601.

(14) Q: Do emergency situations include matters of security—e.g., when the Secret Service requests vehicles with no under-vehicle luggage compartments?

A: No. Situations involving the Secret Service would fall under the government officials section of the regulation (49 CFR section 604.7), which allows up to 80 hours annually of charter service to government officials on official government business, which can include non-transit purposes.

(15) Q: Are rural transit operators (section 5311) exempt from the rule? What about recipients of 5310 vehicles or JARC or New Freedom grants?

A: Recipients under section 5311, 5310, 5316, and 5317 are not subject to the charter rule when using FTA-funded vehicles to provide public transportation or coordinated human service transportation or to serve groups of individuals with disabilities, the elderly, or low income individuals. The charter rule does apply, however, if the FTA recipient wants to provide other charter service using FTA-funded or maintained vehicles. A rural transit operator may provide other charter service only under the exemptions/exceptions contained in the rule.

(b) Exemptions

(16) Q: Does the exemption of demand response service from the definition of charter service exclude rural and small urban systems entirely?

A: No. The exemption of demand response service from the definition of charter service is intended to exclude service provided to individuals, as opposed to a group, who request service such as paratransit service. In addition, the exception contained in section 604.7 does not include service provided to QHSOs (organizations providing service to persons with disabilities, low income individuals, and the elderly).

(17) Q: Is there an expedited process to obtain the Administrator's decision and signature for time sensitive events so that there could be sufficient time to plan and implement service?

A: Petitions to the Administrator for events of regional or national significance will be processed as quickly as practicable.

(c) Definitions

(18) Q: If a transit agency provides service that is irregular or on a limited basis for an exclusive group of individuals, but provides the service free of charge, is the service exempt from the charter regulation?

A: Yes. So long as the transit agency does not charge a premium fare for the service and there is no third party paying for the service in whole or in part.

(19) Q: Does ''qualified human service agency'' include any non-profit entity that provides services to the disabled, or economically disadvantaged without reference to age?

A: Yes, so long as the QHSO either receives funding from one of the programs listed in Appendix A or registers as a QHSO on the FTA charter Web site. Under section 604.7, a recipient may provide charter service to entities that meet the definition of ''qualified human service organization.'' This includes organizations that serve persons who qualify for human service or transportation-related programs or services due to a disability, income or advanced age. All three are not required, however, so an organization may qualify as a QHSO but serve only persons with low income.

(20) Q: Is it charter service when the local transit authority provides event or fair service, that is open to the public, with or without charge, where the transit authority determines the routes and times and it is scheduled for the same time every year, but the Fair Association subsidizes all or part of the costs?

A: Yes. The fact that the Fair Association pays for the service in whole or in part means the service is charter under section 604.3(c)(2).

(21) Q: What qualifies as indirect financial assistance?

A: The inclusion of ''indirect'' financial assistance as part of the definition of ''recipient'' is covers ''subrecipients.'' We modified the definition of recipient in the final rule to make this point clear.

(22) Q: When a transit authority contracts out its smaller accessible vehicles for use during football games to offer service free of charge for persons with disabilities and their escorts, is it charter service?

A: Yes. Under the facts presented, this type of service falls under the definition of charter service in section 604.3(c)(1). Since ''contracting out'' involves a third party, exclusive use, and a negotiated price. Thus, the transit authority would need to determine whether one of the exceptions under subpart B applies.

(23) Q: Is it considered charter service when the transit authority funds shuttles to and from football games? Regularly scheduled service is suspended on these days, but this service partially follows the existing route and is open to the public at the regular fare.

A: No. If the service provided by the public transit agency costs the same as the customary fixed route fare and it is open to the public then it is not charter.

(24) Q: Is shuttle service for a one-time event considered charter service, if the service is open to the public, widely advertised, and the itinerary is determined by the transit operator? What if the service has been provided for decades?

A: No. So long as the transit authority charges its customary fixed route fare for the shuttle service, and there is no third party involvement, then the service is not charter. Widely advertising the service or providing the service for decades has no bearing on whether the service is charter.

(25) Q: Is demand response service included in the definition of charter service?

A: No. Demand response service is excluded from the definition of charter service under section 604.3(c).

(26) Q: Is it charter service when a university pays a public transit agency a fixed charge to allow all faculty, staff, and students to ride the transit system for free?

A: No. So long as the public transit agency provides the service on a regular basis, along a fixed route, and the service is open to the public, the fact that the university may be subsidizing student and faculty rides, does not convert the service to charter.

(27) Q: Can a transit agency provide service when the customer wants a particular type of equipment such as a (rubber tire) trolley bus, vintage bus, or CNG bus that the private operators do not have?

A: No. Public transit agencies cannot provide charter service solely based on a customer's vehicle preferences. FTA only recognizes two categories of vehicles: buses and vans.

(28) Q: What is a ''qualified human service organization?''

A: A qualified human service organization is an organization that provides service to individuals that qualify for federally conducted or assisted transportation related programs due to disability, income or advanced age. See section 604.3(q).

(29) Q: If a transit agency has restored or preserved historic electric buses for limited, special use, are the buses subjected to charter bus restrictions?

A: Yes, if the public transit agency purchased the historic electric buses with Federal funds or maintains those vehicles in federally funded facilities.

(30) Q: If a grantee operates assets that are locally funded are such assets subject to the charter regulations?

A: It depends. If a recipient receives FTA funds for operating assistance or stores its vehicles in a FTA-funded facility or receives indirect FTA assistance, then the charter regulations apply. The fact that the vehicle was locally funded does not make the recipient exempt from the charter regulations. If both operating and capital funds are locally supplied, then the vehicle is not subject to the charter service regulations.

(31) Q: Does ''pattern of violations'' apply from the effective date of the final rule?

A: Yes. The new definition of pattern of violations applies from the effective date of the final rule. In other words, in order to establish a pattern of violations, the violation had to occur after the effective date of the final rule.

(32) Q: What is a violation? Does it require an official charter decision or could it also include an oversight finding or other means of identifying shortcomings?

A: The new rule defines ''violation'' as a finding by FTA of a failure to comply with one of the requirements of this part. A finding may be an official charter decision by the Chief Counsel or the Administrator. An oversight finding would also qualify as an FTA finding.

(33) Q: Are sightseeing trips still not charter?

A: Yes. ''Sightseeing'' is excluded from the definition of ''public transportation'' under 49 U.S.C. Section 5302(a)(10). Therefore, it is not permissible for public transit agencies to provide sightseeing service with FTA-funded assets.

(34) Q: If a transit agency provides vehicles to a special event, but the event is open to the public, the route is controlled by the transit agency, the route is advertised similarly to the transit agency's regular routes, the buses are not identified as ''special service'' or any other different markings, and the vehicles go to and from fixed stops in an express bus manner, is this charter?

A: No. So long as the transit authority does not charge a premium fare for the service and a third party does not pay for the service in whole or in part. Advertising or different markings on the bus are longer determinative of whether the service is charter.

(35) Q: Does FTA consider wait time as a factor, in and of itself, when determining whether service is charter service?

A: No. Wait time is not, in and of itself, considered a characteristic of charter service.

(36) Q: What if there is no ''contract'' under the ''single contract'' factor and the transit agency merely sees a need and provides the charter-type service on its own initiative, is that charter?

A: No. If a transit agency sees a need and wants to provide service for a limited duration at the customary fixed route fare, then that service is not charter service. The existence of a contract is no longer determinative of whether service is charter service.

(d) Exceptions

(37) Q: If the federal government calls on a public transit agency for transit service and it will exceed the proposed 80 hour limitation, are public operators to refuse this service or seek a waiver directly from the federal government?

A: A public transit agency can petition for more service hours if it exceeds the 80 hour annual allowance. Instructions on how to file a petition are more fully described under 49 CFR Section 604.6(c) of the new regulation. Public transit agencies should be mindful that the Administrator will grant such requests under extraordinary circumstances only.

(38) Q: What kind of events qualify for the ''Events of Regional and National Significance'' exception?

A: First, this exception is now located in section 604.11 and is called ''Petitions to the Administrator.'' Second, the exception is designed to allow public transit agencies to participate in providing service to large events that will attract a lot of visitors. Some examples are: the Kentucky Derby, the Indianapolis 500, a bridge opening, or a new transit facility opening. If a transit authority is unsure whether a particular event fits within the exception, the transit authority may request an Advisory Opinion from FTA according to section 604.17.

(39) Q: What should a transit agency do when it is in the process now of planning for an event of regional significance? Will the new rules terminate these plans?

A: The new rule will impact a transit authority's planning process for an event of regional significance. Any service provided by the transit authority after the effective date of the rule—April 30, 2008—is subject to the provisions of the new rule.

(40) Q: What can a public transit agency do if there is a time sensitive event in which the agency does not have time to consult with all the private charter operators in their area? For example, the presidential inauguration.

A: Section 604.11 provides a process to petition the FTA Administrator for permission to provide service for a unique and time sensitive event. A presidential inauguration, however, is not a good example of a unique and time sensitive event. A presidential inauguration is an event with substantial advance planning and a transit agency should have time to contact private operators.

(41) Q: How should a public transit agency handle the situation of a regional or nationally significant event when there is a requirement to plan significant events (e.g., the Super Bowl) many years in advance long before the list of registered charter service providers is compiled?

A: If the transit agency plans to provide service to an event of regional or national significance after the effective date of the rule—April 30, 2008—then that service is subject to the requirements of the new rule.

(42) Q: Does the hardship exception apply to small urban operators?

A: Yes. Under section 604.11, the hardship exception applies to non-urbanized areas under 50,000 in population or a small urbanized area under 200,000 in population.

(e) Notice

(43) Q: May a transit agency indicate in the notice that goes out to registered charter providers that the customer requested specific equipment?

A: No. In terms of type of vehicles, the notice can include whether the customer needs a bus or a van. The registered charter provider, when it contacts the customer will learn of the specific customer needs. At that time, the registered charter provider can determine whether to seek out the specialized equipment from other private charter operators or a public transit agency.

(44) Q: Must a public transit agency provide notice of all potential charter trips to registered charter providers?

A: No. A public transit agency needs to provide notice only for charter trips that it is interested in providing. If an exemption or one of the exceptions applies, then the public transit would, after providing the service, record the service as required by section 604.12.

(45) Q: What does ''notifying private operators'' entail? What actions are to be taken when a notification e-mail is undeliverable? Is it sufficient to provide phone numbers of private operators when people call in for charter service?

A: Only ''registered charter providers'' need to be contacted. In order to qualify as a ''registered charter provider'' the information provided, including contact information, must be valid. If the e-mail is undeliverable, then the notice should be faxed to the registered charter provider. If the public transit agency declines to provide the service to the customer, then they should

refer the customer to the FTA charter registration Web site. It is not necessary to provide the customer with the registered charter provider's phone number if the public transit agency refers the customer to the charter registration Web site.

(46) Q: May a recipient provide service that allows customers to park at a distant location, like a museum, and then have a transit vehicle take them to a sporting event for a fare that is higher than the normal fixed route fare? May a recipient prevent a private charter operator from providing a similar service from the same starting point to the same destination?

A: No. In this case, since the recipient charges a premium fare for the service, it meets the definition of charter. In order to provide the service, the recipient must give notice to registered charter providers in accordance with section 604.14. A recipient may not prevent a private charter operator from providing a similar service. This is true whether or not the private charter operator is registered on the FTA Charter Registration Web site.

(f) Complaint & Investigation Process

(47) Q: May a trade association or other operators that are unable to provide requested charter service have the right to file a complaint under the new rule?

A: Yes. A registered charter operator or its duly authorized representative, who can include a trade association, may file a complaint under section 604.26(a). Under the new rule, a private charter operator that is not registered with FTA's charter registration Web site may not file a complaint.

(48) Q: Is there a time limit for making complaints?

A: Yes. Complaints must be filed within 90 days of the alleged unauthorized charter service.

(49) Q: Are there examples of the likely remedies FTA may impose for a violation of the charter service regulations?

A: Yes. Appendix D contains a matrix of likely remedies that FTA may impose for a violation of the charter service regulations.

(50) Q: When a complaint is filed, who is responsible for arbitration or litigation costs?

A: FTA will pay for the presiding official and the facility for the hearing, if necessary. Each party involved in the litigation is responsible for its own litigation costs.

(51) Q: What affirmative defenses might be available in the complaint process?

A: An affirmative defense to a complaint could state the applicability of one of the exceptions such as 49 CFR Section 604.6 which states that the service that was provided was within the allowable 80 hours of government official service.

(52) Q: May a state waive participation in the complaint proceedings and forward the complaint directly to FTA after initial receipt and review?

A: A state is no longer involved in the complaint process, and, therefore, no waiver is necessary. In order for a complaint to be filed, it must be filed directly with the Office of the Chief Counsel.

(53) Q: What can a transit agency do if it believes that a private provider is not bargaining in good faith with a group and responds to a notice with a price or terms that are not acceptable to that group?

A: If a transit agency believes that a registered charter provider is not bargaining in good faith, the transit agency may file a complaint for removal from FTA's Charter Registration Web site.

(54) Q: What actions can a private charter operator take when it becomes aware of a transit agency's plan to engage in charter service just before the date of the charter?

A: As soon as a registered charter provider becomes aware of an upcoming charter event that it was not contacted about, then it should request an advisory opinion and cease and desist order. If the service has already occurred, then the registered charter provider may file a complaint.

(55) Q: When a registered charter provider indicates that there are no privately owned vehicles available for lease, must the public transit agency investigate independently whether the representation by the registered charter provider is accurate?

A: No. The public transit agency is not required to investigate independently whether the registered charter provider's representation is accurate. Rather, the public transit agency need only confirm that the number of vehicles owned by all registered charter providers in the geographic service area is consistent with the registered charter provider's representation.

(56) Q: Who qualifies as a presiding official, what are the duties, and what other limitations are imposed?

A: A presiding official will have training and/or experience in conducting hearings. More important, the person may not have any conflicts of interest or previous contact with the parties concerning the issue in the proceeding. A presiding official's duties include, but are not limited to, convening a hearing, issuing orders, ruling on motions, and drafting recommended decisions.

(57) Q: What recourse does a transit operator have when a registered charter provider indicates interest in providing the charter service set out in the notice and then does not do so?

A: A transit operator can and should file a complaint for removal against the registered charter provider. This notifies FTA of the registered charter provider's alleged actions. FTA will then investigate the allegations and potentially remove the registered charter provider from the registration list.

(58) Q: Are there any measures to regulate who is considered a registered charter provider? And, are there any penalties for those that register and actually are not in a position to perform the needed services—for example an individual who owns a taxicab.

A: Yes. Through the self-registration process, a registered charter provider certifies that the information it provides on the charter registration Web site is true and accurate. The penalty for providing inaccurate or untrue information is removal from the registration Web site and possibly criminal penalties under 18 U.S.C. 1001.

(59) Q: If a customer hosts a large community event and the public transit agency cannot provide service because of the charter regulations and private operators will not provide service because the payment is not sufficient, is there any alternative means or does the service not get provided at all?

A: A public transit agency may provide the service if, after providing the notice required in section 604.14, no registered charter providers in the transit agency's geographic service area are interested in providing the service.

(60) Q: What will result if a registered charter operator cannot actually provide the service, but responds to a recipient's notice anyway?

A: If a registered charter provider responds to a notice, then it is expected to negotiate in good faith with the customer to provide the service. If a registered charter provider vindictively responds to a notice in order to prevent a public transit agency from providing the service, then that registered charter provider may be subject to a complaint for removal from the charter registration Web site.

(61) Q: What method will the decision maker employ in determining the penalty for violating the charter regulations?

A: Remedies will be based upon the facts of the situation, including but not limited to, the extent of deviation from the regulations and the economic benefit from providing the charter service. See section 604.47 and Appendix D for more details.

(62) Q: Can multiple violations in a single finding stemming from a single complaint constitute a pattern of violations?

A: Yes. A pattern of violations is defined as more than one finding of unauthorized charter service under this part by FTA beginning with the most recent finding of unauthorized charter service and looking back over a period not to exceed 72 months. While a single complaint may contain several violations, the complaint must contain more than a single event that included unauthorized charter service in order to establish a pattern of violations.

(g) Recordkeeping

(63) Q: What if the public transit provider does not have sufficient time to evaluate a request and make sure that all the information is complete before notifying the registered private charter companies?

A: A recipient should wait to provide notice that is consistent with 49 CFR Section 604.14.

(h) Miscellaneous

(64) Q: Are body-on-van-chassis vehicles classified as buses or vans under this provision?

A: Body-on-van-chassis vehicles are treated as vans under the regulation.

(65) Q: Are there adequate provisions to ensure that the registry site will be maintained in such a way that carriers provide evidence of insurance?

A: Registered charter providers are required to certify that they have insurance but are not required to provide evidence of insurance. If there is information that indicates the provider has provided a false certification, then it can be subject to criminal penalties under 18 U.S.C. 1001 and removed from the FTA Charter Registration Web site.

(66) Q: Will the registration Web site be fully functional and grantees receive training on how to use the Web site before the rule's effective date?

A: Yes. The Web site will be fully functional before the rule's effective date. A

training manual will also be distributed before the effective date. FTA intends to also do a roll-out of the regulation prior to the effective date of the final rule.

(67) Q: When a new operator registers, may recipients continue under existing contractual agreements for charter service?

A: Yes. If the contract was signed before the new private operator registered, the arrangement can continue for up to 90 days. During that 90 day period, however, the public transit agency must enter into an agreement with the new registrant. If not, the transit agency must terminate the existing agreement for all registered charter providers.

(68) Q: Do FTA's attorneys have the necessary training to serve as administrative law judges and makes rulings on motions, a task that heretofore has not been a part of the day-to-day activities of regional counsel?

A: Yes. FTA attorneys who have the delegated responsibility to serve as a Presiding Official may rule on motions and will possess the necessary qualifications to carry out their delegated tasks and responsibilities.

(69) Q: Must a public transit agency continue to serve as the lead for events of regional or national significance, if after consultation with all registered charter providers in its geographic service area, registered charter providers have enough vehicles to provide all of the service to the event?

A. No. If after consultation with registered charter providers and there is no need for the public transit vehicles, then the public transit agency may decline to serve as the lead and allow the registered charter providers to work directly with event organizers. Alternatively, the public transit entity may retain the lead and continue to coordinate with event organizers and registered charter providers.

Appendix D to Part 604—Matrix of Remedies for Violations

Remedy Assessment Matrix:

EXTENT OF DEVIATION FROM REGULATORY REQUIREMENTS

	Major	Moderate	Minor
Major Economic Benefit	$25,000/violation to 20,000	$19,999/violation to 15,000	$14,999/violation to 11,000.
Moderate	$10,999/violation to 8,000	$7,999/violation to 5,000	$4,999/violation to 3,000.
Minor	$2,999/violation to 1,500	$1,499/violation to 500	$499/violation to 100.

FTA's Remedy Policy:

—This remedy policy applies to decisions by the Chief Counsel, Presiding Officials, and final determinations by the Administrator.

—Remedy calculation is based on the following elements:

(1) The nature and circumstances of the violation;

(2) The extent and gravity of the violation (''extent of deviation from regulatory requirements'');

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

(4) The operating budget of the recipient;

(5) Such other matters as justice may require; and

(6) Whether a recipient provided service described in a cease and desist order after issuance of such order by the Chief Counsel.

Issued this 7th day of January, 2008.

James S. Simpson,

Administrator.

[FR Doc. 08–86 Filed 1–8–08; 4:36 pm]

BILLING CODE 4910–57–P